

Police Policy Committee

Minutes

August 12, 2008

The Police Policy Committee of the Board on Public Safety Standards and Training held a regular meeting on August 12, 2008 in the Governor Victor G. Atiyeh Boardroom of the Oregon Public Safety Academy. The meeting was called to order at 1:32 p.m. by Chair Andrew Bentz.

Attendees

Policy Committee Members:

Andrew Bentz, Chair, Oregon State Sheriffs' Association
Rob Gordon, Oregon State Sheriffs' Association
Mike Healy, Oregon Association Chiefs of Police
Brandon Kaopuiki, Non-Management Law Enforcement
Brian Martinek, Portland Police Bureau Assistant Chief
Tim McLain, Superintendent, Oregon State Police
Steven Piper, Non-Management Law Enforcement
Stuart Roberts, Oregon Association Chiefs of Police
Raul Ramirez, Oregon State Sheriffs' Association

Committee Members Absent

Robert King, Non-Management Law Enforcement
Dave Miller, SAC FBI, Oregon
Edward Mouery, Oregon State Police

Guests:

Maxine Bernstein, The Oregonian
Cheryl Pellegrini, Assistant Attorney General, Oregon Department of Justice

DPSST Staff:

Eriks Gabliks, Deputy Director
Marilyn Lorange, Standards and Certification Supervisor
Bonnie Salle-Narvaez, Certification Coordinator
Theresa King, Professional Standards Coordinator
Steve Winegar, Curriculum Research and Development
Kristen Turley, Standards and Compliance Coordinator
Carolyn Kendrick, Administrative Specialist



1. Minutes of May 13, 2008 Meeting

Approve minutes from the May 13, 2008 meeting.

See Appendix A for details

Staff noted an error in the transcription of Appendix B1. There are two places where there is an erroneous citation whereas comments by Assistant Attorney General Darin Tweedt were attributed to Deputy Chief Martinek on pages 7 and 8.

Tim McLain moved to approve the minutes as amended. Mike Healy seconded the motion. The motion carried unanimously by all voting.

2. **OAR 259-008-0060 – Proposed Rule**

Creditable Service Time

Presented by Bonnie Salle-Narvaez

See Appendix B for details

Tim McLain moved to recommend filing OAR 259-008-0060 with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Brian Martinek seconded the motion. The motion carried unanimously by all voting.

It is the consensus of the committee that there is no significant fiscal impact on small businesses.

3. **OAR 259-008-0065 – Proposed Rule**

Certification Recall – Failing to Maintain First Aid/CPR

This amended item was not brought before the committee due to technical difficulties and will be brought back to the table at the November 11, 2008 meeting.

Mike Healy brought forward a comment from a Chief (not on the committee) regarding the possibility of certain administrative positions being exempt from this rule. The committee disagreed with that idea, the main reason being that the public expects all officers, regardless of rank, to have basic training for police.

It is the consensus of the committee that no further amendments be made to this proposed rule that will be brought before the committee at the November 11th meeting.

4. **OAR 259-008-0010 – Hearing Officer’s Report and Recommendation**

Denial and Revocation

Presented by Bonnie Salle-Narvaez

See Appendix C for details

Rob Gordon moved to adopt the proposed rule language previously submitted to the Police Policy Committee, amending OAR 259-008-0010 as a permanent rule. Brian Martinek seconded the motion. The motion carried unanimously by all voting.

5. **OAR 259-008-0070 – Hearing Officer’s Report and Recommendation**

Denial and Revocation

Presented by Bonnie Salle-Narvaez

See Appendix D for details

Tim McLain moved to adopt OAR 259-008-0070 as a permanent rule with the identified additional modifications to the original proposed rule language. Stuart Roberts seconded the motion. The motion carried in an 8 to 1 vote with Brandon Kaopuiki voting no.

6. **Convene in Executive Session**

To discuss matters exempt from disclosure under ORS 92.660(2)(f) related to whether medical waivers for Chad Arnold and Robert Jordan should be recommended to the Board.

7. **Reconvene in Regular Session**

See Appendix E for details.

Chad Arnold – Medical Waiver

Rob Gordon moved to approve the medical waiver with the provision that Chad Arnold be required to pass an independent exam by an examiner of the agency's choosing.

After further discussion about the wording of the medical examination, Rob Gordon withdrew his motion.

Rob Gordon then moved to deny the request of a medical waiver for Chad Arnold but communicate to him that the committee would reconsider the waiver upon his completion of an independent medical exam that states in an affirmative way that he can in fact accomplish the essential functions of a police officer. Tim McLain seconded the motion. The motion carried in a 5-4 vote with Brandon Kaopuiki, Brian Martinek, Steve Piper, and Stuart Roberts voting no.

Robert Jordan – Medical Waiver

Steve Piper moved to recommend approving the medical waiver for Robert Jordan. Brian Martinek seconded the motion. The motion carried unanimously by all voting.

7.5. Discussion with Department of Justice

Presented by Cheryl Pellegrini, Assistant Attorney General

Due to cases that have gone to contested case hearings which have had no insight into what the policy committee was thinking or factors it considered when the initial determination to recommend revocation of certification was made, the Department of Justice would like to recommend the following:

- *Policy committee to vote to adopt the staff report and the exhibit list and make it part of the record; and*
- *State on the record, after consideration of the report, the specific basis in the event the committee votes to revoke or not, and to cite what factors were considered – both aggravating and mitigating – and relate specific facts in the report to specific provisions in Administrative Rules.*

8. Sjon Charles CLEMONS – DPSST #39482

Presented by Theresa King

See Appendix F for details.

1. The Police Policy Committee **adopts** the Staff report as the record upon which its recommendations are based. *Rob Gordon moved to adopt the staff report and exhibits as the record from which recommendations are based. Raul Ramirez seconded the motion. The motion carried unanimously by all voting.*
2. The Police Policy Committee believes:
 - a. CLEMONS' actions ***do*** cause a reasonable person to have doubts about his honesty, respect for the rights of others, and respect for the laws of the land ***based on the report submitted by Oakridge Police Department which includes interviews of other police officers; private citizens who witnessed the conduct on the forest service road; and the incident involving the young man using the police officer's pickup and the statement that the officer checked the young man's driving record which proved to be false.***

Committee members pointed out that the wording in the above statement should say "... and/or respect for the laws of the land", to give the option of agreeing with all, or part of the reasons listed. Staff stated that the OAR does read "or".

- b. CLEMONS' conduct *did* involve dishonesty, fraud, deceit, or misrepresentation.
 - c. CLEMONS' conduct *was* prejudicial to the administration of justice.
 - d. CLEMONS' conduct *did* adversely reflect on his fitness to perform as a police officer.
 - e. CLEMONS' actions *do* make him inefficient or otherwise unfit to render effective service because of the agency's and the public's loss of confidence in his ability to perform competently.
3. The Police Policy Committee finds CLEMONS' conduct *does* rise to the level to warrant the revocation of his certifications, and therefore recommends to the Board that CLEMONS' certifications *be revoked*.

Rob Gordon moved to approve items 2 (a-e) in the affirmative based on the following: speed racing in a marked vehicle while on duty which is a violation of the law; loaning agency vehicle to private citizen; lying to another officer; and involvement as a supervisor in an inappropriate relationship with a recruit and believes that Clemons' conduct does rise to the level to warrant the revocation of his certifications and therefore recommends to the Board that Clemons' certifications be revoked. Tim McLain seconded the motion. The motion carried unanimously by all voting.

Brandon Kaopuiki voiced his discomfort in the procedure. It was his understanding there would be discussion after the motion and prior to the vote. He is uncomfortable with the background investigator having the same weight as the first hand information through affidavits, Brandon would have proposed an amendment to the previous motion that the committee's recommendation be based only on dishonesty and disregard for the law in the instance of the forest service road conduct and the traffic stop conduct and not consider the allegations regarding the inappropriate relationship.

Chair Andrew Bentz said Brandon could offer the aforementioned as a competing motion. Brandon Kaopuiki so moved.

Rob Gordon was not willing to withdraw the previous vote unless the majority of the committee wished to do so. He stated that the allegations of an inappropriate relationship are indeed relevant to the recommendation to revoke Clemons' certifications.

After further discussion Brandon Kaopuiki concedes the end result would be no different and withdrew his motion.

9. ORPAT Maintenance Standard for Police

Presented by Steve Winegar

See Appendix G for details.

10. Law Enforcement Memorial Wall Nomination

Presented by Eriks Gabliks

See Appendix H for details.

Tim McLain moved to add Robert Riley's name to the Law Enforcement Memorial Wall. Rob Gordon seconded the motion. The motion carried unanimously by all voting.

11. Next Police Policy Committee Meeting is November 11, 2008

With no further business before the committee, Robert Gordon moved to adjourn the meeting. Michael Healy seconded the motion. Motion carried unanimously by all voting. The meeting adjourned at 3:44 p.m.

Appendix A

Police Policy Committee Minutes (Draft) May 13, 2008

The Police Policy Committee of the Board on Public Safety Standards and Training held a regular meeting on May 13, 2008 in the Governor Victor G. Atiyeh Boardroom of the Oregon Public Safety Academy. The meeting was called to order at 1:30 p.m. by Chair Andrew Bentz.

Attendees

Policy Committee Members:

Andrew Bentz, Chair, Oregon State Sheriffs' Association
Andrew Jordan, Vice Chair, Oregon Association Chiefs of Police
Brian Martinek, Portland Police Bureau Assistant Chief
Ray Gruby, Non-Management Law Enforcement
Rob Gordon, Oregon State Sheriffs' Association
Dave Miller, SAC FBI, Oregon
Robert King, Non-Management Law Enforcement - teleconference
Stuart Roberts, Oregon Association Chiefs of Police
Tim McLain, Superintendent, Oregon State Police
Mike Healy, Oregon Association Chiefs of Police
Edward Mouery, Oregon State Police
Raul Ramirez, Oregon State Sheriffs' Association

Committee Members Absent

Steven Piper, Non-Management Law Enforcement

Guests:

Todd Anderson, Corrections Policy Committee Chair
Darin Tweedt, Assistant Attorney General, Oregon Department of Justice
Bruce McCain, Attorney for Bernard Giusto
Arthur Sulzburger, The Oregonian
Pat Dooris, KGW Television
Mike Galimanis, KGW Television
Stephanie Yap, The Oregonian
Brian Barker, KATU Television
Jon Farley, KATU Television

DPSST Staff:

John Minnis - Director
Eriks Gabliks, Deputy Director
Cameron Campbell, Director of Academy Training
Marilyn Lorance, Standards and Certification Supervisor
Bonnie Salle, Certification Coordinator
Theresa King, Professional Standards Coordinator
Lorraine Anglemier, Legal Services Coordinator
Shirley Parsons, Investigator
Jeanine Hohn, Public Information Officer
Tammera Hinshaw, Executive Assistant
Heather Hatch, Curriculum Specialist
Steve Winegar, Curriculum Research and Development



1. **Minutes of February 12, 2008 Meeting**

Approve minutes from the February 12, 2008 meeting.

See Appendix A for details

Tim McLain moved to approve the minutes from the February 12, 2008 meeting. Stuart Roberts seconded the motion. The motion carried unanimously by all present.

2. **Bernard GIUSTO – DPSST #07617**

See Appendix B for details

ACTION REQUESTED:

Staff requests the Police Policy Committee review the matter and make a recommendation to the Board whether or not GIUSTO's certifications should be revoked based on violation of the established moral fitness standards.

After lengthy discussion and clarification, Robert King moved to recommend to the Board to not decertify GIUSTO's certifications based on the two specific allegations brought back to committee by staff at the request of the committee. The motion failed due to the lack of a second.

When questioned by the committee, staff confirmed that Sheriff GIUSTO was invited to be interviewed and he, through his attorney, declined.

Brian Martinek moved to recommend to the Board to not decertify GIUSTO regarding the allegations of untruthfulness about his response about events and circumstances surrounding his transfer as security for Governor Goldschmidt and in his affidavit discussing those matters. Tim McLain seconded the motion. Motion carried unanimously by all voting with Gordon Huiras abstaining from voting.

Brian Martinek moved to recommend to the Board that GIUSTO be decertified based on issues related to truthfulness regard his conversation with LeRon Howland and Reg Madsen as applies to the considerations to the committee on 3 of 4 on OAR 259-008-0010(6) issues 1 and 3 of affidavit 2008. Tim McLain seconded the motion. The motion carried 10 to 1 with Robert King voting no and Gordon Huiras abstaining from voting.

A detailed transcript of the committee discussion on this matter can be found in Appendix B1.

3. **Break**

4. **OAR 259-008-0025(1) – Proposed Rule**

Basic Course – Mental Illness Training

Presented by Bonnie Salle

See Appendix C for details

Tim McLain moved to recommend filing the proposed language for OAR 259-008-0025(1) with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Michael Healy seconded the motion. The motion carried unanimously by all voting.

It is the consensus of the committee that there is no significant fiscal impact on small businesses.

5. **OAR 259-008-0025(5) – Proposed Rule**

Missing Children and Adults
Presented by Bonnie Salle

See Appendix D for details

Ed Mourey moved to recommend filing the proposed language for OAR 259-008-0025(5) with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Raul Ramirez seconded the motion. The motion carried unanimously by all voting.

It is the consensus of the committee that there is no significant fiscal impact on small businesses.

6. **OAR 259-008-0065 – Proposed Rule**

Certification Recall – Failing to Maintain First Aid/CPR Certification
Presented by Bonnie Salle

See Appendix E for details.

After much discussion the committee asked staff to bring this back to committee with new language, specifying one reporting time for tracking all training.

7. **OAR 259-008-0070(3) – Proposed Rule**

Denial/Revocation (Failing to attend Mental Health session after utilizing deadly physical force)
Presented by Bonnie Salle

See Appendix F for details.

Tim McLain moved to recommend filing the proposed language with the insertion of “resulting in the death of an individual” for OAR 259-008-0070(3) with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Brian Martinek seconded the motion. The motion carried 11 to 1 with Rob Gordon voting no.

It is the consensus of the committee that there is no fiscal impact on small business.

8. **OAR 259-008-0200 – Hearing Officer’s Report**

Presented by Bonnie Salle

See Appendix G for details.

Rob Gordon moved to adopt the proposed rule amending OAR 2259-008-0200 as a permanent rule as originally approved by the Police Policy Committee and Board on Public Safety Standards and Training. Tim McLain seconded the motion. The motion carried unanimously by all voting.

9. **OAR 259-013-0000 – Proposed Rule**

Criminal Records Check Rule
Presented by Bonnie Salle

See Appendix H for details.

Tim McLain moved to approve the proposed language for OAR 259-013-0000 with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Mike Healy seconded the motion. The motion carried unanimously by all voting.

It is the consensus of the committee that there is no significant fiscal impact on small business.

10. Basic Police Training Update

Presented by Cameron Campbell

Firearms course information:

Staff has studied the data on the firearms qualification rates from past and present classes. The data shows that past and present rates are within one percent of each other on both the indoor and outdoor range. The new program is more difficult. The primary difference we see is we now have turning targets which operate on timers. This accounts for the one percent change.

Feedback on training:

The 16-week academy has been running for 1.5 years now and our feedback has been positive in regard to the training. We believe we have found the right balance of academics and scenario-based training given the amount of time we have. We will be reinstituting the Curriculum Advisory Committee to take a look at the curriculum and get their feedback on whether or not there are areas they think need to be adjusted. This committee will name its recommendations to the Police Policy Committee.

Class scheduling:

Another issue being looked at is the number of classes and the speed with which officers can enroll in the academy. Right now we are looking at about 60 days from date of hire to admission to the academy. There are a number of factors. We have as many classes scheduled through this year and next as we can physically schedule into the facility. We believe this will be enough classes to meet the demand however, the facility is quickly running out of space.

VO2 Testing Project:

This project is strictly voluntary on behalf of the students. This low impact cardio vascular testing is able to correlate the VO2 test results to the cardiac health of the individual and potential future health if said individual continues with the current health regimen. We here are interested in the correlation of the VO2 test and ORPAT times.

With no further business before the committee, the meeting adjourned at 4:05 p.m.

Appendix B

Department of Public Safety Standards and Training Memo

Date: July 15, 2008
To: Police Policy Committee
From: Bonnie Sallé
Rules Coordinator
Subject: OAR 259-008-0060 – Proposed Rule
Creditable Service Time

Issue:

DPSST has received requests from constituents to clarify in writing current practices and policies regarding the circumstances under which a public safety professional does or does not accrue creditable service time for purposes of certification. The proposed rule documents those circumstances.

Telecommunications Policy Committee: On May 1, 2008, the Telecommunications Policy Committee met and reviewed staff's proposed amendments to OAR 259-008-0060 and recommended approving the language to the Board.

Corrections Policy Committee: On May 20, 2008, the Corrections Policy Committee met and reviewed staff's proposed amendments to OAR 259-008-0060 and recommended approving the language to the Board.

The following revised language for OAR 259-001-0060 contains recommended additions (**bold and underlined**) and deletions (~~strikethrough text~~). For ease of review, only the relevant portion of the recommended language has been included.

259-008-0060

* * *

(11) Experience/Employment:

(a) Experience acquired as a corrections, parole and probation, or police officer employed full time with municipal, county, state, or federal agencies, may be accepted if the experience is in the field in which certification is requested and is approved by the Department. For the purpose of this rule, **creditable service time for experience will cease to accrue under the following circumstances:**

(A) When an individual is employed in a casual, seasonal, or temporary capacity;
~~employment shall not qualify as experience toward certification. Experience~~

(B) When an individual is on “leave.” This includes, but is not limited to, medical leave, a leave of absence or military leave;

(C) Notwithstanding section (B) of this rule, a public safety professional may submit a written request for credit for military time served upon return from a military leave. The Department may approve credit for military time served if the public safety professional’s military duties are determined to be equivalent to the duties the public safety professional was performing prior to the public safety professional’s military leave. Any credit received for time served will be at the discretion of the Department.

(D) From the date a public safety professional’s certification is recalled until it is reinstated by the Department;

(E) When a public safety professional fails to obtain Basic certification within a mandated timeframe and is prohibited from being employed as a public safety professional;

(b) Experience acquired as a telecommunicator or emergency medical dispatcher employed with a public or private safety agency may be accepted if the experience is in the field in which certification is requested and is approved by the Department.

(c) Experience acquired as a certified **part-time telecommunicator, emergency medical dispatcher as defined in OAR 259-008-0005(12) and (32) respectively, or** part time parole and probation officer, as defined under OAR 259-008-0005(~~22~~) **(20)** and (~~23~~) **(21)** and OAR 259-008-0066, shall count on a pro-rated basis.

~~(e)~~ **(d)** Police, corrections, parole and probation, telecommunicator, or emergency medical dispatch experience in fields other than that in which certification is requested may receive partial credit when supported by job descriptions or other documentary evidence. In all cases, experience claimed is subject to evaluation and approval by the Department.

ACTION ITEM 1: Determine whether to recommend filing the proposed language for OAR 259-008-0060 with the Secretary of State as a proposed rule.

ACTION ITEM 2: Determine whether to recommend filing the proposed language for OAR 259-008-0060 with the Secretary of State as a permanent rule if no comments are received.

ACTION ITEM 3: Determine whether there is a significant fiscal impact on small businesses. (see form attached)

Appendix C1

Department of Public Safety Standards and Training Memorandum

DATE: July 15, 2008

TO: Police Policy Committee

FROM: Bonnie Sallé
Hearing Officer

SUBJECT: Hearing Officer's Report and Recommendation
Denial and Revocation
OAR 259-008-0010

The Police Policy Committee and Board on Public Safety Standards and Training previously reviewed and approved filing a proposed permanent rule with the Secretary of State's office to amend the rules relating to the denial or revocation of a public safety officer's or instructor's certification. The proposed rules were filed with the Secretary of State's Office and opened for public comment.

A total of one (1) comment was received during the open comment period. The comment is attached to this memorandum and incorporated by reference.

FINDINGS OF FACT:

1. On February 15, 2008, a Notice of Proposed Rulemaking Hearing was filed with the Secretary of State's office (see Exhibit A)
2. On March 1, 2008, the Notice of Proposed Rulemaking Hearing was published in the Secretary of State's monthly publication (Bulletin). (see Exhibit B)
3. During the month of March 2008, the Notice of Proposed Rulemaking Hearing was posted on the Department of Public Safety Standards and Training's website.
4. On March 24, 2008, a public hearing was held. Zero (-0-) individuals attended the hearing and no public testimony was given.
5. On March 24, 2008, the public comment period closed.

CONCLUSION:

The Department previously presented proposed rule amendment to OAR 259-008-0010 to the Police Policy Committee, Telecommunications Policy Committee, and Corrections Policy Committee. It was reviewed and discussed by all committee members from each committee and the Department received approval from all three committees to forward their recommendation to approve the proposed language for 259-008-0010 to the Board.

The Department presented the proposed rule amendment to OAR 259-008-0010 to the Board. It was reviewed by Board members and the Department received approval to file the proposed amendment with the Secretary of State's office as a proposed rule.

The Department provided notice of a proposed rulemaking hearing to:

- a) The Secretary of State's office;
- b) Legislative Counsel;
- c) The agency interested parties' list; and
- d) The Department's website;

The Department received one public comment during the public comment period which erroneously referenced a previous modification to OAR 259-008-0010 and was not relevant to the current proposed language most recently approved by the Board.

It is the conclusion of the hearing officer that the Department provided ample notice of the proposed rule amendment to OAR 259-008-0010 to the largest extent possible to public safety agencies and public safety personnel. After careful consideration of comment submitted, contrasted with the extensive public notice given, the single erroneous comment received did not appear to represent a statewide concern among public safety agencies about the rule amendment as originally drafted.

HEARING OFFICER'S RECOMMENDATION: Adopt the proposed rule language previously submitted to the Police Policy Committee, amending OAR 259-008-0010, as a permanent rule.

Appendix C2

Comment #1:

On March 21, 2008, a comment was received within the text of Comment #1 (responding to OAR 259-008-0070) expressing the following concern:

“We are pleased to see that the BPSST has codified what the Department says is the current practice of closing any investigation where an arbitrator has ruled that alleged conduct did not occur. We are also pleased that BPSST has recognized that not all conduct requires a lifetime ban from public service. We are disappointed that the only change to OAR 259-008-0010 is the removal of the mention of background investigations and the removal of the requirement to take a reading test if the applicant has a college degree. There is still no way for a prospective applicant or revoke to know what the BPSST defines as “good moral fitness.”

Staff Response: *The Department believes this concern is erroneous because it does not adequately respond to the current proposed rule revision to OAR 259-008-0010. The Department previously amended a portion of OAR 259-008-0010 to eliminate the language relating to background investigations which were adopted as a permanent rule. However, in the current proposed revision,, substantive changes were made to the moral fitness definition to include “professional standards;” and relevant portions of OAR 259-008-0010 were amended to define lack of “moral fitness” to mean disqualifying misconduct as defined in the proposed OAR 259-008-0070.*

The remainder of the issues raised in the response are discussed in the context of staff response to 014-259-008-0070.

Appendix C3

Comment #2 & #3:

On March 20, 2008, two comments containing identical language were received, expressing the following concerns:

“I wish to compliment the DPSST on their belated & grudging recognition of the arbitration process as it relates to the denial and revocation process. However, the Board’s failure to act on another of the recommendations of the certification work group, which proposed creating a certification review committee was very disappointing. Our group maintains that there must be due process in certification hearings. I strongly encourage the continued promulgation of rule changes that are both fair and productive.

Currently, when the performance or behavior of a public safety professional (psp) is questioned, the ‘system’ has no semblance at all – to what Oregonians have come to expect as ‘due process’ or even fairness. First the certification is revoked – by a process that allows minimal input from the accused psp then the revoke may to appeal to get an actual day in court before an Administrative Law Judge. The process most certainly does affect the ‘public’ economically, in the form of legal fees, lost wages & financial hardship on the member & the member’s family, plus a financial burden on the bargaining unit bound by law, to defend their member! Our Association is a member group of the Oregon Council of Police Associations. Oregon Firefighters along with our 5,000 plus police officers, Sheriff’s Deputies, Corrections Officers, Parole & Probation Officers and Law Enforcement Support Professionals, strongly encourage fairness in any future rule changes. In the absence of prompt & fair rule changes, we may be forced to introduce corrective legislation in 2009. Additionally, we feel that it is obvious that the management heavy make-up of the Board and various policy sub-committees is responsible for a bias that allows the continuation of such an unjust denial/revocation process. Legislative rebalancing of the BPSST & the DPSST Policy Sub-Committees will be considered as well.”

Staff Response: *The Department has modified the proposed rule language for clarification, where appropriate. The modified language has been reviewed and approved by the Department’s legal counsel.*

The remaining issues noted in the above comments are beyond the scope of the proposed rule change and were not issues originally raised or addressed during the Phase 2 workgroup’s review of these rules. In other areas, the comments do not accurately reflect the Department’s current denial/revocation process, which is in accordance with the Attorney General’s Model Rules and the Administrative Procedures Act.

Appendix C4

Staff analysis and recommendations, in response to public comment on proposed changes to OAR 259-008-0070, received from the Portland Police Association (PPA) on Friday, March 14, 2008:

Staff process:

Following receipt of the PPA comment on the proposed rule, staff determined that review and analysis by the Oregon Department of Justice (DOJ) was appropriate, to guide staff recommendations for changes in response to the comments received. Attorneys from both the Criminal Justice and General Counsel Divisions of DOJ participated in the analysis and advised staff. Their analysis and recommendations are reflected in the proposed permanent rule language attached to the hearings officer report and submitted to you for approval.

Staff analysis and recommendations:

This document references paragraph numbers in the PPA comment, which was submitted to DPSST by e-mail. As staff has noted on the comment copied in your packets (Attachment "D"), those paragraph numbers were inserted by DPSST staff for ease of reference. Staff also formatted the response (deleting extra paragraph, line and page breaks, etc.) for ease of reading. No other changes were made to the original response.

The staff analysis and recommendations have been grouped and outline-numbered consistent with the general categories of the comments. [The specific paragraphs discussed are identified at the beginning of each section, as follows: "PPA Par (XX)."]

I) PPA Par (3) makes general statements, but no specifics are identified and neither staff nor DOJ are able to analyze or respond to this paragraph. Specific concerns identified in the subsequent paragraphs have been reviewed and analyzed extensively. Analysis and recommendations are summarized below, and recommended changes to the proposed rule are reflected in the rule language attached to the hearings officer report.

II) PPA Par (4) discusses the definition of discharge for cause. Consistent with current statutes, rules, and agency process, DPSST's jurisdiction is established based on the employer's actions. However, staff and DOJ concur with the PPA view that a revocation or denial action based on discharge for cause should not be finalized if arbitration is pending, as long as DPSST is made aware that no final determination has been made. Filing the Notice of Intent based on an employer's discharge initiates communication between DPSST and the officer and his/her attorney and ensures that DPSST will be informed if an arbitration is pending. The agency currently stays its action pending the outcome of an employment arbitration once it has been notified that the discharge has not yet been finalized. To clarify and codify this practice, DOJ has developed, and staff recommends, additional language in Paragraph (3)(a)(A) of the proposed rule, which is reflected in the rule language attached to the hearings officer report.

III) PPA Par's (5) through (16) refer to the proposed definitions of misconduct under the definition of discharge for cause. Based on staff review and DOJ recommendations, several clarifications are proposed for the permanent rule. These include:

- Inserting "Comment" language recommended by DOJ following definitions i, ii, iii, and v.

- Clarifying language for Disregard for the Rights of Others and removing the reference to the Code of Ethics from that definition. Based on the clarifications recommended, it is also recommended that the statement that “In this category there is a victim” be removed.
- Adding a requirement in the definition of Incompetence that remedial measures were unable to correct the incompetence that resulted in a discharge.
- Clarifying the Misuse of Authority definition to identify that misconduct within this category constitutes “abuses” by the officer rather than “actions” by the officer.

These changes are reflected in the proposed permanent rule language attached to the hearings officer report.

In reviewing the other concerns submitted under Par’s (5) through (16), staff considered the following prior to its decision to recommend no additional changes to the referenced proposed rule language:

- DOJ guidance and recommendations, including the following:
 - The necessary link between the proposed definitions and the requirement that the misconduct must have resulted in a discharge for cause;
 - Clarification of incorrect statements in the PPA comments;
 - Confirmation that the definition of “dishonesty” appropriately uses the term “includes” in describing some components of dishonesty;
 - Confirmation that that the terms included within dishonesty have distinct commonly understood meanings; and
 - The distinctions between the employment processes and certification/licensure processes.
- The current definition of Gross Negligence, which has been found to be a legally sufficient definition in previous cases. That definition is identical to the proposed definition of Gross Misconduct recommended by the workgroup and reflected in the current proposed rule.
- The extensive review by workgroup representatives’ associations during preliminary rule development, publication and solicitation of constituent input via the Ethics Bulletin while still in a preliminary draft stage, submission of draft language to every constituent agency and association before initial presentation as proposed rules, and the public comment period and hearing, none of which identified similar concerns from others.

IV) PPA’s Par’s (18) through (26) discuss Section (4) of the proposed rule regarding discretionary disqualifying misconduct. Based on staff review and DOJ recommendations, several clarifications are proposed for the permanent rule. These include:

- Structural reorganization to define discretionary disqualifying misconduct and the associated categories at the beginning of this section.
- Inserting “Comment” language recommended by DOJ, following Category I, II, III, IV, and V definitions, consistent with the revisions to (3) of the rule discussed in “**III**” above..
- Clarifying language for Disregard for the Rights of Others and removing the reference to the Code of Ethics from that definition. Based on the clarifications recommended, it is also recommended that the statement that “In this category there is a victim” be removed. These changes are consistent with the revisions to (3) of the rule discussed in “**III**” above.
- Clarifying the Misuse of Authority definition to identify that misconduct within this category constitutes “abuses” by the officer rather than “actions” by the officer. These changes are consistent with the revisions to (3) of the rule discussed in “**III**” above.

These changes are reflected in the proposed permanent rule language attached to the hearings officer report.

In reviewing the other concerns submitted under Par’s (18) through (26), staff considered the following prior to its decision to recommend no additional changes to the referenced proposed rule language:

- DOJ guidance and recommendations regarding legally sufficient rules, and the link between the proposed definitions and the aggravating and mitigating circumstances that must be considered in any case involving discretionary disqualifying misconduct.
- The current definition of “Insubordination” as a mandatory ground for revocation or denial when it results in a discharge. That definition is identical to its proposed definition under this category. The only effect of the change the workgroup proposed is to remove insubordination as a mandatory ground for revocation or denial and to include it only as discretionary disqualifying misconduct.
- The current definition of Gross Negligence (a mandatory disqualifier when resulting in discharge for cause), which has been found to be a legally sufficient definition in previous cases. That definition is identical to the proposed definition of Gross Misconduct recommended by the workgroup and reflected in the current proposed rule. The workgroup included Gross Misconduct under both mandatory and discretionary grounds for revocation or denial.
- Regarding stated concerns with Category V (the definition of Misconduct):
 - Similar language has been in current rules for many years [See OAR 2549-008-0070(2)(a)(A)(iii) Incompetence or Gross Misconduct: in determining what constitutes “incompetence or gross misconduct,” sources the Department may take into account include but are not limited to practices generally followed in the profession...]
 - DOJ has confirmed that it is not uncommon for a regulatory agency in Oregon to refer to accepted or generally recognized standards in describing conduct that may be grounds to deny, revoke, or refuse to issue or renew a license.
- The extensive review by workgroup representatives’ associations during preliminary rule development, publication and solicitation of constituent input via the Ethics Bulletin while still in a preliminary draft stage, submission of draft language to every constituent agency and association before initial presentation as proposed rules, and the public comment period and hearing, none of which identified similar concerns from others.

V) PPA Par (27) states the PPA’s position that DPSST, its policy committees and its Board should have no jurisdiction over discretionary misconduct not resulting in conviction. Staff considered the following prior to its decision to recommend no changes to the referenced proposed rule language:

- Guidance from DOJ that including within the rule types of discretionary misconduct that do not result in conviction is both reasonable and consistent with the distinct statutory directions given to the agency in ORS 181.662(b) and (c), and meets the legislative mandate to establish standards by rule.
- One of the concerns of the workgroup, as reflected in the current proposed rule language, was to ensure that if situations are similar, officers would be similarly treated. An example of the concern is that if one officer is discharged for misconduct warranting revocation, while another officer resigns during an investigation, prior to being discharged for the same misconduct, both officers should be subject to the same standards of review and sanction, if the misconduct warrants it. Staff recommends no changes to the referenced proposed rule language.
- The PPA position does not reflect current statute or rules regarding the agency’s authority, workgroup direction, or Committee and Board policy direction to the agency.

VI) PPA Par’s (28) through (35) state three general areas of concern with Section (9) of the proposed rule, Denial and Revocation Procedure.

1) The first area of concern, (Process) referred to an opportunity to be heard. Based on staff review and DOJ input, the following change is proposed for the permanent rule:

- A change is recommended to (d) to clarify that the Policy Committee and Board role precedes and is preliminary to initiation of formal proceedings and is not a final decision to deny or revoke certification.

This change is reflected in the proposed permanent rule language attached to the hearings officer report.

In reviewing the other concerns in this area, staff considered the following prior to its decision to recommend no additional changes to the referenced rule language:

- DOJ has provided prior written advice confirming the preliminary role of the current policy committee and Board procedures and that the current DPSST procedures for revocation of a public safety officer's certification comply with procedural due process requirements.
- The change requested exceeds the scope of the proposed rules and would change established processes.
- The policy committees and Board are not hearings bodies. The body responsible for these due process hearings is the Office of Administrative Hearings. That body has established processes for conducting hearings; subpoenas can be issued; rules of discovery apply, and all parties can be represented by counsel before any proposed denial or revocation proceeds to a final order.
- DOJ identified PPA Par's (30) and (31) as erroneous. Policy committee and Board procedures, and the role of staff are delineated in the current proposed rule, in (9)(a) through (m).

2) The second area of concern (Arbitration) in PPA Par's (32) and (33) discussed the proposed rule language regarding arbitration. The proposed rule language reflects current agency processes. The position stated by the PPA was discussed by a multi-discipline workgroup during the 2007 legislative session, and at all policy committee and Board meetings prior to the proposed rules being opened for comment; and those bodies recommended moving the proposed rule language forward. The changes advocated by the PPA exceed the scope of the current proposed rule. DOJ advice confirms the distinctions between employment processes and certification/licensure processes, and advises that DPSST should not be bound by an arbitrator's decision in an employment matter. Staff recommends no changes to the referenced proposed rule language.

3) The third area of concern was described in the PPA Par's (34) and (35) as "Standards." However, the referenced rule language delineates the requirement for the policy committees and the Board to consider "mitigating and aggravating circumstances" or factors when comparing the officer's conduct to the standards previously identified in the rule. The rule then lists circumstances or factors that may be relevant, which the PPA comment identifies as "standards" for decertification. DOJ has advised staff that the PPA interpretation that these circumstances or factors are equivalent to "standards" is in error. Certifications are not denied or revoked based on mitigating or aggravating circumstances discussed in this section of the rule, but on misconduct that violates minimum standards, as defined elsewhere in the rule. Additionally, the term "including the following..." means that the list of factors is not exhaustive.

However, to ensure that the referenced rule language is clear, staff recommends the following changes to the proposed rule language:

- The inclusion of "...but not limited to..." prior to the list of possible aggravating or mitigating circumstances in (9)(d), as follows: "including, **but not limited to**, the following:"
- The addition of a reference to consideration of the public safety professional's or instructor's physical or emotional condition at the time of the conduct, as an additional factor among those that may be considered as applicable [(9)(d)(I)].

These changes are reflected in the proposed permanent rule language attached to the hearings officer report.

In reviewing the other concerns submitted under Par's (34) and (35), staff considered the following prior to its decision to recommend no additional changes to the referenced proposed rule language:

- Current rule language identifying mitigating and aggravating circumstances, which is substantively the same as the language recommended in (9)(d)(A) through (F) of the proposed rule.
- Current rule language describing lack of moral fitness in OAR 259-008-0010(6)(a) and (a)(E), and in 259-008-0011(3)(a) and (a)(E). This language is substantively the same as the language recommended in (9)(d)(G) and (H) of the proposed rule. The effect of the proposed change in (G) and (H) is simply to remove language from the rule describing lack of moral fitness and to identify these considerations as factors (mitigating or aggravating circumstances) rather than descriptions of a standard. The corresponding changes to OAR 259-008-0010 and -0011 were previously presented to the policy committees and Board, published separately as proposed rules, and will be filed separately as permanent rules.

Staff analysis and recommendations above are consistent with advice and recommendations by DOJ, which disagrees with the PPA conclusions in PPA Par (36). DOJ concludes that the draft permanent rules attached to the hearings officer report fully address specific objections and concerns raised in the PPA comments.

Appendix D1

Department of Public Safety Standards and Training Memorandum

DATE: July 15, 2008

TO: Police Policy Committee

FROM: Bonnie Sallé
Hearing Officer

SUBJECT: Hearing Officer's Report and Recommendation
Denial and Revocation
OAR 259-008-0070

The Police Policy Committee and Board on Public Safety Standards and Training previously reviewed and approved filing a proposed permanent rule with the Secretary of State's office to amend the rules relating to the denial or revocation of a public safety officer's or instructor's certification. The proposed rules were filed with the Secretary of State's Office and opened for public comment.

A total of five (5) comments were received during the open comment period. The comments are attached to this memorandum and incorporated by reference. For ease of review, staff responses to relevant issues are addressed individually after each attached comment.

FINDINGS OF FACT:

1. On February 15, 2008, a Notice of Proposed Rulemaking Hearing was filed with the Secretary of State's office.
3. On March 1, 2008, the Notice of Proposed Rulemaking Hearing was published in the Secretary of State's monthly publication (Bulletin).
4. During the month of March 2008, the Notice of Proposed Rulemaking Hearing was posted on the Department of Public Safety Standards and Training's website.
6. On March 24, 2008, a public hearing was held. Zero (-0-) individuals attended the hearing and no public testimony was given.
7. On March 24, 2008, the public comment period closed.

CONCLUSION:

The Department previously presented proposed rule amendment to OAR 259-008-0070 to the Police Policy Committee, Telecommunications Policy Committee, and Corrections Policy Committee. It was reviewed and discussed by all committee members from each committee and the Department received approval from all three committees to forward their recommendation to approve the proposed language for OAR 259-008-0070 to the Board.

The Department presented the proposed rule amendment to OAR 259-008-0070 to the Board. It was reviewed by Board members and the Department received approval to file the proposed amendment with the Secretary of State's office as a proposed rule.

The Department provided notice of a proposed rulemaking hearing to:

- a) The Secretary of State's office;
- b) Legislative Counsel;
- c) The agency interested parties' list;
- d) The Department's website;
- e) The Department's Ethics Bulletin (listserve) and
- f) All public safety agencies and associations (via listserve)

The Department received five public comments during the public comment period, two of which contained duplicate language (*see* Comment 2 & 3).

The Department has amended relevant portions of its originally proposed rules to address some of the concerns expressed in the comments received during the public comment period. The original proposed rules, as well staff's proposed amendments to address the public comments received, have been reviewed with the Department's legal counsel. In addition to the proposed new language, staff included minor housekeeping and structural changes to the attached rules. All new text proposed by staff will appear as ***bold, italicized, and dotted underlined*** text in the attached document.

It is the conclusion of the hearing officer that the Department provided ample notice of the proposed rule amendment to OAR 259-008-0070 to the largest extent possible to public safety agencies and public safety personnel. After careful consideration of issues raised in the comments, contrasted with the extensive public notice given, the few negative comments received did not appear to represent a statewide concern among public safety agencies about the rule amendment as originally drafted. However, as stated above, the Department consulted with its legal counsel and has made additional modifications to the proposed rules for purposes of clarity and to address concerns expressed by constituents, where appropriate.

HEARING OFFICER'S RECOMMENDATION: Adopt the attached version of the proposed rules amending OAR 259-008-0070 as a permanent rule with the identified additional modifications to the original proposed rule language.

Attachments:

- "A" – Comment #1 (Includes staff's response)
- "B" – Comment #2 & #3 (Includes staff's response)
- "C" – Comment #4 (Includes staff's response)
- "D" – Comment #5
- "E" – Staff Response to Comment #5

Appendix D2

259-008-0070

Denial/Revocation

(1) It is the responsibility of the Board to set the standards, and of the Department to uphold them, to insure the highest levels of professionalism and discipline. These standards shall be upheld at all times unless the Board determines that neither the safety of the public or respect of the profession is compromised.

Definitions

(2) For purposes of this rule, the following definitions apply:

(a) “Denial” or “Deny” means the refusal to grant a certification for mandatory grounds or discretionary disqualifying misconduct as identified in this rule, pursuant to the procedures identified in (9) of this rule.

(b) “Discretionary Disqualifying Misconduct” means misconduct identified in OAR 259-008-0070(4).

(c) “Revocation” or “Revoke” means to withdraw the certification of a public safety professional or instructor for mandatory grounds or discretionary disqualifying misconduct as identified in this rule, pursuant to the procedures identified in section (9) of this rule.

Grounds for Mandatory Denial or Revocation of Certification

~~(2)~~ **(3) Mandatory Grounds for Denying or Revoking Certification of a Public Safety Professional or Instructor:**

(a) The Department must deny or revoke the certification of any public safety professional or instructor after written notice and hearing, based upon a finding that:

(A) The public safety professional **or instructor** has been discharged for cause from employment as a public safety professional **or instructor**. For purposes of this rule, "discharged for cause," means an employer-initiated termination of employment for any of the following reasons **after a final determination has been made. If, after service by the Department of a Notice of Intent to Deny or Revoke Certifications (NOI), the public safety professional or instructor provides notice to the Department within the time stated in the NOI that the discharge has not become final, then the Department may stay further action pending a final determination.**

(i) Dishonesty: Includes untruthfulness, dishonesty by admission or omission, deception, misrepresentation, falsification; [Comment: Conduct underlying the mandatory disqualifying misdemeanors involving these elements in Subsection (D) and the Category I offenses in section (4), is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(ii) Disregard for the Rights of Others: Includes violating the constitutional or civil rights of others, 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.

This category involves a victim; [Comment: Conduct underlying the Category II offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(i) ~~(iii)~~ Gross Negligence **Misconduct**: means the public safety professional's **an** act or failure to act **that** creates a danger or risk to persons, property, or to the efficient operation of the **department 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; **[Comment: Conduct underlying the Category IV offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]**

~~(v) Incompetence or Gross Misconduct: in determining what constitutes "incompetence or gross misconduct," sources the Department may take into account include but are not limited to practices generally followed in the profession, current teaching at public safety training facilities, and technical reports and literature relevant to the fields of law enforcement, telecommunications, or emergency medical dispatch.~~

(iv) Incompetence: means a demonstrated lack of ability to perform the essential tasks of a public safety professional or instructor that remedial measures have been unable to correct.

~~(v) 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; or~~

(v) Misuse of Authority: Includes abuse of public trust, abuse of authority to obtain a benefit, avoid a detriment, or harm another, and abuse actions under the color of office. [Comment: Conduct underlying the Category III offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(B) The public safety professional or instructor has been convicted in this state or any other jurisdiction of a crime designated under the law where the conviction occurred as being punishable as a felony or as a crime for which a maximum term of imprisonment of more than one year may be imposed;

(C) The public safety professional or instructor has been convicted of violating any law of this state or any other jurisdiction involving the unlawful use, possession, delivery or manufacture of a controlled substance, narcotic or dangerous drug except the Department may deny certification for a conviction of possession of less than one ounce of marijuana, which occurred prior to certification; or

(D) The public safety professional or instructor has been convicted in this state of any of the following offenses, or of their statutory counterpart(s) in any other jurisdiction, designated under the law where the conviction occurred as being punishable as a crime:

162.075 (False swearing),

162.085 (Unsworn falsification),

162.145 (Escape in the third degree),

162.175 (Unauthorized departure),

162.195 (Failure to appear in the second degree),

162.235 (Obstructing governmental or judicial administration),

162.247 (Interfering with a peace officer),

162.257 (Interfering with a firefighter or emergency medical technician),

162.295 (Tampering with physical evidence),

162.305 (Tampering with public records),

162.315 (Resisting arrest),

162.335 (Compounding),

162.365 (Criminal impersonation),

162.369 (Possession of false law enforcement identification),

162.375 (Initiating a false report),

162.385 (Giving false information to a peace officer for a citation or arrest warrant),

162.415 (Official misconduct in the first degree),

163.200 (Criminal mistreatment in the second degree),

163.454 (Custodial sexual misconduct in the second degree),

163.687 (Encouraging child sexual abuse in the third degree),

163.732 (Stalking),

164.045 (Theft in the second degree),

164.085 (Theft by deception),

164.095 (Theft by receiving),

164.125 (Theft of services),

164.235 (Possession of a burglary tool or theft device),

164.877 (Unlawful tree spiking; unlawful possession of substance that can damage certain wood processing equipment)

165.007 (Forgery in the second degree),

165.017 (Criminal possession of a forged instrument in the second degree),

165.037 (Criminal simulation),
165.042 (Fraudulently obtaining a signature),
165.047 (Unlawfully using slugs),
165.055 (Fraudulent use of a credit card),
165.065 (Negotiating a bad check),
165.080 (Falsifying business records),
165.095 (Misapplication of entrusted property),
165.100 (Issuing a false financial statement),
165.102 (Obtain execution of documents by deception),
165.825 (Sale of drugged horse),
166.065(1)(b) (Harassment),
166.155 (Intimidation in the second degree),
166.270 (Possession of weapons by certain felons),
166.350 (Unlawful possession of armor-piercing ammunition),
166.416 (Providing false information in connection with a transfer of a firearm),
166.418 (Improperly transferring a firearm),
166.470 (Limitations and conditions for sales of firearms),
167.007 (Prostitution),

Oregon Laws 2007, Chapter 869, Sec. 2 (Furnishing sexually explicit material to a child),

~~167.065 (Furnishing obscene materials to minors),~~
~~167.070 (Sending obscene materials to minors),~~
167.075 (Exhibiting an obscene performance to a minor),
167.080 (Displaying obscene materials to minors),
167.132 (Possession of gambling records in the second degree),
167.147 (Possession of a gambling device),
167.222 (Frequenting a place where controlled substances are used),

167.262 (Adult using minor in commission of controlled substance offense),

167.320 (Animal abuse in the first degree),

167.330 (Animal neglect in the first degree),

167.332 (Prohibition against possession of domestic animal),

167.333 (Sexual assault of animal),

167.337 (Interfering with law enforcement animal),

167.355 (Involvement in animal fighting),

167.370 (Participation in dogfighting),

167.431 (Participation in cockfighting),

167.820 (Concealing the birth of an infant),

475.525 (Sale of drug paraphernalia),

475.840 (Manufacture or deliver a controlled substance),

475.860 (Unlawful delivery of marijuana),

475.864 (Unlawful possession of marijuana),

475.906 (Distribution of controlled substance to minors),

475.910 (Application of controlled substance to the body of another person),

475.912 (Unlawful delivery of imitation controlled substance),

475.914 (Unlawful acts, registrant delivering or dispensing controlled substance),

475.916 (Prohibited acts involving records and fraud),

475.918 (Falsifying drug test results),

475.920 (Providing drug test falsification equipment),

475.950 (Failure to report precursor substances transaction),

475.955 (Failure to report missing precursor substances),

475.960 (Illegally selling drug equipment),

475.965 (Providing false information on precursor substances report or record),

475.969 (Unlawful possession of phosphorus),

475.971 (Unlawful possession of anhydrous ammonia),

475.973 (Unlawful possession of ephedrine, pseudoephedrine or phenylpropanolamine; unlawful distribution),

475.975 (Unlawful possession of iodine in its elemental form),

475.976 (Unlawful possession of iodine matrix),

~~475.981 (Falsifying drug test results),~~

~~475.982 (Providing drug test falsification equipment),~~

~~475.986 (Application of controlled substance to the body of another person),~~

~~475.991 (Unlawful delivery of imitation controlled substance),~~

~~475.992 (Manufacture or deliver a controlled substance),~~

~~475.993 (Unlawful acts, registrant delivering or dispensing controlled substance),~~

~~475.994 (Prohibited acts involving records and fraud),~~

~~475.995 (Distribution of controlled substance to minors),~~

~~475.999 (Manufacture or delivery of controlled substance within 1,000 feet of school),~~

807.520 (False swearing to receive license),

807.620 (Giving false information to police officer),

Any offense involving any acts of domestic violence as defined in ORS 135.230.

(b) The Department must take action on a mandatory disqualifying conviction, regardless of when it occurred, unless the Department, or the Board, has previously reviewed the conviction and approved the public safety professional or instructor for certification under a prior set of standards.

Discretionary Disqualifying Misconduct as Grounds for Denying or Revoking Certification

~~(3)~~ **(4)** Discretionary **disqualifying misconduct as** Grounds for Denying or Revoking Certification**(s)** of a Public Safety Professional or Instructor:

(a) The Department may deny or revoke the certification of any public safety professional or instructor, after written notice, and a hearing, if requested, based upon a finding that:

(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

(b) (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 (2)(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; [Comment: Conduct underlying the mandatory disqualifying misdemeanors involving these elements in Subsection (D) and the Category I offenses in section (4), is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(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. This category involves a victim; [Comment: Conduct underlying the Category II offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in criminal conviction.]

(C) Category III: Misuse of Authority: Includes abuse of public trust, obtaining a benefit, avoidance of detriment, or harming another, and abuses actions under the color of office. [Comment: Conduct underlying the Category III offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(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; [Comment: Conduct underlying the Category IV offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.]

(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; [Comment: Conduct underlying the Category V offenses identified in section (4) is illustrative of the types of conduct falling within this definition. However, misconduct need not have resulted in a criminal conviction.] 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. [Note: There are no category VI crimes.]

(c) For discretionary disqualifying misconduct under (a) (A) or (B), the applicable category will be determined based on the facts of each case. For discretionary disqualifying misconduct under (a)(C), the following list identifies the applicable category for each discretionary offense:

(b) The following list identifies the offenses that constitute discretionary disqualifying misconduct and identifies their applicable category of misconduct, as defined in subsection (e) of this section:

162.405 (Official Misconduct in the Second Degree) – Category III,

162.425 (Misuse of Confidential Information) – Category III,

162.455 (Interfering with Legislative Operations) – Category V,

162.465 (Unlawful Legislative Lobbying) – Category I,

163.160 (Assault in the Fourth Degree) – Category II,

163.187 (Strangulation) – Category II,

163.190 (Menacing) – Category II,

163.195 (Recklessly Endangering Another Person) – Category IV,

163.212 (Unlawful Use of Stun Gun, Tear Gas or Mace in the Second Degree) – Category IV,

163.415 (Sexual Abuse in the Third Degree) – Category II,

163.435 (Contributing to the Sexual Delinquency of a Minor) – Category II,

163.445 (Sexual Misconduct) – Category II,

163.465 (Public Indecency) – Category II,

163.467 (Private Indecency) – Category II,

163.545 (Child Neglect in the Second Degree) – Category IV,

163.693 (Failure to Report Child Pornography) – Category IV,

163.575 (Endangering the Welfare of a Minor) – Category III,

163.700 (Invasion of Personal Privacy) – Category II,

163.709 (Unlawful Directing of Light from a Laser Pointer) – Category IV,

164.043 (Theft in the Third Degree) – Category V,

164.132 (Unlawful Distribution of Cable Equipment) – Category V,

164.140 (Criminal Possession of Rented or Leased Personal Property) – Category V,

164.162 (Mail Theft or Receipt of Stolen Mail) – Category I,

164.243 (Criminal Trespass in the Second Degree by a Guest) – Category V,

164.245 (Criminal Trespass in the Second Degree) – Category V,

164.255 (Criminal Trespass in the First Degree) – Category V,

164.265 (Criminal Trespass While in Possession of a Firearm) – Category IV,

164.272 (Unlawful Entry into a Motor Vehicle) – Category V,

164.278 (Criminal Trespass at Sports Event) – Category V,

164.335 (Reckless Burning) – Category IV,

164.345 (Criminal Mischief in the Third Degree) – Category V,

164.354 (Criminal Mischief in the Second Degree) – Category V,

164.373 (Tampering with Cable Television Equipment) – Category V,

164.377 (Computer Crime) – Category V,

164.775 (Deposit of Trash Within 100 Yards of Water) – Category V,

164.785 (Placing Offensive Substances in waters/on highways or property) – Category IV,

164.805 (Offensive Littering) – Category V,

164.813 (Unlawful Cutting and Transporting of Special Forest Products) – Category V,

164.815 (Unlawful Transport of Hay) – Category V,

164.825 (Cutting and Transport of Coniferous Trees without Permit/Bill of Sale) – Category V,

164.845 (FTA on Summons for ORS 164.813 or 164.825) – Category V,

164.863 (Unlawful Transport of Meat Animal Carcasses) – Category V,

164.865 (Unlawful Sound Recording) – Category V,

164.875 (Unlawful Video Tape Recording) – Category V,

164.887 (Interference with Agricultural Operations) – Category II,

165.107 (Failing to Maintain a Metal Purchase Record) – Category V,

165.109 (Failing to Maintain a Cedar Purchase Record) – Category V,

165.540 (Obtaining Contents of Communications) – Category V,

165.555 (Unlawful Telephone Solicitation) – Category V,

165.570 (Improper Use of Emergency Reporting System) – Category IV,

165.572 (Interference with Making a Report) – Category II,

165.577 (Cellular Counterfeiting in the Third Degree) – Category I,

165.805 (Misrepresentation of Age by a Minor) – Category I,

166.025 (Disorderly Conduct in the Second Degree) – Category IV,

166.027 (Disorderly Conduct in the First Degree) – Category IV,

166.075 (Abuse of Venerated Objects) – Category II,

166.076 (Abuse of a Memorial to the Dead) – Category II,

166.090 (Telephonic Harassment) – Category II,

166.095 (Misconduct with Emergency Telephone Calls) – Category IV,

166.155 (Intimidation in the Second Degree) – Category II,

166.180 (Negligently Wounding Another) – Category IV,

166.190 (Pointing a Firearm at Another) – Category IV,

166.240 (Carrying a Concealed Weapon) – Category V,

166.250 (Unlawful Possession of a Firearm) – Category V,

166.320 (Setting of a Springgun or Setgun) – Category IV,

166.385 (Possession of Hoax Destructive Device) – Category IV,

166.425 (Unlawful Purchase of Firearm) – Category I,

166.427 (Register of Transfers of Used Firearms) – Category V,

166.480 (Sale or Gift of Explosives to Children) – Category IV,

166.635 (Discharging Weapon or Throwing Object at Trains) – Category IV,

166.638 (Discharging Weapon Across Airport Operational Surfaces) – Category IV,

166.645 (Hunting in Cemeteries) – Category V,

166.649 (Throwing Object off Overpass in the Second Degree) – Category IV,

167.122 (Unlawful Gambling in the Second Degree) – Category V,

167.312 (Research and Animal Interference) – Category II,

167.315 (Animal Abuse in the Second Degree) – Category IV,

167.325 (Animal Neglect in the Second Degree) – Category IV,

167.340 (Animal Abandonment) – Category IV,

167.351 (Trading in Nonambulatory Livestock) – Category V,

167.352 (Interfering with Assistance, Search and Rescue or Therapy Animal) – Category IV,

167.385 (Unauthorized Use of Livestock Animal) – Category II,

167.388 (Interference with Livestock Production) – Category II,

167.390 (Commerce in Fur of Domestic Cats and Dogs) – Category V,

167.502 (Sale of Certain Items at Unused Property Market) – Category V,

167.506 (Record Keeping Requirements) – Category V,

167.808 (Unlawful Possession of Inhalants) – Category IV,

167.810 (Creating a Hazard) – Category IV,

167.822 (Improper Repair Vehicle Inflatable Restraint System) – Category IV,

411.320 (Disclosure and Use of Public Assistance Records) – Category II,

468.922 (Unlawful disposal, storage or treatment of hazardous waste in the second degree) – Category V,

468.929 (Unlawful transport of hazardous waste in the second degree) – Category V,

468.936 (Unlawful Air Pollution in the Second Degree) – Category V,

468.943 (Unlawful Water Pollution in the Second Degree) – Category V,

468.956 (Refusal to Produce Material Subpoenaed by the Commission) – Category V,

471.410 (Providing Liquor to Person under 21 or to Intoxicated Person) – Category IV,

496.994 (Obstruction to the Taking of Wildlife) – Category V,

496.996 (Attempt to Take Wildlife Decoy) – Category V,

498.164 (Use of Dogs or Bait to hunt Black Bears or Cougars) – Category V,

717.200 to 717.320 (Any violation) – Category V,

803.225 (Failure to Designate Replica.. Vehicle in Title or Registration Application) – Category I,

807.430 (Misuse of Identification Card) – Category I,

807.510 (Transfer of documents for the purpose of misrepresentation) – Category I,
807.530 (False Application for License) – Category I,
807.570 (Failure to Carry or Present License) – Category V,
807.580 (Using Invalid License) – Category I,
807.590 (Permitting Misuse of License) – Category I,
807.600 (Using Another’s License) – Category I,
811.060 (Vehicular Assault of Bicyclist or Pedestrian) – Category V,
811.140 (Reckless Driving) – Category IV,
811.172 (Improperly Disposing of Human Waste) – Category V,
811.182 (Criminal Driving While Suspended or Revoked) – Category V,
811.231 (Reckless Endangerment of Highway Workers) – Category IV,
811.540 (Fleeing or Attempt to Elude a Police Officer) – Category IV,
811.700 (Failure to Perform Duties of Driver when Property is Damaged) – Category V,
811.740 (False Accident Report) – Category I, and
813.010 (Driving Under the Influence of Intoxicants) – Category IV.

Misconduct Categories and Initial Periods of Ineligibility

(d) Upon determination to proceed with the denial or revocation of a public safety professional’s or instructor’s certification based on discretionary disqualifying misconduct *identified in subsection (a)*, an initial minimum period of ineligibility to apply for certification will be determined based upon the category of misconduct (i.e., Dishonesty, Disregard for Rights of Others, Misuse of Authority, Gross Misconduct, Misconduct or Insubordination).

(e) Following review and recommendation by a Policy Committee, the Board will determine the initial minimum period of ineligibility for discretionary disqualifying misconduct identified in subsection (a) from the time frame identified below for each category of discretionary disqualifying misconduct from the time frame identified for each of the following categories:

(A) Category I: Dishonesty (5 years to Lifetime). Includes untruthfulness, dishonesty by admission or omission, deception, misrepresentation, falsification;

(B) Category II: Disregard for Rights of Others (5 years to 15 years). Includes constitutional violations, violation of the Code of Ethics regarding fairness, respect for the rights of others, protecting the vulnerable and the fundamental duty to protect and serve. In this category, a person is a victim;

(C) Category III: Misuse of Authority (5 years to 10 years). Includes abuse of public trust, obtaining a benefit or avoidance of detriment, and actions under the color of office;

(D) Category IV: Gross Misconduct (5 years to 10 years). Includes 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 would observe in similar circumstances; and

(E) Category V: Misconduct (3 years to 7 years). 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;

(F) Category VI: Insubordination (3 years to 7 years). 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.

Eligibility to Reapply; Ineligibility Periods

(5) A person is not eligible to reapply for training or certification if the person had training or certification denied or revoked for:

(a) Mandatory grounds identified in section (3) of this rule; or

(b) Discretionary Disqualifying Misconduct identified in section (4) of this rule that is determined to be a Category I lifetime disqualifier.

(6) Eligibility to reapply for certification:

(a) In determining the initial minimum period of ineligibility within any category for discretionary disqualifying misconduct listed in section (4) of this rule, the Board will take into consideration any mitigating or aggravating factors, subject to the provisions of section (9) of this rule.

(b) The initial minimum period of ineligibility will be included in any Final Order of the Department.

(c) Any subsequent eligibility to apply for certification will be determined by the Board, after Policy Committee review, subject to the provisions of section (11) of this rule.

Guidelines for Denial or Revocation Based on Discretionary Disqualifying Misconduct

(7) In determining whether to take action on a conviction, the Department must use the following guidelines:

(A) (a) In making a decision on a discretionary denial or revocation, the Department will consider the implementation dates relating to new mandatory conviction notification requirements adopted in 2003 and statutory changes dealing with lifetime disqualifier convictions for public safety officers adopted in 2001.

~~(B)~~ **(b)** The Department will not take action on a ~~discretionary~~ conviction **constituting discretionary disqualifying misconduct** that occurred prior to January 1, 2001. However, the Department may consider such conviction as evidence that a public safety professional or instructor does not meet the established moral fitness guidelines.

~~(C)~~ **(c)** The Department may take action on any ~~discretionary disqualifying~~ conviction **constituting discretionary disqualifying misconduct** that occurred after January 1, 2001.

~~(D)~~ **(d)** The Board may reconsider any mandatory conviction which subsequently becomes a ~~discretionary~~ conviction **constituting discretionary disqualifying misconduct**, upon the request of the public safety professional or instructor.

~~(E)~~ **(e)** The length of ineligibility for training or certification based on a conviction begins on the date of conviction.

~~(F)~~ **(f)** Notwithstanding subsection (2)(b) ~~(b)~~ of this section, all denial and revocation standards must apply to public safety professionals and instructors. **The Department will not take action against a public safety professional, instructor, or agency for failing to report, prior to January 1, 2003, a conviction that constitutes discretionary disqualifying misconduct.**

~~(G)~~ **(g)** A public safety professional or agency will not be held accountable for failing to report a ~~discretionary~~ conviction **that constitutes discretionary disqualifying misconduct, if such conviction** that occurred prior to January 1, 2003. **The Department may take action against a public safety professional, instructor, or agency for failing to report, after January 1, 2003, any conviction that constitutes discretionary disqualifying misconduct.**

~~(e)~~ **(h)** 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.

Procedure for Denial or Revocation of a Certificate

~~(4)~~ **(8)** Scope of Revocation. Whenever the Department ~~denies or~~ revokes the certification of any public safety professional **or instructor under the provisions of OAR 259-008-0070**, the ~~denial or~~ revocation will encompass all **public safety** certificates, **except fire certification(s)**, the Department has issued to that person.

~~(5)~~ **(9)** Denial and Revocation Procedure.

(a) ~~Employer Request~~ **Agency Initiated Review**: When **the entity utilizing** a public safety professional **or instructor**'s employer requests that a public safety professional's **or instructor's** certification be denied or revoked, the employer **it** must submit **in writing to the Department** the reason for the requested denial or revocation and all factual information supporting the request, ~~in writing, to the Department.~~

(b) Department Initiated ~~Request~~ **Review**: Upon receipt of factual information from any source, and pursuant to ORS 181.662, the Department may request that the public safety professional's **or instructor's** certification be denied or revoked.

(c) Department Staff Review: When the Department receives information, from any source, that a public safety professional **or instructor** may not meet the established standards for Oregon public safety professionals **or instructors**, the Department will review the request and the supporting factual

information to determine if the request for denial or revocation meets statutory and administrative rule requirements.

(A) If the reason for the request does not meet the statutory and administrative rule requirements for denial or revocation the Department will notify the requestor.

(B) If the reason for the request does meet statutory and administrative rule requirements but is not supported by adequate factual information, the Department will request further information from the employer or conduct its own investigation of the matter.

~~(C) The Department will seek input from the affected public safety professional or instructor, allowing him or her to provide, in writing, information for the Policy Committee and Board's review.~~

~~(D) If the Department determines that a public safety professional or instructor may have engaged in discretionary disqualifying misconduct listed in subsection (34), the case may be presented to the Board, through a Policy Committee.~~

~~(C)~~ **(D) The Department will seek input from the affected public safety professional or instructor, allowing him or her to provide, in writing, information for the Policy Committee and Board's review.**

(E) In misconduct cases in which there has been an arbitrator's opinion related to the public safety professional's or instructor's employment, the Department will proceed as follows:

(i) If the arbitrator's opinion finds that underlying facts supported the allegations of misconduct, the department will proceed as identified in paragraphs (A) through (D) of this subsection.

(ii) If the arbitrator has ordered employment reinstatement after a discharge for cause without a finding related to whether the misconduct occurred, the Department will proceed as identified in paragraphs (A) through (D) of this subsection.

(iii) If the arbitrator's opinion finds that underlying facts did not support the allegation(s) of misconduct, the Department will proceed as identified in paragraph (A) of this subsection and administratively close the matter.

~~(d) Policy Committee and Board Review: The Policy Committees and Board may will consider mitigating and aggravating circumstances in In making a decision to ~~deny or revoke~~ authorize initiation of proceedings under subsection (e) of this rule, certification-based on discretionary disqualifying misconduct, the Policy Committees and Board will consider mitigating and aggravating circumstances, including, *but not limited to*, the following:~~

(A) When the misconduct occurred in relation to the public safety professional's or instructor's employment in public safety (i.e., before, during after);

~~(A)~~ **(B) Was a If a the misconduct resulted in a conviction:**

(i) Whether it was a felony, misdemeanor, or violation?;

~~(B)~~ **(ii) How long ago did a conviction occur? The date of the conviction(s);**

~~(C)~~ **(iii) Was Whether the public safety professional or instructor was a minor at the time and tried as an adult?;**

~~(D)~~ **When did the conduct occur in relation to the public safety professional's employment in law enforcement (i.e., before, during, after)?**

~~(E)~~ **Did (iv) Whether the public safety professional or instructor served time in prison/jail and, if so, the length of incarceration? If so, how long?**

~~(F)~~ **(v) If Whether restitution was involved ordered, has and whether the public safety professional or instructor met all obligations?;**

~~(G)~~ **(vi) Was Whether the public safety professional or instructor has ever been on parole or probation? If so, when did the date on which the parole/probation period expired or is set to expire; the parole or probation end? Is the public safety professional still on parole or probation?**

~~(H)~~ **(vii) Whether the How many other convictions does this public safety professional or instructor has more than one conviction and if so, over what period of time; have? Over what period of time?**

~~(J)~~ **~~(viii)~~ ~~(C)~~ Whether Has the public safety professional or instructor has been convicted of engaged in the same misconduct more than once, and if so? Is this a repeated violation or a single occurrence over what period of time?;**

~~(H)~~ **~~(C)~~ ~~(D)~~ Whether the actions of the public safety professional or instructor violate the established moral fitness standards for Oregon public safety officers identified in OAR 259-008-0010(5), i.e., moral turpitude, dishonesty, fraud, deceit, misrepresentation, conduct prejudicial to the administration of justice, conduct that reflects adversely on the profession, or conduct that would cause a reasonable person to have substantial doubts about the public safety professional's or instructor's honesty, fairness, respect for the rights of others, or for the laws of the state or the nation?;**

~~(K)~~ **~~(D)~~ ~~(E)~~ Whether Does the misconduct involved domestic violence?;**

~~(L)~~ **~~(E)~~ ~~(F)~~ Whether Did the public safety professional or instructor self reported the misconduct?;**

~~(F)~~ ~~(G)~~ Whether the conduct adversely reflects on the fitness of the public safety professional or instructor to perform as a public safety professional or instructor;

~~(G)~~ ~~(H)~~ Whether the conduct renders the public safety professional or instructor otherwise unfit to perform their duties because the agency or public has lost confidence in the public safety professional or instructor;

(I) What the public safety professional's or instructor's physical or emotional condition was at the time of the conduct.

(e) Initiation of Proceedings: Upon determination that the reason for denial or revocation is supported by factual data meeting the statutory and administrative rule requirements, a contested case notice will be prepared.

(f) Contested Case Notice: The "Contested Case Notice" will be prepared in accordance with **OAR 137-003-0001 of** the Attorney General's Model Rules of Procedure adopted under OAR 259-005-0015. The Department will have a copy of the notice served on the public safety professional **or instructor**.

(g) Response Time:

(A) A party who has been served with a "Contested Case Notice of Intent to Deny Certification" has 60 days from the date of mailing or personal service of the notice in which to file with the Department a written request for a hearing.

(B) A party who has been served with the "Contested Case Notice of Intent to Revoke Certification" has 20 days from the date of mailing or personal service of the notice in which to file with the Department a written request for hearing.

(h) Default Order: If a timely request for a hearing is not received, the Contested Case Notice will become a final order denying or revoking certification pursuant to OAR 137-003-0645.

(i) Hearing Request: When a request for a hearing is received in a timely manner, the Department will refer the matter to the Office of Administrative Hearings in accordance with OAR 137-003-0515.

(j) Proposed Order: The assigned Administrative Law Judge will prepare Findings of Fact, Conclusions of Law and Proposed Final Order and serve a copy on the Department and on each party.

(k) Exceptions and Arguments: A party must file specific written exceptions and arguments with the Department no later than 14 days from date of service of the Findings of Fact, Conclusions of Law, and Proposed Final Order.

(A) The Department may extend the time within which the exceptions and arguments must be filed upon a showing of good cause.

(B) When the exceptions and arguments are filed, the party making the exceptions and arguments must serve a copy on all parties of record in the case and provide the Department with proof of service. A failure to serve copies and provide proof of service will invalidate the filing of exceptions and arguments as being untimely, and the Department may disregard the filing in making a final determination of the case.

(l) Final Order: A final order will be issued pursuant to OAR 137-003-0070 if a public safety professional or instructor fails to file exceptions and arguments in a timely manner.

(m) Stipulated Order Revoking Certification: **The Department may enter a stipulated order revoking the certification of a** Any public safety professional **or instructor upon the person's voluntary agreement to** who wishes to voluntarily terminate an administrative proceeding to revoke a certification, or **to voluntarily** relinquish a certification, ~~may enter a stipulated order with the Department, at any time, revoking his or her certification~~ under the terms and conditions outlined in the stipulated order.

Appeals, Reapplication, and Eligibility Determinations

~~(6)~~ **(10)** Appeal **Procedure** and Reapplication.

~~(a)~~ A public safety professional or instructor, aggrieved by the findings and ~~e~~**O**Order of the Department may, as provided in ORS 183.480, file an appeal with the Court of Appeals from the final ~~e~~**O**Order of the ~~d~~**D**epartment.

(11) Reapplication Process.

~~(b)~~ **(a) Any public safety professional or instructor who has had a whose certification has been denied or revoked pursuant to ORS 181.661, and 181.662 or subsection (a) of this section (4) of this rule, may reapply for certification within the applicable timeframes described in sections (4) through (6) of this rule. The initial minimum ineligibility period will begin on the date an Order of the Department denying or revoking certification becomes final. The initial minimum ineligibility period will cease when the applicable timeframe stated in the Order has been satisfied, but not sooner than four years after the date on which the Order of the Department revoking certification became final.**

(b) Any public safety professional or instructor whose certification has been denied or revoked pursuant to section (9) of this rule based on discretionary disqualifying misconduct may not reapply for certification until:

(A) The initial minimum period of ineligibility stated in an Order of the Department denying or revoking certification has been satisfied;

(i) If the initial period of ineligibility for the individual was for a period of less than the maximum period identified in section (4) of this rule, and the Board determines that an individual must remain ineligible to apply for certification, then the individual may not reapply for certification under the provisions of this rule until after the maximum initial period of ineligibility identified in (4) of this rule has been satisfied.

(ii) If the individual has satisfied the maximum initial period of ineligibility and the Board determines that an individual must remain ineligible to apply for certification, then the individual may not submit any further requests for an eligibility determination, and the original denial or revocation remains permanent.

(B) A written request for an eligibility determination has been submitted to the Department and a Policy Committee has recommended that a public safety professional's or instructor's eligibility to apply for public safety or instructor certification be restored and the Board has upheld the recommendation;

(i) A request for an eligibility determination should include documentation or information that supports the public safety professional's or instructor's request for eligibility to apply for certification.

(ii) In considering a request for an eligibility determination, the Policy Committee and the Board may consider mitigating and aggravating circumstances identified in Section 9(d) of this rule.

(iii) After reviewing a written request for an eligibility determination, the Board, through a Policy Committee, may determine that the individual's eligibility to apply for certification be restored if the criteria for certification have been met; or determine that the factors that originally resulted in denial or revocation have not been satisfactorily mitigated and the individual must remain ineligible to apply for certification.

(C) The public safety professional or instructor is employed or utilized by a public safety agency; and

(D) All requirements for certification have been met.

Appendix E1

Department of Public Safety Standards and Training Memo

Date: July 15, 2008
To: Police Policy Committee
From: Bonnie Sallé
Subject: Medical Waiver – Chad Arnold
DPSST # 43050

Issue: Former police reserve officer Arnold is requesting a waiver of the medical requirements so he can make application for a police officer position and become certified. OAR 259-008-0010(7)(h) allows the Board to "waive any physical requirement where, in its judgment, the waiver would not be detrimental to the performance of an officer's duties, including the protection of the public and the safety of co-workers. "

Background: The City of Bandon hired Mr. Arnold as a reserve officer on January 27, 2003. He resigned from this position on September 20, 2005. Mr. Arnold indicated in his letter to the Department (Attachment "A") that he was, "summarily offered a full-time position with Bandon Police Department, but was unable to accept it due to being unable to meet DPSST's vision requirement. A short time later, I was let go from the agency because the company who provides their insurance declined coverage to the department as long as I was a reserve officer and unable to meet the state requirements to be a full-time officer." (Attachment "A").

After leaving his position at the City of Bandon, Mr. Arnold applied to be a reserve police officer with the City of North Bend and also for a full-time position with the Warm Springs Tribal Police Department. Mr. Arnold noted, "since applying with North Bend Police Dept., I have completed all the requirements they have asked of me to be a reserve officer. To date, I have completed the ORPAT, POST, Oral Board and am currently in the background phase. I also met the standards required by Warm Springs Tribal Police to be a full-time officer, and while in background was informed that they would not be able to accept me due to the DPSST vision requirements." (Attachment "A"). Mr. Arnold was advised that if he obtained a vision waiver, he was welcome to reapply for a full-time position with Warm Springs Tribal Police.

Mr. Arnold suffers from optic nerve damage he received as a result of a truck rollover accident when he was five years old. He indicated he is not blind in the eye and can actually see fairly well. It just doesn't meet the minimum requirements of 20/30 correctable or the required depth perception. Mr. Arnold indicated it cannot be corrected due to the nerve being damaged. Mr. Arnold indicated his peripheral vision in his left eye is fine and meets the minimum standards required. He also indicated his vision does not affect his day to day life or what would be required of a full-time officer. He has adapted since the injury occurred, over 25 years ago, and can drive, shoot firearms, judge distance and perform tasks just as well as a person with full vision. (Attachment "A").

Mr. Arnold currently holds a position with the Mill Casino & Hotel Security Department as a Security Assistant Manager and deals with security issues ranging from intoxicated, belligerent individuals to investigations of theft, narcotics, fraud, assault, etc. Mr. Arnold also provided several letters of reference:

1. City of North Bend: Jon Bohanan, Reserve Program Coordinator, indicated Mr. Arnold is currently in the background phase to be hired as a reserve police officer. To date, he has passed all testing standards for the position. (see Attachment "C")
2. Bandon Police Department: Sgt. Lynch indicated Mr. Arnold was a member of the Bandon Police Department Reserve Program from May 2002 until May 2006. Sgt. Lynch indicated he believes Mr. Arnold has the ability to be a police officer if given the chance. (see Attachment "D")
3. Eagle Point Police Department: Officer Anselmi worked with Mr. Arnold as a Loss Prevention officer at Fred Meyer. They made several arrests and he believes Mr. Arnold would make a great police officer stating, "I strongly urge that Chad Arnold be given an opportunity to prove himself and fulfill a dream he has had for years." (see Attachment "E").
4. Hillsboro Police Department: Officer Johnson has known Mr. Arnold since June 2006. He worked with him for 18 months in the security department at the Mill Casino and Hotel. When he began working at the casino, Mr. Arnold was a security officer. He was also assigned to the medical team as a First Responder helping people with medical emergencies. He attained the position of training officer and later became Assistant Security Manager. Officer Johnson believes Mr. Arnold would make an excellent choice for a full time police officer. (see Attachment "F")

If Mr. Arnold is hired as a police officer, he would be employed in a certified police officer position and, pursuant to OAR 259-008-0075(3), be required to complete a Basic Police Course and become certified as a police officer within 18 months of hire. OAR 259-008-0010(8)(A) requires all law enforcement officer applicants to be examined by a licensed physician and pass a visual acuity test with corrected vision of 20/30 (Snellen) in each eye.¹

Item #1: Mr. Arnold's initial uncorrected visual acuity in his left and right eyes was 20/4000. With a soft contact lens, his corrected visual acuity was 20/20 in the right eye. However, his left eye has optic atrophy and cannot be corrected. The optometrist who conducted the visual examination, Dr. Cheslock, indicated Mr. Arnold did not meet the mandatory minimum standard because the vision in his left eye was not corrected with glasses or soft contact lens. (see Attachment B)
On July 15, 2008, Mr. Arnold's optometrist (James Cheslock) provided a statement indicating Mr. Arnold's current vision should allow Mr. Arnold to perform all the tasks listed on the police officer's essential task list (F-2 Physical Examination). (see Attachment "G")

The remainder of the physical examination was conducted by Mr. Arnold's Roger Willis, M.D. Dr. Willis deferred the vision and hearing findings to the applicable specialists but did not find that there were any other conditions which, in his medical opinion, suggested further examination and did not find that there were any other physical condition(s) that would prevent Mr. Arnold from performing the essential tasks of the police officer job.

¹ OAR 259-008-0010(8)(a)(A) provides the following medical standard for visual acuity: "Corrected vision shall be at least 20/30 (Snellen) in each eye. Due to the demonstrated likelihood of dislodgment or breakage, candidates who are able to wear only glasses with frames shall meet an uncorrected standard not worse than 20/100 (Snellen) in each eye. Those candidates whose soft contact lenses (SCLs) shall have vision correctable to at least 20/30 in each eye, with no uncorrected standard, provided the employing agency will monitor compliance. Replacement glasses or lenses (as appropriate) shall be on the person or readily available at all times during each work shift."

Mr. Arnold is requesting a waiver of the visual acuity standard because he believes that his eyesight is acute and healthy enough to permit him to perform the duties of a police officer and he has demonstrated his ability to perform the essential duties of a police officer while employed as a reserve officer.

ACTION ITEM #1: The Committee needs to determine whether they will recommend approval to the Board for a waiver of the visual acuity standard for Chad Arnold so he can apply for a Police Officer position with a law enforcement agency.

Attachments:

Attachment "A" – Letter requesting course waiver from Chad Arnold, dated 4/8/08

Attachment "B" – DPSST Form F-2 (Physical Examination)

Attachment "C" – Letter from J. Bohanan, City of North Bend, dated 7-13-08

Attachment "D" – Letter from Sgt. Lynch, Bandon P.D., dated 7/10/08

Attachment "E" – Letter from Officer Anselmi, Eagle Point P.D., undated

Attachment "F" – Letter from Officer Johnson, Hillsboro P.D., dated 7/4/08

Attachment "G" – Memo from James Cheslock, optometrist, dated 7/15/08

Appendix E2

Department of Public Safety Standards and Training Memo

Date: July 15, 2008
To: Police Policy Committee
From: Bonnie Sallé
Subject: Medical Waiver – Robert Jordan
DPSST # 49508

Issue: The Milwaukie Police Department is requesting a waiver of the medical requirements for the Chief of Police, Robert Jordan, so he can attend the Basic Police Career Officer Development Course and become certified. OAR 259-008-0010(7)(h) allows the Board to "waive any physical requirement where, in its judgment, the waiver would not be detrimental to the performance of an officer's duties, including the protection of the public and the safety of co-workers. "

Background: The Milwaukie Police Department hired Chief Jordan on April 9, 2008. This is a certified police officer position and, pursuant to OAR 259-008-0075(3), Chief Jordan is required to complete a Career Officer Development Course and become certified as a police officer within 18 months. OAR 259-008-0010(8)(A) requires all law enforcement officer applicants to be examined by a licensed physician and pass a visual acuity test with corrected vision of 20/30 (Snellen) in each eye.²

Item #1: Chief Jordan's initial uncorrected visual acuity in his left and right eyes was 20/200. With soft contact lenses, his corrected visual acuity was 20/30 in the right eye and 20/100 in the left eye. The physician who conduct the medical examination, Dr. Gavlik, indicated Chief Jordan did not meet the mandatory minimum standard because the vision in his left eye was not corrected with glasses or soft contact lens. (see **Attachment C**)

Chief Jordan was subsequently seen by Dr. Zoller, an ophthalmologist, who indicated, "Robert Jordan was examined 4-22-08. His current aided acuity with his contact lenses worn was 20/20-2 in the right eye and 20/40+ in the left eye. His best correctable visual acuity was 20/20-1 in the right eye and 20/40+2 in the left eye." (see **Attachment D**)

² OAR 259-008-0010(8)(a)(A) provides the following medical standard for visual acuity: "Corrected vision shall be at least 20/30 (Snellen) in each eye. Due to the demonstrated likelihood of dislodgment or breakage, candidates who are able to wear only glasses with frames shall meet an uncorrected standard not worse than 20/100 (Snellen) in each eye. Those candidates whose soft contact lenses (SCLs) shall have vision correctable to at least 20/30 in each eye, with no uncorrected standard, provided the employing agency will monitor compliance. Replacement glasses or lenses (as appropriate) shall be on the person or readily available at all times during each work shift."

The Milwaukie Police Department noted that Chief Jordan has had 27 years of experience with the FBI and he was most recently a Special Agent in Charge of the Portland Office and provided a copy of his professional resume. (see **Attachment A**)

The Milwaukie Police Department also indicated Chief Jordan had previously been able to hold a top administrative position for another law enforcement agency, that being the FBI, prior to accepting the position of Chief and the Department felt “very confident that Mr. Jordan is fully capable of performing all the duties of Police Chief at the City of Milwaukie.” (see **Attachment B**)

The Milwaukie Police Department is requesting a waiver of the visual acuity standard because they believe that Chief Jordan’s eyesight is acute and healthy enough to permit him to perform the duties of a police officer.

Item #2: Chief Jordan initially did not meet the minimum standard for resting blood pressure readings of less than, or equal to, 140 mmHg systolic and 90 mmHg diastolic on three successive readings. However, follow-up blood pressure tests were conducted at West Linn Family Health Center on June 2, 2008 and Chief Jordan received three blood pressure readings which meet the minimum standards (118/72, 114/72 and 102/76). (see **Attachments C & E**).

ACTION ITEM #1: The Committee needs to determine whether they will recommend approval to the Board for a waiver of the visual acuity standard for Robert Jordan so he can attend the next Police Career Officer Development Course.

Attachments:

- Attachment “A” – Letter requesting course waiver from City of Milwaukie, dated 4/2/08
- Attachment “B” – Letter requesting medical waiver from City of Milwaukie, dated 4/11/08
- Attachment “C” – DPSST Form F-2 (Physical Examination)
- Attachment “D” – Letter from Richard Zoller, O.D., dated 4/23/08
- Attachment “E” – Letter from Ryan Scott, M.D., dated 6/2/2008

Appendix F

Department of Public Safety Standards and Training Memorandum

DATE: August 12, 2008
TO: Police Policy Committee
FROM: Theresa King
Professional Standards Coordinator
SUBJECT: Sjon Charles CLEMONS DPSST #39482

ISSUE:

Should Sjon CLEMONS' Basic, Intermediate and Advanced Police certifications be revoked based on a violation of the Moral Fitness standards defined in OAR 259-008-0010?

BACKGROUND and OVERVIEW

On July 24, 2003, CLEMONS was hired by the Oakridge Police Department (OPD).³

On January 15, 2001, CLEMONS signed an F-11, Criminal Justice Code of Ethics.⁴

CLEMONS holds Basic, Intermediate and Advanced Police Certifications.⁵

In early October 2006, Chief Louis GOMEZ contacted DPSST and advised that he was conducting an internal investigation and asked for a template Stipulated Order Revoking Certification, which was sent to him.⁶

On October 6, 2006, CLEMONS resigned from OPD.⁷ After a series of email communications with GOMEZ, on July 24, 2007 GOMEZ provided DPSST with a cover letter and the internal investigation on CLEMONS, along with concerns that CLEMONS no longer met the standards to continue as a police officer.⁸

CLEMONS resigned while under an investigation which ultimately sustained allegations that:

- 1. CLEMONS was untruthful with a fellow officer regarding the driving status of a citizen who was driving CLEMONS' vehicle.⁹*

³ Ex A6

⁴ Ex A7

⁵ Ex A6

⁶ Ex A1

⁷ Ex A3

⁸ Ex A8 – A36

⁹ Ex A11, p. 1; A12, p. 1-2; Affidavit A13; Affidavit A14; Memo A15 and A16; LEDS checks A17-A20; CLEMONS mitigating circumstances A41

2. *CLEMONS committed traffic violations, allowed traffic violations to be committed in his presence when he used an OPD police vehicle to race a citizen, and he clocked the speed of other racers using his agency-owned radar equipment.*¹⁰
3. *CLEMONS engaged in inappropriate sexual behavior while on duty, was untruthful with superiors about an inappropriate sexual relationship with a subordinate reserve officer and regarding an internal investigation.*¹¹
4. *Upon further review, the employer determined there was no evidence to substantiate the belief that CLEMONS used the LEADS system improperly.*

*On October 5, 2007, after a review of the underlying investigation that led to the resignation, DPSST mailed a certified letter to CLEMONS advising him that his case would be heard before the Police Policy Committee and provided him an opportunity to provide mitigating circumstances for the Committee's consideration.*¹² *On or about October 9, 2007, DPSST received a certified mail return receipt.*¹³

*On or about November 5, 2007, DPSST received a cover letter from CLEMONS' attorney and a two-page response from CLEMONS for the Committee's consideration.*¹⁴ *Staff requests the Committee review this material in its entirety. Subsequent to this, CLEMONS sought a public records request and DPSST provided a response to this request.*¹⁵

*On July 1, 2008, DPSST provided CLEMONS' attorney with a Draft Staff Report, as had been offered in the November 6, 2007 public records request.*¹⁶

DISCUSSION:

Oregon law requires that DPSST, through its Board, identify in Oregon Administrative Rules (OAR) the conduct or criminal convictions that require denial or revocation. For all other conduct or convictions, denial or revocation is discretionary, based on Policy Committee and Board review. Committee and Board members may consider any mitigating or aggravating factors in their review.

Moral Fitness

OAR 259-008-0010(6) states, in part, "All law enforcement officers must be of good moral fitness. Moral fitness is described as:

- (a) For purposes of this standard, lack of good moral fitness means conduct not restricted to those acts that reflect moral turpitude but rather extending to acts and conduct which would cause a reasonable person to have substantial doubts about the individual's honesty, fairness, respect for the rights of others, or for the laws of the state and/or the nation.

¹⁰ Ex A11, p 2; A12, p 2-3; Affidavit A21; Affidavit A22; Affidavit A23; Patrol schedule A24; CLEMONS mitigating circumstances A41

¹¹ Ex A11, p 2-3; A12, p 3 Kordosky call; p.4 Howard call and Cudahy interview; A25 Cudahy Affidavit; A27 Cudahy statement; FTO manual A29 showing CLEMONS FTO to Howard; CLEMONS mitigating circumstances A41

¹² Ex A38

¹³ Ex A39

¹⁴ Ex A40-41

¹⁵ Ex A44 – A45

¹⁶ Ex A45

(b) The following are indicators of a lack of good moral fitness:

(A) Illegal conduct involving moral turpitude;

(B) Conduct involving dishonesty, fraud, deceit, or misrepresentation;

(C) Intentional deception or fraud or attempted deception or fraud in any application, examination, or other document for securing certification or eligibility for certification;

(D) Conduct that is prejudicial to the administration of justice;

(E) Conduct that adversely reflects on his or her fitness to perform as a law enforcement officer. Examples include but are not limited to: Intoxication while on duty, untruthfulness, unauthorized absences from duty not involving extenuating circumstances, or a history of personal habits off the job which would affect the law enforcement officer's performance on the job which makes the law enforcement officer both inefficient and otherwise unfit to render effective service because of the agency's and/or public's loss of confidence in the law enforcement officer's ability to perform competently.

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.

ACTION REQUESTED:

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

4. The Police Policy Committee *adopts/does not adopt* the Staff report as the record upon which its recommendations are based.
5. The Police Policy Committee believes:
 - a. CLEMONS' actions *do/do not* cause a reasonable person to have doubts about his honesty, respect for the rights of others, and respect for the laws of the land.
 - b. CLEMONS' conduct *did/did not* involve dishonesty, fraud, deceit, or misrepresentation.
 - c. CLEMONS' conduct *was/was not* prejudicial to the administration of justice.
 - d. CLEMONS' conduct *did/did not* adversely reflect on his fitness to perform as a police officer.
 - e. CLEMONS' actions *do/do not* make him inefficient or otherwise unfit to render effective service because of the agency's and the public's loss of confidence in his ability to perform competently.
6. The Police Policy Committee finds CLEMONS' conduct *does/does not* rise to the level to warrant the revocation of his certifications, and therefore recommends to the Board that CLEMONS' certifications *be revoked/not be revoked*.

SUBSEQUENT DUE PROCESS:

Each Oregon public safety professional is entitled to due process when revocation or denial action is considered.

The Policy Committee's recommendation will be forwarded to the Board. Upon review the Board will either affirm the Policy Committee's decision, or overturn it with a 2/3 vote. If the Board determines that revocation action is not appropriate, DPSST will close the case. If the Board upholds a revocation recommendation by the Policy Committee, DPSST will issue a Notice of Intent to Revoke to the officer. The officer will have twenty (20) days to request a hearing to contest the revocation action in front of an Administrative Law Judge.

Due process is an important part of the contested case hearing. Every public safety professional has the right to:

- Examine reports and evidence against them as a part of discovery.*
- Face or cross-examine their accuser.*
- Call witnesses.*
- Appear in person.*
- Be represented by counsel.*

The Administrative Law Judge hearing the case is assigned the case through the Office of Administrative Hearings. All hearings are subject to the Administrative Procedures ACT. The hearing is similar to a trial; full discovery is provided and each side calls witnesses and offers evidence. The Judge issues a Proposed Order; each side may review it and file legal exceptions. A Final Order is then issued. Due process allows for a judicial review to the Court of Appeals where three Oregon justices will review the case.

Appendix G

Department of Public Safety Standards and Training Memorandum

DATE: August 12, 2008

TO: Police Policy Committee

FROM: Steve Winegar
Curriculum Unit

SUBJECT: ORPAT Maintenance Standard for Police
Discussion and Alternatives for Standards

Background: Upon recommendation from the Police Policy Committee, the Board on Public Safety Standards and Training has adopted a standard for completion of the ORPAT in order to pass the Basic Police Academy course. At the League of Oregon Cities Conference last September, the Oregon Mayors Association and the Conference Attendees adopted a resolution urging the Board adopt a requirement that police officers pass the ORPAT bi-annually. The recommendation was brought before the Board on Public Safety Standards and Training who requested the Police Policy Committee consider the recommendation.

Issue:

Authority of the Board on Public Safety Standards and Training

ORS 181.640 (1)(a) grants the authority to the Board on Public Safety Standards and Training to establish minimum standards for police officers; the statutory language is:

- (a) The department shall recommend and the board shall establish by rule reasonable minimum standards of physical, emotional, intellectual and moral fitness for public safety personnel and instructors.

During the earlier consideration of ORPAT for police officers, the Attorney General's office advised that DPSST had the authority to recommend and the Board could require completion of ORPAT as a pre-academy standard. The issue of adoption of a "maintenance standard" was not considered during the earlier legal review, but the statutory language would seem to authorize adoption of such a standard.

If the Board wishes to adopt a standard for completion of ORPAT for incumbent officers, the standard must be a "reasonable minimum standard" for physical fitness for police officers; a "reasonable minimum standard" should reflect the minimum qualifications to perform safely and efficiently the tasks required in the job.

ORPAT

The Oregon Physical Ability Test (ORPAT) was developed to reflect the typical physical demands of a police officer, based on an analysis of the physical job tasks for police officer. The various stations

and tasks of ORPAT have been determined to represent or reflect the physical tasks that police officers perform as part of their jobs.

DPSST has been administering the ORPAT to students in Basic Police Academy courses since January 2000. DPSST has gathered data, including ORPAT times and demographic information, on over 2000 students from Basic Police Academy courses since that date. At the direction of the Police Policy Committee, in 2005 DPSST staff analyzed ORPAT data from Basic Police students. DPSST staff provided the analysis to the Police Policy Committee and the Board which resulted in the adoption of a “qualification standard” for ORPAT **for Basic Police Academy students**; the standard adopted was 5 minutes 30 seconds (5:30). This standard was based on the analysis of the data and the “qualification standard” time was set to eliminate any disparate impact of the standard under EEO guidelines. The standard became effective with all Basic Police Academy classes starting July 1, 2007.

Applying the ORPAT Standard to Incumbent Officers

There has been considerable discussion, particularly over the past year, concerning the applicability of the Basic Police Academy ORPAT standard to incumbent police officers. The logic of the argument for applying ORPAT standard to incumbent officers is that ORPAT is an assessment of one’s ability to perform the critical and essential physical tasks of the job of police officer; the critical and essential physical tasks of the job are the same whether the officer has just graduated from the Police Academy or they have been on the job for twenty years. The ORPAT “qualification standard” reflects a “reasonable minimum standard of physical ... fitness” for Basic Police Academy students, who will be doing the same job as incumbent officers. Therefore, incumbent officers should be able to complete ORPAT within the same “qualification standard” as Basic Police Academy students.

ORPAT Times for Incumbent Officers

The easiest way to support applying the 5:30 ORPAT completion standard as reflecting a “reasonable minimum standard of physical fitness” for incumbent officers would be to test a representative sample of current officers who are safely and efficiently performing the tasks required of a police officer. If the officers in the sample were able to complete ORPAT within the 5:30 standard, then there would be significant support that 5:30 would represent a “reasonable minimum standard of physical fitness” for police officers.

When information on ORPAT was initially presented to the Police Policy Committee, the presentation included data on ORPAT completion times for one hundred incumbent police officers. Although the qualification standard did not have disparate impact on the sample of incumbent officers tested, the sample of incumbent officers was NOT a representative sample of police officers in Oregon. Based on existing data from the one hundred incumbent officers, DPSST cannot assert that the 5:30 ORPAT completion time would be a “reasonable minimum standard” of physical fitness for incumbent police officers as we do not have data on ORPAT completion times for a statistically representative group of successful incumbent officers.

At this time we do not have credible data to show that a 5:30 ORPAT “qualification standard” reflects the level of physical fitness of incumbent officers.

ORPAT Standard and Continued Employment in a Police Position

If ORPAT times are an assessment of the ability to perform the critical and essential physical tasks required of police officers, and if 5:30 reflects a “reasonable minimum standard” of physical fitness for a police officer, then officers who completed ORPAT with times slower than the 5:30 standard would

be more likely to NOT be able to safely and efficiently perform the critical and essential physical tasks of a police officer. As a result they would be more likely to no longer be employed in a police capacity.

To support the assertion that an ORPAT completion time of 5:30 reflects a “reasonable minimum standard of physical ... fitness” for police officers as required by statute, DPSST staff analyzed ORPAT times and continued employment as a police officer eighteen (18) months after hire. The eighteen month period was selected because it reflects the typical probationary period and most terminations or departures during probationary periods are for inability to do the job. Lack of physical fitness to do the basic job functions is one of many reasons a new officer may be unable to do the job, but if an ORPAT time of 5:30 or better reflects the “reasonable minimum standard for physical fitness for a police officer,” there is likely some fairly consistent percentage of the terminations during the probationary period that are the result of the new officer being physically unable to safely and efficiently perform the job tasks. Following this reasoning, there should be some relationship between ORPAT times and failure to successfully complete the probationary period.

ORPAT data from students in the Basic Police Academy between 2000 and 2005 were analyzed because they completed ORPAT prior to any standard being discussed or adopted and adequate time has elapsed for those students to have completed their field training and probationary periods.

For the students who attended the Basic Police Academy between 2000 and 2005, students who completed ORPAT with times slower than 5:30 are less likely to continue to be employed in a police position, but the difference is not statistically significant (meaning the difference could be the result of just chance). However, there is also a relationship between gender and no longer being employed in a police position (females are nearly twice as likely as males not to be employed in a police position 18 months after hire).

A CAUTIONARY NOTE ALSO NEEDS TO BE INCLUDED IN THIS ANALYSIS – this data includes very few Basic Police Academy students who completed ORPAT slower than 5:30 (48 of the nearly 1400 students or just over 3% of the total); additional data would be required for any findings to be meaningful.

At this time a 5:30 ORPAT “qualification standard” for incumbent officers **cannot** be supported based on successful completion of a probationary period.

ORPAT Standard and Sustaining an Injury on the Job

Another assertion is that students who complete ORPAT slower than the 5:30 standard are less physically able to successfully perform the critical and essential physical job tasks of a police officer, and they would be more likely to be injured during the performance of those tasks. If this were true that data should show that students who complete ORPAT with times slower than the “reasonable minimum standard” of 5:30, are more likely to sustain an on-the-job injury.

DPSST staff also has access to extensive data on injuries incurred on-the-job for police officers. The data is from about 80 agencies that employ a total of nearly 1500 officers for 2001 through mid-2008 (over 7 years), and it includes data on about 1400 injuries. DPSST has data on ORPAT times for Basic Police Academy students between 2000 and mid-2008; ORPAT times are available for about 400 of the injured officers when they were students in the Basic Police Academy. The injury data can be used for valid comparisons because the data also shows that over half of the on-the-job injuries occur during the officer’s first five years of employment, meaning that the injury data covers a significant portion of this high injury rate period for many of the students.

Comparing ORPAT times and injury data for officers who are employed in the same agency, there is no significant difference between the ORPAT times for the injured officers (n=268) as compared to officers who were not injured (n=458). ORPAT completion times of slower than 5:30 in the Academy do not appear to be related to the chance of sustaining an on-the-job injury.

At this time a 5:30 ORPAT “qualification standard” for incumbent officers **cannot** be supported based on the likelihood of sustaining an on-the-job injury.

Summary – ORPAT Standard for Incumbent Officers

At this time DPSST does not have data that support a 5:30 ORPAT “qualification standard” for incumbent police officers as representing the “reasonable minimum standard of physical fitness” that reflects a person’s ability to safely and efficiently perform the critical and essential tasks of a police officer.

If the Police Policy Committee and the Board are interested in pursuing a time standard for ORPAT for incumbent officers, additional work will need to be done. The current 5:30 standard is based on testing of new officers in the Police Academy, and at this time it is relevant only in that context.

Recommendation: Staff recommends that the Police Policy Committee consider the issues associated with adoption of a maintenance standard for ORPAT for incumbent certified police officers, and provide direction to staff on further research and analysis efforts concerning ORPAT standards.

Appendix H

Department of Public Safety Standards and Training Memorandum

Date: July 20, 2008

To: BPSST/DPSST Police Policy Committee

From: Eriks Gabliks
Deputy Director 

Subject: Law Enforcement Memorial Wall Nomination
Robert Riley – Lane County Sheriff's Office

Background

Robert Riley was a Reserve Deputy with the Lane County Sheriff's Office. Shortly after midnight on August 17, 1958, Deputy Riley was off-duty meeting with Springfield Police Officer Rod Brester. At the time of their meeting, an audible intrusion alarm was activated at the Paramount Market in the 2000 block of Main Street. This location was across the street from where the two officers were meeting. Almost immediately after the alarm was activated, a vehicle left the parking lot at a high rate of speed. Deputy Riley joined Officer Brester in his patrol car and a high speed pursuit ensued. At the intersection of Main Street and 32nd Street, a car driven by a drunk driver, turned into the path of the patrol car. Officer Brester took proactive measures to steer away from a collision with the vehicle and swerved into an adjacent gas station. The patrol car struck a parked vehicle and Deputy Riley was ejected some 50 feet from the patrol car (at the time cars did not seat belts). Deputy Riley was severely injured and transported to Sacred Heart Hospital in Eugene. He suffered a crushed chest from the crash and never regained consciousness. He passed away from his injuries in the early hours of August 17, 1958. He was 36 years of age. Nine members of the Riley family are, or have been, active in Oregon's law enforcement community.

Staff Recommendation

The death meets the criteria for the Oregon Law Enforcement Officer Memorial. Oregon Administrative Rule 259-008-0100 (i) defines "In the line of duty death" as a fatal injury which is the direct or proximate result of any enforcement action or emergency response resulting in death or death directly resulting from law enforcement training for enforcement action or emergency response that the law enforcement officer is authorized or obligated to perform by law, rule, regulation, or condition of employment or service while on or off duty.

Action Item(s)

Determine whether Deputy Robert Riley's name will be included on the Law Enforcement Memorial Wall.

Attachments

Documents from Lane County Sheriff's Office
Documents from Steve Riley (Son of Deputy Robert Riley)
OAR 259-008-0100 – Oregon Law Enforcement Officer Memorial

259-008-0100

Miscellaneous Activities of the Board or Department

(7) In accordance with the Oregon Revised Statutes the Board, in consultation with the Department, designates the following classifications of public safety personnel killed in the line of duty who may be honored at the Law Enforcement Memorial Wall.

(a) Eligibility

(A) For the purpose of placing names, law enforcement officer includes, as defined in ORS 181.610, police officer, reserve officer, corrections officer, and parole and probation officer. Also included are federal law enforcement officers assigned to or performing law enforcement duties in Oregon.

(b) Criteria for placement on the Law Enforcement Memorial Wall:

(A) Officers who suffered an "in-the-line-of-duty" death.

(i) "In the line of duty death" means a fatal injury which is the direct or proximate result of any enforcement action or emergency response resulting in death or death directly resulting from law enforcement training for enforcement action or emergency response that the law enforcement officer is authorized or obligated to perform by law, rule, regulation, or condition of employment or service while on or off duty.

(ii) A fatal injury may include a medical condition which arises out of law enforcement actions or training for enforcement action or emergency response causing an officer's death immediately or within 24 hours or causing her/his death during a continuous period of hospitalization resulting from a law enforcement action.

(iii) Not included under this definition are deaths attributed to natural causes (except when a medical condition arises out of law enforcement action or law enforcement training for enforcement action or emergency response causing an officer's death immediately or within 24 hours or causing his/her death during a continuous period of hospitalization immediately following the taking of law enforcement action). Deaths attributed to voluntary alcohol or controlled substance abuse, deaths caused by the intentional misconduct of the officer, deaths caused by the officer's intention to bring about his or her own death, and deaths attributed to an

officer performing his/her duty in a grossly negligent manner at time of death are not included under this definition.

(iv) When there is doubt arising from circumstances of the officer's death or with respect to individual status as a law enforcement officer, the matter shall be resolved by a majority vote of the Board on Public Safety Standards and Training Executive Committee.

(c) Exclusions from the Law Enforcement Memorial Wall:

(A) Officers whose deaths are attributed to natural causes are not eligible for inclusion in the wall; or

(B) A death that is attributed to the officer's voluntary alcohol or substance abuse use; or

(C) Death caused by intentional misconduct of the officer; or

(D) Death caused by the officer's intention to bring about his or her own death; and

(E) Death attributed to an officer performing his or her duty in a grossly negligent manner at the time of death.

(d) When there is doubt arising from the circumstances of the officer's death or with respect to the individual status as a law enforcement officer, the matter shall be resolved by a majority vote of the Executive Committee.

(e) The costs of maintenance and relocation of the Law Enforcement Memorial Wall and the costs of an annual memorial service honoring persons killed in the line of duty shall be paid out of the Police Memorial Trust Fund

Stat Auth.: ORS 181.640

Stats Implemented: ORS 181.640

Hist : PS 12, f. & ef. 12-19-77; PS 1-1985, f. & ef. 4-24-85; Renumbered from 259-010-0080; PS 1-1990, f. & cert. ef. 2-7-90; PS 2-1995, f. & cert. ef. 9-27-95; PS 10-1997(Temp), f. & cert. ef. 11-5-97; BPSST 1-1998, f. & cert. ef. 5-6-98; BPSST 2-1998(Temp), f. & cert. ef. 5-6-98 thru 6-30-98; BPSST 3-1998, f. & cert. ef. 6-30-98

To: E. CABUKS : PLEASE REVIEW + PROVIDE A
W/ A DRAFT RESPONSE .
FM 5/20/08

Lane County Sheriff's Office

Russel E. Burger, Sheriff



May 14, 2008

John Minnis, Director
Department of Public Safety Standards and Training
4190 Aumsville Highway
Salem, OR 97317

Dear Mr. Minnis:

Thank you for giving our agency the opportunity to attend the Oregon Law Enforcement Memorial Ceremony held at DPSST on May 8, 2008. Lane County Sheriff's Office Undersheriff Tom Turner attended along with an invited guest, Steve Riley. Steve Riley is the son of Robert Riley, an LCSO Reserve Deputy Sheriff who died during a ride along with a Springfield Police Officer on August 17, 1958. More information regarding the event is provided on our internet web site at the following address:

http://www.co.lane.or.us/Sheriff_PoliceServices/hallof Honor/riley.htm

Robert Riley was not listed in the program or on the Memorial Wall at DPSST; though his name has always been read at local ceremonies in the past and is listed on the National Memorial Wall in Washington, D.C. Hopefully, this omission may be corrected in time for next year's ceremony. Thank you in advance for your assistance. If you have any questions, please contact Undersheriff Tom Turner at (541) 682-6790.

Sincerely,

A handwritten signature in black ink, appearing to read "Russel E. Burger".

Russel E. Burger
Sheriff

cc: Steve Riley

May 31, 2008

Russel E. Burger, Sheriff
Lane County Sheriff's Office
125 East 8th Avenue
Eugene, OR 97401

Sheriff Burger:

Director Minnis has asked me to respond to your letter of May 14, 2008 regarding the Oregon Law Enforcement Officer Memorial and the inclusion of Reserve Deputy Sheriff Robert Riley. Steve Riley, son of Robert Riley, has also sent us information on this event.

The criteria for the Oregon Law Enforcement Officer Memorial are defined in Oregon Administrative Rule (OAR) OAR 259-008-0100 (i) defines "In the line of duty death" as a fatal injury which is the direct or proximate result of any enforcement action or emergency response resulting in death or death directly resulting from law enforcement training for enforcement action or emergency response that the law enforcement officer is authorized or obligated to perform by law, rule, regulation, or condition of employment or service while on or off duty

Based on the information both you and Steve have submitted it is clear to me that Reserve Deputy Sheriff Robert Riley meets the criteria and should be honored and remember of the Memorial Wall

The Police Policy Committee (PPC) of the Board on Public Safety Standards and Training (BPSST) reviews each nomination for the Wall. We will prepare the necessary information so the PPC can do so at its next scheduled meeting.

We are glad that you brought this issue to our attention. We know there are a number of Oregon officers who are not on the Wall. Jim Knapp, the Memorial Historian, works countless hours to gather data to make sure that each and every law enforcement officer that has made the ultimate sacrifice in the line of duty is remembered.

We will add Reserve Deputy Sheriff Robert Riley's name during the 2009 ceremony. We will keep you, and Robert, posted on our progress.

Sincerely,

Eriks J. Gabliks
Deputy Director

Attached: OAR 259-008-0100

Gablks Eriks

From: Hohn Jeanine
Sent: Thursday, May 22, 2008 9:47 AM
To: 'Steve Riley'
Subject: RE: Law Enforcement Memorial Wall Statute

Hi Again Steve,

I have forwarded your request to our Deputy Director Eriks Gablks for preparation for Police Policy Committee review. (They, essentially, are the deciding body.) Eriks also has received a request on your father's behalf from the Lane County Sheriff. The next policy committee meeting isn't until August 12, 2008, so we won't have an answer for you until then. Be assured the process is now moving forward. If you have any questions, please feel free to send me another note, or give me a call. Take care.

Jeanine Hohn

Oregon Department of Public
Safety Standards and Training
Public Information Officer - Legislative Liaison
503 378 4404

From: Steve Riley [mailto:sriley194@qwest.net]
Sent: Wednesday, May 21, 2008 12:02 PM
To: Hohn Jeanine
Subject: Re: Law Enforcement Memorial Wall Statute

Jeanine:

Thank you for writing and the information. With regard to eligibility, my dad met the following criteria:

ORS 181 610(4) "Commissioned" means an authorization granting the power to perform various acts or duties of a police officer or certified reserve officer and acting under the supervision and responsibility of a county sheriff or as otherwise provided by law.

He was sworn and commissioned by Sheriff Edward W. Elder of the Lane County Sheriff's Office with his final commission card being dated March 24, 1958 with an expiration of "When Revoked". He actually had two certification/commission cards, the above one was for "Special Deputy" and the one issued on December 24, 1956 was for "Reserve Deputy No. 6", also issued by Sheriff Elder also carrying the expiration of "When Revoked".

He did not have the State certification listed in ORS 181 610(3) only because it did not exist at that time.

He also met the criteria of *ORS 181 610(17) "Reserve officer" means an officer or member of a law enforcement unit.*

With regard to specific eligibility for being included on the Memorial Wall, per the standards as set forth in 259-008-0100.

In (7)(A) Officers who suffered an "in-the-line-of-duty" death

(i) "In the line of duty death" means a fatal injury which is the direct or proximate result of any

5/31/2008

enforcement action or emergency response resulting in death or death directly resulting from law enforcement training for enforcement action or emergency response that the law enforcement officer is authorized or obligated to perform by law, rule, regulation, or condition of employment or service while on or off duty.

Shortly after midnight on August 17, 1958, dad was off-duty at the time meeting with a Springfield Officer, Rod Brester, who later retired as chief of Gresham PD. At the time of their meeting, an audible intrusion alarm activated at the Paramount Market in the 2000 block of Main Street across the street from where they were. Almost immediately after the alarm activation, a vehicle left the parking lot at a high rate of speed east bound on Main Street. My father jumped in the Springfield patrol car with officer Brester to provide back-up as a deputy and a high speed pursuit ensued. At the intersection of Main Street and 32nd Street, a car driven by a driver by the last name of Wilson, who was under the influence of alcohol at the time, turned in front of the on-coming patrol car. At that time, Officer Brester swerved into a gas station on the southeast corner of the intersection to avoid collision with Wilson's vehicle and in the process, struck a parked car at the gas station. At that time the patrol car became airborne and took the corner off of a rental cabin to the east of the gas station and broke off a utility pole approximately 10 feet above the ground. The patrol car passenger door came open and my father was thrown approximately 50 feet from the vehicle. In 1958 they did not have seat belts in the cars. My father was rushed to Sacred Heart Hospital in Eugene with a crushed chest, but never regained consciousness and passed away in the early hours of August 17, 1958.

He met no parts of part (c) *Exclusions from the Law Enforcement Memorial Wall*

I believe that you will see he fully meets any and all requirements to be included on the Memorial Wall as he is already listed on the Memorial Wall in Washington, D.C. On that wall, he is listed on Panel 47, W -2.

His personal information is: Name: Robert M. Riley
DOB 06-12-22
DOD 08-17-58
Age at time of death: 36

If you need further information or confirmation, you may contact former Lane County Deputy Kee Briggs at (321) 773-6464 in Florida, or;

Retired Lane County Deputy Larry Moore at (541) 942-8462.

Additional information, there are nine members of my family, including myself that are either current or former law enforcement officers, representing the Lane County Sheriff's Office, Eugene Police Dept., Springfield Police Dept., Douglas County Sheriff's Office, Oregon State Police, Salem Police Dept., and Gold Beach Police Dept.

My desire is to have his name added to the Memorial Wall at the academy. Thank you for your assistance in this matter.

Steve Riley

Hohn Jeanine wrote:

5/31/2008

Greetings Steve,

Attached is a document that outlines the Oregon Law Enforcement Memorial Wall ORS that we use in determining eligibility of fallen officers whose names can be placed on the wall. Please take a look and let me know if/how you would like to proceed.

Thanks,

Jeanine Hohn

Oregon Department of Public
Safety Standards and Training
Public Information Officer - Legislative Liaison
503 378.4404



Lane County Sheriff's Off HALL OF HONOR Deputy Robert Riley

IN MEMORY OF... "Those who asked so little and sacrificed so much."

	<p>Deputy Robert M. Riley was riding in an off-duty capacity with a Springfield Police Officer and merchant patrolman. While in pursuit of a speeding vehicle, that was fleeing the scene of a reported alarm activation, an intoxicated driver turned in front of the patrol car. The officer used evasive measures to avoid the drunk driver, but in doing that ran into a car in a gas station lot. It then crashed into a telephone pole that was 10 feet above the ground.</p>
<p>Mr. Riley, a Lane County Reserve Deputy, died as a result of the injuries suffered in the accident.</p>	
<p>August 17, 1958</p>	

[Sheriff's Office](#) [Police Services Division](#)

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