

1 DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING

2 STATE OF OREGON

3 In the Matter of the Proposed Revocation
4 of the Basic Corrections Certification of:

5 **PATRICIA LYON**
6 DPSST No.: 57573

FINAL ORDER

OAH Case No. 2020-ABC-03907
Agency Case No. DPSST# 57573

7 On June 23, 2020, the Department of Public Safety Standards and Training (“DPSST”)
8 issued to Patricia Lyon (“Petitioner”), a Notice of Intent to Revoke Certifications and
9 Proposed/Final Order on Default (“Notice”). Petitioner requested a timely hearing on July 6, 2020.
10

11 On February 26, 2021 and March 8, 2021, Administrative Law Judge (ALJ) Joe L. Allen
12 convened a hearing with the parties for Agency Case No. 57573, OAH Case No. 2020-ABC-03907.
13


14 ALJ Allen issued the Proposed Order on June 3, 2021, reversing the Notice of Intent to
15 Revoke Certification and Proposed/Final Order on Default.
16

17 On October 28, 2021, the Board of Public Safety Standards and Training adopted a
18 Proposed Amended Order indicting DPSST failed to show Officer Lyon lacks of the requisite moral
19 fitness to be certified as a corrections officer based on a January 6, 2020 conviction for DUII. A
20 copy of the Proposed Amended Order is attached to this Final Order and incorporated by this
21 reference as if fully set forth herein.
22
23

1 **ORDER**

2 DPSST hereby reverses the July 23, 2020 Notice of Intent to Revoke Certification and
3 Proposed/Final Order on Default. Petitioner's Basic Corrections Certification remains in good
4 standing.

5 DATED this 10 day of Jan, 2021.
6

7
8
9 By: 
10 J. E. Granderson, Director
Department of Public Safety Standards and Training

11 **NOTICE OF RIGHT TO APPEAL.** You are entitled to seek judicial review of this order.
12 Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals
13 within sixty (60) days from the service of the final order. Judicial review is pursuant to the
provisions of ORS 183.482.

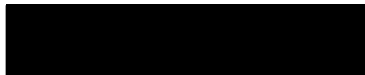
1 DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING
2 STATE OF OREGON

3 In the Matter of the Proposed Revocation of
4 Basic Corrections Certification for:

CERTIFICATE OF SERVICE

5 **Patricia Lyon**
6 DPSST #57573

7
8
9 I certify that on the 16th day of November, 2021, I served the foregoing, *Final Order* on
10 the party hereto by mailing regular mail, true, exact and full copies thereof to:
11

12 Patricia Lyon
13 

14 **Via Regular Mail Only:**

15 Katelyn S Oldham
16 Tedesco Law Group
17 12780 SE Stark St
18 Portland OR 97233

19 Superintendent Nichole R. Brown
20 DOC/Coffee Creek Correctional Facility
21 24499 SW Grahams Ferry Road
22 Wilsonville, OR 97070

23 **Via OAH Portal Only:**

Office of Administrative Hearings

Department of Public Safety Standards & Training

By: 

Melissa Lang

Professional Standards Case Manager

whether to propose to revoke Officer Lyon's certification and the role of Department staff in presenting information to the CPC and the Board.

The administrative process for review and deliberation by the CPC and the Board is statutorily set forth in ORS 181A.630 and as established by rule in OAR 259-008-08-0310(9) and (10) and (11). Any findings or conclusions as to the process that CPC and the Board review evidence and deliberate based on such evidence is not within the scope of the ALJ's role in this matter. ORS 183.417(8) and (9) (The ALJ's role is to inquire into the facts necessary for consideration of all issues properly before it; to correctly apply the law to those facts; and to create a record on such inquiry.) The ALJ's inclusion of any references to these processes is based on an incorrect interpretation of the statutory and regulatory process for proposing and issuing final orders of discipline by DPSST and the Board as set forth in ORS 181A.630, OAR 259-008-08-0310(9) and (10) and (11). Accordingly, all findings, discussions and conclusions relating to this process are removed. Such modifications are not "substantial" pursuant to ORS 183.650(2) or OAR 137-003-0665(3) because they do not change the outcome or the basis for the order or any particular finding of fact.

ISSUES

1. Whether Officer Lyon lacks the requisite moral fitness to be certified as a corrections officer because she engaged in misconduct, by violating criminal laws, when she was convicted of Driving Under the Influence of Intoxicants (DUII). OAR 259-008-0010(5); OAR 259-008-0300(3)(a)(C).
2. If so, whether the Department may revoke Ms. Lyon's Basic Corrections Certifications and prohibit her from reapplying for certification for a period of three years. OAR 259-008-0300(3)(b)(A); OAR 259-008-0310(10)(d)(B).

EVIDENTIARY RULING

Exhibits A1 through A14, offered by the Department, were admitted into the record without objection. Similarly, Exhibits R1 through R8 and R10 through R12, offered by Officer Lyon, were also admitted into the record without objection.¹

FINDINGS OF FACT

1. Officer Lyon was hired by the Oregon DOC as a Corrections Officer and assigned to the Coffee Creek Correctional Facility (CCCF or Coffee Creek) on June 26, 2017. DPSST issued Officer Lyon a Basic Corrections Certification on August 20, 2018. (Ex. A1 at 1.)
2. During her employment at CCCF, Officer Lyon has distinguished herself as a diligent, dedicated, and responsible corrections officer who follows all DOC policies and procedures. Officer Lyon has demonstrated her ability to be an empathetic, compassionate, and caring corrections officer toward both staff and inmates in her charge. Officer Lyon's work ethic

¹ Officer Lyon withdrew Exhibit R9 as irrelevant at the outset of the hearing on February 26, 2021.

has earned her a letter of commendation from the CCCF Superintendent as well as placement in positions of authority despite her limited tenure with DOC. (Test. of King, Bogue, and Dabler; Exs. R4 through R6, A8 at 3 through 5.)

3. On October 22, 2019, a close friend of Officer Lyon committed suicide. Officer Lyon was also close friends with the family of the deceased and offered to assist them in planning the funeral. At approximately 4:00 p.m. on Friday, November 29, 2019, Officer Lyon met with the family to make the final funeral arrangements and offered to record the service via photographs and video recording. The funeral was to be held the following day on November 30, 2019. (Test. of Lyon; *see also* Exs. A8 at 6 and A13 at 1.)

4. Officer Lyon remained with the family until just before midnight on November 29, 2019. During that time, many of those present consumed alcoholic beverages. Specifically, Officer Lyon consumed at least two beverages of undisclosed size containing vodka and soda. (Test. of Lyon; Ex. A8 at 1.)

5. At approximately 12:30 a.m. on November 30, 2019, Officer Nicole Mitchell of the Sherwood Police Department (SPD) was on routine patrol in the area of SW Langer Farms Road and SW Oregon Street in Sherwood. Officer Mitchell observed Officer Lyon operating her Chevy pickup truck at a high rate of speed. Officer Mitchell also noted that the truck repeatedly crossed over the center lane line before returning to the proper driving lane. Officer Mitchell continued to follow the vehicle until she identified a safe place to initiate a stop. (Test. of Mitchell; Ex. A3 at 3.)

6. While following the truck, Officer Mitchell observed that, as the vehicle made a right turn from SW Oregon St. to SW Tonquin Rd., the front and rear passenger side tires of the vehicle left the road surface and briefly rode on the sidewalk. Officer Mitchell initiated a traffic stop for failure to maintain the proper lane. (Test. of Mitchell; Ex. A3 at 3.)

7. Officer Mitchell approached the vehicle and made contact with the driver, Officer Lyon. Upon making contact, Officer Mitchell noticed a strong odor of alcohol emanating from the vehicle. Officer Mitchell also observed the driver's bloodshot and watery eyes, drooping eyelids, and slurred speech. (Test. of Mitchell; Ex. A3 at 3.)

8. When Officer Mitchell asked the driver why she drove up on the curb, Officer Lyon responded that she saw the police cruiser following her, became nervous, and underestimated the turn. (Test. of Lyon and Mitchell.)

9. Officer Mitchell asked Officer Lyon if she had consumed alcohol that evening. Officer Lyon admitted to having at least two vodka and soda cocktails within the two hours preceding her drive home. (Test. of Mitchell and Lyon; Ex. A3 at 3.) When Officer Mitchell inquired as to whether Officer Lyon was feeling the effects of the alcohol, she replied, "not right now." By that, Officer Lyon intended to indicate that she was not feeling intoxicated at that time due to the stress and anxiety of being stopped. (Test. of Lyon.)

10. Officer Mitchell requested a copy of the driver's license, insurance verification,

and registration. In response, Officer Lyon appeared confused and unable to locate her cell phone, which she indicated to Officer Mitchell held her driver license. After locating the driver license and cell phone, Officer Lyon attempted to access the auto insurance app on her cell phone. Officer Mitchell noted that Officer Lyon appeared confused and unable to operate her cell phone. In response to Officer Mitchell's request for the vehicle registration, Officer Lyon produced a yellow sheet of paper and asked if that was what the officer needed. Officer Mitchell did not recognize the document and handed it back to Officer Lyon. (Test. of Lyon and Mitchell; Ex. A3 at 3.)

11. While Officer Mitchell was obtaining documentation from Officer Lyon, SPD Officer Colton Waker arrived on scene to act as cover officer while Officer Mitchell acted as the arresting officer during the encounter. (Test. of Mitchell; *see also* Ex. A3.)

12. Once on scene, the Officer Waker assisted Officer Lyon locate the insurance app on her cell phone, which she had previously been unable to identify because she was nervous, crying, shaking, and unable to locate her reading glasses when stopped. Officer Waker noted that the yellow sheet of paper Officer Lyon originally produced for the arresting officer was a carbon copy of a completed application for a new registration card. Officer Lyon had recently lost the original registration card. (Test. of Lyon.)

13. With the cover officer on scene, the arresting officer requested Officer Lyon participate in a series of field sobriety tests (FST). Officer Lyon agreed. (Test. of Mitchell and Lyon; Ex. A3 at 3.) The arresting officer conducted the horizontal gaze nystagmus (HGN), the walk-and-turn, and one-leg stand tests on Officer Lyon. (Test. of Mitchell; Ex. A3 at 3-4.)

14. For the HGN, the arresting officer instructed Officer Mitchell to follow a stimulus with her eyes only, not turning her head during the test to follow the stimulus. Officer Lyon indicated that she understood the instructions. Nonetheless, despite multiple attempts to perform the test, Officer Lyon was unable to follow the stimulus without moving her head. The arresting officer elected to terminate the test, indicating in her report that Officer Lyon "was not following instructions." (Test. of Mitchell; Ex. A3 at 3-4.)

15. Officer Lyon performed the remaining two FSTs without issue. For the Walk-and-Turn test, the arresting officer observed seven out of eight clues indicating impairment including lack of balance, performing steps and turns improperly, and stepping off the designated line. For the One Leg Stand, the arresting officer observed three out of four clues indicating impairment including swaying, using arms for balance, and inability to maintain a single leg stand. (Test. of Mitchell; Ex. A3 at 4.)

16. Following the FSTs, the arresting officer advised Officer Lyon that she was under arrest for DUII. Officer Mitchell placed Officer Lyon in handcuffs and transported her to SPD for processing. During the transport to SPD, Officer Lyon was distraught over her situation and lamented that, "I ruined my life." (Test. of Lyon.) The arresting officer heard Officer Lyon's lamentations from the rear of the vehicle and believed Officer Lyon was accusing the arresting officer of ruining her life by arresting her. (Test. of Mitchell.)

17. Upon arriving at SPD, the arresting officer removed Officer Lyon from the vehicle and provided instructions for the remainder of her processing. Officer Lyon disclosed to the arresting officer that she was a corrections officer and familiar with the procedures because they are similar to those used at CCCF. (Test. of Mitchell and Lyon.) Officer Lyon's intent was to indicate her understanding and willingness to cooperate. (Test. of Lyon.) The arresting officer believed Officer Lyon's tone to be condescending. (Test. of Mitchell.)

18. The arresting officer asked Officer Lyon to submit to a breath test using an Intoxilyzer device designed to measure an individual's blood alcohol level (BAC). Officer Lyon consented to a breath test and provided two valid breath samples. According to the Intoxilyzer results, Officer Lyon's BAC approximately one hour after the stop was 0.20 percent, more than twice the legal limit of 0.08 percent. (Test. of Mitchell; Exs. A3 at 4-5, and A8.)

19. Following processing at SPD, the arresting officer again placed handcuffs on Officer Lyon in preparation for transport to the Washington County Sheriff's Office (WCSO). Transport from SPD to the WCSO takes approximately 25 minutes by car. Prior to transport, Officer Lyon complained that the handcuffs were too tight on her left wrist and asked the arresting officer to loosen the cuffs slightly on that side for comfort and circulation. The arresting officer initially refused but eventually acquiesced to Officer Lyon's pleas and loosened the handcuffs prior to placing Officer Lyon in the patrol cruiser. (Test. of Lyon and Mitchell.) During transport to the WCSO, the arresting officer commented to Officer Lyon, "You think you're better than me." Officer Lyon was at the WCSO for a short time before being released on the morning of November 30, 2019. (Test. of Lyon.)

20. After her release from the WCSO, Officer Lyon went home to sleep for a couple hours before attending the funeral she had been planning the prior evening. On her way to the funeral, Officer Lyon contacted her commanding officer at CCCF and reported the stop and arrest for DUII. The following scheduled work day, Officer Lyon met with the superintendent for CCCF and a DOC Human Resources representative. Officer Lyon was reminded that she was required to report any resulting conviction to DPSST within five days.² (Test. of Lyon.)

21. Following the arrest, SPD forwarded a copy of the arresting officer's report to DPSST and CCCF. (Ex. A3 at 5.)

22. After her arrest, Officer Lyon voluntarily reached out to a local alcohol and drug treatment center. After conducting an intake interview, the treatment facility advised Officer Lyon that her drinking habits did not indicate a need for treatment unless the court ordered it. (Test. of Lyon.)

23. On December 9, 2019, Officer Lyon was charged in Washington County Circuit Court with one count of DUII and one count of Reckless Driving, both Class A misdemeanors.

² At hearing, the parties spent a significant amount of time addressing the timing of Officer Lyon's report of the arrest to DPSST and a recent rule change that requires reporting of arrests rather than simply convictions. However, failure to timely report the arrest to DPSST is not a basis for the proposed discipline in the Notice not is it listed as an aggravating circumstance in the Notice or staff report to the CPC. As such, this order does not address the timing of Officer Lyon's reporting in any detail.

On January 6, 2020, Officer Lyon plead guilty to and was convicted of the charge of DUII. The court dismissed the Reckless Driving count and sentenced Officer Lyon to two years bench probation and alcohol treatment, as well as other general conditions. The court also imposed penalties and fees against Officer Lyon. (Test. of Lyon; Ex. A4 at 1-2.) Following sentencing, Officer Lyon complied with all court-ordered conditions of probation. (Test. of Lyon and Morin; Exs. R3 and A8 at 1.)

24. Upon receiving notification of the arrest from SPD, DPSST opened a professional standards case regarding Officer Lyon. DPSST then monitored Officer Lyon's court proceedings through final disposition. On or about December 13, 2019, DPSST sent a letter notifying Officer Lyon of the case opened regarding the DUII arrest/conviction and provided instructions for her to submit mitigation materials for DPSST/CPC's consideration. On January 12, 2020, Officer Lyon emailed DPSST to notify them of her recent conviction and to acknowledge receipt of the mitigation notice. (Test. of Morin; Ex. A2.)

25. During its investigation into possible professional standards violations by Officer Lyon, DPSST noted that she had also been arrested for DUII on May 29, 2010. According to court records, Officer Lyon's 2010 DUII was disposed of through diversion, which she completed. (Test. of Morin and Lyon.)

26. On or about March 25, 2020, Officer Lyon provided her own letter of mitigation regarding the January 6, 2020 DUII conviction and the preceding arrest. In that letter, Officer Lyon accepted full responsibility for her actions and acknowledged that those actions placed her career as a corrections officer in jeopardy. Officer Lyon also provided her recollection of the arrest disputing the claim of the arresting officer that she was argumentative during the encounter. Officer Lyon acknowledged her disorientation from alcohol and disorganization from the stress of the stop likely contributed to the arresting officer's perception of her behavior. Officer Lyon informed DPSST/CPC that her intent was always to cooperate with the officers on scene and demonstrate to them that she was not a threat. (Test. of Lyon; Ex. A8 at 1-2.)

27. In addition to her own mitigation letter, Officer Lyon provided DPSST/CPC with letters of support from DOC Corporal Lisa Clifford, DOC Lt. (then Sgt.) Apryl Bogue, and Anthony Benthin, family friend and father of the deceased for whom Officer Lyon was organizing a funeral on the night of the arrest. (Test. of Lyon and Morin; Ex. A8 at 3-6.)

28. The CPC is made up of a cross-section of corrections professionals consisting of DOC and non-DOC members. (Test. of Morin; *see also* Ex. R2 at 1.)

29. On June 16, 2020, DPSST prepared a staff report for consideration by the CPC. In that report, DPSST notified the CPC of the circumstances of Officer Lyon's arrest, the charges and resulting conviction, and her compliance with court orders. (Test. of Morin; Ex. A9.) The DPSST staff report also provided other relevant circumstances for consideration by the CPC which included:

- During the arrest Lyon informed the officer that she is a corrections officer with the DOC/CCCF. Lyon appeared to do this out of courtesy and not an attempt to influence the officer[;]
- During the arrest Lyon indicated to the officer that she and her friend were going through a difficult time due to the unexpected death of the friend's daughter. (Lyon provided additional information that supports this claim.)[;]
- The [arresting] officer indicated in her report that Lyon was "very argumentative", stating she knew how to do her job better than the officer[;]
- Lyon was previously arrested for DUII and successfully completed diversion. The DUII was dismissed on July 20, 2011. The arrest and disposition was prior to employment in public safety[;] and
- Lyon reported her arrest to DPSST on 1/12/20 after receiving notification that a professional standards case was opened. OAR requires notification of an arrest within 5 business days of the arrest.

(Ex. A9 at 2-3.)

30. Along with the staff report, DPSST provided the CPC with copies of the mitigation letters submitted by or on behalf of Officer Lyon and a copy of the proposed Notice in this matter. The proposed Notice proposed revocation of Officer Lyon's certifications based on the January 2020 conviction for DUII and cited among the aggravating circumstances that Officer Lyon's was "combative and argumentative during [the] arrest and [her] previous arrest for DUII in 2011 demonstrates a pattern of alcohol abuse." (Test. of Morin; Ex. A11 at 1-2.) The proposed Notice submitted to the CPC does not identify Officer Lyon's failure to timely report her arrest as a basis for the proposed disciplinary action or as an aggravating circumstance. (*See*, Ex. A11 generally.)

31. When considering Officer Lyon's case on June 16, 2020, the CPC also considered two other cases involving corrections officers recently convicted of DUII. Of the three DUII cases before it on that date, the CPC voted to recommend Board action solely against the certifications of Officer Lyon. (Test. of Morin and Bogue; Ex. R2 at 3-7.)

32. The CPC ultimately voted to adopt DPSST's staff report and proposed Notice, recommended the Board on Public Safety Standards and Training (Board or BPSST) move forward with revocation of Officer Lyon's Basic Corrections Certification based on the conviction for DUII and the aggravating factors listed in the staff report. The CPC also voted to recommend Officer Lyon be ineligible to reapply for certification for a period of three years. The applicable period of ineligibility for misconduct is between three and 10 years. (Test. of Morin; Ex. A9.) The CPC voted 7-6 in favor of recommending action against Officer Lyon, with all DOC members of the CPC voting against such action. (Ex. A9; test. of Bogue, Morin, and Lyon.)

33. On July 23, 2020, the Board met, considered the CPC's recommendation regarding revocation of Officer Lyon's certification as part of a consolidated consent agenda. The Board voted to adopt the consent agenda as a whole, including the CPC's recommendation and DPSST's proposed Notice pertaining to Officer Lyon's certification. (Test. of Morin; Ex. A14 at 3-4.)

CONCLUSIONS OF LAW

1. DPSST failed to show Officer Lyon lacks of the requisite moral fitness to be certified as a corrections officer based on a January 6, 2020 conviction for DUII.
2. DPSST may not revoke Officer Lyon's Basic Corrections Certification.

OPINION

On September 1, 2020, the Department issued a Notice proposing to revoke the Basic Corrections Certifications granted to Officer Lyon, and to bar her from reapplication for three years, on the grounds that she engaged in misconduct and therefore lacks the requisite moral fitness to be certified as a public safety officer in Oregon. Specifically, the Department alleged that Officer Lyon "committed acts of misconduct * * * when [she] violated criminal law by being convicted of DUII." Notice at 3. As the proponent of the proposed revocation, the Department bears the burden of proving its allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings, including license-related proceedings, is the preponderance standard.) Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, any party advocating a particular position bears the burdens of production and persuasion as to that position.

ORS 181A.410 provides, *inter alia*, minimum standards and training for certification of public safety professionals and provides, in relevant part:

- (1) In accordance with any applicable provision of ORS chapter 183, to promote enforcement of law and fire services by improving the competence of public safety personnel and their support staffs, and in consultation with the agencies for which the Board on Public Safety Standards and Training and Department of Public Safety Standards and Training provide standards, certification,

accreditation and training:

* * * * *

(e) The department shall deny applications for training and deny, suspend and revoke certification in the manner provided in ORS 181A.630, 181A.640 and 181A.650 (1).

* * * * *

(4) Pursuant to ORS chapter 183, the board, in consultation with the department, shall adopt rules necessary to carry out the board's duties and powers.

(5) Pursuant to ORS chapter 183, the department, in consultation with the board, shall adopt rules necessary to carry out the department's duties and powers.

(6) For efficiency, board and department rules may be adopted jointly as a single set of combined rules with the approval of the board and the department.

ORS 181A.640 identifies grounds for suspension or revocation of a certification of public safety professionals and provides, in part:

(1) The Department of Public Safety Standards and Training may deny the application for training, or deny, suspend or revoke the certification, of any public safety officer or instructor, except a youth correction officer or fire service professional, after written notice and hearing consistent with the provisions of ORS 181A.630, based upon a finding that:

* * * * *

(c) The public safety officer or instructor does not meet the applicable minimum standards, minimum training or the terms and conditions established under ORS 181A.410 (1)(a) to (d).

* * * * *

(5) The department, in consultation with the board, shall adopt rules specifying those crimes and violations for which a conviction requires the denial, suspension or revocation of the certification of a public safety officer or instructor.

In accordance with the authority granted under ORS 181A.410 and 181A.640, the Department has adopted OAR 259-008-0010 which identifies the minimum standards for employment as a law enforcement officer and states, in pertinent part:

(5) Moral Fitness. All law enforcement officers must meet moral fitness standards for certification. The moral fitness standards defined in OAR 259-008-0290 and

OAR 259-008-0300 apply to law enforcement officers who are employed in a certifiable position but not yet certified, currently certified law enforcement officers and law enforcement officers with lapsed certification.

OAR 259-008-0005 provides definitions applicable to DPSST certification actions and provides, in part:

(8) “Corrections Officer” means an officer or member employed full-time by a law enforcement unit who:

(a) Is charged with and primarily performs the duty of custody, control or supervision of individuals convicted of or arrested for a criminal offense and confined in a place of incarceration or detention other than a place used exclusively for incarceration or detention of juveniles;

(b) Has been certified as a corrections officer described in paragraph (a) of this subsection and has supervisory or management authority for corrections officers as described in paragraph (a) of this subsections; or

(c) Is any full-time employee of the Department who possesses the requisite qualifications and is so certified pursuant to ORS 181A.570.

* * * * *

(19) “Law Enforcement Officers” means police, corrections, parole and probation officers and regulatory specialists as described in the Public Safety Standards and Training Act.

* * * * *

(30) “Public Safety Professional”, “Public Safety Personnel” and “Public Safety Officer” include corrections officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, reserve officers, telecommunicators and regulatory specialists.

OAR 259-008-0300 identifies the grounds for denial, revocation or suspension of a public safety professional’s certifications and provides, in relevant part:

(1) The Board has established moral fitness standards that it has determined are critical to upholding the public’s trust in the public safety profession, protecting the public and ensuring that the conduct of a public safety professional or an applicant does not reflect adversely on the public safety profession. The Board finds by adopting this rule that a violation of these standards is substantially related to the duties performed by a certified public safety professional.

(3) Discretionary Denial or Revocation of a Public Safety Professional’s

Certifications.

(a) The Department may deny or revoke a public safety professional's certifications based upon a finding that the public safety professional engaged in conduct that includes any or all of the following elements:

* * * * *

(C) Misconduct.

(i) Misconduct includes conduct that violates criminal laws, conduct that threatens or harms persons, property or the efficient operations of any agency, or discriminatory conduct;

* * * * *

(b) For the purposes of this rule, conduct subject to discretionary review includes, but is not limited to:

(A) A criminal disposition when the criminal disposition is not a conviction constituting mandatory grounds as defined in section (2) of this rule;

(B) Conduct related to an arrest, a criminal citation to appear or its equivalent, or a criminal disposition;

* * * * *

(c) Review of discretionary criminal dispositions applies to criminal dispositions that occurred on or after January 1, 2001. The Department will not open a case to review criminal dispositions that occurred prior to January 1, 2001.

1. *Moral Fitness.*

In the Notice, DPSST alleges a single basis for the proposed revocation of Officer Lyon's certifications, a conviction for DUII while employed as a corrections officer. In determining whether this violation constituted misconduct, as defined in OAR 259-008-0300(3)(C), DPSST proposed and the CPC considered as aggravating circumstances Officer Lyon's alleged argumentative and combative behavior during the arrest.

a. *Misconduct.*

The Notice asserts Officer Lyon does not meet the moral fitness standards required of public safety professionals in Oregon because she "* * * committed acts constituting misconduct by violating criminal law when [she] was convicted of DUII on January 6, 2020." Notice at 2. Moreover, as aggravating circumstances, the Notice cites Officer Lyon's BAC at the time of the arrest, that she was "combative and argumentative during [the] arrest," and a prior arrest for

DUII purportedly demonstrating “a pattern of alcohol abuse.” *Id.*

It is undisputed that, on November 30, 2019, Officer Lyon operated her vehicle on public roads with a BAC of at least 0.20. It is also undisputed that Officer Lyon plead guilty to and was convicted of a single count of DUII on January 6, 2020. Further, it is uncontested that the November 2019 arrest was the second DUII arrest for Officer Lyon, the first occurring on May 29, 2010. Moreover, when considering Officer Lyon’s case on June 16, 2020, the record reflects the CPC also considered two other cases involving corrections officers recently convicted of DUII. Of the three DUII cases before it, the CPC voted to recommend Board action solely against the certifications of Officer Lyon.

The proposed Notice provided to the CPC with the staff report reflects Officer Lyon was “argumentative and combative” during the arrest. Notice at 2.

Neither “argumentative” nor “combative” is defined in DPSST statutes or administrative rules. Therefore, one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (“[W]ords of common usage typically should be given their plain, natural, and ordinary meaning.”). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) (“Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.”). I see no basis for adopting a divergent approach when seeking relevant definitions of the terms in issue that appear in DPSST’s Notice. In this case, Merriam-Webster’s online dictionary provides definitions of the operative terms as follows:

Argumentative: 1: given to argument : tending to argue : having or showing a tendency to disagree or argue with other people in an angry way : DISPUTATIOUS; 2: consisting of or characterized by argument.³

Combative: marked by eagerness to fight or contend.⁴

The arresting officer’s police report contains a single statement at the end of the narrative indicating Officer Lyon was “very argumentative” during the “entire interaction” at the Sherwood Police Department. Exhibit A3 at 5. In apparent support of this assertion, the arresting officer’s report indicates Officer Lyon “constantly told [the arresting officer] she knew how to do [the] job better than [the arresting officer].” *Id.* The remainder of the arrest report does not support these assertions. Moreover, when questioned about these statements at hearing Officer Mitchell’s only justification for determining Officer Lyon was “very argumentative” was her perception that Officer Lyon appeared condescending during the encounter. That statement does not appear in the arrest report. Moreover, the remainder of the arrest report fails to support the arresting officer’s recollection of the encounter. Officer Lyon appears to have been

³ Retrieved 4/15/2021 from, <https://www.merriam-webster.com/dictionary/argumentative>.

⁴ Retrieved 4/15/2021 from, <https://www.merriam-webster.com/dictionary/combative>.

cooperative, admitted her alcohol consumption that evening, and was compliant with officers' instructions for FSTs to the extent she was able considering her level of intoxication. Additionally, the arresting officer's liberal use of adverbs modifying the terms "argumentative" and "interaction" reveal a propensity for overstatement as it is unlikely that Officer Lyon was both cooperative with document and FST requests while being very argumentative during the entire interaction with Officer Mitchell. Moreover, nothing in the arrest report or the arresting officer's testimony reveals how Officer Lyon's statements or behavior demonstrated a tendency to argue or disagree. The arresting officer's perception of Officer Lyon's statements or behavior is irrelevant unless supported by objective evidence in the police report or other evidence in the record. Here, the record is devoid of such support.⁵ I find Officer Lyon was not argumentative during her arrest by Officer Mitchell.

Next, there is no mention, in the arrest report from SPD, of Officer Lyon being 'combative' with the arresting officer or the cover officer. On cross-examination, Officer Mitchell acknowledged that Officer Lyon was not aggressive, did not resist arrest, did not use profanity toward the SPD officers, was as cooperative as she could be with the officer's instructions regarding field sobriety tests and requests for documentation, and answered the officer's questions truthfully. Moreover, the record reveals that, during the encounter, Officer Lyon was remorseful and lamented the negative consequences of her poor decision to operate a vehicle while intoxicated.

In closing arguments, DPSST acknowledges the absence of the term "combative" in the arrest report. DPSST dismisses the discrepancy claiming that "it is apparent that the Committee [was] using this word as a synonym for argumentative." DPSST Hearing Memorandum at 5-6. I disagree. As identified above, the definitions of the terms 'argumentative' and 'combative' are similar yet not synonymous. For these reasons, I find DPSST's arguments regarding the relevance of the term combative unpersuasive.

The CPC ultimately voted to adopt DPSST's staff report and proposed Notice, recommended the Board move forward with revocation based on the conviction for DUII and the aggravating factors listed in the staff report and accompanying materials, and deemed Officer Lyon ineligible to reapply for certification for a period of three years. . It cannot be determined that, absent the allegation of combativeness toward the arresting officer, as well as consideration of other hyperbolic language in the officer's arrest report, the CPC would have voted to revoke Officer Lyon's certification. This is particularly true in light of the CPC's consideration of other DUII convictions involving officers sharing similarities in recentness of the conduct and BAC.

Finally, DPSST asserts that Officer Lyon's arrests for DUII in May 2010 and again in November 2019 demonstrate a pattern of alcohol abuse and should be considered as an aggravating circumstance. I disagree. First, two occurrences of a particular behavior over the course of nearly a decade cannot reasonably be said to demonstrate a pattern of that behavior.

⁵ Notably, DPSST elected not to offer testimony from or any report prepared by the cover officer on scene to assist Officer Mitchell during the arrest. Moreover, DPSST did not offer body camera footage from either officer despite indications in the arrest report that Officer Mitchell was equipped with such a device at the time of the arrest.

The record is devoid of any evidence indicating Officer Lyon regularly engaged in alcohol consumption, particularly to the point of abuse. Moreover, the record in this matter clearly demonstrates extenuating circumstances surrounding the November 2019 incident, *to wit* the recent loss of a long-time family friend to suicide. According to the undisputed evidence in the record, immediately preceding the stop and arrest, Officer Lyon had been with the deceased individual's family preparing for the upcoming funeral. According to the evidence, those in attendance assuaged their grief with alcohol while making the funeral arrangements. There is no doubt Officer Lyon engaged in poor decision making when she decided to operate her vehicle after consuming alcohol. Nonetheless, on the record before me, I find no basis to determine Officer Lyon's conduct on November 30, 2019, is demonstrative of a pattern of alcohol abuse.

2. *Sanction.*

OAR 259-008-0310 identifies bases for denial or revocation of a certification as well as the initiation and review of professional standards cases and provides, in part:

(1) When the Department receives information from any source that a certifiable public safety professional or an applicant may not meet the established standards for public safety professionals, the Department will review the information to determine if substantial evidence exists to support denial, revocation or emergency suspension of certifications under the statutory and administrative rule requirements for public safety professional certification.

* * * * *

(10) Policy Committee Review of Discretionary Professional Standards Cases.

(a) In professional standards cases where the Department has determined that the conduct being reviewed violates the moral fitness standards established by the Board as discretionary grounds for denial or revocation as defined in OAR 259-008-0300(3), the Department will submit its findings to a Policy Committee for disposition. The Policy Committee's disposition will be submitted as a recommendation to the Board for approval.

(b) The Policy Committee will review the professional standards case to:

(A) Affirm, modify or negate the Department-identified moral fitness violations;

(B) Identify aggravating and mitigating circumstances unique to the professional standards case;

(C) Determine how the moral fitness violations and aggravating or mitigating circumstances impact the public safety professional's fitness for certification; and

(D) When recommending denial or revocation of public safety professional certifications, determine how long the individual should be ineligible for

certification.

(c) Aggravating and mitigating circumstances are conditions, factors or actions that increase or decrease the total impact that the identified moral fitness violation has on the public safety professional's fitness for certification.

(A) *Aggravating circumstances generally increase the severity of the impact the moral fitness violation has on fitness for certification and may, in addition to the moral fitness violation, be grounds to deny or revoke certification.* Aggravating circumstances may increase the recommended ineligibility period. Circumstances that may be considered aggravating include, but are not limited to, the degree of the criminal disposition, prior criminal dispositions or misconduct, lack of accountability, number of persons involved in the underlying conduct, number of separate incidents, passage of time from date of incident or incidents, or any other circumstance the Department or the Policy Committee consider aggravating given the specific issues in the case.

(B) Mitigating circumstances do not excuse or justify the conduct, but generally decrease the severity of the impact the moral fitness violation has on fitness for certification and may decrease the recommended ineligibility period. Circumstances that may be considered mitigating include, but are not limited to, written letters of support, truthfulness, cooperation during the incident or investigation, or any other circumstance the Department or the Policy Committee consider mitigating given the specific issues in the case.

(d) The ineligibility period is the timeframe that the public safety professional or applicant is ineligible for public safety certifications and prohibited from performing the duties of a certifiable public safety professional as the result of the total impact of the moral fitness violations and the aggravating and mitigating circumstances on the public safety professional's fitness for certification.

(A) When the identified moral fitness violations include Dishonesty or Misconduct that is discriminatory as defined in OAR 259-008-0300(3), the Policy Committee may recommend an ineligibility period from three years to lifetime.

Emphasis added.

Based on the evidence in the record, I find Officer Lyon's conviction for DUII on January 6, 2020, does not rise to the level of misconduct warranting discretionary revocation contemplated by OAR 259-008-0300(3)(a)(C)(i). . . In addition, the CPC considered Officer Lyon's prior conviction for DUII as demonstrative of a pattern of alcohol abuse and disregard for the law. As addressed above, I do not agree. Officer Lyon was neither argumentative nor combative during her encounter with Officer Mitchell. Moreover, the occurrence of an act twice over the span of nearly a decade does not constitute a pattern. As such, on the record before me, I find DPSST failed to establish Officer Lyon engaged in a pattern of alcohol abuse or disregard for the law. Accordingly, I find no basis for upholding the proposed sanction of revocation and

ineligibility.

ORDER

I propose the Department of Public Safety Standards and Training issue the following order:

The Department's Notice of Intent to Revoke Certification and Proposed/Final Order on Default issued July 23, 2020 is REVERSED.

/s/ Joe L. Allen

Senior Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS

The proposed order is the Administrative Law Judge's recommendation to the Oregon Department of Public Safety Standards and Training (Department). If you disagree with any part of this recommendation, you may make written objections, called "exceptions," to the recommendation and present written argument in support of your exceptions. Exceptions and argument must be filed with the Department not later than fourteen (14) days following the date of mailing of the proposed order at the following address:

Director
DPSST
4190 Aumsville Hwy SE
Salem, Oregon 97317

FINAL ORDER

After considering all the evidence, the proposed order, and the timely filed exceptions, if any, the Department will issue the final order in this case. The final order may adopt the proposed order prepared by the Administrative Law Judge as the final order or modify the proposed order and issue the modified order as the final order. *See* OAR 137-003-0665.

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within sixty (60) days after the final order is served upon you. *See* ORS 183.480 et seq.

CERTIFICATE OF MAILING

On June 3, 2021 I mailed the foregoing Proposed Order issued on this date in OAH Case No. 2020-ABC-03907.

By: First Class or Electronic Mail

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Hearing Coordinator