

# Telecommunications Policy Committee

## Minutes

### August 7, 2008

The Telecommunications Policy Committee of the Board on Public Safety Standards and Training held a regular meeting on August 7, 2008 at the Oregon Public Safety Academy in Salem, Oregon. Chair Robert Poirier called the meeting to order at 10:02 a.m.

#### Attendees

##### Committee Members:

Robert Poirier, Public Safety Telecommunicators, Chair  
Tamara Atkinson, Association of Public Safety Communications Officers  
Brian Casey, Oregon Association Chiefs of Police  
Bob Cozzie, Association of Public Safety Communications Officers  
James Rentz, Oregon State Police  
LeAnne Senger, Public Safety Telecommunicators  
Chris Benson, Oregon Fire Medical Administrators' Association  
Jennifer Brinlee, Public Safety Telecommunicators  
Tom Clemo, Oregon Fire Chiefs' Association

##### Committee Members Absent:

Elizabeth Morgan, Emergency Medical Services and Trauma Systems  
Jack Jones, Oregon State Sheriff's Association

##### Guests:

Cheryl Pellegrini, Assistant Attorney General, Oregon Department of Justice

##### DPSST Staff:

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



#### 1. Minutes from May 1, 2008 Meeting

Approve meeting minutes from May 1, 2008.

#### See Appendix A for details

*Tamara Atkinson moved to approve the minutes from the May 1, 2008 meeting. James Rentz seconded the motion. The motion carried unanimously by all voting.*

2. **OAR 259-008-0070 – Denial and Revocation**  
Hearing Officer’s Report and Recommendation  
Presented by Bonnie Salle-Narvaez

**See Appendix B(1-4) for details**

*Brian Casey moved to accept the Hearing Officer’s recommendation of adopting the amendment of OAR 259-008-0070 as a permanent rule with the identified additional modifications to the original proposed rule language. LeAnne Senger seconded the motion. The motion carried unanimously by all voting.*

3. **Department of Justice Discussion Regarding Contested Case Hearings**  
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:*

- a.) *Policy committee to vote to adopt the staff report and the exhibit list and make it part of the record; and*
- b.) *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.*

4. **Lori Matthews – DPSST #39371**  
Presented by Theresa King

**See Appendix C for details**

*Bob Cozzie moved to adopt the staff report as the record. Tom Clemo seconded the motion. The motion carried unanimously by all voting. The Telecommunication Policy Committee adopts the Staff report as the record.*

*It is the consensus of Telecommunications Policy Committee that:*

- a.) MATTHEWS’ actions *do* cause a reasonable person to have doubts about her honesty, respect for the rights of others, and respect for the laws of the land. *The witness’ statement contradicts Matthews’ statement as well as other instances of dishonesty.*
- b.) MATTHEWS’ conduct *did* involve dishonesty, fraud, deceit, or misrepresentation. *When Matthews was spoken to at home, she said she did not drive home. However, Matthews’ own child said she saw her face pulling into the apartment complex and the car wasn’t there when Matthews was not there and the car was there when Matthews arrived.*
- c.) MATTHEWS’ conduct *was* prejudicial to the administration of justice. *James Rentz cited Matthews’ comment to the officer, “wait until you have a pursuit in my jurisdiction...” basically saying next time you come through my jurisdiction I’m not going to properly dispatch your pursuit.*

- d.) MATTHEWS' conduct *did* adversely reflect on her fitness to perform as a Telecommunicator. *Tami Atkinson cited the same example as in item "c", not going to perform duties in certain situations.*
- e.) MATTHEWS' actions *do* make her inefficient or otherwise unfit to render effective service because of the agency's and the public's loss of confidence in her ability to perform competently. *Untruthfulness, pattern of history, and documented absenteeism are a few good examples of Matthews' being unfit to perform as a Telecommunicator.*

*Bob Cozzie moved to recommend items a-e in the affirmative. Tom Clemo seconded the motion. The motion carried unanimously by all voting.*

After a review of any mitigating and aggravating circumstances it is the consensus of the committee that:

- a.) MATTHEWS' case *does not contain* mitigating circumstances. *Opportunities were given for mitigating circumstances but do not appear to have been taken seriously by Matthews, such as court diversion and with the probationary situation that was set up with the employer. The fact that Matthews failed to provide any mitigating circumstances gives the committee really nothing to go on.*

*Tami Atkinson moved that it is the consensus of the committee that there are no mitigating circumstances. Chris Benson seconded the motion. The motion carried unanimously by all voting.*

- b.) MATTHEWS' case *contains* aggravating circumstances. *The fact that court diversion and rehabilitation through her employment were effectively shunned by Matthews shows aggravating circumstances. The multiple DUII arrests also show aggravating circumstances as well as threats to the officers.*

*James Rentz moved to state that Matthews' case does contain aggravating circumstances. LeAnne Senger seconded the motion. The motion carried unanimously by all voting.*

*It is the consensus of the committee that MATTHEWS' conduct does rise to the level to warrant the revocation of her certifications, and therefore recommends to the Board that MATTHEWS' certifications be revoked.*

*Tami Atkinson moved, that after adopting the staff report in its entirety and with reviewing elements of the moral fitness clause and finding no mitigating circumstances and several aggravating circumstances, to recommend to the Board that Lori Matthews' certifications be revoked. Bob Cozzie seconded the motion. The motion carried unanimously by all voting.*

## 5. Reading and Writing Standards for Telecommunicators

Presented by Marilyn Lorange and Steve Winegar

*See Appendix D for details*

*Staff's request for direction from the committee is whether as a minimum state standard*

*we should continue requiring 12<sup>th</sup> grade writing score as well as a 12<sup>th</sup> grade reading score when DPSST can't legally justify it.*

*The committee asked if the Job Task Analysis (JTA) supports any kind of writing requirement. Staff answered that the JTA states "effective communications skills using the written word." Stanard's test reflects general language comprehension, not the ability to write in a 12<sup>th</sup> grade manner. The 12<sup>th</sup> grade reading level has inferential writing ability by virtue of completing the reading elements. The committee is concerned about lowering standards for the Telecommunication profession. Since there is no justification from the Job Task Analysis for specific writing standards, each agency could keep the writing standard as an element of the hiring process, irrespective of DPSST's look at state minimum standards, based on statewide essential tasks.*

*Bob Cozzie moved to approve staff removing "and writing" from the OAR and having it no longer be considered a standard for Telecommunicators. Tami Atkinson seconded the motion. The motion carried unanimously by all voting.*

*Staff stated that when looking at Stanard's test as a beta test for Telecommunicators, it is not necessarily a good idea due to the fact that the students have already been screened and approved as passing the 12<sup>th</sup> grade reading standard by the hiring agencies.*

6. **Additional Business**

Presented by Steve Winegar

*With the other disciplines staff started to look at hiring trends and is just starting to do so with Telecommunications. Within a couple months we should have that information available for committee perusal.*

7. **The next regularly scheduled Telecommunications Policy Committee meeting is November 6, 2008 at 10:00 a.m.**

**With no further business before the Committee, the meeting adjourned at 11:30 a.m.**

## Appendix A

### **Telecommunications Policy Committee Minutes (Draft) May 1, 2008**

The Telecommunications Policy Committee of the Board on Public Safety Standards and Training held a regular meeting on May 1, 2008 at the Oregon Public Safety Academy in Salem, Oregon. Chair Eric Swanson called the meeting to order at 10:03 a.m.

#### Attendees

##### Committee Members:

Eric Swanson, Public Safety Telecommunicators, Chair  
Tamara Atkinson, Association of Public Safety Communications Officers  
Brian Casey, Oregon Association Chiefs of Police  
Bob Cozzie, Association of Public Safety Communications Officers  
Jack Jones, Oregon State Sheriffs' Association  
James Rentz, Oregon State Police  
LeAnne Senger, Public Safety Telecommunicators

##### Committee Members Absent:

Tom Clemo, Oregon Fire Chiefs' Association  
Elizabeth Morgan, Emergency Medical Services and Trauma Systems  
Jennifer Brinlee, Public Safety Telecommunicators  
Chris Benson, Oregon Fire Medical Administrators' Association

##### Guests:

Robert Poirier, Santiam Canyon Communications  
Tony Collins, Clackamas County Communications

##### DPSST Staff:

Eriks Gabliks, Deputy Director  
Carolyn Kendrick, Administrative Assistant  
Bonnie Salle, Certification Coordinator  
Pamela Collette, Telecommunications Training Coordinator  
Heather Hatch, Curriculum Specialist



#### 8. Minutes from February 7, 2008 Meeting

Approve meeting minutes from February 7, 2008 meeting.

*See Appendix A for details*

*Brian Casey moved to approve the minutes from the February 7, 2008 meeting. Bob Cozzie seconded the motion. The motion carried unanimously by all present.*

9. **Minutes from April 15, 2008 Special Meeting**  
Approve meeting minutes from April 15, 2008 special meeting.

**See Appendix B for details**

*Tami Atkinson moved to approve the minutes from the April 15, 2008 special meeting. James Rentz seconded the motion. The motion carried unanimously by all present.*

10. **Hearing Officer's Report – OAR 259-008-0200**  
Civil Penalty  
Presented by Bonnie Salle

**See Appendix C for details**

*Brian Casey moved to adopt the proposed rule amending OAR 259-008-0200 as a permanent rule as originally approved by the Telecommunications Policy Committee and Board on Public Safety Standards and Training. Jack Jones seconded the motion. The motion carried unanimously by all present.*

11. **OAR 259-008-0060(11) – Proposed Rule**  
Creditable Service Time  
Presented by Bonnie Salle

**See Appendix D for details**

*Jack Jones moved to recommend filing the proposed language for OAR 259-008-0060(11) with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Brian Casey seconded the motion. The motion carried unanimously by all present.*

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

12. **OAR 259-013-0000 – Proposed Rule**  
Criminal Records Check  
Presented by Bonnie Salle

**See Appendix E for details**

*Bob Cozzie moved to recommend filing 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. Tami Atkinson seconded the motion. The motion carried unanimously by all present.*

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

13. **OAR 259-008-0064 – Proposed Rule**  
Maintenance Training for Telecommunicators/EMD  
Presented by Bonnie Salle

*See Appendix F for details*

*Jack Jones questioned if this proposed rule would cause any impact in maintenance training? Staff stated there has not been anyone who has used instructed hours in the last five years towards meeting maintenance training requirements.*

*Jack Jones moved to recommend filing the proposed language for OAR 259-008-0064 with the Secretary of State as a proposed rule and as a permanent rule if no comments are received. Brian Casey seconded the motion. The motion carried unanimously by all present.*

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

#### **14. Curriculum Update**

*12<sup>th</sup>-Grade Level Reading and Writing Test  
Presented by Eriks Gabliks*

*Stanard and Associates has brought forth a proposal to our organization. They want to reformat their 12<sup>th</sup>-grade reading and writing test for telecommunications professionals. One of the things identified is that the writing standard as currently adopted doesn't accurately match up with what telecommunicators are doing on the job. DPSST has agreed to beta test Stanard and Associates' new test in the next four basic telecommunication classes here at the academy. This is not a pass/fail test but merely a data collection tool. This will give us a basis to evaluate whether to adopt this standard over the currently adopted writing standard for telecommunication. Chair Swanson asked for this information so he can forward it to his associates at APCO/NENA.*

*Chair Swanson announced his term is over and introduced Rob Poirier as the new Chair for the Telecommunications Policy Committee.*

*The next regularly scheduled Telecommunications Policy Committee meeting is August 7, 2008 at 10:00 a.m.*

*With no further business before the Committee, the meeting adjourned at 10:22 a.m.*

## **Appendix B(1)**

**DATE:** July 10, 2008

**TO:** Telecommunications Policy Committee

**FROM:** Bonnie Sallé  
Hearing Officer

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

The Telecommunications 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.
2. On March 1, 2008, the Notice of Proposed Rulemaking Hearing was published in the Secretary of State's monthly publication (Bulletin).
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 259-008-0070 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 B(2)**

### **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 B(3)**

*[DPSST Note: DPSST staff has formatted the e-mail and added paragraph numbers to the substantive paragraphs in the response below for ease of reference in the DPSST staff report]*

-----Original Message-----

From: Robert King [<mailto:president@PPAVIGIL.ORG>]

Sent: Fri 3/14/2008 9:24 PM

To: Salle Bonnie; Gabliks Eriks; Minnis John

Subject: Amend Rules relating to Denial or Revocation of Certification, Moral Fitness and Arbitration

Bonnie, John and Eriks,

(1) Please consider this email as the Portland Police Association's comments on Draft Rule OAR 259-008-0070. Can you also advise me if I need to submit it to anyone else on in any other format for our comments to be considered?

(2) The PPA represents more than 900 police officers, detectives, sergeants and criminalists employed by the City of Portland. The PPA's perspective on the Draft Rule is derived from its understanding of the job of a police officer, its experience with the City of Portland's disciplinary process, and its experience with DPSST.

(3) Some of the changes in draft OAR 259-008-0070 are needed revisions of DPSST's certification rules. However, many of the proposed changes are very troubling, often from both a legal and a policy standpoint, and should be avoided in the final version of OAR 259-008-0070. If adopted as drafted, OAR 259-008-0070 would not only be unfair, but would violate a variety of fundamental due process rights of public safety employees. In addition, some of the changes contemplated by the new rule are confusing, others are contradictory, and the new rule is written in a fashion that will subject the State to unnecessary litigation. The PPA believes that much, much more work need be done before OAR 259-008-0070 can be placed in final form.

The comments set forth below highlight the PPA's areas of concern with the Draft Rule.

(4) Section 3.a.A. The PPA believes that the phrase "discharged for cause" in this section of the Draft Rule needs a definition. The Draft Rule does not state when it is determined that a discharge is "for cause." While Oregon statutes are silent on the issue, the PPA believes that the Washington statute, RCW 43.101.105 (1)(d) provides appropriate modifying language. RCW43.101.105 (1)(d) was recently amended to allow decertification of a peace officer if "The peace officer has been discharged for disqualifying misconduct, the discharge is final . . ." The addition of this language would make clear that the exhaustion of any appeals process has resulted in the determination that the discharge has been "for cause."

(5) Section 3.a.A.i. The PPA does not believe that "Dishonesty," at least as the term is defined in the Draft Rule, should be an automatic disqualifier. The term "dishonesty" encompasses the telling of any untruth, whether on the job or off, whether serious or not, whether well intentioned or not, and whether or not the individual seeks any monetary or other gain from the telling of the untruth. The synonyms included with the Draft Rule's definition of dishonesty even sweep within

the definition of "dishonesty" the notion of "dishonesty by omission," apparently where the individual says nothing but is judged by someone to have had some obligation to say something.

(6) There are many things wrong with the Draft Rule's proposed definition of dishonesty. First, to be a mandatory disqualifier that stands on its own absent the presence of any other mandatory disqualifiers, dishonesty should be related to the job or the DPSST certification process. DPSST has no right to inquire into an officer's off-duty life to determine if the officer is dishonest, whether the dishonesty is trivial (telling one's child there is a Santa Claus), beneficial (telling a falsehood to a seriously ill person to ease the stress on the individual), or harmful (dishonesty associated with having an affair). If the non-job-related dishonesty is criminal, then it may be that other mandatory disqualifiers apply. However, if the non-job-related dishonesty is non-criminal, it should be none of DPSST's business.

(7) Second, the blanket rule that any job-related dishonesty mandates decertification should be changed. To be sure, many if not most job-related instances of dishonesty would justify decertification. However, the Draft Rule requires that all job-related dishonesty, no matter what the degree and no matter what the mitigating circumstances, result in the decertification of a peace officer. Such a result may well be inappropriate, for example, if the dishonesty is not serious (calling in sick and misreporting the actual nature of the officer's condition), or if the officer was suffering from transient physical or psychological conditions that may have impacted judgment.

(8) Third, even if one can cross the "job-related" and "blanket rule" problems with the Draft Rule, the drafting of the language should be completely revamped. The Draft Rule, rather than defining dishonesty, simply lists a number of what appear to be synonyms for dishonesty. DPSST must take care that a basic "rule of construction" of regulations is that every word in a regulation is presumed to have independent meaning. Finding independent meanings for "dishonesty," "untruthfulness," and "falsification" is a chancy proposition, yet unless the regulation is changed, that is precisely what DPSST and/or a court will have to do. It is far better to give a definition to the term rather than list synonyms.

(9) The PPA anticipates that the drafters of the proposed rule may respond that the rule requires a discharge for dishonesty (or any of the other mandatory disqualifiers) before decertification is mandatory, and that there are internal checks at the employer level to make sure that discharges are fair. Should such an argument be raised, it should be rejected. To begin with, not all public safety officers are covered by a collective bargaining agreement and some have no job protections whatsoever against improper discharge. In addition, the PPA has too often witnessed discipline of public safety officers being imposed for reasons that are purely political, or have no basis in fact. If DPSST is to have a rule mandating decertification for discharges for listed types of conduct, it needs to make sure that its enumeration of the underlying conduct is clear, appropriate, specific, and understandable.

(10) Section 3.a.A.ii. The PPA believes the definition of "Disregard for the Rights of Others" is extremely poorly drawn, and should be substantially changed. Perhaps the closest this portion of the Draft Rule comes to acceptability is the inclusion of "constitutional violations" in the list of what are examples of disregard for the rights of others. Even this, though, is fraught with problems. Whether something is a "constitutional violation" is exclusively in the province of the courts; the language of the Draft Rule should be amended to read something like "judicially-determined constitutional violations."

**(11)** Just as importantly, there is nothing in the definition that indicates that the constitutional violation must be intentional to serve as a mandatory disqualifier. The actions of many well-intentioned public safety officers have later been held by the courts to violate the constitutional rights of a suspect, even though the public safety officers firmly held the reasonable belief that their conduct was completely appropriate. As written, the Draft Rule would mandate the decertification of any officer who ever had a search declared unconstitutional, who arrested a suspect where a judge later determined there was no probable cause for the arrest, or who seized property pursuant to a warrant that was later rejected by a court.

**(12)** When one moves beyond "constitutional violations," this section of the Draft Rule becomes even more troubled. The language continues mandating decertification for officers who commit a "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." A basic tenet of regulation drafting is that the regulation itself should contain all operative language, and that there should not be references to external sources. There are many "codes of ethics"; even assuming that one can assume that the "code of ethics" referred to in the draft rule is the one used elsewhere by DPSST, one cannot say with any certainty what portions of that code of ethics "regard fairness." If this rule is to mandate decertification when an officer is "unfair," then the precise definition of what "unfair" conduct is should be in the rule itself.

**(13)** The same is true with such vague phrases as "respect for the rights of others," "protecting the vulnerable," and "the fundamental duty to protect and serve." If DPSST is going to mandate decertification for conduct that falls into these categories, it has the obligation to include in its rule precisely what conduct falls in those categories. The questions that can be raised about the current language of this portion of the Draft Rule are almost endless. Do phrases such as "fairness" and "protecting the vulnerable" refer only to on-duty conduct, or to off-duty conduct as well? And, if so, what type of conduct would or would not be "fair" or sufficiently "protecting" of whoever the "vulnerable" might be? What does "respecting the rights of others" add to the phrase "constitutional violations"? What types of "rights of others" are being described? Constitutional rights? Civilly-created rights? Contract rights? Would a police chief's breach of a collective bargaining agreement require mandatory decertification of the chief?

**(14)** The point is that the rules of a governmental body should be clear, understandable, and specifically line out what is prohibited. Section 3.a.A.ii fails all three of these tests.

**(15)** Section 3.a.A.iv. The PPA believes the definition of "incompetence" needs to be significantly rewritten. For incompetence to result in the extreme step of mandatory decertification, it should be a demonstrated pattern of incompetence that remedial measures such as progressive discipline have been unable to correct. The definition in the Draft Rule takes a different approach, and prescribes disqualification if an officer has "a demonstrated lack of ability to perform the essential tasks of a public safety professional or instructor." The Draft Rule thus applies to performance problems that are long-standing and those that are of short duration or transient. The Draft Rule also applies without regard to whether the performance problems are caused by a disability protected by the ADA and Oregon's employment laws. In addition, the Draft Rule applies without regard to whether the performance difficulties are correctable and without regard to whether the employer has tried remedial measures to correct any pattern of performance.

**(16)** Section 3.a.A.v. The PPA recommends that the definition of "misuse of authority" be completely rewritten. To begin with, read literally the rule calls for mandatory decertification of

officers who engage in "actions under the color of office," a nonsensical result. In addition, rules that mandate decertification should not use vague terms such as "abuse of public trust," a term that could have any of a variety of meanings. Phrases such as "obtaining a benefit or avoidance of detriment" have no particular meaning, and are susceptible to far too many interpretations. Taken literally, if an officer receives "a benefit" such as pay, health insurance, or psychic satisfaction from the job, she would be subject to mandatory decertification.

**(17)** Section 4. The PPA believes the provisions in the Draft Rule on discretionary disqualifying misconduct are thoroughly confusing and should be rewritten. There are four subsections to Section 4. In outline form, the subsections provide as follows:

#### Subsection

#### Contents

(a)

**(18)** Contains three grounds for discretionary decertification: (A) the submission of falsified information to the DPSST; (B) the officer fails to meet the standards set in ORS 181.640; and (C) the officer is convicted of a crime enumerated in Subsection (b).

(b)

**(19)** Lists the various crimes the conviction of which provides grounds for discretionary disqualification, and assigns those crimes to one of six categories.

(c)

**(20)** Requires someone (the rule doesn't specify who) to set an "initial minimum period of ineligibility" depending upon the "category of misconduct."

(d)

**(21)** Calls for the Board to determine the initial minimum period of ineligibility. Describes the six categories, including topics such as insubordination, misuse of authority, and "an act or failure to act" that creates a danger to another.

**(22)** What's completely unclear from this structure is whether discretionary disqualification is appropriate for just the three reasons listed in Subsection (a) or whether additional disciplinary offenses of the sort listed in Subsection (d) can be the basis for disqualification. The text of Subsection (b) strongly implies that convictions are necessary for discretionary disqualification to occur, a structure found also in Section 7 of the Draft Rule. However, while the categories in Section (d) match up to the categories assigned to crimes in Section (b), the text in Section (d) implies that disciplinary offenses can be the basis for discretionary disqualification. Without question, this contradiction demands the complete redrafting of the rule.

**(23)** Beyond that, if one assumes that Section (d) is intended to apply to non-criminal disciplinary offenses, the PPA sees numerous difficulties with the inclusion of certain offenses in the categories. The PPA has already commented on most of the phrases in Categories I and II. Category II, however, also contains the rather obscure sentence "In this category, a person is a victim." Since nothing in Category II uses the words "person" or "victim," it is impossible to tell what this sentence means.

**(24)** Category III contains the wholly inadequate definition "Includes abuse of public trust, obtaining a benefit or avoidance of detriment, and actions under the color of office." If a DPSST rule is to allow decertification for such offenses, it should specifically define the terms it is using. What, for example, is the "public trust," and what does it mean to "abuse" the public trust? What possibly could "actions under the color of office" mean or refer to?

**(25)** While the offenses listed in Category IV are generally understandable, those listed in Category V are a mystery. The definition in Category V states "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." DPSST simply cannot have a rule so vague as to allow the ending of an officers career on the basis of "standards generally followed in the Oregon public safety profession." Many examples of the problems with the drafting of this portion of the rule could be given, but one will suffice. It may be, for example, that there are three ways of handcuffing a suspect. 80% of Oregon public safety organizations follow Method A, 10% follow Method B, and 10% follow Method C. The way the rule is written, an officer could be decertified for following Method B, even though it was in use in Oregon and may have been in use in his agency. Since the officer was not following the handcuffing standard "generally followed" in Oregon, he would be adjudged by the DPSST to have committed misconduct.

**(26)** The definition of insubordination in Category VI fails to follow the generally accepted definition of the term. Under the definition, so long as an order was "reasonably related" to the "orderly, efficient or safe operation of the agency", a public safety officer could be decertified for refusing comply with the order even if the order was illegal, in breach of a collective bargaining agreement, or required the officer to inappropriately put themselves or others at risk.

**(27)** Beyond these concerns about the specific definitions, the PPA has an overriding concern about DPSST's involvement in the types of offenses listed in Categories I-VI, assuming the DPSST intends the rule to reach into non-criminal conduct by officers. The regulation of such conduct should be a matter of local concern. If an officer commits insubordination, for example, that should be a matter between the officer's employer and the officer. If the employer and the officer agree that the insubordination merits a particular disciplinary penalty, that should end the matter. Absent the most serious of offenses, offenses that also involve crimes, there is no statewide interest that warrants DPSST's involvement through the decertification process in what should be local matters of discipline.

**(28)** Section 9. The PPA sees three independent and significant problems with Section 9. First, the process contemplated for decertification does not provide public safety officers with a fair opportunity to be heard. Second, the proposed treatment of arbitration opinions fails to accord those opinions the deference to which they are owed. Third, the standards for consideration by the Board are inadequate.

**(29)** Section 9 (Process). As to the process, though the Draft Rule is confusing written on the issue, it appears that the first in-person opportunity the officer facing disqualification has to make any presentation is after the Policy Committee has met and made a recommendation and after the full Board itself has decided upon decertification. This is wrong. Due process demands that individuals holding property rights be given the opportunity for a hearing both before and after the decision is made to terminate the property right (the seminal case on point, the Supreme Court's *Loudermill* decision, resulted in the Court holding that pre-termination hearings had to be held even where the individual received a post-termination remedy). And, even if the right to

make presentations to the Policy Committee and the full Board were not constitutionally guaranteed, it simply is not fair for the process to move so far down the road to decertification without the officer having the right to present his or her case.

**(30)** Moreover, the Draft Rule is silent on the procedures to be used by the Policy Committee and the full Board in deciding decertification issues. It should not be. Whatever procedures are to be followed should be carefully and clearly spelled out in the Draft Rule so that officers, the public, and the Board know what procedures will be used. Those procedures should include, at a minimum, the right of the officer to address the Policy Committee and the Board, either personally or through or with counsel, and the right to present evidence in support of why decertification is inappropriate. The Policy Committee and the Board should be the first to hear from the officer and the first to hear actual evidence of what occurred, not an administrative law judge long after the Policy Committee and the Board have made their decisions in the absence of such evidence.

**(31)** The Draft Rule is also silent as to the role of staff in the investigatory process. A recent decertification matter considered by the Policy Committee illustrates the clear need for the Board to give staff explicit direction about its expectation for certification investigations. That direction should be contained in the Draft Rule.

**(32)** Section 9 (Arbitration). The PPA disagrees with the treatment of the arbitration process by the Draft Rule. From the PPA's perspective, an arbitrator's decision that overturns the discharge of a public safety officer should be the end of the matter. As shown by Oregon's collective bargaining laws, the Oregon Legislature has a strong bias towards final and binding arbitration as an effective and valuable method of resolving disciplinary questions. The Draft Rule clearly allows employers "two bites at the apple"; if an employer loses an arbitration hearing on the discharge of an officer, the Draft Rule allows it to bring the matter to DPSST where, in the absence of basic principles of fairness found in the arbitration process, the employer can achieve the same result it originally intended.

**(33)** For DPSST to effectively overturn an arbitration decision, there should be some overriding public policy violated by the decision. What the Draft Rule ignores is that Oregon law has long recognized that arbitrators' opinions can be overturned by the courts if those opinions are in violation of public policy. In other words, there is an existing mechanism - appeal through the court system - to make sure that arbitrators' opinions do not violate public policy. The decertification process should not exist as second way of challenging arbitrators' awards.

**(34)** Section 9 (Standards). The standards for consideration of a decertification question laid out by the Draft Rule are deficient, and fail to recognize many important considerations. For example, the standards fail to even mention such basic and important facts as the officer's intent in committing the act that gave rise to the decertification process, the officer's state of mind at the time of the act, the officer's physical and emotional condition, and whether other mitigating circumstances exist that would be important in adjudicating a decertification question. The Draft Rule fails to even mention the employer's rules or absence of rules, the employer's enforcement of those rules, and the officer's understanding of the rules.

There are numerous other relevant considerations simply ignored by the Draft Rule.

**(35)** Even where the Draft Rule contains standards, the standards are frequently difficult to understand or flatly inappropriate. For example, Section G allows decertification where "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." In other words, Section G allows decertification where the officer has done nothing wrong, but where, for some reason, the "agency or public" has "lost confidence" in the officer. How any of this could be quantifiably measured is questionable at best, but in any case DPSST should never decertify an officer who has done nothing wrong. In a similar vein, Section F allows decertification where the conduct "adversely reflects" on the fitness of the officer. Once again, this language allows decertification where the officer has done nothing wrong. It's entirely possible for an officer to have followed all of her agencies procedures and still have the eventual action "adversely reflect" on the fitness of the officer.

**(36) Conclusion.** The PPA believes that the problems with the Draft Rule are so significant that it is time to "go back to the drawing board" on the Draft Rule. Portions of the Draft Rule are unconstitutional, other portions are contradictory, other portions are so vague they cannot be understood, and yet other portions are simply wrong. The certification of thousands of Oregon's public safety officers is a critically important issue, one that requires reflection and research. Once the Draft Rule is rewritten, there should be a new public comment period on the redrafted rule.

Robert J. King

President

## Appendix B(4)

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.]

(+) (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 (c) 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.~~

~~(E) (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)~~ If **(v) 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?

~~(I)~~ **(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;**?

~~(J)~~ ~~(C) (D)~~ **Do 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;**?

~~(M)~~ ~~(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;**

~~(N)~~ ~~(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;**

~~(O)~~ ~~(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 ~~Order~~ of the Department may, as provided in ORS 183.480, file an appeal with the Court of Appeals from the final ~~Order~~ of the ~~d~~Department.

### **(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 C

### Department of Public Safety Standards and Training Memorandum

**DATE:** August 7, 2008

**TO:** Telecommunications Policy Committee

**FROM:** Theresa King  
Professional Standards Coordinator

**SUBJECT:** Lori Michelle MATTHEWS DPSST #39371

**ISSUE:**

Should Lori MATTHEWS' Basic Emergency Medical Dispatcher and Basic Telecommunicator certifications be revoked based on violation of the Moral Fitness standards defined in OAR 259-008-0011, or the discretionary disqualifying convictions defined in OAR 2590-008-0070, or both?

**BACKGROUND and OVERVIEW**

*This case involves the following actions and processes related to MATTHEWS:*

*On January 3, 2002, MATTHEWS was hired by the Bureau of Emergency Communications (BOEC).*

*On May 3, 2003, MATTHEWS signed an F-11T, Telecommunicators Code of Ethics.*

*On June 24, 2003, MATTHEWS was granted a Basic Telecommunicator and Basic Emergency Medical Dispatcher certification.*

*On March 2, 2007, MATTHEWS was discharged for cause from BOEC, based on her conduct during a 2006 arrest for DUII and untruthfulness on a subsequent urine analysis.*

*On June 26, 2007, after a review of the underlying investigation that led to the discharge, DPSST issued a Notice of Intent to Revoke Certifications. MATTHEWS made a timely request for a hearing. DPSST was subsequently made aware that the discharge was being grieved.*

*In January 2008, DPSST received a letter from BOEC advising that as a part of a settlement agreement, MATTHEWS accepted a resignation in lieu of termination, rather than having her record reflect "discharge for cause."*

*On February 5, 2008, DPSST mailed MATTHEWS a letter advising her that her case would be heard before the Telecommunications Policy Committee and allowed her an opportunity to provide mitigating circumstances for the Committee's consideration. This letter was sent certified mail. On February 8,*

2008, DPSST received the certified mail return receipt. To date MATTHEWS has not provided any response.

A routine records check was conducted on MATTHEWS which revealed the following contacts with law enforcement:

*On December 3, 2005, MATTHEWS was involved in a Hit and Run, Fail to Perform Duties of Driver. MATTHEWS was later arrested and pled guilty. This was subsequently dismissed on a civil compromise.*

*On July 22, 2006, MATTHEWS was arrested for DUII. While MATTHEWS was initially placed on diversion, she violated her diversion agreement and received a DUII conviction on July 30, 2007.*

*On June 3, 2007, MATTHEWS was arrested for DUII and received a DUII conviction on October 3, 2007*

*On July 21, 2007, officers responded to MATTHEWS' residence on a domestic disturbance involving MATTHEWS alcohol abuse in the presence of her three minor children. This matter was referred to DHS.*

*On August 1, 2007, officer responded to MATTHEWS' residence on a welfare check of MATTHEWS. After contact with MATTHEWS, officers cleared this call without action.*

*On June 17, 2008, MATTHEWS was arrested on an outstanding warrant stemming from the 2006 DUII arrest and non-compliance with diversion.*

[PROCESS NOTE: A discharge for cause is a mandatory disqualifying event. A resignation in lieu of termination may be a discretionary disqualifying event, depending upon the conduct. The crimes that MATTHEWS has been convicted of are discretionary disqualifying crimes, for purposes of certification. The crime that MATTHEWS had dismissed through civil compromise may be considered for purposes of determining a pattern, or for determining whether her conduct falls below the minimum standards for public safety professionals.]

**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.

**STANDARD OF PROOF:**

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

## DISCRETIONARY DISQUALIFYING CONDUCT

OAR 259-008-0070 specifies discretionary disqualifying conduct which includes criminal convictions and violations of the established moral fitness standards. This rule provides for Committee and Board consideration of aggravating and mitigating circumstances by stating, in part:

...

*(3) Discretionary Grounds for Denying or Revoking Certification of a Public Safety Profession or Instructor: 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:*

...

*(c) 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. (moral fitness)*

and OAR 259-008-0070(5) specifies the procedures to be used by stating, in part:

...

*(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 conduct listed in subsection (3), the case may be presented to the Board, through a Policy Committee.*

...

*(d) Policy Committee and Board Review: The Policy Committees and Board may consider mitigating and aggravating circumstances in making a decision to deny or revoke certification based on discretionary disqualifying conduct.*

## Moral Fitness

OAR 259-008-0011(3) states, in part, "All telecommunicators and emergency medical dispatchers 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.

(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 telecommunicator. 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 telecommunicator's performance on the job which makes the telecommunicator both inefficient and otherwise unfit to render effective service because of the agency's and/or public's loss of confidence in the telecommunicator's ability to perform competently.

**Discretionary Disqualifying Convictions:**

OAR 259-008-0070(3) specifies discretionary disqualifying conduct. This rule provides for committee and Board consideration of aggravating and mitigating circumstances by stating, in part:

*“(i) In making a decision on a discretionary denial or revocation the policy committee may use the criminal disqualifier and decision matrix approved by the Board.*

*(ii) The matrix is designed as an aid in guidance to decision-making only and provides parameters for deviation.*

*(iii) Policy committees may consider aggravating and/or mitigating circumstances from the criminal disqualifier matrix for the parameters included but not limited to the list below:*

*(I) Was the conviction a felony, misdemeanor, or violation?*

*(II) How long ago did the conviction occur? (refer to the matrix)*

*(III) Was the person a minor at the time and tried as an adult?*

*(IV) Did it occur before, during, after, or in between employment in law enforcement?*

*(V) Did the individual serve time in prison/jail? If so, how long?*

*(VI) If restitution was involved, has the person met all obligations?*

*(VII) Was the individual on parole or probation? If so, when did the parole or probation end? Is the person still on parole or probation?*

*(VIII) Are there any aggravating or mitigating circumstances that should be considered?*

*(IX) Do the actions violate the rule definition of moral fitness (OAR 259-008-0010(6)), 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 individual's honesty, fairness, respect for the rights of others, or for the laws of the state and/or the nation?*

*(X) How many other convictions does this person have? Over what period of time?*

*(XI) Has this person been convicted of this same crime more than once?*

*(XII) If a DUII, is this the first, second, or third time within the previous 10 years? (Has this DUII become a felony (it's a felony if this is the fourth conviction and the last three were within the previous ten-year period)?)*

*(XIII) Does this conviction involve any domestic violence situation?*

## **ACTION REQUESTED:**

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

1. The Telecommunication Policy Committee *adopts/does not adopt* the Staff report as the record.
2. The Telecommunications Policy Committee believes:
  - a. MATTHEWS' actions *do/do not* cause a reasonable person to have doubts about her honesty, respect for the rights of others, and respect for the laws of the land.
  - b. MATTHEWS' conduct *did/did not* involve dishonesty, fraud, deceit, or misrepresentation.
  - c. MATTHEWS' conduct *was/was not* prejudicial to the administration of justice.
  - d. MATTHEWS' conduct *did/did not* adversely reflect on her fitness to perform as a Telecommunicator.
  - e. MATTHEWS' actions *do/do not* make her inefficient or otherwise unfit to render effective service because of the agency's and the public's loss of confidence in her ability to perform competently.
3. After a review of any mitigating and aggravating circumstances cited in the above "discretionary disqualifying convictions" section:
  - a. MATTHEWS' case *contains/does not contain* mitigating circumstances.
  - b. MATTHEWS' case *contains/does not contain* aggravating circumstances.
4. The Telecommunication Policy Committee finds MATTHEWS' conduct *does/does not* rise to the level to warrant the revocation of her certifications, and therefore recommends to the Board that MATTHEWS' certifications *be revoked/not be revoked*.

## Attachments

### *Information Only - **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:*

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

### Memorandum

**Date:** July 24, 2008  
**To:** Marilyn Lorance, Standards and Certification Program Supervisor  
**From:** Steve Winegar, Education Program Specialist  
**Subject:** Reading and Writing Standards for Telecommunicators

Questions have been raised about the relevance of a 12<sup>th</sup> grade reading and writing standard for employment as a telecommunicator, contained in OAR 259-008-0011 (5). After recent discussions and review of the 2002 Job Task Analysis and 2007 DACUM for telecommunicators, there appears to be nothing in the job tasks of a telecommunicator that would support the need for a 12<sup>th</sup> grade **writing** requirement.

A telecommunicator must be able to read and comprehend materials that are written at a 12<sup>th</sup> grade level based on the Job Task Analysis and the analysis of the telecommunicator curriculum. However there is no documented task on the job or current requirement during Academy training that would support a 12<sup>th</sup> grade **writing** requirement. This reflects information we have received from telecommunicator job task analysis in other areas of the county; they find no support for a 12<sup>th</sup> grade writing requirement.

Two courses of action are available to address the writing requirement. First, the job task analysis could be updated to clarify the need for a 12<sup>th</sup> grade writing requirement. Alternatively, the 12<sup>th</sup> grade writing requirement could be removed from the minimum standards in the administrative rules.

I would recommend the Telecommunications Policy Committee review the issue and determine if they wish to recommend modifying the current writing standard for telecommunicators.

RCUD  
7/27/08

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