BEFORE THE PUBLIC SAFETY OFFICER STANDARDS AND TRAINING COUNCIL, STATE OF MONTANA

IN THE MATTER OF THE PROPOSED SUSPENSION OR REVOCATION OF THE CERTIFICATE OF DANIEL L. WADSWORTH))))	**Case No. 11-14**

POST COUNCIL FINAL DECISION

On July 16, 2013, the Public Safety Officer Standards and Training Council, following a hearing at which counsel for POST and for Daniel L. Wadsworth presented oral argument, considered the Findings of Fact, Conclusions of Law, and Proposed Order, and unanimously voted. Based on the Council's decision,

IT IS HEREBY ORDERED:

(1) That the hearing examiner's findings of fact are adopted in full.

(2) That the hearing examiner's conclusions of law are adopted, with the exception of conclusion of law #24, which is modified as follows:

a. The Code of Ethics set forth in ARM 23.13.203 applies to the Respondent. Accordingly, Count IV is proven.

(3) With respect to the hearing examiner's recommendations:

a. The hearing examiner's recommendation (1) is adopted and all of the Respondent's certificates except his basic certificate are hereby revoked.

b. The hearing examiner's recommendation (2) is adopted and the Respondent's basic certificate is suspended for a period of fifteen (15) years, effective July 16, 2013.

c. The hearing examiner's recommendation (3) was neither discussed nor adopted.

The Interim Executive Director is directed to take the administrative steps

necessary to implement this order. Daniel L. Wadsworth and his counsel are hereby notified that Mr. Wadsworth may appeal this decision to the Board of Crime Control by following the procedures set forth in Mont. Code Ann. § 44-4-301(2) and Mont. Admin. R. 23.14.1001 to 23.14.1009.

DATED this 17 day of July, 2013.

Hal Harper
Chairman, Public Safety Officer
Standards and Training Council

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing POST Council Final Decision to be mailed to:

Mr. Allen Horsfall
2260 Sierra Road East
Helena, MT 59602

Sarah Hart
1712 Ninth Ave
PO Box 201440
Helena, MT 59620-1440

Mr. Edward G. Chester, Jr.
Chester Law Office, PLLC
P.O. Box 691
Polson, MT 59860

DATED: 7/17/13

BEFORE THE PUBLIC SAFETY OFFICERS STANDARDS AND TRAINING COUNCIL
STATE OF MONTANA

IN THE MATTER OF THE PROPOSED SUSPENSION OR REVOCATION OF THE CERTIFICATION OF: **DANIEL WADSWORTH,** RESPONDENT	))))))	Hearing Case No. 11-04 FINDINGS OF FACT, CONLCUSIONS OF LAW AND RECOMMENDED DISPOSTION

This matter came on for a hearing on the merits on April 8, 2013, in Helena, Montana. Both parties waived an opportunity to submit proposed findings of fact and conclusions of law.

WITNESSES

The following individuals testified on behalf of the Peace Officers Standards and Training Council (POST):

- Kevin Olson, Administrator of the Montana Law Enforcement Academy.
- Peter Bovingdon, Assistant Attorney General, Law Enforcement Academy instructor and legal adviser to Montana Law Enforcement Academy.
- Allysen Jones.
- Kevin McCarvel, Agent for the Montana Division of Criminal Investigation.
- Steve Hughes, Detective, Columbia Falls Police Department and former officer in the Ronan Police Department.
- Arthur Walgren, Newtown, North Dakota Police Chief and former Assistant Chief of Police in Ronan.
- George Finkle, former Sergeant for Ronan Police Department.
- Clayton Coker, Acting Executive Director of POST and POST investigator.

Respondent did not testify and did not call any witnesses. Respondent was, however, deposed and his deposition is in evidence. ((Ex. 44.) I have read and considered his deposition.

EXHIBITS

POST offered sixty (60) exhibits. Respondent was provided a pre-hearing opportunity to object to any of the exhibits but did not do so. At hearing his counsel stated he had no objections to the exhibits and the exhibits were summarily admitted. Respondent did not offer any exhibits.

LIMITED CONSIDERATION GIVEN TO EXHIBITS

Lacking any objections by Respondent's attorney, all of the sixty exhibits should be deemed admitted for all purposes. However, many of the exhibits contain hearsay and other objectionable content if offered for unlimited purposes. Based on prior discussions in prior hearings, it appears that many of the exhibits were offered in rebuttal to procedural contentions by Respondent's counsel. For example, Respondent's attorney contended that the investigation was deficient. During hearings I indicated my intent to apply the Rules of Evidence in considering the exhibits. For example, I indicated that hearsay would be given no weight.

Therefore, In making my findings of fact regarding the substantive allegations against Respondent, I have considered only the testimony given at trial and non-hearsay exhibits which relate to those allegations. I have also considered the depositions in evidence since they contain sworn testimony and are admissible under the Montana Rules of Evidence. Any prerequisites to their admissibility, e.g., unavailability of the witness, have been waived.

The specific exhibits which figure in my findings are cited in my findings.

CASE RECORD AND CITATIONS

Pursuant to the agreement of counsel and a ***Scheduling and Procedural Order*** issued August 31, 2012, all pleadings, motions, briefs and other documents filed in this case have been maintained electronically in PDF format

and all service has been by email. The docket is electronic and designated ***000 Wadsworth DOCKET.*** The docket entries have been numbered beginning with 000 and the filing dates have been indicated. The file names listed in the docket correspond to the file names of the actual files; however, due to the fact that this hearing officer has served as his own secretary, some file names may be abbreviated and may not perfectly correspond to actual file names of the electronic files.

PROCEDURAL HISTORY OVERVIEW

As reflected in my prior orders and transcripts of hearings in this case, the attorney for Respondent has obstructed discovery, failed to appear for scheduled hearings, and ignored and defied orders I have issued. He also failed to substantively respond to POST's motions for sanctions, summary judgment and in limine. His conduct in this case has caused me concern regarding the adequacy of his representation of Respondent and resulted in denying motions to limit Respondent's evidence. Despite that latitude, Respondent presented no witnesses or exhibits.

I have **not** attributed any of his counsel's improper conduct to Respondent. My goal has been to reach a fair and impartial decision with respect to the merits of the allegations against Respondent.

FINDINGS OF FACT

I. Procedural History

1. The Respondent is and at all times material herein was the Chief of Police of the Ronan, Montana Police Department. He has been a sworn officer for twenty-seven years. (Ex. 47.)

2. The original complaint in this proceeding was filed by Wayne Ternes, Executive Director of POST, on August 3, 2011. (001 Complaint.) Respondent has presented no evidence that Mr. Ternes was not in fact the properly appointed Executive Director of POST at the time the complaint was filed. Mr. Coker's

testimony and multiple exhibits reflect a through investigation of the charges brought.

3. The complaint alleged that in December 2010 Respondent falsified an application to the Montana Law Enforcement Academy (MLEA) and violated regulations pertaining to MLEA attendance. The application was for Trevor A. Wadsworth, Respondent's son. The complaint alleges that, contrary to Respondent's certification on the application, Trevor Wadsworth was not an employee of the Ronan Police Department and was not a sworn peace officer. The original complaint further alleges that Respondent violated POST's Code of Ethics by thereafter knowingly hiring his son in violation of Montana nepotism laws.

4. The matter was initially assigned to another hearing officer.[1]

5. On June 28, 2012, the undersigned hearing officer was designated by Mr. Ternes, Executive Director of POST, to act as "hearing officer" in POST proceedings. (000 Letter of Appointment of Hearing Examiner.)

6. At the time I was designated, this proceeding had already been assigned to Erin T. Inman for hearing. On August 14, 2012, Inman recused herself. (007 Inman Recusal.) I was requested to assume jurisdiction and did so on August 15, 2012. (006 Order re Further Proceedings and Setting Scheduling Conference.)

7. Thereafter, I held a telephonic scheduling conference with counsel for both parties. Following that conference, on August 31, 2013, I issued a ***Scheduling and Procedural Order.*** (008 Scheduling and Procedural Order.) The dates for completion of discovery, pretrial motions, the merits hearings, and submission of a pre-hearing order were set with the agreement of both counsel. (*Id.*)

8. As permitted by the scheduling order, an *Amended Complaint* was filed on September 26, 2012. (010 Amended Complaint) The Amended

1 POST has used the term "Presiding Officer" for assigned hearing examiners. MAPA refers to them as "hearing examiners" and I have used the term "hearing officer." The are all one and the same.

Complaint repeated the facts alleged in the initial complaint but added alleged instances of falsification with respect to two other individuals – Steve Hughes and Allysen Jones. The Amended Complaint also expanded the list of specific statutes and regulations allegedly violated.

9. Thereafter, POST sought leave to file a second amended complaint to correct technical errors. Specifically, it sought to correct an erroneous allegation that Respondent was a "Lake County Deputy" and an erroneous citation to a regulation. Since Respondent had been properly identified as the Ronan Chief of Police in the initial complaint and the reference to the regulation was obviously erroneous, I permitted the filing of the Second Amended Complaint to correct the technical errors. (020 Order Granting Motion to File Second Amended Complaint.)

10. The amended and second amended complaints were signed by Clay Coker as "Acting Executive Director" of POST. (*Id.)* No evidence was presented by Respondent which would show that Mr. Coker was not in fact the Acting Executive Director.

11. A history of Respondent's attorney's dilatory tactics, obstruction of discovery, and disregard of my orders in this case is set forth in my March 23, 2013, ***Decision Regarding Requested Discovery Sanctions.*** (070 2013.03.23 Decision re Requested Discovery Sanctions.)

12. In addition to the conduct set forth in my March 23, 2013 decision, the pattern of dilatory tactics, obstruction of discovery, and outright defiance of my procedural orders continued thereafter:

- Respondent's attorney failed to cooperate in setting up depositions I ordered be taken of witnesses he intended to call at hearing. Moreover, he stonewalled attempts by POST's attorney to set up those depositions. (061 2013.03.11 minute entry; 061A 2013.03.11 Hearing Transcript; 068 2013.03.19 ORDER RE DEPOSITIONS; 2013.03.28 Renewed Motion in Limine and for Sanctions.)

- Respondent's attorney failed to respond to the proposed pretrial order sent to him by POST's counsel, in violation of orders that he do so. (008 Scheduling and Procedural Order, ¶ 2.A.; 055 Order of February 26, 2013 – ¶ 6; 071 2013.03.25 Notice of FilingPPHO(W); 071 A 2013.03.25 PPHO Email 3.15.13.)
- Respondent's attorney failed to appear at a March 29, 2013 pre-hearing conference in this case and in the Daniel Duryee matter, Docket 10-11. At the commencement of the merits hearing on April 1, 2013, in the Duryee case he lamely said that he had been tied up on other matters and couldn't attend.

13. Respondent, not his attorney, is on trial in this matter, a fact that I have noted continuously in hearings and prior orders. However, notwithstanding the shortcoming of Respondent's counsel, the evidence in this case is clear and compelling.

II. Issues for Decision

14. The Second Amended Complaint fixes the scope of factual and legal issues to be determined in this case. Some evidence presented in this case relates to conduct not charged in the Second Amended Complaint. That conduct may be grist for further charges but is not at issue herein.

15. The specific charges set forth in the Second Amended Complaint are summarized as follows:

Count I: On or about December 10, 2010, Respondent falsely certified that his son, Trevor Wadsworth, was a Ronan Police officer qualified to attend the Montana Law Enforcement Academy Basic 143.

Count II: After being warned that hiring his son would violate Montana nepotism statutes, Respondent hired his son as a police officer on May 12, 2011 in violation of nepotism statutes.

Count III: Respondent sent two other individuals who were not sworn officers employed by the Ronan Police Department to the MLEA -- Steve Hughes in 2005 and Allyson Jones in 2004.

Count IV: This Count incorporates I, II and III by reference and alleges the the conduct alleged therein constituted violations of the code of ethics found in ARM 23.13.702(2)(g).

Count V: This Count incorporates I, II, and III by reference and alleges that the conduct alleged therein violated ARM 23.13.702(2)(k).

III. Substantive Findings of Fact

A. Basic Background Facts

16. Respondent is and was the Chief of Police of the Ronan, Montana Police Department at the times mentioned in these findings. He has been a law enforcement officer for twenty-seven (27) years.

17. Respondent presently holds the following POST certifications:

Basic
Intermediate
Advanced
Instructors in Use of Force
Instructors in Firearms
Command
Supervisory

(Ex. 57.) All of the certificates were issued on May 15, 2008 or earlier. (*Id.*)

B. Trevor Wadsworth MLEA Application

18. Trevor Wadsworth is Respondent's son.

19. On December 21, 2010, Trevor Wadsworth submitted a Montana Law Enforcement Academy Course Application for the Basic 143 course commencing in January 2010. Respondent certified Trevor's eligibility to attend the academy., signing the following declaration:

> I certify that the person mentioned herein as "Applicant has met all the minimum qualifications for employment as a law enforcement or public safety officer as dictated in 7-32-303, MCA, 7-31-202, MCA; and 23-14-525, ARM.

(Exhibit 1.) The application form states that the application is "to be completed by the agency training representative authorized to submit **personnel** for training on behalf of their organization." *(Id.,* bottom of page.) Respondent also specifically certified that Trevor was a sworn officer of the Ronan Police Department. (*Id.* at page 4; Ex. 44 – Wadsworth Depo. at 11 and Ex. 1.)

20. Respondent admitted during his deposition that in signing Trevor's application, as well as an application for Steve Hughes, he was "certifying that the applicants met the requirements for admission into the Montana Law Enforcement Academy." (Ex. 44 – Wadsworth Depo. At 12-13.)

21. At the time Respondent certified Trevor's application,Trevor was neither employed by the Ronan Police Department nor a sworn officer. Respondent claimed in his deposition that Trevor had in fact been sworn in prior to his academy attendance but that his paperwork had been stolen. Those claims are not credible.

21.1 Arthur Walgren, whom I found to be a credible witness, was Ronan's Assistant Chief of Police in December 2010. He testified that he was responsible for paperwork related to hiring and firing personnel and that all police department personnel documents were forwarded to the city clerk. Walgren testified that no personnel file existed for Trevor until one was created on May 27 or 28, 2011.

21.2. No paperwork showing that Trevor was either sworn or employed prior to May of 2011 was ever produced by Respondent or by the City of Ronan in response to specific requests that they do so.

21.3 No notice of employment, which § 7-32-303(4), MCA (2003-2011) required be provided to POST within 10 days of employment, was

ever submitted to POST. Respondent was aware of the 10 day notice requirement. (Ex. 44 – Wadsworth Depo. At 44.)

21.4. The only documentation produced by the Respondent and the city shows that Trevor was sworn in on May 12, 2011, and that his first pay was received on May 19, 2011. (Exs. 17 and 25.)

21.5 Respondent's deposition testimony claiming that Trevor had been sworn in prior to May 12, 2011, and that his prior oath of office was missing because his personnel file had been stolen (Ex. 44 – Wadsworth Depo. at 23-24, 62-634), was inconsistent with prior statements:

(i) On December 11, 2011, Respondent told an agent for the Montana Department of Investigation[2] that Trevor "might not have been sworn in when he went to school over there. And that would've been just an overlook." (*Id.* At 88-89, Depo. Ex. 7 at 19.) Later in the interview he reiterated that "He [Trevor] might not have been [sworn in] when he went to the academy, When he went on the street, yes, he was sworn in." (*Id.* At 90-91, Depo. Ex. 7 at 30.)

(ii) Respondent also admitted that when he talked by telephone with MLEA Administrator Kevin Olsen on March 15, 2011, he, Respondent, did not mention any stolen records; he claimed that he did not mention the stolen records because "Kevin Olson had already lied to me once" (*id.* at 64), testimony that I find implausible.

(iii) Olsen testified about the conversation and also made a contemporaneous written memorandum (ex. 3). He testified that when he questioned Respondent about payroll records which would show that Trevor was in fact employed by the Ronan Police Department, "Chief Wadsworth replied that their employment is always contingent upon his officers passing the Law Enforcement

2 The agent was conducting an investigation into another matter.

Officer Basic Course. Upon graduation they are then offered a position." (Ex. 3.) Peter Bovingdon, who was present during the conversation, corroborated Olsen's testimony.

21.6 In his deposition Respondent also asserted that both the mayor and Trevor could verify that Trevor was hired and sworn prior to his attendance at the MLEA. Respondent, however, called no witnesses at hearing to substantiate his claims. Moreover, in his deposition, Mayor Kim Aipperspach testified that he could not remember "one way or another" as to swearing Trevor in as an officer prior to January 2011. (Ex. 45- Aippersapach Depo. at 47.)

22. I further find that when he certified Trevor's application Respondent knew that Trevor was neither a sworn officer nor an employee of the Ronan Police Department.

23. Based on his December 2010 application, Trevor began attending Basic 143 commencing in January 2011, with the city of Ronan footing the bill for his tuition.

24. On March 10, 2011, Kevin Olson, the MLEA Administrator, was notified by Wayne Ternes that POST had not received a "hire slip" for Trevor. On March 11, 2011, Olsen initiated a request for documentation showing that Trevor was a sworn and paid law enforcement officer. On March 14, 2011, Trevor met with Olson and said he could not provide the requested documentation because Ronan City offices were closed. No documentation was thereafter provided to Olson or the MLEA to show that Trevor was a sworn and paid officer of the Ronan Police Department. Trevor did not return to the MLEA and did not complete Basic 143.

25. Trevor was not paid by the city of Ronan or its police department during his attendance at the MLEA.[3] The only payment was for his tuition.

3 One of the benefits of employment is workers' compensation insurance coverage. While Respondent has urged that Trevor Wadsworth, Allyson Jones and Steve Hughes were covered by workers' compensation insurance while attending the MLEA, both Hughes and Jones understood they did not have such coverage and incurred medical bills which they paid personally. Moreover, wage benefits

26. Similarly, Steve Hughes, who attended MLEA Basic beginning in January of 2005 and Allysen Jones, who attended beginning in 2004, and whose applications were certified by Respondent, were not paid by the city of Ronan or its police department during their attendance. The only payments were for their tuition.

27. The city of Ronan had a policy of not paying wages to the persons it sent to the MLEA despite the express requirement in section 44-10-302, MCA that "**[a]**ll officers shall be paid their regular salary during their attendance at the academy." In his deposition, the mayor testified that budgetary constraints prevented the city from paying officers while at the academy. He expressed his belief that payment of tuition provided the officers with sufficient compensation during their attendance. (Ex. 45 – Aipperspach Depo., passim.) In his deposition Respondent testified that insufficient funds are appropriated by the city to pay officers attending the MLEA and to also keep officers on the street. (Ex. 44 – D. Wadsworth Depo., passim.)

28. In his deposition Respondent also claimed that when he signed the MLEA applications for Trevor and Steve Hughes (and by implication Allyson Jones) he was unaware of any requirement that officers sent to the MLEA be paid a salary during their attendance. (Ex. 44 – D. Wadsworth Depo. At 12-16.) He testified that he relied on the 2003 version of the Montana Code Annotated and that those statutes did not require payment of salaries for municipal police officers during MLEA attendance.

29. While not able to personally observe Respondent's testimony and judge his credibility based on testimony, as he did not testify at hearing, other testimony and evidence leads me to discredit his deposition testimony and find that he was in fact aware of the pay requirement. That evidence is as follows:

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under workers' compensation laws are based on actual wages paid. §§ 39-71-701 to 703, MCA. Since no wages were paid, the attendees were denied wage benefits even if they were entitled to medical benefits.

29.1 I have reviewed the 2003 statutes and can find nothing in them that supports a pay distinction between officers appointed by municipalities and other officers. In 2003, as presently, section 44-10-301, MCA,[4] limited MLEA eligibility to bona fide Montana law enforcement officers." Section 44-10-302, MCA, the present version of which is also identical to the 2003 statute, requires that "[a]ll officers shall be paid their regular salary during their attendance at the academy . . . ." Moreover, the provisions for appointment of police officers by cities have not materially changed. See Title 7, chap., part 41, MCA. Stated simply, I did not find any statutory basis for distinguishing between officers appointed by municipalities and officers appointed by other agencies, and no statutory authority was pointed out to me by Respondent in his deposition or by his attorney in these proceedings.

29.2 Arthur Walgren, whom I found to be a credible witness, testified that prior to December 2010, he and Respondent had discussed the requirements for sending officers to the MLEA. The discussion followed a 2010 POST audit of the Ronan Police Department, an audit in which the department had been provided with forms and statutes pertaining to Montana law enforcement officers. (Coker Testimony and Ex. 46.) Walgren specifically discussed the requirement to pay officers with Respondent. Respondent replied that the department could only afford so much and that it would continue to operate as it had done in the past.

29.3 While Walgren's duties included processing personnel matters, he did not fill out Trevor's application and was unaware of the application until Trevor began attending the MLEA.

29.4 George Finkle, a former sergeant in the Ronan Police Department and an officer in the department from 1995 to 2006, testified that he had conversations with Respondent in 2004 about Steve Hughes not being

4 The current section 44-10-301, MCA is identical to the 2003 version; it has not been amended.

paid while attending the MLEA and that he had pointed out the statute requiring pay. Finkle testified that Respondent said that the MCA's (Montana Code Annotated) were only "guidelines. Finkle was a credible witness.

29.5 As Chief of Police, Respondent had a responsibility to be informed of statutes and regulations applicable to attendance at the MLEA and the appointment of sworn police officers. MLEA Administrator Kevin Olsen testified that the laws and requirements for attendance at the MLEA are well known in the law enforcement community.

30. I find that Respondent has demonstrated a disregard for express provisions governing the appointment and employment of police officers and their attendance at the MLEA.

NEPOTISM FINDINGS

31. Count II of the Second Amended Complaint alleges that Respondent violated nepotism laws by hiring Trevor in May 2011. In a March 15, 2011 telephone with MLEA Administrator Kevin Olsen, Respondent had been warned that hiring his son would violate Montana nepotism laws.

32. Documentation provided by the city of Ronan shows that Trevor Wadsworth was sworn in as an officer of the Ronan Police Department on May 12, 2011. (Ex. 17). While the evidence presented at hearing raises serious issues regarding the actual dates those documents were executed, i.e., whether they were backdated, those matters are not at issue in this case. However, payroll records furnished by the city, show that Trevor received a first paycheck on May 19, 2011 and thereafter received twice-monthly pay checks. (Ex. 25.)

33. On May 12, 2011, Montana statutes as they pertain to the city of Ronan provided that police officers had to be appointed by the mayor of the city.

§ 7-32-4103, MCA. There was no independent authority for Respondent to appoint officers.

34. The May 12, 2011, documents were signed by the mayor and designated Trevor Wadsworth a part-time, permanent police officer. (Ex. 17.)

35. The process for appointment of police officers in Ronan at the times at issue herein, was described in Respondent's and mayor's depositions. Summarized, Respondent provided recommendations to the mayor, who invariably approved and authorized them. However, despite the mayor appearing as a rubber-stamp for those recommendations, there is no evidence showing that there was an agreement or promise by the mayor to approve whomever was tendered by Respondent. More specifically, there is no persuasive evidence showing that there was an agreement or promise on the part of the mayor to appoint Trevor Wadsworth or any other relative of Respondent.

Steve Hughes and Allyson Jones

36. As noted in Finding 26, both Steve Hughes and Allyson Jones were not paid while attending the MLEA.

37. Allyson attended MLEA Basic commencing in April 2004. She testified that she was working part-time for the Ronan Police Department at the time she applied to the MLEA. A notice dated May 26, 2004 to POST and signed by Respondent stated that Allyson was hired on February 18, 2004 as a part-time officer. Although not paid during her MLEA attendance, there is insufficient evidence to persuade me that she was not a sworn officer at the time of her attendance or that she was not employed by the Ronan Police Department at the time of her application.

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38. Steve Hughes attended MLEA Basic. Although he was not paid during his MLEA attendance, there is insufficient evidence to to persuade me that he was not a sworn officer at the time of his attendance or that he was not employed by the Ronan Police Department at the time of his application.

AGENCY AND OFFICER IMPACT

39. The public expects its law enforcement officers to be honest and law abiding. Irrespective of practical budgetary considerations, disregard of express laws and regulations and false statements, even when related to internal law enforcement matters, inevitably undermines public confidence in the officer and agency involved. I therefore find that Respondent's conduct as charged in Count I was by its very nature and context harmful to both the reputation of the Ronan Police Department and Respondent.

EVIDENCE OF OTHER INFRACTIONS

40. Evidence that Steve Hughes and Trevor Wadsworth were employed and acted as peace officers beyond the one year period allowed in section 7-32-303(5), MCA, without successfully completing MLEA Basic was presented at hearing. The Second Amended Complaint does not encompass those matters so no findings of fact are made. However, the evidence is sufficient to warrant, indeed require, further charges and investigation. Indeed, it is my view that putting officers on the street in violation of 7-32-303(5), MCA is more serious than the infractions charged in this case.

CONCLUSIONS OF LAW

1) The Peace Officers Standards and Training Council ("POST") is a state agency established by statute. Section 2-15-2029 (1)(a), MCA, provides:

> 1) (a) There is a Montana public safety officer standards and training council. The council is a quasi-judicial board .

2) POST is empowered to "provide for the certification and recertification of public safety officers and for the suspension or revocation of public safety officers." § 44-4-403(c), MCA.

3) As an administrative agency, POST has only those powers expressly granted by statute. ***Auto Parts of Bozeman v. Employment Relations Division Uninsured Employers' Fund***, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193.

4) Citing section 44-4-403(3), MCA (2011),[5] Respondent insists that a contested case hearing can only be held **after** his POST certificate is revoked or suspended, an ironic argument if there ever was one, since it would require POST, without opportunity for a hearing, to revoke or suspend his certification in the first instance and put the burden on Respondent to challenge its action after-the-fact.

5) Respondent's argument overlooks another statutory provision which expressly and more broadly empowers the POST Council to "**provide . . . for the suspension or revocation of certification of public safety officers.**" § 44-4-403(1)(c), MCA.[6]

6) POST is expressly authorized to adopt rules implementing its statutory powers and duties. Section 2-15-2019(2), MCA, provides:

> (2) The council may adopt rules to implement the provisions of Title 44, chapter 4, part 4. Rules must be adopted pursuant to the Montana Administrative Procedure Act.

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5 Section 44-403(3), MCA (2011), provides in relevant part:

> (3) A person who has been denied certification or recertification **or whose certification or recertification has been suspended or revoked is entitled to a contested case hearing before the council pursuant to Title 2, chapter 4, part 6 . . . ..** (Emphasis added.)

6 The subsection provides in full:

> **44-4-403. Council duties -- determinations -- appeals.** (1) The council shall:
>
> . . .
>
> (c) provide for the certification or recertification of public safety officers *and for the suspension or revocation of certification of public safety officers.* (Italics added for emphasis.)

7) POST has in fact adopted a rule providing formal procedures for the suspension and revocation of a public safety officer's certification. That rule, overlooked by Respondent, is ARM 23.13.704, which provides:

> COMMENCEMENT OF FORMAL PROCEEDINGS FOR SUSPENSION OR REVOCATION OF CERTIFICATION
>
> (1) Formal proceedings may be commenced only after the filing of a complaint as described in these rules, the director's determination that formal proceedings are necessary, the designation of a presiding officer, and the issuance of a written order to show cause, and notice of opportunity for hearing.
>
> (2) Formal proceedings for suspension or revocation are subject to the Montana Administrative Procedure Act, and must be conducted pursuant to that act.
>
> (3) In formal proceedings, the respondent must file an answer, or be in default. The answer shall contain at least a statement of grounds of opposition to each allegation of the complaint which the respondent opposes.
>
> (4) Service shall be made in a manner consistent with Montana law.
>
> (5) If a review of the conduct of a person holding a certificate subject to revocation or suspension under these rules is pending before any court, council, tribunal, or agency, the director may, in their discretion, stay any proceedings for revocation and suspension pending before the council.
>
> (6) In the event the respondent fails to answer, appear, or otherwise defend a complaint against them of which the respondent had notice, the presiding officer may enter an order containing findings of fact, conclusions of law, and an opinion in accordance with the Montana Administrative Procedure Act, Montana Rules of Civil Procedure, and/or any other rule of law applicable.
>
> (7) Any party may represent themselves, or may at their own expense be represented by an attorney licensed to practice law in the state.
>
> (8) A representative from the office of the Attorney General may present the case of the complainant.

(9) The presiding officer may utilize a legal advisor to assist in conducting the hearing. If the presiding officer's legal advisor is employed by the office of the Attorney General, their contact with the representative from the office of the Attorney General who presents the case of the petitioner shall be restricted to that permitted by law.

(10) Unless required for disposition of ex parte matters authorized by law, after issuance of notice of hearing, the presiding officer may not communicate with any party or their representative in connection with any issue of fact or law in such case, except upon notice and opportunity for all parties to participate.

8) Pursuant to the forgoing rule, the POST Council determined that the due process afforded through a contested case proceeding should apply **before** any certificate is revoked or suspended, **a protection that benefits public safety officers and benefits Respondent.** Providing greater protection to public safety officers under broad authority to provide rules and procedures for suspension and revocation of certificates is **not** inconsistent with or in derogation of section 44-4-403(3), MCA The two sections must be construed together and harmonized. ***Stockman Bank of Mont. v. Mon-Kota, Inc.,*** 2008 MT 74, ¶ 31, 342 Mont. 115, 180 P.3d 1125.

9) Section 2-15-2029 (1) (b), MCA, authorizes the POST Council to "hire its own personnel and independently administer the conduct of its business . . . " POST Council in ARM 23.3.703 has provided for a director and authorized the director or designee to investigate complaints, ARM 23.3.703 (4), and for the director to "file a formal complaint with the council on their own behalf," ARM 23.3.703 (5)(a).

10) The initial complaint in this matter was filed by Wayne Ternes as executive director of POST and no evidence has been presented to show that he was in fact not the duly appointed director.[7]

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7 Assertions by Respondent's attorney made at various times that the director must be appointed by the Governor are contrary to statute and spurious.

11) The amended and second amended complaints were executed by Clayton Coker as "Acting Executive Director." No evidence or law was presented to show that he is in fact not duly designated by the POST Council as the acting director; in any event the amended complaint does not change the basic allegations in the original complaint.

12) At the time of Trevor's MLEA application, as well as when Steve Hughes and Allyson Jones applied, attendance at the MLEA was limited to "law enforcement officers" and to certain others who met qualifications adopted by the Montana Department of Justice. Section 44-10-301, MCA (2003-2011) provided:

> **44-10-301. Eligibility.** *All bona fide Montana law enforcement* officers and other individuals who meet the qualifications established by the department of justice shall be eligible to apply for admission to the Montana law enforcement academy. (Italics added for emphasis.)

The section sets up two classes of attendees: (1) bona fide law enforcement officers and (2) others meeting requirements set by the Montana Department of Justice.

13) Subjacent regulations governing attendance at the MLEA limited attendance at the MLEA to law enforcement officers in fact employed by a law enforcement agency. ARM 23.12.1201(1) provides:

> (1) An applicant to attend MLEA basic programs must be employed by a law enforcement or public safety agency within the state of Montana as a public safety officer as defined in 44-4-401(2), MCA.

A separate regulation provides for some persons who are not law enforcement officers ("preservice applicants") to attend on a competitive and self-pay basis and makes clear that part-time, as well as full-time law enforcement officers, are eligible to attend as law enforcement officers. ARM 23.12.1203 provides in relevant part:

> (1) Preservice applicants are persons not employed as full-time or part-time public safety officers. Preservice applicants shall be

> selected to attend the MLEA basic course based on their ability to meet minimum qualifications. . . .

Reserve officers are eligible to attend only as preservice applicants. ARM 23.12.1201(3).

14) Section 44-10-303, MCA, provides for local governments to pay for the attendance of their law enforcement officers:

> **44-10-303. Expenditure of funds by local governments authorized.** The expenditure of funds by any city, town, municipality, or county for the board, room, and travel expenses of the officers attending the academy shall be a lawful expenditure.

The provision has been part of Montana law since 1959.

15) Section 44-10-302, MCA, provides that officers attending the academy are to be paid their regular salary during their attendance.

> **44-10-302. Retention of employment rights.** All officers shall be paid their regular salary during their attendance at the academy, and time spent in such attendance shall not be deducted from the vacation to which any attending officer is entitled. No officer shall lose any pension, seniority, or other rights by reason of attendance at the academy.

This provision was originally enacted in 1959 and was last amended 1967.

16) Supervision of a municipal police department and the appointment, removal and discipline of its officers is statutorily delegated to the mayor, or to the city manager in the cities operating under a commission-manager form of government. As applicable to this case, it is the mayor. Section 7-32-4103, MCA (2007-2011),[8] provides:

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8 The current version of the section was adopted in 2007, when the section was last amended. The amended section did not materially change the provisions of the provision. From 2003 until its amendment in 2007, the section provided:

> In all cities and towns, the mayor, or the manager in those cities operating under the commission-manager plan, shall have charge of and supervision over the police department thereof. He shall appoint all the members and officers thereof. Subject to the provisions of this part, he shall have the power to suspend or remove any member or officer of the force. He shall make rules, not inconsistent with the provisions of this part, the other laws of the state, or the

> **7-32-4103. Supervision of police department.** The mayor in all cities and towns or the manager in those cities operating under the commission-manager plan has charge of and supervision over the police department. The mayor or manager shall appoint all the members and officers of the department. Subject to the provisions of this part, the mayor or manager may suspend or remove any member or officer of the force. The mayor or manager shall make rules, not inconsistent with the provisions of this part, the other laws of the state, or the ordinances of the city or town council, for the government, direction, management, and discipline of the police force.

17) As police chief, however, Respondent was in direct "charge and control of all police officers." § 7-32-4105 (1)(c), MCA (2003-2011).

18) At the time of Trevor's MLEA application, as well as the applications by Steve Hughes and Allyson Jones, any policeman or other peace officer was required to take an oath of office "at the time of appointment." § 7-32-303(4) MCA (2009); and § 7-32-303(3), MCA (2003). Moreover, the appointing authority was required to provide written notice of the appointment to POST within 10 days. § 7-32-303 (5), MCA (2009); § 7-32-303 (4), MCA (2003).

19) The grounds for revocation or suspension of a POST certificate are set forth in ARM 23,13.702(2) (2008). The subsections invoked in the Second Amended Complaint are as follows:

> (2) The grounds for sanction, suspension, or revocation of the certification of public safety officers are as follows:
> (a) willful falsification of material information in conjunction with official duties;
> ...
> (f) neglect of duty or willful violation of orders or policies, procedures, rules, or regulations;
> (g) willful violation of the code of ethics set forth in these rules;
> (h) other conduct or a pattern of conduct which tends to significantly undermine public confidence in the profession;
> . . . .

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ordinances of the city or town council, for the government, direction, management, and discipline of the police force.

(k) acts that are reasonably identified or regarded as so improper or inappropriate that by their nature and in their context are harmful to the agency's or officer's reputations.

20) Count I charges that in certifying Trevor's application for MLEA Basic Respondent was guilty of "willful falsification of material information in conjunction with official duties" in violation of ARM 23,13.702(2)(a). As set forth in the findings of fact, in his capacity as chief of police Respondent knowingly and willfully falsified Trevor's MLEA application by certifying that Trevor was a sworn police officer employed by the Ronan Police Department. **Count I is therefore proven.**

21) Count II charges that Respondent violated ARM 23,13.702(2)(f) by hiring his son – Trevor Wadsworth in violation of section 2-2-302, MCA. Since the mayor was responsible for appointment of police officers, and in fact appointed Trevor in May of 2011, section 2-2-302, MCA, which prohibits appointment of a relative, is inapplicable. However, an agreement or promise to appoint a relative is also proscribed by section 2-2-303, MCA, which provides:

> **2-2-303. Agreements to appoint relative to office unlawful.** It shall further be unlawful for any person or any member of any board, bureau, or commission or employee of any department of this state or any political subdivision thereof to enter into any agreement or any promise with other persons or any members of any boards, bureaus, or commissions or employees of any department of this state or any of its political subdivisions thereof to appoint to any position of trust or emolument any person or persons related to them or connected with them by consanguinity within the fourth degree or by affinity within the second degree.

Violation of section 2-2-303 was not charged. In any event the evidence presented at hearing, while suggesting that the mayor rubber-stamped officer candidates tendered by Respondent, was insufficient to show that there was an agreement or promise to appoint Trevor. There is also no case law nor Attorney General opinion which provides clear guidance with respect to Trevor's

appointment by the mayor. **Count II is therefore unproven and should be dismissed.**

22) Count III incorporates the allegations of Count I and II and adds allegations that Steve Hughes and Allysen Jones "were not sworn officers employed by the Ronan Police Department" when they went to the MLEA in 2004 and 2005. The Count alleges violation of ARM 23,13.702(2)(h), which refers to "other conduct or a pattern of conduct which tends to significantly undermine public confidence in the profession." The wording of the provision indicates that conduct violating another provision is not a separate chargeable count unless part of a "pattern of conduct. Thus, Count III must be predicated on more than proof of Count I, although proof of Count I in connection with other prohibited conduct to show a pattern of conduct is sufficient. Here, Count I was proven; however, neither Count II nor the additional conduct charged with respect to Steve Hughes and Allysen Jones was proven. **I therefore find that Count III is unproven and should be dismissed.**

23) Count IV charges that the conduct alleged in Counts I, II and III violated ARM 23.13.702(2)(g), which is based on violations of the Code of Ethics found in ARM 20.13.203. Relevant to Count IV, the Code of Ethics provides:

> 23.13.203 <u>CODE OF ETHICS</u>
>
> (1) Regulations governing certification of public safety officers requires that a code of ethics shall be administered as an oath.
> (2) The procedure for administration of the code of ethics is as follows:
> (a) each applicant for certification will attest to this code of ethics and the oath shall be administered by the head of the public safety agency for which they serve, or by the Montana Law Enforcement Academy (academy) administrator or designee;
> (b) the applicant and the administrator administering the oath will sign two copies of the public safety code of ethics; and
> (c) one copy will be retained by the applicant and the other copy will be retained in the applicant's academy student file, which will be available for inspection by the council staff at any reasonable time.
> (3) The oath of the public safety officers' code of ethics is:

. . .

"I shall perform all duties impartially, without favor or ill will and without regard to status, sex, race, religion, creed, political belief or aspiration. I will treat all citizens equally and with courtesy, consideration, and dignity. I will never allow personal feelings, animosities, or friendships to influence my official conduct.

. . .

I will not engage in nor will I condone any acts of corruption, bribery, or criminal activity; and shall disclose to the appropriate authorities all such acts. I will refuse to accept any gifts, favors, gratuities, or promises that could be interpreted as favor or cause me to refrain from performing my official duties.

. . .

"I will at all times ensure that my character and conduct is admirable and will not bring discredit to my community, my agency, or my chosen profession."

24) The Code of Ethics was adopted in 2008 and is expressly made a part of an oath to be sworn in connection with receipt of any POST certification. It was effective August 1, 2008, **after** the last POST certificate was issued to Respondent. It was therefore not part of any oath taken by Respondent. **Accordingly, Count IV is unproven and dismissed.**

25) Count V incorporates the allegations of Counts I, II and III and charges that the conduct alleged in those counts violated ARM 23,13.702(2)(k), which is based on "acts that are reasonably identified or regarded as so improper or inappropriate that by their nature and in their context are harmful to the agency's or officer's reputations." Respondent's falsification of Trevor's application, as charged in Count I, inevitably undermines the integrity and reputation of Respondent and his agency. While Counts II and III were unproven, Count I was proven and in itself is sufficient and compelling grounds for proof of Count V. **Accordingly, Count V is proven.**

RECOMMENDED DISPOSITION

My recommendation is based solely on the findings with respect to the specific charges before me.

As I have found, Respondent falsified Trevor Wadsworth's application by certifying he was a sworn law enforcement officer and employee of the Ronan Police Department, when in fact he was not. The evidence further demonstrated Respondent's disregard for statutes and regulations regarding attendance of officers at the MLEA. On the other hand there is evidence that to some extent his actions were the result of institutional issues and policies limiting the resources available to pay officers and send them to the MLEA . While that evidence does not excuse his disregard of statutes and regulations and his false certification, it is evidence to consider in any disposition. Also a consideration in any disposition is the length of Respondent's law enforcement career, which spans 27 years, and the lack of any evidence of any prior disciplinary action taken against him in those 27 years, as well as well as the fact that Respondent's conduct did not involve interaction with the public or local law enforcement matters.

Complicating the matter is evidence that Respondent may have allowed officers who failed to complete MLEA Basic within one (1) year of appointment to continue acting as law enforcement officers with arrest powers. Section 7-3-303, MCA, provides in relevant part:

> 5) (a) Except as provided in subsections (5)(b) and (5)(c), it is the duty of an appointing authority to cause each peace officer appointed under its authority to attend and successfully complete, within 1 year of the initial appointment, an appropriate peace officer basic course certified by the Montana public safety officer standards and training council. **Any peace officer appointed after September 30, 1983, who fails to meet the minimum requirements as set forth in subsection (2) or who fails to complete the basic course as required by this subsection (5)(a) forfeits the position, authority, and arrest powers accorded a peace officer in this state.** (Emphasis added.)

Disregard of this section seems to this hearing officer to be a more serious matter than those charged in the complaints in this matter: Putting officers on the street and authorizing them to arrest persons in violation of this provision not only

brings into question the legality of any arrests they make and the legality of any other actions they take as police officers but may subject the agency to both public condemnation and serious civil liability.

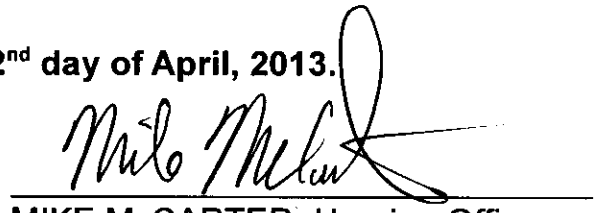
With all of this mind, and taking into consideration the evidence and charges before me, I recommend as follows:

(1) That POST Council revoke Respondent's supervisory certification and any other certificate which is predicated on courses dealing with the administration and supervision of a law enforcement agency and that it require Respondent to reapply for such certifications and complete all coursework required for those certifications;

(2) That POST Council suspend all of Respondent's other certifications for period of time the Council deems appropriate under the circumstances;

(3) That POST Council require the Director to review the evidence indicating that Respondent has allowed officers to perform law enforcement functions in violation of section 7-3-303(5)(a), MCA, and conduct such further investigation as needed to determine if further charges are appropriate.

Done and dated this 22nd day of April, 2013.



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