

PUBLIC REPORT

Ombudsman Investigation

Department of Health and Social Services, Division of Health Care Services, Background Check Program

A2018-0629

January 23, 2020

The Alaska State Ombudsman provides a public summary of the investigation of complaint A2018-0629 pursuant to AS 24.55.200.

Introduction

In May 2018, the Ombudsman received a complaint about the Department of Health and Social Services Background Check Program (BCP), which is within the Division of Health Care Services. The complainant explained that their employer received a notice from the BCP stating that they had a permanent barrier stemming from a municipal misdemeanor conviction more than twenty years before. As a result, the employer placed the complainant on administrative leave. The complainant hired a lawyer to help with requesting redetermination of the barrier determination. BCP staff advised the complainant to request a variance instead. The complainant contacted the Alaska State Ombudsman for help at that point.

The complainant had been employed in various positions that required a valid background check through the BCP and had been cleared on multiple occasions. The old criminal conviction had not prevented clearance before, so the complainant did not understand why the criminal conviction was now considered a barrier. The complainant requested help resolving the problem, so they could return to work.

Assistant Ombudsman Kate Higgins investigated the complaint. She reviewed documents provided by the complainant, including the court file for the misdemeanor conviction, the statutes and regulations governing the BCP, and relevant case law. She also interviewed the BCP Manager. The investigation revealed these facts.

In 1996, the complainant pled no contest to a violation of Anchorage Municipal Code 8.05.060(b)(1), which made it a violation to “knowingly, intentionally, or negligently and without justifiable excuse” cause or permit a child under the age of 16 years to be “in any place under circumstances creating a substantial risk of injury to the child.” The charging document did not provide any specific information as to how the complainant was alleged to have violated the code. The complainant was cited but not arrested. The complainant was not represented by an attorney at the initial hearing. The complainant pled no contest and was sentenced to a fine (half of which was suspended), 20 days incarceration (all suspended), and three years of probation. There is no evidence in the court file that the complainant violated the terms of probation or was charged with a criminal offense in the years since.

In April 2012, the BCP cleared the complainant.¹ The complainant worked for multiple facilities covered by the background check program. Those employers “piggy-backed” on the original clearance.² The complainant remained continuously employed in positions subject to the BCP from the original clearance in 2012 until they attempted to renew their clearance in 2018.

In March 2018, the complainant submitted a background check renewal application. On April 10, 2018, the BCP notified the complainant and their employer that the complainant had a permanent barrier to employment.³ As a result of the BCP’s notice, the complainant was placed on administrative leave.

On April 23, 2018, the complainant’s attorney requested redetermination by the BCP. The attorney referred to the “barrier crimes matrix” which had been used in the past by the BCP to guide its decision-making.⁴ At some point after the request for redetermination was submitted, the attorney spoke with the BCP Manager. The attorney told the ombudsman investigator that the manager said that the matrix was simply “advisory” and not mandatory authority. The manager described the

¹ In 2012, the BCP regulations specified that a valid background check was good for six years. In July 2017, the BCP amended its regulations and now requires individuals to renew their background checks every five years.

² When a person who holds a valid background check clearance applies to work for a new employer, the employer has the option of “piggy-backing” on the applicant’s original clearance or having the applicant submit to a new background check. Piggy-backing is a more efficient option if the applicant still has a significant amount of time left on their current clearance.

³ The USPS tracking information shows that the letter was never delivered to the complainant and the postal service returned it to the BCP in late May 2018.

⁴ See Appendix A.

call differently, stating that they had explained that the matrix was no longer reliable authority because the regulations underpinning the matrix had been revised in July 2017. The manager said that the conversation ended when the attorney said they planned to do more research and would get back to the BCP. It does not appear that the BCP took any action on the complainant's April 23 request for redetermination because the manager was waiting to hear back from the complainant's attorney.

In early May 2018, the complainant was advised by a different BCP employee to submit a variance request. Instead, the complainant filed a complaint with the Ombudsman on May 9, 2018.

On May 10, 2018, the ombudsman investigator notified the BCP manager of the complaint and asked if the BCP would act on the complainant's request for redetermination. On May 30, 2018, the manager notified the investigator that the BCP had reversed its decision. The manager explained that staff had erred in processing the complainant's renewal due to regulation changes that had taken effect in July 2017.

The complainant returned to work on June 5, 2018. The complainant had used nearly 300 hours of personal leave to mitigate their loss of earned income.⁵ In addition, the complainant incurred \$505.50 in attorney's fees for drafting the request for redetermination.

Allegation

Based on the facts alleged in the complaint, the Ombudsman investigated the following allegation:

Based on a Mistake of Fact: The Background Check Program determined that the complainant's criminal conviction was a permanent barrier to employment when, in fact, it is not.

⁵ The value of the complainant's lost personal leave is \$7,010.75 (291.75 hours x \$24.03 per hour).

Relevant Statutory, Regulatory, Policy Authority

7 AAC 10.905. Barrier crimes and conditions.

...

(b) Except as otherwise provided in this section, the following are permanent barriers, including the attempt, solicitation, or conspiracy to commit any of the following crimes or to violate a law or ordinance of this state or of another jurisdiction if that law or ordinance has similar elements to one or more of the following crimes, except that the barrier time for an adjudication as a minor for crimes under this subsection is limited to 10 years from the date of the individual's majority:

...

(7) a crime under AS 11.51 (Offenses Against the Family and Vulnerable Adults) as follows:

(A) AS 11.51.100 (Endangering the Welfare of a Child in the First Degree); . . .

AS 11.51.100. Endangering the welfare of a child in the first degree.

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child . . .

Anchorage Municipal Code 8.05.060. Child abuse (effective in 1996)

A. It is unlawful for any person to commit child abuse.

B. A person commits child abuse if he knowingly, intentionally or negligently and without justifiable excuse causes or permits a child to be:

1. In any place under circumstances creating a substantial risk of injury to the child;
2. Abandoned, tortured, cruelly confined, or cruelly punished; or
3. Deprived of necessary food, clothing, or shelter.

Analysis

The complainant pled no contest to a municipal misdemeanor in 1996. The complainant was cleared by the BCP sixteen years later in 2012. Then, in 2018, when the complainant tried to renew their clearance, the BCP determined that the 1996 conviction was a permanent barrier. In May 2018, after the ombudsman investigator asked the BCP to review the complainant's request for a redetermination, the BCP determined that it had erred. This decision was consistent with the 2012 background check clearance.

The BCP manager explained to the ombudsman investigator that the BCP erred in its 2018 determination that the complainant had a permanent barrier because of the recent changes in regulations regarding barrier crimes and conditions. However, the 2017 regulation changes did not alter the standards for permanent barriers (7 AAC 10.905(b)). Because 7 AAC 10.905(b) was unaffected by the 2017 revisions, it should not have affected the 2018 renewal.

BCP's Response to the Ombudsman's Preliminary Findings

The BCP manager who had performed the redetermination of the background clearance left the agency. A subsequent manager responded to the Ombudsman's preliminary report on March 7, 2019. That manager stated that, in 2016, the Department of Law had provided the BCP with legal advice that AMC 8.05.060 and AS 11.51.100 were equivalent. Based on this advice, the BCP imposed a permanent barrier if the applicant was convicted of violating AMC 8.05.060, without a review of the applicant's court file.

That manager explained the BCP's 2018 decision to bar the complainant was correct under the advice given by the Department of Law. Therefore, the BCP intended to revoke the complainant's eligibility determination again. The BCP would give the complainant a 90-day window to pursue a variance. During a subsequent phone call with Ombudsman Kate Burkhart, that BCP manager agreed to hold revoking the complainant's clearance until further discussions could be had.

The Ombudsman and investigator subsequently had several in-person consultations with BCP and Health Care Services management and its Assistant Attorney Generals. On June 14, 2019, the

Department of Law provided additional analysis of the equivalency issue, concluding that it was “reasonable and legally supportable for [the BCP] to conclude that the ordinance is equivalent to AS 11.51.100.”

On September 16, 2019, the Ombudsman issued another preliminary report to the BCP offering additional recommendations. The BCP responded on October 11, 2019, accepting two recommendations and rejecting the others. The BCP expressly accepted the recommendation not to revoke the complainant’s background check clearance “in the interest of justice,” although the agency maintains its position that the complainant’s conviction constitutes a permanent barrier.

Equivalency Determination

7 AAC 10.905(b) provides that a conviction of Endangering the Welfare of a Child in the First Degree, or of another law or ordinance from another jurisdiction with “similar elements,” is a permanent barrier. Thus, in order to consider the complainant’s conviction to be a permanent barrier, it must have similar elements to AS 11.51.100.

The Alaska Supreme Court recently examined how the Department of Public Safety makes equivalency determinations for the purposes of the state’s sex offender registry.⁶ In reviewing, whether two individuals’ out-of-state convictions required them to register with Alaska’s sex offender registry, the Court held that “it is the *law* that must be similar. We therefore ‘employ a categorical approach by looking to the statute . . . of conviction, rather than to the specific facts underlying the crime’ to determine whether that statute is similar.”⁷ The Court stated “if the out-of-state statute ‘is more restrictive than the Alaska statute’ in such a way that ‘any offender who could be convicted under the [out-of-state] law would be subject to conviction under the elements of the Alaska statute,’ the elements are ‘similar.’”⁸

⁶ *State of Alaska, Dept. of Public Safety v. Doe I*, 425 P.3d 115 (Alaska 2018)

⁷ *Id.* at 119 – 120, citing *Esquivel-Quintana v. Sessions*, — U.S. —, 137 S.Ct. 1562, 1568, 198 L.Ed.2d 22 (2017) (alteration in original) (quoting *Kawashima v. Holder*, 565 U.S. 478, 483, 132 S.Ct. 1166, 182 L.Ed.2d 1 (2012)).

⁸ *Id.* at 120, citing *State v. Delagarza*, 8 P.3d 362, 366 (Alaska App. 2000) (quoting *Martin v. State*, 704 P.2d 1341, 1342 (Alaska App. 1985)); *cf. Esquivel-Quintana*, 137 S.Ct. at 1568 (“Under [the categorical] approach, we ask whether ‘the state statute defining the crime of conviction’ categorically fits within the “generic” federal definition of a corresponding aggravated felony.’ In other words, we presume that the state conviction ‘rested upon ... the least of th[e] acts’ criminalized by the statute, and then we determine whether that conduct would fall within the federal

Using the Alaska Supreme Court’s categorical approach, we compared the elements of the municipal code provision, AMC 08.05.060, under which the complainant was convicted, against the elements of the state statute, AS 11.51.100. At the time of the complainant’s conviction, AMC 08.05.060(b)(1) allowed conviction if the individual “*knowingly, intentionally, or negligently*” caused or permitted a child to be in any place under circumstances creating a substantial risk of injury to the child. The Department did not specify in its notice which provision of AS 11.51.100 the complainant’s conviction is “similar” to, but it appears to most closely resemble AS 11.51.100(a)(1). AS 11.51.100(a)(1) requires that the individual “*intentionally* deserts the child in a place under circumstances creating a substantial risk of physical injury to the child.”

On behalf of the BCP, the Department of Law affirmed the opinion that AMC 08.05.060(b)(1) and AS 11.51.100 are equivalent despite differences in the plain language of the two laws. The Department of Law also argued that “any ambiguity between the two statutes should be resolved in favor of protecting vulnerable Alaskans, which is the primary purpose of enacting regulations establishing barring crimes and conditions.”

The municipal code in effect at the time of the complainant’s conviction was broader than the state statute. Under the municipal code, the *mens rea* element included knowing, intentional, or negligent conduct. The state statute includes only intentional conduct. Because it was possible to violate the municipal code through negligent or unintentional actions, a violation of the municipal code would not necessarily constitute a violation of the more narrow state statute.

While it is possible that some violations of the historic AMC 08.05.060 involved intentional actions (something that would be determined based on the facts and court findings in each case), not all violations of that ordinance would be the equivalent of a conviction under AS 11.51.100. The Ombudsman is not persuaded that the BCP could reasonably find that all convictions under the historic AMC 08.05.060 are equivalent to a conviction of AS 11.51.100 such that they constitute a permanent barrier to employment.

definition of the crime.” (second and third alterations in original) (citation omitted) (first quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013); then quoting *Johnson v. United States*, 559 U.S. 133, 137, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010))).

Based on the preponderance of the evidence, the Ombudsman finds the allegation that the BCP acted based on a mistake of fact when it found the complainant's municipal conviction was a permanent barrier *justified*.

Recommendations

Recommendation One: The BCP should revise its barrier crimes and conditions matrix and make it publicly available on its website.

Prior to its 2017 regulation changes, the BCP had a publicly available spreadsheet listing all the barrier crimes and conditions and the barrier time associated with each. It was relatively easy to read and more accessible to the public than reading through pages of regulations to find out which specific offenses constituted barriers and for how long. Although the Department has taken the matrix off its website, it can be found if someone “googles” it. This could lead to confusion for others, as it did for the complainant's attorney, who found it and cited it as authority when requesting redetermination.

In the BCP's March 7, 2019 response, the BCP manager indicated that an updated matrix had been made publicly available on the agency's website. However, we were unable to locate the matrix, updated or otherwise, during subsequent reviews of the BCP's website. In its October 11, 2019 response, the BCP clarified that the matrix had been posted but then taken down, upon advice of the Department of Law, for further revision. The BCP stated that it intended to re-post the matrix by the end of 2019 but it has not done so as of the date of this report.⁹

Recommendation Two: The BCP should not revoke the complainant's background check clearance. In the alternative, if the BCP revokes the complainant's background clearance based on the 1996 municipal conviction, it should instead grant the complainant a permanent variance.

⁹ See <http://dhss.alaska.gov/dhcs/Pages/cl/bgcheck/default.aspx>, last visited January 17, 2020.

The complainant was given a clear background check in 2012 and subsequently worked, continuously, for several employers covered by the BCP's requirements. When they attempted to renew their background check, the BCP initially declared in April 2018 that the complainant had a barrier. It then reversed that determination in May 2018 after ombudsman inquiry. In March 2019, the BCP changed its position again, contending that the conviction *is* a permanent barrier.

As discussed above, the Ombudsman's review of the relevant laws and the court records from complainant's conviction shows that broad *mens rea* elements of AMC 08.05.060(b)(1) – and the violation the complainant pled to – are not equivalent to the intentional crime prohibited by AS 11.51.100(a)(1). However, even if the BCP is correct and the 1996 conviction poses a permanent barrier, the Department is estopped from barring the complainant at this late date.

The Alaska Supreme Court has held that:

Estoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.¹⁰

The BCP granted the complainant a clearance in 2012, asserting a position that clearly satisfies the first element of estoppel. The complainant relied on that clearance by seeking and holding employment in various positions requiring a BCP clearance, thus satisfying the second element.

When, in 2018, the BCP determined that the conviction was a barrier, the complainant suffered clear prejudice in that their employer placed them on administrative leave. The complainant was unable to work for approximately seven weeks, until the BCP reversed its decision. The BCP then sought to revoke the clearance again, which would undoubtedly harm the complainant's ability to work and earn a living in their chosen field. It would also cause the complainant reputational harm.

The fourth prong of the test is arguably the key factor. In *Municipality of Anchorage v. Schneider*, the Alaska Supreme Court stated that “even where reliance has been foreseeable, reasonable, and

¹⁰ *Crum v. Stalaker*, 936 P.2d 1254, 1256 (Alaska 1997).

substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced.”¹¹

In that case, the court upheld a settlement between the city and the Schneiders even though the settlement violated the city’s zoning law. The Schneiders owned property in Eagle River that was zoned to allow construction of up to 8 dwelling units, provided that the units were connected. The Schneiders built two un-connected units and the city brought action against them. During a subsequent settlement agreement, the city allowed the Schneiders to build three additional units to connect the first two units and bring them within code. Unfortunately, no one realized at the time of the settlement that the code had changed and, under the new code, a maximum of two units per lot were allowed. After the Schneiders had spent a significant amount of money in reliance on the settlement agreement, the city moved to revoke the building permit. The court found that the interests of justice required enforcement of the settlement agreement, stating:

The proposed structure will not violate health or safety codes. Further, the proposed structure would have satisfied the terms of the zoning ordinance then in effect had the settlement been reached a month earlier. Finally, the record contains no evidence that the Schneiders’ proposed construction will be seriously out of character with the present structures in the area.¹²

Turning to this complaint, the public interest at issue is the protection of vulnerable populations from potential harm by individuals with a verified history of abuse or neglect. The Ombudsman recognizes and supports this important governmental interest.

The BCP consulted the Office of Children’s Services to find out if that agency had taken any action in response to the 1996 criminal charges (like filing a Child in Need of Aid petition); it had not. Had there been OCS action, or a child protection case, that would have resulted in a separate barrier under the BCP’s regulations.¹³ Further, in the years since the complainant was granted the background check clearance in 2012, there is no evidence that the complainant has engaged in behavior or conduct that would be inconsistent with the Department’s standards. For these reasons,

¹¹ 685 P.2d 94, at 97 (Alaska 1984).

¹² *Id.* at 98.

¹³ 7 AAC 10.905(f)(3) provides that a substantiated report of harm, or any court findings from a child in need of aid case results in a 10-year barrier and termination or relinquishment of parental rights results in a permanent barrier.

it does not appear that the interest of justice would be prejudiced by the enforcement of estoppel against the Department's planned action to revoke the complainant's clearance.

If the BCP intends to maintain its position that the 1996 conviction is a barrier, it should alternatively grant the complainant a variance based on the procedural history of this case and the fact that the complainant does not appear to pose a threat to the vulnerable populations served by those regulated by the BCP. In its response to the preliminary report, the Department of Law asserted that, when the BCP reversed its barrier determination in May 2018, "staff was essentially conducting an independent variance inquiry, not a redetermination inquiry." Because the BCP has already determined that the complainant meets the criteria for a variance, it should immediately offer one if it intends to revoke their background clearance again.

In its October 11, 2019 response, the BCP accepted with the recommendation not to revoke the complainant's clearance "in the interest of justice," although the agency indicated that it still contends that their conviction constitutes a permanent barrier. The BCP also reported that "case notes and a header have been added to [the complainant's] profile in the Background Check" so that if the complainant "applies for an updated clearance, [they] will not be barred for this offense."

Recommendation Three: The BCP should compensate the complainant for the financial losses they incurred because of the BCP's mistaken determination that the complainant had a permanent barrier to employment.

The complainant spent approximately seven weeks on administrative leave pending the BCP's decision on the request for redetermination. During that time, the complainant was able to mitigate their losses by using accrued leave, but that deprived the complainant of the ability to use their personal leave for other reasons. Additionally, the complainant bore the expense of retaining a lawyer to research the issue and request redetermination on their behalf. Altogether, the complainant's losses totaled \$7,516.25.¹⁴

The BCP rejected this recommendation, stating that there was no basis in law that would require the BCP to compensate the complainant for their losses. The Ombudsman notes that the Alaska

¹⁴ \$7,010.75 in lost personal leave + \$505.50 attorney's fees = \$7,516.25.

Tort Claims Act (AS 09.50.250) partially waives the State’s immunity from being held responsible for harms it may cause to citizens by its actions or inactions, and points to case law from the Alaska Supreme Court regarding the State’s sovereign immunity. The Alaska Supreme Court has held that, while the State has immunity from suits based on government decisions related to policymaking and planning, state agency “decisions that are merely operational in nature are not considered to be discretionary acts and therefore are not immune from liability.”¹⁵ ““Normal day-by-day operations of the government’ are not planning decisions and are not entitled to immunity under the discretionary function exception.”¹⁶

The BCP also asserted that the delay in its decision on the request for redetermination was caused by the complainant’s attorney, and not the agency. The evidence shows that BCP’s decision to revoke the complainant’s background clearance had the direct effect of putting them out of work. The BCP’s decision cost the complainant a significant amount of leave and legal expenses. The complainant should not be expected to bear the burden of the BCP’s mistake.

The BCP also stated that the complainant could have requested a variance to continue working while their request for reconsideration was pending. That response ignores the fact that the BCP’s notification of the barrier determination did not notify the complainant that they could request a variance to allow them to continue working while their redetermination request was pending.

Recommendation Four: The BCP should work with the Department of Law when making equivalency determinations in the future.

During the consultation process, the BCP manager explained that making equivalency determinations is complex and technical work. BCP staff are Criminal Justice Technicians who need bright-line guidance to follow when making equivalency determinations.

The Ombudsman agrees that this department function is complex and technical, requiring a certain proficiency with legal research and analysis. Making an accurate determination of whether a

¹⁵ *Carson v. State*, 598 P.2d 969, 972 (Alaska 1979) (citing *State v. l’Anson* 529 P.2d at 193). See also *State v. Abbott*, 498 P.2d 712 (Alaska 1972); *Steward v. State*, 322 P.3d 860 (Alaska 2014); *R.E. v. State*, 878 P. 2d 1341 (Alaska 1994).

¹⁶ *Steward v. State*, 322 P.3d 860, 863 (Alaska 2014) (citing *State v. Abbott*, 498 P.2d 712 at 720 (quoting *Swanson v. U.S.*, 229 F. Supp 217, 220 (N.D.Cal 1964))).

municipal or out-of-state conviction is equivalent to an Alaska state crime identified as a barrier requires reviewing the elements of the law of the person's conviction and comparing it to the elements of the in-state barrier crime. For an older conviction, the BCP may need to review historical versions of the law to see what the law said at the time of the person's conviction. They may also need to review court records to determine the exact nature of the crime charged and findings made by the court. Doing this accurately takes time and an understanding of how to interpret statutes and their elements.

The Ombudsman disagrees that the complexity of its functions excuses the BCP from doing the necessary research and analysis to make accurate determinations – especially when the consequences of missing a barrier crime is risk to vulnerable Alaskans, while the consequences to someone wrongly determined to have a barrier are severe and can include permanent disqualification from entire classes of employment. Thus, we recommend that the BCP consult with the Department of Law when making equivalency determinations. This will ensure that legal professionals will review the correct version of the law under which the person was convicted and compare it to the barrier crime in a way that comports with the Supreme Court's holding in *Doe*.

The BCP responded that it does confer with the Department of Law and did so in this case. However, the evidence shows that the BCP conferred with the Department of Law about the complainant's request to renew their clearance only **after** the Ombudsman issued her first preliminary confidential report.

Recommendation Five: The BCP should offer pre-deprivation due process to individuals before revoking a valid background clearance.

The structure of the BCP is such that employers covered by its requirements are prohibited from hiring or employing individuals with barriers.¹⁷ These employers operate in multiple industries, including health care, foster care, daycare centers, assisted living homes, and providers of home and community-based waiver services. Thus, a barrier completely forecloses an individual from a wide range of employment opportunities.

¹⁷ See AS 47.05.310 and AS 47.05.325.

The complainant had been cleared by the BCP in 2012 and worked continuously after that with protected populations. At the time the complainant was originally cleared, a valid background check was good for six years.¹⁸ Because the complainant had not been subject to any new criminal charges or engaged in conduct that would constitute a civil barrier, they had a reasonable expectation that the 2018 renewal would be granted without issue. The complainant could not reasonably expect that the BCP would reverse its previously held position as to the decades-old municipal conviction.

Further, the BCP's decision to revoke the complainant's clearance came without any warning. Although the BCP attempted to notify the complainant after the fact, the complainant was not given advance notice or an opportunity to challenge the revocation before they were determined ineligible for work. While the BCP regulations specify that an applicant or entity can request a 30-day delay of the imposition of a revocation,¹⁹ the notice that the BCP mailed to the complainant contained no information about the ability to request a delay.

The Alaska Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law."²⁰ Due process includes both procedural and substantive prongs. Procedural due process deals with the processes used by governmental agencies prior to the deprivation. At its most basic, procedural due process requires notice and the opportunity to be heard.

The Alaska Supreme Court has held that at-will governmental employees have no property interest in continued employment, but that a property interest may be created by the terms of employment, such that procedural due process requirements apply.²¹ The complainant's situation is somewhat different in that the state action revoking their background clearance interferes with, and forecloses, employment opportunities within the private sector, rather than employment with a governmental entity.

¹⁸ In 2017, the BCP revised 7 AAC 10.910(c) requiring individuals to renew their background check every five years.

¹⁹ 7 AAC 10.945(d).

²⁰ Alaska Const. art. I, §7.

²¹ See *Nichols v. Eckert*, 504 P.2d 1359 (Alaska 1973), holding that non-tenured teachers must be provided a hearing to contest their dismissal, and *Breeden v. City of Nome*, 928 P.2d 924, (Alaska 1981), holding that an employment contract with a 30-day notice of termination provision gave rise to a property interest.

Property interests may also be found in the form of business licenses. The Alaska Supreme Court has held on several occasions that license-holders have a property interest that is protected by the due process provision of the Alaska Constitution. In *Frontier Saloon, Inc. v. Alcoholic Beverage Control Board*, the Court found that “an interest in a lawful business is a species of property entitled to the protection of due process.”²² In *Herscher v. State, Dept. of Commerce*, the Court held that a hunting guide had a property interest in his state-issued license, such that due process requirements applied.²³

A background check clearance may be analogous to a property interest in a state-issued license. Once issued, a background clearance is valid for a set duration (five years) provided that the individual does not engage in conduct that would constitute a barrier. A person can reasonably expect to rely on the BCP’s clearance when seeking out and obtaining employment. As long as the individual does not engage in conduct prohibited by the BCP’s regulations, they can expect that subsequent renewals of their clearance would be routinely granted.

The Ninth Circuit Court of Appeals has held that individuals placed on the California child abuse registry have a protected liberty interest.²⁴ The *Humphries* case involved a couple placed on the child abuse registry after one of their children falsely reported they had abused her. There was no mechanism for the couple to contest their placement on the registry. Like Alaska’s BCP, various entities were required to consult the California registry prior to hiring or allowing an individual to volunteer.²⁵ Unlike Alaska’s system, however, entities were not prohibited from hiring or associating with an individual placed on the child abuse registry.²⁶ The Court held that “where a state statute creates both a stigma and a tangible burden on an individual’s ability to obtain a right or status recognized by state law, an individual’s liberty interest has been violated.”²⁷

Based on the available case law, a court could find that the complainant had either a property or liberty interest protected by the due process clause of the Alaska Constitution. Once that property

²² 524 P.2d 657, at 659 (Alaska 1974).

²³ 568 P.2d 996, at 1002 (Alaska 1977).

²⁴ See *Humphries v. County of Los Angeles*, 554 F.3d 1170 (9th Cir 2009).

²⁵ *Id.* at 1177-1178.

²⁶ *Id.* at 1188.

²⁷ *Id.*

or liberty interest is found, *Matthews v. Eldridge* provides the framework for assessing the level of due process required:

identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁸

In reviewing the constitutionality of municipal ordinances regulating licensing for operators and employees of massage parlors, the Alaska Supreme Court stated that “the individual has an interest in pursuing a chosen career and making a livelihood.”²⁹ That would seem to apply to here. The complainant has an interest in continued employment within their profession.

A court would next assess the adequacy of the BCP’s safeguards against erroneous determinations. Individuals may request redetermination if they feel the BCP made a mistake.³⁰ However, the BCP has 30 days to issue a decision on a request for redetermination.³¹ For those already employed, a 30-day delay may mean the loss of pay for a month and possibly the job entirely. For those employed in the fields regulated by the BCP, loss of pay for any length of time is likely a significant financial burden. The BCP’s regulations specify that if a background clearance is revoked, the BCP has the discretion to delay imposition of the barrier for up to 30 days.³² However, it is up to the individual or the individual’s employer to request the delay. If the notice that the BCP sent to the complainant is any indication, it does not appear that the BCP routinely notifies individuals of their ability to request a delay.

While there are some safeguards in place for individuals incorrectly determined to have a barrier, those safeguards may not be adequate to protect the individual against the financial and reputational loss that accompanies an incorrect barrier determination. There is no doubt that the

²⁸ *Matthews v. Eldridge* 424 U.S. 319, 334-335 (1976).

²⁹ *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 37 (Alaska 1980).

³⁰ 7 AAC 10.927.

³¹ 7AAC 10.927(c).

³² 7 AAC 10.945(d).

State has a significant interest in protecting the vulnerable populations served by individuals subject to the BCP's requirements. Yet, as the *Humphries* court identified, the question is not whether the state's goal of identifying and preventing child abuse was significant, "but rather whether California has a significant interest in having a limited process by which an individual can challenge inclusion on the [child abuse registry], and to what extent adding additional processes will interfere with the overarching interest in protecting children from abuse."³³

We understand that offering pre-deprivation due process to individuals prior to revoking a previously valid background clearance imposes an administrative burden on the BCP. However, not doing so unfairly shifts the burden to a private citizen to bear the personal reputational and financial burden of being placed out of work while trying to navigate the bureaucracy of requesting redetermination and waiting for the agency's decision.

Note: The Ombudsman is not recommending that the BCP offer hearings to those individuals who are barred in their initial application for a background clearance or who engage in new conduct that forms the basis of a barrier. This recommendation is **limited** to those who have already been cleared by the BCP and have relied on that clearance in obtaining employment with an entity requiring background clearance.

The BCP rejected this recommendation, stating that an individual "can apply for the variance or redetermination process and continue to be associated with the provider." The BCP's response does not address the remedy proposed. A pre-deprivation hearing would allow an individual to contest the BCP's determination **before** experiencing the negative consequences that flow from a barrier. While it is true that an individual may continue to be associated with their employer pending a variance or redetermination request, that association is wholly dependent on the employer's willingness to maintain employment based on the request for a variance and then on the BCP's decision to grant the request.

³³ *Supra* n. 24 at 1194.

Recommendation Six: The BCP should allow individuals to request an exemption from a barrier determination, if they can show that they are unlikely to reoffend, or that their barrier does not pose a risk of harm to the clientele they serve in the course of their employment.

The Alaska Supreme Court has held that the state’s sex offender registry violated the privacy rights of sex offenders “to the extent it applies to sex offenders who do not present a danger of committing new sex offenses.”³⁴ In order to avoid striking down the sex offender registry entirely, the Court held that offenders must be given the opportunity to prove that they do not pose a threat to the public. If an offender prevails, “he should be relieved of the requirements of registration.”³⁵

If a convicted sex offender is entitled to argue that he should no longer be required to register as a sex offender because he poses no danger to the public, then individuals subject to a barrier determination – whether criminal or civil – should be entitled to make the argument that their barrier does not pose a risk of harm to the clientele served in their employment. The BCP used to have a provision that conceivably allowed individuals to request removal from the program’s registry.³⁶ AS 47.05.330(j) provided:

A person about whom information is placed in the registry shall be notified of the placement by the department and may request the department to delete or modify the information to correct inaccuracies. The department shall investigate the request and make necessary deletions or modifications if the department finds no relationship between the information placed in the registry and risk of harm to the entity’s clientele.

In 2018, the Department asked the Legislature to consider statutory changes to the BCP. In amending the BCP statutes, the provision above was repealed.

We acknowledge that, to some extent, the BCP’s variance process is a mechanism for individuals with barriers to show that their history poses no current risk. However, there are barriers to employment that result directly from the variance itself. Employers are required to publicly post a

³⁴ *Doe v. State, Department of Public Safety*, No. S-16748, 2019 WL 2480282 (Alaska June 14, 2019).

³⁵ *Id.*

³⁶ As initially enacted, the Background Check Program was to consist of a registry of individuals with criminal or civil barriers to employments in fields regulated by DHSS. This registry was never completed and, instead, the BCP conducts a comprehensive background check of various databases when it receives a request for background check clearance.

variance on their premises,³⁷ which may discourage employers from hiring individuals with variances. Anecdotally, the Ombudsman has heard from individuals about employers who refused to hire individuals with a variance,³⁸ or that their educational program would not let them participate in practicums with a variance in place.³⁹

The BCP rejected this recommendation, stating that the variance process is the exemption process. While a variance may allow an individual to work, it still comes with the requirement that the employer must post the variance at the place of employment for all to see. Because of the stigma attached to posting a variance, employers may not want to hire an individual, even if they have a variance.

Conclusion

The complainant came to the Ombudsman for help after being told that they were permanently barred by the BCP and placed on administrative leave by their employer. The agency's error resulted in significant financial and reputational losses for the complainant. The Ombudsman's recommendations support the important role and function of the BCP in protecting vulnerable Alaskans while ensuring that the regulated public can rely on the agency's decisions without risking unforeseeable negative consequences for that reliance.

The Ombudsman appreciates that the former BCP manager took action to research and reverse the barrier determination, once the ombudsman investigator provided notice of the complaint and investigation. However concerning the BCP's decision to reverse its decision – again – upon receipt of the preliminary investigative report, the Ombudsman appreciates that the BCP has agreed to maintain the complainant's clearance and taken steps to ensure future renewals are not denied based on the 1996 conviction.

³⁷ 7 AAC 10.940.

³⁸ See Ombudsman Complaint A2013-0776.

³⁹ See Ombudsman Complaint J2019-0422.

Appendix A

Background Check Program Matrix (January 5, 2017)

BARRIER CRIMES MATRIX FOR THE BARRIER CRIMES LISTED IN 7 AAC 10.905

January 5, 2007

The crimes listed in this document bar an individual from being associated in any manner described in 7 AAC 10.900(b) with any entity or individual service provider that is subject to the requirements of 7 AAC 10.900 – 7 AAC 10.990.

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BARRIER CRIME [See notes at end of table for conditions that increase some barrier times]	A Barrier Within the Following Time Periods					See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	1 Year	
ATTEMPT, SOLICITATION, AND CONSPIRACY						
AS 11.31.100 (attempt to commit a crime)						
Unclassified felony if the crime attempted is murder in the first degree	X					(b)(1)
Class A felony if the crime attempted is an unclassified felony other than murder in the first degree	X					(b)(1)
Class B felony if the crime attempted is a class A felony	Same barrier as the class A felony attempted					
Class C felony if the crime attempted is a class B felony	Same barrier as the class B felony attempted					
Class A misdemeanor if the crime attempted is a class C felony and is a barrier crime	Same barrier as the class C felony attempted					
Class B misdemeanor if the crime attempted is a class A or class B misdemeanor and is a barrier crime	Same barrier as the misdemeanor attempted					
AS 11.31.110 (solicitation to commit a crime)						
Unclassified felony if the crime solicited is murder in the first degree	X					(b)(1)
Class A felony if the crime solicited is an unclassified felony other than murder in the first degree	X					(b)(1)
Class B felony if the crime solicited is a class A felony	Same barrier as the class A felony solicited					
Class C felony if the crime solicited is a class B felony	Same barrier as the class B felony solicited					
Class A misdemeanor if the crime solicited is a class C felony and is a barrier crime	Same barrier as the class C felony solicited					
Class B misdemeanor if the crime solicited is a class A or class B misdemeanor and is a barrier crime	Same barrier as the misdemeanor solicited					
AS 11.31.120 (conspiracy to commit a crime)						
Unclassified felony if the object of the conspiracy is murder in the first degree	X					(b)(1)
Class A felony if the object of the conspiracy is a crime punishable as an unclassified felony other than murder in the first degree	X					(b)(1)
Class B felony if the object of the conspiracy is a crime punishable as a class A felony	Same barrier as the class A felony involved in the conspiracy					
Class C felony if the object of the conspiracy is a crime punishable as a class B felony	Same barrier as the class B felony involved in the conspiracy					
OFFENSES AGAINST THE PERSON						
AS 11.41.100 (murder in the first degree) <i>Unclassified Felony</i>	X					(b)(1)
AS 11.41.110 (murder in the second degree) <i>Unclassified Felony</i>	X					(b)(1)
AS 11.41.120 (manslaughter) <i>Class A Felony</i>	X					(b)(1)
AS 11.41.130 (criminally negligent homicide) <i>Class B Felony</i>	X					(b)(1)
AS 11.41.200 (assault in the first degree) <i>Class A Felony</i>	X					(b)(1)
AS 11.41.210 (assault in the second degree) <i>Class B Felony</i>	X					(b)(1)
AS 11.41.220 (assault in the third degree) <i>Class C Felony</i>	X					(b)(4)
AS 11.41.230 (assault in the fourth degree) <i>Class A Misdemeanor</i>			X			(d)(1)(A)
AS 11.41.250 (reckless endangerment) <i>Class A Misdemeanor</i>			X			(d)(1)(B)

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BARRIER CRIME <i>[See notes at end of table for conditions that increase some barrier times]</i>	A Barrier Within the Following Time Periods					See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	1 Year	
AS 11.41.260 (stalking in the first degree) <i>Class C Felony</i>		X				(c)(1)
AS 11.41.270 (stalking in the second degree) <i>Class A Misdemeanor</i>			X			(d)(1)(C)
AS 11.41.300 (kidnapping)						
<i>Unclassified Felony</i>	X					(b)(1)
<i>Class A Felony</i> (victim released without serious injury . . .)	X					(b)(1)
AS 11.41.320 (custodial interference in the first degree) <i>Class C Felony</i> ("crime involving domestic violence")	X					(b)(2)
AS 11.41.330 (custodial interference in the second degree) <i>Class A Misdemeanor</i>			X			(d)(1)(D)
AS 11.41.410 (sexual assault in the first degree) <i>Unclassified Felony</i> ("sex offense")	X					(b)(1)
AS 11.41.420 (sexual assault in the second degree) <i>Class B Felony</i> ("sex offense")	X					(b)(1)
AS 11.41.425 (sexual assault in the third degree) <i>Class C Felony</i> ("sex offense")	X					(b)(11)
AS 11.41.427 (sexual assault in the fourth degree) <i>Class A Misdemeanor</i> ("sex offense")	X					(b)(11)
AS 11.41.434 (sexual abuse of a minor in the first degree) <i>Unclassified Felony</i> ("sex offense")	X					(b)(1)
AS 11.41.436 (sexual abuse of a minor in the second degree) <i>Class B Felony</i> ("sex offense")	X					(b)(1)
AS 11.41.438 (sexual abuse of a minor in the third degree) <i>Class C Felony</i> ("sex offense")	X					(b)(11)
AS 11.41.440 (sexual abuse of a minor in the fourth degree) <i>Class A Misdemeanor</i> ("sex offense")	X					(b)(11)
AS 11.41.450 (incest) <i>Class C Felony</i> ("sex offense")	X					(b)(11)
AS 11.41.452 (online enticement of a minor)						
<i>Class B Felony</i> if the defendant was required to register as a sex offender or child kidnapper ("sex offense")	X					(b)(1) and (b)(3)
<i>Class C Felony</i> if not required to register as a sex offender or child kidnapper	X					(b)(3)
AS 11.41.455 (unlawful exploitation of a minor) <i>Class B Felony</i> ("sex offense")	X					(b)(1)
AS 11.41.458 (indecent exposure in the first degree) <i>Class C Felony</i> ("sex offense")	X					(b)(11)
AS 11.41.460 (indecent exposure in the second degree) ("sex offense")						(b)(11)
<i>Class A misdemeanor</i> if before a person under 16 years of age;	X					(b)(5)
<i>Class B misdemeanor</i> if before a person 16 years of age or older	X					(b)(5)
AS 11.41.500 (robbery in the first degree) <i>Class A Felony</i>	X					(b)(1)
AS 11.41.510 (robbery in the second degree) <i>Class B Felony</i>	X					(b)(1)
AS 11.41.520 (extortion) <i>Class B Felony</i>	X					(b)(1)
AS 11.41.530 (coercion) <i>Class C Felony</i>			X			(d)(1)(E)
OFFENSES AGAINST PROPERTY						
AS 11.46.120 (theft in the first degree) <i>Class B Felony</i>		X				(c)(2)(A)
AS 11.46.130 (theft in the second degree) <i>Class C Felony</i>			X			(d)(2)
AS 11.46.140 (theft in the third degree) <i>Class A Misdemeanor</i>				X		(e)(1)(A)
AS 11.46.220 (concealment of merchandise) if a <i>Class C Felony</i>			X			(d)(2)

BARRIER CRIMES MATRIX FOR THE BARRIER CRIMES LISTED IN 7 AAC 10.905

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BARRIER CRIME <i>[See notes at end of table for conditions that increase some barrier times]</i>	A Barrier Within the Following Time Periods				See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	
AS 11.46.260 (removal of identification marks) if a <i>Class C Felony</i>			X		(d)(2)
AS 11.46.270 (unlawful possession) if a <i>Class C Felony</i>			X		(d)(2)
AS 11.46.280 (issuing a bad check)					
If <i>Class B Felony</i>		X			(c)(2)(B)
If <i>Class C Felony</i>			X		(d)(2)
AS 11.46.285 (fraudulent use of an access device)					
If <i>Class B Felony</i>		X			(c)(2)(C)
If <i>Class C Felony</i>			X		(d)(2)
AS 11.46.290 (obtaining an access device or identification document by fraudulent means) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.300 (burglary in the first degree) <i>Class B Felony</i>		X			(c)(2)(D)
AS 11.46.310 (burglary in the second degree) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.320 (criminal trespass in the first degree) <i>Class A Misdemeanor [if domestic violence crime]</i>				X	(e)(1)(B)
AS 11.46.360 (vehicle theft in the first degree) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.400 (arson in the first degree) <i>Class A Felony</i>	X				(b)(6)
AS 11.46.410 (arson in the second degree) <i>Class B Felony</i>	X				(b)(6)
AS 11.46.430 (criminally negligent burning) <i>Class A Misdemeanor [if domestic violence crime]</i>				X	(e)(1)(C)
AS 11.46.475 (criminal mischief in the first degree) <i>Class A Felony</i>		X			(c)(2)(E)
AS 11.46.480 (criminal mischief in the second degree) <i>Class B Felony</i>		X			(c)(2)(F)
AS 11.46.482 (criminal mischief in the third degree) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.484 (criminal mischief in the fourth degree) <i>Class A Misdemeanor[if domestic violence crime]</i>				X	(e)(1)(D)
AS 11.46.486 (criminal mischief in the fifth degree) <i>Class B Misdemeanor[if domestic violence crime]</i>				X	(f)(1)
AS 11.46.500 (forgery in the first degree) <i>Class B Felony</i>		X			(c)(2)(G)
AS 11.46.505 (forgery in the second degree) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.510 (forgery in the third degree) <i>Class A Misdemeanor</i>				X	(e)(1)(E)
AS 11.46.520 (criminal possession of a forgery device) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.530 (criminal simulation) If a <i>Class C Felony</i>			X		(d)(2)
AS 11.46.550 (offering a false instrument for recording in the first degree) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.565 (criminal impersonation in the first degree) <i>Class B Felony</i>		X			(c)(2)(H)
AS 11.46.600 (scheme to defraud) <i>Class B Felony</i>		X			(c)(2)(I)
AS 11.46.620 (misapplication of property) If a <i>Class C Felony</i>			X		(d)(2)
AS 11.46.630 (falsifying business records) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.660 (commercial bribe receiving) <i>Class C Felony</i>			X		(d)(2)
AS 11.46.670 (commercial bribery) <i>Class C Felony</i>			X		(d)(2)

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BARRIER CRIME [See notes at end of table for conditions that increase some barrier times]	A Barrier Within the Following Time Periods					See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	1 Year	
AS 11.46.710 (deceptive business practices)						
Class C Felony			X			(d)(2)
Class A misdemeanor				X		(e)(1)(F)
AS 11.46.730 (defrauding creditors)						
If Class B Felony		X				(c)(2)(J)
If Class C Felony			X			(d)(2)
AS 11.46.740 (criminal use of computer) <i>Class C Felony</i>			X			(d)(2)
OFFENSES AGAINST THE FAMILY AND VULNERABLE ADULTS						
AS 11.51.100 (endangering the welfare of a child in the first degree)						
If Class B Felony (if child dies)	X					(b)(7)(A)
If Class C Felony (if the child suffers sexual contact, sexual penetration, or serious physical injury)	X					(b)(7)(A)
If Class A misdemeanor (if the child suffers physical injury)	X					(b)(7)(A)
AS 11.51.110 (endangering the welfare of a child in the second degree) <i>Violation</i>			X			(d)(3)(A)
AS 11.51.120 (criminal nonsupport)						
Class C Felony			X			(d)(3)(B)
Class A misdemeanor				X		(e)(2)
AS 11.51.121 (aiding the nonpayment of child support in the first degree) <i>Class C Felony</i>			X			(d)(3)(C)
AS 11.51.130 (contributing to the delinquency of a minor) <i>Class A Misdemeanor</i>			X			(d)(3)(D)
AS 11.51.200 (endangering the welfare of a vulnerable adult in the first degree) <i>Class C Felony</i>	X					(b)(7)(B)
AS 11.51.210 (endangering the welfare of a vulnerable adult in the second degree) <i>Class A Misdemeanor</i>	X					(b)(7)(C)
OFFENSES AGAINST PUBLIC ADMINISTRATION						
AS 11.56.740 (violating a protective order) <i>Class A Misdemeanor [if domestic violence crime]</i>				X		(e)(3)(A)
AS 11.56.745 (interfering with a report of a crime involving domestic violence) <i>Class A Misdemeanor</i>				X		(e)(3)(B)
AS 11.56.750 (unlawful contact in the first degree) <i>Class A Misdemeanor</i>					X	(f)(2)
AS 11.56.755 (unlawful contact in the second degree) <i>Class B Misdemeanor or Violation</i>					X	(f)(2)
AS 11.56.765 (failure to report a violent crime committed against a child) <i>Class A Misdemeanor</i>			X			(d)(4)(A)
AS 11.56.807 (terroristic threatening in the first degree) <i>Class B Felony [if domestic violence crime]</i>		X				(c)(3)
AS 11.56.810 (terroristic threatening in the second degree) <i>Class C Felony [if domestic violence crime]</i>			X			(d)(4)(B)
AS 11.56.815 (tampering with public records in the first degree) <i>Class C Felony</i>			X			(d)(4)(C)
AS 11.56.835 (failure to register as a sex offender or child kidnapper in the first degree) <i>Class C Felony</i>	X					(b)(8)(A)
AS 11.56.840 (failure to register as a sex offender or child kidnapper in the second degree) <i>Class A Misdemeanor</i>	X					(b)(8)(B)

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	PERMANENT	10 Years	5 Years	3 Years	1 Year	
OFFENSES AGAINST PUBLIC ORDER						
AS 11.61.120 (harassment) <i>Class B Misdemeanor [if domestic violence crime]</i>					X	(f)(3)
AS 11.61.123 (indecent viewing or photography)						
Class C Felony	X					(b)(9)(A)
Class A misdemeanor	X					(b)(9)(A)
AS 11.61.125 (distribution of child pornography) (“sex offense”)						
Class A Felony	X					(b)(9)(B)
Class B Felony	X					(b)(9)(B)
AS 11.61.127 (possession of child pornography) <i>Class C Felony</i> (“sex offense”)	X					(b)(9)(B)
AS 11.61.128 (electronic distribution of indecent material to a minor)						
Class B Felony if the defendant was required to register as a sex offender or child kidnapper	X					(b)(3)
Class C Felony if not required to register as a sex offender or child kidnapper	X					(b)(3)
AS 11.61.130 (misconduct involving a corpse) <i>Class A Misdemeanor</i>			X			(d)(5)(A)
AS 11.61.140 (cruelty to animals) <i>Class A Misdemeanor</i>			X			(d)(5)(B)
AS 11.61.145 (promoting an exhibition of fighting animals, if <i>Class C Felony</i>)			X			(d)(5)(C)
AS 11.61.190 (misconduct involving weapons in the first degree) <i>Class A Felony</i>		X				(c)(4)(A)
AS 11.61.195 (misconduct involving weapons in the second degree) <i>Class B Felony</i>		X				(c)(4)(B)
AS 11.61.200 (misconduct involving weapons in the third degree) <i>Class C Felony</i>			X			(d)(5)(D)
AS 11.61.240 (criminal possession of explosives)						
Class A Felony		X				(c)(4)(C)
Class B Felony		X				(c)(4)(C)
Class C Felony			X			(d)(5)(E)
Class A misdemeanor				X		(e)(4)
AS 11.61.250 (unlawful furnishing of explosives) <i>Class C Felony</i>			X			(d)(5)(F)
OFFENSES AGAINST PUBLIC HEALTH AND DECENCY						
AS 11.66.110 (promoting prostitution in the first degree)						
Class A Felony - If the person who was induced or caused to engage in prostitution was under 16 years of age	X					(b)(10)(A)
Class B Felony						
If the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense (“sex offense”)	X					(b)(10)(A)
If the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense		X				(c)(5)

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BARRIER CRIME [See notes at end of table for conditions that increase some barrier times]	A Barrier Within the Following Time Periods					See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	1 Year	
AS 11.66.120 (promoting prostitution in the second degree) <i>Class C Felony</i>						
If the person who was induced or caused to engage in prostitution was under 16 years of age	X					(b)(10)(B)
If the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense (“sex offense”)	X					(b)(10)(B)
If the person who was induced or caused to engage in prostitution was 18 years of age or older at the time of the offense			X			(d)(6)
AS 11.66.130 (promoting prostitution in the third degree) <i>Class A Misdemeanor</i>						
If the person who was induced or caused to engage in prostitution was under 16 years of age	X					(b)(10)(C)
If the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense (“sex offense”)	X					(b)(10)(C)
CONTROLLED SUBSTANCES						
AS 11.71.010 (misconduct involving a controlled substance in the first degree) <i>Unclassified Felony</i>		X				(c)(6)
AS 11.71.020 (misconduct involving a controlled substance in the second degree) <i>Class A Felony</i>		X				(c)(6)
AS 11.71.030 (misconduct involving a controlled substance in the third degree) <i>Class B Felony</i>		X				(c)(6)
AS 11.71.040(a)(1), (a)(2), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(10) (misconduct involving a controlled substance in the fourth degree) <i>Class C Felony</i>			X			(d)(7)
IMITATION CONTROLLED SUBSTANCES						
AS 11.73.010 (manufacture or delivery of an imitation controlled substance) <i>Class C Felony</i>			X			(d)(8)
AS 11.73.020 (possession of substance with intent to manufacture) <i>Class C Felony</i>			X			(d)(8)
AS 11.73.030 (delivery of an imitation controlled substance to a minor) <i>Class B Felony</i>		X				(c)(7)
AS 11.73.040 (advertisement to promote the delivery of an imitation controlled substance) <i>Class C Felony</i>			X			(d)(8)
OTHER CRIMES						
AS 21.36.360 (fraudulent or criminal insurance acts)						
<i>Class B Felony</i>		X				(c)(8)
<i>Class C Felony</i>			X			(d)(10)
AS 28.35.030 (operating a vehicle, aircraft or watercraft while intoxicated)						
(n) – A <i>Class C Felony</i> (if the person convicted has been previously convicted two or more times since January 1, 1996, and within 10 years preceding the date of the present offense)		X				(c)(9)

BARRIER CRIMES MATRIX FOR THE BARRIER CRIMES LISTED IN 7 AAC 10.905

January 5, 2007

The crimes listed in this document bar an individual from being associated in any manner described in 7 AAC 10.900(b) with any entity or individual service provider that is subject to the requirements of 7 AAC 10.900 – 7 AAC 10.990.

DISCLAIMER: this matrix is provided as an information tool only. The department does not warrant that the information in this document is accurate, nor should anyone rely upon this document as controlling legal authority regarding the time associated with any barrier crime. The regulations are the legal authority that should be relied upon and if there are any questions, individuals should refer to the regulations which will control if there are any discrepancies.

BARRIER CRIME <i>[See notes at end of table for conditions that increase some barrier times]</i>	A Barrier Within the Following Time Periods					See 7 AAC 10.905 at:
	PERMANENT	10 Years	5 Years	3 Years	1 Year	
AS 28.35.032 (refusal to submit to chemical test)						
(p) – A Class C Felony (if the person is convicted under this section and either has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense, or punishment under AS 28.35.030(n) or 28.35.032(b) was previously imposed within the last 10 years)		X				(c)(10)
AS 47.30.815 (limitation of liability; bad faith application a felony [willful initiation of an involuntary civil commitment procedure without good cause] <i>Felony</i>)			X			(d)(11)

IMPORTANT NOTES

(1) Under AS 12.62.900(23) "serious offense" means a conviction for a violation or for an attempt, solicitation, or conspiracy to commit a violation of any of the following laws, or of the laws of another jurisdiction with substantially similar elements: (A) a felony offense; (B) a crime involving domestic violence; (C) AS 11.41.410 - 11.41.470; (D) AS 11.51.130 or 11.51.200 - 11.56.210; (E) AS 11.61.110(a)(7) or 11.61.125; (F) AS 11.66.100 - 11.66.130; (G) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160; or (H) former AS 11.40.080, 11.40.110, 11.40.130, or 11.40.200 - 11.40.420, if committed before January 1, 1980.

(2) Under AS 12.63.100(6) "sex offense" means (A) a crime under AS 11.41.100(a)(3) [murder in the first degree], or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3); (B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction: (i) sexual assault in the first degree; (ii) sexual assault in the second degree; (iii) sexual abuse of a minor in the first degree; or (iv) sexual abuse of a minor in the second degree; (C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction: (i) AS 11.41.410 - 11.41.438; (ii) AS 11.41.440(a)(2); (iii) AS 11.41.450 - 11.41.458; (iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense; (v) AS 11.61.125 or 11.61.127; (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or (vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200.

(3) Under AS 18.66.990(3) "domestic violence" and "crime involving domestic violence" mean one or more of the following offenses or an offense under a law or ordinance of another jurisdiction having elements similar to these offenses, or an attempt to commit the offense, by a household member against another household member:
 (A) a crime against the person under AS 11.41; (B) burglary under AS 11.46.300 - 11.46.310; (C) criminal trespass under AS 11.46.320 - 11.46.330; (D) arson or criminally negligent burning under AS 11.46.400 - 11.46.430; (E) criminal mischief under AS 11.46.475 - 11.46.486; (F) terrorist threatening under AS 11.56.807 or 11.56.810;
 (G) violating a protective order under AS 11.56.740(a)(1); or (H) harassment under AS 11.61.120(a)(2) - (4).

(4) Regardless of the barrier crimes listed above – or the barrier times shown above -- the following is a permanent barrier under 7 AAC 10.905(b)(3): a crime that is a felony and involves a victim who was a child under 18 years of age at the time of the conduct, including a crime where the perpetrator was a person responsible for the child's welfare; in this paragraph, "person responsible for the child's welfare" has the meaning given in AS 47.17.290.

(5) Even though some class B felonies are not classified as permanent barriers, if there is a conviction for two or more those felonies, that constitutes a permanent barrier under 7 AAC 10.905(b)(12).

(6) AS 47.05.310(c) provides: The department may not issue or renew a license or certification for an entity if an individual is applying for a license, license renewal, certification, or certification renewal for the entity and that (1) individual has been found by a court or agency of this or another jurisdiction to have neglected, abused, or exploited a child or vulnerable adult under AS 47.10, AS 47.24, or AS 47.62 or a substantially similar provision in another jurisdiction, or to have committed medical assistance fraud under AS 47.05.210 or a substantially similar provision in another jurisdiction; or (2) individual's name appears on the centralized registry established under AS 47.05.330 or a similar registry of this state or another jurisdiction.