

BEFORE THE ADMINISTRATIVE RULES COMMITTEE**March 11, 2014**

Chairman Devlin, Members of the Administrative Rules Committee:

The following written testimony is submitted by Major Les Witkowski, Chief Deputy, Burleigh County Sheriff's Department, Chairman of the North Dakota Peace Officer's Standards and Training Board ("P.O.S.T. Board) in response to the February 25, 2014, request of John Walstad, Legislative Council Code Revisor.

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.

The P.O.S.T. Board first promulgated administrative rules for peace officer licensing, standards, and training pursuant to legislation that became effective in 1989 relating to training and licensing peace officers. 1987 ND Laws, ch. 154.

The present rules include amendments based on statutory changes to N.D.C.C. § 12-63-09 relating to peace officer limited licenses and to N.D.C.C. § 12-63-12 relating to adverse license action, including the authority to take adverse license action for violating rules of the P.O.S.T. Board. The legislation was enacted by the Sixty-third Legislative Assembly. 2013 ND Laws, ch. 101, §§ 1, 2.

The Sixty-third Legislative Assembly also transferred oversight of correctional officer training for county and regional correctional facilities from the North Dakota Department of Corrections and Rehabilitation to the P.O.S.T. Board. 2013 N.D. Laws, ch. 97, §§ 1, 2. See N.D.C.C. §§ 12-44.1-01(1) and 12-44.1-02(4).

2. Whether the rules are related to any federal statute or regulation. If so, please indicate whether the rules are mandated by federal law or explain any options your agency had in adopting the rules.

The present rules are not related to any federal statute or regulation but instead implement N.D.C.C. ch. 12-63, the governing chapter for peace officer licensing and standards.

3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.

The P.O.S.T. Board followed the statutory rule-making procedures required under N.D.C.C. ch. 28-32. Public notice of the rule-making was published in all official newspapers in accordance with the requirements of N.D.C.C. ch. 28-32.

Notice of the rule-making was provided to Representatives Larson, Dockter, and Karls, and to Senators Carlisle and Lyson, the sponsors of House Bill 1138, which amended peace officer limited license provisions and provisions relating to grounds for adverse license action and adverse license action proceedings. Notice was also sent to Representatives K. Koppelman, Hanson, Hogan, Karls, Klemin, Larson, and Paur, and to Senators Hogue and Lyson, the sponsors of House Bill 1392, which placed oversight over correctional officer training with the P.O.S.T. Board.

A public hearing was held at the North Dakota Highway Patrol Training Academy on September 18, 2013, and after comment period, the P.O.S.T. Board reviewed and addressed all oral and written comments, made changes to the proposed rules based on the comments, and submitted the matter to the North Dakota Attorney General for review and an opinion.

The North Dakota Attorney General issued his opinion approving the rules on October 28, 2013.

4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. If so, describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint. Please summarize the comments of any person who offered comments at the public hearings on these rules.

The P.O.S.T. Board received oral comments at the public hearing on September 18, 2013, and it also received written comments on the proposed rules during the comment period following the public hearing. A summary of the oral comments and written comments, and the P.O.S.T. Board's changes in response to the comments, is attached to this written testimony.

5. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.

The cost of publication for the public notice was \$2084.40. The approximate cost, not including staff time, for developing the rules was approximately \$200.00 for travel expenses.

6. An explanation of the subject matter of the rules and the reasons for adopting those rules.

The rules and amendments relate to peace officer licensing, licensing fees, peace officer training and continuing education requirements, adverse license action, weapon training and qualification requirements, ethical standards for peace officers, and instructor and training course requirements.

The reason the rules were adopted was to implement N.D.C.C. ch. 12-63, which includes, in part, the following provisions:

12-63-02. License required. An individual may not perform peace officer law enforcement duties in this state unless the individual is licensed as required in this chapter.

12-63-04. Board - Powers - Duties - Authority. The board shall administer, coordinate, and enforce the provisions of this chapter, evaluate the qualifications of applicants, and approve the examinations for licensing under this chapter.

1. The board shall:

a. Prescribe the criteria for certification of basic, advanced, and specialized peace officer training curriculum, instructors, and schools;

b. Certify curriculum, instructors, schools, and officers that have met the training certification criteria;

c. Establish the curriculum for basic and advanced peace officer training; and

d. Prescribe minimum standards of sidearm training and certification for peace officers before they may carry a sidearm.

2. The board shall keep records and minutes necessary to carry out its functions. The board may:

a. Issue subpoenas, examine witnesses, administer oaths, and investigate allegations of practices violating the provisions of this chapter or rules adopted by the board.

b. Examine, under oath, any applicant for licensing.

c. Examine, under oath, any licensed peace officer during a hearing to suspend, revoke, or to not renew a license of a peace officer.

d. Adopt rules relating to the professional conduct of peace officers and to implement the requirements of this chapter, including rules relating to professional licensure, continuing education, and ethical standards of practice, for persons holding a license to practice peace officer duties.

(Emphasis provided)

12-63-05. Fees. The board shall prescribe by rule the fee for application for examination, for an initial license, for renewal of a license, and for late renewal of a license. The board shall administer fees received under this chapter in accordance with section 54-44-12. (Emphasis provided)

12-63-09. Limited license.

1. The board may grant a limited license to an individual who has completed the education, medical, psychological examination, criminal history background investigation, and sidearm requirements of the board and this chapter.

2. The limited license allows the individual to perform peace officer duties in accordance with the rules of the board.
3. After becoming employed as a peace officer, the individual shall attend the first available basic full-time peace officer training course authorized by the board in accordance with the rules of the board.
4. The limited license is limited to the jurisdiction in which the person is employed and is valid until:
 - a. The individual has completed the first available basic full-time peace officer training course authorized by the board; and
 - b. The individual has completed the licensing examination and has been issued a peace officer license by the board.
5. The limited license may be renewed one time if the individual has failed the licensing examination.
6. The limited license is subject to section 12-63-12. (Emphasis provided)

12-63-12. Adverse license action - Appeal.

1. The board shall deny a license, refuse to renew a license, suspend a license, revoke a license, or impose probationary conditions if the individual has been convicted or pled guilty or nolo contendere before a court of competent jurisdiction in any state, or before any court, of a felony offense.
2. The board may deny a license, refuse to renew a license, suspend a license, or revoke a license, or may impose probationary conditions if the individual:
 - a. Has been convicted or pled guilty or nolo contendere before a court of competent jurisdiction in any state, or before any court, of an offense involving domestic violence or violation of a domestic violence restraining order, an offense involving child abuse or neglect, an offense involving firearms under title 12.1 or title 62.1, or another criminal offense determined by the board to have a direct bearing upon an individual's ability to serve as a peace officer, or the board determines, following a conviction or adjudication, that the individual is not rehabilitated under section 12.1-33-02.1.
 - b. Has used unjustified deadly force in the performance of the duties as a peace officer as described in section 12.1-05-07.
 - c. Has made a false material statement under oath to the board.
 - d. Has made a false material statement to the board while obtaining or renewing a license or permit.
 - e. Has violated a provision of this chapter or a rule of the board.
3. Denial, refusal to renew, suspension, revocation, or imposition of probationary condition on a license may be ordered by the board after a hearing in accordance with chapter 28-32. An application for reinstatement may be made to the board one year from the date of the refusal to renew or the revocation of the license. The board may accept or reject an application for reinstatement and may hold a hearing to consider the reinstatement. In the case of a denial of an application, the applicant may not reapply for a period of one year from the date of the order of denial.

4. An appeal from the final decision of the board to refuse to issue, to not renew, to suspend, or to revoke a license may be made to the district court. Venue is the county in which the aggrieved individual resides. The appeal must be made within thirty days from the service of the decision on the individual.

7. Whether a regulatory analysis was required by North Dakota Century Code (NDCC) Section 28-32-08 and whether that regulatory analysis was issued. Please provide a copy.

A regulatory analysis was not required.

8. Whether a regulatory analysis or economic impact statement of impact on small entities was required by NDCC Section 28-32-08.1 and whether that regulatory analysis or impact statement was issued. Please provide copies.

A regulatory analysis or economic impact statement of impact on small entities was not required, as these rules relate to professional licensing.

9. Whether these rules have a fiscal impact on state revenues and expenditures, including any effect on funds controlled by your agency. If so, please provide copies of a fiscal note.

The proposed rules, amendments, and repealed rules do not have a fiscal impact on state revenues and expenditures.

10. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. Please provide a copy if one was prepared.

A constitutional takings assessment was not required.

11. If these rules were adopted as emergency (interim final) rules under N.D.C.C. Section 28-32-03, provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support that declaration and provide a copy of the Governor's approval of the emergency status of the rules.

These rules were not adopted as emergency rules.

**Summary of Oral and Written Comments and
North Dakota Peace Officer Standards and Training Board (P.O.S.T. Board) Response
October 9, 2013
BCI Conference room, Bismarck ND**

1. Major Les Witkowski, Burleigh County Sheriff's Department and P.O.S.T. Board Chairman, submitted written comments through an email dated August 27, 2013. Chairman Witkowski's comments consisted of grammatical and technical changes in language in sections 109-02-01-02 (1), 109-02-02-04 (2), 109-02-02-05 (3), 109-02-02-06 (1), 109-02-04-07 (1), 109-02-04-07.1 (1c), and 109-02-04-09 (2a).

The Board agreed to accept all of Chairman Witkowski's recommended corrections and changes:

109-02-01-02 (1) line 2 add "or appoints" after "hire."

109-02-02-04 (2) line 7 add "time" after "reasonable."

109-02-02-05 (3) line 3 strike "another" and replace with "a."

109-02-02-06 (1) line 9 strike "must."

109-02-04-07 (1) line 9 strike "the" between "of" and "adequate."

109-02-04-07 (1) line 11 strike "during the certification period" and replace with "prior to certification."

109-02-04-7.1 (1c) subsection "c" strike "and" and replace with "or."

109-02-04-09 (2) line 6 strike "and" between "course" and "and."

2. Assistant Chief Mike Reitan, West Fargo Police Department, sent in three separate written submissions of comments that were received at the POST Board office.

In submission one, a five page document with the title "Notice of Intent to Adopt, Amend, and Repeal Administrative Rules." Assistant Chief Reitan requested clarification and definitions for 109-02-01-01 (11) and (17) to include Stockmen's Association and Railroad because they were part of the board's proposed amended definition of "agency".

The Board agreed to change the language in 109-02-01-01 (11) to read as follows:

"Full time peace officer" means a full time salaried public servant employed by an agency, or a peace officer employed by the North Dakota stockmen's association or a railroad to enforce the law or conduct or engage in investigations or prosecutions for violations of law.

The Board agreed to change language reference the Stockmen's Association and Railroad in 109-02-01-01 (17) to read the same as change made to the definition in subsection 11.

3. Assistant Chief Mike Reitan requested a change in language for in the definition at 109-02-01-01 (7) to accommodate courses "completed through" an online university.

The Board recognized Assistant Chief Reiten's point and agreed to change the definition in 109-02-01-01 (7) from "completed at" to courses "completed through."

4. Assistant Chief Mike Reitan requested a change in language in the definition in 109-02-01-01 (23) to include conducted energy weapons.

The Board declined to accept the change and keep the definition as currently written.

5. Assistant Chief Mike Reitan requested a language change for 109-02-01-03 (11) explaining the fact there are other discharges for criminal behavior included in general discharge under less than honorable conditions.

After discussion and review of information received from the Joint Staff Judge Advocate Office, the Board agreed to change the language of 109-02-01-03 (11) to read:

“Must not have been dishonorably discharged or administratively discharged from United States Military Service for conduct that would be in violation of the peace officer code of conduct.”

6. Assistant Chief Mike Reitan requested clarification of wording in 109-02-02-01 (3), (4), and (5) as it appears these sections refer to a person who has been hired but has not worked for a specified amount of time.

After discussion, the Board agreed to change 109-02-02-01 (3) by replacing the word “not” in line one and adding “never.”

The Board agreed to the same language change in 109-02-02-01 (4).

The Board agreed to the same language change in line one of 109-02-02-01(5).

7. Assistant Chief Mike Reitan requested a technical change in 109-02-02-04 (4) by adding the word “licensing” before the word “examination”.

The Board agreed to add the word “licensing” before examination in line four of the subsection

8. Assistant Chief Mike Reitan requested the same wording be made in sections 109-02-02-05 (2), 109-02-02-04 (4) and 109-02-02-06 (2).

After discussion, the Board did not take action on this request. It was already part of the rule.

9. Assistant Chief Mike Reitan requested clarification in 109-02-02-05 (1) line four if the term “federal” included military training. The board determined it did not mean federal training includes military training, which is different. The military police have not changed their training to reflect state peace officer training as of yet.

The Board agreed to change the language starting in 109-02-02-05 (1) line three to clarify that it meant a federal law enforcement agency and changed it to read: “course conducted in another state or by a federal law enforcement agency.”

10. This issue generated additional discussion by Board members who agreed to a language change in 109-02-02-05 (1)(a) line one to read:

“Training received in a state or from a federal law enforcement agency.”

The Board agreed to similarly change the language in 109-02-02-05 (3) line three by adding the words “law enforcement” after federal.

The Board agreed to make this same change in 109-02-02-05 (4) to clarify the board meant a federal law enforcement agency.

11. Assistant Chief Mike Reitan requested a grammatical change in 109-02-02-06 (1) line eight by striking the word “must.”
The Board agreed with this grammatical change.
12. Assistant Chief Mike Reitan asked for a determination on whether or not there should be a standard set for the physical exam as defined in 109-02-02-08 that would meet minimum requirements of WSI presumptive language in Section 65-01-15.1 (3).
The Board took no action on this request as it pertained to 109-02-02-08.
13. This comment generated discussion among Board members as it related to keeping language in 109-02-01-03 (8) consistent with 109-02-02-08 and current board business practices.
The Board agreed to a language change in 109-02-01-03 (8) so the subsection would read as follows:
“Must have passed a medical examination and psychological examination. The psychological examination must be administered by a board approved psychological provider.”
14. Assistant Chief Mike Reitan stated that the limitation of 20 hours of online or web based training is too restrictive as it relates to the continuing education requirement stated in 109-02-02-15 (1).
After discussion, including that there needs to be interaction between an instructor and peace officers, and between the officers, the Board took no action on this request.
15. Assistant Chief Mike Reitan requested a language change in 109-02-02-15 (1a) from “training seminar” to “training syllabus.”
The Board agreed to change the language in 109-02-02-15 (1a) as requested to replace the word “seminar” with “syllabus” as it was more accurate..
16. Assistant Chief Mike Reitan requested clarification and language change in the title of 109-02-04-02 to include the word “North Dakota.”
The Board agreed to change 109-02-04-02(1) to read as follows because the board only has jurisdiction over North Dakota licensed peace officers:
“A North Dakota licensed peace officer applying for certification ...
17. Assistant Chief Mike Reitan requested a language change by removing the words “training courses” from the headnote of 109-02-04-07.
The Board took no action on this request, but the Board agreed to make a change in 109-02-04-07 and remove the words “training courses” and have the first sentence read:
Training providers must be certified by the board prior to the commencement of training.

18. Submission two from Assistant Chief Reiten was an email dated September 9, 2013. It should be noted all of the requests listed his second submission were covered and addressed by the Board in the five page document described as submission one.
19. Submission three from Assistant Chief Reiten is a one page word document dated September 27, 2013.
20. Assistant Chief Mike Reitan requested clarification and language changes in 109-02-01-02 (1) and 109-02-01-04(1) line seven in regards to the amount of paperwork that needed to be sent to the POST Board office. The rules currently require “a copy” of the completed criminal history background investigation, medical examination, and psychological examination to be sent in to the board.
The Board agreed to a language change in 109-02-01-02(2) line three to replace “copy” with “verification” and added “and results” to read:
“The school shall file verification of the completed criminal history background investigation and results on a form provided by the board.”
The Board agreed to a language change in 109-02-01-04 (1) line seven to read:
“The agency shall submit on a form provided by the board, verification of completion of the criminal history background investigation, medical examination, and psychological examination and a complete record of the individual’s previous training and law enforcement experience to the board.”
21. Assistant Chief Mike Reitan requested a technical/punctuation change in 109-02-05-01 (4c) line one by adding a comma after the word possess.
The Board agreed to this change in 109-02-05-01 (4c) and added a comma after the word “possess.”
22. Lloyd Halvorson, Vice President of Academic Affairs, Lake Region State College, submitted an email dated September 13, 2013, requesting clarification of language in 109-02-01-03 (12) as it related to Lake Region “pre-service students.”
After discussion, including an acknowledgement by Mr. Halvorson that he did not think the rule needed to be changed, the Board did not take action on this request.
23. Lloyd Halvorson submitted an email dated September 16, 2013, and requested grammatical and technical changes to 109-02-02-04 (2).
This request had been previously addressed by Board action.
24. Lloyd Halvorson requested a language change and clarification in 109-02-02-06 in reference to using the word “individual” versus “applicant.”
The Board agreed to a language change in 109-02-02-06 (1) to read as follows:

“An individual is eligible to take the licensing examination during or upon completion of the basic full time peace officer training course.” In 109-02-02-06 (2) the Board agreed to strike the word “applicant” from line one, five and eight and replace it with the word “individual.”

25. Burleigh County Sheriff Pat Heinert provided oral testimony at the public hearing held at 1 p.m. on September 18, 2013, at the Law Enforcement Training Academy.

Sheriff Heinert requested a language change in 109-02-05-01 (4a) line one dealing with the words “or has the likely result” because of the subjectivity of that statement and difficulty in enforcement.

The Board agreed to remove the proposed 109-02-05-01(4)(a) in its entirety.

26. Sheriff Heinert also had concerns with language in 109-02-05-01 (4d) line 3 relating to “whether or not” an officer has been charged.

The Board agreed to remove language in 109-02-05-01 (4d) so it would read as follows:

To engage in conduct that is in violation of the criminal laws of the state or federal government or ordinances of a political subdivision of the state of North Dakota.

27. Sheriff Heinert’s comments led to additional discussion of two other rules that could present enforcement problems. There was discussion by the P.O.S.T. Board, and the P.O.S.T. Board agreed to a language change in 109-02-01-05 (4a) to remove the words “or the rules promulgated by the Board.” because of likely enforcement issues for minor rule violations.

The Board also agreed to a similar language change in 109-02-05-01 (4)(i) to read as follows: “To willfully fail to report the violation of a criminal law or North Dakota Century Code chapter 12-63 by a peace officer” for the same reason.

28. A concern was expressed that different agencies may use different oaths of office, although the oaths may be very similar to the proposed oath in the rules. The Board agreed to a language change in 109-02-05-02 (1) to read as follows:

“Every peace officer must be sworn in as a peace officer and take an oath that substantially complies with the following”

29. Maren Arbach, Department of Corrections and Rehabilitation, submitted an email dated September 26, 2013. Maren Arbach requested clarification and definitions in 109-02-01-01 (4) (20) and (22) to include the language “corrections subjects” and “correctional officer training courses” Maren Arbach’s comments were based on the changes in the recent legislation session to place correctional officer training courses within the oversight of the P.O.S.T. Board instead of the Department of Corrections and Rehabilitation.

The Board agreed to change the language in 109-02-01-01 (4) to read:

“Certified instructor” means an instructor certified by the board to instruct law enforcement or basic correctional officer training courses.

The Board agreed to change the language in 109-02-01-01 (20) to read:

“School” means a facility or academy that conducts board certified basic, advanced, and specialized peace officer training courses, or basic correctional officer training courses.

The Board agreed to change the language in 109-02-01-01 (22) to read:

“Training provider” means an individual, school, facility, or academy that conducts certified basic, advanced, and specialized peace officer training courses or basic correctional officer training courses.

30. Maren Arbach requested a language change in 109-02-04-07 (1) line 6 to include “correctional facility subjects.”

The Board agreed to a language change in 109-02-04-07 (1) line 6 to read:

“... education in law enforcement subjects or basic correctional officer training courses before the board may certify.”

31. Maren Arbach also suggested punctuation changes in 109-02-04-07.1. as follows:

109-02-04-07.1 - add a semicolon after subdivision (a); add a semicolon and the word “or” after subdivision (b); add a period after subdivision (c); add a semicolon after subdivision (a); and add a semicolon and the word “or” after subdivision (b).

The Board agreed to the above punctuation changes for 109-02-04-07.1.

32. Chief Arland Rasmussen, West Fargo, submitted an email requesting reconsideration of the 20 hour limitation for online training. Chief Rasmussen was requesting at least 40 hours of online training be allowed.

The Board addressed this issue previously.