

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Wednesday, January 16, 2013

TIME: 8:00 A.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman McKenzie, Senators Davis, Fulcher, Hill, Winder, Lodge, Siddoway, Stennett and Werk

ABSENT/ EXCUSED:

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the Committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman McKenzie** convened the Senate State Affairs Committee (Committee) meeting at 8:00 a.m. on Wednesday, January 16, 2013 with a quorum present.

Sarah Thomas, State Appellate Public Defender, provided a copy of the poverty guidelines to qualify for a public defender in response to a request from last meeting.

Chairman McKenzie announced that the Committee will continue to review the rules for the Department of Administration as presented by Director, Teresa Luna. As has been the practice of the Committee, public testimony will not be taken. However, there is a specific question for Monica Hopkins, Executive Director, American Civil Liberties Union (ACLU), relating to a lawsuit involving those rules and the statute. **Chairman McKenzie's** question was whether they are contending that the fees either exceed statutory or exceed constitutional authority which was one of the contentions in the ACLU's brief. **Ms. Hopkins** introduced and deferred her time to Richard Eppink, Legal Director, ACLU.

CONTINUATION OF RULES REVIEW Department of Administration (Department) – **Docket Nos. 38-0406-1202, 38-0407-1202 and 38-0408-1202**

Mr. Eppink stated that a hearing for a summary judgement is scheduled for February 26th before Judge Winmill in Federal Court in Boise. The rules, in the view of the ACLU, go far beyond the kind of government restrictions that are necessary or appropriate when dealing with core constitutional rights. Government restriction of core freedoms such as the right to assemble and the right to speak should be taken extremely seriously by the Committee and the Senate. There are pages of rules with government restrictions. The justification is unclear and the poignant problems with the rules engenders confusion. The court will be concerned with the chilling of speech. These rules include restrictions specifically targeted at speech and assembly while carving out exceptions for activities not protected by the first amendment and by the Idaho constitution.

Senator Davis asked for an explanation of the items you believe this body should reject. **Mr. Eppink** commented that the ACLU does not see a need for these rules whatsoever, at least **Docket Nos. 0406 and 0408**. The definitions of events, exhibits and public use in **Docket No. 38-0408-1202** are where the rules outline different kinds of activities, some of which are singled out for regulation and some of which are not regulated in the same way. It is an extremely broad definition as is the definition of exhibit. **Mr. Eppink** continued to expand on the first amendment rights and explain why these rules are in opposition to those rights.

Senator Davis stated that the rules have a good definition of event and exhibit. The question is, does that definition in and of itself deter speech. It doesn't, it just defines it. Is it in the rules where the restrictions occur that the definition becomes constitutionally problematic? **Mr. Eppink** agreed that the definitions themselves would not be problematic. However, the purpose of the definitions is to do work later on in the rules and in Rules 200 and 201, you will see where event and exhibit are used to single out speech. Rule 200 authorizes events and exhibits only in locations and during hours that are set forth in these rules. Public uses are not subject to the same limitation on hours and location. Rule 201 limits exhibit and event duration but does not put those limits on public use.

Senator Davis asked if Mr. Eppink believes that the United States (US) Supreme Court interpretation says that there can never be restrictions on location or hours. **Mr. Eppink** responded that the existing US Supreme Court does say that the Idaho Legislature has discretion to limit the time, place and manner of speech. However, it must narrowly tailor those regulations to serve a substantial government interest and it must cure any substantial state interest interference. It must leave alternatives open and it must not use excessive discretion. These rules have problems with all of those requirements.

Senator Davis asked, why and where in the rules do time, place and manner cross the line constitutionally?

Mr. Eppink explained that the line is crossed when discriminating against speech. The substantial evidence necessary to meet the government's extraordinarily heavy burden to regulate speech around the statehouse without showing that there have been problems is not there. **Senator Davis** added another component to the issue, the seven day consecutive 24 hour time periods. **Mr. Eppink** said that they are now referring to Rule 201 which contains a duration limit. Idaho's interest, particularly in open spaces, has generally been limited to regulating competing uses so that everyone has the opportunity to hold an event. However, the rules are now limited to seven days. Due to the hour limitations, there could not be a 24 hour event or exhibit without sanctions. There is an ambiguity as to what consecutive could mean in Rule 201 considering the hour limitation in Rule 200.

Senator Hill stated that it was his understanding Mr. Eppink participated in a meeting Thursday evening in the Capitol. **Mr. Eppink** said that he did. The meeting was a Know Your Rights training put on by the ACLU. During that meeting, he covered several topics: a limited history of certain protests and demonstrations at the Capitol building; outside the Capitol building; and, on the Capitol Mall. Other presenters talked about how the legislature meets and what happens on the floor, what happens in committee, and what happens in lobbying meetings.

Mr. Eppink explained the Department's rules with the hope of dispelling some of the confusion against permits, activities adjacent to walls and windows, affixing posters and placards, using sidewalk chalk and other rules they had received questions about or were ambiguous. People were encouraged to contact the ACLU through their protester hotline in case they encountered discriminatory treatment with respect to these rules and with respect to bringing protester demonstrations into the Capitol.

Senator Hill asked if participants were encouraged to break rules so that they could be challenged. **Mr. Eppink** answered no, it would not be appropriate to do so. **Senator Hill** asked if, even though meetings held in the Capitol are to be open to anyone, was it communicated that preregistration was required to be admitted to that meeting or could anyone could walk in. **Mr. Eppink** deferred to Ms. Hopkins. **Ms. Hopkins** responded that they encouraged people to RSVP but it was a free meeting open to the public. Walk-ins had occurred at the Sunday meeting.

Senator Hill asked Mr. Eppink if people were told that they should schedule events in or around the Capitol and it was okay to intentionally mislead the scheduler regarding the real format and intent of the event. **Mr. Eppink** answered no.

Senator Hill asked if people were encouraged in any way to bring guns to the Capitol. **Mr. Eppink** answered that there had been a question at a prior event about firearm rights within the statehouse. That question was answered by another participant who was an advocate for bringing guns to the Capitol.

Senator Stennett asked what this line of questioning had to do with the rules. **Senator Hill** responded that the questions were to identify the motive for challenging the rules. Mr. Eppink has spent time describing what he thinks is inappropriate within and around the Capitol and the Capitol Mall. Since he is challenging the rules, it would be helpful to know what he thinks is appropriate and what he has told others.

Senator Hill pursued his line of questions. At any of the meetings, did you or anyone representing ACLU say something to the effect "it is not your fault that your weapon instills fear in others?" **Mr. Eppink** stated that he was not aware anyone said that.

Senator Werk asked if it would be an event if a group of people sharing a common theme that had a connotation of some cause gathered in one place, would the unplanned gathering be considered an event? **Mr. Eppink** stated he didn't know because of the ambiguity in these rules. **Senator Werk** said that if it is difficult to decide what an event is and then try to apply the definition to a specific instance in the rules, it would be difficult to enforce the rule and would lead to confusion of whether or not there is an event. **Mr. Eppink** stated that when an event can be anywhere between one person and a group, two immediate questions arise: 1) Why is there a need to regulate a single person with a sign? and, 2) How does a Capitol Mall security officer make the determination as to whether something is recreational or something else.

Chairman McKenzie asked if Mr. Eppink was contending that there are other restrictions on time, place and manner that exceed the constitutional limit? **Mr. Eppink** answered yes and volunteered to provide a copy of the briefing that has been filed in the litigation. **Docket No. 38-0408-1202**, Rule 400 state that permits for the Capitol steps have to be acquired five days in advance. Courts have said repeatedly that political speech has to be allowed to happen spontaneously. The courts have struck down waiting periods shorter than five days.

Senator Davis recalled that speech is not prohibited if you don't have a permit, it says that if you get a permit there are some additional benefits and burdens associated with it such as priority and sound amplification. The burden is a four hour limit. The principle purpose of the permit are the benefits. There is nothing in the rules that prohibits non permitted assembly. **Mr. Eppink** agreed but this illustrates a narrow tailoring problem. The reservation system provides benefits, it does not serve any government interest in regulating competing uses.

Chairman McKenzie asked if there were additional comments from Ms. Luna or questions from the Committee. **Senator Davis** asked if Julie Weaver, Deputy Attorney General, could speak to the constitutional concerns that have been expressed. **Ms. Weaver** deferred to Ms. Luna.

Ms. Luna said that these rules are reflective of policies and guidelines that have been used for a long time as well as the rules from 1992. Since these rules were implemented in April 2012, they have not denied permits and they have not closed down free speech. Law required that rules be promulgated within 30 days and the Department met that requirement to the best of their ability.

The event and exhibit definitions are consistent with other states definitions. They are there for a permitting process that has been in place for a number of years. If someone wanted to stand on the steps every day with a sign, if the steps are not being used, they are more than welcome to do so. They will not issue a permit for more than seven days in a row for the same group. The Department is there to serve and to make sure everyone has an opportunity to be heard and with that, **Ms. Luna** stood for questions.

Senator Fulcher referred to page 43, Rule 400, in the Pending Rules Book. Subsection 02 restricts the issuance of permits to the Jefferson Street steps. Why isolate that area? **Ms. Luna** explained that the permits are for business hours only although all the steps are open from 6:00 a.m. through 11:59 p.m. every day. **Senator Fulcher** asked why the same rules do not apply to all the Capitol steps. **Ms. Luna** answered that people can use those steps, they just don't permit them. Traditionally, all permitted activities have been on the Jefferson steps.

Senator Hill referred to Rule 202 on page 39 that "no person shall place items on, sit, or stand on stairways other than the Jefferson Street steps." What purposes can the steps be used for? **Ms. Weaver** answered that those steps remain clear for entering and exiting the Capitol.

Senator Werk restated his question on the connotation of a group with a single theme versus a group that has no connotation – is one an event and the other not? **Ms. Luna** explained that the rules are broad but allow some measure of management.

Senator Werk asked how the security personnel are trained to recognize the difference between an event and public use. **Ms. Luna** answered that they try to differentiate between public use (specific purpose) and pedestrian use (recreational use). **Ms. Luna** deferred to Adrian Rice, Security. **Ms. Rice** said that security is provided 24/7. Security officers are trained for routine activities and procedures. If questions arise, the attorneys are contacted to provide interpretation and clarification.

Senator Werk asked Ms. Luna about the concrete pad in front of the Jefferson steps that extends to the street. Is this considered Capitol property or Ada County Highway District (ACHD) property? When people gather on the sidewalk and encroach on the concrete pad in front of the steps, are they creating an event at the Capitol? Will some kind of marking identify where one area begins and the other ends? **Ms. Luna** said that Senator Werk described the area accurately. There could be an encroachment issue but only after the hour of midnight since that is when the steps shut down. There is no plan to make any area designations.

Senator Winder noted that, according to these rules, spontaneity would not be an issue unless there was a conflicting event. Is that true? **Ms. Luna** agreed. **Senator Winder** asked in what instance would a line of division be needed. **Ms. Luna** responded that they haven't had that type of use.

Senator Stennett asked why, if the policies and guidelines were already in place, are we looking at rules. **Ms. Luna** responded that H 693 required that the rules be promulgated by the Department within 30 days of signing by the Governor.

Senator Winder asked about hours and location of uses. Subsection e restricts the hours for the Jefferson steps from 6:00 a.m. through 11:59 p.m. What is the impact for the rest of the rules if that subsection should be stricken so the use could be 24 hours? **Ms. Weaver** stated that if the hours subsection was removed it would eliminate the maintenance and improvement section. Some things would be lost because other parts of the rules refer back to that section. **Senator Winder** observed that life savings issues and other issues would be struck. **Ms. Weaver** agreed.

Dennis Stevenson, Rules Administrator, clarified what would happen when striking the rule as far as references are concerned. A section may be rejected without affecting other sections even though there are references. Those corrections would be made.

Senator Werk said that life safety was included in the old guidelines and policies which the Department could fall back on if these rules were rejected. **Ms. Luna** responded that they could fall back on those but that doesn't give them any enforcement authority.

MOTION: **Senator Davis** moved to approve in total, **Docket No. 38-0407-1202** regarding the interior of State property and the Capitol Mall. **Senator Winder** seconded the motion. The motion carried by **voice vote**.

MOTION: **Senator Davis** moved to approve **Docket No. 38-0408-1202** except to reject Rules 201, 313 and 302 within the docket except for Rule 302.e which would be adopted. (Note: a clerical correction was made to this motion in the January 18th minutes.) **Senator Hill** seconded the motion.

Chairman McKenzie called for discussion.

Senator Davis stated it was not fair to the Department to not allow them the time needed to go through the negotiated rule making process. The Department should revisit the three sections that were rejected to encourage free exercise of speech rights.

Senator Hill stated he also had some problems with Rule Nos. 302.02, 313 and 201.

SUBSTITUTE MOTION: Senator Werk was troubled by the definitions and offered a substitute motion. **Senator Werk** moved to reject **Docket No. 38-0408-1202** in total. **Senator Stennett** seconded the motion.

Senator Werk stated that the flow of the definitions to the rules was difficult to interpret. While the Department is in the position that they must write rules, they must negotiate with others and reach agreement. Meantime, they can return to the policies and guidelines that have been used in the past.

Senator Davis commended the Department for their work. The problem isn't the definitions, it is the application of the definitions. He believes that the Department will revisit those definitions and let the process go forward.

The substitute motion failed by **voice vote**.

ORIGINAL MOTION: **Chairman McKenzie** stated that the original motion is now before the Committee.

Senator Hill noted his appreciation to the Department and assured them that rejecting a portion of the rules in no way reflects on the confidence he has in the Department.

Senator Stennett commented on the motion and meant no disrespect to the Department for the work they have done.

Senator Werk added his compliments and stated his concerns.

Senator Winder noted that the idea of free speech and the right to demonstrate is important and that is the reason the Committee has raised some concerns. These rules will apply to everyone and does not single out any specific group or philosophy.

The motion carried by **voice vote**.

MOTION: **Senator Davis** moved to adopt **Docket No. 38-0406-1202** but reject Rule Nos. 201,313 and 302 within the docket except for Rule 302.e which would be approved. (Note: a clerical correction was made to this motion in the January 18th minutes.) **Senator Hill** seconded the motion.

SUBSTITUTE MOTION: **Senator Stennett** moved to reject **Docket No. 38-0406-1202** in its entirety. **Senator Werk** seconded the motion. The substitute motion was defeated by **voice vote**.

ORIGINAL MOTION: **Chairman McKenzie** stated that the original motion was now before the Committee and asked for further discussion.

The motion carried by **voice vote**.

DOCKET NO. 03-0101-1201 **03.01.01 - Pending Fee Rules Governing the State Athletic Commission**

Chairman McKenzie introduced Roger Hales to speak on behalf of The Bureau of Occupational Licenses and the Athletic Commission (Commission).

Roger Hales introduced Tom Katsilometes, Chairman of the Board, who was in the audience. **Mr. Hales** explained that the Commission regulates boxing, the Mixed Martial Arts (MMA) and wrestling in both the professional and amateur arenas. It was created to protect the public, specifically the minors involved in these events. **Mr. Hales** outlined the duties and some history of the Commission.

The rules being brought forward reflect a continuing effort to protect the fighters. Additionally, it addresses the issue with the Commission in regards to its financing and its effort to be self supporting. The increase in fees that the legislature granted to the Commission last year has helped to somewhat stabilize its finances even though the full impact has not yet been felt. Last year at this time, the Commission outspent revenues by \$25,000. As of December 31, 2012, the Commission is approximately \$1,500 in arrears.

Mr. Hales summarized the rules as follows: the requirements for male and female combatants age twelve and under are clarified; an additional rule was added requiring promoters to report event results and injuries; clarifying glove requirements; and, term of license and fees are stated to establish that there is no penalty for non-renewal. In addition, the sanctioning event permit fee is being increased from \$200 per event to \$1,000 per event to offset the Commission's expenses (Rule 104.01.e). **Senator Fulcher** related that the need to write rules for male and female combatants under 12 years of age stood out. Is there any guidelines as to the levels of intensity for those activities for that age group and do they have to have parental consent? **Mr. Hales** stated that if you are involved in a combat sport you are obligated to get a license and there is no limitation on age for either professionals and amateurs. That age group is not involved in MMA but in sports like karate and kickboxing. From a legal standpoint there must be legal guardian or parental consent but he could not positively answer that question.

Senator Lodge stated her concern for the under 12 age group. Are any of these kids performing for financial gain for someone? **Mr. Hales** answered that these are mostly amateur organized events; it is a nonprofit scenario. **Senator Lodge** inquired about the police leagues; are they involved in boxing? **Mr. Hales** said that there are certain types of associations that are exempt as it relates to boxing. There are young individuals involved in boxing.

Mr. Hales continued through the rules explaining each of the changes.

The Commission has made some progress toward financial independence. One method was taxing the pay-per-view. There are two ways the Commission gets money; license fees and a percentage of the gate. There has been twelve events during the first six months of this year compared to 16 for the previous full year. If the revenue continues as it has, the Commission would generate about \$50,000.

A significant problem at the Commission is that they are \$180,000 in the red. It is not just a matter of stabilization, it is also a matter of paying back the money that other boards and the bureau have lent to them. How do they generate the revenue and who bears the burden? This can come from the promoters since they are the ones making money from the events.

Senator Winder asked if the Commission used the negotiated rule process. **Mr. Hales** responded that they did not.

Senator Stennett referred to Rule 107.08. Are females 12 and above always subjected to breast and pelvic examinations and how invasive is the exam? **Mr. Hales** responded that by implication, that is true. **Mr. Hales** said there is a ring doctor involved who interviews and examines the participant. It is always done in a closed locker room setting and could include the parents. **Mr. Hales** doesn't believe it is an invasive exam; it is more in the nature of a discussion and over the clothes exam but the doctor does have some discretion. **Senator Stennett** asked how frequently the pregnancy test would be given. **Mr. Hales** said that would be done by the doctor for every event they participated in.

Senator Lodge asked if the exam could be done and certified by a private physician. **Mr. Hales** said it could.

Chairman McKenzie extended his appreciation for the Commission's attempt at reducing the price for the combatants. The financial situation is being handled appropriately and hopefully will be in the black soon.

MOTION:

Senator Fulcher moved to adopt **Docket No. 03-0101-0201**. **Senator Siddoway** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
15-0603-1201**

**15.06.03 - Pending Fee Rules for the Bureau of Homeland Security
Public Safety Communications Rules (New Chapter)**

Steve Steiner, Chief, Bureau of Public Safety, Idaho Bureau of Homeland Security, stated that they are seeking the Committee's approval to implement a set of rules and gave an overview of what the Bureau of Public Safety does and why they need these rules. (A copy of the full presentation is included with the minutes as part of the record.) The primary role is to support all emergency communications for the Idaho Military Division based with local state and federal partners. They also provide emergency communication support to state agencies who utilize radio systems and other means of communications.

Currently, they do not have rules in the system even though they have been providing these services since the 1950s. After being moved about to several different agencies, they are now under the Idaho Bureau of Homeland Security. There has not been a fee increase in over 23 years. New technology is available that local and federal governments are asking them to provide services for. There is no fee structure to properly bill them for those services. The rules will allow them to grow so that they can meet the demands of the people they serve. They receive no general funds, they only collect fees from each of their users and those fees go into the salaries and infrastructure across the State.

Senator Fulcher asked what the percentage increase of the overall revenue stream will be if these rules are adopted. **Mr. Hales** stated that they expect between three and seven percent. Some agencies would see an increase and others might see some savings. The difference is the kind of technology the agencies are moving to. They are not in the business for profit, they just have a fee structure to enable them to pay for staff and upkeep of the locations where stations are located throughout the state.

Chairman McKenzie called for questions from the Committee.

MOTION: **Senator Winder** moved to adopt **Docket No. 18-0603-1201**. **Senator Werk** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 54-0301-1201 **54.03.01 - Pending Rules for the Office of the State Treasurer - Idaho Unclaimed Property Administration**
Chairman McKenzie introduced Cozette Walters, Administrator, to present the rules.

Ms. Walters offered an explanation for each of the changes within the rules. All changes were items of clarification.

MOTION: **Senator Winder** moved to adopt **Docket No. 54-0301-1201**. **Senator Siddoway** seconded the motion. The motion carried by **voice vote**.

ADJOURNED: **Chairman McKenzie** thanked the Committee and the presenters for their patience. The meeting adjourned at 10:32 a.m.

Senator McKenzie
Chairman

Twyla Melton
Secretary