

MINUTES

HOUSE JUDICIARY, RULES, & ADMINISTRATION COMMITTEE

DATE: Thursday, January 21, 2016

TIME: 1:30 P.M.

PLACE: Room EW42

MEMBERS: Chairman Wills, Vice Chairman Dayley, Representatives Luker, McMillan, Perry, Sims, Malek, Trujillo, McDonald, Cheatham, Kerby, Nate, Scott, Gannon, McCrostie, Nye, Wintrow

**ABSENT/
EXCUSED:** None

GUESTS: Victor McCraw, Idaho POST; Russ Wheatley, ISP; Dawn Peck, ISP; Leila McNeill, ISP; Ross Gutterud, Idaho Licensed Beverage Association (ILBA); Susan Jenkins, ILBA; Andrea Sprengel, Correctional Industries; Karin Magnell, Correctional Industries; Alan Anderson, Correctional Industries; Carlie Foster, Lobby Idaho; Mary Schoeler, Parole Commission; Jack Carpenter, Parole Commission; Brad Hunt, OARC; Adam Jarvis, DFM.

Chairman Wills called the meeting to order at 1:30 PM.

Chairman Wills appointed **Reps. Scott and Wintrow** to proof read the minutes.

Chairman Wills turned the gavel over to **Vice Chairman Dayley**.

DOCKET NO. 11-1003-1501: **Dawn Peck**, presented **Docket No. 11-1003-1501**, Rules Governing the Sex Offender Registry. This rule is to determine if sex offenders need to register in Idaho. This rule change defines the process for those offenders looking to possibly work or live in Idaho to determine if they will need to register. The catalyst for this change was from an Idaho Supreme Court Ruling. The Supreme Court stated there is a mechanism in place for sex offenders who already reside, work or are students in Idaho. The Court noted there should be a process for those who had not yet moved to Idaho or began work in Idaho. This rule change is presented to provide the process for this to happen.

MOTION: **Rep. McCrostie** made a motion to approve **Docket No. 11-1003-1501**. **Motion carried by voice vote.**

DOCKET NO. 11-1101-1501: Division Administrator **Victor McCraw**, Idaho Peace Officer Standards and Training Council (POST), presented **Docket No. 11-1101-1501**, Rules of the Idaho Peace Officer Standards and Training Council. The mission of POST is to develop skilled law enforcement professionals who are committed to serving and protecting the people of Idaho. This rule is intended to assist POST in accomplishing their mission by maintaining standards of competence and character for the men and women they certify to carry out their various public safety duties. Additionally, these rules clarify the required standards for maintaining certification, allowing POST to be certain they have the right people in these positions, while upholding public trust and law enforcement professions. Mr. McCraw reviewed the changes in the rule.

The changes do the following: brings POST into compliance with the FBI criminal fingerprint check restrictions; clarifies the certification qualifications regarding past misdemeanors and past decertifications in Idaho and other states; removes language prohibiting POST from considering misdemeanor convictions related to sex crimes, crimes against children and vulnerable adults; clarifies the certification requirements regarding past misdemeanor convictions within 10 years; eliminates the need for physical readiness or agility testing for certified individuals planning to return to the profession or seeking recertification; and eliminates the requirement for students to live on campus during their academy sessions. Additionally, there are substantial changes to a POST instructor's description of duties, certification process and record keeping requirements.

In response to a question from the committee, **Mr. McCraw** explained the FBI has ruled they will not recognize POST in their definition of a law enforcement agency for the administration of justice. Thus, the cost of background checks, previously administered at no cost to POST, has now become an expense for POST. Each agency already runs a background check on each participant. POST is not privy to the information gathered by the agency; however, the agency can verify to POST whether or not the individual is qualified by POST's standards. He said it was imperative to strike the section saying a misdemeanor conviction wouldn't be basis for rejection of an applicant because when it was added in 2014 it was overlooked that this section included crimes against children and vulnerable adults. By striking this section it will again allow POST to consider all violations when approving or denying a certification.

Mr. McCraw addressed the rule change removing the closed campus requirement. This allows POST and other agencies to expand their recruitment pool and accept applicants who are local, and/or single parents. Rural students will continue to have the option to stay on campus. Additionally, this will save POST funds.

In response to a question from the committee, **Mr. McCraw** confirmed, although attendance is not expressly spelled out in the rules, attendance is required by policy. Students commuting will not have a different attendance policy. Individuals returning for recertification do not go through basic training, thus they are not required to go through agility and physical readiness testing. This portion of the rule removes the requirement for them to go through agility and physical readiness testing, leaving it to the individual agencies to determine the individual's readiness. Individuals who have not been in the profession for 8 years or longer must go through basic training and agility and physical readiness testing again.

Mr. McCraw addressed the instructor certification changes. Presently POST processes close to 3,000 certifications every year. This takes countless hours for the instructor to fill out and submit requests for every topic they teach annually and for POST to process every request with little to no quality control due to the sheer volume. These rule changes accomplish the following: allows POST to issue training credit for only those courses taught by at least one certified or approved instructor unless otherwise designated in the rule; adds a provision for non-punitive suspension of an instructor's certification for significant or repeated deviation from POST training standards; eliminates exemptions for instructors; reduces the instructor application documentation requirements; eliminates the requirement for recertification as an instructor every year on every topic unless those topics are classified as high liability training which includes shooting, fighting or driving. The changes maintain and refine the current level of oversight, training and recertification requirements for any high liability instructors. Additionally, this rule establishes a 40 hour POST instructor development course to determine the instructor candidate's proficiency in the discipline, as well as, whether they are capable of teaching the discipline.

In response to a question from the committee, **Mr. McCraw** explained a conducted energy device instructor instructs in the use of a taser. Instructors are required to be in compliance with the rule and the device manufacturer's instruction requirements.

MOTION: **Rep. Nye** made a motion to approve **Docket No 11-1101-1501**. **Motion carried by voice vote.**

DOCKET NO. 11-1104-1501: Division Administrator **Victor McCraw**, Idaho Peace Officer Standards and Training Council (POST), presented **Docket No. 11-1104-1501**, Rules of the Idaho POST for Correction Officers and Adult Probation and Parole Officers. The changes in this rule address the FBI's challenge of POST's use of free background checks. This rule also addresses striking the physical fitness and agility recertification requirements for correctional officers who have left the position for a short lapse of time and are not required to go through basic training again. There is a specific change for correction officers and adult probation and parole officers who are recertifying and had originally certified at a time when fire arm handling was not part of their basic training. These officers will be required to go through basic certification to carry a firearm in order to recertify. Officers moving to Idaho are allowed to challenge the requirement to go through basic correction academy in order to work in the State of Idaho. This section has also had the agility portion stricken and the basic fire arms handling added to their requirements. This section requires applicants to disclose any decertifications.

MOTION: **Rep. Trujillo** made a motion to approve **Docket No. 11-1104-1501**. **Motion carried by voice vote.**

DOCKET NO. 50-0101-1501: Business Operations Manager, **Jack Carpenter**, Idaho Commission of Pardons & Paroles, presented **Docket No. 50-0101-1501**. He reviewed the changes, which include removing infractions from the definitions of non-technical and technical violation; providing Violation Hearing Officers the authority to impose sanctions for the purpose of matching language placed into statute during the previous session; implementing conditions and guidelines for a simpler and more transparent process when an individual seeks to have their firearms restored; adding provisions for confidential evaluations of substance abuse; clarifying the Executive Director's authority to recall a decision; and, providing an additional explanation of conditions of a parole contract including sanctions and rewards, all conditions must be in writing and signed by the parolee.

The changes also clarify what constitutes excessive alcohol use, the wording has been changed to mirror a standard condition of parole which states that no alcohol use is allowed. These changes authorize violation hearing officers to implement 90/180 day sanctions without appearing before the Commission; and remove the reference to institutional parole. The Commission requested the committee reject changes made to sub-section 05 because the Commission may need to use this section in regard to the 90/180 day sanctions for parole violators.

In response to a question from the committee, Executive Director, **Sandy Jones**, Idaho Commission of Pardons and Parole, defined Institutional Parole. Institutional Parole is a situation where a parolee is in custody on a different charge under a different jurisdiction or authority, and they are serving time while on parole for a separate charge. This requires the rules of parole to still apply to that person even though they are in custody on a separate charge.

Jack Carpenter, addressed the remaining changes which remove references to staff progress reports which were never adopted or utilized by the parole commission. Offenders have a self initiated progress report (SIPR) used to request a reconsideration of a commission decision. He also said in 2006 a memorandum of understanding was signed by the Governor, the Department of Correction and the Parole Commission granting the Parole Commission the authority to comply with the Foreign National Treaty. This process simply needed to be added to the IDAPA rules.

MOTION: **Rep. Wintrow** made a motion to approve **Docket No. 50-0101-1501 with the exception of Section 250 Subsection 05. Motion carried by voice vote.**

DOCKET NO. 06-0102-1502: Financial Manager, **Andrea Sprengel**, Idaho Correctional Industries, presented **Docket No. 06-0102-1502**. This rule clarifies the definition of a private agriculture employer. Per the request of the committee in 2015 this rule removes "shall" and replaces it with "will", "must" or "may".

MOTION: **Rep. Trujillo** made a motion to approve **Docket No. 06-0102-1502. Motion carried by voice vote.**

DOCKET NO. 11-0501-1401: **Capt. Russell Wheatley**, ISP, presented **Docket No. 11-0501-1401**, Rules Governing Alcohol Beverage Control. This proposed rule change is intended to define the actual use requirement for owning a Idaho Liquor License. Liquor licenses are in high demand and ISP has a priority waiting list, which contains at least one entity that has been on the waiting list since 1975. Idaho has adopted rules requiring liquor licenses be displayed prominently and be placed into, and remain, in actual use. The challenge for ABC is actual use is not defined anywhere in Idaho Code or rule. This change seeks to clearly define what actual use of a liquor license constitutes. From 2014-2015 ABC litigated 17 cases involving non-use of a liquor license. In one instance, ABC had evidence a licence had not been in use for an entire calendar year and the property was vacant and listed for sale. Opposing council stated their client had sold 5-10 drinks on one day in consecutive months and argued this met the actual use standard. ABC does not believe that is the intent of the actual use requirement. It is not ABC's intent to establish a standard that is burdensome to the industry. ABC is seeking a minimum requirement to keep liquor licenses in good standing. A clear actual use definition will keep ABC and licensees from having to litigate this issue on a regular basis.

In the summer of 2014 ABC and members of the industry began the rule making process and in October 2014 ABC published notice for negotiated rule making. Comments and feedback were requested and anticipated but were not received. In the spring of 2015, discussions with the industry continued and ABC tasked their detectives with conducting a survey of small quota system liquor licence holders in remote locations. These licence holders were asked how many days a week and how many hours a day they were open. They were also asked how many liquor drinks they sold per day, and if they experienced a busy and slow season, how many liquor-by-the-drink sales were affected on per day sales. 60 surveys were conducted and the results showed the fewest number of days open was four, the fewest number of hours open per day was five, the fewest number of hours open per week was twenty and the fewest number of liquor drinks sold per week was thirty. Using this information, ABC determined the minimum requirements for actual use should require the licence holder to be open twenty hours per week and have twenty liquor-by-the-drink sales per week. Statute already requires newly issued liquor licenses be used six days a week and eight hours a day.

With this rule ABC is not dictating which days of the week a business must be open, only that they have to be open for legitimate sales of liquor 20 hours per week. It is up to each licensee to decide which hours they will be open to meet the minimum 20 hour requirement. ABC is attempting to adopt a standard that allows remote businesses to operate within the confines of the rules, but also provides the agency with an enforceable standard when liquor licenses are not in actual use. When liquor licenses are being used properly the State of Idaho benefits from revenue from the purchase of liquor from the Idaho State Liquor Division (ISLD), the creation of jobs, and tax revenue. Dormant liquor licenses provide none of these and cause frustration for those on the priority waiting list.

ABC constantly receives complaints pertaining to quota system licenses not being in actual use. When ABC becomes aware of a liquor license not in actual use, a letter is sent to the licensee reminding them there is a requirement for actual use of the license. If the licensee's closure is due to a loss or move of the physical licensed premises the rule allows for 90 days to find suitable premises to prominently display their liquor license. The letter will contain a date by which they must be operational and have legitimate sales. The Director has the authority to grant a 60 day extension if requested. Based on this, 90 days is the shortest period of time ABC would use to calculate the sales per week under this actual use rule. This rule does not affect specialty liquor licenses. The Idaho Licensed Beverage Association (ILBA) is supportive of this rule. If this rule is adopted it will provide a much needed clarification on what actual use of a liquor license constitutes for both regulators and quota system liquor license holders.

In response to questions from the committee, **Capt. Wheatley** explained out of the surveys conducted, no one is in jeopardy of losing their license if the proposed rule were adopted. Audits using their liquor sales records are used to determine if the actual use requirements are being met. The courts have held a liquor license is not defined as property in Idaho because it is a license to do something that is otherwise illegal without the license. The law limiting the number of licenses for sale was adopted by the legislature and has been in Idaho Code for many years. When a license is successfully revoked, it would go back into the quota pool and is offered to the next person in line on the priority waiting list. Because a lapse is a violation of their license, the license holder would not receive any compensation.

MOTION:

Rep. Wintrow made a motion to approve **Docket No. 11-0501-1401**.

**SUBSTITUTE
MOTION:**

Rep. Trujillo made a substitute motion to reject **Docket No. 11-0501-1401**.

In response to questions from the committee, **Capt. Wheatley** clarified no operational business currently using their license would lose their license if this rule was approved. Any licensee not using their license, would likely lose their license. There are individuals being pursued for non-use of their liquor licenses but without a clear definition of actual use, it has been impossible to revoke their license. Without adopting the proposed rule, ABC has no standard to use when responding to a challenge. A license holder who has received a notification has 90 days to become compliant and has the option to sell during those 90 days. Should a license be revoked and go back into the pool, the state sells the liquor license for \$800, not for the current market value. A newly issued license has to remain in use six days a week, eight hours a day, for six months and cannot be sold or transferred for two years. The proposed rule is seeking to define actual use for licenses outside of the initial six month period.

Ross Gutterud, owner of First National Bar and Regional Representative for ILBA, expressed his support for the rule, as well as the support of the members of ILBA.

**VOTE ON
SUBSTITUTE
MOTION:**

Roll call vote was requested on the substitute motion to reject **Docket No. 11-0501-1401**. **Substitute motion carried by a vote of, 10 AYE, 7 NAY. Voting in favor** of the substitute motion: **Reps. Luker, McMillan, Perry, Sims, Trujillo, Cheatham, Kerby, Nate, Scott and Gannon**. **Voting in opposition** of the substitute motion: **Reps. Malek, McDonald, McCrostie, Nye, Wintrow, Chairman Wills and Vice Chairman Dayley**.

**DOCKET NO.
11-0501-1501:**

Capt. Russell Wheatley, ISP, presented **Docket No. 11-0501-1501**, Rules Governing Alcohol Beverage Control (ABC). This rule is a proposed change pertaining to growlers. Requirements for sale and transportation of growlers vary from state to state. In Idaho, growlers are recognized as an open container because they do not have a factory seal, unlike wine or beer bottles. Finding a way to seal growlers is extremely important in order to protect consumers. Presently, a consumer will have their growler filled and place the container in the passenger seat or passenger floorboard, this immediately places them in violation of Idaho's open container law. It was also important ABC defined a growler's size and type. This rule would define the minimum size of a growler as a 750 ml bottle and the maximum size as a gallon bottle. Although most growlers are made of glass or aluminum, a specific material was not designated in the rule because a growler made with different materials may be developed in the future.

The industry requested ABC procure, sell and distribute a tamper proof tape to seal the growler. ABC's oversight would provide consistency for all distributors. The tape chosen meets the necessary tamper proof requirement so the tape could not be simply peeled away and put back into place. However, when the lid is turned the tape will break, showing the bottle has been opened. This rule will provide clarity for anyone who chooses to engage in the sale and use of growlers. This rule clarifies employees, who are the proper age, and working for licensed retailers, breweries, or wineries are the only individuals authorized to fill a growler. This rule establishes growlers are for off-premise consumption only. A fee has been designated to be collected by ABC a division of ISP. This fee would provide for a box of the designated and approved tape, and the cost to mail it to the licensee. This is being sold at cost, ABC is not making a profit off of the tape. This has already been adopted as a temporary rule. Once the rule is adopted, education and distribution of the tape will begin for the licensees. As of six months ago there were 163 licensees who had indicated an interest in selling growlers, today there are 354 interested licensees.

MOTION:

Rep. Kerby made a motion to approve **Docket No. 11-0501-1501**.

Rep. Sims invoked Rule 38 stating a possible conflict of interest but that she would be voting on the rule.

In response to questions from the committee, **Capt. Wheatley** confirmed there have not been any instances where an officer has found an open growler in a vehicle. A location not in possession of an on-site consumption license is not required to post that they cannot allow on-site consumption.

**SUBSTITUTE
MOTION:**

Rep. Perry made a substitute motion to reject **Docket No. 11-0501-1501**. Roll call vote was requested. **Substitute motion failed by a vote of, 5 AYE, 12 NAY. Voting in favor** of the substitute motion: **Reps. McMillan, Perry, Sims, Nate and Scott**. **Voting in opposition** to the substitute motion: **Reps. Luker, Malek, Trujillo, McDonald, Cheatham, Kerby, Gannon, McCrostie, Nye, Wintrow, Chairman Wills and Vice Chairman Dayley**.

VOTE ON ORIGINAL MOTION:

Roll call vote was requested on the original motion to approve **Docket No. 11-0501-1501**. **Original motion carried by a vote of, 12 AYE, 5 NAY**. Voting in favor of the original motion: **Reps. Luker, Malek, Trujillo, McDonald, Cheatham, Kerby, Gannon, McCrostie, Nye, Wintrow, Chairman Wills and Vice Chairman Dayley**. Voting in opposition to the original motion: **Reps. McMillan, Perry, Sims, Nate and Scott**.

Vice Chairman Dayley turned the gavel over to **Chairman Wills**.

ADJOURN:

There being no further business to come before the committee, the meeting was adjourned at 4:12 PM.

Representative Wills
Chair

Katie Butcher
Secretary