

MINUTES
SENATE JUDICIARY & RULES COMMITTEE

DATE: Friday, January 29, 2016

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Lodge, Vice Chairman Nonini, Senators Davis, Johnson, Souza, Lee, Anthon and Jordan

ABSENT/ EXCUSED: Senator Burgoyne

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 Lodge** called the meeting of the Senate Judiciary and Rules Committee (Committee) to order at 1:30 p.m.

PASSED THE GAVEL: Senator Lodge passed the gavel to Vice Chairman Nonini.

DOCKET NO. 11-0501-1401 **Captain Russ Wheatley**, Idaho State Police (ISP), stated that this docket deals with the Actual Use Rules as they relate to licensing. He pointed out that the Alcohol Beverage Control (ABC) bureau issues and regulates alcohol licensing for the manufacture, transportation and sale of beer and wine, as well as liquor by the drink. Licenses in the State exceed 5,000 and include licenses issued to wineries, breweries, distributors, retail establishments and direct shippers who ship wine into Idaho from other states. **Captain Wheatley** explained the quota system used to issue licenses, the value of the licenses (which varies among locations) and the number of applicants on the waiting list (see attachment 1). Because of the waiting list for applicants desiring these valuable licenses, ABC is concerned about the number of licenses that are not being used. He emphasized that while a standard under this change is not meant to be burdensome to the industry, it is important to have a minimum requirement to keep liquor licenses in good standing.

Captain Wheatley reviewed the process of adopting rules regarding the licenses (Idaho Code § 23-9084 and IDAPA 11.05.01.14.01). The term "actual use" is used in these rules, but the definition of the term has not been established. Because of the ambiguity, several cases have been litigated costing ABC thousands of dollars. In order to establish a viable definition, ABC invited conversation with the participants in the industry and asked for public comment. However, no feedback or comments were received. The ABC followed up with a survey targeting very small and remote license holders to determine the normal usage of their licenses (see attachment 1). These surveys were used to establish the base number of hours per week and the liquor-by-the-drink sales per week, two of the factors used to determine actual use. **Captain Wheatley** pointed out that dormant liquor licenses instill frustration in applicants on the waiting list and reduce the positive economic benefits to the State, such as revenue from the Idaho State Liquor Division, the creations of jobs and tax revenue.

Captain Wheatley explained that this rule does not affect specialty licenses because they are already restricted. In addition, the Captain reported that the Idaho courts have ruled that there is not a property right to a liquor license.

Senator Davis inquired how the House Judiciary, Rules and Administration Committee acted on this proposal. **Captain Wheatley** replied that ABC was not successful in the House. **Senator Davis** stated that the House felt this should not be a rule but should be statutory. He asked if the ISP disagreed with that approach. **Captain Wheatley** responded that they did not disagree. **Senator Davis** inquired if **Captain Wheatley** was asking to withdraw the rule. **Captain Wheatley** said he was not. **Senator Davis** commented that in looking at Idaho Code § 23-9084 he interprets it as being in conflict with ABC's proposal since it says the license must be in force for six consecutive months before it can be forfeited. This proposal imposes an additional standard beyond six consecutive months. **Captain Wheatley** pointed out that the six consecutive months is the exception listed in the rule. **Captain Wheatley** further explained that when a new license is issued and the new licensee accepts it, the new licensee has 180 days to put it to use. When it is established that the license is being put to use, it must be in use six days a week, eight hours a day for the first six months. It cannot be sold or transferred during the first two years. The rule being considered in this docket covers everything outside of that spectrum. They are trying to clarify what "actual use" means. **Senator Davis** acknowledged that he understands the intent of this rule, but that it goes beyond statute. He suggested they put it into statute.

Senator Souza asked what the fee is for beer and wine licenses, and how many of those and how many there are in Idaho compared to liquor licenses. **Captain Wheatley** replied that he did not have those statistics at hand, but a beer license is \$50 and a wine license is an additional \$150. Quota system licenses are issued for about \$750. There are almost 3,000 beer, beer and wine, brewery and other licenses, and they differ from liquor licenses. **Senator Souza** inquired if an establishment with a liquor license could also sell beer and wine. **Captain Wheatley** responded that they could.

MOTION:

Senator Davis expressed his agreement with the ISP. He moved to not take up an actual vote on **Docket No. 11-0501-1401** today but to make it subject to the call of the chair to reconsider this issue after some work is done to clarify the language. **Senator Souza** seconded the motion. The motion passed by **voice vote**.

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

Captain Wheatley, ISP, returned to the podium to present this docket. He stated that this rule applied to growlers. He exhibited a growler and explained that growlers are containers that can be filled with liquor on tap. He added that they have various designs and are made of a variety of materials. They are filled with beer or wine by a licensed retailer, winery or brewery. He detailed the history of growlers in Idaho. **Captain Wheatley** described his research into the laws and rules in other states with regard to growlers and found that some states required them to be sealed and some did not. In looking at Idaho's open container law, Idaho Code § 23-505(2), it was obvious these would be considered open containers since they are not factory sealed. He was concerned for consumers who would have their growler filled and then put it on the front seat or floorboard of their car to take it home. He indicated that he had received many questions in his office regarding the size of growlers and felt minimum and maximum sizes should be defined.

In order to prepare this legislation, **Captain Wheatley** held meetings with stakeholders and discussed various questions pertaining to growlers. The seal for a growler caused the most concern. ABC was asked by members of the industry to procure the tape so it would be consistent and retailers could purchase it from ABC. **Captain Wheatley** recounted the course of his research which resulted in using a tape that was tamper proof.

Captain Wheatley pointed out that this docket provides clear rules for those who sell growlers. It states the size will be a minimum of 750 ml, equal to a standard wine bottle, and a maximum of one gallon. The rule also identifies who can fill growlers (employees of licensed retailers, breweries or wineries who are the proper age). It states that growlers are for off-premise consumption and provides for the collection of \$20 to be collected by ABC to cover the costs of the tape, mailing fees and administrative costs. **Captain Wheatley** noted that the tape would need to be tamper proof.

Captain Wheatley declared that ABC now has the tamper-proof tape and is ready to conduct the training.

Senator Jordan asked if people with growlers have been pulled over for having an open container. **Captain Wheatley** replied the he had no specific examples, but people have been pulled over for open containers. **Senator Jordan** inquired if there were two separate markets, pubs and retail establishments. She perceived that grocery and convenience stores have implemented taping to prevent consumption in their stores. **Captain Wheatley** responded that some retailers use tape, but the tape is not tamper proof. **Senator Jordan** queried if a sober driver would receive an open container ticket if a growler or partially consumed bottle of wine being brought home from a dinner party were in the car. **Captain Wheatley** replied that a person can be pulled over for many reasons. If there is a traffic stop and the growler were observed, it would be at the discretion of the officer whether or not a ticket would be issued.

Senator Souza inquired if she were stopped with a growler in her car but had no alcohol on her breath, would she receive a ticket? **Captain Wheatley** reiterated that it would be at the discretion of the officer.

Senator Johnson expressed a need for a more definitive definition of "growler", the purchase of growlers from outside of Idaho, the capacity of the growler and who is responsible for sealing the growler. **Captain Wheatley** stated that if a growler were brought in from another state, once in Idaho the consumer would be subject to the laws of the State of Idaho. Regarding the seal, the retailer is responsible for filling and sealing the growler, according to Captain Wheatley. He also pointed out that a growler cannot be prefilled. It requires a licensed bottling facility in order to refill a bottle. The growler is just a container until the alcohol is put into it.

Senator Lee stated that she also lives in a border city, and that Oregon has implemented an education campaign to advise consumers growlers are subject to open container laws and they need to be put in the trunk. She asked if Captain Wheatley felt a public awareness campaign would be beneficial in place of legislation. **Captain Wheatley** asserted that while he did not have a budget for that, the distributors could manage such a campaign. **Senator Lee** pointed out that a point-of-sale notification would be a good way to get the information to the consumer.

Vice Chairman Nonini expressed similar concerns regarding border towns. He also asked about the brown color of the bottle making it difficult for an officer to determine how much liquid was in the bottle. He inquired if growlers were different colors. **Captain Wheatley** explained that the amber color protects the product. There are some that are solid metal so they are not transparent. He pointed out that the seal would be an effective way to determine that the growler is not an open container. **Vice Chairman Nonini** inquired what the House did with this rule. **Captain Wheatley** replied that it was passed in the House.

Senator Davis discussed with Captain Wheatley problems in the definition of a growler as well as who would have the duty to seal the growler. **Senator Davis** expressed a need for clarifying the language in the rule.

Senator Davis proposed that if the rule passes, Captain Wheatley will come back next year with a rewrite that imposes the affirmative duty at the point of sale to securely cap it, and then to put tamper-proof on top of it. **Captain Wheatley** agreed to this proposal.

MOTION: **Senator Davis** moved to approve **Docket No. 11-0501-1501**. **Senator Lodge** seconded the motion.

Senator Jordan indicated concern regarding business owners needing to have the tape on hand. If they run out of tape they may be out of business until it arrives. Without having evidence that people are abusing this she stated she could not support the motion.

Senator Lee complimented the ISP on educating the people about the laws and on their professionalism. She reiterated Senator Jordan's concern that there would be a competitive disadvantage for small business owners. She stated that she would not support the rule.

Senator Sousa voiced her concern about the impact on small business. Without data to indicate a problem, she prefers starting with education.

Senator Lodge stated that she will support this motion mainly to assist young people from being charged with carrying an open container.

Vice Chairman Nonini inquired where the container would need to be kept so it would not be subject to the open container law. **Captain Wheatley** replied that the law simply says "out of reach" of the driver.

Senator Anthon expressed concern about passing a rule with the idea that it will be brought back next year with adjustments. He stated he will not support the motion.

SUBSTITUTE MOTION: **Senator Johnson** moved to reject **Docket No. 11-0501-1501**. **Senator Souza** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 05-0102-1501 **Sharon Harrigfeld**, Director, Idaho Department of Juvenile Corrections (IDJC), introduced Steve Jett from the Southwest Idaho Juvenile Detention Center. **Director Harrigfeld** detailed the recommended changes in the rule dealing with training that will ensure high-liability courses are taught by instructors who are certified in the subject. The grading matrix will show that students are meeting the requirements of the class ensuring that officers who work with juveniles meet an adequate level of proficiency.

Director Harrigfeld pointed out that other changes are to 1.) delete the record of deposits language because offender accounts are no longer maintained by any of the juvenile facilities, and 2.) delete redundant language regarding emergency situations. She indicated that the rest of the changes involve clarifying rules, including those relating to corrective action and security devices training in POST as well in the juvenile facilities.

MOTION: **Senator Souza** moved to approve **Docket No. 05-0102-1501**. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
05-0201-1501**

Director Harrigfeld reminded the committee that she was asked to come back to confirm these rules from last year. She provided handouts to define what happened with these rules for the new members of the Committee. She pointed out that these changes are mainly for clarification (see attachment 2). **Senator Jordan** asked if IDJC has policies that identify the gender of the person conducting the search? **Director Harrigfeld** answered that it is in Docket No. 05-0202-1501. **Senator Anthon** requested clarification of the section dealing with personal provider vehicles. **Director Harrigfeld** replied that juveniles in custody will not be transported in the private vehicles of anyone who works for a contract provider unless it is an emergency.

MOTION:

Senator Anthon moved to adopt **Docket No. 05-0201-1501**. **Senator Lodge** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
05-0202-1501**

Director Harrigfeld explained that this rule revision changed terms defining medical health professional. The wording concerning body searches was revised to establish that the health professional conducting the body search will be of the same sex as the child. She added that a body cavity search may only be conducted in a medical facility outside of the juvenile facility. **Senator Davis** inquired what procedures are in place regarding juveniles in transition. **Director Harrigfeld** explained that the sex of the health professional would be the choice of the juvenile.

MOTION:

Senator Lodge moved to adopt **Docket No. 05-0202-1501**. **Senator Lee** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
05-0203-1501**

Director Harrigfeld pointed out that the rule in this docket contains the same changes already passed but they are for the reintegration providers.

MOTION:

Senator Davis moved to adopt **Docket No. 05-0203-1501**. **Senator Lee** seconded the motion. The motion passed by **voice vote**.

**PASSED THE
GAVEL:**

Vice Chairman Nonini passed the gavel back to Chairman Lodge.

ADJOURNED:

Chairman Lodge adjourned the meeting at 3:02 p.m.

Senator Lodge
Chair

Carol Cornwall
Secretary