

Draft Rule-by-rule Analysis

Note: This excerpt is from an early, rough draft of the POST Board’s Statement of Need and Reasonableness (SONAR). The draft has not been reviewed or approved by the Board. When a complete SONAR on proposed rules (Revisors Draft 04641) has been developed and approved by the Board, it will be published with the actual approved draft of proposed rules.

6700.1600. Standards of Conduct.

Minn. Stat. § [626.843](#) requires the board to establish in rule “*minimum standards of conduct which would affect the individual's performance of duties as a peace officer*”. While law enforcement agencies bear the responsibility to address employment performance issues with their employees, POST bears the responsibility of addressing standards of conduct and fitness for licensure for law enforcement officers in Minnesota. Current standards of conduct address conduct on a very limited basis and do not address many areas of egregious conduct, failing to identify the full scope of serious conduct that would reasonably call into question an officer’s fitness for licensure and ability to faithfully perform the duties of an officer.

It is needed and reasonable to amend the standards to enable the board to carry out its regulatory responsibilities. The board must fully address conduct of law enforcement officers that jeopardizes the health, safety, and welfare of the public, or that interferes with their ability to fairly protect and serve all their communities. The proposed amendments expand the areas of officer conduct that are vital to the performance of their duties. The amendment also reorganizes the rule part for better clarity and accessibility.

In general, the proposed amendments to this rule part focus on officer conduct, not criminal conviction. The board considered continuing to use a conviction standard for criminal, but determined that maintaining the current conviction standard was inappropriate for these reasons:

- A. Minn. Stat. § [626.843](#), subd. 1(6) requires the board to develop standards of conduct “...which would affect the individual's performance of duties as a peace officer.” It does not limit the board to addressing only criminal conduct for which an officer is convicted as an appropriate standard of conduct. A law enforcement officer must conduct their self both on and off duty in a manner that reflects high standards consistent with the expectations of the communities served by law enforcement.
- B. Licensing boards, including the POST Board, are subject to the requirements set out in statute. Minn. Stat. § [214.10](#), subd. (10) and (11) statute contains specific provisions for the POST Board (regarding the board’s regulatory responsibility when a complaint alleges a violation of a statute or rule that the board is empowered to enforce. The disciplinary standard for the POST Board identified in this statute is whether reasonable grounds are found to believe that a violation of the standards of conduct occurred. A criminal conviction standard is substantially higher than the reasonable grounds standard the board is directed to use in statute.
- C. Finally, criminal behavior does not always lead to charges, and charges do not always lead to convictions regardless of whether or not the conduct actually occurred. A conviction standard fails to address the circumstances when the conduct occurred but a criminal charge is not brought or is dismissed, or when an individual accepts a plea to a lower charge.

- D. It is important to note that an officer's due process rights are protected through the board's complaint investigation processes and statutorily protected under Minn. Stat. § [214.10](#), regardless of whether the conduct in question was criminal in nature, or whether criminal charges were filed, or whether a criminal conviction resulted.

It is needed and reasonable to amend the standards of conduct to include conduct of officers that would call into question the officer's fitness to serve as a law enforcement officer, and to include any conduct that would have barred the officer from licensure had the conduct occurred prior to licensure application. The POST Board affirms that all of the proposed revisions to the standards of conduct are needed and reasonable. Each rule subpart is further discussed below.

6700.1600, Subp. 1 Standards. The proposed amendment to this part clarifies that discipline may result from a violation of a standards of conduct.

Subp. 1, Item A. The Advisory Committee reached consensus approval of the eight conduct areas in this rule part. The eight areas include conduct described in felony, gross misdemeanor, and lower level criminal offenses that are inappropriate for an officer of the law. The Advisory Committee and board considered other conduct described in various lower level offenses, but propose only three new areas of conduct that are not in the current standards and that would call into question the officer's fitness for duty. These three areas of conduct (obstruction of justice, fleeing from law enforcement on foot, and carrying a pistol while under the influence) are included in Items A(5), (6), and (7) because such conduct demonstrates a serious lack of judgement and reasonably calls into question the officer's fitness for duty and fidelity to the principles of law enforcement.

Subp. 1, Item B. This proposed amendment expands on a current standard of conduct by adding law enforcement agencies and the courts as entities in addition to the board where providing false information would violate conduct standards. The proposed rule also clarifies that any conduct that may lead to an impeachment disclosure or a Brady-Giglio impairment is a violation of standards of conduct. Under Brady-Giglio requirements, information about a witness, including a law enforcement officer, must be disclosed to the defense when their testimony could be impeached for allegations of misconduct regarding truthfulness (among other reasons).

When an officer could be impeached as a witness in a criminal trial, the prosecution can no longer rely on the officer's testimony as evidence in proving its case. In some cases, an officer may have the only firsthand account of a crime. Officer reports and other documents prepared by the officer would be considered inadmissible hearsay unless the officer could testify at the trial. Without the testimony of the officer with the most knowledge of the facts, the prosecution would likely find it difficult to prove their case.

It is reasonable and needed to establish truthfulness as a standard of conduct as the word of a law enforcement officer must be relied upon in law enforcement activity. The Advisory Committee approved Item B by consensus.

Subp. 1, Item C. Item C represents a current standard of conduct, and continues to identify cheating on exams or the licensing process as a standards violation. The Advisory Committee approved Item C by consensus.

Subp. 1, Item D. This proposed rule amendment adds to the current conduct standard regarding the unauthorized use of deadly force. Because current standards do not address less than lethal force, the board has no jurisdiction regarding use of force complaints when the force used was less than lethal. It is needed and reasonable to include unreasonable or excessive use of less than lethal force.

The amendment also adds the new statutory requirements in Minn. Stat. § [626.8745](#) regarding specific new responsibilities for officers on interceding and reporting inappropriate or illegal use of force violations by other officers.

The Advisory Committee approved Item D by consensus.

Subp. 1, Item E. This item contains four requirements. Current standards of conduct rule requirements are incorporated in this part, and an added requirement is to comply with statutory reporting requirements for law enforcement officers on bias crimes. This does not impose any new requirement on officers but does hold officers accountable for compliance with the statute.

The existing reporting requirement in part [6700.1610](#), subp. 2 is moved to this part. The types of conduct to be reported are clarified, and a reporting time period is identified. These changes remove any confusion regarding the reporting requirement and should result in better compliance and easier enforcement of the rule. The changes are needed and reasonable as it is not uncommon for unreported conduct to turn up during background checks on currently employed officers. Specifically identifying the reporting requirement in standards of conduct may aid officers in compliance.

The remaining two requirements in this item are part of current standards (cooperate with board investigations and comply with rule and statutory requirements) and are moved to this section as part of the re-organization of the rule part.

The Advisory Committee approved Item E by consensus.

Subp. 1, Item F. The conduct identified in this item relates to the abuse of power related to the misuse of an officer's authority and misconduct of a public employee. It is needed and reasonable to establish such conduct as antithetical to the integrity required for a law enforcement officer, given the powers and authority of law enforcement officers. The Advisory Committee approved Item F by consensus.

Subp. 1, Item G. This proposed rule item was approved with consensus by the Advisory Committee.

A definition of discriminatory conduct is proposed under part 6700.0100, subp. 26.

It is needed and reasonable to establish discriminatory conduct as a violation of standards of conduct. On or off duty discriminatory conduct of officers reduces community trust, and can lead to Brady-Giglio impairments. Discriminatory conduct of officers on duty is prohibited by the Minnesota Human Rights Act. Furthermore, a history of discriminatory conduct is a bar to licensure. Background investigations of licensure candidates are thorough, and consider the

character, morals, and history of a candidate to determine fitness for licensure. Discriminatory conduct is a specific area of investigation under the proposed rule part 6700.0670 subp. 2(A)(5). Candidates that express through words or actions an aversion to or bias against a protected class group do not pass background investigations. Conduct that would prevent a person from licensure is equally unacceptable after a person is licensed, as law enforcement officers must uphold the state laws and serve all members of their community fairly.

Community Trust

A community's trust in law enforcement is fundamental to effective protection of persons and property. Trust improves community interactions, enhances communication, and promotes shared responsibility for addressing crime and disorder. When trust in law enforcement is lacking, community members are less likely to contact police regarding criminal activities, to cooperate or respond to law enforcement requests for information or witnesses, and crime rates rise.

A community cannot be expected to trust an officer who exhibits on or off duty behavior or communication that demonstrates the officer's bias against community members based on a protected class identified in state law. Minneapolis Police Chief Arradondo testified at a 2021 arbitration hearing on an officer who was terminated for anti-Muslim Facebook posts *"...In this profession, we are being held to a higher standard, as we should be. But anytime that we have an employee that engages in conduct that strikes to the heart of that issue of dignity, respect, are we being discriminatory in our words, thoughts, or actions; are we expressing thoughts on social media which seem to pick out Muslim-Americans, African-Americans, and then to expect us to put this uniform back on the next day and say, well, no, that's not how I'm going to treat you when I deal with you professionally, that a reasonable person would not think that is the case."*

Brady-Giglio Impairments

An officer who engages in discriminatory conduct, on or off duty, creates a potential Brady-Giglio¹ impairment. Under Brady-Giglio, prosecutors must disclose evidence that could lead to the impeachment of witness testimony including testimony of a law enforcement officer, including any findings or allegations of untruthfulness or bias. Bias includes both personal bias towards an individual, and bias towards a group in which the individual in question is a member. Law enforcement officers who are known to exhibit discriminatory conduct, or to hold biases against certain groups, could be impeached as a witness in cases where a member or members of that group are involved.

Prosecutors cannot rely on an impeached officer's testimony. Not only would the prosecutor not be able to use the law enforcement officer to testify to facts in a criminal case, the prosecutor would also be unable to use the officer's reports and other documents without the officer's testimony. Any testimony from an officer known to

¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); U.S.A.M. 9-5.001(B).

have engaged in discriminatory conduct against certain protected classes would likely be impeached in cases against a member(s) of the group(s) against whom the officer is demonstrably biased.

The Brady-Giglio impact of discriminatory officers was illustrated in Philadelphia after the [Plainview Project](#) released data on offensive or discriminatory Facebook posts by more than 300 Philadelphia officers. Prosecutors pulled cases where the identified officers were expected to testify, specifically reviewing cases involving Muslim, Black, immigrants, and other defendants where disclosure related to the officers' bias would be required.

Reliance on an officer's testimony and work output is a central part of an officer's performance of a job.

Minnesota Human Rights Act

[The Minnesota Human Rights Act](#) prohibits discriminatory conduct by law enforcement officers in the performance of their duties. Officers are frequently required to instantaneously assess situations and individuals, and respond accordingly when answering service calls or otherwise carrying out their responsibilities. It is unreasonable to expect that demonstrated bias does not enter into the officer's on-the-scene assessment and response, especially given the knowledge that even unconscious or implicit bias, where a person does not profess discriminatory beliefs but is still affected by sociological conditioning reflecting bias, may impact a person's actions.

Subp. 1, Item H. This rule part identifies support, advocacy, or participation in white supremacist, hate or extremist groups or criminal gangs (hate group) by licensed officers as a violation of the standards of conduct.

The [IACP standards of conduct](#) model includes this statement: "Officers shall not knowingly join or participate in any organization that advocates, incites, or supports criminal acts or criminal conspiracies or that promotes hatred or discrimination toward racial, religious, ethnic, or other groups or classes of individuals protected by law."

A number of states are moving to address officer involvement in white supremacy and other hate groups as are the various branches of the U.S. military. White supremacy is specifically identified in the proposed rule because white supremacists are the domestic terror group identified in the [FBI 2006 report](#), in a 2021 regional FBI analysis² as infiltrating law enforcement, and in recent congressional hearings. The U.S. Dept. of Homeland Security identified white supremacist extremists as the most persistent and lethal threat among domestic violence extremists in a DHS [2020 report](#).

The board gave careful consideration to First Amendment rights of freedom speech and association, which protect an individual's right to join various groups. The government can,

² <https://abcnews.go.com/US/white-supremacists-seek-affiliation-law-enforcement-goals-internal/story?id=76309051>

however, limit the employment opportunities of group members who hold sensitive public sector jobs, such as law enforcement, when their association would interfere with their duties. The issues discussed in Item G above discuss how a law enforcement officer's discriminatory conduct negatively impacts the ability of law enforcement to address crime and protect the public by reducing community trust and creating Brady-Giglio impairments which leave the officer unable to testify in some criminal cases. The issues of community trust and Brady-Giglio impairments also apply to an officer's support, advocacy and participation in white supremacist, hate or extremist groups, or criminal gang (hate group).

Items H (1), H (2), and H (3). The Advisory Committee and board wrestled with the issue of how to determine whether any particular group was a white supremacist, hate or extremist group, or criminal gang. Committee members raised concerns regarding possible criteria which could be used to identify a group as a hate group. A committee member requested that Black Lives Matter be identified as a hate group, and worried that their church could be considered a hate group because of the church's discriminatory views on women and the LBGQTQIA communities. The proposed language distinguishes between a group, such as the committee member's church, that adheres to discriminatory beliefs for their followers, and a group, such as a hate group, which works to harm an individual or group.

The board considered using lists of hate groups developed and tracked by the [Southern Poverty Law Center](#) (SPLC) since 1990, but determined that the lists could not be the relied on as the sole determiner. SPLC identified 9 hate groups in Minnesota active in 2021. While the presence of a group on the SPLC list is telling, the absence of a specific group on an SPLC list does not necessarily mean that the SPLC has determined that the group is not a hate group. Groups also evolve, splinter off, and change names, making any list of groups potentially outdated shortly after creation.

[ADL](#) also tracks hate groups and hate crimes, showing 163 incidents in Minnesota in 2021 of hate activity, of which 159 involved white supremacist incidents.

The board also considered the [FBI](#) as a possible source, however, FBI lists of hate groups are not readily accessible. While historical data on hate groups may be available by submitting an information request through the [Vault](#), the FBI's FOIA (Freedom of Information Act) library, FOIA requests are not always answered in a timely manner.

While SPLC, ADL, and the FBI may provide limited information on established hate groups, the board reasoned that providing criteria for hate groups would enable officers to assess a group before engaging. Criteria would also provide the board with the means to assess newly formed hate groups and address splinter groups as well. To answer the question of whether a specific group is a white supremacist, hate, extremist group or criminal gang, a set of three criteria were developed as indicated in sub items 1, 2, and 3. A group that meets one or more of the three specific criteria is by definition a hate group.

The Advisory Committee could not reach consensus to approve or disapprove Item H (see Appendix [X](#) for the committee's report to the board). While the entire committee

supported addressing hate and bias in the law enforcement profession, roughly half of the committee identified concerns that prevented consensus.

- Some members objected to specifically identifying “white supremacist” in the rule because it is a subgroup of hate or extremist groups. The board considered this but chose to specifically identify white supremacist groups. It is the white supremacist groups that are recognized as a significant national security threat and are the only hate or extremist group identified as using infiltration of law enforcement tactics. White supremacist activity in Minnesota exceeds any other type of hate activity as reported by ADL. The disproportionately high rate of distrust in law enforcement found among Black Americans and in Black Minnesotans is thoroughly discussed in the 2021 Minnesota Justice Research Center report on [Trust in Policing: The Role of White Supremacy](#).
- Some Advisory Committee members suggested replacing “....supporting, advocating, or participating in the activities of” with “....actively engaging in material support or direct action in conduct that the officer knows or reasonably should know is to carry out harmful and/or derogatory activities of”. The qualifiers “material” and “direct” suggest that some level of support or action is permissible and lowers the standard. The board considered this suggestion but finds the board’s draft language less subject to interpretation, given that Item I provides clarification on activities that constitute “supporting, advocating, or participating”.

Item H is needed because officer involvement in hate groups has a serious and deleterious impact of on community trust; is expected to result in Brady-Giglio impairments which limit officer’s ability to perform essential functions of a law enforcement position; and lowers the equal justice and fairness standard expected of law enforcement officers. These issues are discussed thoroughly in the rule-by-rule analysis of Item G regarding discriminatory conduct.

Item H It is reasonable because an officer’s First Amendment rights³ are outweighed by the state’s interest in promoting fair and consistent public services by law enforcement officers who uphold the laws of this state. That interest cannot be served by officers who do not accept that all persons in Minnesota, regardless of protected class status, are entitled to basic civil rights and fair law enforcement. First Amendment rights also do not protect unlawful activity, so to the extent that a hate group promotes the use of threats, force, violence, or criminal activity, an officer’s involvement with that hate group may not be protected regardless of the government’s interests.

Subp. 1, Item I. This proposed rule part clarifies conduct that constitutes support, advocacy, or participation in a hate group.

The Advisory Committee did not reach consensus on approving or disapproving Item I. (see Appendix X for the committee’s report to the board).

- Some members objected to the list of conduct in Item I on the basis that the conduct identified as support, advocacy, and participation was not a “direct action”

³ [Pickering v. Board of Education](#)

or “do not demonstrate active engagement in harmful activities”. The board considers the support, advocacy and participation in a hate group to be the harmful activities/direct action that would constitute a standards violation.

- Other members were concerned that an officer might simply happen upon an event not knowing it was a hate group event. It is important to note that officers who are the subject of a complaint on violating the standards of conduct are afforded due process, and have the opportunity to defend themselves. The complaint investigation committee will determine, given the specific circumstances and the totality of the evidence, whether reasonable grounds are found to believe that a violation of the standards of conduct occurred.
- Some members suggested adding a qualifier to each of the four examples of supporting, advocating, or participating in a hate group. The qualifier is that the action would have to promote the use of threats, force, violence or criminal activity. The board disagrees with the suggestion because the intent of the rule is to identify methods of support, advocacy or participation in a hate group, not to identify an officer’s individual use of threats, force, violence, or criminal activity. Such behavior is addressed elsewhere in the proposed standards of conduct. To add the qualifier suggested by some committee members would mean that an officer could freely disseminate anything from a hate group such as meeting notices, branded items, stickers, slogans, etc. if the meeting notice, etc. did not itself contain or promote threats, force, violence or criminal activity. An officer could attend rallies, and participate in hate group marches because the march itself wouldn’t necessarily constitute threats, force, violence or criminal activity. Using the qualifiers suggested would not serve the purpose or the need of the rule.
- Some members disagreed with the provision in I.(f) stating that “*There does not need to be a broad catchall clause, if any of the activities fall outside of A-E, then they need to be addressed directly under a different section*”. The board disagrees. Although the most common ways of engagement in a hate group are listed, it is not possible to identify every possible way of supporting, advocating for, or participating in a hate group.

Subp. 1, Item J. This rule part provides an exception to an officer’s involvement with a white supremacist, hate or extremist group, or criminal gang when the involvement is part of the officer’s duties.

Subp. 1, Item k. This rule part is part of the current standards of conduct, and is retained here. It continues to be needed and reasonable to enable discipline for an officer whose law enforcement licensure in another jurisdiction was subject to discipline.

6700.1600 Standards of Conduct, Subp. 2. Incapacitation. This existing rule is part of the current standards of conduct and is moved to this subpart. It continues to be needed and reasonable to address the licensing status of an officer where a court adjudication calls into question the officer’s ability or fitness to continue to serve as a law enforcement officer.