



Board of Peace Officer Standards and Training

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Post-hearing Response to Public Comments on Proposed Amendments to Rules Governing the Education and Licensing of Law Enforcement Officers

OAH Docket # 8-9007-38401

December 1, 2022

INTRODUCTION

This document represents the POST Board's response to the comments made at hearing and during the period of September 29, 2022 through November 29, 2023. The post-hearing comment period ends on December 6, 2022, and the Board will respond to comments made after November 29, 2022 through the end of the post-hearing comment period as needed in a rebuttal response.

During this period, there were 12 comments representing 20 individuals and 15 organizations. At the two hearings, 16 individuals representing themselves or various organizations testified. There remains 7 days in the post-hearing comment period.

The Board's response below addresses both new issues raised by commentators, and continued discussion of issues raised earlier. Not included in this response are new comments that reiterated concerns previously addressed in the Board's October 27, 2022 Preliminary Response to Comments.

GENERAL SUPPORT

Support for the proposed rules – 9 comments (*Council for Minnesotans of African Heritage, Communities United Against Police Brutality, Black Lives Minnesota, Racial Justice Network, Center for Victims of Torture, Minnesota Justice Center, MPLS for a Better Police Contract, Families Supporting Families Against Police Violence*)

6700.0100 DEFINITIONS

Subp. 26. Discriminatory Conduct

Concern that the proposed modification from “conclude” to “doubt” did not address concerns, and required speculation about future behavior – 2 comments (*MPPOA /LELS, Jason Kamerud*)

Concern: “Doubt is a far lower standard than used in any level of proof in court. Even civil cases impose at minimum a preponderance of evidence and the burden is on the proponent. This term is simply too vague to provide a meaningful standard to be used as a measure of conduct and should be rejected”. – 2 comments (*MSA, Renee Carlson at hearing*)

The Board looks forward to any suggested language from the commentators that would address their stated concerns. Discriminatory conduct is a term used in the rules on background investigations (6700.0670, Supb. 2(A)(5)) and in the rules on standards of conduct (6700.1600, Subp. 1(G)).

Background investigations will require the hiring agency to consider the applicant's history, if any, of discriminatory conduct. Based on the investigation, the hiring agency will determine whether any data from the investigation leads the agency to doubt the applicant's ability to serve impartially. Agencies always consider the future conduct of subjects of background investigation based on their findings.

Discriminatory conduct, under the proposed rules, is a violation of the standards of conduct. An alleged violation of the standards of conduct is referred to the Board's Complaint Investigation Committee. The due process provisions and the standard of proof identified in statute apply. Ultimately, if the Board finds reasonable grounds that a violation occurred and imposes discipline, the licensee may plead their case at an administrative hearing.

Concern that the "definition continues to risk violating the First Amendment Rights of licensees and applicants. While line 1.8 addresses membership in religious organization as outside the scope of the definition, the entire definition ignores other First Amendment Association Freedoms. For example, in *Elfbrandt v. Russell*, 384 U.S. 11 (1966) the Supreme Court held adverse public sector employment action for mere membership in an organization without evidence of efforts to further its illegal goals was a First Amendment violation. This proposed rule bears the same constitutional defect" - 1 comment (*Minnesota Sheriff's Association*)

The Sheriff's Association cited to *Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) in its objections to the definition of discriminatory conduct proposed by the Board. However, *Elfbrandt* addresses criminal punishment for association with prohibited groups; Rule 6700.1600, subpart 1(H)-(I) focuses on an individual's conduct and imposes no criminal penalty. The Association's reliance on *Elfbrandt* is misplaced.

Concern that "claiming of membership in a religious organization should not be a free pass to the holding of violent or bigoted attitudes that are contrary to the public interest and the attitudes that we can justifiably expect from LEOs. It is undeniable that there has been a rise in white supremacist and neo-nazi groups flying under a flag of purported Christianity in recent years. The New Apostolic Reformation is one recent example" – 1 comment (*Steve Timmer*)

The modification simply clarifies that belonging to a church that practices discrimination in the church's religious activities, by itself, does not constitute discriminatory conduct. A hate or extremist group that promotes harm, violence, or seditious activity (part 6700.1600, Subp. 1(H)) is not shielded because the hate group associates itself with a religion. In general, organized religion in the United States does not promote harm, threats, force, violence, or criminal activity.

As a clarification, the proposed rules focus on conduct and do not address attitude.

6700.0670 BACKGROUND INVESTIGATIONS

Subp. 1(A) applicants

Concern that the term "personnel file" should be modified to "personnel data" - 1 comment (*MSA*)

The Board accepts the suggestion and proposes a modification to the rule text.

Subp. 1(C) information release for officer applicants

Concern that the release of information directly related to minimum standards is not defined, and the release of all data should be required” – 1 comment (MSA)

The Board asserts the language is clear, and notes that each agency may determine any additional information it might require as part of the background investigation. As a licensing agency, the rule part (6700.0670, Subp. 1) identifies the expectations for applicants and licensees participating in a background

investigation. Nothing in the rule prevents the agency from requesting a release of other or additional information that the agency believes is unrelated to the minimum selection standards.

Subp. 1(D) – licensed applicants disclosure

Concern that officers should not have to disclose “ other conduct which required a Brady-Giglio disclosure by a prosecuting authority of which the applicant has personal knowledge “...due to the lack of a clear standard or application of Brady-Giglio disclosure determinations [...] we do not think the officer would be legally required to disclose under this section unless it was related to discipline or a court finding” - 1 comment at 11/14 hearing (Jeff Potts/MPPOA)

Concern that because there may be differences in how Brady-Giglio issues are addressed in by prosecutors, it isn't fair to require officers to disclose because it is disparate treatment – 1 comment (Richard Hodsdon/MSA)

The applicant's disclosure of any of the job-related conduct or license fitness issues identified in this rule part is a reasonable requirement to allow the hiring agency to properly assess the applicant's qualifications. Disclosure under this rule part simply provides an information point for the agency, and does not mean that the applicant will be automatically disqualified. There are many topics included in a typical background investigation where there are no clear standards or where some subjectivity in the application of the standard is involved. These topics include grades, recommendations, performance reviews, disciplinary actions, results of interviews with family, neighbors and landlords; personal references; and even driving violations, arrests, and convictions. Experienced background investigators are nevertheless able to establish a profile of the applicant and to report findings to the hiring officials.

The Board has the statutory authority to require information related to the officer's fitness for licensure, including matters addressed in Brady-Giglio disclosures regardless of whether or not the disclosure resulted in discipline or a court finding.

It is reasonable and needed to ensure that issues related to an applicant's integrity or performance are identified for both officers who are not yet licensed in Minnesota, and for currently licensed officers moving to a new agency.

Concern that “intentional” or deliberate should be added to mishandling of evidence – 1 comment (Jason Kamerud)

The agency will determine if the mishandling of evidence, intentional or not, impacts the agency's assessment of the applicant. Mistakes may be of interest to the agency.

Concern that “[...] the POST Board is setting upon itself to re-evaluate final determinations of an adjudicative body; this is the only reasonable interpretation for not limiting the disclosure to findings where actual violations of the standards have been finally reviewed and found by a court or other decisionmaker.” – 1 comment (MPPOA/LELS)

The officer's disclosure under this rule part is made to the hiring agency conducting the background investigation and not to the Board. The hiring agency will review any disclosure information and determine whether the disclosure impacts the agency's hiring decisions, regardless of whether the court determined that the disclosure was applicable to the specific case at hand. A disclosure is but one of

many parts of the background investigation, where a wide range of information is acquired and reviewed in the course of assessing the applicant.

Subp. 2(A)(4) – alcohol and drug use

Concern that an agency conducting a pre-employment background investigation may violate federal law when the investigation is conducted prior to a conditional job offer– 1 comment (*Richard Hodson/MSA*)

Minnesota Statutes, section 626.87, and the proposed rule require that the background investigation is completed before the applicant is employed. Proposed rule requires that the earliest an investigation may be completed is 6 months prior to the offer of employment. These requirements do not conflict with or relieve an agency of its obligations to comply with other state and federal requirements governing employment matters. An agency must make its own determination of when to conduct required components of background investigations and minimum selection requirements to ensure the agency's compliance with state and federal requirements.

Subp. 2(A) (13) – inquiry to prosecutors

Concern that prosecutors have access to not public data, and an inquiry to prosecutors could result in the prosecutor violating the Minnesota Data Practices Act (MDPA) or attorney professional standards. – 1 comment (*Jason Kamerud*)

Prosecutors have access to relevant data under other data classifications identified in the MDPA, including public data. The rule simply requires an inquiry, and prosecutors are generally experienced at navigating data disclosure issues and their own professional standards.

6700.0675 PSYCHOLOGICAL SCREENING

Item A (3) – history of discriminatory conduct

Concern that the rule requires the psychologist to gather facts outside their normal purview without time limitation, [...] and potentially into conduct that occurred as a minor; and discriminatory conduct is not related the Board's statutory rulemaking authority to establish physical, mental and educational standards for licensing – 1 comment (*MPPOA/LELS*)

This rule is consistent with Minnesota Statutes, section 626.8471 which requires a psychological evaluation demonstrating that the individual is not likely to engage in racial profiling before an applicant is eligible to take a licensing test. As noted by the commentator, Minnesota Statutes, section 626.842 Subd. 1(4) provides rulemaking authority to the Board regarding physical, mental, and educational standards governing the licensing of law enforcement officers. The Board disagrees with the commentator's assertion that discriminatory conduct is not related to the physical, mental or educational standards necessary for the licensing of law enforcement officers. Psychological research on various types of discrimination and bias is well documented, some of which has given rise to the statutory requirements

on implicit bias training for officers. Discrimination and bias based on protected class status is rooted in basic psychological concepts.

6700.0700 MINIMUM SELECTION STANDARDS

Subp. 1(E)

Concern that the proposed rule excludes felonies from other states which are not felonies in Minnesota and would result in law enforcement officers prohibited by firearm regulations from possession of firearms - 1 comment (*discussions with Bureau of Criminal Apprehension*)

On the federal level, 18 U.S.C. § 925(a) contains an exception for government actors: “The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.”

On the state level, Minnesota Statutes, section 624.713, Subd. 1(10)(i) does prohibit felons from possession of a weapon, and does not appear to provide an exception for law enforcement. The Board proposes a modification to the rules that would address felony convictions from other states.

Subp. 1(E)(2)(q) – misdemeanor theft

Concern that the exception for misdemeanor theft conflicts with Brady-Giglio requirements and would weaken the standard of integrity – 3 comments (*MPPOA/LELS, MSA, Jason Kamerud*)

Misdemeanor thefts of movable property under a value of five hundred dollars are not an absolute bar to licensure under the proposed rule. This allows an agency to consider the applicant’s history, the circumstances of the theft, the length of time between the theft and the application, and other relevant factors. An agency is not required to accept an applicant with such a conviction, but may decide that the circumstances of the theft are not indicative of the applicant’s future conduct.

The Board has granted at a rule variance in the past to an applicant whose theft involved intoxication and a broken down bike. A metropolitan agency is currently supporting a pending variance request from an individual whose minor theft charge stemmed from desperate circumstances.

Sheriff Kamerud suggested requiring a minimum of 5 years following the misdemeanor theft conviction before an applicant would be eligible for licensure. The Board considered this, but is not persuaded that imposing an arbitrary period of time is more reasonable than the current provisions that enable each agency to consider the specific circumstances of the misdemeanor theft and the candidate, rather than imposing an arbitrary time period.

Subp. 1(E)(2)(x) – excluding marijuana non-felony

Continued concern regarding minimum selection standards that allow licensure of a person with a non-felony marijuana offense– 1 comment (*Jason Kamerud*)

Sheriff Kamerud discussed the current conflict between federal and states regarding the legalization or changing criminal status regarding possession of marijuana. The Board has considered Minnesota's evolving legislative stance on this issue as well.

Sheriff Kamerud noted that federal firearms laws (18 USC 922) prohibit a user of a controlled substance such as marijuana from possessing firearms. A misdemeanor conviction of possession of marijuana in an applicant's past does not necessarily establish that the applicant is a current user of controlled substances at the time of the applicant is applying for licensure. Regardless, as noted earlier, law enforcement officers are exempt under 18 USC 925(a) from federal firearm requirements. The exceptions to this do not include the provisions regarding controlled substances.

While there is a prohibition in Minnesota Statutes, section 624.713 against firearm possession for someone convicted of a misdemeanor or gross-misdemeanor controlled substance crime under Minnesota Statutes chapter 152, it does have a time-limitation to the bar. After three years following conviction, and without any other controlled substance violations, a person is allowed to possess a firearm.

An agency may apply more stringent standards than the minimum selection standards (6700.1500, Subp. 4).

Subp. 1(G) – discriminatory conduct

Support for provisions of discriminatory conduct rule part – 8 comments (*Communities United Against Police Brutality, Black Lives Minnesota, Racial Justice Network, Center for Victims of Torture, Minnesota Justice Center, MPLS for a Better Police Contract, Families Supporting Families Against Police Violence*)

Concern that there is no time limitation to address those who may have learned or changed their minds or behaviors - 1 comment (*Jason Kamerud*)

The definition of discriminatory conduct includes a provision referring to the ability to perform the duties of a peace officer in a fair and impartial manner. This provision addresses the possibility that the person may have learned or changed their behaviors.

Subp. 1(H) – no record of participation in hate group

Support as [...] trust, however, would be irreparably broken in a community where its police officers were known to be members of which promulgate the type of behavior that puts our community at risk. It is impossible for members of a community that are being marginalized or targeted by a group to feel secure if members of the group attacking them are also responsible for their safety – 1 comment (*Robert Allen on behalf of Jewish Community Relations Council of Minnesota and the Dakotas*)

Support for hate group provisions– 8 comments (*Communities United Against Police Brutality, Black Lives Minnesota, Racial Justice Network, Center for Victims of Torture, Minnesota Justice Center, MPLS for a Better Police Contract, Families Supporting Families Against Police Violence*)

Subp. 1(M) - minimum age

Concern that brain development, emotional regulation, and impulse control is not fully developed until age 25; given the serious nature of law enforcement jobs, a minimum age of 21 is appropriate - 18 comments (*Nami MN, Abel Woldu, Allan Gao, Barry Peterson, Chandra Bouma, Christina Smith, Geeta Rajamani, Harry Arndt, Isabella Green, Kaitlyn Mulherm, Maddie Larkin, Mario Bertogliat, Melanie Quick, Melissa Walsh, Quin Nelson, Rishabh Gupta, Vineet Raman, Barry Peterson*)

The Board does not dispute the findings on brain development that indicate adolescence extends up to age 25, and that a 25 year old will have more impulse control, etc. than an 18 year old. There does not appear to be evidence that a typical 21 year old will have significantly more impulse control compared to a typical 18 year old. It appears reasonable to assume that the pace of brain development begins rapidly at infancy and slows towards adulthood. The behavioral differences between a 12 year old and a 15 year old are significantly greater than the behavioral differences of an 18 year old and a 21 year old. In Minnesota, legislators have determined that an 18 year old person is mature enough to legally possess and carry a pistol or semiautomatic military-style assault weapon.

Applicants who have chosen law enforcement as a profession, completed a post-secondary degree and basic law enforcement education, passed the licensing test, and have been screened through a background investigation, psychological evaluation, and a law enforcement agency's employment selection process may represent individuals who are more mature than a typical 18 year old person.

6700.1600 STANDARDS OF CONDUCT

Standards of Conduct

Concern that there is no need for the Board to address police misconduct because the law enforcement agencies can do that – 1 comment (*Jim Mortenson/LELS*)

Concern that the rules diminish the ability of local agencies to address public safety, and increase the role of the Board in making decisions that limit the role of local law enforcement – 1 comment (*Brian Peters/MPPOA*)

There continues to be confusion over the role of an employer and the role of a licensing agency.

Employment issues, including job performance, are the purview of the employing law enforcement agency. Licensure issues, including fitness for licensure, are the purview of the Board. The discipline of a licensed officer by the employer does not substitute for the licensure discipline by the Board, just as the Board's discipline of a licensee does not substitute for the employer's discipline of its employee.

Support for disciplinary language as a critical tool for institutionalizing a culture of continual improvement and performance accountability within our statewide policing practice - 1 comment (*Council for Minnesotans of African Heritage*)

Subp. 1(A)(7) & (A)(8) - driving or carrying a pistol under the influence

Concern that proposed rule modification uses the phrase "intoxicating substance" which excludes alcohol and controlled substances and all three should be addressed in the standards of conduct – 1 comment (*Minneapolis City Attorney's Office*)

The Board agrees and will further modify the rule as consistent with statutory language in Minnesota Statute sections [624.7142](#) and [169A.20](#).

Subp. 1(B)

Concern that the mishandling of the evidence should be limited to intentional mishandling – 1 comment (Mark Schneider/LELS/MPPOA).

Following the Board's review of earlier public comments received during the comment period, which ended July 20, 2023, the Board proposed modifications to the draft rules. The modifications to this rule part of Standards of Conduct added the provision related to intentional conduct at that time.

Subp. 1(G), (H) (I) – discriminatory conduct and hate groups

Support "Our sense is that the changes to the draft improve clarity and precision. We want to reiterate our support for language that establishes civil rights protections as part of the rules governing the education and licensing of peace officers. Our Council thanks the POST Board for specifying that affiliation with white supremacist and other hate groups violates the peace officer standards of conduct and will be subject to disciplinary action." – 1 comment (*Council for Minnesotans of African Heritage*)

Concern that rules prohibiting attorneys from discriminating on categories similar to POST rules were deemed unconstitutional by a Federal court in Pennsylvania on speech and due process grounds – 4 comments (*True North Legal, National Legal Foundation, Pacific Institute, Northstar Law and Policy Center*)

True North Legal, and other commentators, object to the proposed rules on discriminatory conduct. In support of their position, they cited to *Greenberg v. Goodrich*, 593 F.Supp. 3d 174 (E.D. Pa. 2002). *Greenberg* is a Third Circuit federal case with no binding precedent in Minnesota. Further, the *Greenberg* court found that the proposed professional responsibility rules at issue in the case were meant to address "not how the attorney's speech affects the practice of law but how it affects the perception of lawyers by the public" and were thus content-based restrictions on speech. Here, the

proposed rules do not prohibit all discriminatory speech, but rather a pattern of conduct or single egregious act which would affect the officer's ability to carry out their work, providing community protection equally to all residents.

6700.0615 REQUIRED AGENCY POLICIES

Subp. 1 (A) – agencies must adopt policies

Support for the “Required Agency Policies” amendment. We want to reiterate our support for this amendment, which we believe aids clarity, consistency, and excellence within local and statewide public safety policies and practices in Minnesota and support for the public assembly response policy” – 1 comment (*Council for Minnesotans of African Heritage*)

Subp. 2 (A) – posting required policies

Concern that there is a cost and the rules would weaponize the Data Practices Act – 1 comment (*Mark Schneider/LELS/MPPOA*)

The Board is unclear about the stated LELS concern regarding weaponizing the Data Practices A. The cost of posting documents on a website or in a public reception area is negligible. The cost of staff time will vary, as will the amount of time it takes to post on a particular web platform, but as an example, it takes the Board less than 15 minutes of one staff person's time to post board meeting materials on the website. The Board is hopeful that the commentator will provide additional information about their concerns prior to the end of the post-hearing comment period.

Concern that the posting of required policies is unnecessary because the public may access data through the Minnesota Data Practices Act; that the MDPA procedures are not burdensome; and no provision in statute or 6700 granting POST authority to control agency website content was found – 1 comment (*Jason Kamerud*)

Providing faster and easier access (including 24-hour access via a website) results in greater transparency. Website access has the benefit of anonymity, which can be significant where trust is lacking on an individual or community level. The instant access to policies is also important when an incident between law enforcement and members of the public occur. The benefits of this access are not replicated by a slower, more cumbersome access provided by the Minnesota Data Practices Act.

For example, Carver County Sheriff's Office currently posts the Body-Worn Camera Policy on the county's [website](#). This policy can be found in minutes and can be accessed any hour of the day, on weekends and holidays. The Carver County [Guide for Members of the Public Requesting Information](#) posted on the website has 12 pages with an information request form that requires access to a printer. The form doesn't have an address to submit the request, but the guide includes 7 pages of postal and email addresses of county departments and offices. To request a copy of the policy requires the person to identify the department, find a printer to print the form, complete the form, and mail it to the correct department. The form could be emailed only if the requestor had access to a scanner. Assuming in the best case scenario that the requestor had a printer and scanner, and was able to email the form with their identifying name and email address, and was able to correctly identify the department and the policy, there would then be a resulting delay dependent on the mail delivery, the official's business hours and

workload. Finally, without a list of available policies, the average member of the public may not be aware of the range of policies that might apply to their interest and for which a copy could be requested for review.

The Board has the statutory authority under Minnesota Statute, section 626.843 to adopt this rule.

CONCERN that the Board has no authority to discipline a chief law enforcement officer for violations of “ not statutorily authorized “ rules – 1 comment *(Richard Hodson/MSA)*

The Board has the authority to enforce its administrative rules. Rules, under the Administrative Procedures Act in Minnesota Statutes, section 14, are subject to judicial review prior to adoption to ensure the agency has the statutory authority to adopt the rule.

The Board has the statutory authority to adopt this rule as discussed in the SONAR.

Conclusion

The Board asserts the proposed rules are needed and reasonable, and will provide a final response to comments as well as a final draft of proposed modifications to the rules following the close of the post-hearing comment period.