MINNESOTA
OFFICE OF
ADMINISTRATIVE
HEARINGS

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January 23, 2023

VIA EMAIL ONLY
Rebecca Gaspard
1600 University Ave #200
Saint Paul, MN 55155
Rebecca.w.gaspard@state.mn.us

Re: ***In the Matter of the Proposed Permanent Rules Relating to Education and Licensing of Peace Officers***
OAH 8-9007-38401; Revisor 04641

Dear Ms. Gaspard:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of Administrative Law Judges Eric L. Lipman and Suzanne Todnem. The Agency may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Agency must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, william.t.moore@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,

DARA XIONG
Legal Assistant

Enclosure
cc: Office of the Revisor of Statutes
Legislative Coordinating Commission

OAH 8-9007-38401
Revisor ID R-04641

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Board of Peace Officer Standards and Training about the Education and Licensing of Peace Officers *Minnesota Rules*, Chapter 6700; Proposed Repeal of Minnesota Rules, parts 6700.0601, subparts 2 and 3; 6700.070; 6700.1400, subpart 3; 6700.1500; 6700.1700, subparts 1, 3, and 4; 6700.2700; 6700.2701; 6700.2702; 6700.2703; and 6700.2704

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON REVIEW OF RULES

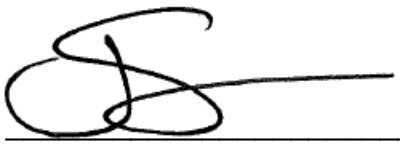
This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subds. 3, 4 (2022), and Minn. R. 1400.2240 subp. 4 (2021). These authorities require the Chief Administrative Law Judge review an administrative law judge's findings that a proposed agency rule is defective and should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge **CONCURS** with the disapproval of the identified proposed rule amendments and approves in all respects the findings in the Administrative Law Judges' Report dated January 12, 2023. The changes or actions necessary for approval of the disapproved rules are identified in that Report.

If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations for review under Minn. Stat. § 14.15, subd. 4.

If the Board chooses to make changes to correct the defects or adopt the recommendations of the Administrative Law Judges, it shall submit to the Chief Administrative Law Judge: (1) a copy of the rules as initially proposed; (2) the order adopting the rules; and (3) the rules showing the Board's changes. The Chief Judge will then determine whether the defects have been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: January 23, 2023



JENNY STARR
Chief Administrative Law Judge

[185475/1]

OAH 8-9007-38401
Revisor R-04641

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Board of Peace Officer Standards and Training about the Education and Licensing of Peace Officers *Minnesota Rules*, Chapter 6700; Proposed Repeal of Minnesota Rules, parts 6700.0601, subparts 2 and 3; 6700.070; 6700.1400, subpart 3; 6700.1500; 6700.1700, subparts 1, 3, and 4; 6700.2700; 6700.2701; 6700.2702; 6700.2703; and 6700.2704

REPORT OF THE ADMINISTRATIVE LAW JUDGES

This matter came before Administrative Law Judges Eric L. Lipman and Suzanne Todnem for rulemaking hearings on November 15 and 16, 2022. The public hearings were held via videoconference using the WebEx platform.

The Board of Peace Officer Standards and Training (POST Board or Board) proposes to amend its rules relating to the screening, selection, education, licensing of law enforcement officers. The Board's proposals include new regulatory definitions and revising rules on background investigations, psychological screenings, selection standards, standards of conduct and minimum policies for local agencies.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[2] The Minnesota Legislature has designed this process to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearings were conducted to permit agency representatives and the Administrative Law Judges to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are within the agency's statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the agency made after the proposed rules

[1] Exhibit (Ex.) F (Dual Notice of Hearing) (June 20, 2022).
[2] *See* Minn. Stat. §§ 14.131 through 14.20 (2022).

were initially published in the *State Register* are within the scope of the matter that was originally announced.[3]

The agency panel at the public hearings included Kelly McCarthy, Chairperson; Justin Terrell, Chair of the Rules Committee for the POST Board; Eric Millelt, Executive Director; and Rebecca Gaspard, Rules and Legislative Coordinator.[4]

Approximately 93 people attended the hearings.[5] The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Nineteen members of the public made statements or asked questions during the two hearings.[6]

After the close of the hearing, the Administrative Law Judges kept the rulemaking record open for another 20 calendar days – until December 6, 2022 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[7] The hearing record closed on December 13, 2022.

SUMMARY OF CONCLUSIONS

Except as noted in Findings 90, 113 and 129 below, the Board has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judges make the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Police academy training certification began in 1967 when the legislature created the Minnesota Peace Office Training Board (MPOTB).[8] The purpose of the MPOTB was to standardize police training across the state.[9]

2. In 1977, the legislature abolished the MPOTB and replaced it with the Minnesota Board of Peace Officer Standards and Training (POST Board or Board).[10]

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[3] Minn. Stat. §§ 14.05, 14.23, 14.25 and 14.50 (2022).
[4] Hearing Transcript, Volume I, at 2 (November 15, 2022).
[5] There were approximately 68 participants from the public at the November 15, 2022, hearing and 25 participants at the November 16, 2022, hearing. These numbers do not include duplicates, staff or panelists.
[6] Hearing Transcript, Volume I, at 3; Hearing Transcript, Volume II, at 129 (November 16, 2022).
[7] *See* Minn. Stat. § 14.15, subd. 1 (2022).
[8] Ex. D at 2 (Statement of Need and Reasonableness).
[9] *Id*.
[10] Ex. D at 2.

The Board established licensing and training requirements and set standards for law enforcement agencies and officers.[11]

3. The Board continues to develop and enforce standards for the education, licensing, training and conduct of peace officers and law enforcement officers[12] in Minnesota.[13]

II. Rulemaking Authority

4. The Board cites Minn. Stat. § 626.843 (2022) as its source of statutory authority for the proposed rules. This statute grants the Board, in relevant part, authority to:

> adopt rules with respect to . . . (4) minimum standards of physical, mental, and educational fitness which shall govern the admission to professional peace officer education programs and the licensing of peace officers within the state, by any state, county municipality or joint or contractual combination thereof, including members of the Minnesota State Patrol; . . . (6) minimum standards of conduct which would affect the individual's performance of duties as a peace officer. These standards shall be established and published. The board shall review the minimum standards of conduct described in this clause for possible modification in 1998 and every three years after that time; . . . (13) such matters as may be necessary consistent with sections 626.84 to 626.863. Rules promulgated by the attorney general with respect to these matters may be continued in force by resolution of the board if the board finds the rules to be consistent with sections 626.84 to 626.863.[14]

5. The Administrative Law Judges conclude that the Agency has the statutory authority to adopt rules governing the training and licensing of peace officers.

III. Procedural Requirements of Chapter 14

A. Publications

6. On August 3, 2020, the Agency published in the *State Register* a Request for Comments seeking comments on its plans to amend Minnesota Rules, chapter 6700, by reorganizing the rules, removing unnecessary requirements, provide for better administration of the rules, clarify unclear passages and update the rules.[15]

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[11] *Id*.
[12] "Law enforcement officers" includes peace officers, state troopers who are part of the Minnesota State Patrol, conservation officers with the Department of Natural Resources, county sheriffs and sheriff's deputies, and police officers. *See* Ex. D at 2.
[13] Ex. D at 2.
[14] Minn. Stat. § 626.843, subd. 1.
[15] 45 *SR* 128 (August 3, 2020).

7. On June 1, 2020, the Board requested approval of its Notice of Intent to Adopt Rules With or Without a Public Hearing (Dual Notice), Additional Notice Plan.[16]

8. By way of an Order dated June 8, 2022, Administrative Law Judges Lipman and Todnem approved the Agency's Dual Notice and Additional Notice Plan.[17]

9. The Dual Notice of Intent to Adopt Rules, published in the June 20, 2022, *State Register*, set July 20, 2022, as the deadline for comments or to request a hearing.[18]

10. On June 15, 2022, and June 16, 2022, the Agency emailed a copy of the Dual Notice to all persons and entities who had registered their names with the Agency for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.[19]

11. On June 15, 2022, the Agency mailed a copy of the Dual Notice and the Statement of Need and Reasonableness (SONAR) to certain legislators and the Legislative Coordinating Commissioner in an effort to comply with Minn. Stat. § 14.116 (2022).[20]

12. On June 21, 2022, the Agency mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[21]

13. The Dual Notice identified the dates and times of the remote hearings in this matter and how to participate.[22] The Notice of Public Hearing Date Change identified the updated dates and times of the remote hearings and how to participate.[23]

14. At the hearing on November 15, 2022, the Agency filed copies of the following documents as required by Minn. R. 1400.2220 (2021):

(a) the Agency's Request for Comments as published in the *State Register* on August 3, 2020;[24]

(b) the proposed rules dated May 12, 2022, including the Revisor's approval;[25]

(c) the Agency's Statement of Need and Reasonableness (SONAR);[26]

[16] Letter to Chief Judge Starr (June 1, 2022).
[17] Order on Review of Additional Notice Plan and Dual Notice (June 8, 2022).
[18] Ex. F (Dual Notice as published in the *State Register*) (June 20, 2022).
[19] Exs. G-1 and H.
[20] Ex. K-2.
[21] Ex. E.
[22] Ex. F.
[23] Ex. K-6.
[24] Ex. A.
[25] Ex. C.

(d) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on June 15, 2022, and June 16, 2022, and the Certificate of Accuracy of the Mailing List;[27]

(e) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on June 15, 2022;[28]

(f) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on June 15, 2022;[29]

(g) the Dual Notice as mailed and as published in the *State Register* on June 20, 2022;[30]

(h) the Certificate of Mailing the SONAR to the Legislative Coordinating Commission on June 22, 2022.[31]

(i) the written comments on the proposed rules that the Agency received during the initial comment period following the Dual Notice;[32]

(j) the written comments on the modified proposed rules that the Agency received following publication of the Notice of Public Hearing Date Change on October 3, 2022;[33] and,

(k) its letter to Minnesota Management and Budget as required in Minn. Stat. § 14.131.[34]

B. Additional Notice Requirements

15. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

16. On June 15, 2022, the Board provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

(a) Provided specific notice via email to licensees, eligible to be licensed individuals, schools, and Professional Peace Office

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[26] Ex. D.
[27] Exs. G-1 and G-2.
[28] Ex. H.
[29] Ex. K-2.
[30] Ex. F.
[31] Ex. K-2.
[32] Ex. I-1.
[33] Ex. I-2
[34] Ex. K-1.

Education Coordinators via email with links to the Notice, Statement of Need and Reasonableness;

(b) Published the Dual Notice on the Board's website at https://dps.mn.gov/entity/post/Pages/statute-rules.aspx;

(c) Provided specific notice to tribal authorities as identified in the Additional Notice Plan section of the SONAR via mail with copies of the Notice, SONAR, and proposed rule amendments;

(d) Provided specific notice to law enforcement associations and labor representatives; community, professional and civic organizations and associations; and certain state agencies and other entities identified in the Additional Notice Plan section of the SONAR via email with a hyperlink to electronic copies of the Notice, SONAR, and proposed rule amendments.[35]

C. Notice Practice

1. Notice to Stakeholders

17. On June 15, 2022, and June 16, 2022, the Board emailed a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its Additional Notice Plan.[36]

18. The initial comment period on the proposed rules expired at 4:30 p.m. on July 20, 2022.[37]

19. There are 34 days between June 16, 2022, and July 20, 2022.

20. The Administrative Law Judges conclude that the Agency fulfilled its responsibilities under Minn. R. 1400.2080, subp. 6 (2021), to mail the Dual Notice "at least 33 days before the end of the comment period . . ."

2. Notice to Legislators

21. On June 15, 2022, the Board sent a copy of the Dual Notice and the SONAR to Legislators as required by Minn. Stat. § 14.116.[38]

22. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its

[35] Ex. H; *see also* Ex. D at 9-11.
[36] Ex. G-1.
[37] Ex. F.
[38] Ex. K-2.

Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.[39]

23. The Administrative Law Judges conclude that the Board fulfilled its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period . . ."[40]

3. Notice to the Legislative Reference Library

24. On June 21, 2022, the Board mailed a copy of the SONAR to the Legislative Reference Library.[41]

25. Minn. Stat. §§ 14.131 and 14.23 require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.[42]

26. The Administrative Law Judges conclude that the Board fulfilled its responsibilities, to mail the SONAR to the Legislative Reference Library.

D. Impact on Farming Operations

27. Minn. Stat. § 14.111 (2022) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

28. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judges find that the Board was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

29. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.[43] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

[39] Minn. Stat. § 14.116.
[40] *Id*.
[41] Ex. E.
[42] Minn. Stat. §§ 14.131 and 14.23.
[43] Minn. Stat. § 14.131.

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and**,**

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

1. The Board's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

30. The Board asserts that members of the public, including members of the BIPOC and LGBTQIA communities, immigrants, religious minorities and other members of protected classes who are served by law enforcement; applicants for licensure; applicants for law enforcement officer positions; law enforcement officers; and law enforcement agencies are most likely to be affected by the proposed rule changes.[44]

31. The Board states law enforcement agencies may have minimal costs and the POST Board will bear the cost of the proposed rule change.[45]

32. The stated classes that will benefit from the proposed rule are members of the public; law enforcement officers; chief law enforcement officers; and law enforcement agencies.[46]

[44] Ex. D at 5.
[45] *Id.* at 6.

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

33. The Board anticipates the proposed rule would increase costs to the Board because of expanded areas of officer conduct that would be subject to the Board's disciplinary process.[47] The anticipated increase in complaints that would go before the Board is based primarily on the inclusion of unreasonable or excessive use of force complaints.[48] Due to the anticipated increase in complaints, the Board anticipates five to eight additional staff at an estimated cost of $130,000 each.

34. The Board does not anticipate increased costs for law enforcement agencies. However, there might be negligible costs to law enforcement agencies that do not already provide emergency medical responder training for officers, which is required in the proposed rules. Agencies that hire out-of-state applicants who do not have emergency medical responder training would also incur training costs if that applicant is hired. Training costs were estimated at $500-$700.[49] Applicants who have completed the Minnesota professional peace officer education program receive the emergency medical responder training as part of the program.

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

35. The Board asserts that it has carefully considered the costs and burdens of the proposed rules, including seeking input from interested parties, and found no less costly or less intrusive methods to achieve the purposes of the proposed rules.[50]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

36. While the POST Board did detail a number of regulatory alternatives that it considered and rejected, it did not identify methods other than rulemaking to provide the recommended regulatory relief.[51]

(e) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as

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[46] *Id.* at 6.
[47] *Id.*
[48] *Id*.
[49] *Id.*
[50] *Id.* at 7.
[51] *Id.* at 12.

separate classes of governmental units, businesses, or individuals.

37. Law enforcement agencies might incur additional costs to conduct background investigations on applicants. Law enforcement agencies are required to perform background investigations on its applicants.[52] The proposed rules codify existing best practices that are not currently in rule.[53] The Board estimates that a hiring law enforcement agency might incur additional costs under the proposed rules if its background investigation practices are less rigorous than what is required in the proposed rule.[54] If there is a cost increase, the increase was estimated at $60 to $120 per applicant.[55]

38. Law enforcement agencies might incur additional costs if they hire an applicant who was trained in another state and did not require emergency medical responder training.[56] An applicant who has not completed emergency medical responder training may obtain the training on his or her own. The estimated cost is $500 to $700 per applicant in need of the training.[57]

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

39. The Agency cited probable costs from continued litigation and settlement costs related to the use of force and First Amendment violations during law enforcement response to demonstrations and crowd events.[58]

40. The Board cited three probable consequences of not adopting the proposed rule:

a. Continued erosion of the public's trust of law enforcement officers and agencies;

b. Members of law enforcement leaving the profession over public scrutiny and hostility or negative attitudes towards officers because the public's trust has been broken by the events of 2020 and 2021; and

c. Continued delegation and abdication of the Board's authority to regulate licensed officers to individual law enforcement agencies.

[52] *Id.* at 7-8.
[53] *Id*. at 8.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 7.
[57] *Id*. at 6.
[58] *Id*. at 8.

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

41. The Board asserts that there are no federal regulations pertaining to Minnesota law enforcement officer selection or the applicable standards of conduct. As a result, the proposed rules are not different from, or potentially inconsistent with, regulations under federal law.[59]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

42. Because, as noted above, law enforcement officer selection and standards of conduct are not matters regulated by federal law, the Board maintains that the proposed rules do not add to the regulatory burdens of meeting the requirements of federal law.[60]

43. The Administrative Law Judges find that the Board has met its obligation to complete the eight assessments, set forth in Minn. Stat. § 14.131, in the text of its SONAR.

2. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

44. As required by Minn. Stat. § 14.131, by letter dated May 18, 2022, the Board requested the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and fiscal benefits of the proposed rules on local units of government.[61] The Board did not receive a response from MMB.

3. Performance-Based Regulation

45. The Administrative Procedure Act requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.[62]

46. The Board believes the proposed rules are performance based because they strengthen the minimum selection standards and the standards of conduct governing law enforcement officers. In its SONAR, the POST Board maintains that the current peace officer selection and screening standards are under-performing and that

[59] *Id*. at 9.
[60] *Id*.
[61] Ex. K-1.
[62] Minn. Stat. §§ 14.002 and 14.131 (2022).

the proposed changes will both improve those methods as well as reduce the costs of settlements arising out of claims of police misconduct.[63]

4. Summary

47. The Administrative Law Judges find that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127 (2022)

48. Minn. Stat. § 14.127, requires the agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[64]

49. The Board determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed $25,000 for any applicable business.[65] While many small cities have police departments that will be directly impacted by the proposed rules, the Board determined the cost of complying with the proposed rules will not exceed $25,000.[66]

50. The Administrative Law Judges find that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

G. Adoption or Amendment of Local Ordinances

51. Under Minn. Stat. § 14.128 (2022), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[67]

52. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board's proposed rules pertain to applicants and licenses and not to local government

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[63] Ex. D at 6-9.
[64] Minn. Stat. § 14.127, subds. 1 and 2.
[65] Ex. D at 12.
[66] *Id*. at 12-13.
[67] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

regulations. Therefore, local governments will not be required to adopt or amend local ordinances and regulations.[68]

53. The Administrative Law Judges find that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

54. The Administrative Law Judges must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[69]

55. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[70] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[71] and the agency's interpretation of related statutes.[72]

56. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[73] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[74]

57. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[75] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[76]

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[68] Ex. D at 12.
[69] *See* Minn. R. 1400.2100 (2021).
[70] *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[71] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[72] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[73] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[74] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[75] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[76] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

58. Because both the POST Board and the Administrative Law Judges suggest changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judges to determine if this new language is substantially different from that which was originally proposed.

59. On December 1, 2022, the POST Board detailed the revisions it wishes to make to the proposed rules in response to the stakeholder feedback during the rulemaking hearing and during the comment period.[77]

60. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

> (1) "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice";
>
> (2) the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and
>
> (3) the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

61. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judges are to consider whether:

> (1) "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests";
>
> (2) the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing"; and
>
> (3) "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."[78]

V. Rule by Rule Analysis

62. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that

[77] RD4641 (December 1, 2022) ("December RD4641").
[78] *See* Minn. Stat. § 14.05, subd. 2.

follows below focuses on those portions of the proposed rules as to which commenters prompted a genuine dispute as to the reasonableness of the POST Board's regulatory choice or otherwise requires closer examination.

63. The Administrative Law Judges find that the POST Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

64. Further, the Administrative Law Judges find that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Minn. R. 6700.0100, subp. 26 – Discriminatory Conduct
Minn. R. 6700.0700, subp. 1(G) – Minimum Selection Standards
Minn. R. 6700.1600, subp. 1(G) – Standards of Conduct

65. The POST Board proposes to revise its rules to include a definition of "discriminatory conduct" by licensed peace officers. The proposed definition reads:

> Subp. 26. **Discriminatory conduct.** "Discriminatory conduct" means a pattern of conduct or a single egregious act that evidences knowing and intentional discrimination based on the actor's perception of a person's race, color, creed, religion, national origin, disability, sex, sexual orientation, gender identity, or public assistance or any other protected class as defined in Minnesota statutes or federal law; and would lead an objectively reasonable person to doubt the actor's ability to perform the duties of a peace officer in a fair and impartial manner. Membership in a religious organization as a lawful exercise of the freedom of religion is not discriminatory conduct.[79]

66. Additionally, the proposed rules would require an absence of such conduct as a condition of obtaining licensure as a peace officer in the first instance and maintaining such a license. To these ends, the proposed regulations require that applicants for licensure "be free of discriminatory conduct"[80] and provide that it is a "violation of standards of conduct to . . . engage in discriminatory conduct . . ."[81]

67. Supporters of this combination of proposed regulations maintain that regulatory standards which bar those who engage in intentional discrimination from serving as peace officers, is essential to the public's trust in policing.[82]

68. The principal critiques of this set of interlocking proposals is that:

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[79] Ex. C at 1 and RD4641 at 1 (December 1, 2022) ("December RD4641").
[80] Ex. C at 10 and December RD4641 at 12.
[81] Ex. C at 16 and December RD4641 at 17.
[82] *See e.g.,* Comments of Robert Allen (trust "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.").

(a) a reasonable "doubt" as to the peace officer's (or applicant's) ability to perform the duties of a peace officer in a fair and impartial manner, is an unduly vague regulatory standard;[83]

(b) with respect to applicants for licensure, the regulations do not include a time limitation on past discriminatory conduct that may be considered by the POST Board;[84] and,

(c) the proposed regulation should not include a safe harbor which protects memberships in religious organizations.[85]

Each of these critiques is addressed, in turn, below.

69. In this context, it is important to note that the existing POST Board rules include similar anti-discrimination provisions. The current rules require those who provide training to peace officers to meet certain anti-bias requirements.[86] These provisions also protect a similar range of persons, as described in the proposed rules, from discriminatory misconduct.[87]

70. The current regulations require investigation and disposition of claims of training misconduct that is:

> oral, written, graphic, or physical conduct directed against any person or group of persons because of their race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, disability, or veteran's status that has the purpose or reasonably foreseeable effect of demeaning or intimidating that person or group of persons.[88]

As stated by the POST Board, the regulatory purposes of the existing requirements are to "ensur[e] professional competence . . . promote professional job-related competence, and meet a law enforcement educational need."[89]

71. With respect to the claim that a reasonable doubt as to a licensee's or applicant's ability to perform the duties of a peace officer in a fair and impartial manner, is an unduly vague standard, the Administrative Law Judges do not agree. In several

[83] *See* Comments of the Minnesota Chiefs of Police Association at 1. Joint Comments of MMPOA and LELS, at 2 (October 21, 2022); Comments of Minnesota Sheriff's Association, at 1; Comments of Sheriff Jason Kamerud, at 1; Comments of True North Legal, the National Legal Foundation, the Pacific Justice Institute, and the North Star Law & Policy Center (collectively TNL) at 2-3.
[84] *See e.g.,* Joint Comments of MMPOA and LELS, at 5 (October 21, 2022); Comments of Sheriff Jason Kamerud, at 1.
[85] *See e.g.,* Comments of Tess Dornfeld; Comments of Steve Timmer; Comments of Brandon Schorsch; Comments of Michael Samuelson.
[86] *See* Minn. R. 6700.0401 (2021).
[87] *Id*.
[88] *See* Minn. R. 6700.0100, subp. 25 (2021).
[89] *See* Minn. R. 6700.0902, subp. 1a (2021).

other contexts, doubt is a proxy for the risks of future unsuccessful performance – particularly if that performance may result in significant harm to the public.

72. As with the proposed set of regulations, an agency's reasonable doubt as to the fitness of a mining permit holder,[90] or the safety of particular pharmaceuticals,[91] or a license holder's ability to operate a motor vehicle,[92] can all prompt further official inquiries and, in appropriate cases, adverse agency action.[93] Reasonable doubt that prompts later inquiries or action is not a defective standard.

73. The recent holding in *Kennedy v. Bremerton School District*[94] does not point to a different conclusion. In that case, a Texas School District prohibited a high school football coach, Mr. Kennedy, from engaging in "any overt actions" that could appear "to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach."[95] The School District issued the directive believing that if those attending football games reasonably thought that Coach Kennedy was hosting prayer sessions on the field, the District would be sued for violating the Establishment Clause of the U.S. Constitution. The Court held that an Establishment Clause violation does not occur if a reasonable person thinks that a government official is praying.[96] It did not hold, however, as was suggested by commenters here,[97] that all reasonable person standards are constitutionally suspect.

74. The Minnesota Supreme Court's analysis and holding *In the Matter of Charges of Unprofessional Conduct Against N.P.*, is likewise instructive.[98] In that case, a lawyer who was facing professional discipline argued that the regulatory duty of lawyers to comply with "reasonable requests" of ethics officials for information, was so

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[90] *See* Minn. R. 6130.6000, subp. 1(B) (2021) (the Commissioner "may require the operator to furnish a performance bond if there is reasonable doubt that the operator will be financially able to comply with the requirements of the permit to mine or these parts").

[91] *See* Minn. R. 6800.1440, subp. 7(c) (2021) ("If the conditions under which a drug has been returned cast doubt on the drug's safety, identity, strength, quality, or purity, then the drug shall be destroyed or returned to the supplier, unless examination, testing, or other investigation proves that the drug meets appropriate standards of safety, identity, strength, quality, and purity").

[92] *See* Minn. R. 7410.2800, subp. 3 (2021) ("When the commissioner has good cause to doubt the adequacy of the driver's or applicant's ability to safely operate a vehicle … a driver's license examination shall be required within 30 days or within such reasonable time that a person may need to obtain a driver's test").

[93] *Accord* Minn. Stat. § 611.42, subd. 3(d) (2022) ("In misdemeanor cases, other than cases involving a targeted misdemeanor, if the court determines there is a reasonable basis to doubt the defendant's competence and there is probable cause for the charge, the court must suspend the criminal proceedings").

[94] *Kennedy v. Bremerton School District,* 597 U.S. ---, 142 S. Ct. 2407, 2022 WL 2295034 (2022).

[95] *Id.,* at 2417.

[96] *Id.* (an "Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech").

[97] *Compare* Comments of TNL at 3 ("it is ironic that the [proposed rules] adopts the reasonable person standard that the Supreme Court has just discarded" in *Kennedy v. Bremerton School District*).

[98] *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (citations omitted); *see also State v. Kelly,* 379 N.W.2d 649, 652 (Minn. Ct. App. 1986) (the statute prohibiting prostitution was not vague because a "person of ordinary intelligence would understand what conduct the statute prohibits").

imprecise that it violated his rights to due process. The Supreme Court disagreed. It noted:

> Due process, however, does not require that a rule contain an explicit definition of every term. All that is necessary is that the rule prescribe general principles so that those subject to the rule are reasonably able to determine what conduct is appropriate.[99]

Moreover, the fact that the lawyer, N.P., had opportunities to seek review of what he regarded as unreasonable requests, provided "an adequate safeguard against encroachment on constitutionally protected conduct" to "comport[] with due process."[100]

75. In the view of the Administrative Law Judges, not intentionally discriminating against persons in a protected class is a sufficiently definite regulatory standard to qualify as a rule[101] and to meet constitutional standards for precision. Further, like the *N.P.* case, challenges to claims of discriminatory conduct under proposed rules 6700.0700, subp. 1(G) and 6700.1600, subp. 1(G), are subject to review by an independent tribunal.[102]

76. With respect to the dual (and opposite) critiques that the proposed regulations should exclude remote instances of discriminatory conduct and proscribe licensees from being members of religious organizations that discriminate, at bottom, those are both policy differences with the POST Board. Neither critique goes to the Board's rationales for making the distinctions that it did, the expression of the Board's approach, or the Board's authority to promulgate the proposed rules – it has such authority.[103] The commenters may wish that the POST Board made other regulatory choices than it did, but the choices that it made were reasoned and lawful. In this setting, that is the end of the inquiry.

77. The proposed revisions to Parts 6700.0100, subp. 26, 6700.0700, subp. 1(G) and 6700.1600, subp. 1(G), to address discriminatory conduct, are needed and reasonable and would not be a substantial change from the rule as originally proposed.

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[99] *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (citations omitted); *see also State v. Kelly,* 379 N.W.2d 649, 652 (Minn. Ct. App. 1986) (the statute prohibiting prostitution was not vague because a "person of ordinary intelligence would understand what conduct the statute prohibits").

[100] *Id.* at 395; *accord* Comments of Toby Cerqua.

[101] *See* Minn. Stat. § 14.02, subd. 4.

[102] POST Board's Rebuttal Comments at 2; *see also* Minn. Stat. § 14.57(a) (2022) (an "agency shall initiate a contested case proceeding when one is required by law").

[103] Minn. Stat. § 626.843, subd. 1(4), (6) ("[t]he board shall adopt rules with respect to . . . minimum standards of physical, mental, and educational fitness which shall govern . . . the licensing of peace officers within the state . . . [and] minimum standards of conduct which would affect the individual's performance of duties as a peace officer").

B. Minn. R. 6700.0670, subp. 1(D) (2022) – Background Investigations

78. A set of U.S. Supreme Court decisions has held that the guarantee of due process of law in the U.S. Constitution requires prosecutors to turn over evidence that is both material to the accusations and favorable to those who are accused of crimes. Similarly, police offices are obliged to make prosecutors aware of any evidence that may be favorable to the accused.[104] The resulting shorthand for the required disclosures of impeachment materials, including evidence of investigatory misconduct, is drawn from the names of the two key court cases – *Brady v. Maryland,* 373 U.S. 83 (1963) and *United States v. Giglio,* 405 U.S. 150 (1972). Thus, in the criminal justice field, the disclosures are colloquially known as "*Brady-Giglio* materials."[105]

79. Similarly, a "*Brady-Giglio* impairment" of a police officer:

> refers to a prosecutor's decision not to allow the officer to testify at the trial of a criminal defendant because the prosecutor would be required to disclose to the defense existing information about the officer's prior misconduct or other grounds to attack the officer's credibility, disclosures which could compromise the prosecution. Officers who are [so] impaired based on the existence of such compromising information may be prevented from participating in police investigations or making arrests to avoid a situation where a criminal prosecution is dependent on that officer's testimony.[106]

80. In the May 12, 2022, version of its rule revisions, the POST Board proposed 6700.0670, subpart. 1(D) to require disclosure of any "*Brady-Giglio* impairments." The proposal read:

> Each applicant who is currently or previously licensed as a peace officer must disclose any conduct that resulted or may result in an impeachment disclosure or Brady-Giglio impairment.[107]

81. As the POST Board argued, these additions to Part 6700 were needed to "identify any potential impeachment issues or Brady-Giglio impairments . . . [that] may affect the applicant's qualifications for a law enforcement position . . . [or undermine] the integrity of law enforcement officers as well as the judicial process."[108]

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[104] *See generally* Ex. D at 15, n. 5.
[105] *Id*. *See also* Joint Comments of MMPOA and LELS, at 5-11 (December 6, 2022).
[106] *Stockdale v. Helper,* 3:17-CV-241, 2017 WL 2546349, at *2 (M.D. Tenn. June 13, 2017); *see also City of Blaine, Minnesota and Law Enforcement Labor Services, Inc., Local No. 165.*, BMS Docket No. BMS 19-PA-0481, 2019 WL 4849427 (Minn. Bureau of Mediation, June 05, 2019); *In Re Arbitration Between Hennepin County, Employer and Hennepin County Sheriff's Deputies Association, Union*, BMS Docket No. 18-PA-0652, 2018 WL 4300882 (Minn. Bureau of Mediation, August 22, 2018); *Metropolitan Council and Teamsters Local 320.*, BMS Docket No. 16-PA-0581, 2017 WL 2628860 (Minn. Bureau of Mediation, March 3, 2017).
[107] Ex. C at 3.
[108] Ex. D at 15-16.

82. Several of the POST Board's municipal and law enforcement stakeholders objected to the proposed rule as too imprecise to be fair, lawful or enforceable. These stakeholders argued that the proposed rule:

(a) prevented peace officer applicants or licensees from knowing what conduct "may result" in an impeachment disclosure or *Brady-Giglio* impairment;[109]

(b) was over-inclusive because it applied to both negligent and intentional misconduct;[110] and,

(c) was over-inclusive because it obliged disclosure of conduct that the peace officer or applicant did not know resulted in *Brady-Giglio* disclosures.[111]

83. In the response to stakeholder feedback, the Board revised proposed rule 6700.0670, subpart. 1(D) to read:

Each applicant who is currently or previously licensed as a peace officer must disclose any disciplinary or court findings of which the applicant has personal knowledge that find the applicant to have engaged in:

- abuse of police authority;
- bias against a protected class;
- felony criminal conviction or finding of guilt;
- conviction or finding of guilt for a crime of dishonesty;
- an act or statement of dishonesty;
- mishandling of evidence or property;
- undisclosed or improper inducements to witnesses or suspects;
- unreasonable or excessive use of force;
- unauthorized access to or unlawful misuse of government data; or
- other conduct which the applicant is aware resulted in a Brady-Giglio disclosure by a prosecuting authority.

[109] *See e.g.,* Joint Comments of MMPOA and LELS, at 12 (December 6, 2022); Comments of Minnesota Chiefs Association, at 2.
[110] *See e.g.,* Joint Comments of MMPOA and LELS, at 3 (October 21, 2022); Comments of Sheriff Jason Kamerud, at 2.
[111] Joint Comments of MMPOA and LELS, at 11 (December 6, 2022); *see generally* Comments of the Minneapolis City Attorney, at 2.

Nothing in this section prevents the applicant from providing additional or contextual information on the reported conduct.[112]

84. There are two distinct issues with respect to the latest version of proposed rules – the substance of those revisions and the propriety of the POST Board's most-recent phrasing. Those matters are addressed, in turn, below.

85. The Board maintains that as to candidates for licensure or re-licensure, it is proper for it to consider the history of the applicant's earlier misconduct.[113]

86. The Administrative Law Judges agree. Each of the distinct inquires set forth in proposed rule 6700.0670, subpart. 1(D), relates to either the mental fitness for police work or "minimum standards of conduct which would affect the individual's performance of duties as a peace officer" – matters as to which the POST Board has rulemaking authority.[114]

87. Each of the first nine categories of misconduct listed in the proposed rule relate to circumstances as to which there could be "disciplinary or court findings of which the applicant has personal knowledge." Thus, as to their form, subitems 1 through 9 of 6700.0670, subpart 1(D), state proper rules.[115]

88. The difficulty, of course, is that the last subitem is not so clear. The phrasing and structure of the revised rule does not make clear whether this category operates as a catchall provision – to include any conduct that "resulted in a *Brady-Giglio* disclosure by a prosecuting authority" – or instead, is limited to conduct as to which there was both a *Brady-Giglio* disclosure and a court finding or a disciplinary finding. Stated another way, as drafted, it is not clear whether the rules cover instances of *Brady-Giglio* disclosures that are not also reflected in official findings.

89. Significantly, in its response to public comments, the Board noted that it has the 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*."[116] Thus, it appears that the Board wants to receive and evaluate a wider range of submissions; and not merely those that are accompanied by formalized findings. But the text of rule does not read this way or carry out the Board's stated objective.

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[112] December RD4641 at 3.
[113] Ex. D at 15, 31, 36.
[114] *See* Minn. Stat. § 626.843, subd. 1(4), (6).
[115] *See* Minn. Stat. § 14.02, subd. 4 (2022) ("'Rule' means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure").
[116] Board Initial Comments, at 4 (emphasis added).

90. The lack of clarity deprives the applicants of knowing what submissions are required by the POST Board and, thus, a fair opportunity to comply with the revised rule.[117] Proposed rule 6700.0670, subpart. 1(D)(10), is defective.[118]

91. It is important to note that proposed rule Minn. R. 6700.0670, subp. 2(A)(13) (2021), relating to a different phase of the background investigation, has similar terms, but does not suffer the same defect. The sought-after material in this later regulation is not limited to official findings, but instead includes "conduct, records, investigations, or disciplinary or court findings related to the applicant . . ."[119] This broader range of materials does not conflict with the later catchall provision.

92. Depending upon the POST Board's regulatory objectives, curing the defect in 6700.0670, subpart. 1(D), is straight-forward. If the POST Board wishes to reach instances in which there were *Brady-Giglio* disclosures, but not accompanying court findings or disciplinary findings, it should break out 6700.0670, subpart. 1(D)(10), into its own subitem. In this way, the provision would not be narrowed by the earlier language "disciplinary or court findings."[120]

93. Conversely, if the Board believes that it is only proper to obtain details of *Brady-Giglio* disclosures that are accompanied by court or disciplinary findings, it could revise subitem 10 to read:

> ~~other~~ conduct ~~which the applicant is aware~~ <u>that</u> resulted in a *Brady-Giglio* disclosure by a prosecuting authority.

In this context, repeating the awareness requirement in the same regulation would be unnecessary.

94. Additionally, to improve clarity of the rules, and to use formatting conventions that are consistent throughout the subpart, the Administrative Law Judges also recommend numbering each of the subitems of 6700.0670, subpart. 1(D), instead of using bullet points.[121] This same approach would also improve the readability and consistency of proposed rule Minn. R. 6700.0670, subp. 2(A)(13).

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[117] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

[118] *See* Minn. R. 1400.2100(E) (2021).

[119] *See* Minn. Stat. § 14.02, subd. 4 ("'Rule' means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure").

[120] *See* December RD4641 at 3,6.

[121] December RD4641 at 2-7.

C. Minn. R. 6700.0670, subp. 2(A)(1) – Background Verification
Minn. R. 6700.0700, subp. 1(A) – Minimum Selection Standards

95. The POST Board's current rules require peace officers to be citizens of the United States in order to be eligible for licensure.[122]

96. The POST Board proposes to broaden this eligibility requirement to include both United States citizens and those who are "eligible to work in the United States under federal requirements . . ."[123]

97. Under Minn. Stat. § 624.843, subd. 1(11) (2022), the POST Board has authority to promulgate rules on "citizenship requirements for peace officers and part-time peace officers . . ."

98. Some commenters assert that the proposed rule contravenes state law, and therefore the proposed rules are beyond the authority of the POST Board. For example, the League of Minnesota Cities maintains that:

> Minnesota Statutes section 624.714 does not say that persons who are peace officers are necessarily "entitled, regardless of citizenship status, to carry weapons without a permit" . . . The Minnesota legislature has made it a crime for illegal or unlawful aliens to possess firearms, and even nonresident aliens may only possess firearms for hunting. However, both citizens and legal permanent residents may possess firearms and pistols and can be granted a permit to carry a pistol. The POST Board cannot make by rule what the legislature has made explicit: only citizens or legal permanent residents may possess firearms.[124]

99. The Administrative Law Judges do not agree. By its terms, Minn. Stat. § 624.714, subd. 1a (2022), requires "a person, *other than a peace officer*" to obtain a permit before carrying a concealed weapon. This statute is not a substantive limitation upon the activities of duly authorized peace officers.

100. This proposed text is authorized by statute and supported by an affirmative presentation of facts in the SONAR.

D. Minn. R. 6700.0700, subp. 1(H) – Minimum Selection Standards
Minn. R. 6700.1600, subp. 1(H) – Standards of Conduct
Minn. R. 6700.1600, subp. 1(I) – Standards of Conduct

101. The POST Board proposes a series of interrelated regulations to promote "fair and consistent public services by law enforcement officers . . ." by prohibiting licensed peace officers from joining, associating with or supporting groups that are

[122] Minn. R. 6700.0700, subp. 1(A) (2021).
[123] Ex. C at 3, 7; December RD4641 at 4, 10.
[124] Comments of the League of Minnesota Cities, at 4.

"directed at inciting or producing imminent lawless action . . ."[125] These rules drew the most comment, both for and against, by commenters in this rulemaking.

102. The Board proposes the following new rules:

6700.0700 MINIMUM SELECTION STANDARDS, subp. 1

Selection standards. An applicant identified by the board as eligible to be licensed or a peace officer currently licensed in Minnesota may apply for a peace officer position with a law enforcement agency. Prior to employment, the law enforcement agency must establish and document that the following minimum selection standards are met by the applicant. The applicant must:

. . .

H. have no record or indication of participation or support of an extremist or hate group as described in part 6700.1600, subpart 1(H)-(I);

. . .

6700.1600 STANDARDS OF CONDUCT, subp. 1

The board may impose disciplinary action as described in Minnesota Statutes, section 626.8432, subdivision 1(a) or Minn. R. 6700.1710 based on a violation of one or more of the standards of conduct. It is a violation of standards of conduct to:

. . .

H. undermine or jeopardize public trust in law enforcement, create an appearance of impropriety, or disrupt the cohesive operation of law enforcement by supporting, advocating, or participating as identified in part 6700.1600, subpart 1(I), in the activities of a white supremacist, hate, or extremist group or criminal gang that, as demonstrated by its official statements or principles, the statements of its leaders or members, or its activities:

(1) promotes harmful actions against other persons based on a person's perceived race, color, creed, religion, national origin, disability, sex, sexual orientation, gender identity, public assistance status or any protected class as defined in Minnesota Statutes, or federal law;

(2) promotes the use of threats, force, violence, or criminal activity:

(a) to deprive or attempt to deprive individuals of their civil rights under the Minnesota or United States Constitution; or

[125] Ex. D at 40.

(b) to achieve goals that are political, religious, discriminatory, or ideological in nature; or

(3) promotes seditious activities, threats, or violence against local, state, or United States government;

I. support, advocate for, or participate in a white supremacist, hate, or extremist group or criminal gang under item H as demonstrated by:

(1) dissemination of hate or extremist material;

(2) engagement in cyber or social media posts, chats, forums, and other forms of promotion of the group's activities;

(3) display or use of insignia, colors, tattoos, hand signs, slogans, or codes associated with the group;

(4) direct financial or in-kind contributions to the group;

(5) a physical or cyber presence in the group's events; or

(6) other conduct that could reasonably be considered support, advocacy, or participation;[126]

103. The rule proposals raise two separate and distinct questions; namely: (1) Can the POST Board condition the free speech and associational rights of peace officers in its professional licensing standards; and (2) are the regulatory approaches taken by the POST Board in this rulemaking lawful?

104. Some critics of the proposed regulations assert that the POST Board, consistent with constitutional guarantees of freedom of speech and freedom of association, cannot regulate off-duty speech and memberships of peace officers. For example, True North Legal, the National Legal Foundation, the Pacific Justice Institute, and the North Star Law and Policy Center jointly argue:

> [t]he United States Supreme Court has on many occasions emphasized that government employees do not forfeit their constitutional rights by taking a government job . . . The government employer may not punish or refuse to employ the individual for exercising those rights appropriately. The proposed POST Board revisions . . . regulate conduct taking place off-duty, punish pre-employment conduct and beliefs, [and] are viewpoint discriminatory .....[127]

105. For its part, the POST Board is equally firm in its conviction that it can regulate the off-duty speech and association of peace officers, when those restrictions

[126] December RD4641 at 15 and 17-19; *see also* Ex. C at 12 and 16-17.

[127] Comments of TNL at 2; *see also* Comments of Minnesota Sheriff's Association, at 1-2; Joint Comments of MPPOA and LELS, at 20 (July 20, 2022).

are closely related to a substantial public purpose – such as uniform application of the laws. It maintains:

> Although the First Amendment's freedom of association provision protects an individual's right to join white supremacist groups for the purposes of lawful activity, the government can limit the employment opportunities of group members who hold sensitive public sector jobs, including jobs within law enforcement, when their memberships would interfere with their duties.[128]

106. The Administrative Law Judges agree. The applicable case law makes clear that the speech and associational rights of law enforcement personnel are not absolute. Instead, as to speech and associations that also touch upon public policy, there is a balancing between the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[129]

107. The case of *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995) is instructive. In that case, Officer Tindle, a police officer with the Little Rock Police Department, was disciplined after he appeared at a Halloween Party hosted by the Fraternal Order of Police Lodge "dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon."[130] Tindle asserted that disciplining him for his off-duty conduct violated his constitutional rights of free speech. Disagreeing, a panel of the U.S. Court of Appeals for the Eighth Circuit held that the police department's interests in maintaining harmonious working relationships between officers of different races and "high standards of conduct" among officers, justified the discipline. It wrote:

> Because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer. Moreover, "when close working relationships are essential to fulfilling public responsibilities," an employer's judgment may be given a "wide degree of deference."
>
> The need for harmony and close working relationships between co-workers in a police department is of great importance. In this case, it is undisputed that some African–American officers of the [Little Rock Police Department] were offended by Tindle's costume. That race relations were a concern of the LRPD is evidenced by the fact that it had retained an expert to conduct prejudice reduction workshops . . . Under all the circumstances Tindle's interest in appearing as he chose at the party does

[128] Ex. D at 37.
[129] *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *accord Leininger v. City of Bloomington*, 299 N.W.2d 723, 729–30 (Minn. 1980).
[130] *Tindle*, 56 F.3d at 968.

not outweigh the countervailing interests in maintaining discipline and harmonious working relationships within the LRPD.

. . .

Because police departments function as paramilitary organizations, their members may be subject to stringent rules and regulations that could not apply to other government agencies. "Regulations limiting even those rights guaranteed by the explicit language of the Bill of Rights are reviewed more deferentially when applied to certain public employees than when applied to ordinary citizens."

The regulations at issue in this case are rationally related to the department's legitimate interest in developing "discipline, esprit de corps, and uniformity" within its ranks. While it is true that the rules do not precisely define what would constitute impermissible conduct, they give adequate notice that high standards of conduct are required. Tindle's conduct fell squarely within the parameters of the rules . . .[131]

108. Additionally, the case law demonstrates that courts will uphold restrictions on the off-duty conduct of peace officers – even as to activities involving fundamental freedoms – when the officer's exercise of those rights interferes with the police department's orderly functioning or its relationships within the community.[132]

109. For these reasons, the Administrative Law Judges conclude that the POST Board is authorized to develop standards of professional conduct that regulate a licensed peace officer's off-duty conduct when those regulations are closely related to orderly functioning of law enforcement agencies or the relationships that those agencies have with the communities they serve.

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[131] *Id.* at 971-73 (citations omitted).

[132] *See e.g., Perez v. City of Roseville*, 926 F.3d 511, 520 (9th Cir. 2019) (Police Department could legitimately prohibit sexual relations among officers "in light of their possible adverse effect on morale, assignments, and the command-subordinate relationship"); *Lawrenz v. James*, 852 F.Supp. 986 (M.D.Fla. 1994), *aff'd* 46 F.3d 70 (11th Cir. 1995) (holding that correctional institution defendant's interest in the efficient operation of the correctional facility outweighed plaintiff's First Amendment right to wear, off-duty, a T-shirt adorned with a swastika and the words "White Power"); *Briggs v. North Muskegon Police Dept.*, 563 F. Supp. 585, 591 (W.D. Mich. 1983) ("Without doubt, the police department has a legitimate interest in the personal sexual activities and living arrangements of its officers where such activities affect their job performance"); *Riley v. Bd. of Police Com'rs of City of Norwalk,* 157 A.2d 590, 593 (Conn. 1960) (Police Department could terminate a police officer for continuing a sexual relationship with an emancipated 16-year old girl, despite an order not to do so, on the grounds that it was "was essential to the effective operation of the police force that proper discipline be maintained in it"); *see also Fugate v. Phx. Civil Serv. Bd.*, 791 F.2d 736, 741 (9th Cir. 1986) (Police officers do not have a constitutional right to privacy in their sexual activities, when those activities occur while on-duty, because this conduct compromises the "police officer's performance, and that threatens to undermine a police department's internal morale and community reputation").

110. The POST Board's SONAR makes clear that it hopes to promulgate such standards.[133]

111. To that end, the Board draws a regulatory distinction between groups that use unlawful means to pursue goals of racial and ethnic superiority, on the one hand, and religious and civic associations that may have traditional views of marriage and family life, on the other.[134] Membership and association of peace officers in the first category of groups raises concerns about the fair and uniform application of the laws by those same officers while on-duty;[135] whereas membership and association in the latter category of groups does not raise a similar concern.[136]

112. Yet, as pointed out by many of its stakeholders, terms like "extremist or hate group," "harmful actions against other persons," "white supremacist," or "hate or extremist material," are simply not precise enough to inform applicants and licensees of what conduct is prohibited by the regulations.[137] Each of these terms is unduly vague[138] and not reasonably calculated to make the kind of nuanced and lawful distinctions that the POST Board describes in its SONAR.

113. For these reasons, proposed rules 6700.0700, subpart 1(H) and 6700.1600, subparts 1(H) and (I) are defective.

114. In the view of the Administrative Law Judges, however, it is possible to achieve the POST Board's regulatory objectives, and to do so in a way that is consistent with the constitutional guarantees of free speech, free association and due process of law. One possible approach would be to: (a) establish a definition of "hate or extremist group" in Part 6700.0100; (b) make the elements of that regulatory definition clear by highlighting the unlawful and discriminatory purposes of such groups; and (c) link back to this clear regulatory definition when setting the minimum standards for professional conduct.

115. One possible approach that the POST Board might take when curing the defects in proposed rules 6700.0700, subpart 1(H) and 6700.1600, subparts 1(H) and (I), might be:

6700.0100 DEFINITIONS

Subp. 29. **Hate or Extremist Group.** "Hate or Extremist Group" means a group that, as demonstrated by its official statements or principles, the statements of its leaders or members, or its activities:

(1) promotes the use of threats, force, violence, or criminal activity:

[133] *See generally* Ex. C at 2-17; December RD4641 at 8-19.
[134] Ex. D at 36-40.
[135] *Id.* at 38.
[136] *Id.* at 33, 39-40.
[137] *See Grayned*, *supra* at 108.
[138] Minn. R. 1400.2100(E).

(a) against a local, state, or federal entity, or the officials of such an entity;

(b) to deprive, or attempt to deprive, individuals of their civil rights under the Minnesota or United States Constitution; or

(c) to achieve goals that are political, religious, discriminatory, or ideological in nature; or

(2) promotes seditious activities; or

(3) advocates for differences in the right to vote, speak, assemble, travel, or maintain citizenship based on a person's perceived race, color, creed, religion, national origin, disability, sex, sexual orientation, gender identity, public assistance status, or any protected class as defined in Minnesota Statutes or federal law.

6700.0700 MINIMUM SELECTION STANDARDS, subp. 1

. . . The applicant must: . . .

. . .

H. have no record of conduct, as described in part 6700.1600, subparts 1(H)-(I), with:

(1) a hate or extremist group as defined by part 6700.0100, subpart 29; or

(2) a criminal gang as defined by Minn. Stat. § 609.229, subd. 1;

. . .

6700.1600 STANDARDS OF CONDUCT, subp. 1

. . . It is a violation of standards of conduct to: . . .

. . .

H. join, support, advocate for, maintain membership or participate in the activities of:

(1) a hate or extremist group as defined by part 6700.0100, subpart 29; or

(2) a criminal gang as defined by Minn. Stat. § 609.229, subd. 1.

I. for the purposes of item H, support, advocacy, membership or participation in a hate or extremist group, or a criminal gang, is demonstrated by:

(1) dissemination of material that promotes:

(a) the use of threats, force, violence, or criminal activity as described in 6700.0100, subpart 29(1);

(b) seditious activities; or

(c) the goals described in 6700.0100, subpart 29(3);

(2) engagement in cyber or social media posts, chats, forums, and other forms of promotion of the group's activities;

(3) display or use of insignia, colors, tattoos, hand signs, slogans, or codes associated with the group;

(4) direct financial or in-kind contributions to the group;

(5) a physical or cyber presence in the group's events; or

(6) other conduct that could reasonably be considered support, advocacy, or participation in the group's activities.

116. The Administrative Law Judges acknowledge that this approach is less than the Board, and many of its Advisory Committee members, would want as a policy matter[139] – particularly as to the range of protections that these regulations would afford against "harmful actions" to protected classes.

117. A regulatory definition which focuses upon groups who oppose equality of rights in voting, free speech, free assembly, travel, or accessing citizenship, is likely to include groups that advocate violence and a narrowing of rights for particular racial, ethnic or religious minorities, while excluding groups that merely hold traditional views on marriage and the raising of children. This narrower definition thus appears to achieve the key objectives identified in the SONAR while also clarifying the requirements.

118. While some of the Advisory Committee members may also regard traditional views on marriage and the raising of children as harmful to protected

[139] *See generally* Ex. D at 39; Ex. D. at Appendix A at 12.

classes,[140] the Board seems to concede that religious and cultural traditionalists rarely "work[] to harm an individual or group."[141]

119. This distinction is important. Because of the political and associational freedoms involved, hewing to this dividing line[142] is worth the POST Board's close review and consideration.[143]

E. Minn. R. 6700.0700, subp. 1(M) – Minimum Selection Standards

120. The POST Board's current rules do not set a minimum age requirement to be eligible for licensure.[144] The proposed rules would require applicants to be at least 18 years old.[145]

121. The POST Board maintains that without a minimum age requirement, an applicant who is not yet 18, but who has completed post-secondary degree coursework while still in high school, could be eligible for licensure.[146] In the Board's view, these applicants lack important developmental and general life experience that is needed to serve as a peace officer.[147]

122. Historically, those applicants who completed a program of professional peace officer education (PPOE) were between the ages 20 to 24 years old. However, the increase in students taking post-secondary classes while still in high school programs, raises the concern that PPOE graduates would present themselves for licensure while they are still in high school.[148]

123. The Advisory Committee did not reach consensus on what is an appropriate minimum age for licensure.[149] Five Advisory Committee members advocated for a minimum age older than 18. Those members asserted that the human brain does not fully mature until age 25 and many other professional licenses require the applicant to be older than 18.[150] They also noted that 30 states have a licensing age requirement of 19 years and older for law enforcement officers, 27 of which have a minimum age of 21 years of age.[151]

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[140] *See* Ex. D, Appendix A at 12.
[141] Ex. D at 38; *see also* Ex. D, Appendix A at 16.
[142] Ex. D at 40 (the State's interest is "in promoting fair and consistent public services by law enforcement officers who uphold the laws").
[143] *See generally* Ex. D, Appendix A at 14.
[144] *See* Minn. R. 6700.0700.
[145] Ex. C at 11; December RD4641 at 14 (no changes to the minimum age requirement in the December rule draft).
[146] Ex. D at 27.
[147] *Id*.
[148] *Id*.
[149] *Id*; *see also* Advisory Committee Report to the Board, April 2022.
[150] *Id*.
[151] Ex. D at 27-28; *see also* Comments of Elliot Butay, Chris Bray, Joycelyn Alexander Dawn Einwalter, Ann Resemius, Penny Hunt, Peggy Reinhart. *See also* Comments of the Minnesota Chapter of the National Alliance on Mental Illness.

124. Appendix A of the SONAR suggests that selection of 18 years old as a minimum age for licensure is justified, in part, by the difficulty of "building an already struggling workforce."[152]

125. The POST Board then determined that 18 years of age was a reasonable and appropriate minimum age for use in proposed rule 6700.0700, subp. 1(M).

126. In response to stakeholder comments, the POST Board maintained that it is reasonable to assume that the pace of brain development begins rapidly at infancy and slows toward adulthood and that it does not appear that a typical 21 year old will have significantly more impulse control compared to a typical 18 year old.[153] Further, the Board noted that legislators have determined that an 18 year old may legally possess and carry a pistol or semiautomatic military-style assault weapon.[154]

127. From these submissions, we can extrapolate two reasons for a minimum age requirement set at 18 years of age: First, law enforcement agencies are struggling to maintain its workforce and the younger age requirement would broaden the pool of possible applicants.[155] Second, the Board found no evidence that suggests that persons younger than 21 years of age should not be licensed as peace officers.[156]

128. The POST Board's stated concern about the possibility of some high schoolers completing a post-secondary degree while in high school does not rationally support a minimum age requirement of 18. Some individuals graduate high school at 17 years of age, while many others will turn 18 before graduating from high school.

129. In the view of the Administrative Law Judges, the POST Board has failed to make an "affirmative presentation of facts" in support of a minimum age requirement for licensure of 18 years of age.[157] Neither the SONAR nor the remainder of the rulemaking record include evidence as to why the POST Board selected 18 years old as a minimum age, as opposed to 19, 20, 21, or any other age.[158] Without such a presentation of facts, proposed rule 6700.0700, subp. 1(M) is arbitrary and defective.

130. The case of *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984) is instructive. In that case, the Commissioner of Health was tasked with setting, through rulemaking, the maximum level of ambient formaldehyde that would be permitted in new housing units. During the 1980s formaldehyde was used as a bonding agent in building materials, such as plywood and particle board, and those materials were commonly used in manufacturing mobile homes. The Minnesota Supreme Court concluded that a rule setting the level of ambient formaldehyde at five parts per million

[152] Attachment A at 11.
[153] POST Board's Initial Public Comments at 8 (December 1, 2022).
[154] *Id*.
[155] There was extensive commentary about expanding the range of applicants for licensure in the context of other proposed rule parts. The rulemaking record reflects that law enforcement agencies are facing significant staffing challenges.
[156] Ex. D at 28; *But see* Ex. D at 27-28; Ex. D, Appendix A at 10-11; Comments of Elliot Butay.
[157] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2220, subp. 3.
[158] *See* Ex. D at 28.

was arbitrary and capricious when there was "no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments."[159]

131. While the POST Board has the statutory authority to promulgate a minimum age requirement – including one that sets a minimum age at 18 – the Board must explain on what evidence it is relying upon when making that choice and how the evidence connects with the Board's selection.[160]

132. It is not the role of the Administrative Law Judges to say whether a minimum age requirement of 18 years of age is appropriate as a matter of policy. Like the court in *Manufactured Housing Institute v. Pettersen*, we are only saying that from the rulemaking record before us, "we cannot tell if it is within the bounds of what is right."[161]

F. Minn. R. 6700.1615, subp. 1(A)(8) – Required Agency Policies

133. The POST Board has developed various model policies that law enforcement agencies must adopt and implement. Most of the model policies developed by the POST Board and listed in the proposed rules were specifically mandated by the Minnesota legislature in various different statutes.[162] The proposed rules clearly state the requirement that law enforcement agencies, through the chief law enforcement officer, must adopt, implement and enforce these required polices.[163]

134. In 2020, the Minnesota legislature established the Ensuring Police Excellence and Improving Community Relations Advisory Council (EPEICRAC).[164] The EPEICRAC is established under the POST Board with a purpose to assist the Board "in maintaining policies and regulating peace officers in a manner that ensures the protection of civil and human rights."[165] Further, the EPEICRAC is directed to "advance policies and reforms that promote positive interactions between peace officers and the community."[166]

135. The EPEICRAC made a recommendation to the POST Board to add a policy on public assembly and first amendment activity.[167] The POST Board, required to consider their recommendation, accepted the EPEICRAC's recommendation and

[159] *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984).
[160] *See id.*, at 244.
[161] *See id*. at 246.
[162] *See e.g.*, Minn. Stat. §§ 626.8433, .8442, .8452, .8454 (2022).
[163] Ex. C at 21.
[164] Minn. Stat. § 626.8435 (2022).
[165] Minn. Stat. § 626.8435, subd. 2.
[166] *Id*.
[167] Ex. D at 44.

adopted the Public Assembly/First Amendment Activity policy in July 2021 as a recommended best practice.[168]

136. The proposed rules would require law enforcement agencies to adopt, implement and enforce the Public Assembly/First Amendment Activity policy.[169]

137. Commenters who object to the addition of the Public Assembly/First Amendment Activity policy argue that the POST Board does not have statutory authority for this policy because it, like the other model policies, is not specifically mandated in statute.[170]

138. Commenters who support the Public Assembly/First Amendment Activity policy argue it is key to improving civil rights protections of policing public assemblies and the policy creates shared expectations of law enforcement response.[171]

139. The POST Board maintains that it has the authority to regulate officer conduct and the use of force, which the Public Assembly/First Amendment Activity policy regulates.[172] The POST Board has the authority to "perform such other acts as may be necessary or appropriate to carry out the powers and duties of the board under section 626.841 to 626.863."[173]

140. The Administrative Law Judges agree that the POST Board has the authority to include the Public Assembly/First Amendment Activity policy in the proposed rules. The POST Board has broad authority to adopt rules as may be necessary and consistent with sections 626.84 to 626.863.[174]

141. The Minnesota legislature's creation of the EPEICRAC and its purpose to maintain policies as described above supports the finding that the POST Board has the necessary statutory authority. Furthermore, the Minnesota legislature directed the POST Board to "adopt an updated comprehensive written model policy on the use of force" that must "recognize and respect the sanctity and value of all human life and the need to treat everyone with dignity and without prejudice."[175] The Public Assembly/First Amendment Activity policy is consistent with that directive. While that update was completed by September 1, 2020, there is nothing limiting the POST Board's policy updates to specific legislative directives.[176]

142. The proposed revisions to Part 6700.1615, subp. 1(A)(8), are needed and reasonable.

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[168] *Id*.
[169] Ex. C at 21 (proposed rule part 6700-1615, subp. 1(A)(8)).
[170] Comments of MPPOA and LELS, Comments of Sheriff Jason Kamerud; Comments of League of Minnesota Cities.
[171] Comments of CFM African Heritage and Victims of Torture.
[172] Ex. D at 45. The policy sets standards for the use of force and officer conduct at events.
[173] Minn. Stat. § 626.843, subd. 3(4).
[174] Minn. Stat. § 626.843, subd. 1(13).
[175] Minn. Stat. § 626.8452, subd. 1a(a).
[176] *See* Minn. Stat. §§ 626.843, subd. 1(13), 626.8452, subd. 1a(a).

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judges make the following:

CONCLUSIONS

1. The POST Board gave notice to interested persons in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Administrative Law Judges conclude that the Agency has fulfilled its additional notice requirements.

4. Except as noted in Findings 90, 113 and 129, the Post Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

5. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2021).

6. Except as noted in Findings 90, 113 and 129, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

7. The modification to the proposed rules suggested by the POST Board after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. The modifications to the proposed rules suggested by the Administrative Law Judges after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

9. During the public comment process, a number of stakeholders urged the Agency to adopt other revisions to Part 6700. In each instance, the POST Board's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

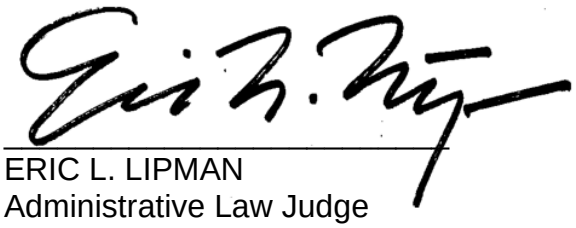
10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the POST Board from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judges make the following:

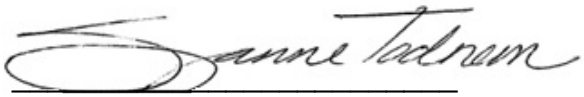
RECOMMENDATION

IT IS HEREBY RECOMMENDED that, except as noted above, the proposed amended rules be adopted.

Dated: January 12, 2023



ERIC L. LIPMAN
Administrative Law Judge



SUZANNE TODNEM
Administrative Law Judge

NOTICE

The POST Board must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the POST Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the

proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the POST Board, and the Board will notify those persons who requested to be informed of their filing.