

BEFORE THE PUBLIC SAFETY OFFICERS  
STANDARDS AND TRAINING COUNCIL  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 23.13.102, 23.13.702, ) PROPOSED AMENDMENT  
23.13.703, 23.13.704, 23.13.706, )  
23.13.719, and 23.13.721 pertaining )  
to the certification of public safety )  
officers )

TO: All Concerned Persons

1. On July 13, 2022, at 10:00 a.m., the Public Safety Officers Standards and Training (POST) Council will hold a public hearing in Auditoriums East and West at the Montana Department of Transportation building, 2701 Prospect Avenue, at Helena, Montana, to consider the proposed amendment of the above stated rules.

2. The POST Council will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the POST Council no later than 4:00 p.m. on July 8, 2022, to advise us of the nature of the accommodation that you need. Please contact Katrina Bolger, POST Council, 2260 Sierra Road East, East Helena, Montana, 59602; telephone (406) 444-9974; or e-mail kbolger@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

23.13.102 DEFINITIONS As used in this chapter, the following definitions apply:

(1) remains the same.

(2) "Case status committee" is a three-member committee of the POST Council, appointed by the chair of the council. The council chair shall designate a chair of the case status committee. The case status committee's purpose is to determine whether allegations of misconduct by a public safety officer should be investigated by POST staff, to determine whether a certificate sanction is appropriate, to determine the appropriate sanction to a certificate upon a finding of misconduct, and to review other proposed actions at the request of the director. The director will act based upon a majority vote of the case status committee.

(2) through (25) remain the same but are renumbered (3) through (26).

(27) "Sexual misconduct" is defined as:

(a) any sexual activity, contact, or communication which occurs while the officer is on duty;

(b) any sexual contact without consent as defined in 45-5-501(1)(b), MCA, without regard to whether such violation results in criminal charges or a conviction,

including gratuitous physical contact with suspects or other civilians, such as unnecessary searches, frisks, or pat-downs;

(c) any sexual activity, contact, or communication, on or off duty, which the officer facilitates with public safety agency property, resources, or information systems;

(d) procuring, observing, or disseminating pornographic or sexually offensive material either on duty or using department property or resources, when such procurement, observation, or dissemination is not related to the officer's official duties;

(e) engaging in sexual harassment as defined in applicable laws; or

(f) any other sexual conduct which, whether committed in the officer's capacity as an officer or otherwise, is prejudicial to the administration of justice or reflects adversely on the employing authority's integrity or the officer's honesty, integrity, or fitness as an officer.

(26) through (28) remain the same but are renumbered (28) through (30).

AUTH: 2-15-2029, MCA

IMP: 2-15-2029, 44-4-403, MCA

REASON: In November of 2021, POST Bureau staff met with the Montana Police Protective Association (MPPA). MPPA expressed concern that stakeholders did not fully understand the role of the case status committee of the POST Council, a committee which has been in place since 2013, and with whom the POST director confers on cases. Currently, the committee's role is defined in POST's procedures but not in administrative rule. POST and MPPA agreed that defining the committee and its duties in rule would address this concern and clarify the committee's role.

During a routine review of POST's rules, contested case counsel for POST identified that POST's rules did not specifically provide for certification sanctions based upon sexual misconduct. POST has agreed that this type of conduct should be defined and sanctionable, especially because, since March of 2020, agency administrators are required to report misconduct. This change provides additional clarity regarding the types of conduct which must be reported to POST.

23.13.702 GROUNDS FOR DENIAL, SANCTION, SUSPENSION, OR REVOCATION OF POST CERTIFICATION

~~(1) The executive director or the council will consider~~ Any legitimate allegation made against any public safety officer that may result in the denial, sanction, revocation, or suspension of that officer's certification must be considered by either:

(a) the case status committee and the executive director; or

(b) the council.

(2) through (3)(k) remain the same.

(l) the use of excessive or unjustified force in conjunction with official duties;

or

(m) engaging in sexual misconduct as defined in these rules; or

(m) remains the same but is renumbered (n).

AUTH: 2-15-2029, MCA  
IMP: 2-15-2029, 44-4-403, MCA

REASON: See reason for amendment to ARM 23.13.102.

23.13.703 PROCEDURE FOR MAKING AND RECEIVING ALLEGATIONS OF OFFICER MISCONDUCT AND FOR INFORMAL RESOLUTION OF THOSE ALLEGATIONS BY THE DIRECTOR (1) through (4) remain the same.

(5) After the employing authority has been notified and given the opportunity to act, the director or POST staff may accept an allegation to be presented to the case status committee. If an allegation is received from an employing agency, the executive director may, if appropriate under the circumstances, send a "Letter 1" (as described in the POST Council's policy and procedure adopted under (1)) to the officer prior to consultation with the case status committee, provided the director notify the committee of the Letter 1 as soon as practicable.

(a) through (d) remain same.

(6) remains the same.

(7) After an allegation has been received or has been initiated by the director, the director, in consultation with the case status committee and contested case counsel for POST, will correspond with the respondent in writing.

(a) through (c) remain the same.

(8) After an allegation is made by or filed with the director, and upon a majority vote of the case status committee, the director, contested case counsel for POST, or other POST staff or designees will investigate the complaint.

(9) Following the review and investigation of an allegation, communication with the respondent, communication with the employing authority, and consultation with counsel for POST, and based upon a majority vote of the case status committee, the director may take any appropriate action, including but not limited to the following:

(a) through (f) remain the same.

(10) If a review of the conduct of an officer is pending before any court, council, tribunal, or agency, the director may, as a matter of discretion, stay any proceedings for denial, sanction, suspension, or revocation pending before the council, no matter what stage or process they have reached, until the other investigation or proceeding is concluded. If the case has already been assigned to a hearing examiner, the hearing examiner must grant a stay based on an application by the director or counsel for POST. The director will notify the case status committee of the stay as soon as practicable.

(11) remains the same.

AUTH: 2-4-201, 2-15-2029, MCA  
IMP: 2-4-201, 2-15-2029, 44-4-403, MCA

REASON: See reason for amendment to ARM 23.13.102. This specific rule change is necessary to address when the director should consult with the committee after receipt of an allegation.

23.13.704 REQUESTS FOR A FORMAL CONTESTED CASE HEARING UNDER MAPA (1) ~~Any person aggrieved by a decision of the director or a decision of the council, other than a decision by the director to deny, sanction, suspend, or revoke a certificate, that is not a final decision following a contested case hearing, as provided in 2-4-623, MCA, may request a contested case hearing before the council by following the procedures set forth in Title 2, chapter 4, part 6, MCA.~~

(2) remains the same but is renumbered (1).

(2) Any public safety officer or employing authority aggrieved by a decision of the director, other than a decision by the director to deny, sanction, suspend, or revoke a certificate, that is not a final decision following a contested case hearing, as provided in 2-4-623, MCA, may request the denial be placed on the agenda for consideration by the council at the council's next regularly scheduled meeting.

AUTH: 2-15-2029, MCA

IMP: 2-4-201, 2-15-2029, 44-4-403, MCA

REASON: Section 44-4-403, MCA provides an opportunity for contested case hearing only for a public safety officer whose certification or recertification has been denied, suspended, or revoked. This change is necessary to conform to the statute and ensure individuals receive timely responses from the council on issues that do not involve denial, suspension, or revocation of certification or recertification and thus do not qualify for a contested case hearing.

23.13.706 CONTESTED CASES, EMERGENCY SUSPENSION OF A LICENSE (1) Pursuant to 2-4-631(3), MCA, if the director or the council determines that public health, safety, or welfare requires emergency action, the director or council may immediately suspend a certification. The order must include findings justifying emergency action, and regular proceedings must be promptly initiated. If the director takes emergency action to suspend a certification, the director will inform the case status committee as soon as practicable and will take further action based upon a majority vote of the committee.

AUTH: 2-4-201, 2-15-2029, MCA

IMP: 2-4-631, 44-4-403, MCA

REASON: See reason for amendment to ARM 23.13.102. This specific rule change is necessary to address consultation with the committee where the director takes emergency action to suspend a certification.

23.13.719 DECISION AND ORDER, STAYS (1) through (6) remain the same.

(7) Case status committee members may not participate in deliberations or any decision of the full council regarding the denial, revocation, or suspension of an officer's POST certification, unless the committee member did not participate in the committee's decisions on the matter and did not participate in committee meetings at which the matter was discussed.

AUTH: 2-15-2029, MCA  
IMP: 2-15-2029, 44-4-403, MCA

REASON: See reason for amendment to ARM 23.13.102. This specific rule change is necessary to avoid any appearance of bias on the part of any council member voting on a hearing examiner's order.

23.13.721 APPEALS (1) A party, other than the council, adversely affected by a final POST Council decision rendered after a contested case proceeding, may appeal to the Montana Board of Crime Control pursuant to ARM 23.14.1004 and 44-4-403(3), MCA. The decision of the Montana Board of Crime Control is the final agency decision subject to judicial review pursuant to 2-4-702, MCA.

(2) The council may appeal to the Board of Crime Control under the conditions provided in Title 2, chapter 4, part 6, MCA.

AUTH: 2-15-2029, MCA  
IMP: 2-4-201, 2-15-2029, 44-4-403, MCA

REASON: During the 2021 Legislative Session, the Legislature amended 44-4-403, MCA, to remove the requirement that a decision of POST be reviewed by the Board of Crime Control. This change is necessary to comport with the statute.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Katrina Bolger, POST Council, 2260 Sierra Road East, Helena, Montana, 59602; telephone (406) 444-9974; or e-mail kbolger@mt.gov, and must be received no later than 5:00 p.m., August 10, 2022.

5. J. Stuart Segrest, Attorney at Law, has been designated to preside over and conduct this hearing.

6. The council maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

9. With regard to the requirements of 2-4-111, MCA, the council has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Sheriff Jesse Slaughter  
Chairman  
Public Safety Officers Standards and  
Training Council

/s/ Derek Oestreicher  
Derek Oestreicher  
Rule Reviewer

/s/ David M.S. Dewhirst  
David M.S. Dewhirst  
Solicitor General  
Montana Department of Justice

Certified to the Secretary of State May 17, 2022.