Attorney Memos Index

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Steve Bullock
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: WINNIE ORE, CHAIRPERSON
MONTANA PUBLIC SAFETY OFFICER STANDARDS AND TRAINING COUNCIL – formerly and often referred to as POST: PEACE OFFICERS STANDARDS AND TRAINING COUNCIL

FROM: NORMAN C. PETERSON
AGENCY LEGAL SERVICES BUREAU
MONTANA DEPARTMENT OF JUSTICE

DATE: APRIL 10, 2012

RE: EX PARTE CONTACTS WITH POST COUNCIL MEMBERS

You have requested that I review with the POST Council the subject of ex parte contacts with council members, and more importantly to inform council members what type of contacts are specifically impermissible.

In researching the issue, I found there were a considerable number of memorandums and legal opinions that have been written on the subject, and written specifically for boards much like, if not identical to the POST Council.

In particular I have attached one very detailed memorandum written for the California State Water Resources Control Board by its Chief Counsel. Along with my memorandum, I would recommend all board members read the California memorandum and keep it in their information packet. The last page of the latter memorandum has a nicely organized flow chart that a board member can use in deciding whether a contact is ex parte, and thus prohibited. I have also attached three administrative rules regarding ex parte contact; these are not POST Council rules, and are attached only for informational purposes. The body of this memorandum discusses the rules and statutes applicable to the POST Council.

A General Discussion of Ex Parte

"Ex parte" is a Latin term that means "by or for one party." It has its origins in providing a fair and unbiased system of justice in which each party to a lawsuit has an equal opportunity to present and hear evidence, rebuttal and cross examination. Judges, by

common law, cannot communicate with one party to a lawsuit on the subject of the lawsuit without the knowledge or presence of the opposing party. Ex parte communications are considered inherently improper as they defeat the purpose of "due process" for all parties.

The same prohibition applies to administrative hearings and the decision makers in those hearings. For our purposes, it refers to communication between a Council member [decision maker] and a person interested in an application before the POST Council, without other interested persons, other Council members, or the public being present. The phrase "person interested" can be generally thought of as a person who has a stake in the subject, such as an employee or person that has a matter before the POST Council. It can also mean a person that has an identified personal interest as being opposed to the application.

"Ex parte" contacts are prohibited because if such contact occurs, several different problems could arise when that contact is eventually disclosed. Since other interested persons were not part of the discussion, disclosure makes those persons feel that the Council member involved has a personal stake in the outcome, or is now biased against their position, or can no longer be neutral in considering the application. There will be pressure for the Council member to disqualify him or herself from the matter being decided. If the Council member refuses to disqualify him or herself, the other interested persons will feel that the person making the ex parte contact has had an unfair advantage in the process.

If the decision is adverse to that other interested person, the ex parte contact creates a potential legal issue because it appears that "due process" has not been provided. Alternatively, these other parties could start making ex parte contacts of their own, causing the Council to lose control of its own procedure.

In some States, if any board decision has been reached as a result of the ex parte contact, the decision may be subject to attack as a violation of the Right to Know statutes, with the possibility of sanctions imposed. Montana has such statutes and while I know of no cases discussing this particular aspect of the law, it could certainly happen here.

Ex parte contacts could cause conflict within the Council and among its members. In addition, if one or more members are disqualified, there may be a problem with a quorum, possibly making it difficult to process the application in a timely and efficient manner.

In some states, Courts have concluded that proof of an ex parte communication by a quasi-judicial officer creates a rebuttable presumption of prejudice unless proven otherwise by competent evidence by the officer. The person affected adversely by the decision is entitled to a new and complete hearing, unless the party defending against a new hearing can show that the communication was not, in fact, prejudicial. For these reasons, among others, ex parte contacts about a case are not allowed.

Montana Statutory Law Applicable to POST

While there is no definition of ex parte contact in the Title 44 statutes, Mont. Code Ann. § 2-4-613 of the Montana Administrative Procedure Act defines ex parte consultation: **"Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate."**

As you will read below, that statute applies to POST.

POST is created in Mont. Code Ann. § 2-15-2029, and is designated as a quasi-judicial board for purposes of Mont. Code Ann. § 2-15-124. That latter section describes the requirements of a quasi-judicial board, and for the purposes of this memorandum the main point is that a quasi-judicial board may make decisions in contested cases.

Mont. Code Ann. § 44-4-40, et seq. provides the powers and duties of POST. The contested case hearing procedures in the Montana Administrative Procedure Act, Title 2, Chapter 4, part 6, are made applicable to POST. The decision making power of POST will be exercised in a controlled contested case setting. Singular to POST, a decision of POST may be appealed to the Board of Crime Control as the final agency decision prior to any appeal to a Montana District Court.

The first sentence of Mont. Code Ann. § 2-4-613 of the Montana Administrative Procedure Act: "**Unless required for disposition of ex parte matters authorized by law"** generally references subjects such as domestic violence cases where there is an immediate and present danger, or mental commitment proceedings, or instances of imminent hazards created by hazardous substances; all of which may require or allow the proceeding to continue without a party being present.

To my knowledge, as regards POST, there are no **"ex parte mattes authorized by law"**, so the qualifier in the first sentence has no application to POST. Therefore, Council members are subject to the prohibitions of Mont. Code Ann. § 2-4-613, and once a notice of hearing or staff action has been issued, no Council member may communicate with any named party [or employee of the party], or that party's representative or attorney regarding any issue of fact or law in that contested matter, unless there has been some notice and opportunity for all parties to participate. That prohibition would include the presentation of any written material, or e-mails, or information of any sort about the facts or merits of a case. It also prohibits the presenting of gifts or favors by an interested party. And communication is a two-way street; no Council member may initiate such a conversation or seek information once a notice of hearing has been issued.

Although not as common, the above ex parte prohibitions may apply to a hearing where the Council is adopting or considering the adoption of an administrative rule, and there has been a publication in the Montana Administrative Register of the Council's consideration of the rule. However, The Administrative Procedure Act allows rule making bodies to have informal and other conferences for purposes of getting information and opinions regarding any proposed rules. That being true, it appears that it is within the discretion of the agency to allow or not allow ex parte contact in such situations. I would recommend that the Council discuss the matter and decide how it wishes to proceed in regard to rule making and ex parte contacts.

Finally, the prohibition on "ex parte" communications does not extend to Council staff; any interested party can communicate with the staff on a procedural matter, or even on the merits of a matter that has been set for hearing, as long as the contact is documented.

As noted earlier, I have also attached to this memorandum other agency definitions of "ex parte" contact. They are not all that different from the Montana Code reference, and they do not apply to POST. They are included only for informational purposes.

Examples of Ex Parte Communications

Deliberate contacts are somewhat self explanatory. No Council member may reach out, in any manner, to an identified interested party and discuss – outside of the Council hearing – the facts or merits of an application that has been noticed for a hearing. Similarly, a Council member cannot discuss, when contacted in any manner by an identified interested party, the facts or merits of a matter that has been noticed for a hearing.

There are other less definitive examples, but each is prohibited as above.

1. An applicant may send a letter or an email to every Council member dealing with a pending application, but there is no notice that the letter or email was shared with the opposing party or the public. This is particularly difficult as this type of contact is quite common, particularly with citizen boards. The absence of information may cause the problem.

Therefore a Council member should always view such information as suspect, and may wish to proceed in this manner. Before viewing it, make sure of the source and who has had access to it. If the Council's staff has given it to the member, it is probably appropriate. If it came directly from an interested party, or the source is simply unknown, it would be best to leave it unread and to bring it to the full Council's attention at the hearing or if at all possible prior to the hearing.

Perhaps the best approach is for the Council, in its internal operating rules, to state that no information regarding a pending matter should be viewed or read unless it comes from staff, or unless it was requested by the Council itself, with all interested parties having the same opportunity.

2. An elected official or appointed official in your town or county, or a neighboring one, may send or forward some information, or talk on the telephone about a pending application, and the communication is not shared with other parties or other Council members. This is a prohibited ex parte contact, and members must avoid such conversations or contacts. This is a particularly difficult example, as in many rural or urban areas, it is simply the way business gets done. However, Coucil members must always be conscious of the fact that they are wearing their "Council member hats" when speaking of a Council matter that has been noticed for hearing. No matter how tempting,

it is still prohibited ex parte conduct.

3. A technical expert assisting a party to a matter gives a report to a Council member, or all members, but does not file it as a hearing exhibit, or give notice that it is being used. This is again, prohibited. Council members must be cautious about the source of materials they view, and again, once a matter has been noticed for hearing, no material that has not come from staff should be viewed or considered prior to its presentation at the hearing.

The problem with much of the above is that the Council member did not initiate the contact nor did the member attempt to make an ex parte contact; but because of someone else's behavior, the member may have received information not made available to other board members, the public or other interested parties.

What Can You Talk About and Whom Can You Talk To?

Not to be flippant, but the simple answer is that as long as you are not discussing a pending application or pending administrative rule adoption [if the latter is included at the Council's choice] you can talk to anybody about anything. Almost anything else is fair game; as after all, you are the ones that know how the Council operates and you can address the questions of the public concerning the Council. This includes procedural questions, status requests, requests for information, or scheduling questions. The important thing to remember about ex parte contacts is a Council member must maintain his or her neutrality by avoiding discussions **about actual cases pending and possibly rule adoptions that have been noticed.**

In addition, you may talk with a party – **even on a pending matter** – on an issue of procedure, as you are not technically discussing the facts or merits of the pending matter. But this is a fairly delicate subject area that can get you in trouble, and avoidance is usually the best policy. For instance, a party asks you a procedural question about which party goes first and if they need an attorney to represent them, or if they need to present a certain type of evidence. You very carefully answer the question without discussing the merits, but at the Council hearing that person blurts out: "But I thought you told me I did not need to present this sort of information?" Ok, now you are in the soup as the rest of the Council and the other party are looking at you and stating: You talked about this case with this person? No matter how innocent the conversation, you are presented in a rather poor light.

My best advice – when you are asked about something by a party to a pending matter – is to always refer them to staff, unless it is an absolutely basic procedural question. If not, you may find yourself being disqualified, or delaying the proceedings, or worse yet, having the entire matter blow up into litigation because of what seemed like an innocent conversation.

How Can the Council or its Members Prevent Ex Parte Contacts?

Initially, there is little a Council member can do to stop such attempted contacts by the public, applicants, or consultants; as after all these matters have important consequences and it is natural for them to ask questions and seek information or advice on how best to advocate for their position. But things can be done.

Rule No. 1 is always to immediately stop the contact when the attempt is first made, and document the fact that the contact was made. A Council member should also relay that matter to the Chairperson or the Chairperson's designee for such purposes. If the contact is by email, it would be appropriate to forward that email to the Chairperson, who then would need to decide whether to share the information with the other board members and to send it to other identified interested parties. At the very least, it should be included in the file as an attempted contact.

If an ex parte contact is made and the Council member inadvertently and suddenly finds him or herself in the middle of a discussion that s/he realizes should not have taken place, the same approach should be taken, but with the addition of further information to the Chairperson about the contact and information received or discussed. At that point, the board member should consider recusing him or herself from a decision on the pending matter, or at least discuss it with the Chairperson or me.

The Chairperson, when receiving such information, should make it part of the file and probably note the contact at the hearing; or prior to the hearing notify any other interested party if that is possible.

If desirable, and requested, the Council can adopt an internal ex parte policy that all members can understand and follow, and which, if possible, can set out in black and white the options of the Council and its members. References can be made to very specific instances; thereby allowing a member a quick and certain means of avoiding certain conversations or situations without the possibility of causing offense.

As noted earlier, any contact can be relayed to staff; they are, after all, the persons who are most familiar with the application and the procedure to be followed, and their job is to keep things on track. They are also not charged with the responsibility of making the final "judicial" decision, and are thus free to discuss matters in greater detail than are board members.

One particular situation that is apparently recurring is when a single Council member, outside a Council meeting, meets with either applicants or the public or interested parties on a subject of interest, and Council member knows there is a hearing pending before the Council that deals with the same subject, and possibly involves some of the people at the meeting. These meetings simply increase the risk of ex parte contact and should be avoided. If they cannot be avoided, and I can see where avoidance would cause public relation problems, the individual Council member must remain on guard as concerns ex parte contacts. Most of the time it is sufficient if the member is simply aware of the facts that define an ex parte contact, as this makes it easier to avoid them.

There is also the situation where the offender is persistent in attempting to make contact when first rebuffed. In that instance, the Chairperson may need to become involved, but in all cases the matter must be brought to public scrutiny and have each and every contact disclosed to any identified interested party and to make it a part of the public record.

As one memorandum noted, the cure is to make the contact public and to provide a reasonable time for everyone else to react and have their say on the matter. Due process for all is the key concept. Everyone should have notice of all aspects of the proceeding, and an opportunity to be heard and to confront the evidence that the Council will be using in coming to a decision.

Conclusion

There is likely no greater temptation for the citizen Council member than to enter into ex parte contacts and rationalizing it with the thought that "I am doing it for personal education and doing the public good."

While we like to think we know ourselves, we do not always recognize what influences our decisions. The public good is done when decisions are made in a controlled environment with all parties and the public having the same opportunity to present information and argue their cases before the unbiased and neutral decision maker. When you wear the hat of the public decision maker, you give up some personal freedom

as regards public contact. You additionally owe a duty of fairness to your fellow board members, the public, and those who appear before you. The prohibition against ex parte contact is literally hundreds of years old and is founded on both law and common sense. Ex parte contact should be scrupulously avoided, and if it occurs, it must be immediately and honestly reported.

MEMORANDUM

To: POST Council

From: Chris D. Tweeten, Legal Counsel

Re: Misdemeanor Probation Officer Training

Date: October 14, 2012

At the last meeting the question arose as to whether the Council has authority to approve training standards for misdemeanor probation officers. For the reasons stated below, in my opinion the Council does have such authority, but only with respect to misdemeanor probation officers employed by a local government.

The Council's general jurisdiction derives from statutes found in Title 44, Chapter 4, Part 4 of the Code. Mont. Code Ann. § 44-4-403 provides in pertinent part:

> (1) The council shall:
> (a) establish basic and advanced qualification and training standards for employment;
> (b) conduct and approve training; and
> (c) provide for the certification or recertification of public safety officers and for the suspension or revocation of certification of public safety officers.

The statute is not clearly arranged, in that subsections (1)(a) and 1(b) do not state *whose* employment and training the Council may govern. However, I think the best reading of the statute, indeed the only one that makes sense, is that all three sub-parts of subsection (1) refer to the "public safety officers" specifically referred to in sub-part (c).

"Public safety officer" is defined in Mont. Code Ann. § 44-4-401(2) to include eight particularly described employment positions related to law enforcement, e.g. correction officers, detention officers, and, notably, probation officers employed by the Department of Corrections, followed by a catch-all sub-

part (2)(i): "any other person required by law to meet the qualification or training standards established by the council."

The Legislature in 1995 allowed a local government to create an office to supervise misdemeanor probationers. The statute allows a local government to hire misdemeanor parole and probation officers and requires that the officers "must have the minimum training required in 46-23-1003." That statute deals with the training of probation and parole officers employed by the Department of Corrections.

Probation and parole officers employed by the Department of Corrections are "public safety officers" under Mont. Code Ann. §44-4-401(2)(g). Since the DOC officers are required to meet the standards established by the Council under Mont. Code Ann. §44-4-403, and misdemeanor probation officers employed by a local government are required to meet the same educational requirements as are the DOC officers, it is my opinion that the misdemeanor probation officers employed by a local government are required to meet training standards established by the Council. They are therefore "public safety officers" under the catch-all provision found in Mont. Code Ann. § 44-4-401(2)(i): "any other person required by law to meet the qualification or training standards established by the council."

It is further my opinion that the Council may, under limited circumstances, approve training by an entity other than MLEA of misdemeanor probation officers employed by a local government. In describing the training required for probation and parole officers employed by DOC, Mont. Code Ann. § 46-23-1003 provides in pertinent part that "[t]he training must be at the Montana law enforcement academy ***unless the council finds that training at some other place is more appropriate***." (Emphasis added.) This statute allows the Council to approve training at a non-MLEA facility, but only on a finding that the non-MLEA facility is a more "appropriate" provider than MLEA. While "appropriate" is not defined, in my opinion the Council would have to make an evidence-based determination that the training provided by the non-MLEA

facility is superior in preparing applicants to serve as local government misdemeanor probation officer to the training provided by MLEA, if any.

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Tim Fox
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: STUART SEGREST, AAG

FROM: SARAH M. HART, ALSB
SHART2@MT.GOV, (406) 444-5797

RE: RESERVE AND PART TIME OFFICERS

CC: ALLEN HORSFALL, POST DIRECTOR

DATE: July 17, 2013

STATUTORY AUTHORITY OF RESERVE AND PART TIME OFFICERS

I. RESERVE OFFICERS

1. Reserve officers may not be paid (a salary).

- "Reserve officer" means a sworn, part-time, *volunteer* member of a law enforcement agency… § 7-32-201(6), MCA (emphasis added).
- "By definition, reserve officers are volunteers, not employees." Informal letter of advice, November 27, 2007 (2007 Mont. AG Lexis 8).
- The best explanation of the nuances of "compensation" is found in AG Opinion No. 68 (1988), which explained that "county public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits," such as workers compensation, "and pay nominal compensation, but the total amount of these provisions may not be given as a form of compensation tied to productivity." The opinion was careful to note that *"these payments must not be a substitute for salaried compensation." Id.*
- Reserve officers must be covered under workers compensation. § 7-32-203, MCA.
- Reserve officers also cannot receive pension or participate in retirement systems like full time officers. § 7-32-202, MCA.

2. Cannot use reserve officers to replace regular officers.

- § 7-32-212, MCA: "A local government may not reduce the authorized number of full-time law enforcement officers through the appointment or utilization of reserve officers."

3. Reserve officers must meet certain qualifications and have 88 hour basic training within 2 years of appointment.

- Qualifications are listed in § 7-32-213, MCA.
- Reserves "may not be authorized to function as a representative of a law enforcement agency performing general law enforcement duties after 2 years from the original appointment unless the reserve officer has satisfactorily completed a minimum 88-hour basic training program." § 7-32-214, MCA.
- Although appointed as reserve officers and not as peace officers, § 7-32-211, MCA states that "A person who meets minimum standards for appointment as a peace officer may be appointed as a reserve officer."
    - The minimum standards for appointment as a peace officer are listed in § 7-32-303(2), MCA.
- There are some residency requirements for reserves. § 7-32-222, MCA; *See also* Informal letter of advice, November 27, 2007 (2007 Mont. AG Lexis 8).
- Reserve officers may not attend the MLEA peace officer basic course. § 44-10-301, MCA.

4. Police departments must have a reserve coordinator and reserve manual.

- Must have a manual "setting forth the minimum qualifications, minimum training standards, and standard operating procedures for reserve officers" § 7-32-215, MCA.
- Must have a "full-time law enforcement officer of the agency as a reserve force coordinator." § 7-32-219, MCA.

5. Reserve officers must be supervised.

- § 7-32-216, MCA: "(1) A reserve officer may serve as a peace officer only on the orders and at the direction of the chief law enforcement administrator of the local government. (2) A reserve officer may act only in a supplementary capacity to the law

enforcement agency. (3) Reserve officers: (a) are subordinate to full-time law enforcement officers; and (b) may not serve unless supervised by a full-time law enforcement officer whose span of control would be considered within reasonable limits."

6. Reserve officers must qualify with firearms and be authorized to carry them.

- A reserve officer cannot carry a firearm "until the reserve officer has qualified on the firing range with a weapon in compliance with the firearms qualifying course conducted by the Montana law enforcement academy" and must be authorized to carry one. § 7-32-217, MCA.

7. Reserve officers becoming peace officers.

- Reserve officers can only be appointed to full time peace officer positions if proper hiring procedures are followed, as required by law. § 7-32-220, MCA.
- Peace officers who leave full or part time employment and become reserves for longer than 36 months must go through (at least) an equivalency proceeding with POST before they become peace officers again (whether full or part time). § 7-32-240, MCA.

II. PART-TIME OFFICERS

8. Part-time officers are peace officers (if they receive a salary).

- As outlined above, if an officer receives a salary or any compensation tied to productivity, he or she is NOT a reserve officer. § 7-32-201(6), MCA; AG Opinion No. 68 (1988).
- Thus, any officer receiving a salary (whether part-time or full-time) is a peace officer and must meet the qualifications of § 7-32-303, MCA. That includes (among many other things) having attended the MLEA academy within one year of appointment and being eligible for POST certification.

smh/clr

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Tim Fox
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: PERRY JOHNSON, POST EXECUTIVE DIRECTOR
POST COUNCIL MEMBERS

FROM: SARAH M. CLERGET
SCLERGET@MT.GOV, (406) 444-5797

RE: MISDEMEANOR PROBATION AND PRETRIAL SERVICE OFFICERS

CC: JIM SCHEIR, ALSB

DATE: Friday, November 21, 2014

A. INTRODUCTION

The POST Council requested this memo at the end of the Council meeting on September 3rd, 2014. It follows a discussion during that meeting about the statutory status of misdemeanor probation officers and pretrial service officers. The Council also had questions about the statutory requirements for training for these officers.

The questions revolved around the differences between officers who were publically employed—i.e. employed by a local government—and those who were employed by a private company (either directly or under a government contract). Thus, this memo addresses four categories of officers: (1) publicly employed misdemeanor probation officers, (2) privately employed misdemeanor probation officers, (3) publically employed pretrial service officers, and (4) privately employed pretrial service officers.

B. QUESTIONS PRESENTED AND SHORT ANSWERS

Regarding **misdemeanor probation** officers:

1) Are they public safety officers?
   Public: yes
   Private: unclear
2) What are their training requirements?
   Public: required to meet all the same requirements as regular probation

and parole officers (160-hour basic and 16hrs/year continuing).
Private: unclear

3) What role does POST have in their training?
Public: POST must set training standards and approve their training. POST does not have to provide the training
Private: unclear
4) What role does POST have in certifying, decertifying/sanctioning, or tracking these officers?
Public: POST must certify, decertify/sanction, and track
Private: It is up to the Council.

Regarding **pretrial service** officers:

5) Are pretrial service officers public safety officers?
Yes, both public and private.
6) What are their training requirements?
Both public and private must have the same training as probation and parole officers (160-hour basic and 16hrs/year continuing).
7) What role does POST have in their training?
POST must set training standards and approve their training. POST does not have to provide the training.
8) What role does POST have in certifying, decertifying/sanctioning, or tracking these officers?
POST must certify, decertify/sanction, and track

C. LEGAL ANALYSIS

(i) Regarding misdemeanor probation officers:

The statutory scheme regarding misdemeanor probation officers is a little convoluted. Therefore, it is easiest to first examine and understand the basic statutory scheme as it relates to misdemeanor probation officers who are employed by a local government. Once that is understood, it is easier to see how officers who are employed by private entities relate to the statutory scheme. For this reason, we will first examine the statutes as they relate to officers employed by a local government.

The definition of "public safety officer" is found in MCA § 44-4-401(2). The relevant portion of that statute states as follows:

> **44-4-401. Definitions**.…(2)"Public safety officer" means:
> …
> (g) a probation or parole officer *who is employed by the department of corrections pursuant to 46-23-1002;*
> …
> (i) *any other person required by law to meet the qualification or training standards established by the council.*

MCA § 44-4-401(2) (2014) (emphasis added). Note that subsection (g) specifically includes probation and parole officers *who are employed by DOC*. More importantly, however, subsection (i) states that *any person* required by law to meet training standards established by POST is a public safety officer. In other words, if POST is required to establish training standards for you, then you are public safety officer by definition.

Misdemeanor probation officers who are employed by a local government are required to meet training standards established by POST. *See* MCA §§ 46-23-1003 and 1005(1)-(2). Therefore, misdemeanor probation officers who are employed by a local government are public safety officers under the definition found in MCA §44-4-401(2)(i).

Here is the specific language from the statutes and an explanation of how they relate to each other:

First, the qualifications for a misdemeanor probation officers are found in MCA § 46-23-1005. The relevant portions of that statute are as follows:

> **46-23-1005. Misdemeanor probation offices -- officers -- costs.** (1) *A local government* may establish a misdemeanor probation office associated with a justice's court, municipal court, or city court. The misdemeanor probation office shall monitor offenders for misdemeanor sentence compliance and restitution payments. An offender is considered a fugitive under the conditions provided in 46-23-1014.
> (2) *A local government may appoint misdemeanor probation officers and other employees* necessary to administer this section. Misdemeanor probation officers:
> (a) *must have the minimum training required in 46-23-1003;*
> (b) shall follow the supervision guidelines required in 46-23-1011; and
> (c) may order the arrest of an offender as provided in 46-23-1012.
> …

MCA § 46-23-1005(1)-(2) (2014)(emphasis added). Subsection (2)(a), above, requires minimum training for misdemeanor probation officers to be the same as what is found in MCA § 46-23-1003. MCA § 46-23-1003 in turn holds the qualifications for regular probation and parole officers. That statute states as follows:

> **46-23-1003. Qualifications of probation and parole officers.** (1) Probation and parole officers must have at least a college degree and some formal training in behavioral sciences. Exceptions to this rule must be approved by the department. Related work experience in the areas listed in 2-15-2302(2)(c) may be substituted for educational requirements at the rate of 1 year of experience for 9 months formal education if approved by the department. All present employees are exempt from this requirement but are encouraged to further their education at the earliest opportunity.
> (2) Each probation and parole officer shall, through a source approved by the officer's employer, obtain *16 hours a year of training* in subjects relating to the powers and duties of probation officers, at least 1 hour of which must include training on serious mental illness and recovery from serious mental illness. *In addition, each probation and parole officer must receive training in accordance with standards adopted by the Montana public safety officer standards and training council* established in 2-15-2029. The training must be at the Montana law enforcement academy *unless the council finds that training at some other place is more appropriate.*

MCA § 46-23-1003 (2014).

Subsection (2) of MCA § 46-23-1003 thus requires that all probation and parole officers receive training as required by POST. POST in turn adopted ARM 23.13.206, which requires that all probation and parole officers attend a 160-hour basic course. The training requirement for regular probation and parole officers therefore includes a 160-hour basic course plus 16 hours per year of continuing education.

Traditionally, this training has been held at MLEA. However, MCA § 46-23-1003(2) indicates that the training may be held at another place if the Council believes that place is more appropriate. Nothing in the statute indicates that the Council must *provide* the training—only that it must approve the training and the standards for probation and parole officers.

Putting all of this together, subsection (2)(c) of MCA § 46-23-1005 requires

misdemeanor probation officers to meet the minimum training for regular probation and parole officers, which is found in MCA § 46-23-1003(2). Subsection (2) of MCA § 46-23-1003 then requires that all probation and parole officers meet training standards approved by POST. POST requires all probation and parole officers to attend a 160-hour basic course and 16 hours of continuing education per year, through ARM 23.13.206. Therefore (via the transitive property) MCA § 46-23-1005 requires misdemeanor probation officers to meet training standards set by POST—the same standards as regular probation and parole officers. Under the definition of "public safety officer" found in MCA § 44-4-401(2)(i), a public safety officer is "any other person required by law to meet the qualification or training standards established by the council." Therefore, misdemeanor probation officers are public safety officers under MCA § 44-4-401(2)(i) and they are required to meet the same training standards as regular probation and parole officers, i.e. a 160-hour basic and 6 hours continuing education. This training must be approved by POST, but does not have to be provided by POST, and can occur at MLEA or any other place the Council deems appropriate.

Additionally, because misdemeanor probation officers are public safety officers whose training is both required and approved by the Council, POST should be certifying, decertifying or sanctioning, and tracking the training for these officers. This is because according to MCA § 44-4-404, POST must "provide for the certification or recertification of *public safety officers* and for the suspension or revocation of certification of public safety officers." MCA § 44-4-404(1)(c). If misdemeanor probation and parole officers are public safety officers, as shown above, then POST is responsible for providing for their certification and applying the contested case process as it would for any other public safety officer.

However, this analysis does not apply to *all* misdemeanor probation officers. Note that the language in subsection (2) of MCA § 46-23-1005 indicates that misdemeanor probation officers are *only* those officers who are appointed *and employed* by a local government. The statute states that "A local government may appoint misdemeanor probation officers *and other employees*" and thus implies that the probation officers appointed by the local government are also employees of that local government. The use of the "AND" in that sentence is very important. If the statute said "*or* other employees" the analysis might be different. However, the statute uses "*and* other employees" presumably to indicate that misdemeanor probation officers are only those individuals who are already employees of the local government and are then appointed to be misdemeanor probation officers (in addition to their previous status as local government employees) or who become government employees through their hire as misdemeanor

probation officers. Thus, the statute seems to say that anyone not employed by a local government is not a misdemeanor probation officer. Under MCA § 46-23-1005, therefore, it does not appear to be possible to have a "misdemeanor probation officer" who is employed by anyone other than a local government— i.e. a private company. Officers employed by private companies might be calling themselves misdemeanor probation officers, but they do not fit under the statute's language and therefore might just as easily be called something entirely different (e.g. private probation officers).

Because privately employed individuals don't fit under MCA § 46-23-1005, they do not appear to be bound by the minimum training requirement in MCA § 46-23-1005(2)(a)— which refers in turn to the training requirements in MCA § 46-23-1003(2). And if they are not bound by the training requirements in MCA § 46-23-1003(2), which requires POST standards and approval, then they also do not fit under the definition of "public safety officers" in MCA § 44-4-401(2)(i). They therefore cannot be considered "public safety officers" under the same analysis as misdemeanor probation officers employed by a local government. They also would not have the same training requirements. These officers appear to be completely left out of the current statutory scheme regulating misdemeanor probation officers. Therefore, it is entirely up to the Council how they want to deal with these officers.

(ii) Regarding Pretrial Service Officers:

The statutory scheme for pretrial service officers is much less complicated than tat of misdemeanor probation. There is only one statute that defines a "pretrial service agency," which would in turn employ pretrial service officers: MCA § 46-9-505. The relevant portion of that statute states:

> **46-9-505. Issuance of arrest warrant -- redetermining bail -- definition.** …(5) As used in this section, "pretrial services agency" means a government agency or a private entity under contract with a local government whose employees have the minimum training required in 46-23-1003 and that is designated by a district court, justice's court, municipal court, or city court to provide services pending a trial.

MCA § 46-9-505(5) (2014).

This statute therefore makes it clear that a pretrial service agency *includes* private entities or those under contract with a local government. Therefore, pretrial officers who are employed by a pretrial services agency—*whether public or private*—are required to meet

the same POST requirements and receive the same post-approved training. Those requirements are the same as regular probation and parole officers, as stated in MCA § 46-23-1003 and ARM 23.13.206, namely a 160-hour basic course and 16 hours of continuing education.

Additionally, because *all* pretrial service officers— *whether public or private*—are required to meet the POST standards and receive POT-approved training in MCA § 46-23-1003, they also *all* fit the definition of "public safety officer" found in MCA § 44-4-401(2)(i). They are certainly other persons who are "required by law to meet the qualification or training standards established by the council." MCA § 44-4-401(2)(i). All pretrial service officers are therefore public safety officers.

Since all pretrial service officers, whether public or private, are public safety officers, POST is required by MCA § 44-4-404 to provide for their certification, etc. This means that POST should be certifying, decertifying, sanctioning, and tracking *all* pretrial service officers regardless of whether they are employed by a public or private entity.

Again, MCA § 46-23-1003 does not require that POST *provide* the 160-hour basic and continuing education training for these officers, just that POST set standards and approve the training. However, privately employed pretrial service officers may present a problem for POST. MLEA only accepts officers who are employed by a local government. *See* MCA §44-10-301; ARM 23.12.1201. Therefore, pretrial service officers who are employed by a private entity are public safety officers who cannot be trained at the academy. Therefore, this may be an instance in which POST wishes to find "that training at some other place is more appropriate," as contemplated by the last sentence of MCA § 46-23-1003. Again, however, there is nothing in the statute that indicates POST must provide the training, only that POST must approve it. Therefore, if private industry were to create a training equivalent to the 160-hour basic received at MLEA by officers who are publically employed, and if POST were to approve that training, the statutory requirements would be met.

D. CONCLUSION

The statutory scheme is clearer with respect to pretrial service officers than with misdemeanor probation officers. It appears that misdemeanor probation officers who are employed by anyone other than a local government are excepted from the statutory scheme entirely, given that MCA § 46-23-1005 refers only to local government employees. Therefore, how the Council handles these officers appears to be open for

debate. It seems that under the current statutory scheme, however, that privately-employed misdemeanor probation officers are not public safety officers, have no training requirement, and are not overseen by POST at all. Publically-employed misdemeanor probation officers and all pretrial service officers—whether public or private—are public safety officers, however. And they are all required to meet the same training requirements as regular probation and parole officers: a 160-hour basic course and 16 annual hours of continuing education.

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

Tim Fox
Attorney General

1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

TO: Perry Johnson, POST Executive Director
POST Council Members

FROM: Sarah M. Clerget
Sclerget@mt.gov, (406) 444-5797

RE: Misdemeanor Probation and Pretrial Service Officers Training Requirements

DATE: Friday, May 08, 2015

A. INTRODUCTION

This memo addresses the training requirements for misdemeanor probation officers and pretrial service officers. POST Director Perry Johnson requested this memo based on discussions during and after the September and December 2014 POST meetings. It follows my November 21, 2014, memo on the statutory status of misdemeanor probation officers and pretrial service officers.

The POST Council determined (during those meetings and based on that memo) that privately employed misdemeanor probation officers are not currently contemplated under the statutory scheme, are *not* public safety officers, and are therefore not under the purview of POST. This memo therefore does not address privately employed misdemeanor probation officers. This memo only addresses the three categories of officers that fall under POST's jurisdiction: (1) publicly employed misdemeanor probation officers, (2) publicly employed pretrial service officers, and (3) privately employed pretrial service officers. (For further discussion of this, see the November 21, 2014, memo.)

B. QUESTIONS PRESENTED AND SHORT ANSWERS

1) What training must misdemeanor probation and pretrial service officers have in order to comply with the current law?

Publicly employed misdemeanor probation officers and all pretrial service officers (whether publicly or privately employed) are public safety officers who must be certified by POST with a basic certificate. These officers must have the same training—or training that is *at least* equivalent to—the training that felony probation and parole officers receive, including a 280 hour basic and 16 hours per-year of continuing education with at least one hour relating to mental illness.

2) Who must provide that training and where may it be held?

The training must be POST-approved but POST is not required to provide the training. Training for publicly employed misdemeanor probation officers and publicly employed pretrial service officers could happen at the Montana Law Enforcement Academy (MLEA). However, because private pretrial service officers cannot be trained at MLEA, it is recommended that the Council approve training these officers at an alternative location.

3) Can POST waive or modify these training requirements?

No. The requirement that publicly employed misdemeanor probation officers and all pretrial service officers must receive the same training as felony probation and parole officers is statutory. The only way to change the training requirements would be to change the current statutory scheme.

C. LEGAL ANALYSIS

(i) Background.[1]

Publicly employed misdemeanor probation officers are public safety officers. Misdemeanor probation officers are statutorily required to meet the training standards set by POST. Mont. Code Ann. § 46-23-1005 (citing Mont. Code Ann. § 46-23-1003). The

[1] This section is a truncation of the November 21, 2014, memo. For further discussion of the information in this section, please see that memo.

definition of "public safety officer" includes "any other person required by law to meet the qualification or training standards established by the council." Mont. Code Ann. § 44-4-401(2)(i). Therefore, publicly employed misdemeanor probation officers are public safety officers under Mont. Code Ann. § 44-4-401(2)(i) because they must meet the qualification or training standards set by POST. Additionally, because publicly employed misdemeanor probation officers are public safety officers, POST must "provide for the certification or recertification . . . and for the suspension or revocation of certification" of these officers. Mont. Code Ann. § 44-4-403(1)(c).[2]

Both publicly and privately employed pretrial service officers are public safety officers. It is clear from Mont. Code Ann. § 46-9-505(5) that a pretrial service agency includes private entities or those under contract with a local government. That statute also requires all pretrial service officers to meet training standards set by POST. *Id.* (citing Mont. Code Ann. § 46-23-1003). Because all pretrial service officers—whether public or private—are required to meet POST standards and receive POST-approved training, they also fall within the definition of "public safety officer" found in Mont. Code Ann. § 44-4-401(2)(i). As public safety officers, all pretrial service officers must be certified, decertified or sanctioned, and tracked by POST, whether they are publicly or privately employed. Mont. Code Ann. § 44-4-403(1)(c).

(ii) Training requirements for felony probation and parole officers under Mont. Code Ann. § 46-23-1003.

The training requirements for felony probation and parole officers is found in Mont. Code Ann. § 46-23-1003, which states:

> (1) Probation and parole officers must have at least a college degree and some formal training in behavioral sciences. Exceptions to this rule must be approved by the department. Related work experience in the areas listed in 2-15-2302(2)(c) may be substituted for educational requirements at the rate of 1 year of experience

[2] Note that the language of Mont. Code Ann. § 46-23-1005(2) implies that the probation officers appointed by the local government are also employees of that local government ("A local government may appoint misdemeanor probation officers *and other employees* . . . "). Thus, misdemeanor probation officers are those officers who are appointed *and employed* by a local government; whereas, the statute seems to say that anyone not employed by a local government is not a misdemeanor probation officer. For further discussion of this point, see the November 21, 2014, memo.

> for 9 months formal education if approved by the department. All present employees are exempt from this requirement but are encouraged to further their education at the earliest opportunity.
>
> (2) Each probation and parole officer shall, through a source approved by the officer's employer, obtain *16 hours a year of training* in subjects relating to the powers and duties of probation officers, at least 1 hour of which must include training on serious mental illness and recovery from serious mental illness. *In addition, each probation and parole officer must receive training in accordance with standards adopted by the Montana public safety officer standards and training council* established in 2-15-2029. The training must be at the Montana law enforcement academy *unless the council finds that training at some other place is more appropriate.*

Mont. Code Ann. § 46-23-1003 (emphasis supplied). POST has in turn adopted administrative rules setting standards for the training of public safety officers, including felony probation and parole officers. *See e.g.* ARM 23.13.201, 23.13.205, and 23.13.206.

To obtain a POST basic certificate, which all public safety officers must have, felony probation and parole officers must attend a basic course. *See* ARM 23.13.201(1), 23.13.205(2), and 23.13.206(1)(a)(ii). The current basic course curriculum approved by the Council is 280 training hours and is hosted by the Department of Corrections at the MLEA.

Additionally, felony probation and parole officers are required by statute to have 16 hours per year of continuing education in subjects relating to probation officers, including at least one hour of training on serious mental illness and recovery therefrom. Mont. Code Ann. § 46-23-1003(2).[3]

[3] The 16 hours per year requirement of Mont. Code Ann. § 46-23-1003(2) exceeds the 20 hours every two years requirement that POST imposes on public safety officers in ARM 23.13.201(2)(j). However, the language of Mont. Code Ann. § 46-23-1003(2) is clear that the yearly statutory requirement (16 hours) is "[i]n addition" to the POST administrative standard (20 hours every 2 years). The Council may want to consider modifying, waiving, or refining the requirement in ARM 23.13.201(2)(j) (as POST cannot waive or modify the statutory requirement) so that any officer whose training is based on Mont. Code Ann. § 46-23-1003 is not required to have 52 hours of training every two years.

Thus, under Mont. Code Ann. § 46-23-1003(2) and the incorporated POST standards, felony probation and parole officers are currently required to attend a 280 hour basic class and receive 16 hours per year of continuing education in probation-related subjects, with at least one hour of mental illness and recovery training, in order to receive and maintain their POST certification.

(iii) Training requirements for publicly employed misdemeanor probation officers and all pretrial service officers.

Like felony probation and parole officers, publicly employed misdemeanor probation officers and all pretrial service officers must meet the training requirements found in Mont. Code Ann. § 46-23-1003 and the incorporated POST standards. For publicly employed misdemeanor probation officers this requirement is found in Mont. Code Ann. § 46-23-1005(2)(a), which states: "Misdemeanor probation officers: (a) must have the *minimum training required in 46-23-1003 . . . .*" For all pretrial officers this requirement is found in Mont. Code Ann. § 46-9-505(5), which defines a "pretrial services agency" as "a government agency or a private entity under contract with a local government whose employees have the *minimum training required in 46-23-1003 . . . .*"

Thus, both of the statutes regulating publically employed misdemeanor probation officers and all pretrial service officers— Mont. Code Ann. §§ 46-23-1005 and 46-9-505(5), respectively—require that these officers have the "minimum training required in 46-23-1003." The statutory construction indicates that first the Council must set training required for felony probation and parole officers, and then apply that felony probation training standard to publically employed misdemeanor probation officers and all pretrial service officers. The statutory scheme does not contemplate a different or modified standard for publically employed misdemeanor probation officers and all pretrial service officers based on their differing duties. Since felony probation and parole officers are currently required, by Mont. Code Ann. § 46-23-1003 and the incorporated POST standards, to attend a 280 hour basic course and, thereafter, 16 hours per year of continuing education training (with one hour devoted to mental illness), this also constitutes the minimum training required for publicly employed misdemeanor probation officers and all pretrial service officers.

(iv) The role of POST with respect to these training requirements.

POST cannot modify or waive these training requirements for publicly employed misdemeanor probation officers and all pretrial service officers because they are statutory.[4] The only way to change these requirements is to amend the statutes—Mont. Code Ann. §§ 46-9-505(5) and 46-23-1005—that incorporate the training requirements for felony probation and parole officers under Mont Code Ann. § 46-23-1003.

Nothing in Mont. Code Ann. § 46-23-1003, or the other relevant statutes, require POST to *provide* the basic and continuing education training for these officers. POST need only review and approve (or deny) the training for POST credit towards obtaining and maintaining POST certification. Once officers meet the necessary training requirements, POST must issue them a basic certificate, track training hours, and then sanction or revoke that certificate as necessary just as it does for all other public safety officers. Mont. Code Ann. § 44-4-403(1)(c).

However, privately employed pretrial service officers may present a difficulty as MLEA only accepts officers who are employed by a local government. *See* Mont. Code Ann. § 44-10-301; ARM 23.12.1201. Therefore, pretrial service officers who are employed by a private entity are public safety officers who cannot be trained at the academy. This may be an instance in which POST wishes to find "that training at some other place is more appropriate," as contemplated by Mont. Code Ann. § 46-23-1003(2). Again, however, there is nothing in the statute that indicates POST must provide the training outside MLEA, only that POST must review it and approve (or deny) it for POST credit. If private industry were to create a training equivalent to the 240 hour basic course and 16 yearly hours of continuing education that are currently provided at MLEA for felony probation and parole officers, and if POST were to approve that training for POST credit, the statutory requirements would be met.

As public safety officers, publicly employed misdemeanor probation officers and all pretrial service officers must be certified by POST in order to operate within the scope of the law. *See* Mont. Code Ann. § 44-4-404; ARM 23.13.201(1). In order to be POST certified, the officers must meet these basic and continuing training requirements. *See* ARM 23.13.201, 23.13.205, 23.13.206, and 23.13.702. Getting these officers trained

[4] For discussion on why the Council cannot waive statutory training requirements for an entire group of officers, see Chris Tweeten's memo of March 3, 2015.

must therefore be accomplished as soon as possible, as they may be operating outside the scope of their authority without such training.

Additionally, operating for any period of time without the required certification and training, or in violation of the statutes discussed herein, may make an officer unfit or ineligible for a POST certificate (even after they ultimately got the required training). This is because ARM 23.13.702(2)(m) forbids "operating outside or ordering, permitting, or causing another officer to operate outside of the scope of authority for a public safety or peace officer . . . ." and ARM 23.13.205(3) and (5)(b) makes compliance with ARM 23.13.702 a prerequisite and requirement for POST certification. Therefore, if officers have you have been operating outside the scope of their authority in violation of the law, then simply curing their training deficits may not be enough to get them POST certified. It is also important to note that under these ARMs *any other* public safety or peace officers who *permits or causes* a publicly employed misdemeanor probation officer or a pretrial service officer to operate outside the scope of his or her authority (i.e. without the proper training and certification) may also be in violation of ARM 23.13.702(2)(m). It is therefore necessary to get publicly employed misdemeanor probation officers and all pretrial service officers trained and certified as soon as possible.

D. CONCLUSION

Under the current statutory scheme, publicly employed misdemeanor probation officers and all pretrial service officers must receive the same or equivalent training as felony probation and parole officers receive pursuant to Mont. Code Ann. § 46-23-1003 and the incorporated POST standards. The only way to change this requirement is to change the statutes which set the training standards for these officers. It is also not possible to just let these officers operate outside the scope of their authority until the next legislative session, as this may make them ultimately ineligible for POST certification. Therefore, training for these officers that is at least equivalent to the training for felony probation and parole officers—i.e., at least a 280 hour basic course and 16 hours of yearly continuing education with at least one hour in mental illness—must be offered as soon as possible, and probably somewhere other than at MLEA.

c: Jim Scheier

MEMORANDUM

TO: Perry Johnson, POST Executive Director

FROM: Chris Tweeten, POST Legal Counsel

RE: Reserve Officer Qualifications and Training

DATE: August 25, 2015

You have asked me to advise regarding the training of reserve officers with respect to these questions:

1. Does POST have authority to adopt training standards for reserve officers that include requirements not provided by Mont. Code Ann. § 7-32-214?

2. If POST adopts standards that differ from those required by Mont. Code Ann. § 7-32-214, could POST be exposed to liability that is greater than would exist if POST adopted no different or additional standards?

I conclude that POST does have such authority, and that its exercise does not necessarily create liability exposure that is greater than would exist if POST did not adopt different or additional standards.

Training requirements for reserve officers are found in Mont. Code Ann. § 7-32-214, which provides:

7-32-214. Basic training program required. (1) A reserve officer may not be authorized to function as a representative of a law enforcement agency performing general law enforcement duties after 2 years from the original appointment unless the reserve officer has satisfactorily completed a minimum 88-hour basic training program that must include but need not be limited to the following course content:

(a) introduction and orientation--1 hour;
(b) police ethics and professionalism--1 hour;
(c) criminal law--4 hours;
(d) laws of arrest--4 hours;
(e) criminal evidence--4 hours;

(f) administration of criminal law--2 hours;
(g) communications, reports, and records--2 hours;
(h) crime investigations--3 hours;
(i) interviews and interrogations--2 hours;
(j) patrol procedures--6 hours;
(k) crisis intervention--4 hours;
(l) police human and community relations--3 hours;
(m) juvenile procedures--2 hours;
(n) defensive tactics--4 hours;
(o) crowd control tactics--4 hours;
(p) firearms training--30 hours;
(q) first aid--10 hours; and
(r) examination--2 hours.

(2) The law enforcement agency is responsible for training its reserve officers in accordance with minimum training standards established by the council.

Two parts of the statute recognize quite clearly that POST has discretion to adopt additional standards. First, subsection (1) provides that the training program "must include but need not be limited to" the training items listed in subsections (a)-(r) of subsection (1). The quoted language provides that the listed training requirements are not exclusive, and that additional requirements may be imposed. Second, subsection (2) of the statute states that the employing agency is responsible for training the reserve officer "in accordance with minimum training standards established by the council." The legislature thus has recognized the Council's authority to set standards.

Please note, however, that the authority to establish additional standards does not give POST the authority to delete categories of training that have been required by the Legislature. Administrative rules must be consistent with statute. The "includes bit is not limited to" language in Mont. Code Ann. § 7-32-214(1) authorizes POST to add to, but not detract from, the requirements of the statute. Thus, POST has the authority to create additional categories of training not provided by statute, but it may not delete from the training standards matters that the legislature has required. The existing POST rule regarding training for reserve officers requires

only that the applicant meet the standards provided in Mont. Code Ann. § 7-32-214. ARM 23.13.214.

Exercise of its discretion to adopt additional training standards for reserve officers should not expand the Council's liability exposure. The Council has clear authority to adopt the standards, and generally rulemaking is beyond the review of the Courts as long as the rules are within the scope of the agency's power, adopted under proper procedures, and not contrary to statute. As discussed above, the Council has authority to make rules in this area. Adherence to procedural requirements is a matter for case by case analysis, but our recent experience in rulemakings should prepare us to comply with the requirements for rulemaking found in MAPA. Mont. Code Ann. Tit.2, ch. 4, pt. 3.

When exercising its discretion to make rules adopting standards for reserve officers, the Council should compare any proposed standards to the statutes, and make sure that the proposed standards do not contradict any of the mandatory standards found in Mont. Code Ann. § 7-32-214(1). If the rules do not contradict anything that is in statute, they should be held valid by a court, and should provide no basis for a finding of liability against the Council.

Please feel free to contact me if you have further questions.

MEMORANDUM

TO: Perry Johnson

FROM: Chris Tweeten

RE: Home School Diploma issue

DATE: March 5, 2018

Questions have arisen regarding treatment of home school diplomas as a credential for POST certification. While the questions have been posed by the Montana Highway Patrol with respect to the statutes governing the qualifications of their recruits, I will confine my analysis to the specific qualifications for POST certification.

As am administrative agency, POST has only those powers delegated by the Legislature. *Montana Society of Anesthesiologists v. Montana Board of Nursing*, 2007 MT 290, ¶ 43, 339 Mont. 472, 489, 171 P. 3d 704, 713. In Mont. Code Ann. 44-4-403(3), the Legislature empowered POST to "establish basic and advanced qualification and training standards" and to "provide for the certification and recertification of public safety officers." It is clearly within POST's delegated authority to establish an education standard for POST certification. Mont. Code Ann. § 2-15-2029 (2) (POST has authority to make rules to implement Mont. Code Ann. § 44-4-403.)

When a matter is within the authority of an agency, but the means and substance of the agency's regulations is not determined by the Legislature, it is left to the agency's discretion to devise regulations to carry out its legislative mission. *Guillot v. Montana State H'way Comm'm*, 23 P.2d 1072, 1076 (1936). In this case, my research has found no statute that would require POST to treat a home school diploma as the equivalent of a diploma issued by an accredited high school for certification. It is therefore left to POST's discretion to determine the educational requirements

for certification. In that process, POST must apply the plain meaning of the words used by the Legislature, without adding or subtracting from what was enacted. *State v. Bullman*, 2007 MT 288, ¶ 11, 339 Mont. 461, 464, 171 P.3d 681, 683; Mont. Code Ann. § 1-2-101 (in interpreting a statute, role of judge is "not to insert what has been omitted or to omit what has been inserted.")

POST adopted for certification purposes many of the requirements of Mont. Code Ann. § 7-32-303 (2), which controls the appointment of public safety officers. POST's rule, ARM 23.13.201(2), brings forward many of the provisions of the statute, including this one:

> In addition to standards set forth in the Montana Code Annotated, including but not limited to 44-4-404, MCA, all public safety officers must:
> …
> (e) be a high school graduate or have been issued an equivalency certificate by the Superintendent of Public Instruction, or by an appropriate issuing agency of another state or of the federal government; ….

The Council then carried forward this requirement into the certification process:

> Prior to issuance of any certificate, the public safety officer must have completed the designated combinations of education, training, and experience as computed by the credit hour system established by the council.

ARM 23.13.205(4).

POST's discretion is broad, but it does not allow the agency to disregard the requirements of its own regulations. *Whitehall Wind, LLC v. Montana Public Service Comm'n*, 2010 MT 2, ¶ 24, 355 Mont. 15, 20, 223 P.3d 907, 910. Having adopted these rules, POST would be guilty of an abuse of discretion if, in a particular case, it decided to accept a home school diploma in place of the academic or equivalency credentials required by its rules. While Mont. Code Ann. § 7-32-303 technically binds hiring authorities, the statute has historically played a central role in POST's administrative rules governing the requirements for certification and employment. If POST wished to change its regulations to allow acceptance of a diploma from a home school to

satisfy ARM 23.13.201(2), it would be best to await a legislative amendment to Mont. Code Ann. § 7-32-303 that recognized the acceptability of home school diplomas.

TO: Perry Johnson, Executive Director POST

FROM: Kristina Neal

DATE: February 19, 2019

RE: College credit

Dear Mr. Johnson:

You have requested a memo on the following question:

Can officers receive an extension in which to submit and receive college credit as part of their training credit?

Previously officers could receive credit for their college hours toward their POST training requirements. However, ARM 23.13.205 was amended and this provision removed from the law. The basis for this change in the law was that it was timely for POST staff but, more so, the change eliminated subjectivity and discretion in determining the applicability of the college courses. The amended version of ARM 23.13.205 became effective December 22, 2018. The amended version did not provide for an exception or for an extension beyond the effective date in which officers could submit their college hours.

Notice of the changes

Although the ARM does not provide for an extension beyond the effective date of December 22, 2018, the decision to modify and adopt this change was

only made after several public meetings. On August 15, 2018, an advertised public meeting was held in which the public was able to offer testimony regarding the changes. Members of the public and law enforcement community were present and did offer testimony at this hearing. Public comment could be submitted both orally and through a written statement.

The decision to adopt this proposed amendment to the ARM was then made on October 2, 2018, at an advertised public POST Council meeting where the issue of proposed ARM changes was placed on the agenda. The POST Council provided the maximum amount of notice allowed pursuant to MAPA – six months from the proposed amendment until its adoption. Thus, although the new law does not provide for an extension of time, beyond the effective date, sufficient notice was provided that such an extension was not required.

Procedural Due Process

Although not permissible pursuant to the ARMs, an officer could potentially have a due process argument for an extension if the officer or officers could establish that, based on circumstances, the officer did not receive sufficient notice. The Montana Constitution provides that no person shall be deprived or life, liberty or property without due process of law. Mont. Const. Art. 2, §17.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Goble v. Montana State Fund*, 2014 MT 99, ¶46, 374 Mont. 453, 325 P. 3d 1211 (The Montana Supreme Court held that no procedural due process violation occurred when the State failed to notify defendants that they would be unable to receive their disability benefits due to their incarcerations) *quoting Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

Challenges based on a person's due process rights rest on the lack of notice, and thus may be overcome in a specific case where reasonable persons are advised what must be done to avoid a certain result. *State v. Pyette*, 2007 MT 119, ¶15, 337 Mont. 265, 159 P. 3d 232 (Defendant's due process rights not violated by statute that allowed the Motor Vehicle Division to suspend her driver's license based on her failure to pay a court ordered fine when the court had sent the defendant two notices and included in its second notice that the defendant had ten days to act or her driver's license would be suspended.) For example, in *Clark Fork Coalition v. Montana Dept. of Environmental Quality*, 2007 MT 176, ¶17, 164 P. 3d 902, 338 Mont. 205 the Montana Supreme Court held the appellants did not violate a mining company's procedural due process rights when it did not serve notice of entry of judgment on the mining company, after the

mining company had unsuccessfully attempted to intervene. The Court held that as the court proceedings were conducted in public with an available record. *Clark Fork Coalition*, ¶15. In reaching its ruling, the Court explained, "'There is no absolute standard for what constitutes due process. The process due in any given case varies with the circumstances." *Clark Fork Coalition*, ¶17 *quoting McDermott v. McDonald*, 2001 MT 89, ¶10, 305 Mont. 168, 24 P. 3d 200. In finding against the mining company, the Court expounded, "We cannot by rule relieve the citizen's duty to superintend his own affairs." *Clark Fork Coalition*, ¶17.

Additionally, in Montana, only the legislature may validly provide for judicial review of agency decisions. "'The legislature may provide for direct review by the district court of decisions of administrative agencies.' A right of judicial review cannot be created by agency fiat." *Nye v. Dep't of Livestock*, 196 Mont. 222, 226, 639 P.2d 498, 500-01 (1982) *quoting* Mont. Const. art. VII, § 4, cl. 2.

Thus, the only discretion that the POST Council would have regarding a request for an extension in which an officer requests training credit for college hours is if the officer can support a due process violation with specific facts which support that the officer received insufficient notice regarding the ARM amendment and its effective date. Further, since the legislature has not provided

for such an extension, or judicial review of a decision regarding an extension, any decision by the POST Council would be final.

LEGAL MEMORANDUM

To: Katrina Bolger and Eric Gilbertson

From: J. Stuart Segrest

Date: January 7, 2022

Re: Public Information Request Scenarios

Katrina and Eric,

You have asked that I provide some guidance as to certain types of public record requests made to POST. With the understanding that public record requests are often fact specific and require a case-by-case analysis, I provide the following suggested responses to the scenarios you propose (labeled "Analysis"). I also include a general road map for analyzing public record requests. As we discussed, please reach out to me or other counsel with any additional questions you have based on the circumstances of a particular request.

Background

As you are aware, the Montana Constitution provides persons a Right to Know and corresponding right to "examine documents." Art. II, § 9. The right to know must be balanced against the "demand of individual privacy." *Id.* The privacy interest must "clearly exceed[] the merits of public disclosure" to prevent dissemination.

The Supreme Court, however, has held that public safety officers serve in a position of "great public trust," and thus their expectation of privacy is reduced and will generally not outweigh the right to know, especially regarding allegations of professional misconduct. *See*, *e.g.*, *Billings Gazette v. Billings*, 2011 MT 293, ¶ 26, 362 Mont. 522, 267 P.3d 11 ("society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual's ability to perform public duties"); *Great Falls Tribune v. Sheriff*, 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989) (the public's right to know outweighed the privacy interests of three disciplined police officers because police officers hold positions of "great public

trust"); *Bozeman Daily Chronicle v. Bozeman Police Dept.*, 260 Mont. 218, 227, 859 P.2d 435, 440-41 (1993) (allegations of sexual intercourse without consent by an off-duty police officer were proper matters for public scrutiny because "such alleged misconduct went directly to the police officer's breach of his position of public trust . . .").

Road Map

Though the specific analysis and outcome may differ depending on the circumstances, each public record request should go through the same basic analytical framework. Is the information:

1. Privileged (if yes then non-disclosable)
2. Confidential by law (if yes then non-disclosable)
3. Disclosable after balancing the right to know vs. the right to privacy

Privilege is a legal term of art. The most relevant for POST's work would be the attorney-client and work-product privileges (discussed below). There may be other privileges that apply in unique circumstances. Confidential by law generally means by statute, either state or federal. This includes confidential criminal justice information (CCJI) and may include federally protected information such as medical and student records. Finally, whether non-privileged, non-confidential information is disclosable is determined by balancing the right to know versus the privacy rights of the officer or other individuals whose information is disclosed in the record. Protected private information or other confidential information (such as CCJI) should be redacted or withheld prior to dissemination.

//////////

Analysis of Scenarios

Scenario 1 – After allegation but before the agency's response.

An allegation has been made directly to POST against an officer. Under ARM 23.13.703, POST has forwarded the allegation to the employing agency to provide a written response within 30 days. Prior to the agency providing the response, POST receives a public record request asking whether an allegation has been made and for a copy of the allegation.

Analysis 1

Where a request is made concerning an allegation that has been sent to the employing agency to investigate and respond, the allegation is likely public information subject to disclosure (and potentially redaction). It is, however, appropriate to tell the requestor you have received an allegation about the officer and have sent it to the employing authority for a response under ARM 23.13.703. If they ask for a copy of the allegation, I suggest you respond that you will provide it after the agency has provided its response. Section 2-6-1006(2) only requires that public information be provided "in a timely manner," and 30 days (or so) is a reasonable response time.

Scenario 2 – After agency response but before POST opens an investigation.

POST receives a public record request for the employing agency's response to an allegation prior to opening its own investigation or providing the allegation to the Cases Status Committee for review and direction.

Analysis 2

1. Direct to originating agency. Where a person requests the agency response before the case status committee has considered the information, I think it is appropriate to direct the requestor to the employing/originating agency. In doing so I would explain that because the originating agency created and compiled the information, it can better assess whether there is privileged or confidential criminal justice information (CCJI) that needs to be redacted, and can better weigh the public interest in disclosure against the privacy interests of the officer and other individuals.

2. Inform agency and officer of request. If the requestor refuses and insists on POST providing the response, POST should contact the agency and officer to inform them of the request and then analyze the response to see whether any portions are 1. privileged, 2. confidential by law (CCJI or other), or 3. protected private information, including: (a) protected personal information as explained by Judge Seeley in the *Missoula Independent* Orders (birthdates, social security numbers, telephone numbers, etc.), and (b) other private information that outweighs the public interest in disclosure (e.g., information identifying minors or officer information that is not relevant to the allegations). Another option before reviewing and redacting, or during the process, is to contact the agency and ask if this is information within the response they feel should be redacted.

3. Redact and release. If the agency or officer objects to release of the entire response, or requests more redactions that POST thinks is legally defensible, POST should respond that it has an obligation to provide the response as information held by a public agency (assuming the agency doesn't label the entire file as CCJI). An officer's expectation of privacy, especially concerning allegations of misconduct, generally will not outweigh the right to know as explained by the Supreme Court. If the agency or officer disagrees with disclosure, then POST should suggest they file a declaratory judgment action to prevent dissemination by a certain date (e.g. "POST plans to release the records on ___ date absent a court order prohibiting disclosure.").

4. File declaratory judgment action if necessary. If POST knows or suspects that the requestor will object to POST's redactions, or if POST is unsure whether some redactions should be made, POST can file a declaratory judgment action as it did in the *Missoula Independent* case, naming all interested parties as defendants: generally the requestor, the accused officer(s), and the agency.

Scenario 3 – Investigative file between "Letter 1" and "Letter 2."

POST has provided the agency response to the Case Status Committee, and the Committee has directed POST to send a "Letter 1" to the officer and to investigate. During the investigation, but prior to providing an investigation synopsis and sanction recommendation to the Committee, POST receives a record request for its investigative file.

Analysis 3

The analysis where POST's investigation is underway is primarily the same as in Scenario 2 above. That is, the information is public unless it is privileged, confidential, or if privacy outweighs the right to know. However, make sure you first read the record request narrowly, and only provide POST's investigation information if expressly requested.

As in Scenario 2, first direct the requestor to the employing agency, explaining that they are the originating agency of (most of) the information and can better assess whether there is privileged, confidential, or private information that needs to be redacted.

If the requestor refuses, then proceed as explained above as to information received from the agency: let the agency and officer know of the record request and ask whether they object. If we disagree and think more should be released, then we explain that and suggest they seek a declaratory judgment if needed to prevent us from releasing the information. If POST is unsure, then you can affirmatively file a declaratory judgment action.

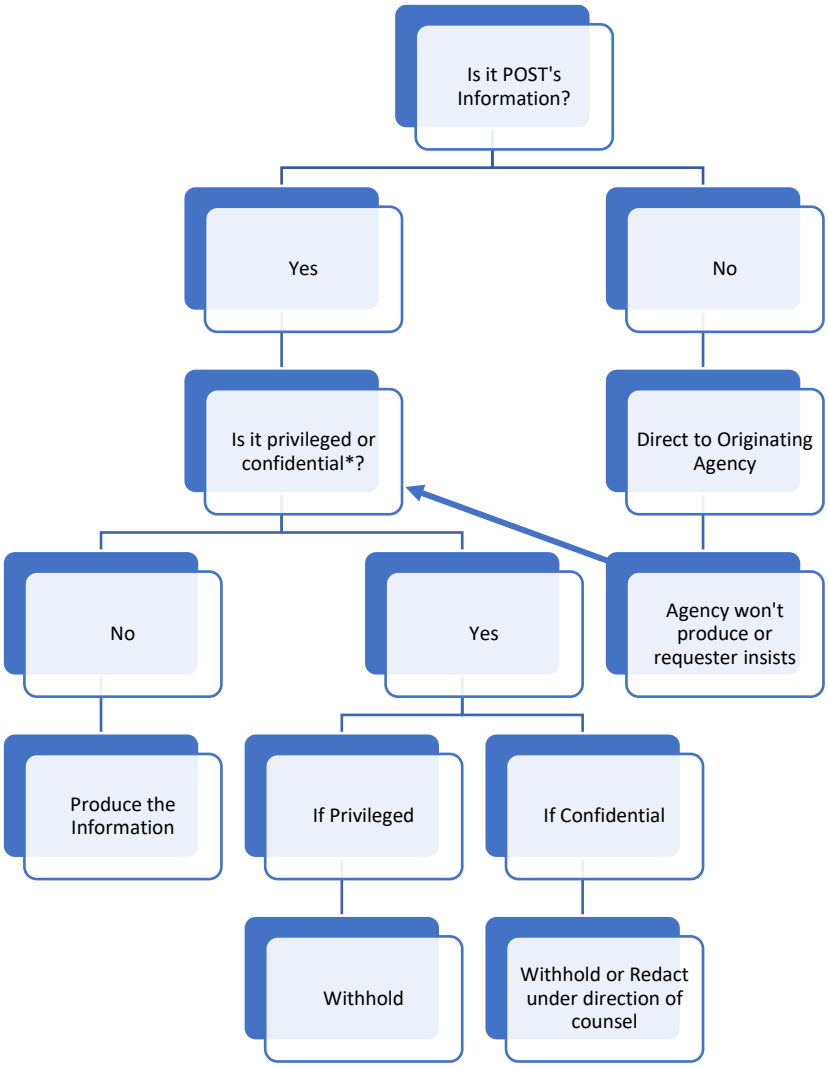
1. Internally generated information may be privileged. As to POST's internally generated information that is not made public, i.e., internal drafts as opposed to Letters 1 and 2, these may be privileged, depending. If the paralegal/investigator is operating as a paralegal, and the document was drafted in anticipation of litigation (i.e., an administrative hearing or district court litigation), the drafts are protected from disclosure as "attorney work product" (the attorney-work-product privilege applies to paralegal work). *See Nelson v. City of Billings*, 2018 MT 36, ¶¶ 30, 37 ("documents protected by the attorney-client and attorney-work-product privileges [are] not subject to release" under the right to know). And if the drafts or correspondence are provided to an attorney to obtain legal advice (or from the attorney giving legal advice), then they are also protected from disclosure.

2. Externally generated information is likely not privileged or confidential. As to information compiled from external sources during POST's investigation, it is not privileged or confidential if compiled or created by the paralegal/investigator while operating as an investigator. Specifically, as an investigator (as opposed to a paralegal working with an attorney), the information is not privileged work product. And interview recordings and other information gathered by POST from external sources is not confidential as CCJI

because POST is not designated as a criminal justice agency for purposes of creating investigatory information (only for "obtaining and retaining" CCJI). The investigation information would thus be redactable only where privacy outweighs the right to know (an unlikely scenario at this stage).

If particular questions you ask, or discussions you have, show your analysis of the matter (as opposed to the witness's factual answers), you may be able to argue those are work product and should be redacted, especially if created with or for an attorney. This will need to be a case-by-case determination.

Public Records Requests ~ Generally



Scenario 1 ~ Allegation sent to agency, and agency hasn't responded yet.

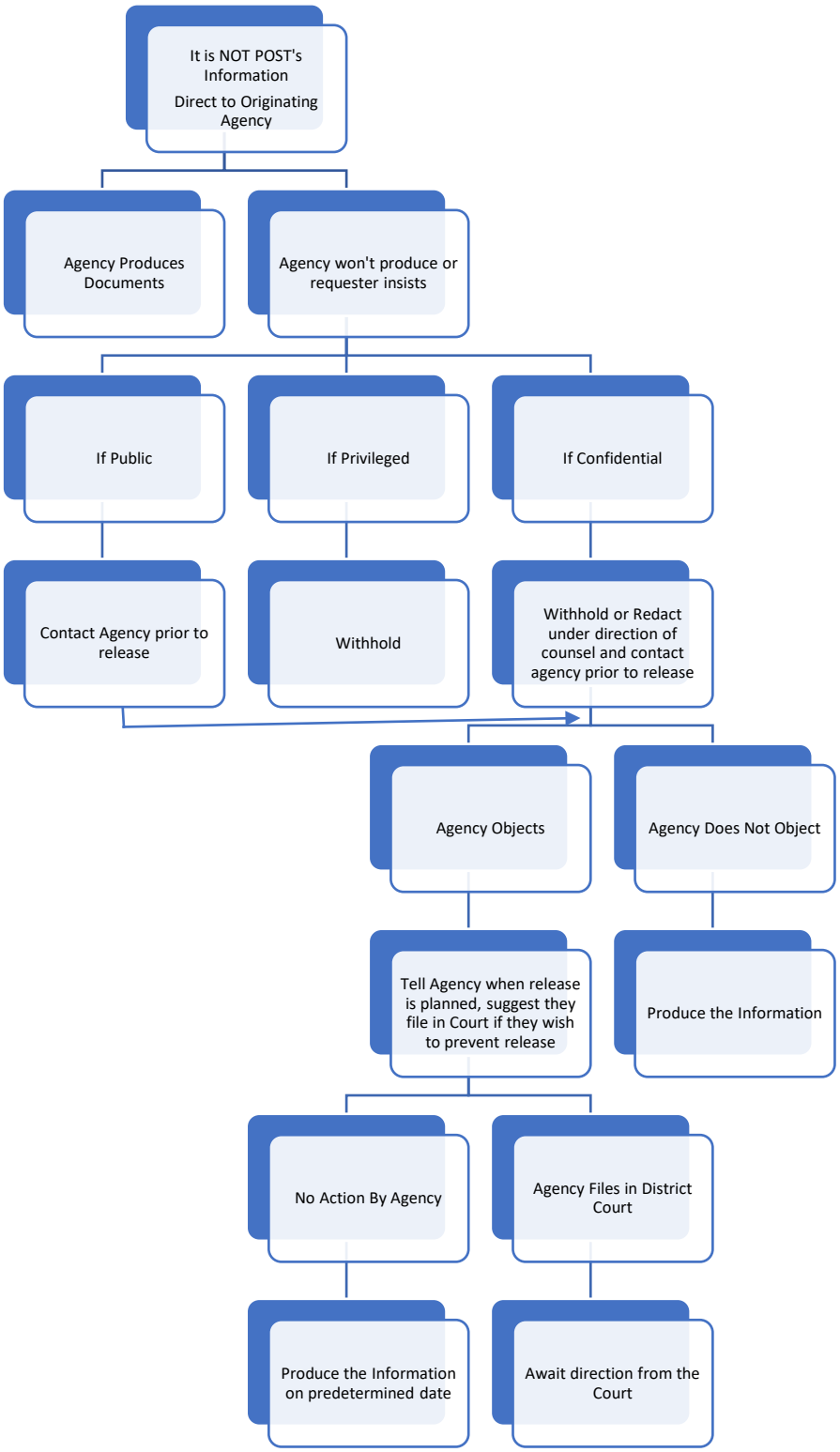
It is appropriate to tell the requestor you have received an allegation about the officer and have sent it to the employing authority for a response under ARM 23.13.703. If they ask for a copy of the allegation, respond that you will provide it after the agency has provided its response.

*Privileged Could be: Attorney-Client Communications, Attorney Work Product

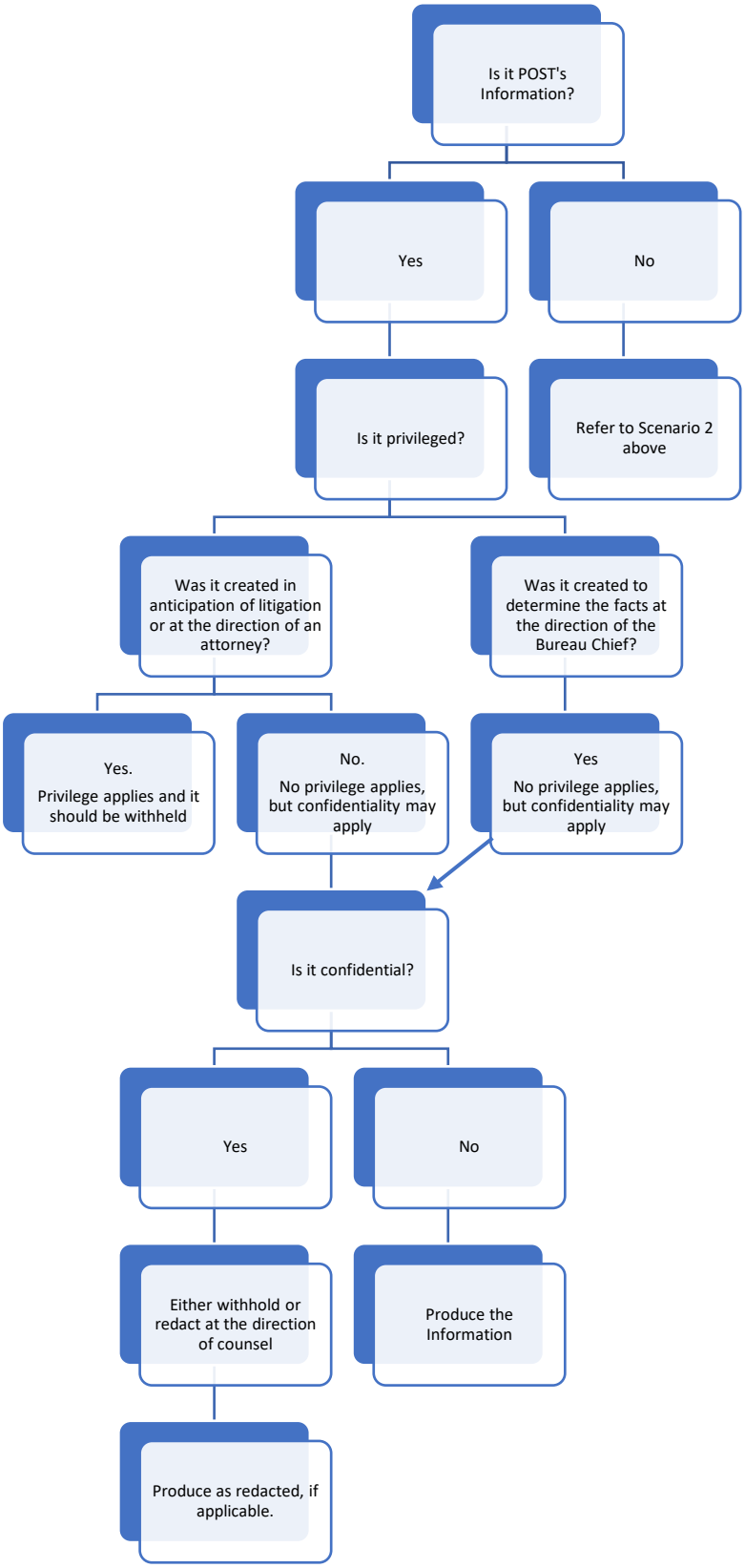
*Confidential Could be: CCJI, Dates of Birth, Social Security Numbers, Medical/Mental Health Information

Scenario 2 ~ Agency has responded, but Case Status Committee hasn't reviewed.

Regarding Agency Response:



Scenario 3 ~ Request for POST's investigation information prior to completion of investigation.



LEGAL MEMORANDUM

To: Eric Gilbertson and Katrina Bolger

From: J. Stuart Segrest

Date: February 3, 2022

Re: Response to Conrad City Attorney's legal memo

Katrina and Eric,

You have asked that I provide a response to a "legal opinion" written by Conrad City Attorney Daniel Jones ("legal memo") regarding the City's obligation to comply with POST's request that it investigate allegations of misconduct against a city police officer. The City Attorney concludes that only POST has authority to investigate allegations of officer misconduct, that POST cannot change this obligation by rule, and that POST cannot require a city to investigate in its stead.

I disagree with the City Attorney's analysis. While he is correct that POST has the authority to investigate allegations of officer misconduct, POST also has authority to adopt rules effectuating investigations, and a city has a corresponding duty to enforce POST's standards, including conducting investigations to determine whether misconduct allegations are substantiated.

Applicable Law

As the legal memo acknowledges, POST has statutory authority to set standards and qualifications for public safety officers, including a city's police officers (i.e. "peace officers"), and to investigate and suspend or revoke certification if these standards are violated. § 44-4-403(1)(a), (c), MCA. An officer whose certification has been revoked or suspended "is entitled to a contested case hearing[.]" § 44-4-403(3), MCA.

The duty to enforce standards and investigate misconduct, however, is not solely POST's. It is also the responsibility of the appointing authority (i.e. the employing agency) "to apply the employment standards and training criteria established by the [POST] council," including "terminating the employment of a public safety officer for failure to meet the minimum standards established by

the council[.]" § 44-4-404, MCA. Likewise, the appointing authority has a duty "to ensure that each peace officer appointed under its authority" meets all "requirements of peace officer certification promulgated by" POST. § 7-32-303(5), MCA. As to cities specifically, each city is required to have a police department, and its police officers "must meet the minimum qualifying standards for employment promulgated by" POST. §§ 7-32-4101; 7-32-4112, MCA.

To implement its oversight of public safety officer standards, POST has adopted administrative rules as allowed by § 2-15-2029(2), MCA. Relevant here, POST has adopted standards for appointment, certification, and continued employment of officers, and grounds for denying, sanctioning, suspending, and revoking an officer's certification. ARM 23.13.201, 23.13.702(3). The procedure for investigating and resolving allegations of misconduct is laid out at ARM 23.13.703, with additional detail provided in POST's "Officer Misconduct Allegation Policy and Procedure."

Considering their duty to apply and enforce POST's standards, POST requires employing agencies to "report to the executive director any substantiated grounds for denial, sanction, suspension, or revocation of POST certification as enumerated in [23.13.702(3)]." ARM 23.13.702(2). To further facilitate coordination with the employing agency, and to ensure it is aware of and has a chance to investigate the allegations, POST requires most allegations to made first to the employing agency. ARM 23.13.703(2)-(3). POST also requires the employing agency "give POST a notice of the employing authority's investigation, action, ruling, finding, or response to the allegation, in writing, which must include a description of any remedial or disciplinary action pending or already taken against the officer regarding the allegation in question, and which may contain a recommendation from the employing authority regarding whether POST should impose a sanction." ARM 23.13.703(4).

Analysis

As explained above, POST is authorized, and required, by law to set public safety officer employment standards and training criteria, and to investigate and discipline officers as necessary. § 44-4-403, MCA. POST has set these standards. But POST does not hire or directly supervise officers: individual agencies, whether local or state, are the "employing agency." Montana law therefore requires these employing agencies (including the City of Conrad) to ensure its officers meet POST's standards, and to terminate those who do not. §§ 44-4-404, 7-32-303(5), 7-32-4112, MCA. As such, POST requires agencies to report, and

investigate, allegations of misconduct made against one of its employed officers. ARM 23.13.702(2), 23.13.703(4).

These investigation and reporting requirements are not only authorized under Montana law, they are necessary to effectuate the statutory scheme. It is not possible for POST, on its own, to investigate at the local level every allegation of misconduct. The Legislature thus requires the employing agency to ensure its officers meet POST's standards. To do so, the agency must investigate allegations of misconduct: i.e. allegations that an officer has violated one or more standards. Even if POST had not adopted ARM 23.13.703(4), Montana law impliedly requires agencies to investigate allegations of misconduct to determine whether the officer continues "to meet the minimum standards established by the council[.]" § 44-4-404, MCA. And it's of no merit that this statute doesn't use the phrase "investigate." It's implied, just like it's implied, but not expressly stated, in § 44-4-403, MCA (the statute providing POST investigatory authority), as acknowledged in the legal memo. Neither POST nor the employing agency can ensure compliance with POST's standards without investigating allegations of misconduct.[1] Contrary to the legal memo's conclusion, then, the City of Conrad is obligated to conduct investigations into misconduct implicating a violation of POST's standards.

The city's duty to investigate is not inconsistent with or prohibited by Montana law regarding self-government powers. As the memo notes, the self-government power is broad, including any power or service not prohibited by statute. § 7-1-101 to 102, MCA. And Montana law explicitly allows and requires a city, as the employing agency of a police officer, to investigate allegations of misconduct.[2] Indeed, the City's refusal to investigate officer misconduct at the direction of POST would itself be "inconsistent with state law or regulation." § 7-1-113(1), MCA (emphasis added). This is so not only because statutes and POST rules require the employing agency's participation, but also because refusing to

[1] Otherwise, the City would not be able to effectively investigate or manage misconduct of its own officers, a result at odds with the Montana Supreme Court's consistent holding that the public has a right to know about officer misconduct. *See, e.g.*, *Billings Gazette v. Billings*, 2011 MT 293, ¶ 26, 362 Mont. 522, 267 P.3d 11 ("society is not willing to recognize as reasonable the privacy interest of [officers] who hold positions of public trust when the information sought bears on that [officer's] ability to perform public duties").

[2] This situation is thus different than *City of Helena v. Svee*, where the subject matter "had been made the exclusive domain" of the state agency. 2014 MT 311, ¶ 16, 377 Mont. 158, 339 P.3d 32 (emphasis added).

investigate would establish "standards or requirements which are lower or less stringent than those imposed by state law or regulation." § 7-1-113(2), MCA (emphasis added). In short, the City's investigation, at POST's direction, would not be "inconsistent with state law and administrative regulation," it's required by state law and regulation.

The legal memo is also incorrect in suggesting the duty to investigate misconduct may not be delegated to the employing agency. First, POST may promulgate rules to effectuate its duties, which includes investigating misconduct. §§ 2-4-201, 2-15-2029, MCA. Investigating misconduct requires obtaining information from the employing agency who is in the best position to obtain that information and initially assess whether misconduct occurred. Second, as explained, the employing agency has an independent obligation to ensure its officers are in compliance with POST' standards: i.e. have not committed misconduct. Finally, POST does not abdicate its duty to investigate by having the employing agency conduct an initial investigation. On the contrary, POST considers the agency investigation when deciding whether to dismiss the allegation as unsupported or conduct its own investigation, which may lead to sanctions and a contested case hearing. *See* ARM 23.13.703 and POST's Officer Misconduct Allegation Policy and Procedure. The agencies investigation is not the end of POST's investigation, it's the beginning, and the ultimate decision as to whether the officer committed misconduct rests with the POST council.

Conclusion

POST is authorized by law to investigate allegations of misconduct and to pass regulations to facilitate this process. In addition, the law requires an employing agency, such as the City of Conrad, to ensure its officers meet POST standards. As such, POST's rule requiring the agency to investigate allegations of misconduct is lawful and enforceable. Hopefully the City of Conrad reconsiders its position and fulfils its duty under the laws and regulations of the State (not to mention its duty to the citizens of Conrad) to investigate allegations of officer misconduct.

LEGAL MEMORANDUM

To: Timothy Allred

From: J. Stuart Segrest

Date: October 14, 2022

Cc: Katrina Bolger

Re: MLEA's approval of law enforcement basic courses at colleges

Timothy,

You have asked that I provide a legal memo analyzing whether current statutory law allows for equivalency of a peace officer basic course taught by colleges off the Montana Law Enforcement Academy's (MLEA) campus if the course was approved by MLEA and the POST Council. In other words, if MLEA and the POST Council approve a college program as "commensurate with the current peace officer basic course offered at the Montana law enforcement academy," do graduates, once appointed as an officer, qualify for the basic equivalency course exception under § 7-32-303(8)(a), MCA? The answer is yes, a graduate of a course approved by MLEA and the Council would qualify for equivalency under § 7-32-303(8)(a).

Applicable Law and Analysis

Section 7-32-303(6) MCA states that "[e]xcept as provided in subsections (7) and (8)" a peace officer is required to "successfully complete the peace officer basic course *at* the Montana law enforcement academy, as approved by the council, within 1 year of" initial appointment or reappointment after a break in service of more than five years. For these officers, then, the only exception to the requirement to complete the full basic course at MLEA is to meet the requirement of 7-32-303(7) or (8).

Section 7-32-303(8)(a) provides that "if a peace officer has successfully completed a peace officer basic course that is ... approved by a ... state ... law enforcement agency" that has also been "reviewed and approved [by the Council] as

commensurate with the current peace officer basic course offered at the Montana law enforcement academy," then the officer need only complete "the peace officer basic equivalency course." Stated differently, an appointed peace officer qualifies to attend the MLEA basic equivalency course if the officer attended a non-MLEA basic course that was approved by both: (1) a state law enforcement agency and (2) the Council.

Here, MLEA is in discussions with colleges in Montana to approve a curriculum for a peace officer basic course that is "commensurate with the current peace officer basic course offered at" MLEA. The program will then be reviewed and approved by the POST Council. The question is whether, when a graduate of this program is appointed by an agency, the exception at 7-32-303(8)(a) will apply and only require a basic equivalency course at MLEA, or whether a statutory change is required.

As explained above, the 8(a) exception applies if the basic course taught at the college is approved by (1) a state law enforcement agency and (2) the Council. Under this scenario, the Council will have approved of the program as commensurate with the MLEA course. Therefore, the only question is whether MLEA qualifies as a "state law enforcement agency." It does. While "state law enforcement agency" is not defined in this section, MLEA is governed by the Montana Department of Justice (DOJ), and DOJ determines the curriculum at MLEA, among other things. *See* § 44-10-201 to -202. As DOJ governs and establishes the curriculum at MLEA, and DOJ is without question a state law enforcement agency, this requirement is met. To interpret the statute otherwise would lead to the absurd result of MLEA not being qualified to approve a basic course as commensurate with its own course—certainly not what the Legislature intended—and thus should be avoided. *See U.S. West v. Dep't of Revenue*, 2008 MT 125, ¶ 19, 343 Mont. 1, 183 P.3d 16 ("a literal application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute.") (citation omitted).

Conclusion

The graduate of a college course approved by MLEA and the Council would qualify for the exception under § 7-32-303(8)(a) and thus only have to take the basic equivalency course after appointment.

LEGAL MEMORANDUM

To: Timothy Allred

From: J. Stuart Segrest

Date: October 25, 2022

Cc: Katrina Bolger

Re: Whether § 7-32-303(8)(a), MCA, allows an officer to attend a non-MLEA basic course after hire and then qualify for equivalency.

Timothy,

You have asked that I provide a legal memo analyzing whether the basic equivalency exception at § 7-32-303(8)(a), MCA (the "8(a) exception"), applies where an agency sends a recently hired, uncertified officer to an approved non-Montana Law Enforcement Academy (MLEA) basic course, as an alternative to MLEA basic, during the year after hire. The answer is no. While the statute is not entirely clear on this point, the best reading of the statute, and the one most in line with the intent and purpose of the statute, is that the 8(a) exception applies only to non-MLEA courses completed prior to an officer's hiring, and thus prior to the start of the one-year period to attend either the full MLEA basic course or the basic equivalency course.

Background

MLEA has been in discussions with Montana colleges regarding a law enforcement basic course curriculum that would be taught at the college and approved by MLEA and the POST Council as "commensurate with" the MLEA basic course. In a prior memo, I explained that a graduate of such an approved course would qualify for equivalency under the 8(a) exception.

In a recent meeting, the Curriculum Committee asked whether an officer would qualify for the 8(a) exception if the uncertified officer attended an approved non-MLEA college course *after* being hired, as an alternative to the basic course at MLEA as contemplated by § 7-32-303(6), MCA. The answer to this question requires an analysis of the language and intent of section 8(a).

Applicable Law and Analysis

Section 7-32-303(6), MCA, requires a peace officer to "successfully complete the peace officer basic course at the Montana law enforcement academy ... within 1 year of" initial appointment or reappointment. The only exception is as provided in subsections (7) and (8).

Section 7-32-303(8)(a), MCA, allows an officer to take the "the peace officer basic equivalency course" as an alternative to the full MLEA basic course if the officer "*has successfully completed* a peace officer basic course that is" approved by MLEA and POST (see prior memo for analysis). Emphasis added. The question here is whether this exception, and particularly the phrase "has successfully completed," requires completion *prior to* the officer's appointment, or whether an officer that successfully completes an approved non-MLEA course *after* appointment qualifies.

The Montana Supreme Court considers four factors when weighing competing statutory interpretations:

> (1) Is the interpretation consistent with the statute as a whole? (2) Does the interpretation reflect the intent of the legislature considering the plain language of the statute? (3) Is the interpretation reasonable so as to avoid absurd results? and (4) Has an agency charged with the administration of the statute placed a construction on the statute?

U.S. West v. Dep't of Revenue, 2008 MT 125, ¶ 16, 343 Mont. 1, 183 P.3d 16.

Taking the statute's plain language (factor (2)), first, the requirement that an officer "has successfully completed a peace officer basic course" may be read two ways. One acceptable way to read the statute is that the 8(a) exception only applies if the officer successfully completed the approved basic course prior to hire. That is, a natural reading of "has successfully completed" is in reference to an event that already happened. However, one could also read "has successfully completed a peace officer basic course" to be met, technically, once the officer passes an approved basic course, even if this occurred post-hire, as long as this occurs within the year of hire and in time to apply for and attend the basic equivalency course. In other words, if the officer takes and passes an approved course within a few months of hire, it is then grammatically correct to say that he "has successfully completed [an approved] peace officer basic course" at that time, even though this was not true when the officer was hired.

Though the 8(a) exception may technically be read to apply to an officer that completes a non-MLEA course after hire, the better reading based on the remaining three factors is that the exception only applies to officers who completed the course prior to hire. As to legislative intent under factor (2), and agency construction under factor (4), POST's intent when it proposed subsection 8(a) and POST's consistent interpretation of the exception is that it only applies to situations where an officer has previously completed an approved non-MLEA basic course prior to appointment. Indeed, the most common scenario in which the 8(a) exception applies is for officers that previously worked for law enforcement in a different state or for a federal or tribal agency in Montana. In these situations, the officer necessarily "has successfully completed a peace officer basic course" prior to appointment.

This interpretation is also more consistent with the statute as a whole (factor (1)). Subsection 6 requires the officer to attend MLEA basic "within 1 year" of appointment. This requirement may be substituted for taking "the basic equivalency course ... within 1 year" of appointment under 8(a). Read together, an officer has one year to either take the full basic course or an equivalency course, not one year to do both. Reading 8(a) to allow an officer to take both a full basic course and an equivalency course after appointment is thus not contemplated by the whole statute when read together.

Finally, interpreting 8(a) to allow an officer to complete a non-MLEA basic course after hire may lead to an absurd result. Specifically, an agency could choose to send an officer to a full non-MLEA course as an alternative to MLEA basic; perhaps for monetary or other reasons. This would contradict, however, or at least undercut, subsection 6's requirement that the officer "complete the basic course *at the* Montana law enforcement academy ...." Emphasis added.

Conclusion

The best reading of § 7-32-303(8)(a), MCA, considering the intent, purpose, and prior construction of the statute, is that the exception applies only to non-MLEA courses completed prior to an officer's appointment, and thus prior to the start of the one-year period to attend either the full MLEA basic course or the basic equivalency course.