

**Summary of Oral and Written Comments and
North Dakota Peace Officer Standards and Training Board (P.O.S.T. Board) Response
April 13, 2018
BCI Conference room, Bismarck ND**

1. Assistant Attorney General Michael Mahoney provided oral comments to the P.O.S.T. Board Office staff on April 13, 2018 consisting of grammatical and technical changes in language in sections 109-02-01-01 (8), and 109-02-02-01 (9). The Board agreed to accept all of Assistant Attorney General Michael Mahoney's recommended corrections and changes:
109-02-01-01 (8) line 1 strike "is defined as" add "means" after "agent".
109-02-01-01 (8) line 2 strike "." add "for the controlled buy, controlled sale or surreptitious recording."
109-02-02-01 (9) line 1 strike "is defined as" add "means" after "violence".

2. Attorney General Wayne Stenehjem provided oral comments to the P.O.S.T. Board Office staff on April 12, 2018 consisting of grammatical and technical changes in language in sections 109-02-06 (1), 109-02-06 (5), and 109-02-06 (6), The Board agreed to accept Attorney General Stenehjem's recommended corrections and changes as follows:
109-02-06 (1) line 1 strike "is responsible for" add "should take reasonable steps to ensure" after "informant".
109-02-06 (5) line 2 add "known" after "all".
After discussion regarding 109-02-06 (6), the Board agreed to the following changes:
109-02-06 (6) line 2 add "in person" after "or".

3. Grand Forks States Attorney David Jones wrote an e-mail dated 2-27-2018 which was subsequently received at the P.O.S.T. Board. Office. Assistant Attorney General Michael Mahoney read the e-mail into the record. Mr. Jones' concerns were regarding open records scrutiny, and wanting the "paperwork" to reference NDCC 44-04-18.7.
After review of the open records statute and board discussion, the consensus was that the Board would not be holding a peace officer liable for something that is required by statute in reference to the possibility of confidential informant disclosure once a case is considered closed. The Board decided to keep the language as currently written.

4. Chief Agent Phil Pfennig from the North Dakota Bureau of Criminal Investigation sent an e-mail dated 3-28-2018 to the P.O.S.T. Board Chairman and Executive Secretary. This e-mail had an attachment in the form of a letter dated 3-26-2018 addressed to the P.O.S.T. Board. In the body of the e-mail, C/A Pfennig had included the verbatim text from the e-mail of David Jones which had already been received at the P.O.S.T. Board Office. This issue was already addressed by the Board. The letter had eight separate paragraphs and five bullet points at the end of the letter all of which had questions pertaining to the proposed rules. Assistant Attorney General Michael Mahoney read each paragraph into the record and the Board addressed each accordingly.

Paragraph 1, C/A Pfennig wanted clarification as to “when the officer is responsible”. The Board stated this issue had already been addressed and agreed to keep the changes to the rules as recently decided.

Paragraph 2, C/A Pfennig wanted clarification regarding confidential informant (CI) record keeping by the individual peace officer and/or an agency. The Board stated the Board only has authority over individual peace officer licenses and agreed to keep the rule as currently written.

Paragraph 3, was a similar concern as already discussed and addressed in Paragraph 2

Paragraph 4, was more of a statement than a question. The Board stated the recent changes in the definition of “controlling agent” address this issue and agreed to keep the changes to the rules as recently decided.

Paragraph 5 C/A Pfennig cited NDCC 29-29.5-04 (2)(f) and wanted clarification on known and unknown target offenders as it related to the century code previously listed. The Board stated this issue had already been addressed in a language change to 109-02-06 (5) and agreed to keep the changes to the rules as recently decided.

Paragraph 6, C/A Pfennig was asking for clarification regarding a potential informant making pre text calls to determine the veracity of their information and whether or not this individual needed to be “signed up” before making the calls and how would a victim of sexual assault who may agree to work with law enforcement that is making a recorded phone call be handled. After discussion, the Board stated that using a CI requires a written agreement pursuant to NDCC 29-29.5-05. A victim making a call likely does not meet the definition of a CI under NDCC 29-29.5-01 (2) as they are not seeking a benefit. If they are, then the use of CI rules would apply. The Board agreed to keep the changes to the rules as recently decided.

Paragraph 7 , C/A Pfennig asked how to handle “mitigating circumstances” surrounding expenses for CI’s that arise which may include living expenses etc. along with addressing CI’s that are “working off charges”. The Board stated NDCC 29-29.5 (2) requires a statement of the benefit be in writing in the CI agreement and (7) requires the anticipated number of sales, buys, acts or the duration of service also be noted in the agreement. NDCC 29-29.5-04 (2)(h) requires the P.O.S.T. Board adopt rules establishing written procedures relating to the use of paid confidential informants. The Board stated the rules as currently drafted along with the CI agreement meet the statutory requirements and no changes are needed at this time.

Paragraph 8, C/A Pfennig had concerns with the language in 109-02-06 (8) which states a “peace officer shall not have any sexual contact or sexual relationship with any confidential informant” and gave the hypothetical example of a peace officers spouse signed up as a CI and they are now restricted. The Board stated that a peace officer would not be the controlling agent of a spouse and that the language in 109-02-06 (8) would remain as written.

In the bullet points at the end of the letter, C/A Pfennig asked if “surreptitious recording” included phone calls. The Board stated yes. C/A Pfennig stated there was nothing related to the number of buys, sales or acts of duration. The Board stated they were addressed in the CI agreement. C/A Pfennig asked if the Board was overstepping there requirements as set forth but NDCC 29-29.5. The Board stated no. C/A Pfennig asked if the Board was reading into the requirements too much. The Board stated no. C/A Pfennig made the comment “we didn’t see anything about training CI’s (29-29.5-04 (2) (c))?”. The Board stated that is what the entire

process of signing up the confidential informant is. The Board agreed to keep the language of the rules as currently decided.

5. Mclean County States Attorney Ladd Erickson submitted two e-mails each with a single attachment to the P,O,S.T. Board Office. One was dated 3-21-2018 and one dated 3-28-2018. It should be noted the content was basically identical except for an additional paragraph added in the 3-28-2018 e-mail attachment. States Attorney Erickson rewrote 109-02-06 (1) combining language from 109-02-06(6). After discussion, the Board stated that recent grammatical and technical changes address this issue and the Board agreed to keep the language as currently decided. States Attorney Erickson wanted to delete 109-02-06(4).After discussion the Board declined to accept this change and agreed keep the language of the rule as written. States Attorney Erickson rewrote 109-02-06(5) in regards to “known” target offenders. The Board stated these changes had been addressed earlier and the Board agreed to keep the language as previously decided.