

NEW MEXICO LAW ENFORCEMENT ACADEMY  
SPECIAL BOARD MEETING

August 28, 2012

10:00 a.m.

Albuquerque Police Academy

5412 Second Street

Albuquerque, New Mexico 87102

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<p>1 we have the agenda right here at the front of the 2 meeting. This meeting is called for a relatively 3 narrow purpose. Item No. 4 is to discuss a proposed 4 rule change to NMAC 10.29.11 relating to the grounds 5 for denial, revocation, or suspension of a police 6 officer or telecommunicator certification.</p> <p>7 Are there any additions or questions about 8 the agenda? Okay. I'll take a motion to approve the 9 agenda.</p> <p>10 MR. BETZ: I make a motion to approve the 11 agenda.</p> <p>12 MR. COON: I second.</p> <p>13 MR. KING: All in favor say aye. 14 (Those in favor so indicate.)</p> <p>15 MR. KING: Any opposed? Okay.</p> <p>16 ITEM NO. 4: PROPOSED RULE CHANGE TO NMAC 10.29.11, 17 GROUNDS FOR DENIAL, REVOCATION, OR SUSPENSION OF 18 POLICE OFFICER OR TELECOMMUNICATOR CERTIFICATION; 19 REPORTING REQUIREMENT</p> <p>20 MR. KING: We'll move to that item I think. 21 Chief Schultz, this is a chance for you to tell us 22 about the rule. And I think overall the idea here is 23 to trigger a rulemaking process. But we'll have Chief 24 Schultz explain the change to the rule.</p> <p>25 MR. SCHULTZ: Thank you, Mr. Chairman. First</p>	<p>1 of all I want to thank everybody for taking time out 2 of their busy schedule, putting the special meeting 3 and agenda on your availability, and everyone coming 4 to Albuquerque.</p> <p>5 The reason why this came about is that, at 6 the last Law Enforcement Academy Board meeting, 7 Director Medina and Monique and staff provided us with 8 a matrix so to speak that Member Korn had been working 9 and along with Mr Medina talking about officer 10 misconduct.</p> <p>11 Obviously this board has been working very, 12 very hard at trying to, one, hold officers accountable 13 who are involved in gross misconduct across the state; 14 but also making sure that those issues of misconduct 15 are very expeditiously dealt with and helping Director 16 Medina manage this very complicated list of 17 discipline.</p> <p>18 And when we were looking at the list after 19 the meeting, I noticed that many of those cases 20 involved officers' misconduct and specifically was 21 also related to criminal charges. And specifically 22 those criminal charges in many cases had actually 23 resulted in the arrest and/or indictment of the 24 officer.</p> <p>25 And many of those cases were several years</p>
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<p>1 old. I met with Secretary Gorden Eden from DPS about 2 two weeks after mainly to compliment staff and 3 specifically Mr. Medina on the great work that they 4 were doing. And we both were talking about this 5 matrix and the number of officers that had pending 6 criminal charges.</p> <p>7 And while looking at the NMAC rule, we 8 realized that there was really no incentive in many 9 cases for the officers or their attorneys to 10 actually -- to try to expedite that process and get it 11 resolved. Because the officer's certification in many 12 cases was still intact.</p> <p>13 As we looked at the NMAC, we believed that 14 the director should have the ability in only the most 15 serious cases and cases where probable cause exists 16 for an officer to be arrested and charged with a 17 felony.</p> <p>18 And, of course, under New Mexico State law, 19 within ten days there is usually an arraignment held 20 and a judge makes a decision whether to hold that 21 officer over. In the case of a grand jury, the 22 officer again is brought in front of the court again 23 for an arraignment.</p> <p>24 So what we have decided to propose and I have 25 in front of you all today is just a very simple rule</p>	<p>1 change to NMAC 10.29.11. And basically we all feel 2 very confident in the ability of the director to hold 3 officers and telecommunicators responsible for their 4 actions. But more importantly to move the burden to 5 that officer or telecommunicator to give them a reason 6 to get the issue resolved as quickly as possible and 7 get it off the very overcrowded docket already.</p> <p>8 So basically under Section 10.29.1.11, 9 entitled Grounds for Denial, Revocation, or Suspension 10 of Police Officer or Telecommunicator Certification; 11 Reporting Requirements, add one new section under B. 12 And basically it would say, "The director upon being 13 notified that a certified peace officer or 14 telecommunicator has been arrested or indicted on any 15 felony charges shall immediately suspend certification 16 of the officer or telecommunicator and initiate the 17 revocation process as per 10.29.12."</p> <p>18 Looking at additional laws I think that would 19 support this primarily when it comes to possession of 20 firearms, an officer under indictment for any felony 21 charge in the State of New Mexico is prohibited from 22 possessing legally a firearm as well as officers 23 involved in domestic violence and/or cases involving 24 illegal drugs or narcotics, where they may be addicted 25 to such, which, when you look at most of the cases</p>

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<p>1 where an officer has been arrested, fall in one of 2 those two categories as well.</p> <p>3 So that's basically the proposed rule change. 4 The subsequent sections which are currently numbered 5 B, D, E, and F, respectively, would change by one 6 additional letter.</p> <p>7 So basically I just want to provide the 8 director with the ability to make that decision, him 9 or herself, obviously in consultation with legal 10 advisors to the director, that when we're given 11 notice -- and the respective agency has 30 days to 12 provide that notice, in most cases that arraignment 13 has already occurred. So the decision in the case has 14 been reviewed by a sitting judge and that felony 15 charge now stands and/or the indictment.</p> <p>16 I think this will add credibility to the law 17 enforcement profession in the State of New Mexico. 18 And we also felt that it was important to have this 19 done, hence the reason for the special meeting prior 20 to the sitting of the next full legislative session, 21 which would be in January.</p> <p>22 So based on my discussions with Secretary 23 Eden, we felt that a special board meeting would be 24 valid so we could have this discussed at the next full 25 regular meeting in the fall since there's only one</p>	<p>1 more regular meeting prior to the legislative session.</p> <p>2 That's kind of my thoughts. I think this 3 would be good for the state and continue to help add 4 additional credibility to the very valuable services 5 that our law enforcement officers and 6 telecommunicators provide in the State of New Mexico 7 and show how important that certification is and how 8 it should be protected by the officers who represent 9 that certification as both police officers and 10 telecommunicators. And with that I'll stand for any 11 questions or discussion.</p> <p>12 MR. KING: Thank you, Chief Schultz. 13 Questions for Chief Schultz.</p> <p>14 MR. COON: Chief, this last one, can initiate 15 the revocation process, what if the officer is found 16 not guilty or whatever?</p> <p>17 MR. SCHULTZ: Mr. Chairman, Sheriff Coon, I 18 think as a board we have heard many cases that have 19 come in front of the board before, either directly to 20 the board or to many of us that have been hearing 21 officers. There's a different burden of proof in a 22 criminal case and the administrative case.</p> <p>23 As we all know, the criminal case is beyond a 24 reasonable doubt. Administratively the director, this 25 board, a special hearing officer does not need that</p>
<p>Page 12</p> <p>1 level of burden of proof to make that decision.</p> <p>2 And I think that's one of the things that 3 this board needs to realize that, officer misconduct 4 very often can be to the level that's required for us 5 to make a decision, which is a preponderance of 6 evidence.</p> <p>7 And I think that's the message that we need 8 to send to the officers in the State of New Mexico and 9 to telecommunicators, is that they are going to be 10 held to the highest standards. Their conduct will be 11 reviewed. And if the preponderance exists, their 12 certification may be in question.</p> <p>13 And I think in many cases obviously the court 14 has to deal with very complex situations in many 15 cases. But I think we all can think of cases in the 16 past that we've seen that have come in front of this 17 board where the officer has been found not guilty in a 18 court of law, but the act definitely occurred, the 19 misconduct definitely occurred.</p> <p>20 But the officer on a technicality slips 21 through the cracks. And I think it's only right that 22 we serve the citizens of New Mexico by holding that 23 officer accountable to the level which we can, which 24 is preponderance of evidence.</p> <p>25 MR. KING: Chief Shilling.</p>	<p>Page 13</p> <p>1 MR. SHILLING: Mr. Chairman, thank you. 2 Chief, one thing that I'm keen on from a legalistic 3 standpoint it says "on any felony charges in plural." 4 So we would have to have a plurality before we could 5 move forward under this rule from a legalistic 6 standpoint. So maybe put parentheses around the S to 7 singular that.</p> <p>8 And then the other question I have is is 9 there any other professional licensing that goes down 10 this road, like doctors, nurses, anybody else?</p> <p>11 MR. SCHULTZ: I would defer to the chair.</p> <p>12 MR. KING: Actually I think Mark is prepared 13 to answer that question. Actually we talked about it 14 yesterday a little bit. So Mark, go ahead.</p> <p>15 MR. REYNOLDS: Chief, I'm aware of two. One 16 is the medical board and one is the racing commission.</p> <p>17 MR. SHILLING: So they don't require 18 convictions, just arrests?</p> <p>19 MR. REYNOLDS: Well, differently. I would 20 put it this way, not that they base it upon an arrest 21 or an indictment but that they are -- that they do 22 deprivation of the license or the certification prior 23 to a hearing. So let me back up a step.</p> <p>24 No. The medical board and the racing 25 commission don't immediately revoke -- or I'm sorry.</p>

<p style="text-align: right;">Page 14</p> <p>1 Suspend a license or certification upon an arrest or a 2 conviction. But what they do do -- do do. What they 3 do is if they have -- if they find grounds that are 4 within the parameters that are set forth in the 5 statute, they will immediately take action and suspend 6 prior to any hearing occurring. So I would say it's 7 analogous to what is being proposed here. 8 MR. KING: Can we add, though -- this is a 9 good place, because I think that we should think about 10 this and we can think about it for our October meeting 11 I think. The statutory basis for those commissions 12 gives them a little more authority to do this. 13 And so I think that we can certainly look at 14 this rule and make this change. I'll talk a little 15 bit about a couple of things that we might need to do 16 to make it work. 17 But one of the things that we might do to 18 make it very clear that we can do this is to talk to 19 the legislature in January and get them to make a 20 small modification to the statute that gives this 21 board its authority to make it clear that we have that 22 authority. 23 So it will be at least worth some discussion 24 I think. And the legislature may very well be willing 25 to do it because it's an important issue. But as I</p>	<p style="text-align: right;">Page 15</p> <p>1 recall the statutes for those two boards, the racing 2 commission and the medical board, are a little bit 3 different than the statutes that gives us our 4 authority; is that right? 5 MR. REYNOLDS: Yeah. Their statutes 6 specifically allow them to take a deprivation of a 7 certification or a license prior to the hearing 8 process. Those are the only two boards where I'm 9 aware of that that's specifically allowed for in the 10 statute. 11 MR. KING: Okay. Chief Shilling. 12 MR. SHILLING: Mr. Chairman, I don't know the 13 appropriate juncture for this. But I would be curious 14 to hear from the director if he has any concerns about 15 due process. If you have an officer embroiled in an 16 indictment or a felony charge, from a due process 17 standpoint, do we have any concerns there as far as 18 the licensure goes? 19 MR. KING: Chief Schultz, if you want to 20 yield, I think it's okay for Mr. Medina to answer that 21 question. Is that all right? 22 MR. SCHULTZ: Yes. 23 MR. KING: Okay. Go ahead, Mr. Medina, you 24 can step up there. 25 MR. MEDINA: I'll take it from right here.</p>
<p style="text-align: right;">Page 16</p> <p>1 Based on the rule change that I see on its face, I 2 would most certainly want to make sure that the 3 officer does have due process. That would be my only 4 concern. 5 And if we can find a way that due process can 6 be adequately served for the officer, of course, I 7 think it's a good idea. But I believe that every time 8 that we have an officer that comes before the director 9 at an informal hearing, we explicitly explain to them 10 in detail due process as the process that there is for 11 holding the informal hearing and processing their 12 misconduct case. 13 MR. KING: Chief, can I add to that. I mean 14 obviously due process is something that our office 15 always worries about in all these things. And like I 16 said we've had some discussions about this. 17 And it might be that at a minimum, if we 18 adopt this rule, that we would also have to make sure 19 that Mr. Medina has a process that would make it clear 20 that upon suspension you had, you know, X number of 21 days to contest the suspension in whatever way would 22 be appropriate. 23 Because I mean that's what due process is all 24 about, is that the person who is affected by this has 25 some opportunity for a fair hearing to present any</p>	<p style="text-align: right;">Page 17</p> <p>1 evidence that they have on their behalf that might be 2 exculpatory or whatever. 3 It's possible that that could be done just by 4 setting up a process for Director Medina, you know, 5 that would meet those due process requirements. You 6 know, if we adopt the rule, it may be subject to some 7 challenge on those grounds. 8 And so one of the things that I think is good 9 about the rulemaking process is that we'll publish 10 this rule. People will have 30 or 60 days, how long, 11 Mark, for comment? 12 MR. REYNOLDS: Thirty days. 13 MR. KING: Thirty days to comment. So I 14 anticipate that we'll get a lot of comment on what 15 needs to be done to make that happen. And we can 16 think about it a little bit too. And then, when we 17 discuss the actual adoption of the rule, if there are 18 any wrinkles that we have to address, we can try and 19 address them at the time when we're discussing 20 adoption of the rule. Chief Schultz. 21 MR. SCHULTZ: Mr. Chairman, if I may, this 22 may be a question for the legal advisor. Federal law 23 Chapter 18 prohibits the possession of a firearm by 24 anybody under indictment for a felony crime in the 25 United States of America.</p>

1 So by not suspending an officer under --  
2 definitely underneath the color of laws under an  
3 indictment, I see a definite conflict with federal  
4 law. And that was one of the discussions I had with  
5 the Secretary.

6 So for us I think federal law kind of trumps  
7 and says that you may not possess a firearm.  
8 Obviously a basic requirement of being a peace officer  
9 is being able to do the duties of the job, which  
10 includes the ability to meet that most basic rule,  
11 which is to be able to possess a firearm in the  
12 performance of his or her duties.

13 MR. KING: And I mean the case in New Mexico,  
14 of course, that's interesting is that case in Vaughn,  
15 I think of a police chief in Vaughn, who actually had  
16 a felony conviction and so just didn't carry a firearm  
17 as the chief. And there's that question about --

18 MR. REYNOLDS: Mr. Chair, that case may be  
19 coming in front of you. So you may not want to talk  
20 about that in this setting.

21 MR. KING: Thanks. I saw that you were  
22 getting kind of anxious. All I was talking about is  
23 what we've heard on the news I suppose. But I mean  
24 those are the kinds of issues -- I mean that's why  
25 you're raising issue about whether you can be a peace

1 very hard for this board to determine whether there is  
2 an addiction problem.

3 But I think, you know, common sense tells us  
4 that many times that there is an addiction problem;  
5 hence, the reason why the officer is having this issue  
6 involving an illegal or a prescription medication.

7 Just as a side note, you know, again going  
8 back and looking at the matrix provided at the last  
9 meeting, another concern that I have and this board  
10 has been trying to address is the issue of what we  
11 call gypsy cops; an officer is moving from agency to  
12 agency.

13 And looking at the matrix provided last year,  
14 it looks likes there's been at least one case where an  
15 officer was let go from an agency for a felony arrest  
16 and was able to go to another agency, get the minimum  
17 amount of required time in order to get to their full  
18 retirement, and then retire.

19 And I think that's a disservice again to the  
20 citizens of the State of New Mexico and more  
21 importantly to everybody else who pays into the  
22 retirement system, that an officer can be held  
23 accountable by one agency because they still have a  
24 certification in place with pending felony charges,  
25 move to another agency, get that minimum amount of

1 officer if you can't carry a gun.

2 And I think the courts recognize this dual  
3 sovereignty issue, where you have to comply with  
4 federal laws and you have to comply with state laws.  
5 And so once again I think that my point is that, just  
6 as we think about adopting this rule, that we should  
7 think about how those interact. And I think that we  
8 can make that work. I think that this is an important  
9 rule that you're presenting.

10 I'm actually a little worried about the  
11 difference between arrest and indictment, because  
12 indeed if there's been an indictment, then you've had  
13 some determination of probable cause at least, whereas  
14 on an arrest, the standard may be a little bit lower.

15 So there again since this rule says arrest or  
16 indictment, I don't know what the federal rule for  
17 carrying firearms says about arrests. Does it say  
18 that you can't carry a firearm if you've been arrested  
19 or just if you've --

20 MR. SCHULTZ: It goes back to the specific  
21 charge and why you're being arrested. And again most  
22 of the time what we see in front of this board are  
23 those felony arrests involving domestic violence or an  
24 illegal drug. And very often, because of lack of  
25 additional investigation by the reporting agency, it's

1 time in, and collect a retirement.

2 So hence the reason why I think that the  
3 legislature may have some interest in this as well as  
4 they discuss the retirement, which obviously is pretty  
5 big.

6 MR. SHILLING: Mr. Chairman.

7 MR. KING: Other questions? Actually, Chief  
8 Shilling, I think you've still got the floor.

9 MR. SHILLING: Just to follow up, during the  
10 discussion we've used the word suspend and revoke kind  
11 of interchangeably. In my mind revoke is run it  
12 through the shredder and you're never going to get it  
13 back.

14 Suspend is hold it in abeyance for a certain  
15 period of time and then with the option of possibly  
16 getting it back. Can we clarify, for a felony arrest,  
17 are we out to revoke and never give it back or are we  
18 out to suspend so that they cannot operate as a police  
19 officer for a certain period of time?

20 MR. SCHULTZ: Mr. Chairman, Chief Shilling,  
21 the purpose of this is it only says suspend. It's  
22 just to suspend in the meantime and then begin the  
23 revocation process, which is already being started by  
24 the director.

25 This is to say while you're under arrest or

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<p>1 having been indicted, that your ability to act as a 2 peace officer is suspended during that time. Again we 3 shouldn't see cases in front of this board that are 4 three, four, five, six, or seven years old. 5 Let's suspend that certification which gives 6 a little bit more incentive on the involved party to 7 get the issue resolved either with the director or 8 through the legal process of the courts. 9 MR. SHILLING: Okay. Because the new 10 language calls for the initiation of the revocation 11 process. 12 MR. SCHULTZ: Right, which is already 13 existing language. 14 MR. SHILLING: Okay. 15 MR. KING: Is that all, Chief Shilling? 16 MR. SHILLING: I'm done. Thank you, 17 Mr. Chairman. 18 MR. KING: Okay. Mr. Korn, did you have a 19 question? 20 MR. KORN: I'd like to first thank Chief 21 Schultz for taking the time to think about how the 22 board can be better and how it can better serve the 23 citizens and also the officers that aren't under a 24 cloud of suspicion or indictment or arrest. 25 Obviously we have a lot more officers that do</p>	<p>1 their job right, go to work every day, and fulfill 2 their roles for the citizens. We're talking about a 3 very few group of people that have almost dishonored 4 the profession simply by being arrested. 5 But I think that the process of suspending a 6 license is akin to suspending a privilege. And I 7 think that from my observation, being able to be a law 8 enforcement officer is indeed a privilege for the 9 officer and also for the citizens. 10 And if an officer is arrested, it would seem 11 to me that it's almost akin to whether they could 12 apply to become an officer in the first place. If 13 they have a cloud of an arrest or a cloud of an 14 indictment and then apply to the academy, the 15 director, of course, would never be able to even 16 entertain their certification much less admission to 17 any academy. 18 So I think this kind of puts things back to 19 the way it kind of should be as far as what we would 20 expect from our officers that are going to be carrying 21 a gun and being able to arrest and take legal action 22 for things that they see in the course of their jobs. 23 I also think that from the standpoint of due 24 process, if I understand your proposal, Chief, nothing 25 restricts the officer downstream. If perchance he is</p>
<p>Page 24</p> <p>1 found not guilty by a court, understanding there's 2 different rules of proof in an indictment and a 3 criminal trial versus what we do in front of the 4 board, there's nothing to prevent that person from 5 reapplying for his license even if he was suspended or 6 revoked downstream. 7 MR. SCHULTZ: That's correct, sir. 8 MR. KORN: So from my standpoint I think 9 we -- I think that the rule is, as the chief said, 10 reestablishing credibility both for the accused 11 officers, both for the 99 percent of officers who do 12 their job well, and, of course, for this board and 13 taking some sort of affirmative action to keep our -- 14 keep the people that police our society to that 15 highest degree of standard. 16 And it still preserves that opportunity for 17 going back and reapplying if by chance they should be 18 found not guilty and there's reasons that they should 19 have their license back. So those are my comments, 20 Mr. Chair. 21 MR. KING: Thank you. Any other questions? 22 MR. COON: I've got a question, sir. 23 MR. KING: Sheriff Coon. 24 MR. COON: Do we have a process to where -- 25 and I don't want to pick on little departments. But</p>	<p>Page 25</p> <p>1 we have, say, a small department that has an officer 2 that has some wrongdoing. And the agency doesn't do 3 any LEA-90 or anything, but we see it on the news. 4 And we know that this officer has been 5 arrested or whatever. But the smaller agency has not 6 done the LEA-90. Can we step in and say, hey, you 7 know, we know this happened. You're not reporting it, 8 can we take action without them doing the LEA-90 or 9 whatever? 10 Do we have like Ernie or somebody that would 11 go in and investigate this? You know, they're going 12 to act like it never happened, but we all know it 13 happened because it was on the six o'clock news. 14 MR. MEDINA: If I may, Mr. Chairman. 15 MR. KING: Go ahead. Mr. Medina. 16 MR. MEDINA: Since being in the position 17 when -- and it's been very few times that that's come 18 to my attention, we've taken action and we've started 19 the process. 20 If it comes to my attention, we do pay due 21 diligence to make sure that we do take action. We 22 conduct a brief inquiry, we request police reports, if 23 they were initiated. But we make sure that if it does 24 come to our attention and there's not an agency that 25 that's not reporting to us, we will take action on it.</p>

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<p>1 MR. KING: Thank you.</p> <p>2 MR. COON: Thank you.</p> <p>3 MR. KING: I'm guessing that -- the rule says</p> <p>4 the director upon being notified. But it doesn't say</p> <p>5 the director upon receipt of an LEA-90 or whatever.</p> <p>6 So notification probably is going to be broad enough</p> <p>7 where you could get notification for other purposes.</p> <p>8 MR. SCHULTZ: Actually, Mr. Chairman.</p> <p>9 MR. KING: Mr. Schultz.</p> <p>10 MR. SCHULTZ: I actually included that</p> <p>11 language specifically that way, because with an arrest</p> <p>12 there will be a filing in the court on an arrest or an</p> <p>13 indictment. So I think just that filing would stand</p> <p>14 on itself for notification to the director.</p> <p>15 MR. KING: Mark.</p> <p>16 MR. REYNOLDS: Mr. Chairman and Sheriff Coon,</p> <p>17 as a direct answer to your question, the answer is</p> <p>18 absolutely yes. We do not need an LEA-90 in order to</p> <p>19 proceed with the disciplinary action under the board's</p> <p>20 rules.</p> <p>21 MR. KING: Okay. Good. Other questions,</p> <p>22 Chief Coon?</p> <p>23 MR. COON: No, sir.</p> <p>24 MR. KING: Sheriff. I'm sorry. I've got too</p> <p>25 many chiefs here. Chief Betz.</p>	<p>1 MR. BETZ: Sheriff Coon already took my</p> <p>2 question. But I would like to go ahead and extend my</p> <p>3 thanks for Chief Schultz for undertaking this, because</p> <p>4 it's more than once we've been out there and somebody</p> <p>5 applies and we have nothing to go by.</p> <p>6 We can go back to a department, and they're</p> <p>7 basically hands off, they won't give you a reply of</p> <p>8 what's going on. So I want to thank you.</p> <p>9 MR. KING: Okay. Other questions? Okay.</p> <p>10 You know, I've had a chance to comment a little bit.</p> <p>11 With regard to that question about due process, you</p> <p>12 know, the way that it's written, it basically says</p> <p>13 that the director will initiate a revocation process</p> <p>14 as per 10.29.</p> <p>15 I mean that's got due process in it. Once</p> <p>16 you've initiated a revocation process, I think there's</p> <p>17 clearly due process there.</p> <p>18 And so I think the biggest concern I have</p> <p>19 that we should just think about a little bit, and it</p> <p>20 might not -- I don't think it's something that can't</p> <p>21 be overcome, is this issue about whether or not if</p> <p>22 there's a suspension, which is indeed some sort of a</p> <p>23 temporary action, whether there is some requirement</p> <p>24 for some process there.</p> <p>25 And we should think about that. We'll think</p>
<p>Page 28</p> <p>1 about that a little bit too. And it might be like we</p> <p>2 said, a simple sort of adding in some sort of trigger</p> <p>3 that says that if you want to contest the suspension,</p> <p>4 here is how you do it. And we can think about that a</p> <p>5 little bit. Mark.</p> <p>6 MR. REYNOLDS: Mr. Chair, Chief, if I may.</p> <p>7 I've had an opportunity to review it. As the board's</p> <p>8 counsel, I would be amiss to not bring up sort of my</p> <p>9 due process concerns, which is I do believe that when</p> <p>10 you take a suspension, due process rights for the</p> <p>11 officer do kick in, whether it's a suspension or</p> <p>12 revocation, just a suspension kicks in due process</p> <p>13 rights.</p> <p>14 My belief for that are twofold. One is the</p> <p>15 board's statute found at 29-7-13 in the NMSA. That</p> <p>16 says, "The board shall promulgate administrative</p> <p>17 procedures for suspension or revocation of a police</p> <p>18 officer's certification that include notice and an</p> <p>19 opportunity to be heard."</p> <p>20 So my concern in reviewing this is that, by</p> <p>21 writing a rule that provides for an immediate</p> <p>22 suspension without a notice and opportunity to be</p> <p>23 heard which seems to be called for under the statute,</p> <p>24 that we may not be complying with the statute.</p> <p>25 I think we can get over this. I think</p>	<p>Page 29</p> <p>1 there's ways to fix it. And the other thing is I do</p> <p>2 think Constitutional due process kicks in even on a</p> <p>3 suspension. You mentioned the federal law about you</p> <p>4 can't carry a firearm where you're a police officer.</p> <p>5 The federal law, that wouldn't trump</p> <p>6 Constitutional due process to somebody's right to</p> <p>7 their livelihood, which in this case is their</p> <p>8 certification to be a police officer. So I do believe</p> <p>9 there's due process concerns both under the United</p> <p>10 States, the state constitution, and the state statute.</p> <p>11 With that said, I do believe that there is a</p> <p>12 way to make this happen. I just believe -- it would</p> <p>13 be my counsel to this board that we should write in</p> <p>14 some sort of notice and opportunity to be heard, which</p> <p>15 I don't believe needs to be the full NCA process that</p> <p>16 you have for everything. The statute only requires</p> <p>17 notice and opportunity to be heard.</p> <p>18 I also do not believe, although I have to</p> <p>19 admit this would be subject to legal challenge, we</p> <p>20 would have to all be aware of that, that the notice</p> <p>21 and opportunity to be heard does not need to occur</p> <p>22 prior to issuing the suspension.</p> <p>23 So I think what we can do is issue the</p> <p>24 suspension. And then provide a notice and opportunity</p> <p>25 to be heard and, therefore, meet our statutory and due</p>



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<p>1 process grounds.</p> <p>2 But I would move this board to consider some</p> <p>3 amendments to your rule to provide for a post-decision</p> <p>4 to suspend notice and opportunity to be heard. I have</p> <p>5 a suggestion for that, if you want to hear it, Chief.</p> <p>6 MR. KORN: I'd like to hear it.</p> <p>7 MR. REYNOLDS: The lawyers always make it</p> <p>8 more complicated. So I know you write a rule that's</p> <p>9 one line long, and then the lawyers get ahold of it</p> <p>10 and turn it into several more lines.</p> <p>11 But my suggestion would be to write in a</p> <p>12 notice and opportunity to be heard process for the</p> <p>13 decision to suspend while the revocation process under</p> <p>14 the normal procedures occurs. So my suggestion would</p> <p>15 be to have -- still have a B where the chief has</p> <p>16 proposed under 10.29.1.11 B and then have a B 1 and a</p> <p>17 B 2. Okay.</p> <p>18 B 1 would have -- it would start with the</p> <p>19 language that the chief has here, "The Director upon</p> <p>20 being notified that a certified police officer or</p> <p>21 telecommunicator has been arrested or indicted on any</p> <p>22 felony charges shall immediately suspend the</p> <p>23 certification of the officer or telecommunicator." I</p> <p>24 would put a period there and deal with the revocation</p> <p>25 in 2.</p>	<p>1 And then I would say, "The procedures set</p> <p>2 forth in 10.29.1.12," which is our NCA process, which</p> <p>3 you'll see is the process that he talks about for</p> <p>4 using for the revocation. So those procedures shall</p> <p>5 not apply to the immediate suspension.</p> <p>6 "Notice of the suspension shall be served on</p> <p>7 the officer or telecommunicator. Upon service of the</p> <p>8 notice, the officer or telecommunicator shall have" --</p> <p>9 I suggested 15 days, but it could be anything --</p> <p>10 "15 days to request to be heard at the next regular</p> <p>11 meeting of the board.</p> <p>12 "At such meeting the officer or</p> <p>13 telecommunicator may present evidence, witness, or</p> <p>14 argument as to why their license should not be</p> <p>15 suspended. The board may deliberate and shall issue a</p> <p>16 decision at the meeting."</p> <p>17 And then have a B 2, which would start off</p> <p>18 the same way, "The Director upon being notified that a</p> <p>19 police officer has been arrested or indicted on any</p> <p>20 felony charges shall initiate the revocation process</p> <p>21 for 10.29.1.12."</p> <p>22 That's my suggestion. I do have a due</p> <p>23 process concern. I believe that we do not have to</p> <p>24 have a due process before the decision. I don't think</p> <p>25 we have to have the full NCA process that takes a long</p>
<p>1 time. But I do think we need to have a timely</p> <p>2 mechanism for the officer to have notice and then an</p> <p>3 opportunity to be heard on the suspension itself.</p> <p>4 And that was my suggestion to provide that</p> <p>5 right to the officer while still trying to accomplish</p> <p>6 what you were looking for in your rule.</p> <p>7 MR. KING: Can I ask one quick question.</p> <p>8 MR. REYNOLDS: Sure.</p> <p>9 MR. KING: Once the officer had been notified</p> <p>10 that they were suspended, even if they get into the</p> <p>11 process that you're recommending, where they come</p> <p>12 before the board, they would still be suspended all</p> <p>13 during that time period.</p> <p>14 MR. REYNOLDS: Correct.</p> <p>15 MR. KING: It's just that they would have</p> <p>16 some opportunity to present whatever argument that</p> <p>17 they had to the board.</p> <p>18 MR. REYNOLDS: I believe -- and again this is</p> <p>19 subject -- this is the part that I believe is subject</p> <p>20 to legal challenge. I think we can take that action.</p> <p>21 And then have the notice and opportunity to be heard</p> <p>22 post-action.</p> <p>23 I could see somebody challenging that. We'll</p> <p>24 defend it. But yes, the way that it's set up is they</p> <p>25 would be suspended. And that suspension would be in</p>	<p>1 place while we have this very abbreviated notice and</p> <p>2 opportunity to be heard that I believe should occur</p> <p>3 under our statutes and under the Constitution.</p> <p>4 MR. SHILLING: Mr. Chairman.</p> <p>5 MR. KING: Questions. I know that there's a</p> <p>6 gentleman out here that keeps raising his hand. When</p> <p>7 we're done with all this, I'll have some opportunity</p> <p>8 for public comment. Chief Shilling.</p> <p>9 MR. SHILLING: If the officer were to do</p> <p>10 that, everything he says and all the evidence he</p> <p>11 presents before the board is a matter -- it's in the</p> <p>12 public realm, right?</p> <p>13 MR. REYNOLDS: Correct.</p> <p>14 MR. SHILLING: So it would potentially be</p> <p>15 used against him or whatever in the pending criminal</p> <p>16 trial which is usually six, eight, ten months down the</p> <p>17 road.</p> <p>18 So I mean no one is going to do it is what I'm</p> <p>19 getting at, because they're going to potentially</p> <p>20 incriminate themselves in a public forum with a</p> <p>21 pending criminal felony charge before them. So is</p> <p>22 there any -- would there be any basis for a legal</p> <p>23 challenge on those grounds from the officer?</p> <p>24 MR. REYNOLDS: Well, I think -- I suppose you</p> <p>25 could have a challenge, Chief. But I would say that</p>

1 if they effectively -- you didn't use these words.  
 2 But if they don't do it because they don't  
 3 want to incriminate themselves so they effectively  
 4 take the Fifth by not exercising the process, I don't  
 5 know -- I would be willing to defend the case that we  
 6 should be able to proceed with this even though they  
 7 took the Fifth or they didn't -- you know, they chose  
 8 not to incriminate themselves in this process.

9 It should be pointed out that that would be  
 10 the case -- that could be the case if you proceed with  
 11 the revocation and your hearing on the revocation  
 12 occurs prior to the criminal proceeding. You would  
 13 have the same situation there also.

14 MR. SHILLING: Right. Okay. Thank you.  
 15 That's all, Mr. Chairman. Thanks.

16 MR. KING: Other questions? Mr. Korn.

17 MR. KORN: Mr. Reynolds, hi. Thank you  
 18 for -- thanks for thinking through this and offering  
 19 your suggestions. A question for you, although I like  
 20 your suggestion. Is not the revocation process that  
 21 the director would be initiating a matter of notice  
 22 and due process in itself? So if that's true,  
 23 wouldn't this be kind of duplicating itself?

24 MR. REYNOLDS: Mr. Chair and Mr. Korn, I  
 25 believe that's the due process or the notice and

1 what Mr. Reynolds has proposed, do you have an opinion  
 2 on that or a position?

3 MR. SCHULTZ: Actually, no. I would support  
 4 that additional language. And just kind of thinking  
 5 this through, you know, we've all been involved in law  
 6 enforcement for many, many years.

7 It's not uncommon for your driver's license  
 8 to be suspended prior to that due process. If you  
 9 fail to meet terms and conditions, not pay a citation,  
 10 there's a whole series of things. Your driver's  
 11 license is immediately suspended until you get the  
 12 problem resolved.

13 And that's basically what we're saying. If  
 14 you're arrested or indicted, you need to be suspended  
 15 until you can get the problem resolved. And during  
 16 that interim period of time, you should not be allowed  
 17 to go out and act as a full service peace officer,  
 18 because obviously your credibility is in question.

19 MR. KORN: And if I may, I think that drives  
 20 the point home, Chief, because really I look at this  
 21 as being a privilege just like a driver's license that  
 22 has to be preserved and maintained by the person that  
 23 has the privilege. And putting it in those terms kind  
 24 of puts the point on the exclamation of what we're  
 25 trying to achieve.

1 opportunity to be heard on the revocation. I'm afraid  
 2 that if we proceed with the process to -- that we have  
 3 under the rules currently to issue an NCA and all  
 4 that, the informal hearing and then the formal hearing  
 5 on the revocation, I don't believe -- my concern,  
 6 Mr. Korn, is that's not due process on the decision to  
 7 suspend immediately.

8 And, therefore, it's not a duplication. I  
 9 think -- I believe -- it's my opinion, and I think  
 10 there could be different opinions, I should always  
 11 make that clear, that a court would find that the  
 12 right to -- the due process right that I believe  
 13 exists kicks in at the suspension and not just the  
 14 decision to revoke. Does that answer your question?

15 MR. KORN: That's a good point. And at the  
 16 very least we're going overboard to be fair.

17 MR. REYNOLDS: I think this is -- yeah.  
 18 Well, I'm legal counsel. My job is to try to keep you  
 19 out of court and to win the cases that do go to court.  
 20 And this is my opinion as to the best way to set us up  
 21 to be able to successfully defend a challenge to it.

22 MR. KORN: Thank you.

23 MR. KING: Other questions for Mr. Reynolds  
 24 or Chief Schultz?

25 MR. KORN: I'm sorry. Chief, in regards to

1 Also I think your point about how officers  
 2 that are indicted go as gypsy cops to other  
 3 departments has been anathema to this board for years.  
 4 And I think your solution here puts that to rest as  
 5 well. So again I compliment you on this simple  
 6 solution.

7 MR. KING: Thank you. Is that all, Mr. Korn?

8 MR. KORN: Yes, sir. Thank you.

9 MR. KING: Other questions? Before we take a  
 10 motion, there is a gentleman out here that wants to  
 11 say something. We usually allow public comment for a  
 12 few minutes. So go ahead.

13 MR. RADOSEVICH: Thank you, Mr. Chairman,  
 14 Board. My name is Fred Radosevich from the Village of  
 15 Los Ranchos. And I commend Chief Schultz for this. I  
 16 think it's a great idea. But I think if you just take  
 17 off that you will initiate the proceedings to  
 18 revoke, that solves your problem.

19 You're going to suspend their license until  
 20 whatever outcome comes. Because under the following  
 21 things, you can only suspend or revoke their license  
 22 upon a conviction. If you look -- if you look at the  
 23 next sentence in the rule, that's one of the causes  
 24 for revocation of your license.

25 So I think, if you just say, you know, we're

1 going to suspend your license. You have a due  
2 process. You can still come in and whatever. But  
3 we're just going to suspend it until the hearings are  
4 over with. Then you can initiate the revocation at  
5 that point.

6 I would think that would be a little bit  
7 cleaner. I'm not a lawyer or anything. But I think  
8 that would be a little bit cleaner, because when you  
9 start the initiation of the revocation, you start a  
10 time limit process of certain things.

11 And I think that that's where you -- because  
12 let's face it, we know people that are under  
13 indictment for four or five years sometimes depending  
14 on the court process. So if you just suspend it that  
15 entire time until that process is done, then you can  
16 initiate the revocation process.

17 That's something I think you might want to  
18 look at. Thank you.

19 MR. KING: Thank you, Mr. Radosevich. Okay.  
20 Any other discussion? All right. I think Mark can  
21 let us know the rule. Sometimes we do rulemakings and  
22 I have a little script up here.

23 But I assume that next we want to place the  
24 rule up for publication. We have to send it to  
25 Records and Archives or whatever and they have to

1 MR. MEDINA: Mr. Chairman, they do have a  
2 schedule for that. And we can -- we have a direct  
3 contact with them. And we can determine what that  
4 schedule is and meet their schedule.

5 MR. KING: They publish every two weeks,  
6 don't they?

7 MR. REYNOLDS: Yes, twice a month. I think  
8 on like the 1st and 15th or something like that. So  
9 perhaps we could get it in in time for the September  
10 15th. I'm guessing it's around that time.

11 MR. KING: The 15th would be sufficient,  
12 yeah.

13 MR. REYNOLDS: And I think that would be  
14 about enough time for the 30-day notice of the rule  
15 hearing that would occur at the October meeting.

16 Now, I need to inform all the members of the  
17 board. And I was actually looking at this last night.  
18 That is the process for a rulemaking that I know will  
19 be approved by a court. It's the process of a  
20 rulemaking that's set forth in the Uniform Licensing  
21 Act and has been tested as a proper rule promulgation  
22 by boards and agencies.

23 What's interesting is that this board isn't  
24 under the Uniform Licensing Act. So what I have to --  
25 you know, as full disclosure, you could make an

1 publish it. Mark, can you talk to us a little bit  
2 about the process, what we need to do.

3 MR. REYNOLDS: Sure. Mr. Chair and Members  
4 of the Board, the way I believe this should work, and  
5 I'll tell you why I say should instead of must work in  
6 a little bit, is that the board, you know, takes a  
7 vote on proposing this regulation. And the staff then  
8 has that published in the New Mexico Register with the  
9 state records center.

10 I believe that there should be a 30-day  
11 period for public notice and comment. And then I  
12 think we might be able to get it in in time for the  
13 October meeting. You would have it on the agenda for  
14 the October meeting.

15 We would have a rule hearing set as an agenda  
16 item on the October meeting in which the board can  
17 consider any public comment that has come in, allow  
18 people to also comment on it, and then deliberate and  
19 make a decision on it at the October meeting.

20 I'm just not 100 percent positive. The  
21 records center has rules as to when you have to have  
22 them in. And I'm not 100 percent positive that the  
23 time period can occur that the records center needs  
24 before the October hearing. But I think so. Louis,  
25 do you have any idea?

1 argument that you do not have to go through that whole  
2 process.

3 But I believe that if you don't go through  
4 that process, then your rule promulgation would be  
5 subject to challenge. And a court may strike it down.  
6 And if you go through that process, I can guarantee  
7 that your rule will stand for not procedural reasons.  
8 So I wanted to make that clarification.

9 MR. KING: I don't know that that's been  
10 raised to me before because we've always just followed  
11 the process. All right.

12 My recommendation, especially since Chief  
13 Schultz said he was okay with that language, would be  
14 for Mr. Reynolds to provide the language to our  
15 reporter. But he read it out loud so I think we all  
16 know what it is.

17 And the good news about that is that whatever  
18 we publish, I mean it's subject to comment. It  
19 frankly would be subject to a comment like  
20 Mr. Radosevich has, that we shouldn't include the  
21 revocation process here.

22 And I think, because of the way the rule is  
23 crafted, that if we were to decide in October that we  
24 didn't want that revocation process, we could take  
25 that out. And it would still be fine, because there's

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<p>1 still plenty of public notice about what the 2 possibilities are or whatever. So I think that that 3 will give us ample time to discuss that.</p> <p>4 MR. REYNOLDS: Mr. Chair, everybody should be 5 aware that one good thing about this process is it 6 gives you time to look at it and get the public 7 comment. And you could still make changes to it at 8 the October meeting after you have the rule hearing.</p> <p>9 The legal standard is that the change that 10 you make is a logical outgrowth, that's lawyer speak, 11 of the rule that you propose. And so I'll be here to 12 help you determine to make sure, if you do want to 13 make changes in October, the change that you want to 14 make is a logical outgrowth of what has been proposed.</p> <p>15 MR. COON: Does this have to go in front of 16 the legislature?</p> <p>17 MR. REYNOLDS: No, Sheriff, it does not need 18 to go in front of the legislature. This falls under 19 your rulemaking authority that the legislature has 20 already given you.</p> <p>21 MR. KING: And back to the point that I was 22 making, that if we have the due process language that 23 Mark recommended that we put in here for the 24 suspension, then I don't think you have to worry about 25 the statue.</p>	<p>1 If we were to decide to do it without that, 2 then one of the ways you could fix that would 3 potentially be go to change the statute so that it 4 only says that you have due process for revocation and 5 it doesn't include that word about suspension. So 6 that's another way to fix it.</p> <p>7 MR. REYNOLDS: Yes. But under my opinion 8 there could be different opinions. That statute could 9 be subject to challenge under Constitutional due 10 process.</p> <p>11 MR. KING: That's true, yes. You raised that 12 Constitutional due process. But I actually think that 13 this fixes both of those things probably. All right.</p> <p>14 So that being said does anybody want 15 Mr. Reynolds to read that rule again? We're going to 16 provide you a copy of it for the record. Is everyone 17 comfortable with that? You all heard what it is.</p> <p>18 And we can have that discussion about whether 19 15 days is the right time or it should be three days 20 or 20 days or whatever. I mean that's one of those 21 kinds of things that could be discussed at our next 22 meeting.</p> <p>23 MR. REYNOLDS: Yes.</p> <p>24 MR. KING: That being said I will accept a 25 motion that we propose to have this rule change</p>
<p>Page 44</p> <p>1 published with the anticipation that we will take 2 action on it at our October 23rd meeting.</p> <p>3 MR. KORN: I would so move.</p> <p>4 MR. COON: I second.</p> <p>5 MR. KING: Second by Sheriff Coon. All in 6 favor say aye. 7 (Those in favor so indicate.)</p> <p>8 MR. KING: Any opposed? All right. None 9 opposed. So we'll take that action.</p> <p>10 So various members of the public that are out 11 there today, you know, be looking for this rule. 12 We'll try and make agencies aware of it I'm sure in 13 various ways.</p> <p>14 And we welcome comment and discussion about 15 these issues. And we will add it to our agenda for 16 our October 23rd meeting, where we'll take a final 17 vote.</p> <p>18 Is there any other business to come before 19 the board? Excellent discussion today. Thank you 20 all. Thanks to those of you who came a long ways to 21 the meeting. We appreciate that.</p> <p>22 ITEM NO. 5: ADJOURNMENT</p> <p>23 MR. KING: I'll take a motion to adjourn.</p> <p>24 MR. COON: Mr. Chairman, I make a motion we 25 adjourn.</p>	<p>Page 45</p> <p>1 MR. BETZ: I'll second. 2 MR. KING: All in favor say aye. 3 (Those in favor so indicate.) 4 MR. KING: All opposed. 5 Thank you, gentlemen. 6 (At 10:50 a.m. the hearing was adjourned.)</p>

1  
2 REPORTER'S CERTIFICATE  
3 I, JAN A. WILLIAMS, New Mexico CCR #14, DO  
4 HEREBY CERTIFY that on August 28, 2012, the  
5 proceedings in the above captioned matter were taken  
6 before me, that I did report in stenographic shorthand  
7 the proceedings set forth herein, and the foregoing  
8 pages are a true and correct transcription to the best  
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14 final disposition of this case in any court.  
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1 RECEIPT  
2 DATE: August 28, 2011  
3 JOB NUMBER: (5123K) JAW  
4 WITNESS NAME: Special Board Meeting  
5 CASE CAPTION: In re: NMAC 10.29.1.11  
6 \*\*\*\*\*  
7 ATTORNEY: DPS/MEDRANO  
8 DOCUMENT: Transcript / Exhibits / Disks / Other \_\_\_\_\_  
9 DATE DELIVERED: \_\_\_\_\_ DEL'D BY: \_\_\_\_\_  
10 REC'D BY: \_\_\_\_\_ TIME: \_\_\_\_\_  
11 \*\*\*\*\*  
12 ATTORNEY:  
13 DOCUMENT: Transcript / Exhibits / Disks / Other \_\_\_\_\_  
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