

IDAHO PEACE OFFICER STANDARDS & TRAINING PROCEDURE

12.27 DECERTIFICATION HEARINGS BEFORE THE HEARING OFFICER

A. General

This procedure covers Peace Officer Standards and Training Office of Professional Responsibility (POST OPR) and the Hearing Officer's authority and responsibilities governing officer decertification proceedings. Additional authority for these proceedings is found in Idaho Code §§ 19-5109(4), 67-5201 et seq. and IDAPA 11.11.01.

B. Definitions and General Provisions

“Peace Officer” means any person who has been certified in Idaho to be an officer (patrol, adult detention, adult correction, reserve, adult misdemeanor probation, felony probation and parole, juvenile detention, juvenile correction, juvenile probation, or emergency communications).

“Agency” means for the purposes of this procedure, Peace Officer Standards and Training.

“Agency Head” means for purposes of this procedure, the Peace Officer Standards and Training Council.

“Council” or “POST Council” means the Peace Officer Standards and Training Council.

“Hearing” means the proceeding that results in the issuance of a preliminary order.

“Hearing Officer” means the person appointed by the agency to hear the contested case.

“Party” means the peace officer named in an administrative procedure for decertification, including their representative and the POST Office of Professional Responsibility.

“POST OPR” means the Peace Officer Standards and Training Office of Professional Responsibility.

C. Decertification

1. Decertification action is initiated after the investigation and review process outlined in POST procedure 12.26 Conducting Decertification Investigations is concluded with a recommendation for decertification.
2. All actions and timelines for the decertification process are carried out under the due process requirements of IDAPA rule 11.11.01.112, Decertification Proceedings.
3. All written communication between POST and the subject of a decertification action is by certified mail to the officer's last known address, return receipt requested. Exceptional circumstances may preclude this method of delivery. Other methods, including email, counsel, in-person, or non-traditional delivery means may be required. In this case, all efforts of communication with the subject of an investigation should be thoroughly documented.

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4. The OPR manager prepares the *Notice of Intent to Decertify* letter, attaching a copy of IDAPA rule 11.11.01.112 and a blank relinquishment form:
 - a. the notice and attachments are mailed to the officer;
 - b. the OPR Manager confirms receipt;
 - c. the officer may sign and return the relinquishment form;
 - d. the officer may fail to respond within 14 days of receiving the notice;
 - e. the officer may respond in writing, giving reasons why the intended action should not be taken;
or
 - f. the officer may request to meet with the POST Division Administrator (POST DA) to present a rebuttal.

D. Officer Signs and Returns Voluntary Relinquishment of Certification(s) Form

When the officer signs and returns the Voluntary Relinquishment of Certification(s) form, the OPR manager follows the process for closing a case as set forth in POST procedure 12.26 Conducting Decertification Investigations, section D. Voluntary Relinquishment of Certification(s)

E. Officer Fails to Respond

1. When the 14-day period to respond (after receipt) to the Notice of Intent to Decertify letter passes without a response from the officer, the OPR manager:
 - a. prepares a POST DA decision letter to the officer, advising:
 - i. when the *Notice of Intent to Decertify* letter was received or delivered, or unclaimed;
 - ii. what the allegations were;
 - iii. that there was a 14-day period to respond;
 - iv. that the POST DA concludes the conduct occurred and warrants decertification; and
 - v. that a final determination is made to decertify the officer;
 - b. the OPR Manager sets 14-day tickler from the date of the decision letter.
2. If the officer fails to respond to the POST DA decision letter within 14 days, the decision becomes a Final Order, and a 28-day period is set to allow the officer to petition the Judicial Court of Appeals.
3. If the officer fails to respond after the POST DA decision has become final within 28 days, the OPR manager authors a notification letter confirming the subject's certification revocation. Additionally, the OPR manager updates the case file and prepares and scans all relevant documents into the digital OPR repository. The POST Council Management Assistant (MA) updates the appropriate officer records regarding revocation of all certifications held and enters the information into the National Decertification Index.

F. Officer Makes a Written Response

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1. When the officer responds in writing within the 14-day period, the POST DA considers the information provided and responds to the officer with a POST DA's decision letter within 28 days of receipt of the letter:
 - a. if the decision is not to pursue decertification, the case is closed, and the file is prepared for secure storage; and a notification letter is sent to the officer and agency head.
 - b. if the decision is to pursue decertification, the letter informs the officer of the right to appeal the decision to a hearing officer in accordance with IDAPA rule 11.11.01.112;
 - c. if the officer does not appeal the POST DA's decision within 14 days, it becomes a Final Order following the process in item E.3 above is followed.
2. If the officer appeals the POST DA's decision within the 14-day period, a decertification hearing is scheduled as set forth in Section H. The Decertification Hearing, of this procedure.

G. Officer Requests to Meet with the POST Division Administrator

1. When the officer requests to meet with the POST DA to present oral or written documentation as to reasons why the decertification action should not be taken, the OPR manager:
 - a. confirms, in writing, the officer's request for a meeting;
 - b. schedules/coordinates an acceptable meeting time to occur no sooner than 14 days from the confirmation;
 - c. informs the officer of the meeting date, time, and location.
2. The OPR manager may provide the officer and/or his attorney (if applicable) with copies of the decertification investigation record.
3. After the meeting occurs, or if the officer fails to appear for the meeting, the POST DA responds to the officer with a POST DA's decision letter within 28 days:
 - a. if the decision is not to pursue decertification, the case is closed, and the file is prepared for secure storage; and a notification letter is sent to the officer and agency head.
 - b. if the decision is to pursue decertification, the letter informs the officer of the right to appeal the decision to a hearing officer in accordance with IDAPA rule 11.11.01.112;
 - c. if the officer chooses not to appeal the POST DA's decision within 14 days, that decision becomes a Final Order and the process in item E.3. above is followed.
4. When the decision is to pursue decertification and the officer fails to respond to the POST DA decision letter within the 28-day appeal period, the OPR manager follows closing processes.
5. The MA updates the appropriate officer records regarding revocation of all certifications held by the officer; and enters the information into the National Decertification Index.

H. Request for Hearing.

The officer must request a hearing in writing and shall include a brief statement of the issues upon which the officer contends a hearing is required.

I. Computation of Time.

Whenever statute, these or other rules, order, or notice requires an act to be done within a certain number of days of a given day, the given day is not included in the count, but the last day of the period so computed is

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included in the count. If the day the act must be done is Saturday, Sunday or a legal holiday, the act may be done on the first day following that is not a Saturday, Sunday or a legal holiday.

J. Prehearing Matters.

1. Upon receipt of a request for hearing, the MA shall assign the matter to a hearing officer for hearing, and:
 - a. prepare a letter to both counsels (copied to the hearing officer) identifying the hearing officer;
 - b. compile and provide decertification documentation (agency records) to the DAG, officer (and counsel if appropriate) and hearing officer; and
 - c. work with the hearing officer to facilitate pre-hearing and hearing logistics, such as scheduling the date, meeting room, and court reporter.
2. Pursuant to Section 67-5252, Idaho Code, any party shall have a right to one disqualification without cause of any person serving or designated to serve as a hearing officer and any party shall have a right to move to disqualify a hearing officer for bias, prejudice, interest, substantial prior involvement in the case other than as a hearing officer, status as an employee of the agency hearing the contested case, lack of professional knowledge in the subject matter of the contested case, or any other reason provided by law or for any cause for which a judge is or may be disqualified. Any party may, within 14 days, petition for the disqualification of a hearing officer after receiving notice that the officer will preside at a contested case.

K. Hearing Officer Authority and Responsibilities. The scope of hearing officers' authority may be restricted in the appointment by the agency.

1. Scope of Authority. Except as limited by IDAPA Chapter 11.11.01 and Procedure 12.27, hearing officers have the standard scope of authority, which is:
 - a. Authority to schedule cases assigned to the hearing officer, including authority to issue notices of prehearing conference and of hearing, as appropriate;
 - b. Authority to schedule and compel discovery, when discovery is authorized before the agency, and to require advance filing of expert testimony, when authorized before the agency;
 - c. Authority to act upon any prehearing motion.
 - d. Authority to preside at and conduct hearings, accept evidence into the record, rule upon objections to evidence, and otherwise oversee the orderly presentations of the parties at hearing; and
 - e. Authority to issue a written decision of the hearing officer, including a narrative of the proceedings before the hearing officer and findings of fact, conclusions of law, and preliminary orders by the hearing officer.
2. Attorneys' Fees and Investigative Costs. The hearing officer shall address attorneys' fees and investigative costs as required by Idaho Code § 12-117(5) and in conformity with Idaho Rules of Civil Procedure Rule 54. When the preliminary order awards costs and/or fees to a party, that party shall have fourteen (14) days from the service date of the final order to file necessary papers (e.g., a memorandum of costs, affidavits, exhibits, etc.) quantifying and otherwise supporting costs or fees, or both, that will be claimed or a motion to extend the time to file for costs and fees.
3. The hearing officer has no authority to declare a statute or rule unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute or rule unconstitutional, or when a federal authority has preempted a state statute or rule, and the

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hearing officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the hearing officer, then the hearing officer shall apply the precedent of the court or the preemptive action of the federal authority to the proceeding before the hearing officer and decide the proceeding before the hearing officer in accordance with the precedent of the court or the preemptive action of the federal authority.

4. The hearing officer shall have the power to subpoena witnesses, administer oaths, examine evidence and witnesses and request additional information from the parties. All parties and agency staff may appear at hearing or argument, introduce evidence, examine witnesses, make, and argue motions, state positions, and otherwise fully participate in hearings or arguments.
5. *Ex parte* communications.
 - a. Unless required for the disposition of a matter specifically authorized by statute to be done *ex parte*, during the pendency of a contested case the hearing officer shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication.
 - b. The hearing officer may communicate *ex parte* with a party concerning procedural matters (e.g., scheduling).
 - c. If the hearing officer becomes aware of a written *ex parte* communication regarding any substantive issue from a party or representative of a party during a contested case, he or she shall place a copy of the communication in the file for the case and distribute a copy of it to all parties of record or order the party providing the written communication to serve a copy of the written communication upon all parties of record.
 - d. Written communications from a party showing service upon all other parties are not *ex parte* communications.

L. Pleadings and Their Service

1. Party Designation. POST OPR shall be designated as the complainant and the officer against whom the action is sought shall be designated as the respondent in all pleadings before the hearing officer. Proper names of each party shall be used in all pleadings.
2. Filing of Pleadings. All pleadings and documents intended to be part of an agency record must be filed with the hearing officer and the agency, either by regular mail, by email or other electronic means stipulated to by the parties and approved by the hearing officer. Pleadings and documents containing text that are sent by email must be in a searchable .pdf format.
 - a. Defective, insufficient, or late pleadings may be returned or dismissed with or without a motion.
 - b. The hearing officer may allow any pleadings to be amended, corrected, withdrawn, or any omission to be supplied upon stipulation or upon prior motion for leave to file submitted by the requesting party. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded.
3. Service of Pleadings. All pleadings and documents intended to be part of the agency record for decision must be served upon the representatives of each party of record. When a document has been filed by email, it must likewise be served upon all other parties to the party's last known email address.
4. Addresses to be Used for Service. Unless approved by the hearing officer for other electronic means stipulated to by the parties, service of all notices to be given, orders or other documents under these procedures shall be by personal service, email, or by U.S. mail, regular or certified, with postage prepaid, addressed to a party's last known address. Service of documents or pleadings upon the agency

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shall be sent to:

POST Council Management Assistant
700 S. Stratford Drive
Meridian, ID 83642
Kelsey.woodward@post.idaho.gov

Office of the Idaho Attorney General
ISP Legal Unit
700 S. Stratford Drive
Meridian, ID 83642
isplegal@isp.idaho.gov

5. **Methods of Service.** Unless otherwise provided by statute or the agency's rules, any party or the officer designated by the agency to serve rules, notices, summonses, complaints, or orders issued by the agency may serve these documents by electronic mail, regular mail, or by certified mail- return receipt-requested, to a party's last known mailing address.
6. **When Service Complete.** Unless otherwise provided by statute, these rules, order or notice, service of orders and notices is complete when a copy, properly addressed and stamped, is deposited in the United States mail or the Statehouse mail, if the party is a State employee or State agency, or when there is an electronic verification that an e-mail has been sent.
7. **Persons Served.** The officer designated by the agency to serve documents in a proceeding must serve all orders and notices in a proceeding on the representatives of each party designated pursuant to these rules for that proceeding and upon other persons designated by these rules or by the agency.
8. **Proof of Service.** Every notice and order that the agency serves in a contested case must be accompanied by a proof of service stating the service date, each party or other person who was served, and the method of service. The agency may use a proof of service similar to those used by parties as set forth in subsection 9. below.
9. **Proof of Service by a Party.** Every document that a party files with and intends to be part of the agency record must be attached to or accompanied by proof of service by the following or similar certificate:

I HEREBY CERTIFY (swear or affirm) that I have this _____ day of _____, 20____, served the foregoing (name(s) of document(s)) upon all parties of record in this proceeding, (by delivering a copy thereof in person: (list names)) (by mailing a copy thereof, properly addressed with postage prepaid, to: (list names and addresses) (by e-mail to: (list names and e-mail addresses))).

(Signature)

10. The initial pleading of each party at the formal stage of a contested case (be it an application or claim or appeal, petition, complaint, protest, motion, or answer) must name the party's representative(s) for service and state all the representative's(s') address(es) for purposes of receipt of all official documents. Service of documents on the named representative(s) is valid service upon the party for all purposes in that proceeding. If no person is explicitly named as the party's representative, the first person signing the pleading will be considered the party's representative.
11. **Service on Representatives of Parties and Other Persons.** From the time a party files its initial pleading in a contested case, that party must serve, and all other parties must serve all future documents intended

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to be part of the agency record upon all other parties' representatives designated pursuant to Subsection 10 above, unless otherwise directed by order or notice or by the hearing officer on the record. The hearing officer may order parties to serve past documents filed in the case upon those representatives. The hearing officer may order parties to serve past or future documents filed in the case upon persons not parties to the proceedings before the agency.

M. Appearances and Representation.

1. The hearing officer at a formal hearing or prehearing conference will identify the representatives of all parties or other persons. In all proceedings in which the agency staff will participate, or any report or recommendation of the agency staff (other than a preliminary order prepared by a hearing officer) will be considered or used in reaching a decision, at the timely request of any party the agency staff must appear at any hearing and be available for cross-examination and participate in the hearing in the same manner as a party.
2. Appearances and Representation. To the extent authorized or required by law, appearances and representation of parties or other persons at formal hearing or prehearing conference must be as follows:
 - a. A natural person may represent himself or herself or be represented by a duly authorized employee, attorney, family member or next friend.
 - b. POST OPR shall be represented by a deputy attorney general.
 - c. Representatives. The representatives of parties at hearing, and no other persons or parties appearing before the agency, are entitled to examine witnesses and make or argue motions.
3. Withdrawal of Parties. Any party may withdraw from a proceeding in writing or at hearing.
4. Substitution of Representative. A party's representative may be changed, and a new representative may be substituted by notice to the agency as set out in Section F (4) above and to all other parties so long as the proceedings are not unreasonably delayed as determined by the hearing officer.
5. Withdrawal of Representative. Persons representing a party who wish to withdraw their representation of a party in a proceeding before the agency must immediately file in writing a motion to withdraw and serve that motion on the party represented and all other parties. The hearing officer shall decide whether good cause exists to grant the motion.
6. Conduct Required. Representatives of parties and parties appearing in a proceeding must conduct themselves in an ethical and courteous manner.

N. Pleadings and Briefs

1. Motions Defined. All other pleadings requesting the hearing officer to take any other action in a contested case, except consent agreements or pleadings specifically answering other pleadings, are called "motions."
2. Form and Contents. Motions should:
 - a. Fully state the facts upon they are based;
 - b. Refer to the particular provision of statute, rule, order, notice, or other controlling law upon which they are based; and
 - c. State the relief sought.
3. Answers to Motions. Objections to motions may be filed. The party objecting to the motion must do so within 14 days of service of the motion or move for, and be granted, additional time to object. The party filing the motion may respond to the objection, if needed, no later than seven days from the service date of the objection.

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4. Briefs and Memoranda. The hearing officer shall allow all parties an opportunity to file memorandums or briefs in support or in opposition to decertification upon conclusion of the hearing or a motion and may allow oral argument before issuing an order on any motion or a preliminary order.
5. Oral Argument -- Time for Filing. If the moving party desires oral argument or hearing on the motion, it must state so in the motion.

O. Discovery

1. Methods of Discovery. The methods of discovery recognized by these rules in contested cases are:
 - a. Requests for Production;
 - b. Written Interrogatories;
 - c. Requests for Admission; and
 - d. Subpoenas;
2. Rules of Civil Procedure. Unless otherwise provided by statute, rule, order or notice, when discovery is authorized before the agency, the scope of discovery, other than statutory inspection, examination, investigation, etc., is governed by the Idaho Rules of Civil Procedure (see Idaho Rule of Civil Procedure 26(b)).
3. Discovery Schedule. The parties have a right to engage in discovery but may agree to forego or limit discovery. Except as agreed by the parties, the hearing officer shall provide a schedule for discovery in the prehearing order and any order compelling discovery, but the order compelling and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure.
4. Subpoenas. Only the hearing officer may issue subpoenas as authorized by statute, upon a party's motion or upon its own initiative. The hearing officer upon motion to quash made promptly, and in any event, before the time to comply with the subpoena, may quash the subpoena, or condition denial of the motion to quash upon reasonable terms.
5. Answers to Requests for Production, Written Interrogatories, and Requests for Admission. Answers to production requests or written interrogatories and to requests for admission shall be filed or served as provided by the order compelling discovery. Answers must conform to the requirements of the Idaho Rules of Civil Procedure. The order compelling discovery may provide that voluminous answers to requests need not be served so long as they are made available for inspection and copying under reasonable terms.
6. Filing and Service of Discovery-Related Documents. Cover letters stating that production requests, written interrogatories or requests for admission have been served, cover letters stating answers to production requests, written interrogatories, or requests for admission have been served or are available for inspection and objections to discovery must be filed and served as provided in the order compelling discovery.
7. Exhibit Numbers. Exhibits offered by POST OPR shall be numerical. Exhibits offered by the officer shall be alphabetical.
8. Prepared Testimony and Exhibits. Order, notice or rule may require a party or parties to file before hearing and to serve on all other parties prepared expert testimony and exhibits to be presented at hearing. Assigned exhibits numbers should be used in all prepared testimony.
9. Sanctions for Failure to Obey Order Compelling Discovery. The hearing officer may impose all sanctions recognized by statute or rules for failure to comply with an order compelling discovery.
10. Protective Orders. As authorized by statute or rule, the hearing officer may issue protective orders limiting access to information generated during settlement negotiations, discovery, or hearing.

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P. Prehearing Conferences

1. Purposes of Prehearing Conferences. The hearing officer shall by order or notice issued to all parties convene a prehearing conference in a contested case for the purposes of formulating or simplifying the issues, obtaining concessions of fact or identification of documents to avoid unnecessary challenges to proof, scheduling discovery when discovery is authorized before the hearing officer, arranging for the exchange of proposed exhibits or prepared testimony, limiting witnesses, discussing settlement offers or making settlement offers, scheduling hearings, establishing procedure at hearings, and addressing other matters that may expedite orderly conduct and disposition of the proceeding or its settlement.
2. Notice of Prehearing Conference. Notice of the place, date and hour of a prehearing conference will be served at least 14 days before the time set for the prehearing conference, unless the hearing officer finds it necessary or appropriate for the conference to be held earlier. Notices for prehearing conference must contain the same information as notices of hearing with regard to an agency's obligations under the American with Disabilities Act.
3. Record of Conference. Prehearing conferences may be held formally (on the record) or informally (off the record) according to order or notice. Agreements by the parties to the conference may be put on the record during formal conferences or may be reduced to writing and filed with the hearing officer after formal or informal conferences.
4. Orders Resulting from Prehearing Conference. The hearing officer may issue a prehearing order or notice based upon the results of the agreements reached at or rulings made at a prehearing conference. A prehearing order will control the course of subsequent proceedings unless modified by the hearing officer for good cause. The prehearing order shall set forth the time, date, and location of the evidentiary hearing.

Q. Evidentiary Hearings

1. Requested Assistance. If the parties and other persons require assistance of the kind that the agency is required to provide under the Americans with Disabilities Act (e.g., sign language interpreters, Braille copies of documents) in order to participate in or understand the hearing, the agency will supply that assistance upon request a reasonable number of days before the hearing. The hearing officer's prehearing order shall also explicitly state the number of days before the hearing that the request for assistance must be made.
2. How Hearings are Held. Hearings may be held in person, by telephone, or other electronic means, so long as each participant in the hearing has an opportunity to participate in the entire proceeding. All persons attending a hearing whether in person, by telephone or other electronic means, must conduct themselves in a respectful manner.
3. Conference at Hearing. In any proceeding the hearing officer may convene the parties before hearing or recess the hearing to discuss formulation or simplification of the issues, admissions of fact or identification of documents to avoid unnecessary proof, exchanges of documents, exhibits or prepared testimony, limitation of witnesses, establishment of order of procedure, and other matters that may expedite orderly conduct of the hearing. The hearing officer shall state the results of the conference on the record.
4. Preliminary Procedure at Hearing. Before taking evidence, the hearing officer will call the hearing to order, take appearances of parties, and act upon any pending motions or petitions. The hearing officer may allow opening statements as necessary or appropriate to explain a party's presentation.

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5. Stipulations. Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the hearing officer or presented at hearing or by oral statement at hearing. A stipulation binds all parties agreeing to it only according to its terms. The hearing officer may regard a stipulation as evidence or may require proof by evidence of the facts stipulated.
6. Order of Procedure. The hearing officer may determine the order of presentation of witnesses and examination of witnesses.
7. Testimony Under Oath. All testimony presented in formal hearings will be given under oath. Before testifying each witness must swear or affirm that the testimony the witness will give before the hearing officer is the truth, the whole truth, and nothing but the truth. Prior to submitting testimonial evidence, the person that is the subject of the contested case shall receive an administrative warning requiring that he provide testimony truthfully, and to acknowledge his understanding that no statements provided shall be used against him in criminal proceedings, based on *Garrity v. New Jersey*, 385 U.S. 493 (1967).
8. Procedure On Prehearing Motions. The hearing officer may consider and decide prehearing motions with or without oral argument or hearing. If oral argument or hearing on a motion is requested and denied, the hearing officer must state the grounds for denying the request.

R. Evidence.

1. Prior to submitting testimonial evidence before the hearing officer, the officer, against whom these proceedings are against, shall receive an administrative warning requiring that he provide testimony truthfully, and to acknowledge his understanding that no statements provided shall be used against him in criminal proceedings, based on *Garrity v. New Jersey*, 385 U.S. 493 (1967).
2. Evaluation of Evidence. The hearing officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The hearing officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.
3. Documentary Evidence. Documentary evidence may be received in the form of copies or excerpts. Upon request, parties shall be given an opportunity to compare the copy with the original if available.
4. Official Notice -- Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties must be given an opportunity to contest and rebut the facts or material officially noticed.

S. Agency Recording of Hearing.

The hearing shall be recorded at the Council's expense. The recording will be the official record of the hearing. Any party to the action may, at their expense, request that a transcript of the hearing be prepared or that additional recordings be made. Such a request shall be approved if the additional recording does not distract from or disrupt the hearing. The failure to record will not invalidate the proceedings.

T. Preliminary Order and Notice

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1. At the conclusion of proceedings, the hearing officer shall issue a preliminary order in writing consisting of findings of fact, conclusions of law solely as to whether the person engaged in misconduct subject to decertification as enumerated in IDAPA Rule Sections 11.11.01.57.07 and 11.11.01.110 and a resulting order that the person be decertified; or that POST OPR failed to prove by a preponderance the misconduct subject to decertification and that the person be reinstated as an officer. The preliminary order and the record of the proceedings shall be filed with the Council. Every preliminary order must contain:
 - a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party files a petition for agency review or reconsideration before the Council within 14 days of the service date of the preliminary order.
 - b. Motion for Reconsideration
 - i. Any party may file a motion for reconsideration of a preliminary order.
 - ii. A motion for reconsideration must be filed with the POST Council MA at the address above in Section F of this procedure.
 - iii. Parties to the matter or their representatives must be served a copy of the motion for reconsideration at any previously designated address or email address for service.
 - iv. The hearing officer shall render a written order disposing of the motion. The motion will be deemed denied if the hearing officer does not dispose of it within 21 days of the filing of the motion.
 - c. Petition for Council Review.
 - i. The 14-day period for filing of a petition for the Council's review shall be tolled if a motion for reconsideration has been filed before the hearing officer.
 - ii. The basis for the review must be stated in the petition.
 - iii. If any party files a petition for Council's review of the preliminary order, opposing parties shall have 21 days to respond to that party's petition. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Council's MA at the address set forth in Section F of this procedure.
 - iv. The Council shall issue a final order within 56 days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Council may remand the matter to the hearing officer for further evidentiary hearing or hold additional hearings itself if further factual development of the record is necessary before issuing a final order.
 - d. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:
 - i. A hearing was held,
 - ii. The final agency action was taken,
 - iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or
 - iv. The real property or personal property that was the subject of the agency action is located.
 - e. This appeal must be filed within 28 days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

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2. Where the preliminary order directs the reinstatement of the person's certification, the Division Administrator shall reinstate certification after 14 days from the service of the preliminary order unless a petition for the Council's review is timely filed.

U. Appeals to POST Council for Review of Preliminary Order for Decertification

1. Petition For POST Council's Review.

- a. The preliminary order of the hearing officer shall become a final order unless a petition for review by the full Council is filed with the Council within fourteen (14) days of the service date of the decision. A petition for review shall include a brief statement of the basis upon which review is requested.
- b. The petitioner shall be responsible for payment of the estimated fee for preparation of a copy of the transcript upon the filing of a petition for POST Council's Review.

2. POST Council's Authority and Responsibilities.

- a. Upon receipt of a petition for POST Council to review a preliminary order of a hearing officer, the Council shall allow all parties an opportunity to file briefs and may schedule oral argument in the matter before issuing a final order.
- b. POST Council will review the record from the proceedings below, briefs submitted, and oral arguments, if any, in making its determination. The record will include:
 - i. all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings;
 - ii. evidence received or considered;
 - iii. a statement of matters officially noticed;
 - iv. stipulations approved by the hearing officer;
 - v. offers of proof and objections and rulings thereon;
 - vi. the record prepared by the hearing officer under the provisions of section 67-5242, Idaho Code, together with the transcript of the administrative hearing;
 - vii. staff memoranda or data submitted to the hearing officer in connection with the consideration of the proceeding; and
 - viii. any preliminary order or order on reconsideration.
- c. Upon considering the record from the proceedings below, briefs submitted, and oral arguments, if any, the Council may:
 - i. affirm, reverse, or modify the decision of the hearing officer;
 - ii. remand the matter to the hearing officer for further evidentiary hearing; or
 - iii. hold additional hearings.
- d. The Council shall issue a final order in writing within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties or for good cause shown.
- e. *Ex parte* communications.
 - i. Unless required for the disposition of a matter specifically authorized by statute to be done *ex parte*, during the pendency of a contested case the Council shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication.
 - ii. The Council may communicate *ex parte* with a party concerning procedural matters (e.g.,

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scheduling).

- iii. If any member of the Council becomes aware of a written *ex parte* communication regarding any substantive issue from a party or representative of a party during a contested case, he or she shall bring the communication to the attention of the Chairman. The Chairman shall place a copy of the communication in the file for the case and distribute a copy of it to all parties of record or order the party providing the written communication to serve a copy of the written communication upon all parties of record.
- iv. Written communications from a party showing service upon all other parties are not *ex parte* communications.
- v. The prohibition of *ex parte* communication applies to the deputy attorney general representing POST OPR and the lead deputy attorney general representing POST Council.

3. Chairman's Authority and Responsibilities

- a. Upon receipt of a petition for POST Council to review a preliminary order of the hearing officer, the Chairman shall issue a briefing schedule allowing the petitioner an opening brief, the respondent a response brief and the petitioner a reply brief.
- b. The Chairman may decide all matters of procedure without convening the full Council. This includes but is not limited to issuing briefing schedules and ruling on any non-dispositive motions filed by either party.
- c. The Chairman may allow any pleadings to be amended, corrected, withdrawn, or any omission to be supplied upon stipulation or upon the granting of a prior motion for leave to file such a pleading submitted by the requesting party. Defective, insufficient, or late pleadings may be returned or dismissed with or without a motion.
- d. If a petition and a cross petition is filed in the same decertification matter, the Chairman may consolidate the petitions upon finding that they present issues that are related and that the rights of the parties will not be prejudiced. In consolidated cases, the Chairman determines the order of the proceeding.
- e. The Chairman may set oral argument on any matter in the contested case on reasonable notice, but not later than fourteen (14) days before the case is set to be heard by the Council, according to the circumstances.
- f. In the event the Council elects to hold additional hearings, the Chairman may, at the request of either party, issue subpoenas as authorized by statute, upon a party's motion or upon the Council's own initiative. The Chairman may also, upon motion to quash made before the time to comply with the subpoena, quash the subpoena, or condition denial of the motion to quash upon reasonable terms.

4. Pleadings.

- a. Party Designation. The party filing a petition for the Council's review shall be designated Petitioner and the other party shall be designated Respondent. In the event cross petitions are filed and consolidated, the first party to file a petition for review shall be known as Petitioner and the second party to file a petition shall be known as Cross-Petitioner. Proper names of each party

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shall be used in the body of all pleadings.

- b. Filing of Pleadings. All pleadings and documents intended to be part of an agency record must be filed with the POST Council, either by regular mail, or email stipulated to by the parties and approved by the Chairman.

5. Service.

- a. Service of Pleadings. All pleadings and documents intended to be part of the agency record for decision must be served upon the representatives of each party of record. When a document has been filed by email, it must likewise be served upon all other parties to the party's last known email address.
- b. Addresses to be Used for Service. Unless approved by the Chairman for other means stipulated to by the parties, service of all notices to be given, orders or other documents under these procedures shall be by personal service, email, or by U.S. mail, regular or certified, with postage prepaid, addressed to a party's last known address. Service of documents or pleadings upon the agency shall be sent to:

POST Council Management Assistant
700 S. Stratford Drive
Meridian, ID 83642
kelsey.woodward@post.idaho.gov

Office of the Attorney General
ISP Legal Unit
700 S. Stratford Drive
Meridian, ID 83642
ISPlegal@isp.idaho.gov

- c. Proof of Service by a Party. Every document that a party files with and intends to be part of the agency record must be attached to or accompanied by proof of service by the following or similar certificate:

I HEREBY CERTIFY (swear or affirm) that I have this _____ day of _____, 20____, served the foregoing (name(s) of document(s)) upon all parties of record in this proceeding, (by delivering a copy thereof in person: (list names)) (by mailing a copy thereof, properly addressed with postage prepaid, to: (list names and addresses) (by e-mail to: (list names and e-mail addresses))).

(Signature)

6. Appearances and Representation.

- a. To the extent authorized or required by law, appearances and representation of parties or other persons at formal hearing or prehearing conference must be as follows:
 - i. The peace officer may represent himself or herself or be represented by an attorney,

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family member or friend.

- ii. POST OPR shall be represented by a deputy attorney general from the Criminal Division/Idaho State Police Unit, unless otherwise assigned by the Office of the Attorney General.
 - iii. POST Council shall be represented by the lead deputy attorney general for the Idaho State Police.
- b. **Withdrawal of Representative.** Persons representing a party who wish to withdraw their representation of a party in a proceeding before the Council must immediately file in writing a motion to withdraw and serve that motion on the party represented and all other parties. The Chairman shall decide whether good cause exists to grant the motion but will also consider whether granting the request will cause undue delay the proceedings.
- c. **Conduct Required.** It is the responsibility of the parties and their representatives to know and understand all applicable laws, rules, and procedures that govern these proceedings. Representatives of parties and parties appearing must conduct themselves in an ethical and courteous manner.

7. Additional Hearings Held.

- a. A hearing may be held to receive additional evidence in the form of physical exhibits or testimonial evidence if, upon a properly noticed motion and majority vote by the Council, the decision is made to hold additional hearings.
- b. **Recording Of Hearing.** Any oral arguments or hearing held shall be recorded at the Council's expense. The recording will be the official record of the hearing. Any party to the action may, at their expense, request that a transcript of the hearing be prepared. The failure to record will not invalidate the proceedings.
- c. **Requested Assistance.** If the parties and other persons require assistance of the kind that POST Council is required to provide under the Americans with Disabilities Act (e.g., sign language interpreters, Braille copies of documents) to participate in or understand the hearing, POST Council will supply that assistance upon request at least fourteen (14) days prior to the hearing in which the assistance is needed.
- d. **How Hearings are Held.** Hearings are to be held in person unless a motion to appear electronically is filed at least fourteen (14) days prior to the scheduled hearing. The motion shall include the reasons good cause exists to grant the motion.
- e. **Order of Procedure.** In the event of a consolidated petition and cross petition, the Chairman will determine the order of presentation of witnesses and examination of witnesses.
- f. **Testimony Under Oath.** All testimony presented in formal hearings will be given under oath. Before testifying each witness must swear or affirm that the testimony the witness will give before the Council is the truth, the whole truth, and nothing but the truth.
- g. Prior to submitting testimonial evidence before the Council, the peace officer, against whom the proceedings are against, shall receive an administrative warning requiring that he provide testimony truthfully, and to acknowledge his understanding that no statements provided shall be used against him in criminal proceedings, based on *Garrity v. New Jersey*, 385 U.S. 493 (1967).

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h. Continuance of Hearing. The Chairman may continue proceedings for further hearing without a motion.

8. Evidence.

- a. The Chairman shall preside over any hearings held and is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order.
- b. Stipulations. Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the Council or presented at hearing or by oral statement at hearing. A stipulation binds all parties agreeing to it only according to its terms. The Council may regard a stipulation as evidence or may require proof by evidence of the facts stipulated.
- c. Grounds for objection to the admission or exclusion of evidence must be stated briefly at the time the evidence is offered. An offer of proof for the record consists of a statement of the substance of the excluded evidence.
- d. The Chairman shall rule on any objections made. The Chairman may, with or without objection, exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.
- e. Official notice may be taken of any facts that could be judicially noticed in an Idaho court.
- f. The Council's experience, technical competence, and specialized knowledge may be used in evaluation of evidence.

9. Orders.

- a. Modification of Order on the Council's Own Motion. The Council may modify or amend its final order at any time before notice of appeal to District Court has been filed or the expiration of the time for appeal to District Court, whichever is earlier, by withdrawing the earlier final order and substituting a new final order for it.
- b. Clarification of Orders. Any party or person affected by an order may petition the Council to clarify any order. Petitions for clarification from orders do not suspend or toll the time to petition for reconsideration or judicial review.
- c. Final Orders. Final orders or orders that becomes final shall contain a reasoned statement in support of the decision and must contain the following paragraphs or substantially similar paragraphs:
 - i. This is a final order or an order that may become final of the Council. Pursuant to Sections 67-5270 and 67-5272, IDAHO CODE, any party aggrieved by a final order or orders previously issued in this case may appeal a final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:
 - 1) A hearing was held;
 - 2) The final agency action was taken;
 - 3) The party seeking review of the order resides, or operates its principal place of

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business in Idaho; or

- 4) The real property or personal property that was the subject of the agency action is located.
 - ii. An appeal must be filed within twenty-eight (28) days of the service date of a final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.
 - iii. The Council's decision shall be a final order and may be appealed to district court by filing a petition for judicial review within twenty-eight (28) days of the date of service of the Council's written decision.
 - iv. Any party may file a motion for reconsideration of the final order within fourteen (14) days of the service date of that order. The Council shall issue a written order disposing of the petition. The petition is deemed denied if the Council does not dispose of it within twenty-one (21) days after the filing of the petition.
 - v. Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the Council, the final order becomes effective when:
 - 1) The petition for reconsideration is disposed of; or
 - 2) The petition is deemed denied because the Council did not dispose of the petition within twenty-one (21) days

10. Attorney Costs and Fees.

- a. When the final order awards costs and/or fees to a party, that party shall have fourteen (14) days from the service date of the final order to file necessary papers (e.g., a memorandum of costs, affidavits, exhibits, etc.) quantifying and otherwise supporting costs or fees, or both, that will be claimed or a motion to extend the time to file for costs and fees.
- b. The final order of the Council may extend the time to file required documents for costs and/or fees beyond fourteen (14) days after the service date of the final order or preliminary order.
- c. The order granting or denying a request for costs and/or fees must cite the statutes or rules under which it is deciding the request for costs and/or fees.
- d. No particular form for filing for costs and fees is required, but in the absence of a statute or rule providing for standard costs and/or fees, the required documents supporting a claim for costs and/or fees should substantially comply with the requirements of Idaho Rules of Civil Procedure 54(d) and (e).
- e. A party may supplement a request for costs and/or fees.
- f. This procedure is not a source of authority for awarding costs and/or fees.
- g. When Costs and/or Fees Not Awarded in Final Order.
 - i. When a final order of the Council does not award costs or fees to a party, and a party contends that the party is entitled to an award of costs and/or fees the party must file a petition for reconsideration addressing costs and/or fees within fourteen (14) days of the service date of the final order if the party wishes POST Council to award costs and/or fees.
 - ii. The petition must be accompanied by required documents quantifying the claimed costs and/or fees.
 - iii. Every petition for reconsideration shall cite the source of the Council's legal authority to award costs and/or fees. The Council may deny a petition that omits a citation to legal authority to award costs and/or fees.

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- h. Opposition to a request for costs and/or fees or a petition reconsideration of costs and/or fees under these rules or motions to extend the time to oppose costs and/or fees filed under these rules must be filed and served within fourteen (14) days of the service date of the request or the petition to be timely. The Council may exercise its discretion to consider and grant an untimely opposition for good cause shown.
- 11. Agency Head Petitions for Recertification with POST Council
 - a. A person decertified by the Council is ineligible for POST certification of any kind for ten (10) years following the date of decertification. After the expiration of ten (10) years, an agency head may petition the Council to allow a decertified officer to attend a basic academy and become certified [again]. IDAPA 11.11.01.110.04.a
 - b. After an agency has hired the formerly decertified person, the agency head shall petition the Council in writing for permission for the person to attend a basic academy and become certified. The agency head shall present oral arguments to the Council and the documentation required below stating the reasons why the person should be given the opportunity to become recertified.
 - c. The Council may review POST decertification records and will require the agency to provide:
 - i. the agency's comprehensive background investigation, including previous employer(s)' disciplinary records and the formerly decertified person's complete criminal history;
 - ii. any employee personnel files; and
 - iii. any pertinent mitigation materials.
 - d. The Council will vote to allow or deny the person to attend an academy to become recertified.
 - i. If the decision is to allow academy attendance and possible recertification, the person's POST academy application will be processed upon receipt.
 - ii. If the decision is to deny the petition, the matter is closed.