

JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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MINUTES

August 17, 2022

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on Wednesday, August 17, 2022, at 10:30 a.m. in Room C-1 of the Stratton Office Building, Springfield. Co-Chair Wheeler called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee meetings. Other persons are encouraged to submit their comments to the JCAR office in writing.

ATTENDANCE ROLL CALL

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|---------------------------------|-------------------------------------|
| X Senator Bill Cunningham | X Representative Tom Demmer |
| X Senator John F. Curran | X Representative Michael Halpin |
| X Senator Donald DeWitte | X Representative Frances Ann Hurley |
| X Senator Kimberly A. Lightford | X Representative Steven Reick |
| X Senator Antonio Muñoz | Representative Curtis J. Tarver, II |
| X Senator Sue Rezin | X Representative Keith Wheeler |

APPROVAL OF THE MINUTES OF THE JULY 12, 2022 MEETING

Co-Chair Wheeler noted with respect to the July minutes that, when the Second Notice Extension motion was made regarding the Department of Healthcare and Family Services' rulemaking titled Social Service for Non-Waiver Home and Community Based Services (89 Ill. Adm. Code 141; 45 Ill. Reg. 10913), it was mistakenly announced that Senator Muñoz made the extension motion. That mistake is corrected in the minutes.

Sen. Curran moved, seconded by Rep. Hurley, that the minutes of the July 12, 2022 meeting as corrected be approved. The motion passed unanimously (11-0-0).

REVIEW OF AGENCY RULEMAKINGS

Illinois State Police – Firearm Owner's Identification Card Act (Emergency) (20 Ill. Adm. Code 1230; 46 Ill. Reg. 13553)

Kelly Griffith, acting Chief Legal Counsel, and Col. Michael Gillock, Assistant Deputy Director for the Division of Justice Services, represented ISP.

Sen. Curran: I appreciate the rule you have filed that's before us today, and appreciate that you are trying to tighten up the review process around FOID applications, which has been highlighted with the incident on 7/4 as something we need to put eyes on and address. I wanted to go back prior to 7/4, to actually the clear and present report (report) filed by the Highland Park Police Department and talk about what was done by your agency in reviewing that report that was forwarded by the Highland Park Police Department, because I'm unclear on a few things based on some of the media releases that came out after the tragic incident on 7/4 as to what exactly was done with that report. When I take a look at the release on 7/5 from ISP – I think this is the initial release – it states here that at the time of the September 2019 incident, when Highland Park police went to the home of the perpetrator, the subject did not have a FOID card to revoke or a pending FOID application to deny. Once this determination was made, ISP involvement with the matter was concluded. I read that to mean that when the report was received, a check on FOID status—whether a pending application or a FOID card issuance—was not on file and there was no further action taken. Is that accurate?

Ms. Griffith: I want to make sure that I'm not getting into the specifics of that case due to the fact that there is an ongoing investigation, but I will address the process—

Sen. Curran: I don't want to ask about the criminal investigation being conducted on the July 4 shooting. I want to talk about the administrative process of ISP with the September 2019 report that was received. Unless there's a pending investigation on the incident in the home in September 2019 that's ongoing, and I'm certainly not looking to get in the way of the pending investigation being conducted by Lake County.

Ms. Griffith: We worked with JCAR staff to file the emergency rule in response to a gap that we found in the clear and present danger reporting in that when we would receive a report and there was no FOID card on file or no FOID card application on file, there was nothing really to action. That is the issue and under the previous rule we would not be able to maintain that information. Any information we would receive about a report where there is no FOID card or FOID card application pending, we were not able to maintain. This rule is hopefully to address that gap—

Sen. Curran: I want to make sure I understand this. When the report was received and there was no FOID application on file or there was no FOID card action or issuance that had previously occurred, the matter then concluded and there was no action taken on the report. That's what the practice was in September of 2019?

Ms. Griffith: There was no action that could be taken because nothing was pending.

Sen. Curran: In the September 2019 report, you had a press release 7/6/22—the next day—that goes into detail: "For the individual charged in the Highland Park shooting, in September 2019 ISP officers confirmed the individual did not have a FOID card or pending application. According to the report submitted, the threat of violence allegedly made by the individual was reported to the Highland Park police second-hand. When police went to the house, both the individual and his mother disputed the threat of violence. The individual told police he did not feel like hurting himself or others, and was offered mental health resources." Additionally, the report indicated the knives did not belong to the individual and were ultimately turned over to the father who claimed they were his. As stated by Highland Park police, there was no probable cause to arrest. Upon review of the report at the time, the reviewing officer concluded there was insufficient information for a clear and present danger determination. When I read that press

release, that would lead me to believe that an investigation was conducted by a reviewing officer on that specific report and a determination was made. But now as you're testifying today that would not be accurate and in fact the practice of ISP back in September 2019 was to not make a determination on a report if there was no FOID card issued or FOID application pending. Is that correct?

Ms. Griffith: We always follow statutory law and the rules that are in effect at the time. I don't really feel it's appropriate for me to comment on the case involving Mr. Primo—

Sen. Curran: Well, you're commenting in a press release. If it's not appropriate for you to come out and comment on the review of that report in September of 2019 before this committee after you've had an opportunity to conduct a review, why are you commenting on it in the press?

Ms. Griffith: I believe there was certain information that was going to be released at the time on some basic facts.

Sen. Curran: I think the public should have an understanding about what was done with that report. What ISP did administratively with that report has nothing to do with the criminal case pending against Mr. Crimo. To come in here today and basically put up that pending criminal case that comes from July 4 as a basis for not answering questions directly, I find it disingenuous.

Ms. Griffith: Well, I apologize. I'm not trying to be disingenuous. We certainly are looking for guidance. This was an operational decision to change the rule based on the Highland Park shooting, and we absolutely want the Committee's input and the public comment on how best to move forward, but this information is important to ISP and public safety, and so we welcome any guidance on how to move forward. We—

Sen. Curran: My point is I think it's difficult to give you guidance when I don't know exactly what happened. I appreciate your bringing this rule. I'm supportive of this rule. I'm just not certain that this rule is addressing everything it needs to address, because I don't know what happened. Because I have two press statements from ISP, one day apart, that are contradictory on their face. One says no investigation was done by the reviewing officer and no determination was made on that report because there was no FOID card issued, no application pending. The next day you're telling the public that a review was done and a burden was not sustained. I'm asking which is it? You're talking in the press; talk to us. We're reviewing your rule. I want to be helpful; I just want to make sure I understand what we're addressing to make sure that we have a totality of a response that's going to ensure public safety. We all know this is very important.

Ms. Griffith: At the time that the report came to ISP in September 2019, the rule would not have allowed us to keep that information. The person didn't have a FOID card; they didn't have an application on file. And so that report was actually not kept. It wasn't until after the incident that that report was received (from Highland Park police), because we weren't able to maintain that particular document.

Sen. Curran: I'm not sure I agree with that, because the first version you put out of this you say you didn't do a review, and when I read your rule that you're changing it says a record of those persons who are determined to present a clear and present danger for purposes of denying or revoking a FOID card pursuant to 8(f) of the Act but shall not maintain a record of persons who are not determined to present a clear and present danger. So if you didn't do a review, as you

first told the public, and the determination wasn't made, your rule had no prohibition on keeping that report. Your rules only required the disposal of that report if you actually made a determination that the burden on a clear and present danger was not sustained. And I do want to get into the burden in a minute here because there's only one burden and that's in the statute, and that burden doesn't come into effect until one appeals a denial. There is no burden on that initial review. That's what I want to make sure we're understanding here. Because that makes a big difference. And changing this rule on whether or not ISP is reviewing reports if there's no application on file or no card currently issued or they're not reviewing reports because of that. Do you read that differently?

Ms. Griffith: The previous rule, is that what you're referring to?

Sen. Curran: Yes.

Ms. Griffith: The previous rule addressed that—

Sen. Curran: Just that last clause: shall not maintain a record of those persons—

Ms. Griffith: Those who are not determined to be a clear and present danger when there's no FOID card or FOID application on file—

Sen. Curran: You don't make a determination.

Ms. Griffith: ...there's no determination that can be made on that—

Sen. Curran: So there's no rule requiring you to dispose of that record. You're only required under your rule previously—that you're fixing—to dispose of that record if a determination was made. We don't know if a determination was ever made because you're not telling us. You've put two different versions out there. I'd like to know which one. I'm going to move on, but I would ask that you follow up. You've had six weeks to review this. If you don't know, you don't know. But if you know, that is information that should be put forth as we're reviewing this rule and we're going to be reviewing a permanent rule to make sure we have this process tightened up. We want to work with you. We are all in this together to promote public safety. What's not addressed in your rule but is addressed in the statute is the only burden in this—and it's a basic civil law burden, it's not a criminal law burden and you've put out some information about probable cause to arrest which has nothing to do with any of this—the FOID Act is an administrative process, not a criminal process—preponderance of the evidence. In statute, preponderance of the evidence is only applied when one takes up their administrative rights and appeals a denial or a revocation of their FOID card—either a denial of the application or revocation of the card. What your 7/6 press release says that you applied that appeal burden up front. If you did, and I don't know if you did, because you don't know if a determination was made, going forward, how is ISP handling that statutory language that doesn't actually place a burden on ISP's action of preponderance, which in laymen's terms is 50.1%? When is ISP placing the burden in the process? Is it still up front? Is it in the appeal process as is written in the statute? Can you clarify for me on that?

Ms. Griffith: So post-the Highland Park shooting, ISP has taken the time to review the entire process of clear and present danger. That is all being discussed, being improved, quality assurance, how to better respond and prepare for these situations as they come in. I believe, Colonel, on the front end is how this is being done—

Col. Gillock: Yes.

Ms. Griffith: ...but we welcome input and thoughts on how we can improve this process but our focus is always going to be public safety first. Obviously, I think we can all agree with that, and I apologize for not being able to directly answer your first question, but we will certainly look into that and make sure we get that answer to the Committee, because I don't want the Committee to feel like questions aren't being answered. I do want to get that information to you—

Sen. Curran: It would be an easy assumption for the Committee to make this morning. If I'm to understand the answer to your last question, you are still applying the preponderance burden at the initial review stage. Is that correct?

Ms. Griffith: That is my understanding.

Sen. Curran: I would just highlight that the statute doesn't require that. Your rule was silent on it. So that may be something as you move forward in a permanent rule you may want to address that, because there is an expectation to the public that that burden is not applied until one exercises their administrative rights in a denial and appeal. The public may be expecting a different application based upon what the legislature has passed in statute than how you're applying it, and I think we can see many instances in which that may have an effect on public safety. When a report is filed, and I'm going to use the report from September 2019 involving the 7/4 perpetrator, but I'm not necessarily asking you specifically because you're not sure whether this was reviewed or not. When I look at this report from September 2019 I see that there's a victim identified who is a juvenile that clearly lives in the home, has specific information about a threat and weapons being kept in the bedroom of the individual that made the threat. There's clearly an outcry witness here, who would be the complainant—that the juvenile, who didn't feel safe going home because of that threat and the presence of weapons, outcried to. This is much more common in sexual assault situations, but certainly applicable here. When you're reviewing a report in a situation like this, does ISP reach out to the victim or the outcry witness in investigating the report and making a determination, or are those reviews done just on the documents provided by the issuing police department, or physician, or whoever is entitled under statute to file a report?

Ms. Griffith: They're done just based on the documents. Is that correct?

Col. Gillock: If there's any outreach, it would be back to the submitting law enforcement agency.

Sen. Curran: And you would ask the law enforcement agency to do follow-up?

Col. Gillock: As they review those documents that are submitted, I would see if we could reach back out to that agency for any kind of verification.

Sen. Curran: In a situation like this, where the submitting agency called the perpetrator Robert Crimo's and his mother's veracity into question in stating that they were not forthcoming as to the language they used around that threat, you would just rely on the Highland Park Police Department's read of it that they were not credible individuals in their statement? When I look at that—and they clearly draw his credibility into question by not being forthcoming at the same time we have a juvenile victim and an outcry witness who proved to be credible because weapons were found in the house right where they said they would be found, when I compare

that report to going back to your 7/6/22 press release where you talked about that report, you say the individual told police he did not feel like hurting himself or others and that the individual and the mother disputed the threat of violence. You seemed to, in that press release on 7/6, substantiate there being not a sustained finding on the report because of their statements. But the statement's veracity is called into question by that issuing department. So I guess I'm curious in a situation like that why some additional investigation is not done, and if you're basing it simply on the report that is filed I don't understand that statement in your press release because that is an illogical conclusion to draw when you have an on-paper credible victim where everything they said has been substantiated in the investigation by Highland Park and you seem to be basing a denial on the statement of the perpetrator whose credibility is called into question specifically in that police report. I would ask you to take another look at that, and take another look at that press release, and figure out what was going on there, or what the thinking was with that statement and press release. Because that doesn't make sense. If it's on the report alone, this report clearly by any independent review would meet the level of preponderance of the evidence. It is clearly above the 50% threshold, more likely than not that there was a threat of violence in that home based upon the credibility that is highlighted by the juvenile victim and calling into question the credibility of the offender who denied the statement himself. ■ In reviewing your emergency rule, how is ISP going to handle going forward a similar situation where there is no FOID application on file or there's no FOID card having been issued and you get one of these reports. How is ISP going to handle that situation now going forward with the changes you've made with the emergency rule?

Ms. Griffith: We would maintain that record and, under the emergency rule, we would be able to keep that record. We look to this Committee for guidance on perhaps considerations in how long to keep that type of information, but we don't want to get in a situation where these reports come in, there is no FOID card application or no FOID card, and we just don't keep those reports. That's not going to help any of us as we move forward in trying to improve public safety and so based on the emergency rule we are keeping those reports now and we would look forward to being able to do that, because that's important and relevant information as the ISP perhaps in the future receives a FOID card application from someone to consider what happened a month ago, a couple of months ago, maybe even a year ago.

Sen. Curran: What if it's two years ago? I guess my question would be "why not make at least an initial determination on the report when the evidence is fresh?" The issuing department can be requested by ISP to do follow-up investigations. ISP themselves can do follow-up investigations while the evidence is fresh. If you put that in a file for two years waiting for it to become relevant to a FOID application, all the evidence is two years old at that point. At that point, you're going to do a review and try to make a determination on that report. There should at least be some initial action done by ISP even if there's no FOID card issued or FOID application pending, I would think, if nothing else, based on freshness of the evidence. In my experience prosecuting, cases never got better as they aged. So that's just a thought as you're taking a look at this and moving toward a permanent rule.

Ms. Griffith: So your recommendation would be to act as though there is a FOID card application or FOID card on file for a person who will work that report up? There wouldn't be any action we could take but then then maintain that information?

Sen. Curran: There's no action to take, but at least you know you've done all the relevant follow-up at that time when evidence is fresh. So when that report is more relevant to an application you have at least a complete investigation that you can either make a determination at the time or you

can make a determination at the time of application in the totality of the circumstances. But you're not going to be able to turn the clock back two years if you don't start looking into it until an application is filed. And I see that as potentially an issue.

Rep. Demmer: I think it's important that we have these discussions, especially in the establishment of a permanent rule, but as it relates to this emergency rule, which is in effect presently, if a clear and present danger report is received today for an individual who does not have a pending FOID card application or a FOID card issued, is the Department making a determination on that report that's received currently today?

Ms. Griffith: I believe that information is being kept. I don't know that we're actually making a determination. Colonel?

Rep. Demmer: The report is being received, no further action is being taken other than to maintain that initial report, but there is no investigation happening today even under this emergency rule?

Col. Gillock: That is my understanding. That's why we're here: to establish a process for doing so.

Rep. Demmer: Sure. And I think that's important for the permanent rule, certainly. But it's relevant today because the emergency rule is currently in effect. The other question is simply around the record retention policy that's outlined here in the emergency rule. The practice, I believe, is to receive that report, maintain it, and there is no separate timeline established in this rule. It simply says in accordance with State and federal law. Looking specifically at State law, over which we have control, which other State laws apply to the retention of a report?

Ms. Griffith: The State Records Act, there would be—

Rep. Demmer: And do you know the timeline the State Records Act would require you to keep the report?

Ms. Griffith: They would require that we keep it until we have a record retention schedule. We wouldn't be able to destroy until then. There are multiple State and federal laws that would be applicable, and we have indicated that for the final rule we could outline those more specifically if that is what the Committee feels is appropriate.

Rep. Demmer: At least indicate to the Committee which other State laws apply to this, because probably the most interesting would be which would trigger first. It could be subject to multiple, but what would become the effective limitation on how long those reports could be kept?

Sen. Rezin: When ISP received the report for the Highland Park shooting, what specifically was done with that report? Did it just sit there? Did somebody review the report and then because there was not a FOID application on file you automatically disposed of that report? Is that the process?

Ms. Griffith: When a report would come in like that it would first be determined if there is a FOID card on file for that person or a FOID card application. In cases where there was not, those records were not kept in my understanding during that time period.

Sen. Rezin: We talked about the burden of proof as Sen. Curran mentioned. There was no determination, and really no investigation, once ISP received the report for purposes of the FOID application. And then the report was disposed of? If there is no FOID application on file, then you do not keep it?

Ms. Griffith: Yes, that's my understanding, and we—

Sen. Rezin: That's the only administration that happened in that time frame.

Ms. Griffith: Correct. And we can look into and get more information for you, but that's my understanding.

Sen. Rezin: A couple of years ago we were here for another shooting in Aurora and I believe ISP had mentioned it was going to go through all of the different policies on file to make sure that we review and address any perceived gaps. And this is what we are doing here today. We feel there is a gap in the administrative rule that has allowed this to happen. We had this conversation several years ago too, I do believe. From the ISP perspective, are you going through all of your policies to look for these gaps to make sure that we don't have to wait until we're in this situation again before we recognize that there's a gap here?

Ms. Griffith: Yes, ma'am, we are.

Sen. Rezin: So you're going through all of your policies. And my last question is you mentioned that you're here because the rule did not allow you to keep the information. Who comes before JCAR with the rule? Isn't it ISP? You have broad statutory authority to come before us with an emergency rule or to change the rule in places where you feel there are gaps, correct?

Ms. Griffith: Yes, ma'am.

Sen. Rezin: So it's not JCAR coming to you saying you have a gap here and you need to change it. ISP has the ability and it's your responsibility to come to us and say "we've reviewed all our policies and we feel there's a gap here and because of that we're giving JCAR a rule to fix that gap." Is that the correct process?

Ms. Griffith: Yes.

Department of Corrections – Impact Incarceration Program (20 Ill. Adm. Code 460; 46 Ill. Reg. 8461)

Rep. Halpin moved, seconded by Sen. DeWitte, that JCAR, with the concurrence of the Department of Corrections, extend the Second Notice period for this rulemaking for an additional 45 days. The motion passed unanimously (11-0-0).

Department of Human Services – Child Care (Emergency) (89 Ill. Adm. Code 50; 46 Ill. Reg. 12177)

Sen. Rezin moved, seconded by Sen. Muñoz, that, with respect to this rulemaking, JCAR recommend that the Department of Human Services limit its emergency amendments to matters required to address an emergency situation in accordance with 1 Ill. Adm. Code 230.400(a)(1)(D). The repetition of statutory text in administrative rule should be completed

through the general rulemaking process outlined in Section 5-40 of the IAPA unless the statute specifically requires or authorizes implementation through emergency rulemaking. The motion passed unanimously (11-0-0).

Department of Financial and Professional Regulation – Cannabis Regulation and Tax Act (68 Ill. Adm. Code 1291; 46 Ill. Reg. 5127)

Co-Chair Wheeler announced that this rulemaking had been removed from the No Objection list and would be placed on the September agenda.

CERTIFICATION OF NO OBJECTION

Rep. Demmer moved, seconded by Sen. Lightford, that the Committee inform the agencies to whose rulemakings the Committee has not voted an Objection or Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemaking made by the agency, no Objections will be issued. The motion passed unanimously (11-0-0).

ANNOUNCEMENT OF SEPTEMBER MEETING

Co-Chair Wheeler announced that the next JCAR meeting will be Tuesday, September 13, 2022, at 11:00 a.m. in Room C600 of the Bilandic Building, Chicago.

ADJOURNMENT

Co-Chair Cunningham moved, seconded by Rep. Reick, that the meeting stand adjourned. The motion passed unanimously (11-0-0).

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