



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 08-2

To: POST Council
c/o Mr. Jeff Black, Executive Director
Peace Officer Standards and Training Academy
P.O. Box 700
Meridian, ID 83680-0700

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion concerning whether members of the University Division of the Rexburg Police Department who patrol the premises of Brigham Young University-Idaho (BYU-Idaho) are peace officers as defined by Idaho Code § 19-5101(d). This analysis is significant because the City of Rexburg and prior decisions by the Peace Officer Standards and Training (POST) Council have relied upon an opinion that POST is permitted to certify employees of BYU-Idaho as peace officers under the terms of Rexburg's Law Enforcement Service Agreement with BYU-Idaho provided that the BYU-Idaho employees are "administered" by the city.

QUESTIONS PRESENTED

1. Does the City of Rexburg have constitutional or statutory authority to delegate its law enforcement authority to employees of a private corporation?
- 2.a. Does the POST Council have the authority to certify the employees of a private corporation as law enforcement officers?
- 2.b. If not, what is the status of the BYU-Idaho employees who have performed law enforcement functions while certified as peace officers by the POST Council?

CONCLUSIONS

1. No. Idaho municipal corporations cannot enter into a joint powers agreement to exercise the municipality's police power with any entity other than the State of Idaho or its political subdivisions. Idaho authorizes joint powers agreements to be entered into only between public entities. As a private educational institution, BYU-

Idaho is not a public agency. The City of Rexburg exceeded its authority by entering into an agreement with BYU-Idaho for the joint exercise of law enforcement authority.

2.a. No. The POST Council can only certify peace officers who are employees of police or law enforcement agencies which are part of or administered by the state or its political subdivisions. Idaho Code §§ 19-5101 and 19-5109. Although the City of Rexburg entered into an agreement with BYU-Idaho to jointly share law enforcement powers, as explained in the answer to Question 1 above, that sharing of powers is *ultra vires*. Therefore, the POST Council has no lawful basis upon which to certify employees of BYU-Idaho.

2.b. POST Council previously certified BYU-Idaho employees as members of the University Division of the Rexburg Police Department. It is our opinion that under Idaho law these employees qualify as *de facto* officers and that all arrests and other lawful actions of BYU-Idaho employees certified in the past as law enforcement officers prior to a decision of a court of competent jurisdiction or de-certification by POST should be upheld.

INTRODUCTORY OVERVIEW

In 1988, the City of Rexburg and BYU-Idaho entered into a Law Enforcement Service Agreement ("Agreement"), under which employees of BYU-Idaho are to be "sworn in and commissioned as police officers of the City of Rexburg." BYU-Idaho bears the costs of paying and equipping the officers, who are supervised in their law enforcement functions by the Rexburg Chief of Police. As BYU-Idaho employees, these officers also perform non-law enforcement functions and are supervised by BYU-Idaho in such capacity.

In 1989 the original Law Enforcement Service Agreement was reviewed by legal counsel for the Department of Law Enforcement¹ who concluded, without in depth analysis, that the agreement complied with Idaho law. The City of Rexburg, BYU-Idaho, and the POST Council have relied upon the 1989 conclusion since its issuance.

Upon receipt of this request, this office reviewed the 1989 conclusion and determined that additional legal research and analysis was necessary to fully address the questions presented. As noted above, the 1989 legal analysis did not undertake a review of the comprehensive statutory system for the certification of police and law enforcement officers, nor did it analyze the limitations on agreements for the joint exercise of powers. Based upon an in-depth legal analysis, this opinion reaches the opposite conclusion, and

¹ Now the Idaho State Police.

insofar as the 1989 analysis concludes differently, it is overwritten as the position of this office by this formal opinion.

As part of this review this office has completed a factual inquiry into the legal relationship created by the Agreement between BYU-Idaho employees and the City of Rexburg. To fully understand the Agreement, this office examined the hiring, training, scheduling, disciplinary, and termination practices of the University Division of the Rexburg Police Department. Based upon interviews with the Chief of the Rexburg Police Department, the City Attorney, and current and former Captains of the University Division, it appears that the Chief of the Rexburg Police Department exercises limited general supervision of the BYU-Idaho employees acting as peace officers.

FACTUAL BACKGROUND

This opinion is based upon the following facts, which were compiled from review of the relevant documents as well as interviews of the interested parties:

1. The University Division of the Rexburg Police Department (University Division) is the result of a contract between the City of Rexburg and Brigham Young University-Idaho, a private non-profit Utah corporation devoted to higher education and owned by the Corporation of the Church of Jesus Christ of Latter-Day Saints. Under the Law Enforcement Service Agreement, the University Division police officers are commissioned by the Rexburg Police Chief to perform law enforcement services on the premises of BYU-Idaho and within a two-block perimeter beyond the border of those premises.

2. The University Division police officers, as employees of BYU-Idaho, are subject to all applicable BYU-Idaho employment policies. The owner of BYU-Idaho, the Corporation of the Church of Jesus Christ of Latter-Day Saints, has particular requirements for eligibility to work at BYU-Idaho. Prospective employees must agree to abide by a specific code of moral conduct. The Rexburg Police Department has tacitly agreed to this code as applied by BYU-Idaho to its employees in the University Division. In order to qualify for employment as a University Division police officer, the applicant is required to abide by specific standards of morality and living espoused by the Church.

3. Applicants for the University Division fill out the standard application for BYU-Idaho employment as well as an application specific to the University Division. University Division applicants have to complete the same physical fitness, written, and oral board examinations as members of the Rexburg Police Department. University Division applicants meet with an oral board, two members of which are representatives of the Rexburg Police Department employed outside the University Division. The top candidates are reviewed by the Captain of the University Division. The Chief of the

Rexburg Police Department has the power to veto any hiring recommendation made by the Captain of the University Division. If both the Chief of the Rexburg Police Department and the University Division Captain are comfortable with a candidate, a conditional offer of employment is made. When the Chief of the Rexburg Police Department endorses a group of candidates, the final decision on who to hire is up to the Captain of the University Division. An officer with the Rexburg Police Department working outside the University Division cannot simply transfer to the University Division, but is required to fill out BYU-Idaho and University Division applications and go through the BYU-Idaho and University Division hiring process.

4. The salaries, benefits, and pensions of the University Division police and all costs attending the law enforcement services of the University Division are paid by BYU-Idaho and differ from those available to members of the rest of the Rexburg Police Department. The University Division maintains its own dispatch center and telephone number. Emergency calls made from landline telephones which are part of the BYU-Idaho telecommunications system go through the University Division dispatch, while such calls made off BYU-Idaho premises and from cellular telephones go through the Madison County Dispatch Center.

5. University Division patrol units bear the Rexburg Police insignia, but also have "University Division" on them. University Division vehicles and equipment are selected, purchased, owned, maintained, and replaced by BYU-Idaho.

6. University Division officers operate under a "two-hat" concept, performing as BYU-Idaho employees while enforcing campus rules and codes, conducting bank escorts, jumpstarting automobiles, unlocking doors, etc., and then providing police services under the Rexburg City Police Policy Manual when called upon to deal with a criminal offense. BYU-Idaho manages all University Division employment issues while the Rexburg Police Department manages just those issues specific to law enforcement that may arise when the BYU-Idaho employees are called upon to act as peace officers.

7. Performance evaluations of University Division officers are conducted by their supervisors in the University Division. University Division officer discipline for minor policy violations is handled by University Division supervisors and the Captain of the University Division who, as employees of BYU-Idaho, have more latitude in such matters than a Rexburg Police supervisor working outside the University Division. Copies of final disciplinary notices are sent to the Chief of the Rexburg Police Department. If the violation is serious or repetitive, the Chief of the Rexburg Police may place the officer on probation or remove his authority to act as a law enforcement officer (referred to as "decommissioning").

8. The only disciplinary authority the Chief of the Rexburg Police has over a University Division officer is to terminate the officer's commission, removing the authority to act as a law enforcement officer. Because the University Division officers are all BYU-Idaho employees, BYU-Idaho has the right to retain a decommissioned employee in a non-law enforcement capacity. If a University Division officer is decommissioned by the City of Rexburg and BYU-Idaho or the employee disagrees with that decision, the City of Rexburg may be asked to revisit the issue and re-commission the BYU-Idaho employee. BYU-Idaho retains the right, without consulting the Rexburg Chief of Police, to terminate a University Division officer from BYU-Idaho employment. A University Division officer terminated by BYU-Idaho must resort to the BYU-Idaho employment grievance process; the City of Rexburg appeals process is unavailable to BYU-Idaho employees. The Rexburg Police Chief does not notify POST of the BYU-Idaho termination of employment of an officer unless the Chief in the exercise of his discretion determines the conduct that prompted termination affects the officer's ability to continue to work as a police officer for another employer.

9. The scheduling of shifts and work assignments in the University Division is handled entirely within the University Division. The day-to-day operation of the University Division is handled by the Division's Captain, an employee of BYU-Idaho. The approval of timesheets, overtime, and vacation time is entirely up to the Captain of the University Division. The University Division Captain meets with the Rexburg Chief of Police every Monday. The University Division detectives meet with the detectives of the Rexburg Police Department every Tuesday. The University Division's patrol officers meet with the patrol officers of the Rexburg Police Department every Thursday. The Chief of the Rexburg Police approves the University Division's logs within a day or two of submission to him and has immediate access to the reports of the University Division's officers through a computer system, allowing the Chief to review the recent activity of the University Division. A Captain of the Rexburg Police Department reviews the citations written by the University Division officers.

10. Officers of the University Division cover shifts for the regular Rexburg Police and vice versa. The University Division has an investigator and the Rexburg Police Department has an investigator. If a significant crime or large investigation occurs on the University campus, the University Division and the Rexburg Police Department share personnel. The Rexburg Police Department assists the University Division with investigative work on campus crimes, but the University Division investigator remains the lead investigator.

11. Under the Agreement, BYU-Idaho indemnifies the City of Rexburg for any activities of the University Division officers related to any non-law enforcement activities. The City of Rexburg is required, by the agreement, to provide liability insurance for the University Division officers for their law enforcement-related conduct.

ICRMP, the city's insurer, when contacted, advised that it does not provide liability coverage for BYU-Idaho's University Division officers since they are not public employees.

The above facts lead us to conclude, as explained below, that the University Division officers are not actually managed or supervised by the City of Rexburg. The management of the University Division is maintained by BYU-Idaho, with only limited involvement by the City of Rexburg.

ANALYSIS

I.

THE CITY OF REXBURG DOES NOT HAVE AUTHORITY TO SWEAR IN AND COMMISSION THE EMPLOYEES OF A PRIVATE CORPORATION AS LAW ENFORCEMENT OFFICERS

A. The Scope of a Municipal Corporation's Police Power

Rexburg is a municipality organized under art. XII, sec. 1 of the Idaho Constitution and its powers are outlined by title 50, chapter 3, of the Idaho Code. The City of Rexburg "may sue and be sued; contract and be contracted with . . . and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho." Idaho Code § 50-301.

The constitution grants an incorporated city or town the legislative and executive power to "make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its [city or town] charter or with the general laws." Art. XII, § 2. This grant of police power is "broad" in scope. Rowe v. City of Pocatello, 70 Idaho 343, 348, 218 P.2d 695, 698 (1950).

But this "broad" grant of police power to cities is not without limitation. Idaho recognizes that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted by the state constitution or the legislature. Alpert v. Boise Water Corp., 118 Idaho 136, 142, 795 P.2d 298, 304 (1990); Adams v. City of Pocatello, 91 Idaho 99, 104, 416 P.2d 46, 51 (1966) ("[I]t is the legislative function to prescribe police regulations governing the conduct of citizens, and the penalties to be enforced by the executive branch for a violation thereof"); Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) ("The legislature has absolute power to change, modify or destroy those powers at its discretion") (*citing* State v. Steunenberg, 5 Idaho 1, 4, 45 P. 462, 463 (1896)).

Under this conditional grant of police powers, municipalities are authorized to form police services to prevent public offenses and keep the peace, Idaho Code § 19-204, and to employ police as set forth in Idaho Code § 50-209. The police authority possessed by a municipality's appointed police officers is set forth in Idaho Code § 50-209:

Powers of policemen.—The policemen of every city, should any be appointed, shall have power to arrest all offenders against the law of the state, or of the city, by day or by night, in the same manner as the sheriff or constable.

Although Idaho cities are expressly granted the power to form a police service, the constitution and statutes do not authorize cities to delegate police power to private entities. No authority exists for the City of Rexburg to appoint the employees of the private company to serve as “peace officers.”² Since authority for cities to designate employees of non-public corporations as police officers does not exist, the inquiry then turns to whether a city may enter into a contract with a private entity for the joint exercise of police authority. As discussed in more detail below, agreements for the joint exercise of powers are expressly limited to agreements with other public entities.

B. Municipal Corporations Lack Authority to Contract for the Joint Exercise of Police Power With Private Entities

1. The Joint Exercise of Powers Act is a Comprehensive Regulation of the Area of Public Agencies' Agreements for the Joint Exercise of Police Powers With Other Entities

Joint powers agreements in Idaho are governed by Idaho Code §§ 67-2326 to 67-2333 inclusive. Idaho Code § 67-2326 provides:

Joint action by public agencies—Purpose.—It is the purpose of this act to permit the state and public agencies to make the most efficient use of their powers by enabling them to cooperate to their mutual advantage

² Under Idaho law only the governor has been granted the authority to delegate police power, and then only to railroad police or steamboat police, as the employees of private entities. Idaho Code § 19-511 permits the governor of the State of Idaho to appoint and commission a person designated by a railroad or steamboat company to serve, at the expense of the company, as a policeman, with the powers of a police officer upon the premises, cars, and boats of the company. The railroad and steamboat company employee so designated is required, while on duty, to wear a shield bearing the name of the company for which he is commissioned and the words “railroad police” or “steamboat police.” Idaho Code § 19-511. The railroad and steamboat company designating such a person is responsible for any abuse of his authority. *Id.*

and thereby provide services and facilities and perform functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.

(Emphasis added.) Idaho Code § 67-2328(a) defines and limits the purpose of joint powers agreements through the following:

Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority

This authority is further defined as permitting cities to contract with one or more other public agencies to “perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized to perform, including, but not limited to joint contracting for services, supplies and capital equipment.” Idaho Code § 67-2332. This authority should not be “interpreted to grant to any state or public agency thereof the power to increase or diminish the political or governmental power of the United States, the state of Idaho, a sister state, nor any public agency of any of them.” Idaho Code § 67-2333.

2. A Joint Powers Agreement Between a City and a Non-Public Entity is Expressly Prohibited

In Idaho, a local ordinance that conflicts with a state law, or is expressly preempted by state regulation of the subject matter, is void. Envirosafe Serv. of Idaho v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). A direct conflict, such as a municipality expressly allowing or undertaking what the state prohibits or prohibiting what the state requires, is a “conflict” in any sense. State v. Musser, 67 Idaho 214, 219-21, 176 P.2d 199, 201-02 (1946).

The legislature has acted in an all-encompassing fashion towards regulating the field of agreements for the joint exercise of police authority. Idaho Code §§ 67-2326 to 67-2333 contain no language authorizing public agencies such as cities to jointly exercise their powers with non-public entities. Any agreement entered into between a city and any entity for the joint exercise of police authority must comply with the express requirements of Idaho Code §§ 67-2326 to 67-2333. The Law Enforcement Services Agreement entered into between the City of Rexburg, a municipal corporation, and BYU-Idaho, a private corporation, does not comply with Idaho Code § 67-2328 because the

statute permits the sharing of municipal powers only between public entities. Therefore, to the extent the Law Enforcement Service Agreement purports to delegate the police power of the City of Rexburg to BYU-Idaho or its employees, that delegation is ineffective.

State preemption of the delegation of municipal police authority to employees of a private entity is analogous to the state preemption of Owyhee County ordinances regarding hazardous waste disposal at issue in Envirosafe. In each, “the very subject matter[s] involved” are “fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach.” 112 Idaho at 691, 735 P.2d at 1003. In Envirosafe, the Idaho Supreme Court found “the field of hazardous waste disposal is uniquely susceptible of, and appropriate for, uniform statewide regulation” and the enactment of the Hazardous Waste Management Act of 1983, a comprehensive legislative act governing the disposal of hazardous waste including PCBs, evidenced “a textually demonstrable commitment by the state to regulate the field uniformly on a statewide basis.” 112 Idaho at 692-93, 735 P.2d at 1004-05.

Similarly, the necessity of uniformity and fairness in law enforcement and criminal justice administration throughout Idaho makes uniform statewide regulation essential. In the simplest terms, within a valid joint exercise of powers agreement the two entities must possess a common power, which is then shared by the two entities for their mutual benefit. In the instant scenario, only the City of Rexburg possesses the police power while BYU-Idaho has no such power. Thus no sharing of powers can take place. An agreement for the joint exercise of powers between an Idaho municipality and a private entity is prohibited by Idaho law.³

II.

THE POST COUNCIL LACKS THE AUTHORITY TO CERTIFY THE EMPLOYEES OF BYU-IDAHO AS PEACE OFFICERS

A. The POST Council Lacks Authority to Enter Into Joint Exercise of Power Agreements With Private Entities

For the same reason that the City of Rexburg lacks the authority to delegate its police power to BYU-Idaho, a private entity, the POST Council does not have the authority under Idaho Code § 67-2330, to recognize the joint exercise of powers agreement between the City of Rexburg and BYU-Idaho and certify officers acting under

³ Based on the above analysis, if the legislature were to authorize the City of Rexburg to grant law enforcement authority to BYU-Idaho, the delegation to or exercise of state law enforcement power by the employees of BYU-Idaho would have to be examined in light of the Establishment Clause in the First Amendment to the United States Constitution and art. I, sec. 4 of the Idaho Constitution.

that agreement. As an agency of state government, Idaho Code § 67-2327, the POST Council is only authorized to approve certification for peace officers empowered under an agreement made pursuant to all the terms and conditions of the joint exercise of powers statutory scheme. The City of Rexburg and BYU-Idaho Law Enforcement Service Agreement does not comply with these terms and conditions because, as set forth above, BYU-Idaho is not a public agency. Idaho Code §§ 67-2327, 67-2328.

B. The POST Council Exceeded Its Authority When It Certified BYU-Idaho Employees as Peace Officers Under the City of Rexburg and BYU-Idaho Law Enforcement Service Agreement

1. The POST Council Is Not Authorized to Certify the Employees of a Private Entity as Peace Officers

Based upon the conclusions reached above, further analysis of the authority of the POST Council to certify the police officers of the University Division is unnecessary because the Agreement between the City and BYU-Idaho is *ultra vires*; however, in the interest of thoroughness, we will complete the analysis. The 1981 legislation creating the POST Council gives the Council the power and duty to establish minimum requirements for employment, retention and promotion of peace officers, including eligibility standards, physical, mental, and moral fitness standards, and education and training requirements. Idaho Code § 19-5109(1)(a) through (f). The POST Council is also charged with certifying those “peace officers as having completed all requirements established by the council in order to be eligible for permanent employment as peace officers in this state.” Idaho Code § 19-5109(1)(g).

Idaho Code § 19-5101(d) has, since 1981, defined a “peace officer” as:

any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. “Peace officer” also means an employee of a police or law enforcement agency of a federally recognized Indian tribe who has satisfactorily completed the peace officer standards and training academy and has been deputized by a sheriff of a county or a chief of police of a city of the state of Idaho.

Except where police powers are vested by statute in state, county, or municipal officers, the primary law enforcement officers of the State of Idaho are the sheriff and prosecuting attorney of each of the several counties. Idaho Code §§ 31-2202, 31-2227. Idaho Code § 31-2227, however, “does not destroy . . . the statutory or implied

constitutional authority and duty of other peace officers.” Monson v. Boyd, 81 Idaho 575, 581, 348 P.2d 93, 96 (1959). Idaho Code defines a “peace officer” as “a sheriff of a county, or a constable, marshal, or policeman of a city or town.” Idaho Code § 19-510; *see also* Idaho Code § 18-8103(4). By statute, the director of the Idaho State Police and persons deputized by him as state policemen are peace officers authorized to exercise within any county the same powers as the sheriff. Idaho Code §§ 67-2902, 67-2905. A “peace officer” includes only the sheriff (and deputies) of a county, the policeman of a city or town, and state police.

“‘Law enforcement’ means any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile corrections.” Additionally, a “[l]aw enforcement agency means a governmental unit of one (1) or more persons employed full time or part time by the state or federal government, or a political subdivision thereof, for the purpose of preventing and detecting crime and enforcing laws or local ordinances and employees of which are authorized to make arrests for crimes while acting within the scope of their authority.” Idaho Code § 18-8103(3).

After January 1, 1974, in Idaho all peace officers were required to “be certified by the council within one (1) year of employment.” Idaho Code § 19-5109(2). The act creating the POST Council, Idaho Code §§ 19-5101, *et seq.*, does not grant the Council the authority to certify the employees of a private entity as peace officers, because as outlined above, the term “peace officers” includes only a discrete group of qualified public officers.

2. University Division Officers are not “Administered by” the City of Rexburg and are not Eligible for POST Certification as Peace Officers

It was POST’s prior position and it is the current position of the City of Rexburg that, under the terms of the Law Enforcement Service Agreement, the University Division officers are “administered by” a political subdivision and therefore are entitled to POST certification as peace officers under Idaho Code § 19-5101(d). Closer examination of the statutory language and the facts of this matter lead us to the conclusion that this is not the case.

The word “administered” in Idaho Code § 19-5101(d), like all words in a statute, is interpreted according to its plain language. Where the language of a statute is plain, the court will not resort to principles of statutory construction. State Dep’t of Health and Welfare v. Housel, 140 Idaho 96, 103, 90 P.3d 321, 328 (2004). Common words in a statute, such as “administered,” are to be given their common meaning. Oregon Short Line R. Co. v. Pfost, 53 Idaho 559, 27 P.2d 877 (1933). As explained by the Idaho Supreme Court in City of Lewiston v. Mathewson, 78 Idaho 347, 354, 303 P.2d 680, 684

(1956): “Laws are enacted to be read and obeyed by the people and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.” The plain and ordinary meaning of the word “administered” in Idaho Code § 19-5101(d) is: “to manage or supervise the execution, use, or conduct of,” as in to *administer* a trust fund, or “to manage affairs.” Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/Administered> (accessed April 5, 2008).

The word “administered” in Idaho Code § 19-5101 must also be viewed in light of the joint exercise of powers statutes, which limits such agreements to public agencies. In enacting Idaho Code §§ 19-5101, *et seq.*, in 1981, it must be presumed that the legislature did so with full awareness of the joint exercise of powers statutes, Idaho Code §§ 67-2326 through 67-2333, enacted 11 years earlier. “Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed.” Druffel v. State, Dep’t of Transp., 136 Idaho 853, 856, 41 P.3d 739, 742 (2002). Therefore, the legislature knew at the time it created the POST Council that public agencies had the power to enter into agreements for the joint exercise of law enforcement authority with other public agencies, Idaho Code § 67-2328, that such agreements might create new public entities, *id.*, and the law enforcement employees of such entities would be “administered” by the parties to a joint powers agreement, Idaho Code § 19-5101(4).

In our view the purpose and intent of the use of the word “administered” in this statute is demonstrated by the example of the peace officers in the Mini-Cassia Drug Enforcement Task Force. This task force is a separate entity created under the joint exercise of powers statutes by Cassia County, Minidoka County, the City of Rupert, and the City of Heyburn, all public agencies. The Mini-Cassia Drug Enforcement Task Force is wholly managed and conducted by the four political subdivisions that created it, each of which has members on the task force Board of Directors. The general operation of the task force is administered by the Board of Directors, with daily operations conducted by the task force commander, who reports to the board. In this instance the peace officer employees of the Mini-Cassia Drug Enforcement Task Force are in fact employees of a “law enforcement agency” that is “administered by . . . [a] political subdivision,” *i.e.*, the cities and counties that are the constituent parties of the joint powers agreement and contributors of resources to the drug enforcement task force. POST certification of the employees of this entity is entirely appropriate and as contemplated by the clear language of the statute.

The University Division officers, on the other hand, are not “administered,” that is actually managed or supervised, by the City of Rexburg. Management and supervision is delegated to BYU-Idaho. Under the “two-hat” concept, the University Division officers

function as BYU-Idaho employees until called upon to enforce the law. The scheduling of shifts and work assignments in the University Division is handled entirely within the University Division consisting exclusively of BYU-Idaho employees. The day-to-day operations as well as administrative matters such as approval of timesheets, overtime, and vacation time is solely in the discretion of the Captain of the University Division, who is a BYU-Idaho employee. The Chief of the Rexburg Police cannot terminate the employment of an officer but has authority only to terminate a University Division officer's commission, ostensibly removing the authority to act as a law enforcement officer. Only BYU-Idaho can fire a University Division officer.

3. The Statutory Requisites for POST Council Certification are not Present

The statutory requisites for POST Council certification of officers under the POST Council statute, Idaho Code § 19-5101(d), are not present here. The University Division officers are not employees of a police or law enforcement agency. They are employees of BYU-Idaho which has no constitutionally or legislatively granted police power. BYU-Idaho is not a part of the State of Idaho or any political subdivision of Idaho. Furthermore, the University Division officers are not administered by the State of Idaho or any political subdivision. Accordingly, it is our view that the POST Council exceeded its authority in certifying the BYU-Idaho employees as peace officers.

C. During the Time the BYU-Idaho Employees Were Certified by the POST Council They Were *de Facto* Officers Under Idaho Law

Although it is our conclusion the POST Council lacked the authority to certify BYU-Idaho employees as peace officers of the University Division of the Rexburg Police Department, our research leads us to conclude that during the time the officers have been POST certified, the law enforcement actions of the officers have been legitimate under the *de facto* officer doctrine. As explained by the Idaho Supreme Court in State v. Whelan, 103 Idaho 651, 655, 651 P.2d 916, 920 (1982), “[a]n officer *de facto* is one who actually assumes and exercises the duties of a public office under color of a known and authorized appointment or election, but who has failed to comply with all the requirements of the law prescribed as a precedent to the performance of the duties of the office.” A *de facto* officer is distinguished from a usurper, who has no lawful title nor color of right, in that “a *de facto* officer performs his duties under color of right of an actual officer qualified in law so to act.” *Id.* *De facto* officers act with the same powers and duties of the office as *de jure* officers. State v. Swenson, 119 Idaho 706, 708, 809 P.2d 1185, 1187 (Ct. App. 1991) (*citing Gasper v. District Court*, 74 Idaho 388, 394, 264 P.2d 679, 682 (1953)). The Idaho appellate courts have recognized and upheld the acts of *de facto* officers. Swenson, 119 Idaho at 708, 809 P.2d at 1187; State v. Wilson, 41 Idaho 616, 243 P. 359 (1925). A reasonable conclusion is that during the time the POST Council certified BYU-Idaho employees as members of the University Division of the

Rexburg Police Department, the officers were *de facto* officers under Idaho law and their actions could not be successfully challenged as illegitimate.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. I, § 4.
Art. XII, § 1.
Art. XII, § 2.

2. Idaho Code:

§ 18-8103.
§ 19-204.
§ 19-510.
§ 19-511.
§ 19-5101.
§ 19-5109.
§ 31-2202.
§ 31-2227.
§ 50-209.
§ 50-301.
§ 67-2326.
§ 67-2327.
§ 67-2328.
§ 67-2330.
§ 67-2332.
§ 67-2333.
§ 67-2902.
§ 67-2905.

3. Idaho Cases:

Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966).

Alpert v. Boise Water Corp., 118 Idaho 137, 795 P.2d 298 (1990).

Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

City of Lewiston v. Mathewson, 78 Idaho 347, 303 P.2d 680 (1956).

Druffel v. State, Dep't of Transp., 136 Idaho 853, 41 P.3d 739 (2002).

Envirosafe Serv. of Idaho v. Owyhee County, 112 Idaho 687, 735 P.2d 998 (1987).

Gasper v. District Court, 74 Idaho 388, 264 P.2d 679 (1953).

Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

Oregon Short Line R. Co. v. Pfof, 53 Idaho 559, 27 P.2d 877 (1933).

Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695 (1950).

State Dep't of Health and Welfare v. Housel, 140 Idaho 96, 90 P.3d 321 (2004).

State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946).

State v. Steunenber, 5 Idaho 1, 45 P. 462 (1896).

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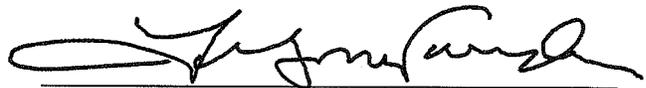
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