

WSR 22-17-170
PROPOSED RULES
DEPARTMENT OF
ENTERPRISE SERVICES

[Filed August 24, 2022, 11:53 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-10-063.

Title of Rule and Other Identifying Information: Chapter 200-220 WAC, Use of the public areas of the capitol buildings and grounds.

Hearing Location(s): On September 27, 2022, from 2:00 to 4:00 p.m., virtual public hearing via Zoom. To attend the hearing: Join from a PC, Mac, iPad, iPhone, or Android device <https://des-wa.zoom.us/j/92108193714?pwd=aGNpMlhtRzhqWDIrbmhqVnF5S0FYZz09>, passcode 189959; or one tap mobile 8778535247,,92108193714#,,,,*189959# US toll-free, 8887880099,,92108193714#,,,,*189959# US toll-free; or join by phone. Dial (for higher quality, dial a number based on your current location) 877-853-5247 (toll free) or 888-788-0099 (toll-free), Webinar ID 921 0819 3714, Passcode 189959. International numbers available <https://des-wa.zoom.us/j/92108193714?pwd=aGNpMlhtRzhqWDIrbmhqVnF5S0FYZz09>.

Date of Intended Adoption: October 6, 2022.

Submit Written Comments to: Jack Zeigler, online at <https://des.wa.gov/about/policies-laws-rules/rulemaking> Use of the Public Areas of the Capitol Buildings and Grounds, by 5:00 p.m., September 30, 2022.

Assistance for Persons with Disabilities: Jack Zeigler, email jack.zeigler@des.wa.gov, by September 1, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this update of the rules is to:

- Align the rules with current RCW for clarification and clean-up purposes;
- Make technical edits for clarification and clean up purposes. This includes clarifying that Washington state patrol (WSP) does have delegated authority from the department of enterprise services (DES) for enforcement on the campus and that the extra step of a DES complaint is not a prerequisite; and
- Establish a process for appealing campus exclusion in the enforcement section.

Reasons Supporting Proposal: The campus use rules are designed to balance the conduct of government business, public access and expression of free speech, public and employee safety and welfare, the stewardship of the capitol buildings and grounds, and civic education. The capitol campus is a traditional public forum for free speech. Protecting the right to assemble and exercise free speech is a top priority for DES and WSP. However, it is important to understand that free speech laws do not extend to protecting unlawful conduct.

Exclusion is an administrative process that can be used instead of citing someone for criminal trespass, which is a misdemeanor. Right now, we don't have the option to use this civil process due to the gap in the rules. DES and WSP use overall public safety as a guide in seeking compliance with rules and laws. Our general approach is to use the lowest level enforcement action, starting with seeking voluntary compliance, whenever possible.

When enforcement is needed, proper tools are important. There has been a change in tenor and tone of activities on the campus over the past several years, with a steady degradation of the expectation of civil and safe behavior. When groups motivated by conflict come to the campus, tactical challenges and response needs increase, and risk to campus visitors and those working on the campus intensifies.

Statutory Authority for Adoption: RCW 43.19.125 and 46.08.150.

Statute Being Implemented: RCW 43.19.125 and 46.08.150.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: DES, governmental.

Name of Agency Personnel Responsible for Drafting: Matt Jones, 1500 Jefferson [Street S.E.], Olympia, WA, 360-407-8153; Implementation: David Rooth, 1500 Jefferson [Street S.E.], Olympia, WA, 360-407-8153; and Enforcement: Matt Jones, 1500 Jefferson [Street S.E.], Olympia, WA, 360-742-6348.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. DES is not an agency listed in RCW 34.05.328 (5)(a)(i). Further, DES does not voluntarily make section 201 applicable to this rule adoption, nor to date has the joint administrative rules review committee made section 201 applicable to this rule adoption.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; and rule content is explicitly and specifically dictated by statute.

August 24, 2022

Jack Zeigler

Rules and Policy Manager

OTS-4057.1

AMENDATORY SECTION (Amending WSR 15-23-062, filed 11/13/15, effective 12/14/15)

WAC 200-220-030 Definitions. For purposes of these rules, these words or phrases have the following meaning:

(1) "Activity" means one or more people gathering for a common purpose or cause.

(2) "Applicant," "I," "you" or "your" refers to any person(s) or organization(s) seeking permission to use the public areas of the capitol buildings and grounds.

(3) "Banners and signs" means pieces of material presented publicly to display a message, slogan, advertisement, or other similar information. Government-recognized flags are not considered banners or signs for purposes of these rules.

(4) "Capitol buildings and grounds" means those buildings and grounds over which the department of enterprise services exercises custody and control under RCW 43.19.125.

(a) "Buildings" means enclosed buildings and adjoining structures. Buildings include, but are not limited to, the Legislative Building, the Temple of Justice, the Old Capitol Building, and the Natural Resources Building.

(b) "Grounds" means exterior spaces including, but not limited to, walkways, plazas, lawns, plantings and parks.

The grounds include such locations as the capitol campus, Heritage Park, Marathon Park, Centennial Park, Sylvester Park, the surface and shores of Capitol Lake, and Deschutes Parkway.

(5) "Commercial activity" means an activity that promotes, creates, or exchanges commercial products or services. Commercial activities include, but are not limited to, advertising, fund-raising, buying or selling any product or service, encouraging paid membership in any group, association or organization, or the marketing of commercial activities. Commercial activities do not include such activities by or for government entities.

(6) "Director" means the director of the department of enterprise services.

(7) "Enterprise services," "department," "us," or "we" refers to the department of enterprise services.

(8) "Exhibit" or "display" means an object or collection of objects presented publicly with the intention to communicate facts, a particular impression, a viewpoint or an opinion. Exhibits or displays include, but are not limited to, paintings, sculpture, ceramics, photographs, video or computer screens, informational booths and tables, or other similar objects and arrangements. Exhibits and displays do not include equipment used in the performance of medical or therapeutic services during a permitted activity, such as a blood drive, delivering flu shots, or administering a therapeutic massage.

~~((8))~~ (9) "Free speech and assembly activity" means an activity for the purpose of communicating information or ideas to others that will draw the attention, attendance, or participation of others. Free speech and assembly activities include, but are not limited to, assemblies, marches, rallies, performances, community events, press conferences, demonstrations, celebrations, ceremonies, speeches and other similar expressive activities.

~~((9) "Enterprise services," "department," "us," or "we" refers to the department of enterprise services.)~~

(10) "Permit" means a written permit issued by the department of enterprise services authorizing the use of public areas of the capitol buildings and grounds as required by these rules.

(11) "Private activity" means an activity sponsored by a private individual, business or organization that is not open to the general public. Private activities include, but are not limited to, banquets, receptions, award ceremonies, weddings, concerts, dances, and seminars.

(12) "Public area" means those areas of the capitol buildings and grounds that are generally open to the public, such as a building's primary public entrance lobby; rotundas and adjoining public mezzanines; and exterior plazas and lawns. Public areas do not include offices, meeting rooms, and other work areas that are ordinarily reserved for or primarily devoted to conducting the business and operations of state government; the governor's mansion; and any area which

is identified by a sign pursuant to WAC 200-200-450 indicating that the area is not open to the public.

(13) "Service animal" means an animal, including guide dogs, trained to do work or perform tasks for the benefit of a person with a disability, as defined by applicable state and/or federal laws.

[Statutory Authority: RCW 43.19.011, 43.19.620, 43.19.985, 43.19.742, 43.19.769, 39.26.080, 39.26.090, 39.26.251, 39.26.255, and 39.26.271. WSR 15-23-062, § 200-220-030, filed 11/13/15, effective 12/14/15. Statutory Authority: 2011 c 43. WSR 11-23-093, recodified as § 200-220-030, filed 11/17/11, effective 11/17/11. Statutory Authority: RCW 43.19.125 and 46.08.150. WSR 09-22-059, § 236-17-030, filed 10/30/09, effective 11/30/09.]

ENFORCEMENT, EXCLUSION, AND APPEAL

NEW SECTION

WAC 200-220-600 Authority to enforce. Statutes, rules, and policies regulating the use of the capitol campus may be enforced by enterprise services, the Washington state patrol, and by any law enforcement agency with appropriate jurisdiction. Prior coordination with or complaint by enterprise services is not a prerequisite for enforcement actions by agencies with enforcement authority.

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NEW SECTION

WAC 200-220-610 Warning of potential exclusion from capitol campus or areas thereof. (1) An officer of the Washington state patrol or a designated enterprise services employee may issue a warning of potential exclusion from the capitol campus or a designated area thereof under the authority of this section, if the issuer has a reasonable belief based upon the facts and circumstances to believe that the person through acts or omissions has violated one or more of the rules applicable to the capitol campus under chapters 200-200 through 200-299 WAC, or an applicable statute, regulation, or policy while on the capitol campus.

(2) A warning of potential exclusion shall:

(a) Be in writing, signed by the person issuing it, identify the issuer's name and title, and identify the person subject to the warning, if known.

(b) Contain the date of issuance and effective date, the violation(s) that the person is alleged to have committed, and a citation to any rule or statute violated.

(c) Warn that a future violation of one or more of the rule or statute violated under the warning of potential exclusion may be grounds for the issuance of a notice of exclusion from the capitol campus or a designated area, in addition to any other legal citation, liability, or remedy provided under the law.

(d) Set out the method of appealing the warning, which shall also include the address where the appeal should be sent.

(3) A person subject to a warning need not be charged, tried, or convicted of any crime or be issued an infraction or have an infraction found committed in order for a warning of potential exclusion to be issued or effective. The issuing person need only establish that probable cause existed to support the issuance of the warning.

(4) A person subject to a warning of potential exclusion may appeal the warning to the director as provided on the notice by submitting an appeal together with a copy of the warning within 10 days of receipt of the warning. The director or a designee shall decide the appeal as a brief adjudicative appeal under RCW 34.05.482 through 34.05.494. The deciding officer shall base the final order on a "more probable than not" standard whether the violation identified in the warning did or did not occur. In the event the director denies the appeal, the decision is appealable under the provisions of chapter 34.05 RCW.

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NEW SECTION

WAC 200-220-620 Exclusion from capitol campus or areas thereof.

(1) An officer of the Washington state patrol or a designated enterprise services employee may exclude a person from the capitol campus or a designated area thereof under the authority of this section, if the issuer has reasonable belief based upon the facts and circumstances to believe that the person through acts or omissions has violated one or more of the rules applicable to the capitol campus under chapters 200-200 through 200-599 WAC or an applicable statute, regulation, or policy while on the capitol campus.

(2) A notice of exclusion shall not be issued unless:

(a) The alleged violator who engaged in the conduct in question was informed that the conduct is a violation of an applicable statute, rule, or policy, was requested to cease or correct that conduct, and the person did not upon request and information promptly cease or correct the conduct, including, if applicable, removing any objects or materials that are in violation; or

(b) The alleged violator has been given a warning of potential exclusion for the conduct in question; or

(c) The alleged violation has resulted in or creates a substantial risk of damage to property or injury to a person.

(3) A notice of exclusion shall:

(a) Be in writing, signed by the person issuing it, identify the issuer's name and title, and identify the person subject to the order, if known.

(b) Reasonably identify the ground or grounds for the exclusion. To the extent practicable, if ground in subsection (2)(b) of this section is relied upon, identify the date of a prior warning, and if ground in subsection (2)(c) of this section is relied upon, describe

the basis for finding damage or a substantial risk of damage to state property or injury or a substantial risk of injury to a person.

(c) Contain the date of issuance and a citation to the rule(s) and/or statute(s) the person is alleged to have violated.

(d) Contain the date the exclusion begins and ends. If the exclusion duration is longer than the standard period of exclusion, the notice shall provide a description of the nature of the violation warranting a deviation from the standard.

(e) Specify the locations from which the individual will be excluded, which the issuer may, if appropriate, limit to areas of the capitol campus where similar conduct might occur. Exclusions do not apply to public rights-of-way and public sidewalks along such rights-of-way that are not closed to the public. Further, exclusions do not apply to direct transit along a direct route through the capitol campus for the sole purpose of attending a public hearing, a legislative session, or a prearranged meeting with a state official unless the notice of exclusion specifically states that such areas are subject to the exclusion and provides the reasons therefore.

(f) Set out the method of appealing the notice, which shall also include the address where an appeal should be sent.

(g) Prominently display a warning of the consequences for failure to comply with the notice and state that a violation of the terms of the notice will constitute criminal trespass under chapter 9A.52 RCW.

(4) The person subject to exclusion need not be charged, tried, or convicted of any crime or be issued an infraction or have an infraction found committed in order for a notice of exclusion to be issued or effective. The issuing person need only establish that probable cause exists that a violation occurred and that one or more of the conditions in subsection (2) of this section are satisfied.

(5) The standard period of exclusion shall be as follows and shall apply unless the issuing person deems a longer period of exclusion is warranted based on the nature of the violation:

(a) First violation: Forty-eight hour exclusion.

(b) Second violation: Thirty day exclusion.

(c) Third violation: One year exclusion.

(6) A person subject to exclusion pursuant to this section may appeal the exclusion to the director as provided on the notice by submitting the appeal together with a copy of the exclusion within 10 days of receipt of the notice of exclusion. The director or a designee shall decide the appeal as a brief adjudicative appeal under RCW 34.05.482 through 34.05.494. The presiding officer shall base the final order on a "more probable than not" standard whether (a) a condition in subsection (2) of this section was or was not present and (b) the violation did or did not occur. The presiding officer may modify the terms of the exclusion to reduce the period and/or area of exclusion. The decision of the presiding officer may be appealed under the provisions of chapter 34.05 RCW.

(7) Unless the appellant requests and obtains a stay from the presiding officer or the exclusion is otherwise invalidated, removed, or modified, the exclusion will remain in effect until its expiration date. A stay request must be accompanied by a statement of the grounds for the stay and identify the evidence setting forth the factual basis for the request. A stay will not be granted unless the deciding presiding officer finds that the appellant is likely to prevail on the appeal or that the appellant has raised a substantial question whether the exclusion should be reversed and has shown a likelihood that the appellant will suffer irreparable harm due to the exclusion.

(8) An individual who has received an exclusion notice may petition the director of enterprise services (of its designee) for an exemption from the exclusion notice to allow entry on specific days and times for specific purposes. A request for an exemption must:

(a) Be made in writing, provide the individual's current address, enclose a copy of the exclusion notice from which the individual is requesting an exemption, and be mailed to the department of enterprise services at (address);

(b) Be received by the department of enterprise services within 25 days after the individual has been served with an exclusion notice or not later than five business days prior to the requested period of exemption; and

(c) Identify: (i) The specific location the individual wants to visit; (ii) the date and time when the individual wants to visit; (iii) the purpose of the visit and whether the individual asserts that the exemption is for the purpose of exercising rights under the first amendment of the U.S. Constitution.

After receiving a request for an exemption, the director of the department of enterprise services or a designee must review the request and issue a decision on the request within three business days. The decision must specify the reasons why the presiding officer granted or denied the request.

In the event the presiding officer grants the request, the decision must specify the location, date, and time of the exemption to the exclusion notice. The department of enterprise services must immediately transmit a copy of the decision to the Washington state patrol's special operations division by email, and regular mail, or other shared systems.

In the event the presiding officer denies the request, the decision is appealable under the provisions of chapter 34.05 RCW.

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