

IDAHO POTATO COMMISSION

In re:)
)
) IDAPA 29.01.03
)
) PROPOSED RULE GOVERNING)
) NOMINATIONS AND ELECTIONS FOR)
) CANDIDATES TO BE SELECTED FOR) **HEARING OFFICER'S**
) COMMISSIONER AND PROPOSED) **REPORT**
) STATUTES REGARDING THE SAME)

I was appointed as a Hearing Officer by the Idaho Potato Commission ("Commission") to conduct public hearings regarding the adoption of the Proposed Rule Governing Nominations and Elections for Candidates to Be Selected for Commissioner, as well as proposed statutes pertaining to the same matter. Public hearings were noticed for 4:00 p.m. on July 24, 2018, at the Commission offices, 5:00 p.m. on July 31, 2018, at the Burley Inn and Convention Center, and 5:00 p.m. on August 1, 2018, at the Shoshone-Bannock Hotel. Each hearing was conducted beginning at the noticed time.

The public hearings were scheduled pursuant to Idaho law. A staff member of the Commission recorded the public hearings and a certified transcript of the testimony presented was prepared. There were numerous exhibits presented in conjunction with the public hearings. As the Hearing Officer, I received a complete copy of the certified transcript of the hearing and reviewed the testimony as reported in the certified transcript.

Patrick Kole, Commission Vice President for Legal and Governmental Affairs, testified at each hearing as the representative of the Commission. Mr. Kole testified in support of the proposed rule, and spoke to the proposed bills designed to enable and work in conjunction with the proposed rule. Testimony was presented by others in support of the proposed rule and bills.

Testimony was presented in opposition to the proposed rule, proposed bills, or in the form of questions seeking clarification from Mr. Kole.

There were several written comments presented either in favor of or in opposition to the proposed rule and proposed bills at the public hearing or in conformance with the opportunity to present written comments as described at the hearing and in the notice of hearing.

Some of the comments or testimony went to the notion that the proposed rule and proposed bills did not go far enough to modify the current methods by which the Commission is composed or operates. Several suggestions were made that pertained to matters outside of the negotiated rule making process, in that the suggestions were not part of the proposed rule or proposed bills, and therefore not within my charge as the hearing officer. While many of the ideas expressed appear to be well taken, my role is limited to the materials put before me by the Commission. However, the spokesman for the Commission indicated that the various ideas expressed would be looked into by the Commission as subjects of further legislative proposals.

Almost all of the commenters recognize that changes to the nominating process should be made. Some cautioned that the Commission should take more time in studying the matter, observing that the commissioner seats most affected by the proposals will remain unchanged until 2020. Given the information put before me regarding the March of 2018 nomination meetings, which included heretofore unrecognized attempts at proxy and absentee voting, and considering the opinion of the Office of the Attorney General, dated April 2, 2018, it is apparent that the Commission has chosen to begin the process of amending the statutes and rule now. I am charged on making recommendations as to what is currently provided by the Commission.

Based upon the information reviewed by this Hearing Officer, the Commission has complied with Idaho law pertaining to the preparation, publication, notification and the

opportunity for public input and participation for the proposed rule, and further took additional steps beyond what is required in Idaho law to notify the public of its intent to seek amendments to Idaho statutes. While it is apparent that there is not complete agreement among the stakeholders, those persons who testified or provided comments clearly exhibited an abiding interest in the work of the Commission and were respectful of the negotiated rulemaking process.

RECOMMENDATIONS

The Proposed Rule

With respect to IDAPA 29.01.03, the proposed rule (Exhibit 111) is to update and clarify the eligibility, nominating process and voting methods for grower, shipper and processor commissioners. Three nominees for each position are to be submitted to the Governor for consideration. The nominating process is to take place upon a call for nominations by the Commission each year. In the event that only three nominations are submitted for any position, no vote will be necessary. In all other cases, mailed ballots will be sent to eligible growers, shippers and processors. The Commission will tally the results and announce the results. Recounts are called for when a nominee disputes the result of the vote. Qualifications for commission members are set forth.

To begin the analysis, it is first noted that there appear to be scrivener's errors in the proposed rule, found in subsections 013.02, .03 and .04. Each of these subsections refers to purported sections of the rule regarding qualifications that are not actually found in the proposed rule. These references appear to be artifacts of an earlier draft rule. It is recommended that the references to the non-existent rule sections be deleted and replaced with reference to section 010.

The proposed rule has three substantial sections. The first is to change the procedure for nominating commissioner candidates for gubernatorial approval, found in proposed subsections

011 and 012. Currently, the process involves public meetings in which nominations are made from the floor by anyone who happens to appear at the meeting. The proposed rule sets up a mail in ballot process. Virtually no one took issue with this proposal, except as to the timing and duration (two weeks) of the nomination process, set to begin in March of each year. The Commission has stated that it works within the fiscal year cycle, which ends in August of each year. Because Commissioners take office in mid-September, moving the nomination process to the fall would mean that newly appointed commissioners would have to take office nearly a year after appointment. The Commission has agreed that thirty days for the process to play out is more appropriate. It is recommended that the proposed rule be modified to include a thirty day process for nominations, but also that the process begins in March of each year.

The second substantial section of the proposed rule pertains to who is qualified to serve on the Commission and who may be qualified to vote for nominees. As to Commission membership, this portion of the rule is found in subsections 013.01 through 04. There appears to be little resistance to the age and residency requirements of 013.01, or the requirement that the members of the Commission be current in their assessment payments in 013.02. It is recommended that those portions of the proposed rule be adopted.

013.02, 03, and 04 set out requirements as to who will qualify as a shipper, grower or processor. Because those qualifications are tied to proposed statutory definitions, they will be dealt with separately below. It is recommended that this portion of the proposed rule be adopted.

013.05 sets out that every grower, shipper or processor (as statutorily defined) may only vote on one ballot, irrespective of the form of business entity or number of owners or stockholders. In the interest of clarity, Mr. Kole pointed out that if an individual was an owner of two separate businesses, both businesses would be entitled to a vote under this proposal.

Conversely, if one business entity has several owners (no matter how designated) the business only has one vote. Although the term "one man-one vote" was used several times at the hearings, the proposed subsection is more properly described as "one business entity-one vote."

This subsection engendered a good deal of comment. On one hand, there is the argument that large corporate entities with significant market share could be marginalized. On the other hand, the argument is made that there is a good reason to protect small businesses, and without the proposed rule large businesses could combine to exclude small business representatives from the Commission. It is clear that there is no perfect answer to this issue that will satisfy everyone. I find no law that indicates the Commission's proposal is improper from a constitutional standpoint. From a practical standpoint, it is hard to envision a weighted scheme that will be capable of reasonable administration. For example, whether votes were to be based upon numbers of shareholders or partners, gross profit, acreage, pounds produced or some other factor, the factors would be continually changing and difficult to collate. All of the weighted schemes would seem to marginalize smaller businesses. Given that the purpose of the Commission is to protect the public and the Idaho industry as a whole, and given that the Governor may pick any nominee based solely upon his or her discretion, and given that it is the duty of each commissioner to represent the entire industry despite his or her business background and expertise, I find that the Commission's proposal as to this issue is reasonable and recommend its adoption.

Having said that, one commenter pointed out that 013.05 could be confusing, in that it could be capable of alternative interpretation. The source of that confusion may be the language that "Each grower, shipper or processor...may only vote once (1x) for each position to be filled..." What is implied is that growers vote for growers, shippers vote for shippers and

processors vote for processors. However, read literally, the sentence could be interpreted to mean that each entity would get a vote for a grower position, a shipper position and a processor position. Given the Idaho judiciary's express rulings that the wording of rules is exalted above legislative and administrative intent, it is recommended that the Commission clarify this sentence to better reflect its intentions.

Subsection 013.06 states that once a person is designated as a grower, shipper or processor, that person shall remain as designated for three years, and hence would only be able to serve on the Commission in that capacity, or be nominated in that capacity, for a three year period. There was some opposition to this proposal. The comment was made that a person could theoretically self-designate as a grower one year and a shipper the next under the proposed bills. This comment was made in the context of assuming that a person who is designated as a grower candidate and is not chosen could not run as a shipper candidate for three years.

Given that many growers hold ownership interest in processing or shipping entities, it is hard to see the detrimental effect of a person running as a representative of one form of entity, losing, and then running a year later as a representative of another form of entity, assuming the proposed statutory qualifications are met. It is also unclear why three years should be the cut-off point before a person could qualify to run as representative of another form of entity. It is recommended that the Commission revisit 013.06 in order to clarify whether it is necessary, and if so, why a three year designation is reasonable.

The Proposed Bills.

There are three proposed bills submitted for comment and consideration. The first (Exhibit 113) is a proposed amendment to Idaho Code § 22-1202. This proposal would eliminate the current nominating process for commissioner appointees, sets out that the

Commission has the power to adopt rules, and sets an emergency clause. This is the enabling bill that will allow the Commission to move forward on IDAPA 29.01.03. There was little opposition to this. In addition, there is a proposed clause, apparently insisted upon by the office of the Governor, stating that commissioners will serve at the pleasure of the Governor.

The second proposed bill (Exhibit 114) is also a proposed amendment to Idaho Code § 22-1202, but proposes in addition to that contained in Exhibit 113, a significant proposed modification to the districts from which grower commissioners shall be nominated and appointed. This bill is set to take effect after September 1, 2020.

The third proposed bill (Exhibit 115A), is a revision of the definitional terms “shipper,” “grower,” and “processor.” This proposed bill is designed to work in conjunction with IDAPA 29.01.03, and contains an emergency clause.

A significant portion of the comments pertained to the language proposed in two of the proposed bills (Exhibits 113 and 114) to the effect that Commission members “shall serve at the pleasure of the governor.” This language engendered some opposition because the commenting individuals felt that the Commission is self-governing and designed to promote the industry, and that industry members should chart the path of the Commission, exclusive of the wishes of the Governor. While comments to that effect are understandable, the reality of the law in the wake of *North Carolina Dental Board v. Federal Trade Commission* (Exhibit 127) is that state administrative boards are at risk for anti-trust litigation unless it is clear that the boards act under the auspices of the state as opposed to the relevant industry. Hence, states across the nation have adopted laws designed to protect their boards by a variety of legislative enactments, of which Idaho’s is among the least intrusive. (See 2016 HB 482). As Mr. Kole explained, the language stemmed from the executive branch upon its review of the proposed bill, and is explicitly added

to protect the Commission from anti-trust litigation. For this reason, it is recommended that the language in the proposed bills remain.

There were several comments regarding the proposed modification of grower districts found in Exhibit 114. The comments range from support of the proposal, to modification of portions of the proposal, to a call to leave matters as they are, to proposals to create districts based upon grow areas or common trading areas. Only the Commission produced an actual plan to redistrict. No commenter proposed alternative draft language. The Commission's plan is based upon county lines. The plan is to redistrict so that approximately 20 % of the production share is realized within each district. Although, mathematical precision is not achieved, there is no question that the plan is more representative than the current statutory districts.

Recognizing that legislative scrutiny will be required, with inevitable give and take among the various interested parties, it is recommended that the Commission move forward with Exhibit 113 and 114 as they are reasonable, good faith efforts to solve problems very much in need of solutions.

Exhibit 115A has been drafted to provide clarification by way of definition to the nomination process contained in proposed IDAPA 29.01.03. As such, it refines the definitions of "Grower" to mean an entity that actively engages in production of potatoes in Idaho and derives a substantial portion of its income therefrom, not primarily engaged in shipping or processing, on five or more acres, for three years, having paid assessments to the Commission for those three years. Some of the minimal requirements were offered to protect the Commission and the industry from activist lawsuits. What opposition to this proposed definitional change that was expressed seemed to coalesce around the notion that a grower should not include an entity engaging in commerce primarily as a shipper or processor. The reason for the proposed

change is self-evident. The Commission has determined that a an entity primarily doing business as a shipper should have a say as to who should serve on the Commission as a shipper, but not serve as a grower. In this way, the interest of growers will be protected. This is an exercise in reasonable line drawing, and is based upon self-declaration in any event. In other words, an entity has the option of defining itself as a grower, or shipper or processor. However, an entity cannot style itself both as a grower and a shipper or processor for purposes of nominating or voting upon candidates. Beyond that, the interests of growers that also act as processors or shippers are not affected in any way.

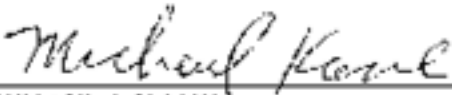
The definitions of "Shipper" and "Grower" remain largely unchanged in the proposed bill, except to clarify that each must be engaging in its business in Idaho. There was virtually no opposition to these changes.

The central purpose of the revised definitions is to clarify that each entity that designates itself as a grower, shipper or processor must designate its voting representative to the Commission, and that each designated representative is entitled to one vote on one ballot in any election for nominees put before the Governor. This led to comments regarding the fairness (or lack thereof) of the "one business entity-one vote" model. As stated previously, no alternate language was proposed, although several ideas were put forth. Without restating what has already been gone over, the Commission's model seems to be the best alternative so far suggested and it is recommended that the Commission move forward with proposed bill Exhibit 115A.

One final point should be made. The seed grower industry has stated that it feels under-represented by the statutory scheme as it currently exists, and is not included in the proposed revisions. The seed grower industry is a miniscule part of the overarching potato industry, but

seed growers do pay assessments. The Commission has stated that it intends to explore options for the seed grower industry for future legislative sessions. This is an appropriate course of action.

RESPECTFULLY SUBMITTED this 28 Day of August, 2018.



MICHAEL J. KANE
Hearing Officer