AOC ASSOCIATION OF OREGON COUNTIES

June 22, 2020

Written Testimony in Support of LC 49

Dear Co-Chairs Courtney and Kotek, Co-Vice Chairs Girod and Drazan,
Senators Burdick, Frederick, Knopp, Prozanski, and Thatcher, and
Representatives Bynum, Holvey, Lewis, Salinas, and Stark,

AOC strongly supports LC 49 and urges its passage.

It should go without saying that persons with an underlying propensity to bend the truth or abuse power should not become police officers.[1] However, over the past few decades there have been examples of police officers retaining their jobs even after having undeniably engaged in repeated patterns of this behavior. How can this happen, and how can we fix it?

One significant contributor to this situation is state collective bargaining law. Oregon is no exception. The Oregon Public Employee Collective Bargaining Act (PECBA) provides for a method of resolving a dispute between a public employer and a union regarding the imposition of discipline. That method involves binding arbitration. When an unresolved dispute about discipline arises, a list of potential arbitrators is provided by the Employment Relations Board (ERB). The two sides take turns striking names from the list until only one remains. That remaining person becomes the arbitrator for the case. The arbitrator then conducts a trial - hearing from witnesses, reviewing the evidence and the collective bargaining agreement, considering arguments from the parties, and issuing a binding decision. That system is fatally flawed.

The very nature of the system just described incentivizes each arbitrator to ensure they are viewed as not biased in favor of either employers or unions. In other words, a sure way to get struck off an ERB list by one side or the other is to be seen as favoring one side or the other. Thus, the system directly incentivizes an arbitrator to: (1) Avoid issuing any string of decisions that could be seen as favoring one side or the other; and (2) ensuring an equal balance of arbitration decisions for employers versus unions over the course of the arbitrator's career. This causes a cascading effect. Employers, faced with an evolving apparent randomness to arbitration decisions,[2] often lessen discipline or decline to stand by their discipline decisions in all but the most serious or strongest cases. But arbitrators don't respond by siding with employers more often. They can't. The system incentivizes otherwise. Then repeat what is described above over-and-over, and you get to where we are now.

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[1] It is worth noting that prosecutors have an affirmative obligation under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to disclose information that puts into question a police officer's veracity. I dealt with a number of these "Brady" issues during my service as a county lawyer and elected district attorney, including officers that had been caught telling lies or engaging in a pattern of using excessive force.

[2] During my service as a county lawyer, I took to carrying an old half dollar around with me, so I could answer questions from my clients about their chances of winning any particular disciplinary arbitration case.

A few years ago, there was a string of arbitration decisions reinstating police officers that had engaged in undisputed egregious conduct. Some of your colleagues began openly talking about reform. AOC and other key stakeholders directly participated in those conversations. Senator Lew Frederick became one of the primary drivers for a solution, and a work group was formed by Senator Floyd Prozanski, Chair of your Senate Judiciary Committee. A number of ideas were floated, each of which were opposed by the police union representatives.

A number of bills were introduced in the 2019 session, including one crafted for Senator Frederick that seemed to meet with slightly less opposition from the police unions. That became 2019 Senate Bill 383. At its core, the bill is fairly simple: An arbitrator cannot set aside discipline imposed on a police officer for misconduct if the arbitrator finds that the misconduct occurred and the employer imposed the discipline in accordance with a disciplinary matrix included in the applicable collective bargaining agreement.

After a hearing in Senate Judiciary, SB 383 passed the Senate unanimously. However, the bill died in the House. The bill was reintroduced as 2020 Senate Bill 1567. It again passed the Senate unanimously and appeared to be gaining traction in the House before the session ended.

As you know, following the killing of George Floyd and the resulting public outcry for reform, the Oregon Legislature's People of Color (POC) Caucus issued a press release calling for, among other things, the passage of this bill in the upcoming special session. That bill is now LC 49. It is notable that the bill is modest in its reform, in light of more recent calls for bigger reform, such as banning police unions from bargaining over discipline at all - and this comes from a Harvard law professor who formerly served as a counsel for the Service Employees International Union (SEIU).

AOC strongly supports LC 49 and urges its prompt passage. As always, please don't hesitate to contact me if you have any questions.

Sincerely,

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