STATEMENT RE: SB 1604

(SUPPORT IF AMENDED)

To: Joint Committee on the First Special Session of 2020
From: Michael Selvaggio, Oregon Coalition of Police and Sheriffs
Date: June 24, 2020

Co-Chairs and Members of the Joint Committee:

For the record, my name is Michael Selvaggio, representing the Oregon Coalition of Police and Sheriffs (ORCOPS). I am speaking to the "Arbitration Bill," SB 1604.

For the first time in my career, I will need to navigate the unenviable position of supporting a measure as it has been described to you and the public, while opposing the same measure as it has actually been drafted.

I suspect that public sentiment will not look kindly upon this opposition, given that the narrative description of the measure portrays a perfectly reasonable and supportable policy. But my testimony needs to be written to the facts, not to the pitch.

I would like to place a number of items on the record, so that when future lawmakers review the inevitable negative effects that follow, they should not be considered "unanticipated."

The measure is described simply: To make discipline guides/matrices for law enforcement officers a mandatory subject of bargaining and then, should they be successfully adopted into the employment contract, to hold to those agreed-upon standards.

The bill text before you is: To make discipline guides/matrices for law enforcement officers a mandatory subject of bargaining and then, should they not be adopted into the employment contract, to allow the employer broad discretion in the adoption and enforcement of standards without contractual remedy. This is especially concerning for a number of reasons.

Our specific concerns, with supporting explanation and documentation below, include:

- **The draft of the measure points to an employer's "policies" -- not a contract!**

- **The assertion that the policy-vs-contract terminology is equivalent is based on an unconfirmed conversation with LC.**
- **This interpretation would grant Chiefs and Sheriffs unprecedented discretionary powers over personnel and facilitate implicit bias in personnel decisions.**
- **Regardless of the intent, courts are not required to consider "Legislative Intent."**
- **This measure is an explicit and overt attempt to affect an ongoing Collective Bargaining Session.**
- **The City of Portland has been inconsistent with regard to acknowledging whether bargaining is ongoing.**
- **The City of Portland has already attempted a questionable interpretation of what constitutes "collectively bargained," which this bill could facilitate.**
- **None of the examples that the City of Portland uses to justify the bill are affected by the bill.**

In addition, ORCOPS proposes a simple fix to the bill that would repair the ambiguity and result in ORCOPS' firm support, without altering the intent of the bill.

CONCERNS

1. **The draft of the measure points to an employer's "policies" -- not a contract!**

The measure professes to simply bind arbitrators to a collectively-bargained discipline guide when evaluating police officer misconduct.

> "*If it's not in the contract the arbitrator can make the decision. This has got to be part of the contract.*" (Senator Frederick, Senate floor 2/20/2020 to SB 1567-A)

> "*This is saying that it has to be bargained within the contract. So if you're bargaining within the contract, that means -- in my view -- that you are somehow agreeing to the contract. Both sides have to agree to the contract.*" (Senator Frederick, OPB 3/4/2020 to SB 1567-A)

Of that core concept, ORCOPS has no objection; in fact I communicated multiple times to the bill's sponsors that ORCOPS hoped to offer its wholehearted support if that was actually reflected in the text of the bill.

However, the bill text only requires that the discipline guide or matrix is adopted "as a result of" collective bargaining and adopted into the employer's policies -- not into a collectively bargained contract! At no point does it suggest or imply that there need be agreement between the parties.

In fact, during oral testimony to LC 49 (Video at 56m:22s), the representative of the Association of Oregon Counties (AOC) responded directly to ORCOPS' suggestion to clarify the language:

> *"There was a proposal from the police unions to change the language in the bill. And, from my perspective, the language that they want would give police unions functional veto power over the disciplinary matrix."* (6/23/2020)

This represents an on-the-record acknowledgement that at least one stakeholder feels the existing language is legally distinct from ORCOPS' proposed clarification, and that the measure as drafted is supposedly intended to prevent the discipline guide/matrix from being subject to collective bargaining approval. (In fact, since Section 2 of the measure makes the issue a mandatory subject of bargaining, it's much more complex than either side having "veto power" in the event it is truly bargained.) This seems to directly contradict AOC's written testimony, which stated:

> *"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."* (Emphasis added)

2. **The assertion that the policy-vs-contract terminology is equivalent is based on an unconfirmed conversation with LC.**

Several Legislators have indicated relying on LC advice that indicated that the phrase "adopted by the agency as a result of collective bargaining and incorporated into the agency's disciplinary policies" is equivalent to a requirement of being incorporated into a collectively bargained contract.

> *"When asked by LC whether this [clarification on policy vs contract] was in fact necessary, they said no, the language is very simple and very clear."* (Senator Frederick, OPB 3/4/2020)

> *"LC informed us, and we shared it on the floor, that the amendments you wanted are unnecessary and would not be beneficial to the bill."* (Rep. Nosse, E-mail 6/8/2020)

Yet to this point, no legislator seems able or willing to produce any documentation to this effect, and such documentation does not appear in the public record on OLIS. Additionally, upon inquiry as to a formally-requested opinion along those same lines to SB 1567-A, LC's response this past month was that they have "not yet had the opportunity to begin work on [the] opinion request."

Further, when asked about this gap in the record, Senator Frederick's office staff responded:

> *"We heard from LC a few times about this and they did share that those changes were not necessary to clarify the intent of the bill. On the record when it was in House Rules, Channa [Newell] shared that on the record in response to Rep. Fahey's question (linked here)."* (Email, 6/19/2020)

(Channa Newell is an adept and talented attorney with a stellar reputation, but to our knowledge she does not speak for Legislative Counsel.) More to the point, Rep. Fahey's question was in regard to mandatory subjects of bargaining in Section 2 of the bill -- not the contract-vs-policy question in Section 1. (The mandatory subject portion has never been in question either in terms of language or intent.)

In fact, Ms. Newell's response clearly indicated that such process "does not compel [the parties] to agree." This provides a roadmap for the exact scenario that ORCOPS has expressed concerns about, whereby the parties do not agree in collective bargaining, and then the guide is nevertheless adopted into policy unilaterally by the employer... "as a result of collective bargaining," (albeit unsuccessful bargaining in that case) as per the bill's existing language.

ORCOPS has asked for some degree of further clarification as to why, in any event, language was used that was more ambiguous than is found elsewhere in ORS 243 (i.e: does not include the word "agreement" that is found in other sections such as ORS 243.672, etc) and whether that novelty would be more likely expose the resulting measure to litigation and varying interpretations. We understand a written response is forthcoming, but have not yet seen it.

3. **This interpretation would grant Chiefs and Sheriffs unprecedented discretionary powers over personnel and facilitate implicit bias in personnel decisions.**

This interpretation creates a concerning confluence of two factors:

a) The employer being able to unilaterally adopt a guide in certain circumstances, and
b) The elimination of arbitration remedies (in most circumstances).

The effect would be to grant wide-ranging personnel powers to Chiefs and Sheriffs, who would be able to adopt discipline guides with an extraordinarily wide spectrum and then have unchecked discretion to selectively enforce policies among officers.

For example, a corrupt suburban Chief would be able to identify officers who were favorable to assisting in corrupt activities (such as racially-motivated harassment) and refuse to impose discipline on those officers, while imposing extraordinarily harsh discipline on any officers who raised objections. (Currently, an officer has the ability to challenge such bias through an arbitrator.) A politically-motivated Sheriff would be able to use selective discipline to hand-pick deputies favorable to their political objectives.

Furthermore, such selective discipline could be used to mask bias based on protected classes, such as race, religion, or gender identity -- whether implicit or explicit -- and opens the door wide to nepotism and other unjust preferences. A vote for this bill in its current form risks allowing implicit bias to play a role in public employee personnel decisions.

4. **Regardless of the intent, courts are not required to consider "Legislative Intent."**

Oregon Revised Statutes section 174.020 describes how a court might consider legislative intent when interpreting statutes:

> *"174.020 (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.*
>
> *...*
>
> *(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."* (Emphasis added)

This may result in wildly different interpretations of the policy that vary from county to county.

Further, in the recent civil rights ruling on *Bostock v Clayton County*, the U.S. Supreme Court's majority opinion admonished:

> *"... the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law..."*

In that case, the result was a favorable ruling for the nation's LGBTQ+ community, but it serves as a reminder that a court need not consider the drafter's intentions when the express terms of a statute provide an alternate interpretation.

5. **This measure is an explicit and overt attempt to affect an ongoing Collective Bargaining Session.**

The City of Portland has stated its support of this legislation thusly:

> *"Specifically, when an arbitrator agrees the alleged misconduct occurred and that the discipline falls within the parameters of a bargained discipline guide or matrix, then the arbitrator would not be able to substitute alternative judgment."* (Letter from Portland City Commissioners, 2/10/2020, on OLIS)

The City of Portland's interest in specifically affecting the Portland Police Association contract negotiations was reflected in a floor letter written by several parties including the League of Cities:

> "*The Emergency Clause is needed so that PPB and the City of Portland can bargaining the discipline matrix/guide in their current negotiations.*" (Floor Letter from Senator Frederick, 2/20/2020)

What is alarming about this statement is that such a discussion is not only already permissible under current law; in fact, both parties had already conveyed an interest in successfully negotiating such a discipline matrix/guide.

It would seem that the only difference this bill would make to that (still) currently-underway process would be to allow the City the latitude (and leverage) to unilaterally adopt such a policy if the negotiations break down.

This explicit desire to have the bill before you materially affect an existing negotiation hews uncomfortably close to an unfair labor practice, outlined by ORS 243.672:

> *"(1) It is an unfair labor practice for a public employer or its designated representative to do any of the following: … (e) Refuse to bargain collectively <u>in good faith</u> with the exclusive representative."* (Emphasis added)

Knowing that it is the stated intent of the measure's supporters and at least one of the sponsors to affect a current negotiating session with this legislation, we ask the Committee not to abet an unfair labor practice.

6. **The City of Portland has been inconsistent with regard to acknowledging whether bargaining is ongoing.**

It should be noted that the City of Portland had previously conveyed to legislators that collective bargaining had not been ongoing; Senator Frederick conveyed that message on the Senate Floor:

> *"There's been some, frankly, misinformation spread about 1567, so first off, the police -- the Portland Police Bureau is not in the middle of bargaining; there's been one single table setting that was open to the public and by the time we sine die there will likely be one more meeting."* (Senator Frederick, 2/20/2020)

In fact, the "Bargaining Ground Rules" agreed to by both the City of Portland and the Portland Police Association states in point 5 that:

> *"5. The parties agree that the 150-day bargaining clock commenced in accordance with the PECBA on February 7, 2020."*

This is the only definitive determination of what constitutes active bargaining, since there is no requirement to have meetings. (I.e: If a meeting has not been set after the 150-day clock begins, it is the result of a bargaining strategy by one or both parties, which are still in contact through other means.)

The lingering accusation that ORCOPS had been spreading misinformation and thusly violated ORS 171.764 has not been rescinded or corrected in any way whatsoever.

7. **The City of Portland has already attempted a questionable interpretation of what constitutes "collectively bargained," which this bill could facilitate.**

In an arbitration session from January 27-28 of this year, a Portland Police Bureau manager in fact attempted to assert just that idea on behalf of the city.

8. **None of the examples that the City of Portland uses to justify the bill are affected by the bill.**

During the 2020 Legislative Session, the *Portland Mercury* reported on SB 1567:

> *"In each of the cases mentioned earlier in this story about officers' punishments being reversed, arbitrators concluded that no discipline was necessary. Meaning that, in each of these cases, Frederick's legislation wouldn't apply."* (Portland Mercury, 2/27/2020)

The examples proffered by the City of Portland have all been above the rank of officers and sergeants; those examples relate to the City's management/command staff, not to rank-and-file

officers and sergeants. (Although Commanding Officers are represented by a union, it is one that the City claims they recognize only voluntarily, which led to the City's opposition to HB 2978 in 2015, which would have formalized recognition of the commanding officers association.)

In sum, the City of Portland is asking for a legislative intervention into a currently-underway bargaining session, in order to impose an already-attempted interpretation, for a problem that it has been unable to identify exists among the officers who will be affected.

OPTIONS TO ADDRESS CONCERNS

1. **Consensus amendment**

The most straightforward way of addressing these concerns is to adopt language that all parties agree would have the same effect: changing the phrase "adopted by the agency as a result of collective bargaining and incorporated into the agency's disciplinary policies" to something such as "adopted as a result of collective bargaining and incorporated into the collective bargaining agreement." (Emphasis added)

ORCOPS is not aware of any parties that believe this would not have the intended effect, and moves ORCOPS into a supportive position.

2. **Incorporation of SB 1567 record**

If the bill is to move forward as a carbon copy of SB 1567-A, it would be reasonable for the Chair to declare the legislative record and intent for SB 1567-A into the record for SB 1604. Such an incorporation would save time and effort re-reading various elements into the record for this bill.

3. **Friendly Minority Report**

If such amendments are not able to be worked out in a timely manner, a "friendly minority report" might be issued in order to save time, whereby the single simple clarification requested would be drafted as a minority report, and then further clarification from LC or other offices could be sought as the bill headed to the floor… with the understanding among all parties that the report would be dropped or passed depending on which version would better further the sponsors' stated intent and eliminate possible misinterpretation.

CONCLUSION

Regarding the fundamental issue of contract-vs-policy: These concerns have been proffered by ORCOPS since before the 2020 Legislative Session began. Near the end of the session, ORCOPS proposed the 1567-A4 amendments that would have made this change (and one other that we do not seek at this point). ORCOPS is acting in good faith, and we stand ready to support a bill that reflects what has been described to the public and to lawmakers.

-Michael Selvaggio