



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

June 24, 2020

NOTE:

SB 1567-A is identical to SB 1604
(1st Special Session of 2020).
Please file this submission under
SB 1604.

Representative Jeff Barker
900 Court Street NE H480
Salem OR 97301

Re: A-engrossed Senate Bill 1567 (2020)

Dear Representative Barker:

You asked the following questions regarding A-engrossed Senate Bill 1567 (2020):

1. Does the language as written (SB 1567-A from 2020) require that a disciplinary guide or discipline matrix actually be approved in a collective bargaining agreement? Or does it only require that it be discussed in collective bargaining negotiations?
2. Would an amendment that changed "discipline guide or discipline matrix adopted by the agency as a result of collective bargaining" to "discipline guide or discipline matrix that is included in the terms of the collective bargaining agreement" reduce the potential for differing interpretations of that sentence in the future?

Short Answer

As we understand it, your questions concern whether the discipline guide or matrix "adopted by the agency as a result of collective bargaining" must be approved in collective bargaining and included in the collective bargaining agreement. We believe that that requirement remains the same regardless of whether the bill is amended to include the language proposed in your second question.

Question 1

Section 1 (3) of SB 1567-A amends ORS 243.706 of Oregon's Public Employee Collective Bargaining Act (PECBA)¹ to impose certain restrictions regarding disciplinary decisions concerning sworn law enforcement officers. Specifically, that section requires an arbitrator who makes a finding of misconduct by a sworn law enforcement officer that is consistent with the finding of the law enforcement agency to order the same disciplinary action as the disciplinary action imposed by the law enforcement agency "if the disciplinary action imposed by the agency is consistent with the provisions of a discipline guide or discipline matrix adopted by the agency as a result of collective bargaining and incorporated into the agency's disciplinary policies."

¹ ORS 243.650 to 243.806.

We conclude that the collective bargaining process set forth under the PECBA provisions not only requires a law enforcement agency and a labor organization to discuss and negotiate the development of a discipline guide or matrix during the collective bargaining process but also obligates the law enforcement agency and labor organization to include the discipline guide or discipline matrix “adopted by the agency as a result of collective bargaining” in a written contract resulting from the collective bargaining negotiations. In other words, the discipline guide or matrix must be included in the collective bargaining agreement. We reach this conclusion for several reasons:

First, under ORS 243.650 (4), “collective bargaining” means:

[T]he performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining . . . and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations.²

Section 2 of SB 1567-A amends ORS 243.650 (7) to expressly include “the development of a discipline guide or discipline matrix” in the definition of “employment relations.” While the collective bargaining process does not require either party subject to the process to agree to a proposal or make a concession, the process does impose upon the parties a duty to enter into good faith negotiations over possible agreements regarding employment relations.³ Accordingly, the development of a discipline guide or matrix is a mandatory subject of bargaining over which law enforcement agencies and labor organizations must meet and negotiate.⁴

Second, the policy governing the administration of PECBA states that “[i]t is the purpose of ORS 243.650 to 243.806 to obligate public employers, public employees and their representatives to enter into collective negotiations . . . and to enter into written and signed contracts evidencing agreements resulting from such negotiations.”⁵ As used in the phrase “adopted by the agency as a result of collective bargaining,” the ordinary dictionary meaning of “adopt” means “to accept formally.”⁶ The formal acceptance of a discipline guide or matrix by the law enforcement agency as a result of collective bargaining would indicate that the parties reached an agreement regarding negotiations over a proposed discipline guide or matrix. Thus, for the parties to fulfill the obligation to enter into written, signed contracts that demonstrate agreements resulting from such negotiations, the resulting collective bargaining agreement must include the discipline guide or matrix.

However, in the event that the parties do not reach an agreement regarding a mandatory subject of bargaining, such as the discipline guide or matrix, the parties may engage in a

² ORS 243.650 (4).

³ ORS 243.672 (1)(e), (2)(b).

⁴ See ORS 243.650 (7)(a) and (b); see also *Springfield Education Association v. Springfield School District*, No. 19, 290 Or. 217, 219 (1980) (explaining that a mandatory subject of bargaining is any proposal within the definition of “employment relations”).

⁵ ORS 243.656 (6).

⁶ *Merriam-Webster Unabridged Dictionary*, <https://unabridged.merriam-webster.com/unabridged/adopt>, sense 2a (2) (last visited June 21, 2020).

mediation process to address the unresolved mandatory subjects.⁷ If, after mediation, the parties have not yet reached agreement, ORS 243.742 requires the parties to initiate the binding interest arbitration process described in ORS 243.746.

The binding arbitration process is compulsory for strike-prohibited employees such as law enforcement officers.⁸ During that process, a neutral arbitrator conducts hearings, reviews the parties' last best offers and selects a last-best-offer proposal, resulting in the terms for a new collective bargaining agreement.⁹ If the arbitrator's decision is "supported by competent, material and substantial evidence on the whole record, based upon the factors set forth in ORS 243.746 (4), [the decision] shall be final and binding upon the parties . . . [and] [r]efusal or failure to comply with any provision of a final and binding arbitration award is an unfair labor practice."¹⁰ Thus, the collective bargaining process provides procedural safeguards to ensure that public employers and labor organizations continue to meet the obligation to enter into written and signed contracts that evidence agreements resulting from bargaining negotiations even in the case of an impasse. Accordingly, the collective bargaining agreement resulting from the interest arbitration process must include the discipline guide or matrix agreed upon during that process.

Fourth, "[w]hen a public employer or a union that represents public employees engages in conduct that is prohibited by PECBA, [including a violation of a duty imposed under PECBA,] it commits an unfair labor practice."¹¹ ORS 243.672 (1)(h) and (2)(e) make it an unfair labor practice for a public employer or its designated representative or for a public employee, a labor union or the union's designated representative to "[r]efuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract." Thus, by necessary implication, ORS 243.672 (1)(h) and (2)(e) obligate the parties to the collective bargaining process to incorporate as part of the collective bargaining agreement the discipline guide or matrix adopted during the collective bargaining process.

That implication is further supported by the fact that the Employment Relations Board, the state agency charged with administration and enforcement of the PECBA provisions, will direct an employer to reduce an agreement to writing and sign the agreement "if the evidence establishes that the employer's conduct objectively indicated that the parties reached a meeting of the minds."¹² As previously explained, we believe that formal acceptance or adoption of a discipline guide or matrix by the law enforcement agency as a result of collective bargaining would indicate such a meeting of the minds. Accordingly, a failure to include the discipline guide or matrix in the collective bargaining agreement would likely constitute a refusal to reduce an agreement to writing in violation of the duty established under ORS 243.672 (1)(h) and (2)(e).

For these reasons, we conclude that the collective bargaining process established under PECBA requires a law enforcement agency and a labor organization to discuss and negotiate the development of a discipline guide or matrix during the collective bargaining process and to include the discipline guide or discipline matrix "adopted by the agency as a result of collective bargaining" in the collective bargaining agreement.

⁷ ORS 243.712.

⁸ See ORS 243.736 (designating police officers as employees who are prohibited from striking).

⁹ See ORS 243.742 to 243.756.

¹⁰ ORS 243.752 (1).

¹¹ Employment Relations Board, *Questions and Answers: PECBA Unfair Labor Practice Cases* (2018), at 12, 15, https://www.oregon.gov/erb/Documents/Q-A_ULPGuide.pdf.

¹² See Oregon State Bar Legal Publication, *1 Labor and Employment Law: Public Sector*, section 9.31 at 9-16 (2011 Revision).

Question 2

As explained above, we believe that, under SB 1567-A, a discipline guide or matrix adopted by a law enforcement agency as a result of collective bargaining must be included in the collective bargaining agreement. We believe that that requirement remains the same regardless of whether the bill is amended to include the language proposed in your question. Nevertheless, to make this abundantly clear, although we do not think it necessary, the Legislative Assembly could choose to replace the current language in the bill to reflect the proposed language.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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