Oregon Legislature 2021 Regular Session
House Committee On Judiciary
House Subcommittee On Equitable Policing
Testimony Regarding HB 2930

From Michael Mann
Training Sergeant (retired) and Oregon resident, writing as a private individual

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Chair Bynum, Vice-Chair Noble and Members Dexter, Lewis, and Wilde,

My name is Michael Mann. As a recently-retired law enforcement officer, I agree with many others who are calling for reform of the criminal justice system. I believe that properly imposed discipline is necessary for law enforcement agencies to be professional and to be trusted by the public. Employers should ensure allegations of any misconduct are fairly and objectively investigated with the goal of discovering the truth. When misconduct is confirmed, officers should receive fair discipline.

I retired in 2019 as the Training Sergeant of a very professional Oregon municipal police department. In that position I developed and provided training, as well as worked on agency accreditation. The agency is the only police department in Oregon that was awarded international accreditation at the level of "Gold Standard with Advanced Meritorious Certification." It was my goal to help develop the most professional police officers anywhere in the state and country. I am not writing as a representative of any agency, but I do have information that you may find valuable.

At my former agency, I was involved in the local police association as a leader and I have always believed that officers should held accountable for improper actions through a fair disciplinary process. Since retiring, I have been learning a new calling as a labor representative, representing labor interests for some front-line members of law enforcement and other public sector employees. I support Oregon's strong commitment to fairness in the workplace and I support Oregon's recognition of workers' right to have a hand in their own destiny through collective bargaining.

I am giving testimony as an individual and my views are my own. I am writing from three perspectives: from the perspective as a human being who is subject to encounters with law enforcement, from the perspective as a knowledgeable trainer of professional police officers and from the perspective of a representative of criminal justice professionals in labor matters including discipline.

Today I am giving testimony on HB 2930 (a bill that would establish state-wide disciplinary standards for police officers and would restrict arbitrators in disciplinary matters).

Other Current Testimony Regarding HB 2930:
As of this writing, there are only two pieces of testimony showing on the legislative website regarding this bill; both are in support. One is a simple, one-line letter from an individual who voiced support. The other is a letter from the American Association of University Women (AAUW) of Oregon. That letter cites two articles (with links). The first is an article published in The Atlantic in 2014 that highlights several selected questionable-appearing arbitrator decisions from across the nation. The letter cites a second article , writing "According to a report that analyzed 170 cases from 2011 to 2019, police discipline was overturned or reduced in arbitration about 70% of the time." That statistic is only reflective of one large agency and has no direct link to the situation in Oregon; the article is specifically about 170 cases from 2011 to 2019 in the Philadelphia Police Department only.

General Reading of HB 2930 and Statement:
HB 2930 is a well-intended effort to improve the caliber of law enforcement officers in Oregon. Unfortunately, I believe this bill is a flawed approach that, if passed, may lead to unforeseen, unfair, and negative consequences and I urge this bill should not be passed in its current form.

All Oregonians believe in fairness; this bill seeks to solve an incorrectly characterized situation – that a plethora of bad officers keep their jobs improperly due to arbitrators' ill-guided decisions based on a one-sided system that favors labor.

Collective bargaining agreements require ultimate agreement of two parties who have equal bargaining status and opportunity to bargain. All labor agreements have gone through a bargaining process between the labor group and the employer, as authorized by Oregon law. Unions do not have an advantage and employers have agreed to the conditions in the contract, including provisions that require just cause for disciplinary actions.

The primary goal of discipline is to correct performance issues. Officers are corrected for policy violations or misconduct throughout their careers and there are many methods to address officer shortcomings that may include counseling, training, verbal warnings, written warnings, work plans, loss of vacation, unpaid suspension, and demotion in pay grade or rank. All of these examples are intended to correct an officer's behavior, as necessary. Agencies invest considerable resources to hire and train officers and the goal is to provide a competent, professional, and ethical worker for the justice system. If an officer has violated a work standard to the point where the employer/employee relationship is irreparably damaged, termination will likely result.

In the Oregon Department of Public Safety and Training Standards (DPSST) police training course "Police Legitimacy and Procedural Justice", it has been taught that legitimacy needs to exist both on the street (how officers treat community members) and within the agency (how officers are treated by each other and by management). *Grievances are filed and arbitration results when justice is perceived to be absent in*

the treatment of officers by the agency in employment matters. Grievances do not decide the lawfulness or the civil liability of an officer who has used force or exercised authority; those matters rightfully belong in the criminal and civil courts. Grievances (including arbitration decisions) address employment matters and the results of arbitration do not decide criminal or civil liability.

Officers normally admit when they violate workplace rules and accept reasonable discipline that is imposed by the agency, so most disciplinary matters never reach an arbitrator. Before an issue reaches an arbitrator, a grievance must have been filed where an employee believed they have been treated wrongly by the agency – either that the officer believes they did not commit the alleged misconduct or that the discipline imposed was not proper. Many grievances that are filed are resolved without reaching an arbitrator. Grievances are not pursued to arbitration simply because an employee is unhappy about a disciplinary action; there must be merit to the grievance.

Disciplinary grievances are normally a disagreement about what actually happened or (if it did happen), what the discipline should be. If an agency does not perform an adequate investigation to show what happened, a grievance may result. If an agency issues discipline that is perceived as unreasonable (or inconsistent with previous discipline for similar conduct), a grievance may result. If a grievance is not resolved – as many are – and it reaches an arbitrator, that independent arbitrator evaluates the case presented to determine if the agency had just cause to discipline the officer and to determine if the imposed discipline was proper.

Arbitrators do not change discipline on a whim; they weigh the evidence with the most serious of minds with great weight on their shoulders. If an employer has not proven misconduct, then no discipline is warranted (this is the reason some disciplinary actions are vacated). If an employer proves misconduct but ”the punishment does not fit the crime”, then discipline is reduced to an appropriate level. Arbitration is a check-and-balance on decisions made by those in charge, a fundamental principal inherent in the foundations of our governmental system. This restriction on arbitrators in this bill undermines the check-and-balance regarding correcting employment behavior.

A potential ramification of passing HB 2930 is that officers may become less likely to perform the dangerous and potentially controversial work they are sworn to do and compelled to do by their oath – protecting the public by pursuing and apprehending suspected criminals. If a person does not feel (including an officer) they will receive just treatment by their employer, it may make the person less willing to perform to the person's fullest capabilities, as self-preservation of economic security is a strong motivator. Officers already willingly put themselves into harms' way as part of their duties but an officer may be hesitant to do what needs to be done if the officer does not believe a reasonably just discipline system will determine the officer's employment fate.

It should also be recognized that sometimes employees face retaliation for challenging the status-quo in police agencies by attempting to make positive changes that ruffle feathers, or by reporting misconduct of peers or superior officers. The grievance and arbitration system is a check-and-balance to ensure officers are disciplined at the appropriate level for misconduct. If police reform were easy and accepted by all police administrators, reforms would already be in place in all agencies; the legislature would not have such a full plate in the 2021 Legislative Session. If an administrator who is resistant to law enforcement reform does not appreciate an officer trying to improve the system from within, how easy would it be to find that the officer has violated some employment policy and remove them from the department if there is no reasonable check-and-balance on discipline?

The idea of state-wide standards created by a board is conceivably a good idea (this is created by Section 4 of HB 2930). Section 3 of HB 2930 requires law enforcement agencies and arbitrators to make determinations regarding alleged misconduct and impose disciplinary action in accordance with the uniform standards that will be adopted under Section 4 of HB 2930. Sections 3 and4 of the bill could improve the law enforcement profession in Oregon and increase public trust.

However, Section 2 of HB 2930 appears to dimmish or remove the traditional concept of just cause from consideration for law enforcement officers because it forces an arbitrator to decide one issue: if evidence exists on the record that would permit a reasonable person to conclude that the officer engaged in misconduct. If the arbitrator finds that there is such evidence, then it appears that other concepts of "just cause" do not apply and the arbitrator cannot deviate from the given discipline and the matter is settled. The traditional seven tests of "just cause" used by arbitrators will apply to every other represented worker in an Oregon disciplinary arbitration except for law enforcement officers. It appears that several of the keys test of "just cause" might no longer be used for officers which include: Was the employee adequately warned of the consequences of the alleged conduct? Was there an investigation completed regarding the conduct? Was the investigation fair and objective? Were the standards applied evenhandedly without discrimination?

Allegations of misconduct must be objectively and fairly investigated and fair discipline should be imposed when wrongdoing is confirmed. Based on my own experiences of 28 years in law enforcement and participation in a local association, I believe that most discipline of law enforcement officers is proper and is not grieved. I also believe that most discipline that is grieved is settled between the parties at steps below arbitration. Some discipline reaches arbitration, where some is upheld and some is reduced or overturned after a careful consideration of the circumstances and applying the just cause principles. I believe that professional arbitrators practicing in Oregon hold both law enforcement officers and managers of law enforcement agencies accountable.

Just like in any legal proceeding, someone will be unhappy with the outcome of arbitration. However, there is not convincing evidence that professional arbitrators

routinely reinstate or reduce discipline for officers who have been <u>properly</u> disciplined. As a general observation, if discipline is properly leveled, arbitrators do not overturn it. The current version of HB 2930 with Section 2 in place undermines proper labor relations and protections for police officers. However, consideration of a different version of HB 2930 that sets state-wide standards for discipline (Sections 3 and 4) while leaving the otherwise current arbitration process in place is likely to improve the professionalism and trust in law enforcement in Oregon. Law enforcement officers are not above the law or disciplinary standards and should be treated as others are treated under the concept of a fair arbitration process.

Exploring the concept of establishing state-wide disciplinary standards may build community trust in law enforcement. The concepts under Sections 3 and 4 of the bill could be a good foundation to build that trust upon, but Section 2 (restricting arbitrators) could have negative effects including deterring prospective police officers from joining the profession and it would undermine labor relations.

<u>Specific Concerns with HB 2930:</u>

#1: Section 2.(1) It appears that the standard of proof for arbitrators will be unjustly lowered under HB 2930 and the lower standard is weighted toward the employer.

Under the current arbitration system, when an officer has been terminated for misconduct and the case reaches arbitration, many arbitrators use the standard of "clear and convincing evidence" to decide if the officer has committed misconduct and should remain terminated. The HB 2930 standard would essentially lower the standard of proof to "preponderance of the evidence", which basically means "is it more likely than not that the person committed the misconduct?" This would be similar to lowering the standard of proof in a criminal trial to convict a person from the current "beyond a reasonable doubt" to the standard of "more likely than not".

In a criminal trial, a person's future is on the line. In an arbitration, a person's professional future is on the line. When a person's future is on the line because of an accusation by the system in authority, the standard of proof should be significant. Officers who are found to have committed misconduct and terminated also face de-certification and the extremely high likelihood of never being able to work in the criminal justice system again. When an officer has actually committed misconduct, this result is proper because such people should not be in the most trusted profession. However, such a result should be based on a significant standard of proof rather than just a preponderance of the evidence.

#2: Section 2 of HB 2930 assumes that investigators of alleged misconduct have done an adequate investigation. There is no standard regarding the qualifications or competence of those who conduct such investigations or how the investigations must be done. Aside from police agency managers, some examples of people who conduct misconduct investigations are private investigators, brand-new police detectives, human resource employees or officers of other agencies whose hiring, retention and training practices may differ widely from the agency using the investigator.

The agency may have done an incomplete, inadequate, or biased investigation; agencies can conduct widely varying investigations and reach widely varying conclusions. There is mistrust of police agencies (as a whole) by segments of the community because police agencies are viewed as conducting poor criminal investigations (investigations that are not objective, fair, and adequate) and lacking proper checks-and-balances. Investigations of officer misconduct can be mishandled just as criminal investigations can be mishandled. The careers of good officers must be given the same consideration as the careers of all other workers who have access to arbitration of discipline: just cause. Under HB 2930, if the employing agency determines an officer has engaged in misconduct, the arbitrator may not make a different determination "if evidence exists on the record that would permit a reasonable person to conclude that the officer engaged in misconduct." It appears the arbitrator may not evaluate the quality of the investigation but instead may just decide if evidence exists that supports the agency's position.

I believe that when arbitrators decide to reduce or overturn discipline, it is not based on a desire to blindly protect officers but is instead based on the arbitrator's objective conclusion that the investigation was poorly done, or a determination that incorrect conclusions were reached by the investigator, that the investigation did not meet the standard of "clear and convincing" or that the level of discipline was not justified. The last issue should be resolved if there is an establishment of state-wide standards. However, poorly-done investigations or incorrect conclusions that are drawn will still remain so officers need the check-and-balance offered by the current arbitration system and standards.

#3: Under HB 2930, Section 4 it is unclear to whom this law will apply. It may be interpreted to create disciplinary standards only for line-level officers who belong to bargaining units and are covered by collective bargaining laws. Do the standards that will be created apply only to collective bargaining unit members? For instance, do supervisors or managers fall under the new standards? If a law enforcement supervisor or manager commits an act of misconduct which would require termination as discipline under the standards, who holds that sworn officer to the new state-wide disciplinary standards?

It appears Section 2 of HB 2930 may set-up two different disciplinary standards for law enforcement officers: One system for the line-level workers who risk their safety daily, whose job security is now being diminished by HB 2930 and another system for those with rank who generally do not spend work shift after work shift in dangerous and possibly controversial encounters. If state-wide standards are set-up that apply to law enforcement officers regardless of rank, then perhaps the professional bar of public service will be raised, but having two different standards with diminished protections for the lowest-ranking employees is fundamentally unfair.

#4: HB 2930 gives an unfair advantage to employers in settlement discussions regarding discipline which may result in less settlements and more arbitrations

that are expensive for both sides. This also tips the scales on the potential costs of arbitration when some labor agreements call for a "loser pays for the costs of arbitration" model; this may also force labor groups to make more decisions based on the fact that arbitration is weighted against the labor group, thus undermining a concept of proper labor relations. The new law may also require new negotiations of current bargaining agreements because of the effect the new law may have on conditions of employment.

#5: Officers must make many and on-going vital decisions over the course of a shift and over the course of a career, many of those decisions under tense and uncertain circumstances. Like any other human, officers will make mistakes and officers should be held accountable for those mistake but as with any situation, the situation should be evaluated based on the totality of the circumstances. Officers may become hesitant to do their jobs or even remain police officers if there is not a proper and meaningful check-and-balance to ensure their discipline is proper when it occurs; that check and balance system includes the current arbitration system. Lack of faith in job security may also make it more difficult to attract and retain quality people for the profession. Overt improper or illegal behavior must not be tolerated but a balanced playing field (including the current arbitration standards) is pertinent to ensure adequate, fair investigations of officer behavior and ensure proper discipline results.

#6: Some of the terms used in Section 4 of HB 2930 (regarding what standards should be established) are very vague and criminal law definitions are included in the standards. Only two topics for the "standards" terms are defined (Under Section 15.(a) and Section 15.(c) but all of these terms should be defined because if they are not defined then there will be no true "standards." For example, the term "use of force" does not appear to have a definition under the Oregon Revised Statutes. "Physical force" has a very vague definition under Oregon law (see ORS 161.015 (6) which states: '"Physical force" includes, but is not limited to, the use of an electrical stun gun, tear gas or mace.') Each law enforcement agency normally sets its own use of force policies and a lack of standard definitions will cause confusion.

The topics under the proposed standards (a-g in the Bill) are Use of force; Sexual Harassment; Sexual Assault; Assault; Conduct motivated by or based on a real or perceived factor of an individual's race, ethnicity, national origin, sex, gender identity, sexual orientation, religion, or homelessness; Professionalism; and the use of drugs or alcohol while on duty. All terms should be defined in the law.

The only terms defined are "Assault" and "Sexual Assault" which are defined by criminal statutes (under ORS 163.115 and ORS 243.317, respectively) although those are not the statutes that law enforcement normally uses for criminal investigations. Consideration should be given whether or not acts that are defined in criminal law should be included in the standards, potentially setting up a type of double-jeopardy or a lower standard of proof for the same alleged acts. Perhaps discipline for alleged criminal activity should be reserved for after the findings of the criminal justice process. These two types of misconduct that fall short of the

criminal elements could still be addressed: physical violence that is not a crime could be covered under Use of Force standards and sexual behavior that is not a crime could be covered under Sexual Harassment standard or the Professionalism standard, eliminating the need for those two topics in the standards, which could eliminate possible conflicts if those two topics have their own standards that reference criminal law.

#7: Restricting arbitrators may lead officers to be less inclined to report misconduct that is now required by HB 4205 (2020) because officers may feel less protected by the check-and-balance of an arbitration of discipline that might result from retaliation when they report other members of law enforcement. The legislature acknowledges the very real possibility that retaliation may occur. Proving that discipline was improper retaliation may be more difficult under restricted arbitration, possibly lessening the protections afforded by Section 2 (5) of HB 4205.

Closing:
Although there are some worthwhile concepts in the bill, I oppose HB 2930 as written. Please consider additional formal examination of the concepts and likely results of what is contained in HB 2930. Establishing state-wide standards of discipline is a worthy concept to explore and may lead to resolution of community concerns about police discipline without diminishing the current protection of the livelihoods of front-line police officers.

Thank you for your consideration in this matter.

Respectfully submitted,
Michael Mann

Additional Statement Regarding Training as a Method of Improving the Police Profession:
I instructed Oregon police officers for 25 years in areas such as de-escalation, police authority, force, physical skills, and other topics including the DPSST developed course "Police Legitimacy and Procedural Justice." I am still involved in instructing. I believe that competent, frequent, and progressive training delivered in a consistent manner is vital to establish a successful and trusted police agency.

There are many paths to build a justice system that more accurately reflects the vision of our nation; one path that I believe would deliver substantial results would be to require standardized on-going training for all law enforcement officers in Oregon, not just to basic police recruits. Many people likely do not realize that police officers in Oregon only receive mandatory state-standardized training during the basic police academy which occurs during the first eighteen months of employment. After that, police officers must receive on-going training, but the content and quality of that training is up to each individual agency; the training is not standardized which inevitably results in different knowledge, different skills, and different practices on the street. Thank you for your consideration.