

2020 Portland Police Contract Webinar Sept. 22, 2020

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ACCOUNTABILITY AND FAIRNESS FOR PORTLAND'S POLICE.

A. What this webinar is not about.

This presentation centers on the Portland police union contract. It does NOT examine several vitally important issues arising in Portland and the United States during recent months including:

1. The causes of the BLM demonstrations engulfing Portland and the nation,
2. The appropriateness of police tactics and violence in response to the demonstrations,
3. The issue of violence and property destruction by a small minority of the demonstrators,
4. Issues raised by the presence of counter-demonstrations by certain groups in support of the police, and violence both from and directed against these groups,
5. Critical issues of police recruitment and training in such things as de-escalation skills, implicit bias, and commitment to equal treatment of all members of our community,
6. Issues of qualified immunity of police officers from civil liability under 42 U.S.C 1983, or proposed "Little" state law remedies similar to Section 1983 but with less protective qualified immunity doctrine. [Colorado has enacted such a "Little 1983," creating a state law remedy for officer violations of constitutional and civil rights.]

While changes to the Portland Police contract are not alone a SUFFICIENT reform for this moment in history, appropriate changes may be a NECESSARY for sufficient reforms to be put into place on the ground. The Portland "street" may speak, the Legislature may command, the Portland Independent Review Board may opine, the best of intentions may be formed all around, but without change

in the police union contract, little may change on the ground. And, stated more positively, re-negotiation of the police union contract presents an opportunity for the City of Portland to recognize and help establish a “new day” in Portland public safety, balancing the need for more accountability while also recognizing the extremely stressful nature of police work, and the many well-intentioned officers facing decisions and stresses that are challenging in any context.

Certainly lawyers and budding lawyers need to understand these issues. They must of course be informed enough to advise clients. Perhaps more importantly, they must play an informed and educating role in the vital public discussions ignited by the police killing of George Floyd, and other controversial killings and treatment of Black Americans, Latinx, and other groups.

The “Seven” --- the Reform Bills Already Enacted Into Law.

Let me first briefly note the 7 reform statutes adopted in two Special Sessions of the 2020 Oregon Legislature.

Three directly address police tactics: the use of tear gas and chokeholds (Appendices A-C), and a fourth established a Committee to make recommendations for further legislative action on police tactics in the future (Appendix D).

The other three bills approved in the Special Sessions deal with accountability and fairness --- the broad topic of our webinar today. One of these makes explicit a police officer duty to intervene in, and report, misconduct by another officer (Appendix E). Another addresses the “record” aspect of police accountability --- a state data base for keeping track of officer misconduct allegations (Appendix F). The last new statute directly addressed part of our topic today --- the power of outside labor relations arbitrators to reverse discipline/discharge of rank and file police officers by Command Officers and the Chief of Police (Appendix G). That bill, ironically, may have made it HARDER for arbitrators to sustain

discipline/discharge even where Chiefs of Police in Oregon decide an officer's misconduct requires termination.¹

B. The Labor Law Duty to Bargain with the Police Union.

Public employees in Oregon --- including Portland police and other Oregon public safety officers ---bargain for the terms of their employment through unions. Once a union gains certification or recognition as the police officers' chosen representative, the public employer --- here the City of Portland --- carries a legal duty to bargain in good faith with the union over wages, hours, and other "conditions of employment." "Conditions of employment" includes standards and processes for firing or otherwise disciplining (reprimand, suspension, demotion, etc.) officers engaging in misconduct. "Conditions of employment" also includes grievance procedures for handling disputes over the interpretation or application of the union contract; these grievance procedures end with a "final and binding" decision by an outside arbitrator chosen by the parties. See generally, ORS 243.650 et. seq.

¹ Senate Bill 1604 [Appendix G] amended ORS 243.706. Prior to enactment of SB 1604 at the First Special Session of the Oregon Legislature in 2020, the statute provided in part: "[A]ny arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work." ORS 243.706 (1).

The new statute added a subsection (3) which provides that in misconduct cases, involving an Oregon law enforcement officer, where the "arbitrator makes a finding that misconduct has occurred consistent with the law enforcement agency's finding of misconduct, the arbitration award may not order any disciplinary action that differs from the disciplinary action imposed by the agency, IF the disciplinary action .. is consistent with the provisions of the discipline guide or discipline matrix adopted...as a result of collective bargaining (emphasis added). SB 1604

"'Discipline Guide' means a grid that is designed to provide parameters for the level of discipline to be imposed for an act of misconduct that is categorized by the severity of the misconduct and that take into account the presumptive level of discipline for the misconduct and any aggravating or mitigating factors." "'Discipline matrix' means a grid used to determine the level of discipline to be imposed for an act of misconduct that is categorized by the severity of the misconduct, according to the intersection where the category of misconduct and the level of disciplinary action meet." SB 1604, Section 1. Both of these terms are defined as "employment relations" matters which must be bargained with a union representing police officers. SB1604, Section 3.

C. The Portland Police Union Contract Contains Many Protections for Police Officers.

Under these provisions of the Oregon labor law, the Portland police contract contains numerous procedural and substantive protections for officers facing accusations of misconduct.

First, the right to discipline or fire an officer must be for a “just cause.” This is a term of art in labor relations. Generally “just cause” in labor relations means that a fair process and the employer’s own rules were followed in making the decision to discharge or discipline, that the employer bear the burden of proof that the facts alleged to support the charges are true, and that the degree of discipline be reasonable under the circumstances. Combined with other provisions of the Portland police contract, the “just cause” clause in the police union contract creates significant hurdles and limits on the City’s power to discipline or fire officers (Articles 20-21, Appendices H and I).

Second, the grievance arbitration clause in the Portland police contract means that a labor relations arbitrator – not the Internal Affairs Division, nor the Police Review Board, nor the Chief of Police nor the Independent Review Board, nor the Major or City Council---- will make the ultimate decision when an officer is fired or disciplined for misconduct (Art. 22, Appendix J).

Third, the Portland police contract and an Oregon statute --- the Police Officers’ Bill of Rights (ORS 236.350 et. seq.) --- strictly limit and regulate INVESTIGATIONS of alleged officer misconduct. These provisions include restrictions on superior officers INTERVIEWING officers involved in incidents involving deadly or other force, the right of the accused officer to consult with an attorney and the police union before telling superiors what happened, and officers’ access to investigation files. Changes to allow timely interviews of accused officers involved in incidents of police violence, and more limited ACCESS TO INVESTIGATIVE FILES and witness statements until a disciplinary investigation has been concluded, might facilitate more accountability and even-handedness in handling allegations of misconduct (Article 61, Appendix J).

Fourth, the police union contract strictly limits the use of official officer EVALUATIONS in matter of pay and in the investigation and disciplinary review

process (Article 59, Appendix K). Under these provisions, an officer's official evaluations cannot even be used in the disciplinary process.

Additionally, SB 1604 appears to require new bargaining issues over a "disciplinary guide" or "disciplinary matrix." See footnote 1.

Finally, various other contract provisions further limit the flexibility of Command Officers and the Chief in matters of employee discipline. Article 3 (Existing Standards), Article 15 "Policies and Procedures...", Article 17 "Manual of Rules and Procedures and Contract" are examples. Other provisions of this lengthy contract may at times come into play as well both for discipline matters and other possible reforms such as changes in police training.

D. Changing the Police Union Contract via "Interest Arbitration."

Under the Oregon Public Employee Collective Bargaining Act, ORS 243.650 et. seq., changes in the police union contract must be bargained in good faith negotiations between the union and city. But what if the City and Union cannot agree on changes in the contract? Most public employees in Oregon – but not police officers – can lawfully strike once the bargaining process breaks down and an "impasse" occurs. Police officers face a legal prohibition to strikes, but also benefit from an alternative dispute resolution process, "Interest Arbitration."

This is arbitration to resolve a bargaining dispute; the arbitrator holds a hearing and receives the arguments and evidence of the City and Union and then makes a "final and binding" ruling that effectively "writes" the new contract. (This is to be distinguished from "grievance arbitration" --- which interprets and applies contract language, the type of arbitration discussed in C. above.)

The upshot is that to make meaningful changes in the police contract, the City must either persuade the police union to accept the changes in good faith negotiations, or persuade an "outside" interest arbitrator to accept and make those changes in her interest arbitration award. In the case of limits on the investigatory process, the requirement for a "just cause" for discipline, and other restrictions, the City would also have to seek amendments to the Oregon Police Officers Bill of Rights in the State Legislature.

E. Conclusion

Our nation and our city confront an opportunity to heal the evident breach between significant portions of the citizenry and our public safety officers, to reduce or eliminate the explicit and implicit racism that affects all of us including our police officers, and to embrace a more positive vision and practice in police interactions with citizens and the community.

Recruitment, training, “community policing”, the direction of funding into mental health and domestic dispute resources, changes in police tactics, a duty to intervene and report, and more sunshine regarding records of misconduct investigations may all be needed reforms. And for these other reforms to be implemented, a re-working of the grievance arbitration, just cause, and other provisions of the Portland police contract carry particular urgency.

Equally important, in my view, if such changes are to be achieved, must be new provisions in the police union contract recognizing that policing is an incredibly high stress job. A police department must not be the “enemy” of the people, and many dedicated officers deserve recognition and support. In this connection many ideas may be offered. One suggestion to facilitate change in policing in Portland involves periodic “sabbaticals” for officers from regular “street and patrol” assignments; during such paid breaks in policing work, officers would work in, with, and for various community service groups, or perform other social service and restorative work; they would thus be periodically “reconnected” with the communities they serve via non-police “good works.”

But one truth looms large: the road to a new day in Portland policing “on the ground” may have many turns and twists, many stops for other reform measures, but that road clearly must pass through the processes of collective bargaining and appropriate revisions in the Portland police contract.