NATIONAL LAWYERS GUILD
PORTLAND, OREGON CHAPTER

POST OFFICE BOX 40723
PORTLAND, OREGON 97240-0723

MEMORANDUM

DATE: December 6, 2013

TO: Mayor Charlie Hales, mayorhales@portlandoregon.gov

FROM: Kristen Chambers and Shauna Curphey, Portland Chapter of the National Lawyers Guild

ENDORSED BY: The AMA Coalition for Justice and Police Reform
League of Women Voters of Portland
Portland Copwatch

CC: Commissioner Dan Saltzman, dan@portlandoregon.gov
Commissioner Amanda Fritz, amanda@portlandoregon.gov
Commissioner Nick Fish, nick@portlandoregon.gov
Commissioner Steve Novick, steve.novick@portlandoregon.gov
Constantin Severe, constantin.severe@portlandoregon.gov
Auditor LaVonne Griffin-Valade, lavonne.griffin-valade@portlandoregon.gov

RE: Proposed Amendments to the IPR Ordinance and the Portland Police Association CBA: Compelled Officer Testimony and the 48-Hour Rule

I. Introduction

The Portland Chapter of the National Lawyers Guild presents this memorandum of law to the Portland City Council and Auditor in response to the concerns expressed at the Council meeting on October 23, 2013 and the assertions in Portland Police Association attorney Anil Karia's letter to the Portland Bureau of Human Resources and Police Bureau dated October 24, 2013 about the legality of granting IPR authority to compel officer testimony. The current Portland City ordinance governing police oversight allows IPR to compel testimony if the collective bargaining agreement with the police union does not prohibit it.[1] The collective

[1] PORTLAND CITY CODE, ch. 3.21.120(C)(2)(b) [hereinafter City Code]. The relevant provision states: "IPR

bargaining agreement between the Portland Police Bureau and the City currently in effect (CBA) implies that only the Bureau may interview officers during investigations of potential misconduct.[2] This memo will show that amending the ordinance to give IPR authority to compel officer testimony would not run afoul of state labor laws or officers' constitutional rights.

We also address a related issue—the legality of eliminating the "48-hour rule." The 48-hour rule, located in the current CBA, allows an officer to receive two days advance notice before the officer is required to submit written reports or participate in interviews.[3] This memo will show that eliminating the 48-hour rule in the CBA would not violate state labor laws or officers' constitutional rights.

Granting IPR authority to compel testimony and institute investigation sooner than 48 hours after an incident of alleged police misconduct would be a huge step toward truly independent police oversight. The current framework unnecessarily deprives IPR of the authority required to conduct adequate independent investigations.

II. Allowing IPR to Compel Officer Testimony is Not a Mandatory Bargaining Subject

The Oregon Employment Relations Board (ERB) has not squarely decided the particular

---

investigations shall be conducted in conformance with legal and collective bargaining provisions. When a collective bargaining agreement is applicable and specifies that a member may only be interviewed by a police officer, the Director shall notify the IAD commander that IPR has undertaken an investigation and the reason. The IAD commander shall appoint a liaison investigator from that office within two working days to arrange and participate in interviews. When members represented by a collective bargaining unit are being interviewed by IPR personnel, the IAD investigator may repeat the question and/or direct the member to answer the question. *When a collective bargaining agreement is not applicable and does not specify that a member may only be interviewed by a police officer, then the Director shall ask the member the question directly and/or direct the member to answer the question*." (Emphasis added).

[2] 2010-2013 LABOR AGREEMENT BETWEEN THE PORTLAND POLICE ASSOCIATION AND THE CITY OF PORTLAND, art. 61.2.2.4, *available at* http://www.portlandoregon.gov/bhr/article/10857 [hereinafter CBA]. The relevant provision states: "The officer being interviewed shall be informed of the name, rank, and command of the officer in charge of the investigation, the interviewing *officer*, and all other persons present during the interview." (Emphasis added).

[3] CBA art. 61.2.1.3. The 48 hour rule states: "Whenever delay in conducting the interview will not jeopardize the successful accomplishment of the investigation or when criminal culpability is not at issue, advance notice shall be given the officer not less than forty-eight (48) hours before the initial interview commences or written reports are required from the officer. The advance notice shall include whether the officer is a witness or a suspect, the location, date and time of the incident, the complainant's name, and the nature of the allegation against the officer."

issue of whether granting authority to an oversight agency to compel officer testimony is a mandatory or permissive bargaining subject. However, the ERB has already identified the scope of bargaining for a number of subjects that fall within the larger category of investigations of employee misconduct. Subjects that the ERB has classified as permissive include "complaint procedures,"[4] "qualifications for a position,"[5] "assignment of duties,"[6] and, more specifically, "assignment of duties to employees outside the bargaining unit."[7] Mandatory subjects include "discipline"[8] and "fundamental fairness."[9] As the cases below illustrate, the ERB would likely conclude that granting IPR authority to compel officer testimony specifically falls within the former categories above, and is therefore a permissive bargaining subject.

In *OPEU v. State of Or. Exec. Dep't*, state hospital and mental health service employees filed an Unfair Labor Practice claim against their employer for refusing to bargain over employee investigation procedures.[10] The ERB weighed the employees' interest in not being subject to stigma and anxiety against the State's interest in controlling the investigation.[11] It found that the "restrictions and conditions imposed on the investigation process which could potentially jeopardize its validity and integrity are . . . matters in which the State's interest in identifying . . . abuse will generally override effects on employees subject to investigation."[12] The ERB held that two of the proposals at issue were permissive and one was mandatory. The subjects deemed permissive included providing notice to the employee of the specific allegations

---

[4] The PECBA Digest has categorized the permissive proposals in *AOCE v. State of Or. Dep't of Corr*., 14 PECBR 832, 870–72 (1993), as falling under the subject of "complaint procedures." THE PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT DIGEST, 1991–1995.

[5] OR. REV. STAT. § 243.650(7)(g) (2009).

[6] *Id*.

[7] *See*, *e.g*., *Eugene Educ. Ass'n v. Eugene Sch. Dist. No. 41*, 1 PECBR 446, 451–52 (1975).

[8] *See*, *e.g*., *Portland Fire Fighters Ass'n, Local 43 v. City of Portland*, 16 PECBR 245, 250–52 (1995).

[9] *See*, *e.g*., *OPEU v. State of Or. Exec. Dep't*, 14 PECBR 746, 767 (1993).

[10] *OPEU*, 14 PECBR at 767.

[11] *Id*. at 768.

[12] *Id*.

against him, providing notice to the employee of the complaining party's identity, and allowing the employee the opportunity to provide information first.[13] The ERB concluded that [d]ecisions about when to interview parties and in general how to conduct . . . investigations are not ones over which the State can be required to bargain" because "[a]n employee has no legitimate interest in interfering with the investigation process."[14] The ERB distinguished the proposal for imposing time frames to initiate and complete investigations. It held this topic to be mandatory because the "State has no interest in unreasonably protracting or delaying the investigation process, while the accused employee has a significant interest in being cleared of or charged with wrongdoing in as swift a manner as possible."[15]

In *AOCE v. State of Or. Dep't of Corr.*, state correctional employees filed an Unfair Labor Practice complaint against their employer for refusing to bargain over particular employee investigation procedures.[16] The ERB weighed the employees' interest in "protections [. . . to] ensure fairness" against the employer's interest in the "integrity and effectiveness of the investigation."[17] It concluded that three of the five proposals were permissive topics. The ERB held that requiring the State to notify employees of a complaint within 48 hours was permissive based on its reasoning in *OPEU v. State of Oregon*.[18] It also held that divulging information concerning the complaint to the accused officer at least 72 hours before questioning and allowing the officer to consult with a representative during the interview are both permissive topics for bargaining because they "substantially defeat[] the purpose of such an interview."[19] The ERB explained that the "purpose of [the interview] is to obtain the employee's own candid, spontaneous, and unvarnished rendition of the events under investigation. The employee has no

---

[13] *Id*. at 767–68.

[14] *Id*. at 768.

[15] *Id*. at 769.

[16] *AOCE v. State of Or. Dep't of Corr.*, 14 PECBR 832, 870 (1993).

[17] *Id*. at 871.

[18] *Id*. at 870–71.

[19] *Id*. at 871–72.

legitimate interest in providing anything else."[20] However, the ERB held that requiring investigators to not use "threats or intimidations" during the interview, and allowing an employee to tape record the interview are mandatory topics for bargaining.[21] The ERB reasoned that these topics were mandatory because they "would not interfere with" or "adversely affect[]" the employer's ability to conduct investigations.[22]

In *Eugene Police Employees Ass'n v. City of Eugene*, a police union contested the city's unilateral action of allowing the auditor to participate in investigatory interviews.[23] The city and the union had previously agreed that neither would pursue "proposals concerning the police auditor's investigatory role."[24] But, the city withdrew its proposal during bargaining, and referred the issue to the voters.[25] Unfortunately, the ERB did not have the opportunity to reach the decision of whether the topic was mandatory or permissive because it held that the City did not change the "*status quo"* when it gave authority to the auditor to conduct investigatory interviews.[26] However, the city asserted that "all matters related to the police auditor's role in interviews, except notice of the interview, were permissive topics of bargaining," and the union did not challenge that assertion.[27]

In addition, the concurring opinion, written by the ERB Chair, found that this issue [the

---

[20] *Id*. at 872.

[21] *Id*. at 872.

[22] *Id*.

[23] *Eugene Police Emp. Ass'n v. City of Eugene*, 23 PECBR 972, 974 (2010).

[24] *Id*. at 973.

[25] *Id*. at 972.

[26] *Id*. at 979. The duty to bargain in good faith under ORS 243.672(1)(e) includes an obligation to bargain prior to changing existing employment conditions that concern mandatory subjects of bargaining. *Id*. at 26–27. In a unilateral change case, the ERB first identifies the *status quo* based on an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln City Ed. Assn. v. Lincoln City Sch. Dist.*, 19 PECBR 656, 664–65 (2002). Then the ERB determines whether the employer changed it. *Id*. If so, ERB decides whether the change affects a mandatory subject for bargaining. *Id*. If it does, the ERB reviews the record to determine whether the employer completed its bargaining obligation before it decided to make the change. *Lebanon Educ. Ass'n/OEA v. Lebanon Cnty. Sch. Dist*., 22 PECBR 323, 360 (2008). Because the ERB found that the city did not change the *status quo* in *Eugene Police Emp. Ass'n*, it never reached the scope of bargaining issue.

[27] *Eugene Police Employees Ass'n,* 23 PECBR at 996.

police auditor's role in interviews] would be permissive.[28] The concurrence reasoned that "[d]eciding who will conduct investigatory interviews clearly concerns assignment and qualifications."[29] By statute, assignment of duties and qualifications for a position are permissive for bargaining.[30] He concluded that the city is not required to bargain over how the oversight agency is included in investigations.[31] The Chair footnoted an exception to the general rule that conducting investigations is a permissive bargaining subject. This exception "concerns aspects of an investigation that involve fundamental fairness to the employee and do not unduly interfere with the investigation," which are mandatory.[32] These include protections such as "completing an investigation as promptly as possible, . . . prohibit[ing] investigators from using 'threats or intimidations,' and . . . allow[ing] tape recording of interviews."[33] While the union argued that "fundamental fairness" was involved because allowing the oversight agency to participate in interviews would cause employees to lose *Garrity* rights, the Chair found no law or proof indicating that this would in fact occur.[34]

The case cited in Mr. Karia's October 24 letter, *Portland Firefighters Association, Local 43 v. City of Portland,*[35] is not persuasive on the issue of compelling officer testimony. In that case, the City eliminated the ability to impose most types of unpaid suspensions on battalion chiefs.[36] The ERB explained that discipline criteria is a "matter in which employees have a substantial interest and in which employers have little or no countervailing interests."[37] The

---

[28] *Id.* at 1004 (Gamson, P., concurring).

[29] *Id.* at 1003 (Gamson, P., concurring).

[30] ORS 243.650(7)(g) (2009).

[31] *Id.* at 1004 (Gamson, P., concurring).

[32] *Id.* at 1003 (Gamson, P., concurring).

[33] *Id.*

[34] *Id.*

[35] 16 PECBR 245 (1995).

[36] *Id*. at 250.

[37] *Id*. at 252 (citations omitted).

discipline criteria examined in *Portland Firefighters Association* is separate and distinct from the issue of investigatory procedures, like compelling testimony. Even though IPR is intimately involved in both investigation and discipline, each involve different goals and outcomes. As stated in *OPEU*, employers have strong interests in investigating employee misconduct, whereas employees have "no legitimate interest in interfering with the investigation process."[38]

Based on ERB precedent and the concurring opinion in *Eugene Police Employees Association*, the ERB would likely find that granting IPR the authority to compel testimony is a permissive subject that does not require bargaining. The authority to compel officer testimony falls under the permissive subjects of "complaint procedures," "assignment of duties," and "qualifications for a position."[39] To further clarify this categorization, it is important to understand that Portland Police Bureau's Internal Affairs already has authority to compel testimony.[40] Thus, granting the authority to IPR primarily involves the narrow subject of "assignment of duties to employees outside the bargaining unit."[41] In other words, the City would merely be sharing the same authority granted to Internal Affairs with IPR.

Unlike OPEU's complaint about time limits for investigations[42] or AOCE's concern about the use of threats and intimidation,[43] compelling officer testimony does not implicate "fundamental fairness." Likewise, it does not infringe on the mandatory subject of "discipline" because disciplinary decisions resulting from interviews and other evidence are made separately from the investigation process, and ultimately by the Chief of Police.[44]

Even if the ERB could not agree on a bargaining subject into which compelling officer testimony fits, it would still be likely to find the subject permissive. Where an issue does not fit

---

[38] 14 PECBR at 768.

[39] *Eugene Police Employees Ass'n,* 23 PECBR at 1003 (Gamson, P., concurring).

[40] CITY CODE, ch. 3.21.120(C)(2)(a); CBA art. 61.2.2.

[41] *Eugene Police Employees Ass'n,* 23 PECBR at 1004 (Gamson, P., concurring) (citing *Eugene Educ. Ass'n v. Eugene Sch. Dist No. 4J*, 1 PECBR 446, 451–52 (1980)).

[42] *OPEU*, 14 PECBR at 769.

[43] *AOCE*, 14 PECBR at 872.

[44] CITY CODE, ch. 3.20.140(B).

neatly into an already identified bargaining subject, the ERB applies a test balancing the employer's management prerogatives with the employees' interests.[45] Applying the balancing test, an employee has no legitimate interest in hiding misconduct whereas an employer has a strong interest in holding its staff accountable. It should come as no surprise to an employee that if he were suspected of breaking the rules of his employer, he would be expected to explain himself in order to retain his employment. ERB precedent dictates that "a public employer is generally not required to bargain over the manner in which it investigates alleged employee misconduct."[46] Conducting interviews and compelling testimony are management prerogatives and thus permissive bargaining subjects.

III. Eliminating the 48-Hour Rule is Not a Mandatory Bargaining Subject

The ERB has explicitly held that notices like the 48-hour rule are not mandatory bargaining subjects. The ERB has found that the following were permissive subjects: providing notice to the employee of the specific allegations against him; providing notice to the employee of the complaining party's identity; allowing the employee the opportunity to provide information first; requiring the State to notify employees of a complaint within 48 hours; divulging information concerning the complaint to the accused officer at least 72 hours before questioning; and allowing the officer to consult with a representative during the interview.[47] The ERB reached these decisions based on the employers' important interest in obtaining candid information soon after an incident and the employees' lack of legitimate interest in restrictions that may thwart meaningful investigations of misconduct.[48] The 48-hour rule in the CBA is no different than the conditions already examined by the ERB and determined to be permissive bargaining subjects.

---

[45] Akin Blitz & Liz Joffe, *Public Employees and Oregon's Scope of Bargaining*, LABOR EDUC. & RESEARCH CTR. U. OF OR. 18 LERC MONOGRAPH SERIES 1, 28 (Marcus Widenor, ed., 2007) *available at* http://www.bullardlaw.com/assets/documents/lercmonographseries0507.pdf.

[46] *Eugene Police Emp. Ass'n*, 23 PECBR at 1003 (Gamson, P., concurring).

[47] *OPEU*, 14 PECBR at 767-68; *AOCE*, 14 PECBR at 871-72.

[48] *Id*.

IV. Allowing IPR to Compel Officer Testimony Would Not Jeopardize Officers' Constitutional Rights

A police officer's constitutional right against self-incrimination is protected in certain circumstances, as explained by the Supreme Court in *Garrity v. New Jersey*.[49] Under *Garrity*, an incriminating statement made by an officer to IPR is inadmissible against the officer in a criminal trial if the officer invoked the right to remain silent and was compelled to make the statement under the threat of job termination.[50] The protections provided by *Garrity* are substantial—as a former Law Professor from Cornell Law School and current Chief of the Criminal Division of the United States Attorney's Office in the Northern District of New York put it: "courts place more stringent restrictions on prosecutors' use of compelled statements that internal affairs investigators take from police officers in noncustodial, noncoercive settings than on their use of confessions that police extract from in-custody suspects by use of illegal physical force or psychological coercion."[51] For this reason, it is important that *Garrity* warnings are administered with care and limitation. The Department of Justice recommends administering *Garrity* warnings only when necessary—not when seeking routine police reports, and not in every situation where an officer is interviewed concerning his or her conduct.[52] Rather, *Garrity*'s protection applies only when an officer reasonably believes that a truthful statement will be self-incriminating in a criminal prosecution and he faces the threat of termination for refusing to answer.[53]

The case cited in Mr. Karia's letter, *City and County of Denver v. Powell,*[54] does not

---

[49] 385 U.S. 493 (1967).

[50] *Id*. at 500.

[51] Steven D. Clymer, COMPELLED STATEMENTS FROM POLICE OFFICERS AND *GARRITY* IMMUNITY, 76 NYU L. Rev. 1309, 1313 (2001).

[52] Dep't of Justice Letter to the Mayor of Seattle re: United States' Investigation of the Seattle Police Department-*Garrity* Protections, Nov. 23, 2011, available at http://samuelwalker.net/wp-content/uploads/2012/01/DOJSeattleGarrity.pdf (citing case law to support this position).

[53] *Id.*; *see also Aguilera v. Baca*, 510 F.3d 1161, 1173 n.5 (9th Cir. 2007) ("[T]he Constitution is offended . . . only when the officer is required to waive his privilege against self incrimination while answering legitimate job-related questions.")

[54] 969 P.2d 776, 780-81 (Co. App. 1998).

undermine IPR's proposal to compel officer testimony. That case addressed whether a civilian police oversight committee could compel officers' testimony despite the officers' decision to invoke the Fifth Amendment privilege against self-incrimination. The Colorado Court of Appeals found that testimony before the committee did not invoke *Garrity* protections because the committee was not involved in disciplinary proceedings. [55] Thus, the officers' statements before the committee would not be considered "coerced" and therefore could be construed as a voluntary waiver of their Fifth Amendment rights in the event the officers faced a criminal prosecution. As a result, the court held that the officers were entitled to assert their Fifth Amendment privilege and decline to answer questions submitted to them where their answers might tend to incriminate them.

Here, the changes to the IPR ordinance do not address whether IPR could compel officer testimony even when an officer invokes a Fifth Amendment privilege, and thus the *Powell* decision is inapposite. Moreover, unlike the committee in *Powell*, IPR is immersed in the Portland Police Bureau's disciplinary proceedings. IPR is a voting member of and recommends the citizen members of the Bureau's disciplinary body, the Police Review Board.[56] Also, IPR has to controvert findings and discipline proposed by the Bureau, triggering review by the Board.[57] Thus, in the unlikely event that an officer invokes the Fifth Amendment privilege during an IPR interview and is nonetheless compelled to provide a statement upon threat of termination, *Garrity* would limit use of those statements in a criminal proceeding. However, if the City is still concerned that IPR does not have sufficient authority to render a *Garrity* warning, such concerns can be alleviated. The ordinance could require the Police Commissioner or Chief or another representative with express disciplinary authority to administer the *Garrity* warning.

V. Eliminating the 48-Hour Rule Would Not Jeopardize Officers' Constitutional Rights

Garrity is inapplicable to the 48-hour rule. By its very terms, the 48-hour rule only

---

[55] *Id*.

[56] CITY CODE, ch. 3.20.140(C)(1)(a).

[57] *Id*. at 3.20.140 (B)(1); 3.21.070(E).

applies when criminal culpability, an essential component of the *Garrity* analysis, is not at issue.[58] Also, allowing IPR to obtain reports from officers without 48 hours' notice does not trigger the same constitutional protections that compelled testimony does. The Fifth Amendment protects a person "only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature."[59] It does not protect an officer from doing his job of submitting routine reports, such as those required after use-of-force incidents.[60]

VI. Conclusion

The City has many important upcoming decisions with respect to police oversight. We hope this memo sufficiently answers the Council's questions, and assists the Council in action to grant IPR power to compel testimony. We also hope the City eliminates the 48-hour rule in the new CBA. The Portland Chapter of the National Lawyers Guild remains ready to address any further concerns of the Council or Auditor on these topics.

---

[58] CBA art. 61.2.1.3.

[59] *Deering v. Brown*, 839 F.2d 539, 540 (9th Cir. 1988).

[60] *Cook*, 526 F. Supp. 2d at 3; *Watson v. Cnty. of Riverside*, 976 F. Supp. 951, 955 (C.D. Cal. 1997); *Devine v. Goodstein*, 680 F.2d 243, 247 (D.C. Cir. 1982).