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May 14, 2013

Chair Shields
Senate Committee on General Government and Consumer and Small Business Protection
Oregon State Capitol
Salem, Oregon 97301

Re: HB 2418

Dear Senator Prozanski,

I am writing to provide you with the League's understanding of how the status of "supervisory" employees would be resolved in the event HB 2418 becomes law. There appears to be some disagreement among stakeholders. The situations impacted are varied, and the law and its application is nuanced. The League has numerous concerns with this legislation. So too should the public – particularly those concerned with the capacity of elected officials and public executives to insure policy is adhered to and public expectations are met. Effective supervision depends on effective supervisors who answer to executive and elected leadership. Conflicts of interest are inherent in the alliance of supervisors and mid-level management that is at the core of this issue.

The intense disagreements taking place over HB 2418 have not been particularly helpful to the legislative process. I hope the explanations that follow are more so.

A major concern of the League is that if HB 2418 becomes law, the resulting transitions in nearly every likely instance will be on opposition to another central labor law concept – self-determination. Consider a typical public sector labor contract which defines the scope of the bargaining unit (union membership) to include "all employees in the City excluding supervisors and confidential employees." In such circumstance, the effect of the Bill will be that those

employees who once were supervisors no longer will be within that definition. Thus, as a matter of contract interpretation and law, those former supervisors—no longer so because they lack the power to impose economic discipline--- will accrete to the bargaining unit and thereafter will be represented by the union. This probably will occur without a vote, and without choice by the former supervisors thus affected.

For the members of the existing bargaining unit, a majority of those employees initially sought to create a certified bargaining unit by their affirmative choice to be represented as determined by an ERB-managed election process. Under HB 2418 in a workplace with a bargaining agreement as described above, supervisors would involuntarily be swept into the existing bargaining unit they formerly supervised due to a change in the "supervisor" definition and they will not have the ability to express their individual choice under ERB law and applicable OARs. Consider still another common labor contract that defines the scope of the bargaining unit in terms such as "employees who are employed in the classifications of …. [either listing the classifications or referring to the classifications set forth in a wage or classification appendix to the contract]. In this situation the union will have the right to petition ERB to change the certification of the bargaining unit." This procedure is referred to as a "unit clarification petition." It is well established under the PECBA and federal labor law procedures. Such a petition can be filed either during a thirty day window between the 60th and 90th day prior to the expiration of the labor agreement or after the contract has expired. If the bargaining unit proposed by a union is appropriate, ERB will order the clarification and the positions will accrete to the unit without a vote of the former supervisors.

Under each of the above scenarios reflecting language commonly found in existing bargaining agreements, HB 2418 would strip employees of their self-determination, forcing former supervisors to become union members absent even the right to cast a vote.

In these instances, we expect that ERB and employers will favor a "wall to wall" bargaining unit. This result, while undermining the employer's ability to effectively lead, manage and mentor through a management team responsible to the public interest rather than union solidarity, may be preferable to a multiplicity of bargaining units. Each carries significant fiscal costs and impacts – the cost of bargaining, contract administration, interest arbitration, and whipsawing in negotiations, to name a few. This impact on the State itself will not be insignificant.

ERB has the discretion to ignore its own declared preference for "wall to wall" units as it did recently in bargaining unit determination proceedings involving Clatsop County. And, ERB has the ability to deviate from the accretion rules and order elections in some instances, although we doubt that it would do so. Nonetheless, the uncertainty will lead to costly litigation and disservice to employers, employees, union and the public interest.

The League is concerned about the cost and complexity that HB 2418 would entail. Notwithstanding the contract language issues referenced above, once a group of former supervisors becomes no longer "supervisory" under the Bill, it is conceivable that multiple unions could seek to represent supervisors in a particular situation. Alternatively, it is possible

that these former supervisors could seek to form a separate union(s), resulting in a greater multiplicity of bargaining units and different union representatives. Either development will compound costs for the State and public employers associated with collective bargaining with more unionized groups. When contracts not bargained and never intended to apply to supervisors unexpectedly are declared to apply to such positions, or new bargaining units are compelled upon an employer which lacks the fiscal resource and labor sophistication to capably and effectively bargain language essential to its supervisory interests, the potential is high for costly mischief in creative union demands having impacts which are difficult for those without rare labor law experience and detailed awareness of the employment setting to understand.

The discussion and debate should concern the reasons for the historic exclusion of managers and supervisors from collective bargaining, the public policy underpinnings of the National Labor Relations Act after which Oregon law is modeled, and the reasoning and support for exclusion of supervisors from bargaining as explained clearly by the Supreme Court of the United States when it has addressed supervisory status in this context.

I have copied the relevant administrative rules and provided commentary after each rule. My commentary is labeled and will appear in italics to avoid confusion with the cited text.

115-025-0005

Petitions for Clarification of Bargaining Unit

(1) Petitions for clarification of a bargaining unit may be filed by the recognized or certified representative or by the public employer when no question of representation exists, subject to the other requirements of this rule. For purposes of this rule, a question of representation exists only when the employees who are the subject of such a petition are unrepresented and as a group would constitute an appropriate unit as determined by the Board. All petitions shall be filed in writing with the Board on a form approved by the Board. The petitioner shall designate one or more of the following subsections on the form to indicate the clarification issue(s) the petitioner intends to raise. After the filing of objections, if any, the Board Agent may determine the issue raised by the petition. If the Board Agent determines that the issue raised is different than that designated on the form, the Board Agent shall determine whether the petition complies with the requirements of the appropriate subsection(s).

Commentary: *This paragraph lays out the framework of the unit clarification (UC) process but makes clear that final determination of which subsection (type of clarification petition) applies rests with the ERB. Additionally, please note that only the employer or the certified representative, not the impacted supervisory employees may file a unit clarification petition.*

This paragraph is a general introduction for the different types of clarification petitions that follow. The second sentence makes clear that if the petition involves an

unrepresented group of employees who would constitute an appropriate unit, then it needs to be filed as a Petition for Representation under OAR 115-025-0000 and not as a Petition for Certification. It is unclear whether ERB could or would rule, contrary to ERB's declared preference for wall-to-wall bargaining units, that a group of supervisors "would" or "could" constitute "an appropriate unit" under this rule; and whether the supervisors would be given a choice with an election ordered. That choice could be among the following – no representation/no union, or any one of several competing unions.

(2) When the issue raised by the clarification petition is one of public employee status under ORS 243.650(6), (16), or (23), the petition may be filed at any time; except that where a position sought to be excluded is expressly by title included within the unit description, a petition may be filed only during the open period provided for in OAR 115-025-0015(4). The Board may order a self-determination election among the affected employees as a result of a petition filed by a labor organization under this subsection of this rule if the Board determines that an election would be appropriate to further the policy expressed in ORS 243.662; for example, where the affected employees, as a class, were excluded from voting when the bargaining unit was certified and subsequently were treated as being excluded from the unit.

Commentary: *This would be the most appropriate process under ERB's rules if HB 2418 were to be enacted. This rule speaks directly to ORS 243.650(23), the statutoryl definition of a "supervisor" which the Bill would amend. It is significant that this rule does not require a showing of interest on the part of the supervisory employees subject to the UC, nor does it grant those employees the right to an election. ERB has considerable discretion.*

(3) When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.

Commentary: *Under this determination method, there is no showing of interest and no election is possible. Unions will be inclined to file this form of petition whenever possible, and ERB's limited staff and fiscal resources will probably compel its reliance on this procedure which requires very little in contrast with the alternatives. And, this process imposes an additional possibility – that being the question of arbitration to determine the meaning of an existing contract as applied to the supervisory issue.*

(4) When the issue raised by the clarification petition is whether certain unrepresented positions should be added to an existing bargaining unit, the petition must be supported by a 30 percent showing of interest among the unrepresented employees sought to be added to the existing unit. If the employees sought to be added to the unit occupy

positions that existed and were filled at the time of the most recent certification or recognition agreement, the petition must be filed during the open period provided for in OAR 115-025-0015(4) and will be subject to the provisions of 115-025-0015(1) and (3). If the employees sought to be added to the unit occupy positions that were created or were filled after the most recent certification or recognition agreement, the petition may be filed at any time and will not be subject to the provisions of 115-025-0015. If the Board determines that it would be appropriate to add the unrepresented positions to the existing bargaining unit, the Board shall order a self-determination election in which the unrepresented employees will vote either to be represented within the existing bargaining unit or for no representation. The election shall be conducted by a Board Agent in accordance with the provisions of 115-025-0055 and 115-025-0060, to the extent such rules are applicable to a self-determination election. If a majority of the unrepresented employees who vote cast ballots in favor of representation, the existing bargaining unit shall be clarified to include the positions of the unrepresented employees.

Commentary: *This UC procedure requires a showing of interest and requires an election, but this method would not be appropriate, based on ERB case law, to resolve UCs involving supervisory employees. This rule (OAR 115-025-0005(4)) is used to resolve questions concerning representation of new positions created after a bargaining unit has been established. For example, if a city has a public works department and they add a parks department, the workers in the parks department would provide a showing of interest and an election would be held after the Employment Relations Board ruled on the appropriateness of the petition.*

I hope I have shed so some light on this rather complicated process and considerations important to the questions presented by the proposal. We are happy to discuss the matter with any interested Senator and we certainly would welcome the opportunity to facilitate a discussion involving labor law experts with depth of understanding in government, public safety and labor law.

Sincerely,

Scott J Winkels