STATEMENT OPPOSING HB 2930

(ELIMINATING ARBITRATION RIGHTS)

To: House Subcommittee on Equitable Policing
From: Michael Selvaggio, Oregon Coalition of Police and Sheriffs
Date: February 15, 2021

Chair Bynum and Members of the Committee:

For the record, my name is Michael Selvaggio, representing the Oregon Coalition of Police and Sheriffs (ORCOPS). We represent line officers and deputies around the State of Oregon, and are Oregon's largest law enforcement organization. On behalf of our membership, I want to convey our strongest possible opposition to the current version of HB 2930, which would functionally dismantle principles of fair treatment and nondiscrimination in public employment.

Recently, this Committee has been treated to descriptions of the arbitration process by employer groups who have implied that the process is marked by randomness and overt abuse.

This is simply not true.

The function of arbitration -- that is, the ability of employees to assert that a management decision is fundamentally unfair or outside the scope of their authority -- is vital to any system that relies in part on the fallibility of human judgment. Arbitration answers the question: "What is an employee to do if their management has made a determination that is a violation of their contract?"

By tilting discretion so far toward initial management decisions, HB 2930 eliminates an important layer of accountability over management decisions. This shift towards allowing more subjective discipline opens the door wide to favoritism, cronyism, and discrimination.

ORCOPS opposes HB 2930 because of the specific policy elements, but also opposes the unsupported premise that the arbitration system is a barrier to fair and predictable discipline. Some of our more significant concerns are outlined below:

- **Employer groups have not presented any example to support their assertions.**
- **Eliminating arbitration exacerbates existing biases against officers of color.**
- **The Committee has been presented with a skewed idea of arbitration as little more than random chance.**
- **Proponents have presented conflicting accounts of their preferences and interpretations.**
- **Reforms passed less than a year ago have not yet been evaluated.**
- **ORCOPS has already indicated its interest in a more careful discussion of arbitration reforms.**

CONCERNS

1. **Employer groups have not presented any example to support their assertions.**

I would like to first point out what I hope did not escape the notice of the Committee: That at no point in last week's presentation on arbitration did the employer groups bring up a single specific example of an arbitration process run amok.

The Committee has previously been treated to two non-sequitur examples of concerns with the arbitration process, previously referenced by the League of Cities in the context of HB 2936. In one example, the case never went to arbitration because the employer sought to violate their own policies. In the other, the arbitrator actually upheld the employer's decision to terminate the employee. *(A more detailed explanation of these cases is in my submitted testimony to HB 2936, attached.)*

Since early 2019, ORCOPS has requested that employer groups and advocates of arbitration reforms present concrete examples to illustrate a definite problem they are trying to solve with these policies. Recently, ORCOPS presented such a request in an August 5 statement to the Joint Committee On Transparent Policing and Use of Force Reform *(attached)*:

> "We invite the witnesses to provide examples of arbitration proceedings in which they found an officer with a "track record" of misconduct difficult to subject to discipline as a result of arbitration in the last ten years. These examples could be in the form of appropriately redacted records of arbitration rulings with appropriate documentation. (Ten years is the period since the last substantive adjustment to the section of ORS 236.360 in which the "just cause" standard is applied to law enforcement officers; Oregon Laws 2009 Chapter 716.)"

Without an enumeration of a clear "problem statement" borne out by evidence, it is difficult to determine how to move forward in cooperation with the advocates.

2. **Eliminating arbitration exacerbates existing biases against officers of color.**

As noted previously, arbitration serves as a level of accountability to the otherwise outsized power of Chiefs and Sheriffs to impose discipline. Diminishing the power of arbitrators to identify and correct cases of disparate treatment and selective enforcement gives more freedom to those in charge to allow their implicit or explicit biases determine employment conditions.

While many Chiefs and Sheriffs hew closely to appropriate action, evidence shows that officers of color are nonetheless disciplined more harshly than their white counterparts. A recent study by researchers at the University of Indiana found that Black officers were often more than twice as likely as their white counterparts to face disciplinary measures:

> "Even when organizations adopt seemingly objective policies for addressing misconduct, it is still possible for certain groups to be disproportionately accused of misconduct and/or disciplined. … we examined the extent to which Black employees (in contrast to

> White employees) are more likely to have formal incidences of misconduct documented in their employment records, even when there are no racial differences in the number of allegations of misconduct. Across three datasets collected from the police departments of three major metropolitan areas (Chicago, Los Angeles, and Philadelphia), we identified the presence of a race discipline gap in archival organizational records of behavioral misconduct."
> *(Sheryl L. Walter, et al, "The race discipline gap: A cautionary note on archival measures of behavioral misconduct".)*

In the face of this existing bias, the authors go on to recommend policy options that might mitigate such disparities:

> "Just as organizational leaders have implemented policies and procedures to mitigate adverse impact in hiring, they may need to implement checks to ensure that there is no adverse impact in the detection and enforcing of organizational misconduct."

By broadly eliminating (in many circumstances) the ability of an arbitrator to review management disciplinary decisions in a "just cause" context, HB 2930 in fact runs counter to this recommendation and exacerbates existing employment biases.

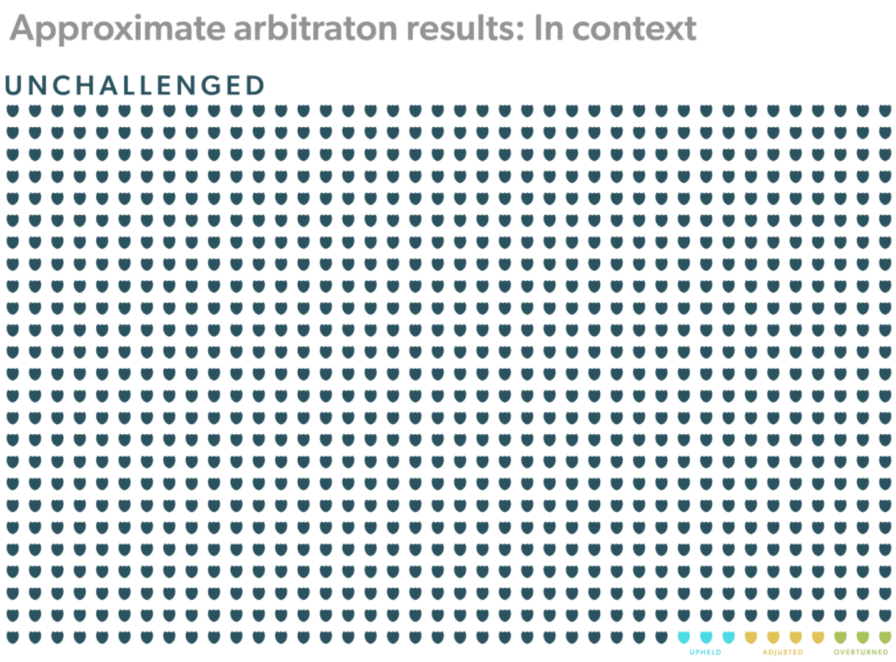
3. **The Committee has been presented with a skewed idea of arbitration as little more than random chance.**

At the February 10 informational hearing on the arbitration process, the Association of Oregon Counties made a show of likening the process to a coin flip, lamenting that because of the arbitration process, officers who had been disciplined would have roughly a 50:50 chance of having that discipline overturned. (Notably, no local labor voices were invited to provide important context to the informational hearing, despite a significant portion of the presentation focusing on local employers.)

This premise is faulty on a number of counts, but primarily because it keeps a vital contextual element from the committee in terms of how rare of a process arbitration actually is.

From a numerical perspective, the 50:50 figure is accurate only in the narrowest sense: Out of 10 arbitrations, roughly 3 will be upheld, 3 will be overturned, and 4 will result in the arbitrator adjusting the discipline in some manner.

However, this ignores the fact that arbitration is exceedingly rare, and only pursued if the union's attorneys have examined the facts of the case and determined that there is a likelihood that the arbitration will be successful. Only about 1 in every 100 cases of discipline will go to arbitration:



With arbitration examined in the full context of the disciplinary process, it is clear that the “50:50” figure is actually closer to “200:1” in favor of an employer’s discipline being preserved.

The fact that arbitrations have an even chance of being successful when they are used is an indication of the selectiveness and restraint that unions use when deciding whether to pursue arbitration. The process is neither based on random chance nor on unscrupulous arbitrators attempting to curry professional favor, but on a careful examination of the facts as applied to a large body of arbitration case law, contractual obligations, and other legal precepts. To imply otherwise is frankly insulting to the arbitrators who bring a dispassionate and careful examination to a complex process.

4. **Proponents have presented conflicting accounts of their preferences and interpretations.**

During the recent public hearing for HB 2936, the League of Oregon Cities (LOC) indicated its desire to establish a “just cause” standard for law enforcement officer discipline.

In fact, the “just cause” standard is a specific reference to accepted arbitration case law and has been in use and enshrined in ORS 236.360 since 1979. It involves the 7-point test refined by Dr. Carroll Daugherty in 1964, and which was referenced by Captain Fox of the Oregon State Police during the February 10 informational hearing (though not referenced by name as the “just cause” standard).

LOC’s position as of February 10 runs counter to the LOC position since at least 2019, where they advocated for changes in arbitration policy that would create exceptions to the “just cause” standards in ORS 236.360.

However, ORCOPS wholeheartedly supports LOC's stated position to return to a "just cause" standard.

5. **Reforms passed less than a year ago have not yet been evaluated.**

In the First Special Session of 2020, the Legislature passed SB 1604, which was a culmination of efforts starting in the 2019 Session to codify collectively-bargained discipline guides into disciplinary standards. Although ORCOPS opposed the specific language used in the measure, we expressly supported the underlying concept itself.

At this point in time, SB 1604 has been effective for less than a year, and many law enforcement agencies have not yet had an opportunity to adopt such discipline guides and therefore evaluate the efficacy of the legislation on the arbitration process.

Passing HB 2930 would fully repeal the terms of SB 1604, not only upending the plans of any local agencies to adopt such guides, but serving as an enormous waste of time and effort spent over 18 months getting to the point of passing SB 1604. This sets a very unwelcome precedent of the Legislature's willingness to repeal and replace significant legislation even before it has been fully implemented, much less evaluated in practice.

6. **ORCOPS has already indicated its interest in a more careful discussion of arbitration reforms.**

ORCOPS has been eager to engage constructively on this issue, and maintains its interest in working with the committee and other stakeholders on an evidence-based identification of problems and solutions that could be presented to the Legislature.

When the 2020 Session ended without an arbitration bill passing, we reached out to legislators in mid-March expressing our interest in clarifying and passing that policy in a special session. We did not receive a response, although a special session was set in June that focused on police reform issues.

At the informational hearing on February 10, the committee expressed a concern about the applicability of past precedent on future disciplinary decisions, and discussed the need to resolve that concern. In fact, ORCOPS forwarded lawmakers a proposal *(attached)* last June to do just that by exempting past precedent from the definition of "mitigating circumstances" and "just cause" in the context of arbitration reforms, but the proposal was not acted upon.

ORCOPS stands ready to meaningfully engage on this issue if the committee will allow us to do so, but opposes HB 2930 as it is currently drafted.

STATEMENT RE: Arbitration Examples

To: Joint Committee On Transparent Policing and Use of Force Reform
From: Michael Selvaggio, Oregon Coalition of Police and Sheriffs
Date: August 5, 2020

Co-Chairs and Members of the Joint Committee:

Earlier this morning this committee heard from representatives of Oregon's police chiefs and sheriffs, who broadly indicated their concerns with the current arbitration process in place. Specifically, we heard that it was "very difficult" to fire or dislodge officers with track records of misconduct.

This has not been ORCOPS' experience -- rather, we are more familiar with cases in which arbitration has prevented the inappropriately disproportionate application of discipline. In fact, these workplace protections have ensured a level playing field and equitable opportunities for advancement for thousands of minority public employees.

We invite the witnesses to provide examples of arbitration proceedings in which they found an officer with a "track record" of misconduct difficult to subject to discipline as a result of arbitration in the last ten years. These examples could be in the form of appropriately redacted records of arbitration rulings with appropriate documentation. (Ten years is the period since the last substantive adjustment to the section of ORS 236.360 in which the "just cause" standard is applied to law enforcement officers; Oregon Laws 2009 Chapter 716.)

This would certainly help to ensure that management's legislative efforts are appropriately addressing an actual problem, as well as illuminate ORCOPS and the Committee as to specifically what kind of additional personnel discretion management believes is required.

TESTIMONY: HB 2936

(DPSST BACKGROUND CHECKS INTO OFFICER CHARACTER)

To: House Subcommittee on Equitable Policing
From: Michael Selvaggio, Oregon Coalition of Police and Sheriffs
Date: February 8, 2021

Testimony given to Subcommittee on Equitable Policing by Michael Selvaggio
February 8, 2020

(Testimony was read; what follows is the source document and may not be a verbatim transcript.)

Madam Chair, members of the Committee:

With regard to HB 2936, I'd like to make a clear statement that ORCOPS is unwavering in its sentiment that there is no place for racism, bias, or discrimination in policing or any public service.

You have my written testimony, which makes several suggestions for improvements to the measure, including our desire for minimum standards for local agencies as well as the need for careful definition of terms and adherence to Brady standards.

I'd like to address some of what we heard last week with regard to the arbitration process, and clear up several statements that were made in the context of this bill.

First, the League of Cities referenced a sergeant in Portland who was dismissed for comments made at roll call, and suggested that the incident precipitated the recent bill stressing adherence to discipline guides, saying that the arbitration process was "unreliable."

This case never went to arbitration, and the reason was that the City's own desired outcome -- termination -- was outside the scope of its own discipline guide. To be clear: In its desire to act outside the scope of its own non-bargained discipline guide, the City of Portland recognized that they would have a weak case and ended up paying lost wages, minus the unpaid suspension that was actually warranted by their own guide.

Using this case as an example of why discipline guides should be more strictly adhered to is a significant disconnect for me.

Second, the League of Cities brought up an example of a West Linn officer who had made offensive Facebook posts, and said that the City had to pay out $154,000 to terminate the officer.

The whole story is a bit different.

What happened in that case is that the arbitrator upheld the City's determination to terminate the officer. But the problem was that management's initial determination upon becoming aware of the posts in question was not to discipline the officer, but rather to "like" the posts.

This created a problem, being that once the situation came to light, management had already given its ill-advised imprimatur of approval to the action, making it difficult to take another bite at that apple.

As I said, the arbitrator absolutely upheld the termination, but also "fined" the City of West Linn $154,000 for the drastic lapse in oversight. It was not a "payout" in order to terminate the officer, but the only avenue an arbitrator has currently to exact such a penalty is an award to the employee. (We'd be happy to explore whether building an additional penalty option would be useful.)

Lastly, the League of Cities has indicated its intention to pursue an amendment allowing for the use of a "just cause" standard for officer termination.

I must confess I find that a bit ironic.

As you may know, that specific standard has been in use and enshrined in ORS 236.360 since 1979, mostly unaffected until last year when -- at the urging of the League of Cities and other groups -- the legislature passed the "Arbitration Bill," SB 1604, allowing discipline guides to supersede the "just cause" standard in certain circumstances.

So if this committee wants to return to a just cause standard, we are OK with that.

Please note that these issues are complex and nuanced, which is why since early 2019, ORCOPS has been asking stakeholders for specific examples of what is trying to be addressed, and being very specific about language, as opposed to relying on half-explained anecdotes.

I sincerely hope that, on Wednesday when this committee hears invited testimony on the arbitration process, it invites a voice from the labor community to ensure that it gets a full and accurate picture.

Thank you.

PROPOSED DRAFT

Law Enforcement Officer Arbitration

Changes to SB 1567-A:

Additions highlighted and underlined / deletions in ~~strikethrough and underlined~~

Relating to arbitration awards; creating new provisions; amending ORS 243.650 and 243.706; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 243.706 is amended to read:

243.706. (1) A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties. As a condition of enforceability, any 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. In addition, with respect to claims that a grievant should be reinstated or otherwise relieved of responsibility for misconduct based upon the public employer's alleged previous differential treatment of employees for the same or similar conduct, the arbitration award must conform to the following principles:

(a) Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline.

(b) Public managers have a right to change disciplinary policies at any time, notwithstanding prior practices, if such managers give reasonable advance notice to affected employees and the change does not otherwise violate a collective bargaining agreement.

(2) In addition to subsection

(1) of this section, a public employer may enter into a written agreement with the exclusive representative of its employees providing that a labor dispute over conditions and terms of a contract may be resolved through binding arbitration.

(3) Notwithstanding subsection (1) of this section, when an arbitration proceeding involves alleged misconduct by a sworn law enforcement officer of any law enforcement agency, as those terms are defined in ORS 131.930, the arbitrator may rescind or reduce the disciplinary action imposed by the law enforcement agency only by issuing a written arbitration award:

(a) That is consistent with the provisions of the disciplinary guide or discipline matrix that is included in the terms of the collective bargaining agreement; and

(b) That is based on mitigating circumstances consistent with just cause.

~~**and 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 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.**~~

[*(3)*] **(4)** In an arbitration proceeding under this section, the arbitrators, or a majority of the arbitrators, may:

(a) Issue subpoenas on their own motion or at the request of a party to the proceeding to:

(A) Compel the attendance of a witness properly served by either party; and

(B) Require from either party the production of books, papers and documents the arbitrators find are relevant to the proceeding;

(b) Administer oaths or affirmations to witnesses; and

(c) Adjourn a hearing from day to day, or for a longer time, and from place to place.

[*(4)*] **(5)** The arbitrators shall promptly provide a copy of a subpoena issued under this section to each party to the arbitration proceeding.

[*(5)*] **(6)** The arbitrators issuing a subpoena under this section may rule on objections to the issuance of the subpoena.

[*(6)*] **(7)** If a person fails to comply with a subpoena issued under this section or if a witness refuses to testify on a matter on which the witness may be lawfully questioned, the party who requested the subpoena or seeks the testimony may apply to the arbitrators for an order authorizing the party to apply to the circuit court of any county to enforce the subpoena or compel the testimony. On the application of the attorney of record for the party or on the application of the arbitrators, or a majority of the arbitrators, the court may require the person or witness to show cause why the person or witness should not be punished for contempt of court to the same extent and purpose as if the proceedings were pending before the court.

[*(7)*] **(8)** Witnesses appearing pursuant to subpoena, other than parties or officers or employees of the public employer, shall receive fees and mileage as prescribed by law for witnesses in ORS 44.415 (2).

(9) As used in this section:

(a) "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 take into account the presumptive level of discipline for the misconduct and any aggravating or mitigating factors.

(b) "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.

(c) 'Just cause' has the meaning given that term in ORS 236.350.

(d) Notwithstanding the definition of 'Just Cause' in ORS 236.350, 'Mitigating circumstances' for the purposes of Subsection 1 of this Section does not include a precedent of a less severe penalty for the same or a similar violation that was committed prior to adoption of and that is inconsistent with a disciplinary guide or discipline matrix included in the terms of the collective bargaining agreement.

SECTION 2. ORS 243.650 is amended to read: 243.650. As used in ORS 243.650 to 243.806, unless the context requires otherwise:

(1) "Appropriate bargaining unit" means the unit designated by the Employment Relations Board or voluntarily recognized by the public employer to be appropriate for collective bargaining. However, an appropriate bargaining unit may not include both academically licensed and unlicensed or nonacademically licensed school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. This limitation does not apply to any bargaining unit certified or recognized prior to June 6, 1995, or to any school district with fewer than 50 employees.

(2) "Board" means the Employment Relations Board.

(3) "Certification" means official recognition by the board that a labor organization is the exclusive representative for all of the employees in the appropriate bargaining unit.

(4) "Collective bargaining" means the 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, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, 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. The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. This subsection may not be construed to prohibit a public employer and a certified or recognized representative of its employees from discussing or executing written agreements regarding matters other than mandatory subjects of bargaining that are not prohibited by law as long as there is mutual agreement of the parties to discuss these matters, which are permissive subjects of bargaining.

(5) "Compulsory arbitration" means the procedure whereby parties involved in a labor dispute are required by law to submit their differences to a third party for a final and binding decision.

(6) "Confidential employee" means one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining.

(7)(a) “Employment relations” includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, labor organization access to and communication with represented employees, grievance procedures and other conditions of employment.

(b) “Employment relations” does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995.

(c) After June 6, 1995, “employment relations” does not include subjects that the Employment Relations Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.

(d) “Employment relations” does not include subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.

(e) For school district bargaining, “employment relations” excludes class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils established under ORS 329.704, requirements for expressing milk under ORS 653.077, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(f) For employee bargaining involving employees covered by ORS 243.736 and employees of the Department of Corrections who have direct contact with adults in custody, “employment relations” includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees.

(g) For employee bargaining involving sworn law enforcement officers of a law enforcement agency, as those terms are defined in ORS 131.930, “employment relations” includes the development of a discipline guide or discipline matrix as those terms are defined in ORS 243.706.

[*(g)*] **(h)** For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, “employment relations” excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(8) “Exclusive representative” means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit.

(9) “Fact-finding” means identification of the major issues in a particular labor dispute by one or more impartial individuals who review the positions of the parties, resolve factual differences and make recommendations for settlement of the dispute.

(10) “Fair-share agreement” means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666. Upon the filing with the board of a petition by 30 percent or more of the employees in an appropriate bargaining unit covered by such union security agreement declaring they desire that the agreement be rescinded, the board shall take a secret ballot of the employees in the unit and certify the results thereof to the recognized or certified bargaining representative and to the public employer. Unless a majority of the votes cast in an election favor the union security agreement, the board shall certify deauthorization of the agreement. A petition for deauthorization of a union security agreement must be filed not more than 90 calendar days after the collective bargaining agreement is executed. Only one such election may be conducted in any appropriate bargaining unit during the term of a collective bargaining agreement between a public employer and the recognized or certified bargaining representative.

(11) “Final offer” means the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse.

(12) “Labor dispute” means any controversy concerning employment relations or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment relations, regardless of whether the disputants stand in the proximate relation of employer and employee.

(13) “Labor organization” means any organization that has as one of its purposes representing employees in their employment relations with public employers.

(14) “Last best offer package” means the offer exchanged by parties not less than 14 days prior to the date scheduled for an interest arbitration hearing.

(15) “Legislative body” means the Legislative Assembly, the city council, the county commission and any other board or commission empowered to levy taxes.

(16) “Managerial employee” means an employee of the State of Oregon or a public university listed in ORS 352.002 who possesses authority to formulate and carry out management decisions or who represents management’s interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A “managerial employee” need not act in a supervisory capacity in relation to other employees. Notwithstanding this subsection, “managerial employee” does not include faculty members at a community college, college or university.

(17) “Mediation” means assistance by an impartial third party in reconciling a labor dispute between the public employer and the exclusive representative regarding employment relations.

(18) “Payment-in-lieu-of-dues” means an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees. The payment must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees.

(19) “Public employee” means an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under [*section 41,*] Article I, **section 41,** of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.

(20) “Public employer” means the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations.

(21) “Public employer representative” includes any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues.

(22) “Strike” means a public employee’s refusal in concerted action with others to report for duty, or his or her willful absence from his or her position, or his or her stoppage of work, or his or her absence in whole or in part from the full, faithful or proper performance of his or her duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment; however, nothing shall limit or impair the right of any public employee to lawfully express or communicate a complaint or opinion on any matter related to the conditions of employment.

(23)(a) “Supervisory employee” means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement does not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation.

(b) “Supervisory employee” includes a faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who:

(A) Is employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; or

(B) Is employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments.

(c) “Supervisory employee” does not include:

(A) A nurse, charge nurse or nurse holding a similar position if that position has not traditionally been classified as supervisory;

(B) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees;

(C) A faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who is not a faculty member described in paragraph (b) of this subsection; or

(D) An employee of the Oregon State Police who:

(i) Serves in a rank equivalent to or below the rank of sergeant;

(ii) Is prohibited from striking by ORS 243.736; and

(iii) Assigns, transfers or directs the work of other employees but does not hire, discharge or impose economic discipline on those employees.

(24) “Unfair labor practice” means the commission of an act designated an unfair labor practice in ORS 243.672.

(25) “Voluntary arbitration” means the procedure whereby parties involved in a labor dispute mutually agree to submit their differences to a third party for a final and binding decision.

SECTION 3. ORS 243.650, as amended by section 2, chapter 146, Oregon Laws 2019, is amended to read:

243.650. As used in ORS 243.650 to 243.806, unless the context requires otherwise:

(1) “Appropriate bargaining unit” means the unit designated by the Employment Relations Board or voluntarily recognized by the public employer to be appropriate for collective bargaining. However, an appropriate bargaining unit may not include both academically licensed and unlicensed or nonacademically licensed school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. This limitation does not apply to any bargaining unit certified or recognized prior to June 6, 1995, or to any school district with fewer than 50 employees.

(2) “Board” means the Employment Relations Board.

(3) “Certification” means official recognition by the board that a labor organization is the exclusive representative for all of the employees in the appropriate bargaining unit.

(4) “Collective bargaining” means the 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, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, 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. The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. This subsection may not be construed to prohibit a public employer and a certified or recognized representative of its employees from discussing or executing written agreements regarding matters other than mandatory subjects of bargaining that are not prohibited by law as long as there is mutual agreement of the parties to discuss these matters, which are permissive subjects of bargaining.

(5) “Compulsory arbitration” means the procedure whereby parties involved in a labor dispute are required by law to submit their differences to a third party for a final and binding decision.

(6) “Confidential employee” means one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining.

(7)(a) “Employment relations” includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, labor organization access to and communication with represented employees, grievance procedures and other conditions of employment.

(b) “Employment relations” does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995.

(c) After June 6, 1995, “employment relations” does not include subjects that the Employment Relations Board determines to have a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.

(d) “Employment relations” does not include subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.

(e) For school district bargaining, “employment relations” excludes class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils established under ORS 329.704, requirements for expressing milk under ORS 653.077, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(f) For employee bargaining involving employees covered by ORS 243.736 and employees of the Department of Corrections who have direct contact with adults in custody, “employment relations” includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees.

(g) For employee bargaining involving sworn law enforcement officers of a law enforcement agency, as those terms are defined in ORS 131.930, “employment relations” includes the development of a discipline guide or discipline matrix as those terms are defined in ORS 243.706.

[*(g)*] **(h)** For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, “employment relations” excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(8) “Exclusive representative” means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit.

(9) “Fact-finding” means identification of the major issues in a particular labor dispute by one or more impartial individuals who review the positions of the parties, resolve factual differences and make recommendations for settlement of the dispute.

(10) “Fair-share agreement” means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666. Upon the filing with the board of a petition by 30 percent or more of the employees in an appropriate bargaining unit covered by such union security agreement declaring they desire that the agreement be rescinded, the board shall take a secret ballot of the employees in the unit and certify the results thereof to the recognized or certified bargaining representative and to the public employer. Unless a majority of the votes cast in an election favor the union security agreement, the board shall certify deauthorization of the agreement. A petition for deauthorization of a union security agreement must be filed not more than 90 calendar days after the collective bargaining agreement is executed. Only one such election may be conducted in any appropriate bargaining unit during the term of a collective bargaining agreement between a public employer and the recognized or certified bargaining representative.

(11) “Final offer” means the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse.

(12) “Labor dispute” means any controversy concerning employment relations or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment relations, regardless of whether the disputants stand in the proximate relation of employer and employee.

(13) “Labor organization” means any organization that has as one of its purposes representing employees in their employment relations with public employers.

(14) “Last best offer package” means the offer exchanged by parties not less than 14 days prior to the date scheduled for an interest arbitration hearing.

(15) “Legislative body” means the Legislative Assembly, the city council, the county commission and any other board or commission empowered to levy taxes.

(16) “Managerial employee” means an employee of the State of Oregon or a public university listed in ORS 352.002 who possesses authority to formulate and carry out management decisions or who represents management’s interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A “managerial employee” need not act in a supervisory capacity in relation to other employees. Notwithstanding this subsection, “managerial employee” does not include faculty members at a community college, college or university.

(17) “Mediation” means assistance by an impartial third party in reconciling a labor dispute between the public employer and the exclusive representative regarding employment relations.

(18) “Payment-in-lieu-of-dues” means an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive

representative of the employees. The payment must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees.

(19) “Public employee” means an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under [*section 41,*] Article I, **section 41,** of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.

(20) “Public employer” means the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations.

(21) “Public employer representative” includes any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues.

(22) “Strike” means a public employee’s refusal in concerted action with others to report for duty, or his or her willful absence from his or her position, or his or her stoppage of work, or his or her absence in whole or in part from the full, faithful or proper performance of his or her duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment; however, nothing shall limit or impair the right of any public employee to lawfully express or communicate a complaint or opinion on any matter related to the conditions of employment.

(23)(a) “Supervisory employee” means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement does not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation.

(b) “Supervisory employee” includes a faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who:

(A) Is employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; or

(B) Is employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments.

(c) “Supervisory employee” does not include:

(A) A nurse, charge nurse or nurse holding a similar position if that position has not traditionally been classified as supervisory;

(B) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees; or

(C) A faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who is not a faculty member described in paragraph (b) of this subsection.

(24) “Unfair labor practice” means the commission of an act designated an unfair labor practice in ORS 243.672.

(25) “Voluntary arbitration” means the procedure whereby parties involved in a labor dispute mutually agree to submit their differences to a third party for a final and binding decision.

SECTION 4. The amendments to ORS 243.650 and 243.706 by sections 1 to 3 of this 2020 Act apply to collective bargaining agreements entered into on or after the effective date of this 2020 Act.

SECTION 5. This 2020 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2020 Act takes effect on its passage.