

Portland Police Association



Officer Daryl Turner, PRESIDENT
Sergeant Tom Perkins, SECRETARY TREASURER

VIA EMAIL

July 27, 2020

Mayor Ted Wheeler
Auditor Mary Hull Caballero
Commissioner Chloe Eudaly
Commissioner Amanda Fritz
Commissioner Jo Ann Hardesty
Portland City Hall
1221 SW 4th Ave.
Portland, OR 97204

RE: Council Agenda Item 633

Council Members and Madam Auditor:

I write on behalf of the Portland Police Association (PPA) regarding Agenda Item 633 which, if passed by Council, would refer a Charter Amendment to voters at the November 3, 2020 General Election to authorize a new police oversight system. In summary, the proposed ballot measure:

- (1) Would violate the law in at least four separate ways;
- (2) Would establish an "Oversight Board" that would exist outside of the budgetary rules and other supervision of the City Council, the Auditor, or any of the City's Bureaus;
- (3) Is a carelessly-drafted proposal that raises many more questions than it answers; and
- (4) Was hastily crafted without the input of any of the meaningful stakeholders concerned about police oversight.

The proposed resolution is neither good public policy nor in the best interests of the citizens of Portland.

(1) THE PROPOSED CHARTER AMENDMENT VIOLATES THE LAW

The proposed charter amendment, if enacted, would violate the law in at least four separate ways. First, the proposed charter amendment would result in the dissolution of the Office of Independent Police Review (IPR). The Settlement Agreement in *United States of America v. City of Portland* requires the City to "retain and enhance" IPR, not dissolve it:

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“PPB and the City shall ensure that all complaints regarding officer conduct are fairly addressed; that all investigative findings are supported by a preponderance of the evidence and documented in writing; that officers and complainants receive a fair and expeditious resolution of complaints; and that all officers who commit misconduct are held accountable pursuant to a disciplinary system that is fair and consistent. The City and PPB seek to retain and strengthen the citizen and civilian employee input mechanisms that already exist in the PPB’s misconduct investigations by retaining and enhancing IPR and CRC as provided in this Agreement.” Settlement Agreement, at 43.

Second, on many occasions, several of which have involved the City, the Employment Relations Board has ruled that disciplinary procedures and standards are mandatory subjects for bargaining. As set forth in the attached correspondence from the PPA’s legal counsel to the City Attorney’s Office, State collective bargaining law and the PPA’s collective bargaining agreement require the City to first negotiate with the PPA before presenting to voters any change to the Police Bureau’s disciplinary procedures and standards. Put simply, the law is that City Charter changes cannot overrule the City’s bargaining obligations with any of its labor organizations, including the PPA.

Third, individual provisions in the proposed charter amendment would run afoul of the law in various ways. For example, Sections 2-1002 and 2-1003 would cause the City to violate the Fourteenth Amendment’s requirements of equal protection of the laws. The complete absence of due process requirements in the way the Oversight Board handles disciplinary investigations would violate the due process requirements of the Fourteenth Amendment. The ballot measure contains no provisions requiring the confidential treatment of medical information and material in personnel files that is exempt from disclosure, leading the City to violate laws as varied as the Americans With Disabilities Act and Oregon’s Public Records Act. Section 2-1008’s grant to the Oversight Board of the authority to conduct criminal investigations would run afoul of various provisions in Oregon’s criminal statutes.

Fourth, Section 2-1004 of the charter amendment calls for the administrative decision to fund the Board in an amount equal to no less than 5% of PPB’s annual operational budget. Article IV, Section 1(5) of the Oregon Constitution allows voters to make “legislative decisions” about laws of general applicability that are permanent nature. But voters cannot make “administrative decisions” involving the details of implementing established policy, such as the amount of Board funding.

(2) THE DANGEROUS STRUCTURE OF THE PROPOSED CHARTER AMENDMENT

The proposed charter amendment simply does not fit with a whole host of provisions in Portland’s City Charter, setting up conflicts that would have to be resolved through a series of subsequent charter amendments. For example, the proposed charter amendment would set up the Oversight Board as a kind of “super bureau” of the City. The Oversight Board would not be

subject to the budgeting process, would not be subject to the rules of the Bureau of Human Resources, would do its own hiring and firing without regard to the City's merit system, and would not be subject to scrutiny by the Auditor.

Under Section 2-1002 of the proposed charter amendment, the grant of authority to the Oversight Board is truly breathtaking: "The Mayor, City Council, Auditor, and City departments, bureaus and other administrative agencies shall not interfere in the exercise of the Board's independent judgment." In sum, the proposed charter amendment would set up the Oversight Board as its own fiefdom within City government, subject to no authority other than its own judgment. It is hard to imagine worse public policy.

(3) THE PROPOSED CHARTER AMENDMENT IS IRREDEEMABLY VAGUE

The obvious haste with which the proposed charter amendment was written is apparent by the number of questions the text immediately raises. Apparently, the charter amendment is proposed on a "we'll fill in the blanks later" basis, with a promise that once it is adopted, the Oversight Board will answer all the questions the charter amendment raises. Once again, this is not good governance. In addition, if voters are to weigh in on a topic as important as police oversight, they should be provided with a complete document, one that spells out all of the particulars of how the police oversight system will operate.

What follows are only examples of the questions the proposed charter amendment raises. The PPA is confident that even a casual reader of the text will come up with additional questions about how the proposed civilian oversight system will operate.

- Section 2-1002, which concerns the makeup of the Board, leaves far too many unanswered questions. How many members will be on the Board? Who nominates them? What are their terms? Will their terms stagger? If a Board member acts inappropriately, who has the authority to remove them? What would be "cause" for removal? If the Council has the initial right to appoint Board members, how can the "Board make provisions" for what its membership looks like? How will the City defend itself from a race discrimination lawsuit if the Board must be comprised of "those who have experienced systemic racism and historic disproportionate policing"?
- Section 2-1003, which bans anyone with a law enforcement background from serving on the Board, raises questions about exactly who serves on the Board. What are the qualifications for Board members? Are convicted felons or those under indictment allowed to serve? Is an individual who is suing the City over a police matter disqualified as a Board member? Must a Board member be a resident of the City of Portland or, for that matter, the State of Oregon? Are minors eligible to serve?
- Section 2-1004 calls for Board funding equal to no less than 5% of PPB's annual operational budget. Where does 5% come from? What percentage of the Police Bureau's budget is currently spent on internal investigations? What percentage of the Auditor's budget is currently spent on independent investigations? Why does it make sense to tie

the Board's budget to the operational costs of the Police Bureau? Who supervises how the Board spends its 5% automatic allotment?

- Section 2-1005 calls for professional staff to serve the Board, but completely cuts the City's Bureau of Human Resources out of the hiring process and from setting salaries and benefits for such staff. Further, the provision leaves unanswered whether the Board will have its own lawyers, risk management staff, auditing staff, and the like. Nor does this provision account for the City's merit and classified service system. Shockingly, the Board would have its own Bureau Director who would not be responsible to elected officials or any other City Bureau, effectively establishing a super-governmental agency that is accountable to no one but itself.
- Section 2-1007, which further defines the Board's powers, grants sweeping authority to the Board to discipline public employees without due process, in violation of decades of Supreme Court precedent. This provision would further neuter the Police Bureau's ability to set standards and policies for its employees after public input, in violation of the USDOT Settlement Agreement.
- Section 2-1008, which defines the duties of the Board, appears to empower the Board to conduct criminal investigations, although it has no such authority under State law. The Board would also have unfettered authority to investigate what it wants, when it wants, and how it wants without any accountability to the public.

(4) THE TROUBLED DEVELOPMENT AND TIMING OF THE PROPOSED CHARTER AMENDMENT

There is a Portland way to develop public policy. We are thoughtful, we look for input from all stakeholders, and we make policy decisions only after careful deliberations. The proposed charter amendment abandons all those principles.

The proposed charter amendment was apparently developed by Commissioner Hardesty behind closed doors without any meaningful input from the public, IPR, the City Auditor, the Portland Police Bureau, its Chief of Police, or the labor organizations that would be impacted by it. No stakeholder group has met. There has been no debate about alternative approaches. There has been no examination of whether police oversight boards along the lines of that proposed by Commissioner Hardesty actually work in other cities. And no formalized public input has been sought. This lack of transparency is striking, made even more so by the "we'll fill in the blanks later" character of the proposed charter amendment.

The timing of the proposed charter amendment is also troubling. Something as serious as a proposed charter amendment that makes radical changes in Portland's system of government should not be advanced with such haste, particularly when the more obvious approach would be to begin due diligence on the issue and leave to the next Council the ultimate decision of shaping any charter amendment.

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We find ourselves at a crossroads where the public demands thoughtful public policy that will improve policing practices, accountability, and public safety. The proposed charter amendment does none of these things. We urge you to reject it and to begin cooperative, not unilateral, discussions with all stakeholders on the important issue of public safety and accountability.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daryl Turner". The signature is stylized with a large "D" and a long horizontal stroke.

Daryl Turner
President

Encl.

Copy: Council Clerk Karla Moore-Love
Chief Chuck Lovell
IPR Director Ross Caldwell
Portland City Attorney's Office

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VIA EMAIL

July 2, 2020

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1221 SW 4th Ave., Ste 430
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RE: Bargaining Obligations Surrounding Civilian Oversight Ballot Measure

Dear Heidi:

I am writing on behalf of the Portland Police Association to remind the City that evading its collective bargaining obligations through a voter-enacted City Charter change violates the PPA collective bargaining agreement and the Public Employee Collective Bargaining Act.

The impetus for this letter is OPB's June 30, 2020 article, *Portland City Leader, Activists Pushing New Police Oversight Board For November Ballot* (available at: <https://www.opb.org/news/article/new-police-oversight-board-november-ballot-portland-oregon/>). As I understand it, the City is considering a ballot measure that would amend the City Charter to allow for a new civilian police oversight system that would ostensibly replace our current civilian oversight bodies—Independent Police Review and the Citizen Review Committee. According to the news article, the newly formed civilian oversight system would, among other things, have the ability to subpoena PPA members and evidence, have final say on disciplinary actions against PPA members through changed disciplinary procedures, and have the ability to change disciplinary standards through revised police directives and policies.

As you know, disciplinary standards and procedures are mandatory for bargaining under the PECBA. *Portland Fire Fighters Ass'n, Local 43, IAFF v. City of Portland*, 16 PECBR 245, 251-52 (1995). Further, the City cannot escape its bargaining obligations by sending mandatorily negotiable subjects, such as a new disciplinary system for PPA members, to voters for a Charter change without first reaching agreement with the PPA over those changes.

This should not be news to the City. While the Employment Relations Board and numerous arbitrators have repeated that admonishment to the City over the years, two cases involving the PPA bear repeating.

In 2010, the ERB rejected the City's attempt to evade its bargaining obligations by sending mandatorily negotiable collective bargaining matters to

voters. *PPA v. City of Portland*, ERB Case No. UP-05-08, 23 PECBR 856, 870 n9 (2010). The analogy used by the ERB in that case related to pension benefits applies with equal force in this case related to discipline: Could the City send to the voters a City Charter amendment that established a new disciplinary body and system for PPA members, and thereby eliminate the City's obligation to negotiate over discipline standards and procedures with the PPA? "The concept is so antithetical to long-standing law under the PECBA as to border on the absurd; yet, the City's argument in this case is precisely to this effect." The City cannot avoid its PECBA responsibilities by vesting voters with decision-making over mandatory bargaining subjects. *Id.*

Again in 2016, the City needed reminding of that basic labor law principle. A labor arbitrator that was mutually selected by the City and the PPA overturned a voter-enacted Charter change to the City's pension system. In that case, the arbitrator (herself a former elected official) ruled that the City violated the PPA collective bargaining agreement by sending a Charter change to the voters related to mandatorily negotiable subjects without first reaching agreement with the PPA. The arbitrator wrote, "To put an issue as important as pension benefits before the voters without a full and honest explanation of the effect of the change is unconscionable. And to put an issue that is a mandatory subject of bargaining before the voters without first reaching agreement with the unions constitutes bad faith." *PPA and City of Portland (27th Pay Period Grievance)* at 17-18 (Skratek 2016). That sentiment rings equally true with Commissioner Hardesty's secretive drafting of a comprehensive change to the Police Bureau's disciplinary system, which must first be bargained to agreement with the PPA before being sent to voters for approval.

For a period of time, the City appeared to take those repeated admonishments to heart. For instance, City Council has approved numerous City Code changes to the Police Bureau's disciplinary system through changes to IPR, CRC, and PRB, but only after the City first negotiated those changes to agreement with the PPA.

The City should not return to its prior bad habit of violating collective bargaining agreements and the PECBA. The City should heed the unwavering and repeated instructions from the ERB and labor arbitrators. Article 3 of the PPA collective bargaining agreement and the PECBA require the City to first negotiate to agreement with the PPA before presenting to voters any change to the Police Bureau's disciplinary procedures and standards.

Sincerely,



Anil S. Karia

Copy: Client