ASSOCIATION REPRESENTATIVES' MANUAL

Prepared for the XYZ Association

President

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1.

THE IMPORTANCE OF ASSOCIATION REPRESENTATIVES

Association representatives play several critical roles in the preparation and enforcement of the Collective Bargaining Agreement between the association and the employer. Perhaps most importantly, association representatives are the first line of defense against any violations of the Collective Bargaining Agreement. By being on the scene and understanding and applying the contract, association representatives can often defuse potentially troublesome situations.

In addition to enforcing the contract, association representatives also guard against violations of the association's collective bargaining rights. Association representatives are usually the first to be aware of the employer's plan to make any change in wages, hours, and working conditions. By asserting the association's right to collective bargaining over "mandatory" subjects of bargaining, an association representative can ensure that the employer complies with its statutory obligation to collectively bargain.

A third important role played by association representatives is the representation of employees in the disciplinary process. Association representatives are often primarily charged with investigating the background of disciplinary charges made against an employee, and representing employees in the initial interview process. By aggressively investigating charges made against employees and preparing the best defense against those charges at an early point in the disciplinary process, association representatives can play an invaluable role in not only assisting employees, but in preventing the employer from making an incorrect disciplinary decision.

Lastly, association representatives will note weaknesses in the present Collective Bargaining Agreement. Such weaknesses will occur when the employer utilizes a vaguely worded part of the contract in order to justify poor management decisions that have a negative impact on employees. These acts should be documented by the representative and submitted to the executive board. Then, when the time comes to negotiate for a successor contract, the executive board can take those documented problems and submit them to the association's attorney for aid in drafting new proposals.

Given the importance of the role which you play as an association representative, your familiarity with your Collective Bargaining Agreement as well as statutory rights and limitations are important. This manual is your guide for succeeding in that role.

2.

AN OVERVIEW OF OREGON'S COLLECTIVE BARGAINING LAWS AND YOUR PROTECTIONS AS AN ASSOCIATION REPRESENTATIVE

2.1 An Overview of the Collective Bargaining Process

Collective bargaining for public employees exists in Oregon only to the extent that it is allowed by State statute. Federal laws in this area, such as the National Labor Relations Act, only regulate private businesses. It is up to each State to decide what type of collective bargaining, if any, is allowed in that State for public employees. That is why there is a wide divergence among different States as to whether or not there is any collective bargaining and the extent to which it exists.

Oregon's modern collective bargaining laws were passed in the mid-1970's by a Democrat-dominated legislature and Governor's office. However, even back then the statutes passed in the Oregon Senate by 1 vote. This is something that the Republicans, who as a general rule oppose public sector bargaining, have not forgotten.

In 1995 when the Republicans regained control of the Oregon Legislature for the first time in 20 years, they altered the collective bargaining statutes by weakening them. The most significant changes occurred in who could be represented, i.e., who is a supervisor, which subjects could be negotiated, mandatory versus permissive subjects of bargaining, and lastly, how interest arbitration is conducted. Interest arbitration is a process by which a contract's terms are imposed by an arbitrator if the parties can't negotiate them. Previous to 1995, interest arbitration provided for an arbitrator deciding each issue that was unsettled between the parties. Today the arbitrator has to decide those provisions by a process of last best offer, total package settlement. This provision, more than any other change, has significantly limited what labor organizations can obtain through the collective bargaining process.

2.2 Who Can Be Represented.

All employees can be members of the labor organization, except for supervisors, confidential employees and, for the State, managerial employees. This sounds fairly all-encompassing, but in fact, changes in 1995 significantly reduced those employees that can belong to a labor organization by a change to the definition of supervisory employees.

Of the three exceptions, managerial employees only apply to the State and will not be discussed. Confidential employees are only those employees who directly assist the employer in labor relations. It is not those employees who deal with confidential material. This could include the executive secretary who types up the negotiation notes

and the finance person who does costing for the employer. However, a police or sheriff's department can usually, at the most, have only one or two confidential employees.

The definition of supervisory employee was significantly changed in 1995. Now, all one has to do as a supervisor is direct and assign work to bargaining unit members, oversee the completeness and accuracy of reports, direct activities of subordinates, prepare evaluations, etc. It used to be that supervisors had to be able to make decisions or effectively recommend them in hiring, firing, imposition of discipline, or resolution of grievances. Given the changes in 1995, it is quite easy for first line supervisors such as sergeants to be exempted from collective bargaining because of the statute. However, some employers have allowed sergeants to remain in labor organizations, recognizing that the mission of the department is not negatively affected by that happening. Other employers insist that supervisors are not in labor organizations primarily to save money. In those cases, many times sergeants enjoy less of an economic benefit such as fully paid health care, that bargaining unit members may enjoy.

2.3 State Statutes as Interpreted by the Employment Relations Board Affects the Composition of Labor Organizations.

Oregon law recognizes two different types of labor organizations: those that have the right to strike, and those that do not. Emergency dispatchers, police officers and correction officers do not have the right to strike. All other employees do. This right is a fiction as the purpose of a strike in the private sector is to bring the employer to its knees by taking away its profits. In the public sector, taxes will be collected whether or not public employees perform duties. In fact an employer will save money if public sector employees go on strike. That is why usually only teachers strike, because withholding of services to children is something that will make parents extremely upset. The pressure is far different if City or County employees go on strike.

The Employment Relations Board ruled that it favors as large as possible labor organizations for employers on the premise that large labor organizations can exercise more clout at the bargaining table. Therefore, in an ideal world, the employer such as the City or County will only have two labor organizations: one representing the employees who have a right to strike; and one representing the employees who do not. The ERB has constantly held that it will not allow "fragmentation" which would be the spin-off of multiple labor organizations within an employer. For instance, the ERB decisions would not permit the corrections officers or patrol deputies to separate from the rest of the sheriff's department. The only way such a split could occur is if the existing labor organization didn't object, and the employer, i.e., the County, or in some cases, the City didn't object. However, that is extremely unlikely to occur, as rival labor organizations that have the right to interest arbitrations would compete with each other to obtain greater benefits, and employers would recognize that is not in their best interests.

The Oregon ERB, also by case law declared that there could be mixed bargaining units, that is a labor organization comprised primarily of employees who have the right to

interest arbitration could include employees who otherwise would have the "right" to strike. That is why clerical employees and non-emergency dispatchers can be in labor organizations representing sheriff office employees or police department employees. While the Board could reverse this decision, as time passes that becomes quite unlikely.

2.4 Protections for Employees who are Involved in Collective Bargaining Activities.

The good news in this area is that the Oregon legislature has not weakened the protections that exist for those employees that are involved in collective bargaining activities nor has the ERB hesitated to protect employees from discrimination.

ORS 243.672(1) spells out what are Unfair Labor Practices for a public employer, which include the following:

A. Interfering, restraining, or coercing employees because of an exercise of their rights under collective bargaining. Examples of this can be:

    1. Retaliating against an employee for requesting a representative under a *Weingarten* setting (which will be explained subsequently).

    2. Retaliating against an association representative who is acting in a representative capacity, including against comments that may be made in a representative capacity which are not exactly positive towards either an immediate supervisor or an employer. However, there are limits in this area.

    3. Interfering with a labor organization conducting its own investigation into allegations of misconduct by any of the following:

        a. Prohibiting employee witnesses from talking to an association representative.

        b. Telling an employee that he or she cannot discuss the alleged incident with other employees.

        c. Attempting to order an employee in a labor organization not to contact witnesses and interview them until the employer has interviewed the witnesses.

        d. Attempting to tell a labor organization that it cannot contact or otherwise interview civilian witnesses.

    4. Threatening to discipline or disciplining an employee for failing to resolve problems through "the chain of command" before going to the labor organization.

5. Telling a labor representative not to discuss an issue with other employees.

All of these were listed by the ERB as unfair labor practices in the case of *OPEU v. Jefferson Co.,* 18 PECBR 146, 153-4 (1999).

B. Dominating, interfering, or assisting in the formation, existence, or administration of any employee organization. The most common example is when a supervisor or a chief or sheriff attempts to tell a labor organization or its members whom they should or should not vote for to be leaders in the labor organization.

C. Discrimination with regard to hiring, tenure, or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization, such as, assignment, promotions, giving time off, extending any employment benefit or withholding any employment. Even though many of these subject matters cannot be bargained, such as who is hired or who is given what assignment, if an employer does not offer an assignment to an association leader because of the leadership role, or in retaliation for that person having a leadership role, if that can be proven, the Employment Relations Board has been known to order employers to give certain assignments to those individuals.

D. Retaliation against an employee for participating in the PECBA process. This could include being a witness at an Unfair Labor Practice Complaint hearing.

E. A failure to bargain in good faith. This includes a wide variety of acts such as: At the time discipline is imposed and a grievance is filed, and/or a due process hearing is scheduled, refusing to provide relevant documentation to the labor organization upon request. This includes a failure to provide information either during bargaining, or a failure to provide information during the processing of a grievance.

In attempting to prove that an employer has committed an Unfair Labor Practice by violating one of the above-mentioned rules, the problem is, as in any litigation, in finding evidence to prove this issue. Many times there is only circumstantial evidence to show that discrimination or retaliation took place.

The ERB has adopted utilize the "because of" test which is utilized in civil litigation to determine whether discrimination took place. "Because of" an employee's conduct, which was protected, would the employee have been so disciplined, received or not received a certain assignment, etc. What has to be proven is that other employees in similar situations were treated differently than an association representative. When this is proven, the Employment Relations Board has not hesitated to protect employees, including reinstating terminated employees with full back pay and benefits.

3.

WHAT CAN OR CAN'T YOU BARGAIN INTO YOUR CONTRACT?

A. Introduction.

Under Oregon Statutes, labor organizations are given the right to collectively bargain over wages, and hours and conditions of employment, which are called mandatory subjects of bargaining. Permissive subjects may be bargained unless one side objects. That is usually the employer. The Association will bargain over mandatory subjects when it bargains its successive labor agreement, and if the employer makes changes on mandatory subjects of bargaining, which are not covered in a Collective Bargaining Agreement, the Association may be able to engage in mid-contract bargaining over the proposed change which will be discussed in this section, and is probably the hardest part of Oregon's collective process to understand.

B. Mandatory Subjects of Bargaining.

Mandatory subjects of bargaining are defined as:

> "Matters concerning direct or indirect monetary benefits, hours, vacation, sick leave, grievance procedures and other conditions of employment."

The ERB has ruled that subjects in those areas are automatically mandatory subjects of bargaining and the ERB will not engage in what is called a balancing test to determine whether or not there should be proposals that, for instance are monetary should be mandatory or not. However, it will declare a proposal to be permissive if it appears really intended to effect permissive area such as assignment of duties.

However, the Oregon legislature went on to declare that anything that the ERB declared to be a permissive subject of bargaining, prior to August 1995 would always be a permissive subject of bargaining. The legislature further indicated that changes in mandatory subjects of bargaining, which are "de minimus" or insubstantial would not trigger a demand to bargain.

In addition the legislature listed numerous subjects which will be permissive and not mandatory regardless of how they impact employees. These are:

1. Staffing Levels (unless they substantially impact employee on-the-job safety),
2. Safety Issues (unless they substantially impact employee on-the-job safety),
3. Scheduling of Services,
4. Minimum Job Qualifications,
5. Performance Evaluations,

6. Assignment of Duties,
7. Workload (when the effect of employee duties is insubstantial),
8. Dress and Grooming, and
9. At Work Personal Conduct Standards (i.e., smoking and gum chewing, etc.)

For other subjects that are not specifically permissive subjects of bargaining, the ERB will engage in a balancing test where it looks at how these subject matters would affect the employer, versus how they would affect the employees, and then decide whether or not they are mandatory. An example would be a shooting policy where one negotiates over protections for employees who have utilized deadly force. In a pre-1995 case, the ERB declared that such a subject would be permissive for State corrections officers because they rarely utilized deadly force but indicated it would probably hold such a proposal to be mandatory for police officers or sheriff's deputies. In addition, much of internal investigative procedures have been held to be permissive as well as a content of personnel files.

Pre-1995 there used to be a lot of litigation over this area, but there have been relatively few cases since then, mostly dealing with economic matters. For instance, the ERB declared that a criminal defense reimbursement proposal was mandatory because it was economic and it would not balance the effect on the employer versus employees.

Many times employees will have expressed frustration with how assignments are made within a department. Also, on some occasions when sheriffs have taken patrol officers and assigned them to work in a jail, this has sparked vigorous complaints. However, the employer is not limited to assigning work within a job classification but can literally assign any duties to an employee. All employees can do is to bargain the "impact" of that assignment, which means how much one gets paid for doing the work.

C. Mid-Contract Bargaining

As indicated, this is probably the toughest area to understand of Oregon's collective bargaining process. However, the rule is quite beneficial to labor organizations. An employer may not make any change in mandatory subjects of bargaining which is not covered in the contract without first negotiating with the labor organization, if it demands to bargain over the change in a timely fashion. For instance, some contracts don't cover when employees are paid. Others don't cover who gets overtime opportunities. In many cases, the issue will be whether a subject has been covered, or negotiated in a contact. The ERB has ruled that the coverage with a right of the employer to make changes must be specific and not in a general management's rights article. For example, if the contract says that with 30 days notice, the employer can use a 5-8, 4-10 or 4-12 shift, then the employer need not bargain over changing shifts. However, if the contract merely says employees will work a regular schedule, then a change in shifts would have to be bargained unless there is language that the employer can change those shifts with so many day's notice.

Oregon law requires that an employer must:

1. Notify the association, in writing, of the changes it proposes to make and

2. Negotiate, in good faith, for 90 days after the date of notification.

After an association receives notification of the employer's anticipated change, it must file a demand to bargain within 14 days of receiving the notification. If the association fails to do so, it has waived its right to negotiate. Therefore, as an association representative, it is important to watch the timelines for mid-contract bargaining.

If an employer fails to notify the association of a proposed change and the association representatives become aware of a change, they should notify the executive board at once. Ideally, the demand to bargain should be made as soon as you are aware that a change is being contemplated or that a change is actually being made. If you wait for weeks or even a month after awareness of a change, doing so will probably waive the association's right to demand to bargain.

If the employer is making a change and the association does not mind the change, then the association need not demand to bargain, but may decide to send the employer notification indicating the association is aware of such a practice, and that the employer should have notified the association of its attempt to make a change in existing conditions before it did so.

If the parties cannot reach an agreement, then they must proceed to interest arbitration through the last best offer process on the mid-contracting proposal. This has occurred twice in Oregon in 25 years. Usually what happens is either a) the matter is settled, b) the employer drops its proposal, or c) the Association decides it cannot prove that there is a right to bargain.

Most of the time the controversy in this area arises because the employer did not make the written notification to a labor organization because it didn't think about its obligation to do so. Then the employer will use one of the following defenses:

1. It has a waiver in the contract allowing it to make changes;

2. There is no past practice that it's changing, so it's free to do as it wants;

3. The change is "de minimus" so it doesn't have to bargain over it, or;

4. The change is not being made to a mandatory subject of bargaining or doesn't even impact a mandatory subject.

This area is extremely complicated, and if there is an issue of an employer making a change, it is important to immediately request our firm's assistance in going over the facts of the particular change that is being made by the employer.

The ERB has held an order to show a change in past practice which triggers mid contract bargaining. A labor organization must prove the following:

1. The subject is a mandatory subject of bargaining, or clearly has a mandatory impact on a permissive subject of bargaining.

2. The past practice is clear and consistent.

3. It has been exercised repeatedly over a long period of time.

4. It has been acceptable to both parties, and

5. Involves mutuality.

In one case where there had been a past practice of taking home vehicles which contradicted written county policy and department heads swore they were unaware that a lower level supervisor had authorized the past practice, the county prevailed because the practice had not been acceptable to both parties and did not involve mutuality, i.e. both parties were aware of the practice.

4.

HOW CONTRACT BARGAINING TAKES PLACE

4.1 The Bargaining Process

Bargaining begins within time limits that are spelled out in the existing Collective Bargaining Agreement, usually in the Length of Agreement Article. If an agreement states that the parties must deliver their proposals to each other on or before date X, then that must be honored or waived in writing. In one case, the failure of an Association to give its proposals in a timely manner caused the contract to be extended for an additional year without wage increases or any other changes.

Then bargaining must take place for 150 days after both sides meet and exchange proposals. Employers are beginning to wake up to the fact that there are plenty of opportunities for mischief here. An employer can say it is not ready to meet for weeks, or even months, and then come to the table without proposals and state that it can't decide whether to make a proposal after it reviews an Association's proposals. An employer can stall bargaining for months by this scenario.

Usually the first thing that can be discussed at bargaining is whether any ground rules should be in existence. An obvious ground rule would be when bargaining starts. A second ground rule could be after so many meetings, no new proposals could be introduced. Other ground rules could include the exchanging of all comparability data.

Ground rules are permissive. Neither side can be forced to bargain over them. The reason for this is because one could spend more time negotiating over ground rules than the contract itself. However, ERB decisions on unfair labor practice complaints have made it clear that the ERB prefers ground rules, and the failure of a party to set reasonable ground rules would be a substantial factor to be reviewed by the ERB to determine if bad faith bargaining has occurred.

The number of sessions that the parties need to meet can be determined by the parties. There is no magic number. The parties must meet and negotiate for 150 days after the meter starts, unless they agree to speed up the process. After 150 days, either party can request mediation. Mediation can also be waived. However, it takes mutual agreement to do so.

What is accomplished at bargaining will depend a lot on the relationship of the parties. If the leaders in the sheriff's department or police department have or wish to have a good relationship with leaders of the Association, then negotiations can be used for mutual problem solving of areas where both sides may see a problem, such as shift bidding or vacation bidding. If, on the other hand, the relationship is bad, there is a tendency from the employer just to say no to everything knowing that the Association will have to drop

virtually all of its proposals due to the last best offer process.

In addition, economic items are usually packaged by the employer on the theory that it only has so much money. Sometimes an employer will work on components such as premium pay, but that is somewhat unusual. Usually wages and insurance are handled together at the end of negotiations.

4.2 Mediation

Mediation usually takes a month to two months to be scheduled. There is a $500 fee for each side for proceeding to mediation. After mediation starts, one or the other of the parties can force it to officially conclude after 15 days.

The mediation process can be a traditional process where the mediator shuffles proposals back and forth, or the parties can use it to continue normal bargaining.

4.3 The "Final Offer"

After one side has declared mediation to be over, 7 days later each side must present a final offer to the ERB with a costing of each other's proposals. The costing must be in good faith but does not have to be precise. The easiest way to do this is to utilize the employer's costing methodology. This is something that can be requested and obtained during bargaining.

Recently, the ERB ruled that if a Final Offer is significantly different from a Last Best Offer, then it may well hold that a party has not negotiated in good faith. Therefore, some attention has to be made ensuring that the Final Offer reflects a good faith effort to have settled the contract. In practice this may be a meaningless requirement.

In addition, utilizing proposals which contain permissive subjects of bargaining can cause fair labor practice complaints to be filed, usually by the employer, over such an issue. The ERB has ruled that a party that takes a "permissive" subject of bargaining to an interest arbitration cannot prevail, and that the ERB is statutorily obligated to invalidate the interest arbitration award. However, in one case, that of *Springfield v. Springfield Police Association,* in 1997, the ERB drastically tied the City's hands on what it could do in going back to a last best offer arbitration when it found that the Association had taken in a permissive proposal. The ERB did so because the City waited until right before arbitration to object to proposals as permissive as opposed to doing it when the parties were bargaining.

4.4 Interest Arbitration: The "Last Best Offer Total Package" Process.

After the final offers have been published, then the parties can request a list of arbitrators from the ERB. Then by flipping a coin and striking off names, an interest arbitrator is selected and interest arbitration can be scheduled.

Fourteen days before interest arbitration the parties exchange last best offers. These are mailed, e-mailed, or faxed on that day. Upon receipt of the other side's last best offer, each party has 24 hours to modify their proposals. Then if one party has modified its proposals again, the other party has an additional 24 hours for the third modification.

As a practical matter, employers become politically get locked into their positions and rarely modify their last best offers. In the few cases where an employer has done so, the modifications have not been significant.

However, the first modification can be critical. The point of a last best offer is that your proposal has to be more attractive to the arbitrator than the other side's. It like outrunning the bear; you simply have to outrun the other person who is also being chased. The movement in the 24 hours on the last best offer has caused a number of arbitrations to be won that might otherwise have been lost. Therefore, it is an important process for the executive board to consult with John Hoag or David Snyder during the last best offer process and how to make your package proposal better than the employer's.

In virtually all cases, the last best offer which is awarded is decided by which economic proposal is easier to justify. The primary criteria for an arbitrator to consider is the interest and welfare of the public. Obviously, this is an indefinable term. However, arbitrators have decided that proposals that are the result of bad faith bargaining or permissive proposals such as to reduce retirement benefits, are reasons enough to reject an employer's last best offer.

If both party's proposals appear to be in the interest and welfare of the public, then arbitrators will consider secondary criteria which primarily will be comparability, the ability of the employer to pay the award, and employee turnover. In 1995, the definition of comparability was restricted to being to like employers; i.e. cities are compared to only cities and counties to counties with the closest population. If everything is equal, the employer's proposal will usually prevail. If an employer has an inability to pay an Association's proposal, the employer will usually prevail. On the other hand, if the employer has the ability to pay, and the Association can make a comparability justification which is enhanced by a turnover problem, then the Association should prevail. The largest economic proposals that have been awarded by arbitrators so far have been 3 percent increases every 6 months for two or three years, depending upon how far behind a labor organization is in comparability, and the admitted ability of an employer to pay for such a proposal.

The arbitration hearing used to take as long as a week when every issue could be litigated that was not settled. Under the last best offer process, only 4 to 6 proposals may go to arbitration, as the more proposals, the greater the risk of loss. Now an arbitration will sometimes take half a day and certainly no longer than a day in the average case. After the hearing is over, the parties usually file post hearing briefs two to four weeks later, and then the arbitrator has 30 days to issue a decision.

5.

ENFORCING THE CONTRACT

A. Introduction.

The importance of an association representative in enforcing the Collective Bargaining Agreement cannot be overstated. Association representatives are often the only individuals who are in a position to be aware of violations of the Collective Bargaining Agreement. Since the strength of a Collective Bargaining Agreement is directly related to the willingness of the association to enforce the contract, the association representative's role becomes all the more important.

1. In enforcing the contract, there are five areas of information any association representative should possess:

   (1) A working knowledge of the provisions of the contract,
   (2) Knowledge of how the grievance procedure works,
   (3) Knowledge of the time limits imposed by the grievance procedure for the processing of grievances,
   (4) Awareness of how to best write a grievance and
   (5) Knowledge of how to process the grievance through the steps in the grievance procedure.

1. Understanding the Collective Bargaining Agreement.

The first task of any association representative should be to read the entire Collective Bargaining Agreement. When reading the contract, the association representative should jot down notes about provisions of the contract that may be unclear. These notes should later be reviewed with members of the association's executive board to ensure that the association representative has the correct working understanding of the rights guaranteed by the Collective Bargaining Agreement.

In addition to the initial reading of the contract, each association representative should, on at least an annual basis, reread the most important portions of the Collective Bargaining Agreement. These portions include, at a minimum, the following sections of the contract: Section 14, Hours of Work; Section 15, Shift Changes; Section 16, Overtime; Section 28, Grievance Procedures; Section 29 Discipline and Discharge; Section 37, Personnel Files; and Section 38, Police Proficiency Incentive Program, and department policies regarding the use of force.

2. The Contract's Grievance Procedure, Article 16, Settlement of Disputes.

The grievance procedure in the association's contract with the employer contains a

5-step process. The steps can be summarized as follows:

Step 1. The employee should first discuss the grievance to his/her supervisor outside the bargaining unit within the thirty (15) days of its occurrence or fifteen (15) days form the date the employee knew or should have known of its occurrence. If the employee does not receive a satisfactory response within ten (10) calendar days of first presenting his/her grievance, then within ten (10) calendar days after the response is received or should have been received, the employee with or without an association representative may submit the grievance as per Step 2.

Step 2. Within ten (10) calendar days after having received a response at Step 1 or within ten (10) days after which a response should have been received at such step, the grievant may submit the written grievance to the supervisor. The supervisor shall respond to the grievance within ten (10) calendar days of its receipt. If the grievant does not receive a satisfactory response at this step, the employee may request a hearing as per Step 3.

Step 3. If after ten (10) days from the date of receipt of the supervisor's reply, the grievance remains unadjusted, the grievance may be submitted within ten (10) days to the Police Chief. The Chief may meet with the employees' immediate supervisor and the aggrieved party, who may request an Association representative at the hearing. The Chief shall respond to the grievance in writing within ten (10) days.

Step 4. If after ten (10) days from the date of receipt of the Chief's reply, the grievance remains unadjusted, the grievance may be submitted within ten (10) days to the City Manager of the City. The City Manager shall meet with the aggrieved party, Association representative and the Chief of Police, and shall respond to the grievance in writing within ten (10) days.

Step 5. If the grievance is not resolved within ten (10) days from submission of the grievance to the City Manager, the employee, with the Association's approval, shall have fifteen (15) days to serve notice to the City Manager, in writing of its intent to arbitrate. The arbitrator shall be selected by mutual agreement of the parties.

3. Time Limits in the Grievance Procedure.

As can be seen above, the grievance contains very specific time limits for the advancement of grievances from one step to another. It is critically important that all association representatives understand these time limits. If a grievance is not advanced within the time limit specified by the contract, the grievance is forever lost and cannot be reactivated (except in limited circumstances when the grievance is of a continuing nature). If you ever have any doubts about time

limits, get in touch with the executive board.

Always document the date, time and person with whom each step is filed. Keep these records in case of any challenge to the timeliness of a grievance.

4. How to Investigate and Write a Grievance.

How well a grievance is investigated and written often determines whether or not the grievance is won or lost. When investigating a grievance, it is important that an association representative follow at least the following basic steps:

Interview the employee. In all cases, the grieving employee should be interviewed prior to the writing of the grievance. In the course of the interview, the association representative should make sure to ask questions that will reveal both the strengths and weaknesses of the grievance. The items that should be covered in the interview of the employee are the following:

(1) Why does the employee believe there has been a grievance,
(2) What section of the contract has been violated,
(3) When did the grievance happen,
(4) What remedy to the grievance is he seeking,
(5) Where did the grievance happen and
(6) Who was involved in the grievance.

Examine all records. Before the grievance is written, the association representative should examine all records relevant to the grievance. This should include records possessed by the employee, and records which the employer may have in its possession.

Speak with the employer's representative. Before writing the grievance, the association representative should attempt to get the employer's side of the grievance. To do this, the association representative should speak with any supervisors who may have knowledge of why the employer took the action which resulted in the grievance.

Speak with other association representatives. Another important step to follow prior to writing the grievance is to speak with other association representatives to determine whether or not they have encountered a similar problem and, if so, how they were able to successfully resolve the problem.

Most clients will contact John Hoag or David Snyder while this process is on going, and we will write the grievance for them.

5. How to Process a Grievance.

Under the association's organizational scheme, association representatives are given the responsibility to monitor the processing of grievances through the steps of the grievance procedure. This requires that the association representatives be aware of all time limits imposed by the grievance procedure, and that association representatives assure movement of the grievance through the grievance procedure in compliance with those time limits. The process of advancing a grievance from one step of the grievance procedure to another is usually best accomplished by hand-delivering a copy of the grievance to the higher step.

Since the passage of Senate Bill 750, association representatives must be aware of the level of authority with whom they are settling a grievance. Under Senate Bill 750 an employer representative is an individual who is "specifically designated by the public employer to act in its interest in all matters dealing with employee representation, collective bargaining and related issues." In other words, to ensure that a settlement is final, make sure that the employer's agent with whom you are making deals can be designated as the employer's representative.

6.

REPRESENTING EMPLOYEES IN THE DISCIPLINARY PROCESS

A. Employees' Right to Representation -- The Weingarten Rule.

Employees are guaranteed the right to representation whenever an employee is being questioned under circumstances which may lead to discipline. These rights were first described by the United States Supreme Court and apply in a variety of settings. In each case, however, the employee is entitled to representation only if the employee requests representation. Absent a request from the employee, the employer has no obligation to notify the employee of the employee's right to request representation.

Because Weingarten rights turn on an employee's request for representation, association representatives should make sure that all employees with whom they work understand that they have the right to an association representative whenever they are being interrogated about a matter which they believe could result in discipline. At a minimum, Weingarten rights exist under the following circumstances:

(1) Any disciplinary interview concerning a citizen's complaint,
(2) Any disciplinary interview concerning a department-initiated complaint, and
(3) Any situation where the employee is required to give an oral or written report about the use of force.

Remember, Weingarten rights only come into existence when the employee requests representation. Association employees have this right whether or not it is in the contract. This right should always be exercised, to ensure you are informed, and that both you and the employee are adequately prepared.

B. The Employees' Right not to Incriminate Themselves -- Miranda Warnings.

All too frequently in the law enforcement business if an employee is being interviewed for conduct which could violate department rules and regulations, it is also possible that the conduct may violate State or Federal criminal statutes. For instance, if excess force was used, an employee may have committed an assault.

Therefore, if an employee is being interviewed about allegations of misconduct which, if true, could result in criminal charges, the employee should be instructed that the employee has the option to obtain an attorney to represent the employee relative to the potential of criminal charges. The association's duty of fair representation is simply to defend the employee against discipline which may be without just cause. Association representatives should not be giving the employee advice regarding the potential for criminal charges. That should be something the employee should determine for himself or herself with or without the employee's personal attorney. An employee may exercise

the employee=s right to remain silent in a criminal investigation without being subject to discipline. However, an employee may be given immunity by the employer and ordered to answer questions where there are potentially criminal charges.

C. Employees' Right to be Granted Immunity Before Answering Questions. -- Garrity Rights.

The Oregon Court of Appeals has held that if an employer orders an employee to answer a question, the employee's answer and the fruits of that answer cannot be used against the employee in a subsequent criminal proceeding. This rule, known as the Garrity rule, is named after the case in which the United States Supreme Court first enunciated the rule.

The impact of the Garrity rule is that whenever an employee is being asked a question about alleged misconduct, the association representative should ensure that the employee always solicits an order prior to voluntarily responding to the questions. A good rule of thumb is that when an employee is being interviewed in a disciplinary setting, the employee should be advised that the first words out of the employee's mouth should be: "Am I being ordered to answer this question?"

If the employee is informed that he or she is not being ordered to answer the question, then the employee should respectfully decline to proceed with the interview. If the employee is informed that he or she is being required to answer the question, then the employee should cooperate fully with the investigation (the employee could be charged with insubordination if he or she does not answer the questions), bearing in mind that the statements made cannot be used against the employee in a criminal setting.

Though it is rare to find a law enforcement officer charged with any criminal law violations, invoking an employee's Garrity rights should nonetheless be part and parcel of the association representative's role in the disciplinary process. The old bromide that "an ounce of prevention is worth a pound of cure" is rarely truer than with the invocation of Garrity rights. The immunity that has been given by the department is simply "use" immunity, which means the employee's statement cannot be used against the employee in criminal prosecution. The employee can still be prosecuted. Should an issue arise where it appears clear that the employee may be facing criminal charges based upon the allegations of misconduct, association representatives should consult with the association's attorney over this issue, and the employee may wish to consult with the employee's private criminal defense attorney.

D. How to Act While Representing Employees in a Disciplinary Interview.

When an employee is being interviewed in this setting, you should ask to tape record the interview. You have no right to tape record the hearing, and the employer may prohibit you from doing so. However, an employer does so at its peril as, if there is a swearing match later as to who said what during the interview, an arbitrator will hold it against the employer for refusing to permit a tape recorder.

ERB decisions have drastically limited the extent to which association representatives may participate in disciplinary interviews. You do have the right to be present during any such interview. You do not have the right to consult with the employee during the interview or before the interview if the employer prohibits it. However, you should request that right if you have not had time to prepare for the interview. All that you can do during the interview process is request "clarification" of questions when they are asked. Practically speaking, you should do so when it becomes clear that the employee is getting very flustered in the process. You or the employee can still request a break to allow the employee to compose himself or go the rest room. During that time, hopefully, you will have a chance to calm the employee down.

It is critical that the employee be urged to be honest during the interview. All too often an employee is being interviewed about improper conduct, and the employee may be embarrassed or feel guilty about his or her actions. In desperation the employee may tell stories which are not truthful or distort facts. If this is the case, defending the employee on subsequent discipline based on untruthfulness becomes extraordinarily difficult. The untruthfulness charge will become more serious than the initial improper conduct as it is usually a termination offense. Therefore, the employee should be counseled that while the association can help an employee keep his or her job in most cases where there are allegations of misconduct, but one cannot defend an employee who is not truthful.

If the employer's representative begins to act inappropriately or ask trick questions, the association representative should not hesitate to object to those questions and seek clarification of them. If an unprofessional or threatening manner is being taken, you should complain about this fact and ask for clarification as to how the interview is proceeding.

Your short check list while in the interview is as follows:

1) Is the employee ordered to be present?
2) Is the employee ordered to answer questions and is subject to discipline if the employee refuses to do so?
3) May I tape record the interview?
4) What is the subject matter of the interview? (What details can you obtain?)
5) Object to unclear, compound, or otherwise unfair questions especially if they assume facts that the employee can=t verify.
6) Get a break if the employee loses his or her composure.
7) If the employee can’t remember the answer to a question, don=t let them Aadopt@ a suggested answer.
8) Remind the employee to be truthful and not to guess or conjecture.

As soon as the Association learns of an investigation, the employee who is the subject of that investigation should be told clearly and emphatically not to discuss the investigation with others in the Department—except for his Association representative. If a fellow

employee is interviewed that employee will have to disclose any non-privileged conversations with the subject. In addition, the employee should be instructed not to attempt to contact witnesses regardless of whether they are fellow employees or citizens. If witnesses need to be interviewed the Association will do so, but the subject employee should not risk an accusation of witness tampering by contacting them.

E. Representing Employees in a Pre-Disciplinary Hearing

Before an employer takes away the "property right" of an employee to an employee's job or to a full paycheck by way of a suspension without pay or a termination, the employer must give the employee a pre-disciplinary or pre-termination hearing. This is called the "Loudermill" Rule, named after a decision of the United States Supreme Court. Under this rule, the employer must at a minimum follow certain guidelines for the hearing:

1) Provide the employee with specific notification of the charges against the employee,
2) Allow the employee to have a representative present, and
3) Allow the employee on an informal basis to respond to the charges against the employee.

The employer may prohibit the employee from calling witnesses, but the employee may indicate what witnesses would say.

The employer must give the employee enough information about the allegation, the investigation and findings, and the recommended discipline so that the employee can be prepared to respond. Otherwise, the right to a Loudermill hearing would be meaningless.

The employee may choose to waive the employee's right to the Loudermill hearing. The employer often has its mind made up and it may be more advantageous to the employee to go straight to arbitration. This may be so because by this time, the employer may not listen to the employee or may use the hearing as "discovery" to get the association representative's detailed arguments and strategy for arbitrating the situation. In many cases it is better to send in a written statement that sets forth your position and not appear in person. Obviously, this is an important decision and you should consult our firm in each case.

F. If an Employee is Charged Criminally

In June, 1997 in the case of Gilbert v. Homar, the United States Supreme Court ruled that if a law enforcement officer is arrested for a criminal act, or even better, indicted for a criminal act, that that could serve as the officer=s Adue process@ so that the officer could be immediately suspended without pay. The U.S. Supreme Court went on to say that an employee will be due a post-suspension due process hearing but left for the lower Courts to decide whether the hearing the employee was given was adequate or not. In this particular case, the employee was arrested on August 26th, the charges were dropped on

September 1st, and he had received a hearing on December 18th. In addition, the Court=s decision left it unclear as to exactly what would be covered at the due process hearing. Would it merely be that the employee was really arrested or indicted, or would it be that the employee engaged in conduct which the employer would have to allege and later prove was inappropriate? Years of litigation will be needed to decide this matter.

Recently, at least one employer began suspending employees without pay after they have been charged criminally, and the same employer has been similarly suspending employees without pay based upon transcripts of their testimony, even if they are not charged criminally if the transcript reveals that the employee has confessed to a termination offense. Stay tuned for years of future developments in this area.

In any event, it will be your association's position that through past practice, and certainly future negotiations, it will try to ensure that no suspensions without pay take place without an adequate due process hearing on the underlying charges that an employee may face. There have been a number of law enforcement employees in this state who have been charged with criminal activities, have been acquitted of those charges, and are back at work. In some cases, unusual settlements can be negotiated for the employee who is charged criminally. In one case, an employer agreed that if the employee was convicted, the employee would resign, but if the employee was acquitted, the employer would not go further. In other cases, an employer has simply agreed that if an employee was acquitted, then the employer will reassess information that is available. However, the employer has a right to go ahead with a pre-termination hearing and force the Association to go to arbitration before a criminal case has proceeded to trial. In at least one situation where that occurred, the employee was placed back to work with no discipline before the criminal trial resulted in the employee’s acquittal.

G. Disciplinary/Just Cause Standards -- What to Look For.

When representing an employee in the disciplinary process, it is important to understand what it is arbitrators look for in a discipline case. In all discipline cases, arbitrators impose a burden upon the employer to prove that it had just cause to discipline an employee.

In a landmark discipline case, Arbitrator Carrell Daugherty enunciated seven factors which arbitrators later have come to accept as being important in all discipline cases. Association representatives should carefully review the following seven questions in the course of investigating a disciplinary incident and representing an employee in the disciplinary process.

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer's business?
3. Did the employer, before administering discipline to an employee, make an effort to

discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation did the judge obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

The above seven questions are a good checklist to use in every discipline case. When investigating the case, association representatives should discuss each question with the employee in order to determine what possible defenses exist.

However, ORS 243.706 limits what an arbitrator can do to set aside discipline in cases involving sexual harassment, sexual misconduct, unjustified and egregious use of physical or deadly force, serious criminal misconduct related to work, and anything else that is “so egregious.” In these cases, discipline cannot be reduced based upon the employer’s uneven handed enforcement of the rule or uneven handed imposition of discipline.

7.

THE RIGHT OF THE ASSOCIATION AND AN EMPLOYEE ACCUSED OF MISCONDUCT TO CONDUCT THEIR OWN INVESTIGATION.

ERB case law has repeatedly affirmed the right of an Association to conduct its investigation into allegations of misconduct, and the right of the employee accused of misconduct, to conduct the employee's own investigation. Obviously, the reason that the Association needs to conduct an investigation in some cases is to perform its duty of fair representation. An individual has a right to attempt to defend one's self.

A leading case on this is that of *Thafault v. Pendleton School Dist.*, 13 PECBR 275 (1991).

The case arose when Ms. Thafault had been accused of spanking students in violation of District policy. She ended up being suspended and charged with a number of violations of the policy, including spanking students, falsifying accounts of the spankings, and attempting to cover up the incident by instructing aides to give false testimony. The disciplinary memo also gave her an order not to discuss her case with any students, parents, or other staff members of the School District. The Superintendent testified that the order was given because she was concerned that Thafault would coerce or taint perspective witnesses.

The OEA representative challenged the validity of the order and was informed by the District's attorney that it was for the purpose of safeguarding the investigation against any taint to it. The District dismissed Thafault, who challenged her termination through the Fair Dismissal Appeals Board, which upheld the termination.

However, the Employment Relations Board ruled that the directive to Thafault violated ORS 243.672(1)(a). The ERB ruled that Thafault had a protected right to discuss her case with others. The ERB held:

> "Fundamental among labor organization activities is the representation of members in the context of grievance and disciplinary proceedings. It follows necessarily that public employees engage in their conduct protected under ORS 243.662 when they participate with their labor representatives in defending themselves or bargaining unit members against allegations of wrong doing – which could result in discipline or discharge." *Id.* p.282

The ERB went on to state that the District's ordering her not to discuss the charges with staff, students, or parents:

> ". . . in practical effect forbidding her from aiding an association investigation in her own defense. Clearly, the association had the right, if not the duty, to test the validity and support for the charges and to begin framing a response to them by interviewing the individual involved. Just as clearly, Thafault had a PECBA right to assist in that effort." *Id.*

The District argued that because it had actual proof of intimidation against witnesses, the order was necessary. The ERB's response was as follows:

> "These circumstances would weigh heavily in the District's favor if Thafault's PECBA rights could lawfully be suspended, even for a short period of time, because of arguably overriding legitimate District concerns. However, we are aware of no authority for the proposition that sets a balancing of interest might warrant even 'reasonable' employer inference with protected rights. To the contrary, we have held that good faith and good business reasons do not insulate an employer from PECBA liability under subsection (1)(a)." *Id.* p. 282-283

The same order not to investigate to the representatives was held to be a "(1)(b) violation" which is an employer domination of a union.

In turning to the remedy, the ERB found that the District's action did not affect the appropriateness of Thafault's termination and therefore, it only issued a cease and desist order, and no other remedy. In a hearing in reconsideration, the ERB re-emphasized its ruling but did state that the District could have ordered her not to engage in investigatory activities during the normal duty time, or not to be disruptive or coercive in her contacts with witnesses. *Id.* p. 282 – 283

The principles of the Thafault case were upheld in the case of *OPEU v. Jefferson County,* 18 PECBR 146 (1999). There the ERB reiterated and listed protections that are afforded to a labor organization or an employee accused of misconduct, as being the following:

1. "The employer may not interfere with the labor organization's conducting its own investigation.
2. They cannot prohibit the employee witness from talking to Association representatives.
3. They cannot tell employees that they cannot discuss the alleged incident with other employees.
4. They cannot order an employee in a labor organization not to contact witnesses and interview them until the employer has interviewed the witnesses.
5. They cannot tell a labor organization they cannot contact or otherwise interview civilian witnesses.
6. They cannot tell a labor representative not to discuss an issue with other employees." *Id.* p. 153-154

Also, in the case of *AOCE v. State of Oregon,* 18 PECBR 64, 70 (1999), the ERB ruled that when the District Attorney asked the employer to withhold reports relevant to the disciplinary case because the DA was considering charges, that was an insufficient reason to do so, and discovery still had to be given.

Suppose the allegation, if true, is of criminal conduct?

All too frequently in the law enforcement business, acts of alleged misconduct, if true, are acts of criminal conduct. For instance in many cases, the use of excessive force is criminal. ERB case decisions have not carved out an exception to the right of an Association to represent a member and to conduct its own investigation if there is an ongoing criminal investigation into alleged acts of employee misconduct. The labor organization and the employee who is subject to the investigation has a right to conduct an investigation and does not have to wait until the employer is through.

This is not to be said that any investigation conducted when there is a criminal investigation doesn't have to be carefully handled. Why? The District Attorney and/or the employer can overreact if there is an on-going criminal investigation. District Attorneys are notoriously ignorant of the basic protections of employment relations and the right to conduct an investigation. A risk exists that a District Attorney will look for a chance to prosecute employees for interfering with an investigation, tampering with witnesses or other assorted allegations. The employer's reaction may be much the same, and it can accuse the employee and/or the Association of attempting to coerce or otherwise manipulate witnesses or other persons to be interviewed. Therefore, any investigation conducted by the Association has to be done in a manner so that the Association will be immune from collateral attacks.

Can the Association member whose conduct is being investigated have a confidential communication with an Association Representative?

ERB case law is less than clear as to whether a confidential communication can take place in such circumstances. In addition, since "privileged" communication needs to be established by statute or case law, whether an ERB decision would give a protection in a State or Federal court is questionable at best. However, without assurances that a conversation is confidential, it becomes very difficult to represent an Association member accused of misconduct.

The way that this firm has resolved this issue is to confer the attorney client privilege on Association Representatives who are conducting an investigation into these allegations. In such cases they will be the "agent", or "investigator" of Snyder and Hoag, LLC, and their actions will be covered as being confidential as part of the attorney "work product." This has been upheld in a Marion County Court proceeding when a deputy district attorney tried to compel Association Representatives to tell what an Association member told them during a confidential interview after the member was arrested on criminal charges. (Incidentally, that member was acquitted and returned to work for the employer.)

In a recent case a Sheriff took the position that since his employees are sworn law enforcement officers, their duties would require them to report any criminal activity. This is certainly true if they observe any such activity or come to hear about it in a non-privileged communication. However, if they are informed of such activity in their capacity as an Association representative, then a claim of privilege can be made. In such cases, it is important to remember that our firm's client in these cases is the Association and not the individual accused of misconduct. It would be

up to the Association as to whether to waive such a privilege, just as it would have to decide whether to proceed to arbitration if a member is ultimately terminated for misconduct.

When and how Should the Association's investigation be conducted?

Also, having the right to do one's own investigation is far different from exercising that right. It is our strongest advice to clients, i.e., Associations, and to the individual effected by an allegation of misconduct, that the individual NOT act in any sort of investigative capacity. First of all, a person who is subject to investigation cannot act objectively. This will taint any interviews, questions that are asked, the answers that are heard, and the follow up that may occur.

Secondly, that individual, just like Ms. Thafault, is subject to allegations of coercion. If there is ever an appropriate time to remember the old adage, that a lawyer that represents himself has a fool for a client, it applies as well to those who investigate their own cases.

On one occasion, John Hoag warned a particularly strong-willed individual that his conducting his own investigation would affect any recommendations as to whether the Association proceeds to arbitration over any subsequent discipline that may be imposed.

Most employers are becoming used to the fact that the Association does get to conduct its own investigation into allegations of misconduct. Heightened paranoia occurs when an Association has to interview "civilians" who are not members of the law enforcement family. If these are individuals who are critical of law enforcement, the temperature rises even higher. If these are persons who are in custody that need to be interviewed, the danger of allegations of manipulation or abuse of power become paramount.

If there is an on-going criminal investigation against an employee, the fact of the matter is that the ability of that potentially accused employee to protect him or herself from a conviction takes priority over the desire to retain their employment. Therefore, any investigation the Association undertakes, as a matter of courtesy, should be coordinated with the attorney of the accused.

Basically the same rules apply for an investigation conducted by the Association as it does for the employer. The first thing the Association needs to do is ensure that the right experienced investigator is assigned to conduct the investigation. The investigator should have background and experience in conducting investigations, especially of the particular allegations in question. If the allegation is of sexual misconduct, it would help to have an investigator who was familiar with sex crimes. If the allegation is excessive force, it would help to have an investigator who was very experienced in the use of force.

If the individual who needs to be interviewed is an inmate, one must be extraordinarily careful of not being subject to allegations that the interview was coercive because the employee conducting it had custodial responsibility for the inmate. In such a case, it is important to have the interview conducted by someone who is not a correctional employee, and who is not in uniform. It is also important that there be proof that the interview is voluntarily conducted, which can involve

having two persons conduct the interview so that there is a witness to what was said, and, to use a tape recorder, and or a video tape recorder for conducting of the interview.

One important issue is when to conduct the investigation. In almost all cases, it is foolish to conduct the investigation until the employer has finished their investigation. The obvious reason for waiting is we don't know what witnesses have previously said. Sometimes you don't even know what the employee will be charged with, and until those facts are known, it is hard to determine what is a relevant line of inquiry.

In addition, waiting has many advantages. First, if the accuser or witness is making up a story, over a time, they will not be able to remember their lies. If the witness becomes unavailable, this will be the employer's problem. It is only if a witness is believed to have potentially helpful statements to make, and may become unavailable, an immediate interview of a witness during an on-going investigation would be advisable.

In the techniques to be used for interviewing, the following help:

1. Finesse. In these investigations, the interviewer does not have the power of a law enforcement agency to compel a witness statement. One has to persuade a witness to talk. You can't use the threat of arrest or grand jury proceeding.
2. It is important that the interview be conducted so later it can be proved that it was part of a search for the truth rather than an attempt to twist or hide facts. Arbitrators seek fairness. They do not like techniques that appear to be browbeating, twisting facts or any other manipulations.
3. Along those lines, the best way to start is to just have witnesses tell their stories, from start to finish.
4. Afterwards, pin down witnesses. Go over the facts carefully. Extract every bit of relevant information that you can from them. The goal is that there will be no surprises in the arbitration, and that we know exactly what witnesses will be saying.
5. Cover motive or bias. Inquire as to those. If that will be an explosive question, do it at the end of the interview.
6. In dealing with witness statements, you will be looking for the following:
   a. The witness has made up a story and is lying.
   b. The witness didn't see the whole event, so it may have been only a snap shot of, say, a dynamic event and has misconceptions based upon their limited abilities to see and observe.
   c. The witness is mistaken.
   d. The witness is credible.

It is important that if the Association's investigation is to be utilized in an upcoming arbitration, we do not want to be conducting an investigation that will put the Association or the interviewee on trial for attempting to conceal or manipulate evidence.

8.

REPRESENTING EMPLOYEES AFTER A SHOOTING OR OTHER CRITICAL INCIDENTS

Being involved in a situation requiring the use of deadly force or taking the life of someone, no matter how justified, will be psychologically traumatic for any law enforcement employee. In addition, studies conducted by psychologists have shown that how the employee is treated by the employer in the subsequent investigation can leave far more traumatic scars than the incident itself.

It is the expectation of Snyder and Hoag, LLC, that the attorney who will represent you will be contacted and will respond to represent the employee as soon as possible after such an incident. The reason for the response is not because of concern for criminal charges or even discipline against the employee as on a nation-wide basis, well over 95% of all police shootings are clearly justified, but to help the employee survive the aftermath, i.e., the department's investigation.

The association has negotiated with your employer over its use of force policy. As a result of those negotiations, the association representatives should be able to complete their assignments when a traumatic incident occurs.

From the association's standpoint, when such a traumatic incident occurs, it is critical that the following happens.

1. The association representative should immediately go to the scene of the incident, or wherever the employee has been taken, to be with the employee.

2. Call John Hoag or David Snyder using the numbers provided below. If they are out of state or unavailable, call or page the back up attorneys in the order that they are listed and ascertain how long it will take them to get there.

John Hoag
Office: 907.772.5079
Cell: 907.650.7440

David Snyder
Office: 503.222.9290
Cell: 503.349.0842

Back Up Attorneys

1. Tom or Sarah Moore Bostwick
Office: 503.370.7745
Home: 503.391.1254
Cell: 503.580.1318

2. Claudia E. Browne
Office: 541.474.0234
Cell: 541.913.3495

3. Make contact with the attorney who will be responding and re-confirm that the representative will be working for the attorney as the attorney's agent. This will allow the employee then to talk to the representative and have a confidential

conversation while being covered by the attorney/client privilege.

4. Separate the employee from command staff, co-workers and anyone else, and inform the employee that the representative is holding the fort until the association attorney arrives. Tell the employee that the representative is working as the agent of the attorney and the employee can have confidential communications with you. This is important as the employee needs to know that somebody is there for them. The employee needs to be able to unload their feelings and emotions surrounding the incident and have someone to talk to with assurances that the matters will be kept confidential. It will not be unusual for an employee to second guess themselves or to wonder why they had to shoot the person, even though the shooting was clearly justified from the standpoint of self-defense.

5. Ensure that the employee is comfortable, has access to liquids, has the ability to attend to personal needs, and has the opportunity to contact family members. However, remind the employee that a confidential communication can occur only with a spouse, and not with parents, children or close friends.

6. Many employers have a trauma team. Oregon law provides for a limited privilege for conversations to trauma team members. There is no privilege if the act about which a conversation takes place is "criminal." Until the District Attorney indicates there are no charges to be filed, any employee involved shooting is potentially criminal. Therefore, an employee involved in a shooting should not discuss the event with the trauma team until the District Attorney indicates there is no potential for criminal charges.

Also, you should check to be sure that the trauma team set up by your Department is in conformity with Oregon law. That means the team members must be listed in the Department Manual, and there must have been documented training for them to function in this capacity. If there is any question about the validity of the Department's trauma team, delay utilizing their services until those concerns have been resolved.

However, in the days or weeks before the District Attorney makes this decision, trauma team members can provide valuable services. They can assist the employee in understanding what the employee will be going through during this time.

7. If the employer provides a psychologist or mental health worker for the employee to consult, establish if there is a doctor/patient privilege with the employee. Is the psychologist there for the employer's benefit or for the employee's treatment? If the former, then the employee should give no statement to the psychologist. Then at the most, the psychologist can just go over with the employee the psychological stages the employee may go through in the aftermath

of such a traumatic incident. If the psychologist is there to provide treatment to the employee, then the two should be alone for a consultation to ensure that a doctor/patient privilege exists. Do not be present during a consultation where the doctor/patient privilege will exist, nor allow anyone else to be present besides the employee. Do be present if there is going to be a non-privileged briefing.

Individual employees who are involved in the use of force may not automatically have the right to have their own private attorney present. For instance, some employers take the tactic that since there is no chance of criminal charges, therefore there is no right to individual representation. That way of thinking has been upheld by the 9th Circuit Court of Appeals. Because of this, it is critical to remember that the backup attorneys who will respond if John Hoag or David Snyder are unavailable are working on an "of counsel" basis for Snyder and Hoag, LLC, and are present to be association attorneys. In shootings and other critical incidents where an employee is going to be scrutinized with a criminal investigation, no matter how outwardly justified the shooting may appear, it is this firm's practice to inform the individual employee or employees involved in this case, that he will be working as an attorney for two clients: the association and the individual employee. In order to do so, the attorney will approach the association representative and then the employee to get a knowing and informed consent of both parties to the dual representation. Snyder and Hoag, LLC, has been using this practice for nearly two decades of responding to employee-involved shootings and to date there has never been an issue with this practice.

What the "knowing and informed consent" means is that the association agrees that the firm of Snyder and Hoag, LLC, can have an individual relationship with the employee in representing the employee. This is important to ensure that attorney-client privileges are protected on the employee's behalf. The employee's "knowing and informed consent" is that John Hoag and David Snyder will have permission to disclose facts surrounding the incident to the association if the employee is disciplined. Then John Hoag or David Snyder can advise the association on evaluating whether to give the discipline to arbitration.

In the unlikely but unfortunate situation where it appears that criminal charges may be filed, then the attorney's role in duly representing both clients will cease, and it is critical that the employee involved in the incident obtain independent, private criminal defense counsel. John Hoag or David Snyder will not represent employees on criminal charges because of the specialization of their practice. However, the backup attorneys for Snyder and Hoag, LLC, all have criminal practices. Our firm recommends that if the employee is comfortable doing so, any of these attorneys can be retained.

Before employees who are involved in a traumatic incident return to work they should consult with a police psychologist. When that occurs, is up to each employee. In some cases that should occur immediately after an incident, in other cases a few days later. Many employees end up suffering from some form of Post-Traumatic Stress Disorder (PTSD) which can include the inability to concentrate, reoccurring nightmares or

avoidance of reminders of the incident. This is easily treatable if treatment is sought right away.

So that employees do not feel stigmatized by having a session with a psychologist, virtually all law enforcement employers require a mandatory session with a qualified psychologist before an employee's return to work. Qualified psychologists in Oregon include:

1. Dr. Suzanne Best, Portland, Oregon. (503) 239-8022.

2. Dr. Robert Jones in Salem, Or. However, in one case Dr. Jones was reluctant to testify. Employees who treat with him, should discuss his participation in a hearing if necessary. (503) 399-7092.

3. Dr. David Baldwin in Eugene, Or. (541) 686-2598.

9.

DEFENDING THE ASSOCIATION WHEN ONE OF ITS MEMBERS ACCUSES IT OF INADEQUATE REPRESENTATION (Duty of Fair Representation)

It is unfortunate to go over this subject, but in today's world it is more prevalent that individual association members are bringing claims against their association. Three types of claims are most prominently filed: The first type is based on a claim that the association has failed its duty of fair representation. The second claim is that the association has discriminated against a member, and the third claim would be that the association is in someway working with the employer to eliminate an employee's rights under the American with Disabilities Act.

An association may act with a great deal of discretion as to how it processes or handles a grievance and not be guilty of violating its duty of fair representation to its members. However, it is important that the association do the following each time a potential grievance is received:

1. Gather the facts. Interview witnesses as necessary.
2. Interview the employee carefully to ascertain what the employee's claim is.
3. Seek a legal opinion from the association's attorney regarding the viability of the grievance and the ground on which it is made.
4. Process a grievance within the time lines, or give the employee written notification of the association's decision not to process a grievance. If in doubt, draft a grievance and begin it through the process so the time lines are not waived and then consult with the association's attorney as to whether in fact there has been a contractual violation.

In disciplinary matters, it is important to go back and look at the seven-step test and gather all the facts possible to analyze the discipline. In complicated cases, as long as you have received a letter of opinion from the association's attorney, the representative's actions will be deemed to be in good faith. Gross negligence will constitute a violation of duty to fair representation such as missing the time lines for a grievance without excuse or ignoring a grievance that has potential merits. However, the burden is extremely harsh and is against the individual employee. The employee's action is against the association as an entity and not against individual members. In order to prevail, an employee must show that the actions were arbitrary, capricious, or were of malicious intent against the individual employee. The only time this raises an issue is when unpopular employees are subject to discipline. The association must be careful that this employee receives the same representation as one of its more popular members.

Above all else, establish a procedure for the processing of grievances for the association. Make the members aware of this process. Follow the process.

The discrimination statutes in federal law cover an association and its individual officers who can be individually liable for discrimination, if the association officer discriminates against a person by virtue of statutorily prohibited reasons such as sex, race, age or national origin. Be critically careful to remember your role if you are an association officer and not act in such a way that will make you subject to claims of discrimination.

A third area of concern is the Americans with Disabilities Act. If an employee is claiming that an employee has a disability and wishes to have a waiver of provisions of the Collective Bargaining Agreement because of the disability, it is important that the representative seek counsel early on. It is also important to get the employee to document exactly what the employee's disability is, how the employee can perform the employee's job with accommodations, what that accommodation would be and lastly, what section of the Collective Bargaining Agreement will have to be waived in order for that accommodation to take place. An example of this is an employee with sleep disorders who has a letter from his doctor saying he should not work on certain shifts. It is a fairly new area of the law and there are a lot of potential loopholes in it. If the association representative has any questions, be sure to seek advice at once.

10.

THE ASSOCIATION REPRESENTATIVES' ROLE IN HELPING THE ASSOCIATION PREPARE FOR FUTURE NEGOTIATIONS

Contract negotiations are a never-ending process. As your association attorneys, we never close our negotiation notebooks from the last negotiations, but keep them handy for reference. When drafting proposals for your next Collective Bargaining Agreement, this will be the initial starting point. Another factor which will be critical in preparation of contract proposals for you will be the facts you bring regarding incidents that occurred during the life of the contract which show the areas of the contract that need improvement. Many of these areas will surround working condition issues of which we will not be aware if you do not document them. Therefore, when an issue arises regarding schedule changes, vacation scheduling, or any other such matter, it is important that you, as the association representative, make contemporaneous notes of the problems. These notes should be in the form of a mini-police report containing the date the incident occurred, which employee or employees were involved, and the supervisor(s) that seemed to be the cause of the problem.

Such documentation is critically important in order to obtain new contract language. We have to explain to the employer what the problem is and why new contract language will lead to an appropriate solution. In addition, most arbitrators follow the Burt Lance rule which is, "If it ain't broken, don't fix it." In order to obtain new contract language that guarantees you additional rights, we have to show the arbitrator that a problem arose during the life of the agreement, that the existing contract language was not adequate to cover the problem, that our proposed language will solve the problem, and, lastly, that our proposed language will be in the best interest of the public. Without your taking the time to document these incidents and forwarding the information to your executive board so it can be kept, our ability to improve your contract will be limited.

11.

CONCLUSION

Your role as an Association Representative is to minimize employee/employer conflict and to ensure smooth working conditions. If you are successful, everybody's day-to-day life will be much better. If you are unsuccessful, then no matter how good the Collective Bargaining Agreement is, we will not have created an appropriate work place for members of the association. Therefore, you should see your role as an association representative not as one who provokes confrontation, but as one who can settle potential problems in an efficient and professional manner.

Sincerely,

Snyder and Hoag, LLC

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