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A City Club Report on IP 62: Public Union Fees & Dues

City Club of Portland (Portland, Or.)

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Petitioners filed the proposed IP 62 in September of 2015, with the goal of passing what would be referred to as the "No Politics from My Pay, Without My Say" Act. As of June 2016, the Oregon Supreme Court had not yet approved a final caption, and the measure will almost certainly fail to qualify for the 2016 ballot.

Currently, Oregon allows public employees who are part of a collective bargaining unit to refuse membership in the union that represents that unit. Because the union is still required to negotiate on their behalf, these nonmembers must contribute "fair-share" costs, but are not required to pay for the union's political activities (so-called "nonchargeable" activities).

Supporters of IP 62 argue that the present system infringes on public employees' free speech rights by making it too difficult to opt out of paying nonchargeable expenses, and that Oregon public-sector unions are not honest about sorting chargeable versus nonchargeable expenses.

The primary result of IP 62 would be to prevent Oregon public unions from spending member dues or nonmember fair-share fees on items that are not "germane to collective bargaining" unless the employee has actively given written permission.

The measure also makes several additional changes to existing Oregon law. Jurisdiction over related claims would be removed from the Employment Relations Board (ERB) and placed in state circuit courts, where prevailing employees would be awarded attorney fees in addition to other sums. Finally, the measure would forbid the state legislature from changing the definition of seven core labor-law terms unless the change itself were to be approved by ballot measure.

Your committee believes that IP 62 goes far beyond what is necessary to protect the First Amendment speech rights of Oregon public sector employees. The initiative would turn an "opt-out" system into an "opt-in" system without justification, would create free-rider problems, and would make several other unnecessary and damaging changes to existing Oregon labor law. Your committee believes a few small changes in the law would have been sufficient to address the concerns of IP 62 supporters, while avoiding substantial unwarranted harm to public unions.

Recommendation: The committee unanimously recommends a "No" vote.

City Club members will debate this report on Wednesday, Aug. 24, 2016 at the Club's Ballot-Palooza event. Club members will vote on the report beginning Thursday, Aug. 25 and finishing Monday, Aug. 29. Until the membership votes, City Club of Portland does not have an official position on this report and Initiative Petition 62. The outcome of the vote will be reported on Aug. 30 in the City Club of Portland Bulletin Vol. 99, No. 2 and online at pdxcityclub.org.

TABLE OF CONTENTS

INTRODUCTION

The official ballot title for IP 62 read:[1]

Limits public union membership terms, dues/fees. Permits employees to benefit without sharing costs. Authorizes lawsuits.

RESULT OF "YES" VOTE: "Yes" vote limits public union membership terms and dues/fees required of members; permits employees to benefit from representation/bargaining without sharing costs. Authorizes lawsuits.

RESULT OF "NO" VOTE: "No" vote retains public employee unions' authority to set membership obligations, require union-represented public employees to share representation/bargaining costs union legally must provide.

SUMMARY: Current law allows public employees to bargain collectively through a union. Union may require membership dues to fund expenditures related to all representation/bargaining and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but not for union activities unrelated to representation/bargaining. Measure prohibits requiring any dues/fees that fund activities not "reasonably and necessarily" incurred for union representation/bargaining concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain; thus, measure permits employees to benefit from representation/bargaining without sharing costs. Union may separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

BACKGROUND

In Oregon, labor relations between public employees, employers, and unions are governed by the Public Employee Collective Bargaining Act (PECBA).[2] Once certified, a union is required to represent and negotiate on behalf of all the employees in the bargaining unit, regardless of whether each employee is a member of the union itself. Public employees may not be required to join a union as a condition of their employment. However, since the union is required to represent nonmembers, PECBA allows the collection of "payment-in-lieu-of-dues," also known as "fair-share" fees, to "defray the cost for services by the exclusive representative in negotiations and contract administration" for nonmembers.[3] Costs that the union may collect from nonmembers are commonly called "chargeable." Nonchargeable costs include "political or ideological activity," which the U.S. Supreme Court has held cannot be included among fair-share fees.[4] However, chargeable costs may include both mandatory subjects of bargaining (topics a collective bargaining agreement is required to address, such as employee wages and hours)

and permissive subjects of bargaining (topics that *may* be covered by a collective bargaining agreement, such as performance evaluation criteria or class size).

PECBA also permits religious objectors who have declined union membership to pay nothing to the union that represents their bargaining unit, and instead "pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization."[5]

Public employees who feel their rights under PECBA have been violated may file a complaint with the Employment Relations Board (ERB). The ERB determines whether an unfair labor practice has taken place and issues a final order, which may then be appealed to the Oregon Court of Appeals.[6]

IP 62: Public union dues

The initiative is fairly complex, and makes several changes to existing Oregon labor law. The most substantial change limits the definition of fees that can be collected from *both* members and nonmembers of the union. The text refers repeatedly to "political and ideological activities or expenditures," but the initiative actually casts a much broader net, covering "any expenditure … that is not [germane to collective bargaining] with [an] employer on matters concerning employment relations." To make these expenditures, the union would be required to collect a signed consent form from each employee.

This would accomplish two things. First, "a union would no longer have authority to set its own membership requirements and to defray its costs through its dues structure," since it would be required to admit members who refused to contribute toward the covered expenditures.[7] Second, the initiative substantially shrinks the category of expenditures that a public union can collect from both members and nonmembers included in the collective bargaining unit. PECBA uses "employment relations" as shorthand for mandatory subjects of bargaining.[8] In other words, if IP 62 were to become law, public unions could not spend money on permissive subjects of bargaining or on services and benefits provided directly by the union, without the written permission of each member or nonmember.

The initiative also removes jurisdiction from the ERB. Public employees would be able to sue in state circuit courts, and would be awarded attorney fees if they prevailed. Finally, IP 62 attempts to "lock down" the definition of seven core labor law terms,[9] forbidding the state legislature from changing their meanings without the approval of a future state ballot measure. However, the initiative itself does not change the definitions included in existing law under ORS 243.650 (2015).

Your committee interviewed various witnesses knowledgeable about this initiative and Oregon public union policies in general, in addition to reviewing literature on the topic and PECBA itself. However, neither the petitioners nor their counsel would agree to be interviewed. Your committee did its best to understand the motivations for the initiative and the intent of its provisions, despite this impediment.

Major assertions made in favor of IP 62:

- Would protect the free speech rights of public union members.
- Would prevent public unions from charging nonmembers for political expenditures.
- Would make public unions more responsive to the concerns of their members.
- It is currently too difficult to opt out of paying for political expenditures, and public unions do not calculate fair-share payments fairly.

Major assertions made against IP 62:

- PECBA already allows objectors to refuse union membership and withhold fees that would go toward political activities.
- The "free-rider" effect would allow public employees to receive benefits without paying for them.
- Would limit public union expenditures on permissive topics of bargaining and other services and benefits.
- Makes unnecessary changes to the law which would result in confusion and increased litigation.

DISCUSSION & ANALYSIS

IP 62 would create a "free rider" problem

One of the core assumptions of public policy is that it is unfair and counterproductive to allow individual members of a group to receive benefits they choose not to pay for, a phenomenon called "free riding." While reviewing draft ballot titles for IP 62, The Oregon Supreme Court held that IP 62 would create the potential for such a problem among public employees:

> Under IP 62, if a union were to bargain on permissive subjects and obtain contractual benefits, those benefits would be available to all bargaining unit members, but the union would be prohibited from recovering those expenses as required dues. An employee who paid only baseline union dues would obtain those contractual benefits for free.[10]

The Court acknowledged that unions have no obligation to bargain on permissive topics, but added that they likewise are not required to bargain for any benefits at all, even though the topic *itself* may be a mandatory topic of discussion.[11] Concluded the Court,

> When a union *does* bargain for a benefit that the union *does* obtain, that benefit must be made available to all employees in the bargaining unit, and a measure that precludes a union from requiring payment of the costs that the union incurs in bargaining for such a benefit creates a potential free rider effect that must be disclosed to voters.[12]

In other words, IP 62 would leave public unions with two options. Either continue to bargain for permissive contractual benefits without reimbursement from some of the employees who would receive those benefits, or give up negotiating for such benefits altogether, resulting in poorer representation for both members and nonmembers.

Witnesses interviewed by your committee argued that the actual scenario would be even more extreme. Although the Court focused on IP 62's effect on permissive bargaining, it would also apply to benefits that public unions provide directly to their members, such as education and training activities.[13] For unions that represent public employees who perform dangerous work, such as firefighters, these services can be lifesaving.[14] If the initiative were passed into law, public unions would face the same unpleasant choice about the services they provide as the contractual benefits they bargain for: either provide them for free to members who fail to complete a consent form, or withdraw them altogether. Your committee feels that neither of these outcomes have been justified either by the text of IP 62 or by the statements of supportive witnesses, even if all their criticisms of the present system are taken as correct.

IP 62 is misleading and exceeds its stated purpose

What is "political and ideological"?

IP 62 repeatedly refers to "political and ideological" activities and expenditures. It states that "It is important to protect the free speech and association rights of individual public employees," and argues that no public employee in a collective bargaining unit, whether an actual union member or not, should be required to support "political and ideological" expenditures. However, the initiative does not define "political and ideological," nor is the term defined in PECBA itself. The initiative is also not limited to expenditures that fall into that category—as explained in the Background section above, it actually covers "any expenditure…that is not [germane to collective bargaining] with [an] employer on matters concerning employment relations." In other words, although the phrase "political and ideological" appears ten different times in the initiative, it is completely irrelevant, with two exceptions. First, Section 6(2) would allow public unions to continue to make expenditures when contracting with third parties to provide "additional incidental member benefits," *even if* those expenditures are not related to bargaining over employment relations, provided the expenditures are not "political or ideological." Second, the written consent form that public employees would need to sign refers only to "political and ideological purposes." There are three possible reasons for this confusion, and all reflect poorly on IP 62. As stated above, the parties responsible for drafting the initiative declined to be interviewed, so your committee can only speculate as to which explanation is correct.

One possible explanation for the initiative's overuse of "political and ideological" is that it's simply a drafting error. The drafters may have intended to create an initiative that made it easier for public employees to withhold only dues and fees used by their union on traditional political activities, such as lobbying or campaign expenditures. If that was the case, not only is IP 62 a different Initiative than the petitioners intended, it was also written with a significant degree of carelessness. Your committee believes changes to Oregon law should be conducted with more caution and thoughtfulness.

A second explanation is that the drafters of IP 62 *intended* to create confusion, and make it look as though the initiative would apply only to what most people think of as "political" activities, while actually going much further. This could conceivably lead to greater support for the initiative – and less willingness by public employees to sign the consent forms – than if its language were more straightforward about its spending limits. This theory would also explain why Section 6(2) of the initiative is written to apply only to "political and ideological" spending, unlike the rest of the law. If the drafters had really meant to deal only with "political" activities, why didn't they make that distinction across the entire text? Needless to say, we would reject such an attempt to mislead Oregon voters.

The final possible reason that IP 62 refers to "political and ideological" activities so often is that petitioners hope that the changes to the law would be interpreted more broadly than the wording of the initiative suggests. One witness interviewed by your committee argued strongly that because public unions bargain with governmental bodies, *everything* they do is a matter of public policy and therefore "political."[15] This idea also has support in existing U.S. Supreme Court precedent: "In the public sector, core issues such as wages, pensions, and benefits are important political issues."[16] Because "political and ideological" is not defined in the initiative, it may encourage courts to interpret its language more broadly than has been deemed necessary either by the text of the initiative or by its supporters.

IP 62 far exceeds its stated goals

Witnesses supportive of IP 62 who were interviewed by your committee argued that PECBA currently fails to sufficiently protect the "free speech and association rights" of public employees. The following are the most substantial criticisms:

- Public unions are not honest when calculating which expenses are "chargeable" to nonmembers and which are not, and sometimes claim that 100% of their expenditures were related to collective bargaining and therefore "chargeable."[1718]
- Public union nonmembers are billed by default for both "chargeable" and "nonchargeable" expenses, and are not informed by the union that they are permitted to opt out of the latter.[19]
- Public unions do not hold elections frequently and are not responsive enough to their members.
- Everything a public union does is "political," and therefore it is a First Amendment violation to require contributions of any kind from nonmembers.[20]

Your committee finds the first three arguments to be at least reasonable, and believes the fourth is at least plausible. We next examined whether IP 62 is appropriately designed to address these concerns, independent of their actual validity.

The first problem is that the initiative applies to all public employees represented by a union, regardless of whether they are actually members of the union itself. Under the initiative, public unions may not "[compel] *any public employee* to pay *member dues* or other money as a condition of joining and

participating as a member" if the dues will be spent outside of mandatory topics of bargaining.[21] If the point of the initiative is to protect free-speech rights, it is not clear why it is necessary to include actual union members. Since unions are required by law to bargain on behalf of everyone in a particular bargaining unit,[22] presumably an objector's first move would be to leave the union. Your committee does not believe it necessary to rewrite PECBA, which "as currently written … does not set the terms and conditions of union membership, nor … prescribe or limit the amounts that unions may charge members"[23] for the sake of union members who object to how the union is spending their dues, but not strongly enough to give up their membership.

Second, IP 62 does not seem to justify the new structure it creates for public union expenditures. An initiative could easily be drafted to change the existing "opt out" system to require more accounting transparency, better notice to public employees of their options, more time for employees to "opt out," and so forth. It appears to your committee that such narrowly-tailored changes would address the large majority of IP 62 supporters' concerns about the current law. However, IP 62 creates an entirely new "opt in" system in which public unions would not even be able to collect dues from their own membership to fund more than their core, legally-mandated functions, without "obtaining [each] employee's affirmative written consent."[24] When asked why the drafters of IP 62 may have opted to throw out the existing system entirely rather than try and correct its claimed deficiencies, one witness (who generally supports union restrictions) speculated it may be "retaliation" against public unions for making it too difficult to opt out of their fees.[25] Your committee agrees with the supporters of IP 62 that the First Amendment rights of public employees must be protected, but retaliation would not be a valid reason to create a presumption in the law that *all* public employees, even current union members, object to union expenditures beyond the bare minimum of mandatory bargaining.

Third, IP 62 would make several substantial changes to the law for which your committee could find no argument whatsoever, either in the initiative itself or from supportive witnesses. The initiative would create a jurisdictional carve-out from the ERB, which previously handled all unfair labor practice allegations from public employees. No witnesses interviewed by your committee made any criticism of the ERB, nor is it clear why a body that has so much experience dealing with PECBA would not be suited to handle cases arising under IP 62. The ERB is even able to award attorney fees,[26] and would therefore be able to adjudicate any cases in a functionally identical manner.

IP 62's handling of attorney fees is another seemingly unjustified portion of the initiative. Under existing law, Oregon courts must weigh various factors when deciding whether to award such fees to a prevailing party, such as whether there was bad-faith conduct on either side, whether the parties made unreasonable arguments, whether awarding fees would deter frivolous claims in the future, and so on.[27] Only in very limited circumstances are such awards currently mandatory.[28] IP 62, on the other hand, makes an award of attorney fees (and "reasonable costs") *mandatory* for prevailing public employees. "One-way pro-prevailing-plaintiff" awards of this kind "uniformly encourage the pursuit of claims of all sorts in all situations. … Such a policy permits plaintiffs to expect greater net recoveries, without adding a counterbalancing threat of loss."[29] Witnesses supportive of the initiative were not able to explain why this provision was included, leaving nothing to rebut statements by its opponents that this is a tactic aimed at "bleeding" public unions.[30] To summarize, IP 62 seems to create a presumption that any public

union sued under its provisions has acted in bad faith, and your committee is not aware of any need to write such a policy into Oregon law.

Finally, Section 8(1) of IP 62 forbids the state legislature from changing the definitions of various core labor law terms without the approval of a ballot measure, even though the initiative itself merely adopts the existing definitions used in ORS 243.650 (2015). None of the witnesses interviewed by your committee had seen language like this before, nor could explain why the drafters of the initiative may have thought it was necessary. Your committee is not aware of past attempts by the state legislature to subvert ballot measures by redefining basic legal terms. Furthermore, it is doubtful that the provision would even function if passed into law—even if it survived a legal challenge, the state legislature could simply strip Section 8(1) itself out of the law, and then proceed as it wished. The existence of such questionably useful language is not the most substantial reason to oppose IP 62, but it contributes to an overall picture of a murky, misleading Initiative.

Existing law is sufficiently protective of free speech

As stated in the Background section above, Oregon public employees who are covered by a collective bargaining agreement have several options if they are unsatisfied with the union that represents their bargaining unit, or oppose its existence altogether. First, if they are still union members, they may either attempt to organize within the union to change it, or quit it altogether while continuing to be represented like any other covered employees. Objectors who have quit the union or were already nonmembers may then choose to pay only their "fair share" for chargeable expenses, which funds the activities the union is legally required to perform on their behalf. Nonmembers who believe the union is interpreting "chargeable" too broadly may demand an accounting, and may sue the union if they are still unsatisfied.[31] If they remain unsatisfied with the whole system and wish to pay nothing towards the union whatsoever, they can sue the union for that as well.[32]

Your committee believes that while this system is not perfect, it does not represent a problem for Oregon voters substantial enough to justify passing a ballot measure to create an entirely new system for collecting public union fees and dues, particularly given the problems with IP 62's language already discussed. No witnesses offered evidence that a substantial number of Oregon public employees are unsatisfied with the present system. Additionally, we heard testimony that 30% of employees represented by SEIU currently opt to pay only their "fair share" fees, suggesting that it is not overly difficult to "opt out" under existing law.[33]

IP 62 would harm public unions beyond what its proponents have justified

It was challenging for your committee to examine the actual effects of IP 62 as compared to the advertised effects. Witnesses supportive of similar measures criticized the current way union nonmembers are charged for union services, but had little to say about the value of public sector unions overall as a matter of public policy.[34] Likewise, the text of IP 62 itself has nothing to say on this topic, and as previously mentioned, its petitioners and their counsel would not agree to be interviewed by

your committee. Witnesses who oppose IP 62, on the other hand, argued extensively about the value that public unions provide both for the employees they represent and the state as a whole.[35]

If IP 62 were a straightforward initiative to limit public unions, your committee would have weighed the arguments for and against a robust public union system. Instead, we were tasked with analyzing an initiative that is ostensibly aimed at one narrow issue, yet proposes changes to Oregon law that far exceed that stated goal, and in some cases appear to propose totally unrelated changes. Essentially, IP 62's findings section – along with one half of our witnesses – argued in favor of an initiative that is not IP 62, while the other half of our witnesses argued directly against IP 62 as it is actually likely to function. Your committee therefore was unable to treat the overall value of public unions as a contested issue to the extent we would have if faced with a clearer Initiative.

If passed into law, IP 62 would revoke the current "fair share" system entirely. It would, for the first time under Oregon law, remove the authority of public unions to collect dues from employees who have voluntarily decided to become union members, and create a presumption that such members do not wish to pay for any benefits or services beyond the absolute core of mandatory bargaining. It would allow both members and nonmembers to receive benefits they have not paid for, unless the union opts to stop providing them altogether. Your committee believes all of these effects would substantially impair the functioning of Oregon public unions. The witnesses we interviewed argued that public unions improve safety for their members,[36] provide crucial benefits beyond traditional bargaining,[37] and give a voice to workers who would otherwise have little control over the terms of their employment.[38] Your committee believes these arguments are persuasive, and that they outweigh the value of an incremental increase in First Amendment protection for objecting public employees.

Conclusions

Your committee concludes that IP 62 is a deeply flawed Initiative that was drafted, whether intentionally or not, to greatly exceed its stated purpose of freeing public union members and covered public employees from supporting "political and ideological" activities with which they disagree. While the current mechanism for protecting the free speech rights of such employees is not perfect, we have found no justification for scrapping it completely in favor of a murky, misleading new system. Public employees who disagree with the union to which they belong or which represents their bargaining unit have several options under existing law for expressing that disagreement, including withholding "nonchargeable" fees and filing lawsuits. We find that imperfections in this system do not justify inflicting substantial harm to Oregon's public unions, and for these reasons your committee recommends that the City Club oppose passage of IP 62 and any similar law.

Your committee also notes that past City Club studies in 1996 and 2008 have questioned the benefits of the ballot initiative process in general, finding that the system "is on balance a negative for the state" except in critical situations where the state legislature is "unwilling or unable to act." We have found no evidence that the petitioners here attempted a legislative remedy or that the issues raised represent a "critical" issue for the state.

Recommendation

The committee unanimously recommends a “No” vote.

Signatures

Respectfully submitted,

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WITNESSES

Jenn Baker, Director of Health Policy and Government Relations, Oregon Nurses Association, May 24, 2016.

Steve Buckstein, Senior Policy Analyst, Cascade Policy Institute, May 17, 2016.

Anne Marie Gurney, Oregon Director, Freedom Foundation, June 7, 2016.

Karl Koenig, Legislative Director, Oregon State Fire Fighters Council, May 24, 2016.

Don McIntosh, Associate Editor, NW Labor Press, May 10, 2016, June 7, 2016.

Maxford Nelsen, Labor Policy Analyst, Freedom Foundation, June 7, 2016.

Benjamin Straka, Freedom Foundation, June 7, 2016.

Brandon Thompson, Our Oregon, May 24, 2016.

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ABOUT CITY CLUB

City Club of Portland brings together civic-minded people to make Portland and Oregon better places to live, work and play for everyone. For more information about City Club of Portland or for additional copies of this report, visit pdxcityclub.org, email info@pdxcityclub.org or call 503-228-7231.

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ENDNOTES

[1] *See Conroy v. Rosenblum*, 359 Or 601 (2016).

[2] ORS 243.650 - 243.782.

[3] ORS 243.650(18).

[4] See *Teachers v. Hudson*, 475 US 292 (1986).

[5] ORS 243.666(1).

[6] ORS 240.086, ORS 663.220.

[7] *Conroy v. Rosenblum*, 358 Or 807, at 813 (2016).

[8] ORS 243.650(7).

[9] "Collective bargaining," "employment relations," "exclusive representative," "labor organization," "public employee," and "public employer."

[10] *Conroy*, 358 Or 807, at 815.

[11] Ibid.

[12] Ibid at 816. Emphasis added.

[13] Witness testimony of Jenn Baker, Oregon Nurses Association.

[14] Witness testimony of Karl Koenig, Oregon State Fire Fighters Council.

[15] Witness testimony of Steve Buckstein, Cascade Policy Institute.

[16] *Harris v. Quinn*, 134 S. Ct. 2618, at 2632 (2014).

[17] Witness testimony of Steve Buckstein, Cascade Policy Institute.

[18] *See*, *e.g.*, *Commun. Workers of Amer. V. Beck*, 487 U.S. 735 (1988).

[19] Witness testimony of Maxford Nelsen, Freedom Foundation.

[20] Witness testimony of Steve Buckstein, Cascade Policy Institute.

[21] Emphasis added.

[22] ORS 243.650(1), (4).

[23] *Conroy*, 358 Or 807, at 811.

[24] Ibid at 813.

[25] Witness testimony of Steve Buckstein, Cascade Policy Institute.

[26] ORS 243.676(2)(e).

[27] ORS 20.075(1).

[28] *See*, *e.g.*, ORS 20.080 (creating mandatory awards for "certain small tort claims").

[29] Rowe, Thomas D. "Predicting the Effects of Attorney Fee Shifting," 47 *Law and Contemporary Problems* 139, at 147 (1984).

[30] Witness testimony of Don McIntosh, NW Labor Press.

[31] *See*, *e.g.*, *Commun. Workers of Amer.*, 487 U.S. 735 (1988).

[32] *See*, *e.g.*, *Friedrichs v. Calif. Teachers Assoc.*, 136 S. Ct. 1083 (2016).

[33] Witness testimony of Steve Buckstein, Cascade Policy Institute.

[34] With the exception of Steve Buckstein, who argued that public unions represent a monopoly on employee representation. Witness testimony of Steve Buckstein, Cascade Policy Institute.

[35] See witness testimony of Karl Koenig, Jenn Baker, Brandon Thompson and Don McIntosh.

[36] Witness testimony of Karl Koenig, Oregon State Fire Fighters Council.

[37] Witness testimony of Jenn Baker, Oregon Nurses Association.

[38] Witness testimony of Don McIntosh, NW Labor Press.