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ACLU OF RHODE ISLAND POSITION: AMEND

TESTIMONY ON 24-H 7198, H-7263, AND H-7313,
RELATING TO THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS
February 8, 2024

Along with many others, the ACLU of Rhode Island firmly believes that it is long past time for significant revisions to, if not repeal of, the Law Enforcement Officers' Bill of Rights (LEOBOR). It is a statute that a majority of states do not have and that the state that first adopted one – Maryland – recently repealed in recognition of its adverse impact on police accountability.

We express this view as a strong defender of due process and as an organization that has defended the constitutional rights of police officers in a variety of contexts. But the scope of protection provided to police by LEOBOR is extraordinary, not only compared with other government employees, but even with the rights of criminal defendants.[1] Further, for the minority of other states that also have LEOBORs, Rhode Island's is considered one of the most protective of police officers accused of misconduct. When you add to that the fact that Rhode Island remains one of only two states in the country that doesn't have a formal decertification process for law enforcement officers, the need for major change is apparent.

Framed by a nationwide upswell of public support for significant reforms to be made to our policing systems, practices, and laws, the ACLU of RI is appreciative of the efforts to pass

[1] To give just a few examples, unlike police officers under investigation, criminal defendants do not have the right to have their interrogation conducted "at a reasonable hour," R.I.G.L. §42-28.6-2(1); to have all questions asked of them only "by and through one interrogator," R.I.G.L. §42-28.6-2(3); to be "informed in writing of the nature of the complaint and the names of all complainants," R.I.G.L. §42-28.6-2(5); or to have interrogations be "for reasonable periods" and timed to allow for "personal necessities." R.I.G.L. §42-28.6-2(6).

legislation to try to address the need for better accountability of law enforcement agencies and their personnel. Since we are fully aware that the law's repeal is not feasible, our testimony will focus on the two bills that make various modifications to LEOBOR.

We believe that H-7313 generally does a much better job addressing flaws in the current statute. While H-7263 (unlike H-7313) partially repeals the broad "gag rule" barring the discussion of disciplinary matters, and also commendably establishes an online portal for the dissemination of information about individual LEOBOR proceedings, we believe that H-7263 falls short in many other areas. For example, it retains a make-up of LEOBOR committees composed of a majority of police officers, does not address the situation of accused police officers resigning before disciplinary action is taken, and allows for summary punishment up to only 14 days even for the use of deadly force that violates department regulations. In other instances, we believe some clarification of language is in order to ensure certain provisions accomplish their goals and, as we have testified in the past, we think it is important that LEOBOR reform include reform of the Access to Public Records Act to complement the transparency and accountability that this bill is designed to promote. We briefly address some of these issues in H-7263 below by bill section:

* Section 42-28.6-1. Definitions – Payment of legal fees. This section changes the size and membership of the LEOBOR hearing committee, but we are disappointed that, unlike other iterations of this legislation, a majority of the committee will continue to be police officers. This section also sets criteria for the police officers who will be qualified to serve on the committee, but we believe those criteria should be tightened. First, the bill provides that no panelist can serve in the same police department as the accused officer; we believe that prohibition should be extended to bar service by an officer who *ever* served in the same

department as the accused. An additional criterion that should be included is that an officer should not be able to qualify for the certified officer pool if they themselves have ever been disciplined for misconduct.

- Section 42-28.6-2. Conduct of investigation. This section includes a partial repeal of the "gag rule" preventing police chiefs from publicly commenting on incidents of alleged misconduct by officers. We strongly support repeal of the gag rule. However, we urge an important clarification of the language on Page 4, line 22. The bill specifically allows the police chief to "releas[e] any video evidence." We urge that this be amended to make it clear that the chief may release "any video or other evidence." We believe this revision is necessary to ensure that the current language of the bill is not misinterpreted to limit public access to other relevant evidence. In addition, there should be no exception for so-called minor violations.

- Section 42-28.6-4. Right to hearing – Notice request for hearing – Selection of hearing committee. Entitlement to an appeal is a critical component of due process; however, the statute allows for an appeal of any disciplinary action *prior* to the decision on the actual discipline to be imposed. The ACLU supported other versions of this legislation last year in which, like H-7313, the hearing committee appeal process was changed to occur following both the initial hearing and the taking of disciplinary action by the law enforcement agency.

- Section 42-28.6-11. Decisions of hearing committee. The ACLU strongly supports the provisions in subsection (g) requiring that information about pending and past LEOBOR hearings be posted on a public website. This is an essential transparency measure.

  However, we are confused by the provisions of subsections (d) and (h) and urge clarification. Subsection (h) requires reporting of various disciplinary actions against officers to a national decertification index. This would alert other law enforcement agencies across the country about an officer's proven misconduct if they apply for a job elsewhere. However, since Rhode Island itself has no decertification process, it is unclear whether this language would bar an officer who was disciplined here from obtaining police employment elsewhere *in Rhode Island*. Subsection (d) seems to establish a quasi-decertification process, but with language that makes it unclear how it would operate in practice.

  More importantly, we also believe that this section contains a major loophole that needs to be addressed. As the bill is written, there would be no reporting either to the state's commission on standards and training or national entities if an officer accused of serious misconduct resigned before they were terminated. This deficiency should be dealt with.

- Access to Public Records Act [Not addressed in bill]. One of the key elements of any police reform, including LEOBOR reform, is an increase in transparency and accountability in the results of investigations of police misconduct. While a few provisions in this bill attempt to address the issue, we wish to reiterate a point we have made in past testimony: it is critical that the Access to Public Records Act also be amended. As committee members know, only a tiny fraction of police misconduct goes through the LEOBOR process. The

public therefore must have access to information that provides insight into how police departments are handling disciplinary matters more generally.

While LEOBOR may make it difficult to hold police officers accountable for misconduct, recent interpretations of APRA make it even more difficult for the public to learn how police departments are handling those investigations and whether the disciplinary system is in fact working properly.

Obtaining this information has been stifled by both Attorney General opinions and by a Superior Court ruling from a number of years ago in a case handled by the ACLU on behalf of a government watchdog group. Under those opinions, the public is not entitled under APRA to see all departmental final reports into the investigation of police misconduct *even with personally identifiable information redacted*. Compare that to the many other states where final reports of misconduct are not only clearly public, but they are also released with the identity of the officers named.

Especially when an officer is determined to have engaged in misconduct, any privacy interests are clearly outweighed by the public's right to know the names of the officers involved. In short, changing some of the investigative and adjudicative procedures in LEOBOR may be a first step, but unless APRA is clarified to require the release of all final investigations of misconduct, the changes could be a hollow victory to some extent. If the committee nonetheless considers amendments to APRA to be outside the scope of this bill, we urge support for separate legislation that would directly address this key issue.[2]

[2] A bill introduced this session, H-7181, makes numerous amendments to the Access to Public Records Act, including an amendment that addresses this issue. We urge its incorporation in any LEOBOR reform legislation or its separate passage by this committee.

We now wish to turn to H-7313. The amendments to LEOBOR contained in this bill, while not as ideal as repeal, would address several provisions that currently impede police accountability. We summarize a few of them below, along with a few additional suggestions:

- Entitlement to an appeal is a critical component of due process; however, where the current language in the statute allows for an appeal of any disciplinary action *prior* to the actual imposition of the discipline – which may mitigate the imposition of discipline in the first place – the amendments more appropriately change the hearing committee appeal process to occur following both the initial hearing and the taking of disciplinary action by the law enforcement agency (§42-28.6-4(a)).
- The proposed language makes important changes to the composition of the hearing committee by providing for the appointment of a majority of committee members from outside of the law enforcement agency. Where under the current statute the committee would be composed of three law enforcement officers – two of whom the law enforcement officer who is the subject of the hearing has the opportunity to directly choose – the proposed amendments would instead increase the committee size to five members and require that three of these members – none of whom can be either currently or previously affiliated with law enforcement – be independent groups and individuals.
- Although these amendments confront the bias inherent in the previous composition of these hearing committees, the law enforcement officer who is the subject of a hearing and the charging law enforcement agency may still select two of the hearing committee members – both of whom will be law enforcement officials – and there is no requirement that these selections be free of a conflict of interest. While the three new citizen selectees on the hearing committee are required to "immediately disclose to the presiding justice of the

superior court any circumstance likely to give rise to justifiable doubt as to said selectee's impartiality or independence, including any bias, prejudice, financial, or personal interest in the result or outcome of the hearing," (§42-28.6-1(3)(i)), there is no such requirement for the law enforcement officers who may sit on the committee. There should be.

- We urge tightening a provision in the statute that allows for the initial interrogation of an officer to be "suspended for a reasonable time until representation can be obtained" (§42-28.6-2(9)). For matters of police accountability, timing is a critical component. Absent a delineated restriction on the permissible length of time that an officer has to secure counsel, this provision could allow for an overly flexible and indeterminate amount of time to pass before an officer even has their initial interrogation. This provision should be amended.
- As noted earlier, we believe any LEOBOR reform should include a repeal of the current "gag rule" as well as revisions to the "law enforcement" exemption in the state's open records law so as to allow the public to have some oversight over disciplinary proceedings.

Again, the ACLU of RI is appreciative of the efforts being made to try to address the need for better accountability measures for law enforcement agencies and their personnel. If the committee is not inclined to repeal LEOBOR at this time, we believe the changes we have suggested to H-7313 will establish a better process that ensures due process for officers, but also provides for accountability, fairness and freedom from systemic bias.

Thank you for your consideration of our views.