AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

TESTIMONY ON 23-S 360, S-605, S-1059 and S-1060
RELATING TO THE LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS
May 23, 2023

The ACLU of Rhode Island firmly believes that it is long past time for significant revisions to – and consideration of 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 It is a statute that a majority of states do not have and that the state that first adopted one – Maryland – recently repealed in recognition of its adverse impact on police accountability.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 rights 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 decertification process for law enforcement officers, the need for major change is apparent.

Before offering a few comments on the legislation being considered today, we believe that an essential prerequisite to any LEOBOR reform – whether it is revised or repealed – is an increase

[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).

in transparency and accountability in the results of investigations of police misconduct. There can be no reform of police misconduct without police transparency.

In that specific regard, it is not necessarily LEOBOR that is the biggest obstacle. Rather, it is recent interpretations of the state's Access to Public Records Act (APRA) that stand in the way. 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.

Therefore, without clarification of APRA and more transparency about the results of investigations into misconduct, we believe that revisions to, or repeal of, LEOBOR will only be a half-victory. If the public is kept in the dark about police misconduct and the discipline applied to police who themselves violate the law, it is impossible to know whether the disciplinary system is in fact working properly.

While we will not use this testimony to go into depth about this open records issue, suffice it to say that obtaining information about police misconduct has been stifled by both recent Attorney General opinions and by a preliminary Superior Court ruling issued three years ago in a case handled by the ACLU on behalf of a government watchdog group. Under those opinions, the public is not entitled 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 the investigative and adjudicative procedures in LEOBOR, as S-1059 and S-

1060 propose, or repealing the law entirely as S-360 does, 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.[2]

Moving on to the bills themselves: In the event that the General Assembly decides to reform, rather than repeal, LEOBOR, we urge summary rejection of S-605. With all the legitimate criticism of LEOBOR, it would be inconceivable to instead expand the law's protections to include police chiefs who, by the very nature of their executive role, simply should not qualify for the swath of procedural protections that might or should otherwise be applicable to rank-and-file officers.

We therefore will focus our testimony on S-1059 and S-1060, which make a variety of substantive changes to the statute. Framed by a nationwide upswell of public support for significant reforms to be made to our policing systems, practices, and laws, some of the amendments contained within this bill, while not as ideal as repeal, would address several provisions which currently impede police accountability. At the same time, in some respects we believe these bills fall short of what should be accomplished by LEOBOR reform. Without going into a line-by-line review of these complex bills, we offer a few general comments about them:

- 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 to both bills more appropriately change the hearing committee

[2] We note that a pending bill in this committee, S-420, 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.

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 in both bills 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.

- The legislation should more forcefully address the current "gag rule" in LEOBOR which severely limits the comments that can be made by police chiefs about disciplinary actions. While S-1059 repeals that provision, the replacement language it proposes still significantly curtails the ability of the public to be apprised of incidents of misconduct in a meaningful way. A revised LEOBOR statute should allow a chief of police to exercise discretion in making public statements during the LEOBOR process
- In at least one key respect, we believe both bills go too far in authorizing discipline against officers. Specifically, the legislation would mandate the termination of any officer found to have willfully engaged in various forms of misconduct. §42-28.6-11(a). While all of the misconduct listed certainly warrants disciplinary action, mandatory termination undermines the legitimate due process interests of police officers.
- As noted earlier, we believe any LEOBOR reform should include revisions to the "law enforcement" exemption in the state's open records law so as to allow the public to have some oversight over the results of disciplinary proceedings.

The ACLU of RI is appreciative of the work that has been done to try to address the need for better accountability of law enforcement agencies and their personnel. If the committee is not inclined to repeal LEOBOR at this time, we urge it to consider the comments we have made about the related legislation and the concurrent need to amend APRA. Thank you for your consideration of our views.