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MEMORANDUM

To: Lane Community College Education Association (LCCEA)
From: Luke Kuzava, Tedesco Law Group
Date: April 1, 2025
RE: Legal Analysis of Proposed "Public Comment Procedure"

The Association asked our office to look into whether the Lane Community College Board of Education's new proposed "Public Comment Procedure" (attached to this memorandum for reference) poses legal issues, with regard to the Constitutional "free speech" doctrines under the Oregon and United States Constitutions as well as with regard to the Oregon Public Employees Collective Bargaining Act (PECBA).

For purposes of this memorandum and the analysis below, the critical provisions within the new proposed public comment procedure are the following provisions, which purport to restrict public comment based on its content:

- Comments should be relevant to agenda items or general college matters;
- Personal attacks, defamatory remarks, or discussion of confidential matters (e.g. personnel issues, student records) are not permitted.
- A single document may not be read aloud by multiple individuals.

As explained below, these proposed rules are problematic from both a constitutional standpoint and under the PECBA.

This memorandum is organized as follows. First, I will discuss the constitutional concerns. My primary focus in that section is the Oregon Constitution. While I believe the above rules likely violate *both* the Oregon and the Federal Constitutions, the Oregon Constitution's free speech protections are more robust than the Federal Constitutions, so the Oregon Constitutional issues would likely be dispositive in any court proceeding without the Court having to reach an analysis under the United States Constitution.

Next, I discuss how the above rules could constitute an unfair labor practice under the PECBA if applied in a way that chills or restricts union-related speech.

I. Constitutional Issues

Both Article I, section 8 of the Oregon Constitution and the First Amendment of the United

States Constitution provide protection for "private speech" occurring on government property**.** See e.g. *State v. Babson*, 355 Or 383, 326 P 3d 559 (applying constitutional analysis to regulations governing the steps outside the State capitol building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 US 37, 45-47, 103 S Ct 1951 (1983) (applying First Amendment analysis to rules restricting speech on government property). Under the Federal Constitution, rules restricting speech on governmental property are scrutinized more closely when the government property in question is designated as a "public forum." *Id.* For purposes of this analysis, there is no doubt that the College Board of Education meetings are a public forum, as ORS 192.630(1) requires that "all meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting."

Generally, both the Oregon and Federal "free speech" doctrines disfavor rules that prohibit speech based on its content or subject. However, the Oregon Constitutional doctrine is the more aggressively pro-free speech of the two, so that is my primary focus. For purposes of Article I, section 8, the Oregon courts apply a framework first established in *State v. Robertson*, 293 Or 402, 412, 649 P.2d 569 (1982). Under the *Robertson* framework, rules that prohibit speech fall into one of three categories:

1. The first category encompasses any law that is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Id*. at 412. Laws in this category are unconstitutional on their face, "unless the restriction is wholly confined within an historical exception that was well-established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id*. [1]

2. The second category encompasses laws that restrict speech, but in a way that is focused on the forbidden effects of the proscribed speech and not the content of the communication itself. *Id.* at 415. For example, think of a law that prohibits "yelling anything that would tend to cause unnecessary panic in a crowded theater," as opposed to a law that prohibits "false yelling 'fire!' in a crowded theater" – the former is focused on the *harmful effects* of the speech act, as opposed to the content of the speech. Laws that fall within this category are analyzed for overbreadth. *Id.* at 410.

3. The third category encompasses laws that do not expressly restrict speech but that may have the effect of prohibiting or limiting it. Laws in this category are not facially invalid but are subject to as-applied challenges. *State v. Babson*, 355 Or 383, 404, 326 P3d 559 (2014).

[1] Under the corresponding Federal Constitutional Doctrine, rules that prohibit speech based on the content of the speech are subject to Strict Constitutional Scrutiny, meaning the rule is presumptively unconstitutional unless the Government can rebut that presumption by establishing that the rule is narrowly tailored to a compelling governmental interest. See *Reed v. Town of Gilbert, Ariz.*, 576 US 155, 135 S Ct 2218 (2015). While this standard is quite difficult for the State to meet, the Oregon Constitutional Standard under *Robertson* for content-based restrictions is even more difficult to meet.

Additionally, and similarly to the corresponding Federal doctrine, the Oregon Constitution is tolerant of reasonable "time, manner, place" rules that are (1) content neutral, (2) are narrowly-tailored to advance a legitimate state interest without restricting substantially more speech than is necessary, and (3) leave open ample alternative avenues for individuals to communicate their messages despite the restriction. *Id.* at 407. *See also Ward v. Rock Against Racism*, 491 US 781, 790, 109 S Ct 2746 (1989) (setting forth a near-identical standard for constitutional review of "time, manner, place" rules under the Federal Constitution).

The critical constitutional flaw with the College's proposed public comment procedures is that it contains a number of *content-based restrictions* – for example, the prohibition on comments that make "personal attacks," "defamatory remarks," or that "discuss personnel issues." **Because these are content-based rules, they are presumptively unconstitutional under both the Oregon and Federal Constitutions**. To survive that presumptively unconstitutionality, the College would have to prove (under the Oregon Constitution) that these prohibitions are "wholly confined within some historical exception" to classic free speech doctrine that was well established by 1859. The College would almost certainly not be able to do this – I am aware of **no historical exception** that was well-established in 1859 relating to a prohibition on discussion of personnel matters in public meetings (and indeed, personnel matters are routinely discussed at certain public meetings to this day – for just one example, school district board meetings often discuss resignations, non-renewals, or terminations of school employees).

The Constitutional analysis could end there – **I have a high degree of confidence that the content-based aspects of the proposed regulations would be found to violate the Oregon Constitution, in which case a reviewing court would not need to even look at the Federal Constitution.** However, it bears mentioning that the content-based restrictions likely also violate the Federal Constitution. In particular, it would be very difficult for the College to demonstrate that the prohibitions on "personal attacks" (which, candidly, seems like it is intended to prohibit public criticism of management) and discussion of "personnel issues" are narrowly tailored to serve a compelling governmental interest.

It is also worth noting that *some* aspects of the proposed rules *do* seem somewhat more clearly connected to a legitimate governmental purpose, but are still overbroad vis-à-vis that purpose. For example, the prohibition on comments that relate to "student records" seems, at least to a degree, related to FERPA – which, as the Association knows, is a federal law that designates many student records as confidential. There are certainly conceivable situations where it would violate FERPA for certain people to disclose certain information student-record related information in a public forum such as a Board of Education meeting. However, even then, the **proposed rule is redundant** – FERPA already would prohibit such a disclosure, so there's not really a need for the Board "public comment rules" to *also* prohibit that disclosure – and perhaps more importantly, the proposed rule paints with too broad a brush: for example, the students themselves can voluntarily disclose information relating to their own student records without running afoul of FERPA, and as such, there could be situations where a student wishes to disclose information about their own academic status to the Board as part of the public comment process without creating any FERPA issues. The College's proposed rule, however, on its face would prevent a student from doing so if they wished to.

The only way to remedy these content-based restrictions is to rescind them. These restrictions are wholly unconstitutional. The Board cannot show that any of their proposed rules fall under a historical exception well established by 1859. To avoid a Constitutional challenge going forward, the Board must refrain from the establishment of any content-based restrictions.

Finally, I also see a Constitutional problem with even the more content-neutral restrictions that were likely intended as "time, manner, place" restrictions. The problem there is that to be a valid "time, manner, place" restriction, the rule in question must "leave open ample alternative avenues" by which someone may communicate their message despite the restriction. **The College's proposed rule does not leave open any such alternative avenue.**

For example, consider the portion of the proposed rule that provides that each speaker "will have a maximum of 2 minutes to present their comments." This rule, on its face, satisfies *two of the three* requirements for a valid "time, manner, place" restriction – it is content-neutral (i.e. all speakers are limited to two minutes regardless of what they are speaking about), and it generally appears to be narrowly related to the legitimate interest of allowing as many people that wish to speak to have the chance to do so. [2]

However, I do not see how the third requirement – that there be an ample alternative avenue of communication – is satisfied by the rule. The rule seems to read as though once the two minutes are up, there is no way to engage in additional communication with the Board about the issue at hand. I have encountered many other public meeting rules and procedures where there is a time limit on in-person speaking, but those rules are usually coupled with some sort of alternative option to submit *written* public comment, such that any member of the public that cannot speak their piece within the time limit can also submit a written comment. Here, however, the policy, on its face, allows written comments *only* when "a speaker is unable to attend in person."

The same issue is generally present with all of the other content-neutral aspects of the proposed rule: they limit speech but do not provide any alternative avenues of communication (let alone *ample* alternative avenues of communication, as both the State and Federal Constitution require). The obvious fix for that issue would be to allow for the submission of written comments to the Board, regardless of whether the commenter is able to attend in person and regardless of whether the commenter provides a verbal comment. That should also be coupled with some provisions and processes that ensure that the Board will also receive and review all written comments.

II. PECBA-Related Issues

The proposed procedure also appears extremely likely to limit the ability of LCCEA and its membership to address the Board at Board meetings about labor-related issues, in a way that likely violates the PECBA. If the College were to apply or enforce these rules in a way that has the effect of limiting the ability to engage in PECBA-protected activities, that would likely constitute an unfair labor practice, in violation of ORS 243.672, potentially in at least two different ways.

First, ORS 243.672(1)(a) prohibits employers from interfering with, restraining, or coercing public employees in or because of their exercise of rights guaranteed in ORS 243.662. That statute, in turn, gives public employees the right to "form, join, and participate in the activities of

[2] That said, I can see a reasonable argument that the rule is not sufficiently narrowly-tailored: the rule purports to limit all speakers to two minutes even when in situations where no one else is waiting their turn to speak (e.g. a Board meeting where only one member of the public attends). In that case, limiting the speaker to just two minutes would seem arbitrary and disconnected from any legitimate time-management purpose.

labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

Second, ORS 243.672(1)(b) prohibits employers from dominating or interfering with the administration of any employee organization.

For purposes of ORS 243.672(1)(a) and (1)(b) claims, when a union represents employees at a public agency that is overseen by a governing board, **the right of the Union and its members to communicate with that governing board is a matter of critical aspect of labor-relations and union business.** For example, the ERB recently held, in *Klamath Falls Association of Classified Employees v. Klamath Falls City Schools*, Case No. UP-039-21, that a union's use of an employer-provided email system to distribute communications about an upcoming school board election was an act of legally-protected "union business," reasoning that "District school-board members have the authority to ratify (or not) tentative agreements reached by [the union] and District's bargaining teams," and that accordingly, part of the Union's role as exclusive representative "is to work toward having a school board more willing to ratify" such agreements. The Board further reasoned that the school board "plays a meaningful (and often determinative) role in the collective bargaining relationship between [the union] and the district." Accordingly, the ERB concluded that a union officers' email regarding the union's perspective on the school board's candidates was "about a matter involving, containing, or including the administration, role, or function of the exclusive representative as it relations to a specific goal" and that as such, the email was legally-protected under the PECBA – such that the employer's interference with the ability to send such an email violated ORS 243.672(1)(b).

By the same token, a public employer's rule that restricts or interferes with a Union's ability to communicate with the employer's governing board also would likely be found to be a violation of ORS 243.672(1)(b). Such a rule would also likely violate ORS 243.672(1)(a) if it interferes with individual union member's ability to engage in union-related activity.

Here, it also bears emphasizing that **LCCEA, in particular, has a long history of using the public comment process at Board meetings to engage in union-related activism.** For example, in the Fall of 2023, LCCEA engaged in a significant organizing effort at a Board of Education meeting to contest the College's planned retrenchment of several faculty members – retrenchments that the College ultimately withdrew, based in large part on LCCEA's successful organizing around the issue. Given that history, LCCEA is in a strong position to show how the ability to raise such issues before the Board of Education is a cornerstone of its union operations. To the extent that this policy interferes with and impedes those important union activities, there is a strong case to be made that the policy violates ORS 243.672(1)(a) and (1)(b).

Conclusion

For the reasons explained above, the College's proposed public comment procedure is highly concerning and very likely unconstitutional in several ways. The content-based restrictions, such as the prohibition of "personal attacks," are presumptively unconstitutional. The content-neutral restriction of a two-minute limit is likely unconstitutional because it does not provide an alternative avenue by which a person can communicate their message. Finally, as the rules relate to union activity by restricting union-related activism at Board meetings, the rules likely violate provisions of the PECBA. If adopted and enacted, they may constitute an unfair labor practice. While it is beyond the scope of this memorandum to discuss litigation strategy, if this policy is implemented, a follow up discussion about potential litigation strategy would be warranted.