

**S M I T H
D I A M O N D
& O L N E Y**
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January 27, 2005

**VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL**

John Lindback
Director of Elections
Office of the Secretary of State
141 State Capitol
Salem, Oregon 97310-0722

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2005 JAN 27 PM 4:56
BILL BRADBURY
SECRETARY OF THE STATE

Re: Full Text Challenges for Initiative Petitions 16, 19, 21 (2006)
Our File No. 328

Dear Mr. Lindback:

This firm represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated January 13, 2005 which invites comments on whether the initiatives filed by Bill Sizemore on January 4, 2005 meet the procedural requirements contained in the Oregon Constitution.

As set forth in this letter, we do not believe that IP 16, 19 or 21 comply with the "full text" requirements contained in Article IV, section 1(2)(d). Accordingly, the proposed initiative cannot appear on the ballot and certified ballot titles should not be issued for them. Please note that we understand that others will be submitting comments on the procedural constitutionality of other initiatives, and that our lack of comments should in no way be interpreted as meaning that we believe those initiatives are constitutionally presented.

Because the legal arguments are similar about why each of the above initiatives fails to comply with the full text requirement, we are submitting comments on the



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initiatives jointly. To the extent necessary, please consider this letter as a separate comment on IP 16, 19 and 21 and place a separate copy in each file.

1. Full Text Requirement

Article IV, section 1(2)(d) of the Oregon constitution provides: "An initiative petition shall include the full text of the proposed law or amendment to the Constitution." In *Kerr v. Bradbury*, 193 Or App 304, 325, 89 P3d 1227 (2004), the Court of Appeals held that Article IV, section 1(2)(d) requires that, in any proposed initiative petition, the initiative include the "full text of the statute as it would appear if amended." In other words, the proposed amendment must set out not only its own text, but also the text of any statutory provision that it amends. 193 Or App at 325-26. The purpose for this requirement is to be sure that voters (and legislators, in the case of bills) are not being asked to vote on a proposal "in the dark," that is, without knowing the effect of the proposed enactment on existing statutes."

2. IP 16 Violates the Full Text Requirement

IP 16 (2006) is a statutory proposal concerning public employee representation. Commenters refer your office to our ballot title comments for a more complete description of what the proposal does. Suffice it to say that IP 16 would radically change existing law concerning public employee collective bargaining. It would prohibit public employers from negotiating or resolving grievances with an existing union, unless it can be certain that a majority of current employees has voted for the union. It gives the Bureau of Labor and Industry (BOLI) jurisdiction over certain types of union elections, and changes the elector process to make non-voters count as "no" votes.

While IP 16 does not expressly amend current law, it by necessity makes numerous changes to it. The Public Employee Collective Bargaining Act ("PECBA") is set forth in ORS 243.650 through ORS 243.782. The laws more specifically relating to representation elections are found in ORS 243.682 and ORS 243.686. IP 16 proposes to make numerous changes to these. For example, under the proposal, BOLI would conduct certain elections, not ERB, thus revising ORS 243.686. Similarly, IP 16 requires that a double-majority of the eligible voters (a majority of all voters, not just those who vote) vote in favor of union representation

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in order for the public employer to be authorized to bargain with the union. Section 1. This would amend ORS 243.686(4), which refers to “the majority of the votes cast in an election shall be certified.” ORS 243.682 requires a sufficient “showing of interest” before ERB holds a decertification election. IP 16 would delete this requirement. ORS 243.692 bans new elections for 12 months; IP 16 would do so for 24 months, where a union is rejected.

The list of changes could continue. The point is that the proposal necessarily amends existing law. Under *Kerr*, this means that the full texts of those laws and the changes must be presented to the voters. This is true, even when the initiative is presented as a “stand-alone” piece of legislation. Chief Petitioner cannot “end run” the full text requirements by simply enacting a stand-alone statute that makes those changes. The Attorney General should reject IP 21.

3. IP 19 Violates the Full Text Requirement

IP 19 (2006) seeks to change the laws on how signatures petition signatures are counted by the Secretary of State. Like IP 16 discussed above, this proposal purports to “stand-alone.” It does not expressly amend any existing statutes, but it necessarily does so. For example, ORS 250.095 authorizes the use of statistical samples for purposes of verifying initiative signatures. IP 19 bars that practice. ORS 247.013(6) defines when a voter’s registration is active, and therefore valid for purposes of petition signatures. IP 19 would amend those provisions. Because the full text of the statutes that are necessarily changed by IP 19 are not set forth in the initiative, it violates the full text requirement and must be rejected.

4. IP 21 Violates the Full Text Requirement

IP 21 (2006) is a statutory proposal that seeks to change current law set out in ORS 342.984 regarding teacher layoffs. It too is presented as a “stand-alone” initiative, with no specific references to current law. However, it plainly amends current law. Indeed, it is possible to see those changes by simply referring to IP 22. That initiative accomplishes the identical goal. However, IP 22 correctly makes the changes in the text of the teacher layoff statute, so that voters can know exactly what the changes are. The failure of IP 21 do so renders it constitutionally deficient and no certified ballot title should be issued.

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5. Conclusion

In *Kerr v. Bradbury, supra*, the Court of Appeals reaffirmed the importance of the full-text constitutional requirement set forth in Article IV, section 1(2)(d) of the Oregon Constitution. During a time when voters are increasingly being asked to pass legislation on complex matters, it is critically important that they have all of the information in front of them. They need to see how the proposed changes interact with existing law in order to cast an informed vote. Here, IP 16, 19 and 21 fail to pass the test and should be rejected. The fact that they are "stand-alone" pieces of legislation does not mean that voters should be left "in the dark" about how the legislation amends other directly relevant law. If that is the case, then chief petitioners could easily evade the full text requirement, and create even more confusion for voters and, subsequently, for the public in interpreting any law passed by initiative.

Thank you for your consideration of these comments.

Sincerely,

SMITH, DIAMOND & OLNEY

Margaret S. Olney

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cc: Chip Terhune
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John Lindback
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 141 State Capitol
 Salem, Oregon 97310-0722

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 2005 JAN 27 11:07
 DEPARTMENT OF
 SECRETARY OF THE STATE

Re: Initiative Petition 21 (2006) - Draft Ballot Title Comments
 Our File No. 328

Dear Mr. Lindback:

This firm represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated January 13, 2005 which invites comments to the draft ballot title for Initiative Petition 21 (2006).

1. INTRODUCTION

Initiative Petition 21 (2006) seeks to enact a statute that would supercede all existing law relating to teacher layoffs with which it is "inconsistent." Those laws are found in ORS 342.934. The effect is virtually identical to that of IP 22 (2006), a proposal that explicitly amends ORS 342.934. That is, under both, a school district is prohibited from giving any consideration whatsoever to teacher seniority - defined as years of teaching experience within the district - when making layoff and recall decisions. Rather, the district must retain the teacher who is "most qualified" to teach, a term that is not defined in the proposed initiative.

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The draft ballot title for IP 21 (2006) is properly patterned after that for IP 22 (2006). Therefore, commenters incorporate by reference the comments that they have submitted for IP 22 (2006). They will also be repeated below, with some minor modifications.

Under current law, layoff and recall within a particular school district is governed by both the statute and the applicable collective bargaining agreement. Under the statute, the district must first determine the licensure and seniority of potentially affected employees. Seniority refers to a teacher's length of service as a teacher within the district. The statute then gives the district discretion to lay off a more experienced teacher if it determines that a less experienced teacher has more "merit and competence." The statute further prohibits school districts from bargaining away the right to consider competence in making layoff and recall decisions. ORS 342.934(8).

Initiative Petition 22 (2006) would severely limit a school district's discretion. It would prohibit local school districts from giving *any* consideration to a teacher's length of service and experience within the district when making layoff decisions. Instead, it requires the district to retain the teachers who are "the most qualified to teacher the classes offered, without regard to employee seniority."

2. CAPTION

The draft caption fails to adequately identify the subject of the proposal. There are two primary problems. First, the draft uses the verb "eliminates" to describe the proposal's ban on any consideration of seniority when making layoff and recall decisions. This verb inadequately describes the affirmative nature of the proposal's prohibition and is therefore misleading. Under IP 22 (2006), school districts are directed to make layoff decisions "without regard to employee seniority."

IP 21 (2006) also prohibits any collective bargaining agreement that conflicts with this mandate. Thus, the proposal makes it illegal to consider seniority in making layoff and recall decisions. This is exactly what the verb "prohibits" means. See THE AMERICAN HERITAGE DICTIONARY, 4th Edition (defining prohibit as "to forbid by authority"). The caption must plainly state this fact.

In contrast, "eliminate" means to "leave out or omit from consideration." THE AMERICAN HERITAGE DICTIONARY, 4th Ed. Seniority could be *eliminated* from consideration in the statute, but not *prohibited*. An example illustrates the point.

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What if the initiative simply eliminated ORS 342.934(3)(b) and ORS 342.934(4), but was otherwise silent on whether seniority could be considered? Under that scenario, the statutory requirement that seniority be considered would be “eliminated” from the statute – the subject identified by this draft ballot title – although the parties would be free to include seniority in collective bargaining. *See, Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 751 P2d 770 (1988). It is impermissible to have the same caption for two initiatives that ultimately have a very different subject. The made-up initiative discussed above is about eliminating seniority from the statutorily required considerations. However, the initiative at issue here is about more than that: it is about *prohibiting any consideration of seniority*. The caption must capture this difference.¹

The second problem with the draft ballot title is that it obscures what decision is being made and who is making it. Seniority is a “factor” of what? Who makes the decision? On this point, it is critically important that voters understand that the proposal seeks to limit the choices available to local school districts when making the hard decisions of whom to lay off.

Finally, the draft caption does not define “seniority” even though it has a particular meaning under current law. Seniority is defined as a teacher’s years of experience within the district. *See* ORS 342.934(3)(b) (current statute); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, p. 2066 (unabridged ed. 1981) (a status attained by length of continuous service). This more complete description of what seniority means should be included in the Caption, if word space allows. The following alternatives do so:

PROHIBITS ANY CONSIDERATION OF SENIORITY (YEARS OF TEACHING EXPERIENCE IN DISTRICT) WHEN MAKING LAYOFF DECISIONS

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¹ This initiative is similar but not identical to IP 127 (2002). In that case, the Attorney General chose “eliminate” over “prohibit” because it communicated the fact that the proposal “removes seniority from an existing mechanism.” AG Letter dated November 7, 2001. This rationale should be rejected for the reasons discussed above. Also, many if not all of the initiatives that “prohibit” something change or eliminate existing law. Yet the captions for those initiatives properly identify the *prohibition* of certain conduct as the key subject of the proposal, and not the impact on existing law. That impact is best described and identified in the result statements and summary.

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3. “YES” VOTE RESULT STATEMENT

The draft “Yes” vote result statement fails to completely and accurately convey what happens as a result of a “yes” vote. As with the caption, the use of the verb “eliminate” is underinclusive. Voters must understand that the proposal ~~prohibits~~ any consideration of seniority. In addition, it is unnecessary to refer to the “existing system” for making layoff decisions. Those words can be better spent describing the initiative itself.

RESULT OF “YES” VOTE: “Yes” vote prohibits local school districts from considering a teacher’s seniority, defined as years of teaching experience in District, when making layoff decisions.

4. “NO” VOTE RESULT STATEMENT

The draft “No” vote result statement appropriately references current law. However, the formulation, which essentially repeats the “yes” vote result statement, provides the voters with little useful additional information. In order to substantially comply with the statutory mandate, it must do so. *Kain v. Myers*, 335 Or 228, 64 P3d 1129 (2003).

RESULT OF “NO” VOTE: “No” vote retains current law allowing local school districts to consider teacher seniority (years of experience in district), among other factors, when making layoff decisions.

5. SUMMARY

The draft summary must more plainly explain to voters what the initiative is about – barring local school districts from considering an employee’s teaching experience in the district when making layoff decisions. Thus, when the term “seniority” is first used it must be accompanied by a definition that clearly states what is meant by the term. We have used the phrase “years of teaching experience in district” as a shorthand for “years of service as a teacher with the district.” Both phrases are accurate and convey to voters what seniority means under current law. We have omitted the reference to leaves of absence because that is an unimportant detail in the context of this proposal.

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We have also added a sentence telling voters that under current law, a school district cannot waive the right to consider competence. Voters need this information in order to understand that current law guarantees that school districts have the ability to consider factors other than seniority when making decisions. Finally, we have clarified that this proposal (unlike earlier versions) requires the district to retain the teacher who is the “most qualified” to fill the position. We have placed the terms in quotations, however, because there is no mechanism spelled out in the proposal about how the district is supposed to determine who is “most qualified.” Note that unlike IP 22 (2006), this proposal only refers to “qualified.” It does not use the term merit or competence.

We propose the following alternative:

SUMMARY: Under current law, when a local school district reduces its teacher staff, seniority (defined as years of teaching experience in the district), is used as a factor in determining which teachers are to be retained. If a school district desires to retain a teacher who has less seniority than a teacher being released, the district must determine that the teacher to be retained has more competence and merit. School districts cannot waive the right to consider competence. This measure requires the district to retain the teacher that is “most qualified,” and prohibits any consideration of a teacher’s seniority – *i.e.*, years of service as a teacher within the district – when making that decision. Collective bargaining agreements must comply. Other provisions.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

SMITH, DIAMOND & OLNEY

Margaret S. Olney

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cc: Mark Toledo

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