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January 21, 2005

Secretary of State
Elections Division
Room 141 State Capitol
Salem, OR 97310

Dear Mr. Secretary:

As an Oregon elector, I am writing to offer my comments on the draft ballot title for Initiative #22, which requires school districts to retain the best teachers when lay-offs occur.

I believe the draft ballot title fails to comply with ORS 250.035.

Current law does not require school districts to keep the most qualified teachers when lay-offs occur. Districts routinely negotiate contracts, as allowed by current law, which require that seniority be the primary basis for determining retention.

Initiative #22 requires school districts to retain the most qualified teachers when lay-offs occur and prohibits retaining a less qualified teacher, because he or she has greater seniority.

Also, the change proposed by Initiative #22 cannot be described as "eliminating the existing system", when only a single component of that system would be changed.

Also, there is no mention in the draft summary that under the current system, districts can agree to contracts that make seniority the primary or only factor in determining retention.

There is a simple way to tell this story by including both aspects, the elimination of seniority as a factor and the requirement that districts keep the most qualified teachers, in one simple ballot title, as follows:

#22

REQUIRES SCHOOL DISTRICTS TO KEEP MOST QUALIFIED TEACHERS, REGARDLESS OF SENIORITY, WHEN STAFF REDUCTIONS OCCUR

Result of a "Yes" vote: Yes vote requires local school districts to retain their most qualified teachers when reducing teaching staff; prohibits using seniority as factor in lay-off decisions.

Result of a "No" vote: No vote rejects requiring school districts to keep their most qualified teachers when reducing teaching staff; retains law allowing using seniority as factor in decisions.

The draft summary spends too many words describing the current system in a way that misrepresents reality. Every school district in the state is party to a collective bargaining contract that makes seniority the foremost factor in determining retention. Every district.

This proposal forces every school district to keep their best teachers, something current law does not do. The summary should contain the following statement: Current law does not require school districts to keep their most qualified, effective teachers when lay-offs occur.

Thanks for considering my comments.

Bill Sizemore

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S M I T H
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January 27, 2005

VIA FACSIMILE (503) 373-7414
AND REGULAR MAIL

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JILL BRADBURY
SECRETARY OF THE STATE

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

Re: Initiative Petition 22 (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 22 (2006).

1. INTRODUCTION

Initiative Petition 22 (2006) proposes to amend ORS 342.934, the statute governing teacher layoffs. 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 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).

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Initiative Petition 22 (2006) would 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 and competent to fill the remaining positions." ORS 342.934(3)(b) (as amended by proposal). Similarly, the proposal bars any legal challenges to either layoff or recall decisions based on "seniority." OR 342.934(f) (as amended by proposal).

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In the realm of collective bargaining, the proposal prohibits school districts from agreeing to waive the right to consider competence and merit. ORS 342.934(8) (as amended by proposal). It also mandates that any bargained-for definition of "competence" ensure that retained teachers are "the most qualified and competent" for the position they fill. The proposal permits the District to consider a teacher's willingness to obtain additional training or education only when "two or more teachers are equally competent to fill the same position." ORS 342.934(9)(a) (as amended by proposal).

Finally, the proposal allows administrators to displace contract teachers, if the administrator is "more competent and qualified" to fill the position.

As discussed below, the draft ballot title fails to completely and accurately describe the initiative or its major effects.

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 "disregard seniority as a factor." In addition, it provides that "in no circumstance shall seniority be basis for challenging a school district's decision on reduction in staff or recall." Simply stated, 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.

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In contrast, “eliminate” means to “leave out or omit from consideration.” THE AMERICAN HERITAGE DICTIONARY, 4th Ed. Thus, seniority could be eliminated from consideration in the statute, but not prohibited. An example illustrates the point. 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 in the statute. 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 words allow. The following alternatives does so:

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

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). We propose the following alternative:

RESULT OF “NO” VOTE: “No” vote retains current law allowing local school districts to consider seniority (years of teaching 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 needs 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 school district to retain the teacher who is the "most qualified and competent" 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 and competent." 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 competent," 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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MSO/lck

cc: Mark Toledo

Chip Terhune

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