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Draft rules to govern police conduct

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Oregon Public Broadcasting

A proposed set of conduct and discipline standards applicable to all law enforcement agencies in Oregon were published Monday.

In several instances, the commission charged with establishing the new rules left room for officers found to have committed serious, often illegal offenses to keep their jobs. For example, officers who commit sexual assault or intentional physical assault may not be fired if there are mitigating factors.

“The butt is considered a sexual part of the body,” said Mark Makler, a former prosecutor who represents police unions and officers, at a meeting on June 30. “So grabbing somebody’s butt in gest or horseplay could be considered a sexual assault.”

Defense attorney Laura Fine, another member of the commission, retorted that that would be sexual harassment, not assault.

Makler and seven other commissioners who were present at that meeting voted against making sexual assault an automatically fireable offense.

“There are things like state of mind or absence of intent that could come into play. Or degree of harm,” Portland Police Association attorney Anil Karia said. “There are nuances in this.”

The commission was formed with the passage of HB 2930 in 2021, one of several pieces of legislation passed last year tackling police accountability and reform.

“The goal...was to have clarity,” bill sponsor Rep. Janelle Bynum, D-Clackamas said in an interview with OPB. “Officers like to have clarity, some level of certainty about what the standards are.”

By having one statewide set of guidelines, Bynum explained, officers who have discipline problems in one local department can’t transfer to a different agency that has lower standards. She said the kinds of people the community wants working in law enforcement, don’t want to work for agencies with low standards.

“The interesting thing about these commissions and how they have these conversations and come up with draft

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rules — you can tell where people’s values are,” Bynum said. “Why would you have rules that just say you could potentially just get a slap on the wrist for sexual assault. Who’s going to want to work there?”

The commission has 13 voting members and two non-voting members. Members include a representative from the Oregon Department of Justice, two police chiefs, a sheriff, two lawyers who represent police unions, a defense attorney who also represents police, the former president of the Salem-Keizer NAACP, the executive director of the Oregon District Attorneys Association, and a

civil rights investigator at Oregon State University.

Over the course of 13 meetings since early March, the group hammered out standards on a range of issues from unjustified use of force to assault to targeting someone based solely on their race, gender or other protected status.

Some of the most notable draft rules are:

h Sexual assault — Default penalty is termination; mitigated penalty is suspension without pay, salary reduction, demotion, or a written reprimand.

h Use of unjustified or excessive *deadly* force that results in serious injury or death — Penalty is termination.

h Use of unjustified or excessive *physical* force that results in serious injury or death — Default penalty is termination; mitigated penalty is suspension without pay, salary reduction, demotion, or a written reprimand.

h Intentionally targeting a protected class — Default penalty is termination; mitigated penalty is suspension without pay, salary reduction or demotion.

The full list of proposed rules, including “moral character” violations, is available online.

The commission based its approach to designing the new rules on the recently created New York Police Department discipline guidelines. The NYPD approach essentially listed the range of potential misconduct along with the default penalty, and more severe or less severe penalties that can be assigned depending on mitigating or aggravating factors.

That approach differs from the Portland Police Bureau’s recently adopted discipline guide which requires people in leadership positions to identify the infraction and then rank the severity from A to E, a subjective step critics say creates an opening for arbitrators to effectively overturn discipline decisions.

In the case of sexual assault, the commission ultimately decided that the default proposed penalty should be termination but that could be lessened to suspension without pay, salary reduction, demotion or a written reprimand if mitigating circumstances are identified by an officer’s chain of command. Potential factors that might lead to a less or more severe penalty include an officer’s conduct history, whether the conduct was intentional, if the officer is a supervisor and the potential for rehabilitation.

At some points in the six months and 26 hours of meetings, proposed rules were watered down after an initial poll suggested they wouldn’t garner the necessary support.

In a meeting on July 7, only five of the 12 present commissioners initially thought officers should be fired without any option for mitigating factors when they use excessive physical or deadly force seriously injuring or killing someone.

Michael Slauson, chief counsel of the Oregon Department of Justice’s Criminal Justice Division and commission co-chair, tinkered with the wording and removed “physical force.”

Ultimately, eight commissioners said an officer should be fired for using unjustified or excessive deadly force causing serious injury or death; the minimum number required to pass. Makler, Karia, Confederated Tribes of the Umatilla Indian Reservation Police Chief Timothy Addleman and Keizer Police Chief John Teague held out and voted against the rule.

If, however, an officer uses unjustified or excessive “physical force” — that is, anything other than deadly force — they can present mitigating factors and potentially keep their job.

“That’s one of the disappointments that I have with the way some members of this commission have looked at this,” Benny Williams, former president of the Keizer-Salem chapter of the NAACP, told OPB, explaining that he is disturbed by the notion that anything short of being killed by an officer is not considered severe enough to warrant termination.

“Sexual assault, deadly force — these are things that have been put in front of us specifically because these are issues that are pervasive across the country,” Williams said. “And Oregon is not in any way unique.”

If an officer intentionally targets someone based solely on a protected class such as their race, ethnicity, national origin, sex, gender identity, sexual orientation, religion, or housing status, the default discipline should be termination, the commission said. But, as with assault, the officer can present mitigating circumstances.

Targeting someone in that way is against state law and a Fourth Amendment violation. Only five commissioners thought the offense should be an automatic termination.

Steven Schuback, the lawyer who represented the city of Portland in police union contract negotiations, said the new protected class of homelessness is not well defined.

“We have to recognize that there are cases of implicit bias that are inherent just in our culture that we are dealing with on disciplinary levels,” Schuback argued. “Exclusive termination is just too tight. Whereas presumptive [termination] allows for some level of mitigation when it’s appropriate.”

Slauson, from the Oregon Department of Justice, pushed back.

“I see this as an extraordinarily high burden of proof if you’re saying that an officer targeted somebody...based solely on homelessness,” Slauson said. “Describe a scenario in which... termination would not be a fair sanction for that.”

Teague, the Keizer police chief, said what he saw as reasonable policing decisions could look like targeting.

“Targeting may connote some nefarious thought but it hardly demands nefarious thought,” Teague said.

He explained his officers would ignore teenagers running around near the river but would likely approach a “disheveled guy stumbling down there” who is “rather apparently a vagrant who’s established a camp.”

“Arguably, it is targeting,” Teague said, even if the officers don’t “take action.”

Oregon state law prohibits “targeting of an individual” by law enforcement officers “based solely on” certain personal attributes, including “homelessness.”

“But homelessness has been part of the profiling statute for at least four years,” Slauson said. He said he hoped officers were trained to identify and know that targeting someone based on their unhoused status is illegal.

Teague’s argument won out. The proposed rules now allow for less severe penalties in some cases where an officer is found to have intentionally targeted someone based solely on a protected class. Even Williams, the former NAACP regional president, supported the slightly less severe penalty. He told OPB he’s a pragmatist and that if these changes are going to be impactful it is important that there be consensus.

“If anybody thought that we were going to have unanimous consent on any and all of these things, they were fooling themselves,” Williams said. “Sometimes it had to be brought back to ‘Wait a minute, here’s why we’re here.’ And so we don’t have to all agree, but we have to have a real consensus of understanding how important this particular issue is.”

The commission opted not to consider what penalties, if any, an officer should face if they join a hate group, prompting pushback from the only two Black members.

“It’s really disappointing to see all the law enforcement and how this doesn’t seem to be an important issue to you,” said Tarron Anderson, a civil rights investigator at Oregon State University who said he felt compelled to speak up over this issue. “I try to be objective and understand from

both sides of the aisle but some of these things are really troubling.”

Williams said it is known that there are officers in the state involved with or sympathetic to white supremacist and extremist groups.

OPB previously reported that more than two dozen current and former members of Oregon law enforcement had joined the Oath Keepers militia, a group that recruits people with experience in law enforcement and the military and which played a central role in the Jan. 6 attack on the U.S. Capitol.

If nothing is done to address the close relationship between extremist groups and some law enforcement, trust between the community and the police will never be restored, Williams said.

After only five members voted in favor of taking up the issue, several commissioners expressed the hope they would return to the topic at a later date.

“The politics of our nation have trained us to take sides: the police or the criminal,” Bynum said. “Taking sides — I don’t think it’s helpful. And that’s why I think the conversations of the commission are very important and, again, it will reveal what the dominant thought is around who gets to be safe in our communities and at work.” The commission will hold a series of public hearings throughout August and ending Sept. 16. They will then consider the public’s comment and make any changes before the rules take effect on Oct. 1.

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