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CONFIDENTIAL SETTLEMENT COMMUNICATION UNDER FRE 408

VIA USPS MAIL

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Re: *United States v. City of Portland*, 3:12-cv-02265-SI
Risk Mgmt. No. G2012-0493-01 BC

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INTRODUCTION

The City of Portland is committed to public safety reform and the goal of changing its systems and institutions to better serve all members of our community. The settlement agreement between the City and the United States is part of this commitment to change and the City's goal of public safety reform. The City appreciates the Department of Justice's (DOJ) feedback and constructive criticism of the City's performance under the settlement in 2020, as reflected in the DOJ's Annual Compliance Report and the DOJ's letter dated March 23, 2021.

As part of the public safety reform efforts, the City Council has taken many steps to transform its systems and programs. For example, the City started the Portland Street Response. This program provides an appropriate response by sending a qualified mental health professional and a person with, at minimum, emergency medical technician training to low acuity calls. The Portland Street Response will decrease police interactions with community members in situations where a police response is not necessary.

The City Council also referred a charter amendment to the voters to create a new oversight board empowered to investigate all deaths in custody, uses of deadly force, complaints of force causing injury, and alleged discrimination and constitutional rights violations. In November 2020, Portland voters adopted the new police oversight measure with over 80% support. The City is also advancing Senate Bill 621 in the Oregon Legislature to further support the new police oversight board approved by voters.

In addition to these reforms to the City's public safety system, the City also worked diligently to meet its obligations under the settlement agreement with the DOJ. Indeed, in

January 2020, the DOJ found the City in substantial compliance with the agreement, and the City entered the one-year monitoring period. The City's achievement of substantial compliance in January 2020 demonstrates the City's commitment to its obligations under the agreement.

IMPACTS OF EVENTS OF 2020

As we all know, however, 2020 was a difficult year for the entire world, and certainly for Portland. While the City began the year in substantial compliance, the pandemic struck in March and caused significant changes to how people in the City lived and worked. The Governor of Oregon declared an emergency and ordered public health restrictions to help limit the spread of the coronavirus. The City of Portland issued its own emergency declaration and directed all staff to telework, if possible. The City issued mask requirements, as well as social distancing and disinfecting protocols to its employees.

In May 2020, George Floyd was murdered by police in Minnesota, and people across the nation – and the world – began demonstrating to advance the racial justice movement. Portland saw many demonstrations throughout the summer of 2020, and the DOJ's most recent criticisms of the City focus almost exclusively on the City's response to the demonstrations, including uses of force, reporting requirements, and disciplinary review processes. The City welcomes the DOJ's constructive criticism and is committed to addressing the DOJ's concerns to achieve substantial compliance once again.

It is important to note, however, that the conduct of the federal government on the streets of Portland in the summer of 2020 made a difficult situation much worse. The first few days of June 2020 had the largest crowds of demonstrators, with numbers exceeding 10,000 people each

day. During this time, a much smaller group of people engaged in significant property damage and violence. However, by the end of June, the scale of demonstrations began to decrease, and by early July only about 150 people could be seen gathering in downtown Portland on any given night.

All of that changed when federal agents were deployed to Portland by the Trump administration. The federal forces deployed to Portland included members of BORTAC, a paramilitary unit of the United States Border Patrol. BORTAC troops wear military-type uniforms and armament, are trained for tactical raids on organized gangs smuggling persons or drugs into the United States, and have in the past been deployed to such places as Afghanistan and Iraq.

In particular, the federal government engaged in two specific catalyzing events that inflamed the situation in Portland. First, on July 11, 2020, a federal agent shot Mr. Donovan La Bella in the head with an impact munition, causing serious injury and drawing widespread condemnation and outrage. Second, on or about July 14, 2020, federal agents in unmarked vans began detaining people associated with the demonstrations. This further inflamed the situation. Indeed, after these events, the City saw a new influx of heated demonstrations, including the Wall of Moms and the Wall of Vets.

The Mayor of Portland spoke out about the federal government's escalation of tensions in the City on July 19, 2020, when he explained:

What's happening here is, we have dozens, if not hundreds of federal troops descending upon our city. And what they're doing is, they are sharply escalating the situation . . . our local and state

law enforcement officials had contained the situation . . . The tactics that the Trump administration are using on the streets of Portland are abhorrent . . . this is completely unconstitutional.

Ignoring these concerns, just three days later, the federal government tear gassed Mayor Wheeler and others outside the federal courthouse on July 22, 2020.

Statistical evidence further demonstrates the significant adverse impact from the deployment of federal agents in Portland. In an analysis done of demonstrations in Portland from May 24 to August 22, 2020, only 24% of demonstrations in Portland before July were met with use of force.¹ After the federal deployment, however, 40% of demonstrations were met with use of force. The same study showed that the number of demonstrations marked by violence increased almost 10% after the federal deployment.

Even worse, the federal agents deployed to Portland did not all receive the necessary training, and also neglected to timely complete the required after-action report. In a recent report, the United States Inspector General analyzed the use of federal officers in Portland. The Inspector General's report noted in a review of 222 of the 755 federal officers² sent to Portland that 36 did not receive the required training prior to arrival. The report notes further that, "14 of the 36 officers for whom we found no evidence of cross-designation training used less-lethal devices or munitions against a person while deployed in Portland." Inspector General Report, OIG-21-31, page 13. Of greater concern is that only seven of 63 officers reviewed received riot

¹ <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>

² The term "federal officer" is used generally and refers to personnel sent to Portland by the federal government from the Federal Protective Service, U.S. Customs and Border Patrol, U.S. Immigration and Customs Enforcement, and Secret Service.

and crowd control training. *Id.* Additionally, the Inspector General raised a concern about training inconsistencies for less-lethal devices in an earlier report (OIG-17-22) and as of January 2021, Department of Homeland Security (DHS) had still not addressed the recommendation from the Inspector General to establish a formal entity to oversee use of force activities and establish consistent training requirements. Finally, the report notes that “as of November 25, 2020, 152 days after the operation began, FPS [Federal Protective Services] had not completed an after-action report for [the operation] to identify and address ongoing issues in Portland.” *Id.* at page 16.

Accordingly, the City hopes the DOJ understands that the conduct of the United States in Portland in 2020 made a difficult situation worse, inflamed the demonstrations, and contributed to the protracted and more intense protests in the City. As a result of the federal government’s conduct, the City was placed in a much more difficult position to meet its obligations under the settlement agreement, particularly the reporting deadlines and timelines for investigations, given the increased level of intensified demonstrations caused by the federal government in Portland. While the City is committed to achieving substantial compliance in cooperation with the DOJ, the City is prepared to explain to the Court, if necessary, how the federal government’s conduct contributed to the City’s difficulty in satisfying all the requirements of the settlement agreement over the summer of 2020.

SETTLEMENT AGREEMENT PROCESS FOR DISPUTE RESOLUTION

This letter is submitted to the Department of Justice pursuant to the dispute resolution terms in paragraphs 178 *et seq.* Either party may use this provision as notification of compliance

concerns. The notice must identify the portions of the agreement about which there are concerns. The DOJ sent notice to the City under paragraph 178 of the settlement agreement. Pursuant to paragraph 180, the City had at least 30 days to respond to the DOJ's concerns. The notice and response are "considered to be in the nature of settlement discussions between the Parties and subject to Federal Rule of Procedure 408."

If the City's response fails to resolve the DOJ's concerns, then pursuant to paragraph 181, the Parties are required to meet as soon thereafter as is mutually convenient and discuss the concerns. Those in attendance must have authority to resolve the concerns unless the resolution requires Council adoption of a Resolution or Ordinance. If the meeting between the Parties does not resolve the issues, then the matter moves to mediation under paragraph 182 of the agreement. If mediation fails, then either Party may file a motion for court review of the issue.

CORRECTIONS TO DOJ'S ANNUAL REPORT

There are three items in the DOJ's Annual Report that should be corrected. They are: (1) DOJ's allegation that the Chief's office approved the use of force at issue in a lawsuit between Don't Shoot Portland and the City of Portland; (2) DOJ's application of a later version of a Portland Police Bureau (PPB) Directive to a matter where the earlier version did not include the prohibition; and (3) DOJ's assertion that PPB changed how the use of a two-handed grip baton is classified when used for control against resistance.

Chief's Office Approval of Use of Force.

On page 7 of the Annual Report, DOJ alleged that on December 3, 2020, the Chief's office approved a use of force as in-policy via the after-action process after a ruling by Judge

Hernandez that such use of force was out of policy. This is inaccurate. The DOJ alleged that the finding of contempt related to a use of less lethal force by a person that the PPB chain of command found within policy. DOJ further stated the in-policy finding was made by the PPB's Chief's office even after the contempt finding. PPB records demonstrate that the DOJ's assertion is incorrect. The after-action review (AAR) at issue was approved **prior** to the finding of contempt. There were two AARs at issue in the case before Judge Hernandez. In one, the Chief's office approved the use of force as in-policy on October 1, 2020. This is the AAR that reviewed the use of force for which Judge Hernandez found the City in contempt on November 27, 2020. The AAR approved as in-policy by the Chief's office on December 3, 2020 did not include the officer's use of force that formed the basis of Judge Hernandez's contempt ruling. Given this error, the DOJ's Annual Report should be amended, and the inaccuracy should be corrected.

Application of Current Policy Version to PPB Directive 315.30 – Satisfactory Performance

On page 51 of its Annual Report, the DOJ alleged that the City did not assess whether a supervisor in a critical use of force event appropriately performed the supervisory role as referenced in Directive 315.30 Satisfactory Performance, Section 3 (Supervisor Performance During Critical Incidents). The incident under review occurred on July 30, 2019, and the Directive language cited was not enacted until May 15, 2020. The direction given in Section 3 is specific to supervisors' performance during critical incidents of PPB's current policy and is not contained in another section of the previous policy. While there was a section in the prior version of this rule that was similar, the two versions of the rule are distinct, offering direction that is not interchangeable.

Classification of Use of Baton as Control Against Resistance

On page 12 of its Annual Report, the DOJ alleged that the City changed its force reporting requirements pertaining to the use of the baton without informing or seeking approval from DOJ or the Compliance Officer (COCL). Specifically, DOJ asserts the City changed how PPB's Rapid Response Team (RRT) captures the use of the baton by recategorizing the two-handed use of the baton from a strike to control against resistance. This change was reflected in a document provided in 2018 to the DOJ and is not a change in policy.

The City requests that the DOJ file a corrected Annual Report with the Court to remedy these inaccuracies.

RESPONSE TO DOJ'S ANNUAL REPORT AND MARCH 23RD LETTER

The DOJ's FRE 408 Notice states that the City failed to implement the terms of the settlement agreement. The Notice refers the reader to the concerns raised in DOJ's Annual Report and in its March 23, 2021 letter to the City regarding concerns with certain Police Review Board (PRB) meetings. By this letter, the City responds to the concerns raised by the DOJ. Specifically, although the letter fails to state with specificity the concerns, the City understands the issues to be as addressed in this response. While it is the intent to respond to all concerns, if the City fails to address any specific areas of concern in the Annual Report or the March 23rd letter, then the City requests the DOJ advise the City so that the issue can be appropriately addressed. This response addresses the DOJ's concerns with the following sections in the settlement agreement: Section III – Use of Force, Section IV – Training, Section VIII – Officer Accountability, and Section IX – Community Engagement and Creation of Portland Committee

on Community Engaged Policing. The end of this letter responds to the areas of concern raised in DOJ's letter dated March 23, 2021 and are analyzed under Section VIII – Officer Accountability.

USE OF FORCE

The DOJ's Annual Report finds the City out of substantial compliance with paragraphs 66, 67, 69, 70, and 73 of the settlement agreement. The report cites to instances of uses of force that must be investigated, and where accountability must occur if such instances are substantiated violations of Directive 1010 – Use of Force. However, much of the DOJ's critique of the City regarding Section III (Use of Force) relates to the after-action process. The City agrees that the after-action process for the demonstrations in 2020 often failed to meet the necessary requirements as outlined in paragraph 70 of the settlement agreement.³

Use of Force Supervisory Investigation and Analysis

On page six of its Annual Report, the DOJ notes that AARs often lacked investigation and analysis by supervisors. The DOJ points out, and the City agrees, that although supervisors could not always respond to the scene of the force events because of the ongoing crowd control situations, the failure in some circumstances to have sergeants who were on scene assessing force events created unresolvable challenges with complying with the requirements of paragraph 70. This paragraph of the settlement agreement requires supervisors to respond to the scene of a use of force, conduct an administrative review and investigation of the force, document their

³ In fact, the City contacted the DOJ in June 2020 to advise them that the timelines for After Action Reports would not be met due to the staffing demands from protests and the number of force events that, in one month, far exceeded the average number of force events in a typical period of a few years. The City attempted to find a workable solution with the DOJ, but the parties were unable to come to agreement as to how to address the issue.

findings in an AAR, and forward their report through the chain of command. The City agrees with this critique.

Often, supervisors writing the AAR did not respond to the scene of the use of force or a proximate location; however, this is authorized by policy and is appropriate in a crowd control event. However, some sergeants were tasked with writing the AAR when they were not on duty during the use of force event and therefore were unable to perform the investigation as dictated in paragraph 12 of Directive 1010 – Use of Force. At other times, sergeants reviewed Force Data Collection Forms (FDCRs) and did not interview the involved officer or any possible witness officers.

It is noteworthy the DOJ found substantial compliance for all uses of force during 2020 that were not associated with the crowd control events. The after-action procedures were followed correctly in those instances. This demonstrates that outside of the crowd control events, the structure in place pursuant to PPB directives on uses of force worked as intended. The failure occurred in the midst of the unprecedented ongoing crowd control situations, which were exacerbated and inflamed by the federal government's actions on the streets of Portland in 2020. Nevertheless, the City acknowledges that this system failure during the crowd control events of 2020 meant that there was not the required review of uses of force necessary to address potentially problematic instances of such force.

Remediation:

To address this concern, PPB has assigned AAR sergeants to be at crowd control events. These sergeants are required to interview involved officers and witness officers before those

officers leave for the night. The AAR sergeant also reviews the FDCR to ensure that any known medical issues were addressed. The City agrees with the DOJ that ensuring adequate investigations during the after-action process results in a greater likelihood of detecting issues and providing quicker feedback to officers, as well as making referrals for administrative review where appropriate.

In addition to these operational remedies, City Council may consider possible financial investments to further ensure remediation as part of the City's ongoing budget development process. Of course, it is important to note that budget decisions are not final until the budget is approved by the City Council, which should happen in June 2021 for the following fiscal year. One possible investment is to purchase and install Office 365 for PPB. This will allow officers to upload the Force Data Collection Report (FDCR) into the system, which will then alert the AAR sergeant with a time-stamped notice. The SharePoint portion of Office 365 allows numerous people to access a document, provides ease of tracking for timeliness and thoroughness, ensures documents are not misplaced during chaotic crowd control events that go on for long periods of time, and is a readily available option for storage of FDCRs and AARs. It also allows the addition of video or image files to the FDCR. Currently, when video or images are added later, they end up in the Digital Image Management System (DIMS) without an easy way for reviewers to know images were uploaded later. Office 365 also provides for better oversight of the process by Command staff. As the DOJ pointed out on page eight of its Annual Report, inadequate review by frontline supervisors interfered with PPB's ability to identify and address potentially problematic uses of force or to seek alternatives.

The DOJ also raised a concern with the AAR review through the chain of command. The City acknowledges and agrees with the concern that the review through the chain of command should be more critical.⁴ Again, the sheer volume of AARs made it challenging to more critically review the AARs through the chain of command and oftentimes the demands on those in the chain of command review process faced time constraints as a result of the nightly protests, impacts of the coronavirus, and an increase in violent crimes starting early on in the pandemic. Like the after-action sergeants, the number of people in the chain of command to deal with an increase in uses of force to this degree was not based on the numbers faced during the 2020 protests, resulting in insufficient people to timely and adequately review all the AARs. A more robust preparation in the forefront of any further events of this nature and duration will provide for a greater ability by Command staff to have time to more critically analyze a large volume of uses of force.

Active Aggression Requirement in Use of Force Events

On page eight and nine of the report, the DOJ raises concerns with the analysis of “active aggression” in the crowd context, as well as conflation of active and passive resistance. The City agrees with this criticism.

Remediation

The City Attorney’s Office trained Rapid Response Team and Mobile Field Force team members that carry impact munitions on these issues in trainings that occurred in March and

⁴ As noted previously, the DOJ’s specific criticism was incorrect by stating that the Chief’s review found a use of force in policy that was previously determined out of policy by Judge Hernandez.

April. Additionally, starting in June, PPB will, among other things, provide training from the City Attorney's Office on these issues bureau-wide.

Disagreement on Use of Force Critiques

While the City agrees with many of the criticisms of the use of force during the protests of 2020, there are some with which the City disagrees. On page eleven, the DOJ contends that PPB altered its force policy when the Mayor ended the use of CS gas for crowd control. The Mayor noted that if there was a threat to life-safety, and if no other less forceful way resolved the threat, then the Mayor or designee could be contacted to request authorization for the use of CS gas. The City informed DOJ at the time, and contends today, that the Mayor's order is not a change to the force policy, as it simply clarifies situations where one force tool may not be used except in extreme circumstances. However, to resolve this issue the City agreed with the DOJ to remediate this concern by issuance of a standard operating procedure (SOP) to explain the process and circumstances referenced by the Mayor for CS gas use in crowd control situations. PPB will then train to the SOP during its bureau-wide crowd control training that begins in June.

Page eight of the Annual Report notes DOJ's expectation of uniformity within a squad for uses of force but fails to acknowledge that individual officers must make an assessment on a case-by-case basis. Because individual officers may face different circumstances and make different assessments, there will likely be disparities between uses of force, even on the same squad. One officer may face a potential threat that another officer does not face or may have a different vantage point. Unless officers use force against the same person, and even sometimes in that situation, comparing the rationale for uses of force by different officers in different

situations may not lead to valid comparisons. The DOJ also asserts that Directive 1010 – Use of Force, paragraph 13.4.10.2.4 requires this comparison between different force events as an assessment of the incident for tactical and training implications. However, paragraph 13.4.10.2.4 refers to the after-action process in analyzing a single force event. Directive 1010 does not require a comparison between uses of force against different people in a crowd control event where each officer must analyze whether force is authorized and appropriate. This type of comparison is for the Force Inspector, not the after-action supervisory process.

Another disagreement between the DOJ and the City is the critique of reliance on the sound truck (Long Range Acoustical Device – LRAD) as a warning system before force is used. The DOJ contends that officers should not assume that crowd members heard the LRAD before using force. The sound truck is often used in neighborhoods to warn people of a significant hazard and is meant to cover a large area and distance; it can be heard up to a half mile away. If a crowd member does not hear the sound truck, which is meant to carry a message over a large distance, then it is unclear how the DOJ expects a crowd member to hear the voice of a single officer wearing a face covering and in a loud protest event.

The City also disagrees with the DOJ's assertion on page twelve that there was a change in force reporting regarding the use of batons. On March 8, 2021, PPB provided the DOJ with a use of force chart approved by DOJ in 2018, as discussed earlier, that shows the distinction between a baton push and strike.

The City reiterates its agreement with the DOJ's concerns and its commitment to remedying the issues and concerns raised by the DOJ. Without lessening this acknowledgement

and commitment, the City must point out that from a legal perspective, it has remained in substantial compliance with most of the paragraphs cited by the DOJ. This is because all but one of the Use of Force paragraphs cited by the DOJ require that PPB include principles and make revisions in the use of force policy to require adherence to limiting the use of force and ensuring that uses of force are reasonably necessary. PPB's use of force policy includes the principles, revisions, and requirements as specified in paragraphs 66, 67, 69, and 73. Therefore, the City is in substantial compliance with these paragraphs.

The only paragraph cited in the Annual Report that is legally applicable is paragraph 70. This paragraph requires PPB to continue enforcement of PPB directives that require "supervisors who receive notification of a force event to respond to the scene, conduct an administrative review and investigation of the use of force, document their findings in an After Action Report and forward their report through the chain of command." This paragraph further requires the completion of AARs within 72 hours of the force event, certain notifications, ensuring the subject receives medical attention where necessary, and interviewing officers individually and not in groups. AARs were often not completed within 72 hours, particularly in the earlier parts of the protest events of 2020.

DOJ Suggested Remediation for Use of Force:

On page four of its report, the DOJ lists recommended actions to PPB to remediate the situation. The DOJ's recommendations are listed in paragraph form below, followed by the City's response.

DOJ's Recommended Action:

- (a) Complete the City's planned comprehensive master after action review of crowd-control events from May 29 to November 15, including a critical assessment of supervisory force investigations and command reviews of FDCRs and AARs

City Response:

The comprehensive master after action review of the ongoing crowd control event was completed and provided to DOJ in March 2021. Additionally, Assistant Chief Resch (AC Resch) reviewed aspects of the protest events and identified challenges and proposed remedial actions so the bureau is better prepared if another large-scale event should occur. The City received constructive feedback from the DOJ and COCL, and the City and PPB are actively considering options and next steps related to this.

DOJ's Recommended Action:

- (b) Identify force events that require administrative investigation, but have not yet had investigations opened, including, where appropriate, referral for investigation consistent with Section VIII-Accountability

City Response:

All force events resulting in complaints, either by community members or PPB members, were referred to either Internal Affairs (IA) or Independent Police Review (IPR). In addition, the Force Inspector is auditing a percentage of the entire uses of force from the 2020 protest event.

DOJ's Recommended Action:

- (c) Develop and implement a method to investigate uses of force in chaotic crowd-control events

City Response:

As stated previously, PPB has implemented a system where one or more sergeants are assigned to an event to analyze and investigate uses of force that occur during a protest event. The sergeant interviews the involved officer and any witness officers before they leave their shift. During the after-action process, the sergeant confirms that the officer addressed any need for medical attention.

Also mentioned before is that the City Council may consider a budget item that would update PPB to Office 365. Office 365 allows numerous people to access a document, provides ease of tracking for timeliness and thoroughness, ensures documents are not misplaced during chaotic crowd control events that go on for long periods of time, and is a readily available option for storage of FDCRs and AARs. It also allows the addition of video or image files to the FDCR. Currently, when video or images are added later, they end up in the Digital Image Management System (DIMS) without an easy way for reviewers to know images were uploaded later.

DOJ's Recommended Action:

(d) Implement additional crowd-control training for both Rapid Response Team (RRT) and Mobile Field Force, including analysis of need for additional members of these and supporting groups in order to handle crowd control without overreliance on a small group of individuals

City Response:

PPB is finalizing the development of a bureau-wide crowd control training that will start in June 2021. This training will ensure that all members are trained on areas of concern with uses of force during crowd control events. The training will address concerns raised by DOJ, as well

as those that arose in the contempt case with Judge Hernandez in the matter of *Don't Shoot Portland v. City of Portland*, Case No. 3:20-cv-00917-HZ (March 16, 2021). The training required by Judge Hernandez requires the inclusion of video, examples, and scenarios from protests this summer in Portland and around the country to assist officers in understanding how to apply Directive 1010 – Use of Force, including discussion of three types of actions that can occur during crowd control events: passive resistance, physical resistance, and active aggression. *Id.* at p. 5-6. The DOJ has indicated concern with proceeding with the training prior to the Needs Assessment of paragraph 79⁵; however, the training is required for compliance with Judge Hernandez' order. Most importantly, this training is critical to ensure that officers understand the legal and policy requirements for uses of force when faced with various situations, especially in crowd control events.

Another area of concern raised by both the DOJ and Judge Hernandez is reliance on a relatively small number of officers to respond to crowd control events when such events span a long time period. City Council and PPB are considering options for ensuring this does not occur in the future, and part of Judge Hernandez' ruling requires PPB members to understand best practices regarding consecutive nights working crowd control events.

⁵ Paragraph 79 requires the Training Division complete an annual Needs Assessment that considers trends, safety issues, misconduct, problematic uses of force, best practices, and gathers input from community members, PPB members, and changes in law. PPB historically has performed the Needs Assessment in the fall. Due to the extensive and thorough nature of the assessment, there is insufficient time to perform the assessment earlier than usual while still doing a timely training for PPB members on the critical issues raised in the case with Judge Hernandez and by the DOJ.

DOJ's Recommended Action:

- (e) Fully implement approved force use and reporting policies going forward.

City Response:

The City agrees that the DOJ-approved force use policies should be fully implemented. The City also agrees that approved reporting policies should be fully implemented. The reporting policies were implemented, but the system was overloaded during the 2020 protests creating a situation where the implemented policies, and particularly the timelines and thoroughness of the investigations, were not met. As previously noted, this failure was solely related to the crowd control events. The situation was analogous to the overload that hospitals faced during the global pandemic. Hospitals and doctors were unable to meet the demands placed on them when coronavirus impacts surged. Hospitals ran out of ventilators. There are likely hospital policies and procedures related to equipment, such as ventilators, that does not account for the situations that have arisen during the pandemic. Similarly, PPB's force use and reporting policies were not developed for a protest event lasting approximately 170 days – something unprecedented and unanticipated, and which was exacerbated by the federal government's actions in Portland. For this reason, the City does not agree with the assertion that it failed to implement its force and reporting policies. The City does, however, agree that there is a need for change, for accountability, and for reform. The City is committed to each of these.

TRAINING

Training Delays

In 2020, many officers did not receive required skills-based (hands-on) training. In its report, the DOJ acknowledges that the approved training did not occur due to the pandemic, crowd control events, and budget cuts. The DOJ cites to a violation of paragraph 78, which requires that all aspects of PPB training shall reflect and instill agency expectations that officers are committed to the constitutional rights of individuals who have or are perceived to have mental illness. The 2020 training was approved by both the DOJ and the COCL, so it clearly met the requirements of paragraph 78. However, while there may not be a technical violation of Section IV of the settlement agreement, there was a delay in providing hands-on training to several hundred officers.

PPB originally delayed hands-on training for approximately half of its officers to August because of the pandemic and the limitation of in-person contact. PPB relies on its overtime budget to cover the duties of personnel attending training, as well as for the instructors. In August 2020, the PPB again cancelled hands-on training citing the protests, ongoing pandemic, and budget cuts.

Remediation:

As the DOJ notes in its annual report, PPB is making up the 2020 training in 2021. The learning objectives for the 2020 training were previously approved by the DOJ and no changes were made for the make-up portion of training. PPB is on track for completion of this training by the end of May 2021. PPB met its 2020 training requirements for classroom training either in

person or virtually. The City will meet its training goals and ensure that all officers are trained on the materials and lesson plans from 2020 as of May 2021.

Training Shall Conform to PPB's Current Policies

The DOJ found the City out of substantial compliance on paragraph 84 of the settlement agreement, which requires that all PPB training must conform to PPB's current policies at the time of the training. It is unclear how the City failed to comply with this term. As is noted above regarding paragraph 78, the City disagrees as to whether there was an actual violation of the terms of the settlement agreement.⁶ Nonetheless, the City agrees that it is critical that officers receive annual training, and all PPB officers will receive the 2020 training as of the end of May 2021, and in-service training for 2021 will occur as required.

Remediation:

PPB will ensure that officers who missed the skills-based training scheduled originally in 2020 will receive it by the end of May 2021.

COMMUNITY ENGAGEMENT

Paragraph 150 of the settlement agreement requires that PPB hold community meetings at each precinct after issuance of its annual report. PPB released and reported to City Council on its annual report in December 2020, which was later than usual. PPB then held precinct meetings

⁶ For example, on page 20 of the DOJ's Annual Report it states that paragraph 84(a) requires "interactive exercises." However, paragraph 84 states that PPB shall train all officers on the Agreement's requirements during the next in-service training scheduled. This requirement was met years ago. The paragraph goes on to state that with respect to patrol officers, PPB shall increase the use of role-playing and interactive exercises that illustrate proper use of force decision making. PPB did increase the use of role-playing and interactive exercises, which is why the DOJ found the City in substantial compliance on this paragraph in 2020.

at only two out of the three precincts. The City agrees that paragraph 150 requires that PPB hold at least one meeting in each precinct area to present its annual report and to educate the community about its efforts in community policing in regard to the use of force and about PPB's policies and laws governing pedestrian stops, stops and detentions, and biased-free policing, including community member's responsibilities and freedoms in such encounters.

Remediation:

PPB intends to issue its annual report and hold the requisite precinct meetings at all three precincts by the end of the summer of 2021.

OFFICER ACCOUNTABILITY

The DOJ raises three concerns under Section VIII – Officer Accountability: (1) timeliness of investigations; (2) transition from IPR to the new Community Police Oversight Board (Oversight Board); and (3) officer accountability for uses of force. The DOJ also raised concerns regarding officer accountability for uses of force in their letter of March 23, 2021.

Timeliness of Investigations

Paragraph 121 of the settlement agreement requires completion of administrative investigations of officer misconduct within 180 days. The term “completion” is defined in the agreement going from an intake of an allegation through approval of recommended findings by the Chief, exclusive of appeals to the Citizen Review Committee (CRC). Paragraph 123 requires that if PPB is unable to meet the timeframe targets, then it shall review the IA process to identify the source of delays and implement an action plan for reducing them. The review of the IA process must be provided to DOJ in writing.

The DOJ correctly notes that the 180-day timeline for completion of investigations of allegations of officer misconduct apply to both IA and IPR. The DOJ noted in their report that IPR expressed that remote working due to the coronavirus, speed of access to information from PPB, and the volume of cases received by IPR all impacted their timelines. The DOJ also noted the lack of full staffing at IPR and the lack of a plan to remediate the timelines of IPR investigations.

The City agrees that investigations by IPR have not comported with the 180-day timeline.

The City would be remiss if it did not point out that paragraph 123 of the settlement agreement appears to contemplate the possibility that the City might not always meet the timeframe targets. IPR presented DOJ with a plan in March 2021 for meeting the timeframe targets. IPR continues to regularly provide DOJ with all data relating to the timeliness of investigations.

Remediation:

The Auditor has temporarily reassigned staff from other areas of her office to IPR to assist IPR with complaint intakes, allowing IPR staff to focus more of their time on investigations. IPR is meeting the timelines for new cases and is working through the backlog of cases from the 2020 protests. The back log of protest cases is on track to be completed in the next one to two months. The DOJ also raised a concern about the failure to fully staff IPR positions. The immediate concern is addressed by the Auditor's temporary reassignment of staff to IPR. As to the longer term issue related to the transition from IPR to the new Oversight Board, discussions are ongoing, including consideration of potential budgetary remedies such as a stated

Council commitment to fund IPR in its present capacity, as needed, through the transition to the voter approved charter amendment that creates the new Oversight Board, and to find suitable incentives aimed at retention for IPR employees.

Officer Accountability for Compliance with Use of Force Policy

Paragraph 169 of the settlement agreement requires PPB to uniformly apply policies and hold officers accountable for complying with PPB policy and procedure. In particular, the DOJ raised concerns with accountability for officers violating the use of force policy.

The DOJ cited to two specific uses of force. The first instance related to an officer's force report of an unintentional head strike. The matter was first investigated as a use of force under Directive 1010, as it was based on the officer's report that the head strike was unintentional. Subsequent to the filing of the FDCR and after an IA investigation started, there was video that raised a question about the intentionality of the strike. The DOJ contended that the City should follow the requirements of Directive 1010.10 – Deadly Force and In-Custody Death Reporting and Investigation Procedures. The investigation and reporting procedures under Directive 1010.10 – Deadly Force Procedures are different than the procedures under Directive 1010 – Use of Force, and many of the deadly force procedures depend on knowledge of the use of deadly force at the time of the incident. The DOJ insisted that the procedures of Directive 1010.10 applied unless and until the City determined a lack of an intentional head strike. The parties are in discussions to create a policy to address these circumstances. Although it took some time for the parties to clarify the issue, the City did subsequently comply with the DOJ's request to

implement as many applicable procedures of Directive 1010.10 – Deadly Force Procedures as was possible.

The second area of officer accountability relates to the application of Directive 315.30 – Satisfactory Performance. This issue is addressed above, as it is an area where the DOJ’s Annual Report held an inaccuracy.

Remediation:

The City is concerned and interested in accountability of officers for excessive use of force or uses of force that do not comport with legal and policy requirements. This issue is addressed more fully below in the response to the DOJ’s letter dated March 23, 2021. In brief, however, the City reiterates its commitment to officer accountability. The process of accountability is one that the DOJ approved several years ago. The process has several levels of review. Investigations start at the intake phase at IA or IPR. Upon completion of the investigation for most use of force allegations there is a triple review that includes the Captain of IA, the Branch Assistant Chief, and the IPR Director or IPR Deputy Director. The case is then reviewed by the Police Review Board, which usually includes five members but increases to seven members in use of force cases. The seven members consist of two community members, two peer members of the same rank as the involved officer, the Assistant Chief (or designee) of the involved officer, the IPR Director or designee, and the responsibility unit manager (or designee) of the involved officer. Noteworthy is that the PRB makes *recommended* findings and disciplinary action. It is ultimately the Police Chief who decides whether an allegation is sustained or not and what level of discipline is appropriate. Therefore, even in cases where the

DOJ is concerned with the outcome of the PRB, the focus rightly should be on the person making the final decision, which is the Chief.

It is also important for DOJ to be aware of the training PPB has done, and is readying to do for others, to ensure that officers understand the legal parameters and interpretations of the policy standards in Directive 1010 – Use of Force. To comply with Judge Hernandez’ contempt remedies order, the City Attorney’s Office provided training to all officers who might use an FN303 or 40MM less-lethal launcher in crowd control events. The training will also be provided in the bureau-wide crowd control training starting in June 2021.

As noted previously, the training provided addresses several issues that are areas of concern for the DOJ. The training explains passive resistance, physical resistance, and active aggression. There is training on the restrictions on the use of CS gas and rubber ball distraction devices (RBDDs). Training also includes recognition and articulation of a threat without speculation and before the use of less-lethal force. It includes training on the number of consecutive days a grenadier is engaged in civil unrest before needing a break and the ability to articulate this based on best evidence. It will address the relationship between Directive 635.10 – Crowd Management and Directive 1010 – Use of Force to ensure that all officers and command staff are clear on the requirement that uses of force in crowd management situations comport with Directive 1010. It will also cover the need for individualized action, not crowd action, as the basis for use of force.

OFFICER ACCOUNTABILITY CONCERNS FROM MARCH 23, 2021 LETTER

On March 23, 2021, the DOJ sent a letter to the City raising concerns under Section VIII – Officer Accountability. The concerns related to certain PRB meetings. These concerns are addressed below as referenced in the DOJ’s letter.

2019-B-0047

The DOJ contends that the City failed to respond to its concerns raised in a letter dated May 13, 2020 where it listed out six issues as follows:

1. Assess management of this force event prior to the shooting, including availability and efficacy of the response from enhanced crisis intervention trained officers and direction to use less lethal force.
2. Act on PPB’s own training and internal affairs recommendations. Document consideration of the recommendations and, where the Chief agrees with the recommendations, provide evidence of implementation.
3. Determine appropriate accountability for investigators’ characterization of interviewee statements.
4. Explain the change in PRB training analysis in this instance. Going forward, complete PRB analyses as required by the Settlement Agreement and Directive 336.00 for all future PRBs.
5. Document PPB’s assessment of the efficacy of 40 mm rounds.
6. Determine whether to apply the force inspector’s checklist of de-escalation techniques to PRB’s officer-involved shooting force-policy determinations.

The following paragraphs will demonstrate PPB's implementation of the suggested technical assistance.

In response to item #1, PPB assessed the force event prior to the shooting, with the specific considerations above by conducting the OIS administrative investigation. This investigation considered the efficacy of the enhanced crisis intervention team, as well as the direction regarding the use of less lethal force. Next, on December 3, 2020, the City provided the DOJ with PPB leadership's written response to the DOJ's proposed actions. In that written response, AC Resch stated that she met with the Command staff of Professional Standards and of Detective Division to provide direction on expectations to ensure that the incident would be evaluated in accordance with all of the applicable directives and laws, address any discrepancies found by detectives, IPR or IA investigators, and document all investigation actions taken. AC Resch's letter addressed action items #1 through #4.

In addition, to demonstrate implementation of action item #2, PPB documented the 2019-B-0047's PRB recommendation and PPB response to the recommendation of conducting a one-day training session for Acting Sergeants. The documentation further provides AC Resch's response to the recommendation, where she partially agreed with the recommendation. AC Resch stated that PPB will continue to rely on acting sergeants as staffing levels decline but agreed to additional training. To further to support the training, acting sergeant members spend time with a mentor sergeant prior to working alone in a supervisory role.

Additionally, the PRB recommended, and AC Resch agreed to, a refresher training through the Learning Management System (LMS) on the public safety statement to reaffirm that

the public safety statement should only be obtained from the involved member if no other sources are available to them. AC Resch agreed with the recommendation, and the Training Division Captain created a refresher on the public safety statement that was completed by all sworn members.

AC Resch also addressed action item #3 in her December 3, 2020 letter. She directed that Command staff ensure that investigators understand that they should ask probing and clarifying questions and that they must be mindful not to over justify member actions when conducting interviews.

Per the DOJ's letter dated March 23, 2021, the DOJ has acknowledged that PPB has implemented action item #4.

With regards to action item #5, the Training Division conducted an assessment of 40MM rounds. The assessment showed that although 40MM rounds are not always effective, the alternative is a harder round that causes greater bodily injury. Therefore, PPB determined that it was not the appropriate action to obtain harder rounds.

As to DOJ's last recommended action item, PPB does not apply the force inspector's checklist of de-escalation technique's to PRB's officer-involved shooting force-policy determinations. These areas of concern are covered by detectives and investigators during the inquiries into de-escalation efforts as part of the administrative investigation; however, PPB agrees that using the Force Inspector's de-escalation checklist may further improve the process and PPB will implement this change.

2020-C-0150

The DOJ raised several concerns about this PRB. The PRB involved a sergeant who used impact munitions a half mile away from a riot. Each concern is addressed individually below.

Lack of Lawful Justification

In this case, the sergeant believed they had authority to use force under Directive 635.10 – Crowd Management. The Acting Captain who reviewed the matter corrected this, noting that force must be justified under Directive 1010 – Use of Force. However, the Acting Captain found that the sergeant was responding to active aggression. As the DOJ aptly noted, Assistant Chief (AC) Leasure controverted the finding in this case, arguing that there was no active aggression justifying the use of force.

Remediation:

The City understands the DOJ’s concern with the application of “active aggression” in this situation. The City Attorney’s Office provided legal advice on May 4, 2021 to all Command staff and reviewed some of the terminology of Directive 1010, including “active aggression,” “physical resistance,” and “passive resistance,” as well as the relationship between Directive 635.10 and 1010, and the requirement for individualized, rather than crowd, aggression. A thorough training of these and various other legal issues related to protest events will be provided by the City Attorney’s Office in a bureau-wide training starting in June, after review and approval of the training materials and lesson plans by the DOJ and COCL.

The City must, however, disagree with the DOJ’s conclusion at the end of this section. While the PRB does act in ways similar to a jury, it is different because juries are final decision

makers whereas PRBs are not final decision makers. In the case of PRBs, it is the Police Chief, not the PRB, who is the final decision maker. If the Police Chief holds officers accountable for use of force violations, then the City has met the objectives of the settlement agreement.

Conflating Mitigation and Category of Discipline

The DOJ raises a concern in this case with the conflation of mitigation and discipline category. The DOJ points out that one PRB member mitigated the discipline category, rather than the level of punishment. The DOJ is correct that mitigation goes to the level of punishment.

Remediation:

The Deputy Chief discussed this issue and ensured that the PRB member who mistakenly applied the mitigation to the category of discipline is aware of the correct application of the mitigation.

2020-B-0039

The DOJ raised a concern about the need for guidance for use of knives and for bureau-issued knives. PPB worked with DOJ on addressing this concern, which arose during an officer involved shooting when a knife was attached to an external vest and grabbed by an assailant. PPB offered to issue bureau-approved knives and to issuance guidance on the use of such knives, including that they are predominately for utility purposes except when necessary for use as a weapon. The knife order was delayed because the vendor was impacted by the pandemic and the required training on knife use was part of the training that was suspended due to the coronavirus pandemic.

Remediation:

PPB has the knives in stock and has almost completed the knife training, which is part of the make-up in-service occurring now. Once bureau-wide training on knives is completed, then the knives will be issued, and the City will have addressed this issue.

2020-C-0229

This investigation related to an officer's self-reported use of three less-lethal FN303 rounds during a crowd control event, one of which missed its intended target and struck another person. The involved officer reported that another person moved their arm into the area of the officer's shot and the person was struck. The DOJ raises various concerns with this PRB, which are addressed below.

Misapplication of Force Policy Standards

The DOJ's concern is that an IA investigator appeared to misunderstand the relationship between Directive 635.10 and 1010. The City agrees with the DOJ that Directive 1010 applies in crowd control situations to justify any uses of force that fall under the policy.

Remediation:

Clarification will be provided to the IA investigator. Additionally, PPB is providing bureau-wide training that reinforces that uses of force, including those that occur during a crowd control event that falls under Directive 635.10, must comply with the requirements of Directive 1010. Additionally, the City Attorney's Office reiterated this at a Command staff meeting on May 4, 2021.

Interference with Administrative Investigation

The DOJ is concerned about a union representative's interjection and questioning during an IA interview. Under labor law, union representatives have some ability to ask questions and make clarifying statements during investigatory interviews. Employers can require union representatives to wait until the end of an interview to do so, but at times investigators find the information helpful during the interview, rather than waiting until the end. If an investigator believes the union is interfering with the investigation, the investigator can tell the union representative to wait until the conclusion of the interview to ask clarifying questions.

Remediation:

The City will remind investigators that they can tell union representatives to hold their clarifying questions until the conclusion of the interview.

Accidental Shooting Targets

The DOJ is concerned that PPB incorrectly interpreted Directive 1010 – Use of Force to not prohibit force on an unintended subject. The DOJ specifically notes a concern that this could establish a precedent for more serious uses of force.

The question presented is whether Directive 1010 prohibits force where the use of force is authorized by Directive 1010 but does not hit the intended person because someone else intervenes by placing their body between the force and the intended person. There is no question that this is a use of force. The question is whether this use of force violates policy. Directive 1010 specifically addresses the reckless or negligent use of deadly force, noting that such force is not justified under this directive. See paragraph 8.2. Members are required to report any use of

force or negligent or unintentional discharge of a less lethal weapon. See paragraph 11.1.1. Paragraph 11.2.4.2 requires canine unit supervisors to complete an AAR for “all directed and unintentional canine bites”. Paragraph 13.13 requires a supervisor respond and investigate all negligent and unintentional discharges of a firearm. These cited paragraphs demonstrate that when intended, negligent and unintentional conduct is specifically addressed. An unintentional target of use of force is not specifically addressed in Directive 1010.

Remediation:

The City will discuss this issue with the DOJ to find a resolution agreeable to all parties.

Excluding Administrative Charges (Directive 315.30)

IPR Director Caldwell wrote an initial controvert memorandum that suggested that the use of force that hit an unintended person could have been considered under Directive 315.30 – Satisfactory Performance; however, he believed it was more appropriately considered under Directive 1010 – Use of Force. Therefore, he controverted the case under Directive 1010. DOJ first raises a concern that the investigation was not restarted after Director Caldwell pointed out that someone might consider this under Directive 315.30 – Satisfactory Performance. For this issue, the City contends that there was not additional information that would have been obtained had the investigation been restarted, as the facts remained the same. The question was whether the facts more appropriately fit under Directive 1010 – Use of Force or Directive 315.30 – Satisfactory Performance or both directives. IA included this when it returned the case to Director Caldwell and Director Caldwell removed reference to Directive 315.30 as he did not believe this was the appropriate policy to apply.

The DOJ is concerned that if a matter is investigated and closed, it cannot be reopened to add a new allegation unless there is new evidence that likely would not have reasonably been discovered in the original investigation. This is correct. A later realization that conduct may have violated a different policy resulting in reopening an investigation violates double jeopardy.

The settlement agreement considers such a possibility in paragraph 133. If a civil case results in liability for an officer's use of force and an investigation occurred prior to the civil case and did not result in a sustained finding, provided that there is no new evidence from the civil trial to justify reopening the IA investigation, then PPB is required to work with IPR to identify the reason why the administrative finding was contrary to the civil trial finding and publish a summary of the results of the inquiry.

Remediation:

PPB and IPR do their best to consider the variety of allegations that are appropriate in any given case. While there may be times when there is disagreement as to the applicability of a policy to a particular set of facts, this does not mean that the system has failed. To the extent there is a mistake, and a policy violation is not cited in an allegation, then it seems appropriate to apply the remedy suggested in paragraph 133 and have PPB and IPR work to identify why the allegation was missed and how to avoid such errors going forward.

Administrative Investigation and Required Supervisor Force Investigation

The DOJ correctly notes that during the 2020 crowd control events there were AARs that were performed by sergeants not on duty at the time of the event and that did not include

interviews with involved and possible witness officers. As noted earlier, the City agrees with this critique and will address this concern as stated previously.

2020-C-0210

This incident involved an officer pulling up a protester's face mask to use O.C. spray. The DOJ states that the video shows the person retreat after the use of force and the officer then deploys a second burst of O.C. spray toward the direction where the person retreated.

Lack of Justification

The DOJ's first concern is that crowd conduct was used to justify force on an individual. The City agrees that uses of force must be justified based on an individual's actions under Directive 1010.

Remediation:

As noted previously, the City Attorney's Office is providing training to ensure the correct understanding of uses of force in crowd control events.

Failure to Identify Collateral Misconduct

The DOJ next contends that PPB failed to identify the second use of O.C. spray as misconduct. The second use of O.C. spray was assessed based on the officer's report and the video, and it was concluded that there was not a sufficient concern to investigate a policy violation as to this second burst. IA and IPR investigate a matter when there is a basis for concern that an act may have violated policy. The City agrees that Directive 1010 requires officers to individually justify each independent application of force. In this instance, AC Resch

reviewed the officer's report and the video and determined that the force was justified. Unless there is a potential policy violation, then conduct is not investigated.

Exonerated vs. Not Sustained

In this instance, the DOJ disagreed with all PRB voting members who recommended a finding of exonerated. As noted earlier, uses of force require a seven-member board for PRBs. The PRB members considered the evidence and made a credibility finding that the DOJ appears to disagree with. The DOJ believes the finding should have been sustained. There are times when people view the same evidence and come to different conclusions. This appears to be one of those times. Unless the DOJ has evidence that no reasonable person could come to the conclusion that all seven PRB members came to, including the two community members, then this is not an accountability failure.

Misapplication of the Evidentiary Standard

The DOJ was concerned with advice provided by the City's legal counsel and the PRB administrator during this PRB.

Remediation:

The City Attorney's Office will clarify the necessary application of Directive 1010 during a crowd control event if a PRB member appears to be considering a use of force in a crowd control event under Directive 635.10 only.

The City will require that the facilitator re-read the explanation of the evidentiary standard if there are questions about the standard of evidence.

CONCLUSION

The City of Portland is committed to police reform and accountability, and to re-establishing substantial compliance with the settlement agreement. The City Council is very engaged in this matter and in reattaining substantial compliance, and will ensure its interests and positions are communicated with the DOJ. The City appreciates the assistance of the DOJ in the evolution of the Police Bureau and policing in the City of Portland.

The City looks forward to moving forward collaboratively with the DOJ and to resolving these outstanding issues.

Sincerely,

/s/ Robert Taylor
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