The Honorable Judge Michael H. Simon
U.S. District Court for the District of Oregon
1327 United States Courthouse
1000 SW Third Avenue
Portland, OR 97204-2944

Re: *United States of America v. City of Portland,* case number 12-CV-02265

Dear Judge Simon:

Thank you for the opportunity to present testimony concerning the fairness of the Settlement Agreement in the above-referenced matter.

INTRODUCTION

Disability Rights Oregon (DRO) is the federally-funded non-profit protection and advocacy law agency for people with disabilities in our state. We represent people with mental illness, with intellectual disabilities, with physical disabilities, with traumatic brain injuries, and with other disabilities. Every one of our clients is a person with a disability who is concerned that s/he has been discriminated against based on his or her disability. DRO has been part of the Portland Police Bureau (PPB) Crisis Intervention Team (CIT) training since its inception. We have served on the CIT Advisory Board as well as serve on the Behavioral Health Unit Advisory Committee. Additionally, DRO is a member of the Albina Ministerial Alliance (AMA) Coalition for Justice and Police Reform.

DRO was heartened that the U.S. Department of Justice (DOJ) came to Portland to conduct a pattern or practice investigation. The fact that the DOJ found reasonable cause to believe that the PPB has an unconstitutional "pattern or practice" of using excessive force against persons with actual or perceived mental illness should clearly be a catalyst for positive change in our community. DRO would like to ensure that the Settlement Agreement engenders change that is meaningful, significant and enduring. Your Honor, below I discuss the Settlement Agreement in terms of whether it is *fair* to all affected; whether it is *reasonable*; and whether it is *adequate* to solve the problems identified in the Complaint.

RECOMMENDATION: THE AMA AND COCL SHOULD HAVE CLEARLY DEFINED ROLES IN THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT.

Overall, the Settlement Agreement is designed to improve the behavior of the Portland Police Bureau (PPB) officers so that they do not use unconstitutionally excessive force against people with or perceived with mental illness. The agreement is only enforceable by the parties (para. 5). The parties are the U.S. Department of Justice, the City of Portland, and the Portland Police Association (PPA).

This is not adequate because it leaves out the community—which had enhanced amicus status in the settlement negotiations and the Settlement Agreement through the AMA. The AMA should be considered a party for purposes of enforcement because they are a critical voice of the community. An identified problem in the US DOJ investigation is a lack of trust between the community and the Portland Police Bureau. Allowing the community a voice through AMA would help engender trust and pave the way for full enforceability.

A newly created Community Oversight Advisory Board (COAB) is comprised of 20 members of the community (para. 142). The COAB has several functions, including to independently assess the implementation of this Settlement Agreement (para. 141(a)). There is, however, no authority given to the COAB to mete out consequences in the instance that the PPB is out of compliance. The COAB is set up to review information and to provide recommendations (para.146). The COAB does not have an enforcement role.

Although it is clear that the new position of Compliance Officer/Community Liaison (COCL) is to whom the COAB reports, it is not clear what authority the COCL has. S/he can “make recommendations to the City regarding measures necessary to ensure full and timely implementation of this Agreement” (para161). The COCL (para. 160) is created to oversee implementation of the Agreement, but has no power before the federal court when recommending changes (para. 164). The Settlement Agreement should give the COCL authority before the federal court to enforce the Settlement Agreement.

Overall, if PPB is clearly out of compliance with the Settlement Agreement according to the community, what is the remedy for the community? Who can assure that it is enforced and that there are consequences? The AMA should be considered a party for purposes of enforcement and the COCL should also have authority before the federal court to address this concern. Additionally, the US DOJ should maintain a presence in Portland to ensure that the Settlement Agreement is complied with and enforced.

The following is commentary on some of the sections of the Settlement Agreement in terms of their fairness, reasonableness and adequacy. It is addressed in the order in which the subjects appear in the Settlement Agreement.

RECOMMENDATION: THE JUDGE SHOULD ENSURE THAT THE PPB UNDERSTANDS AND IS FULLY FOLLOWING THE USE OF FORCE POLICY AS SET OUT IN THE SETTLEMENT AGREEMENT.

The Portland Police Bureau (PPB) "shall attempt to avoid or minimize the use of force against individuals in perceived behavioral or mental health crisis, or those with mental illness and direct such individuals to the appropriate services where possible" (sec. III, page 16). It requires that PPB use disengagement and de-escalation techniques when possible (para. 67(a)). The use of force shall be de-escalated to a level calculated to maintain control with the least amount of appropriate force as resistance decreases (para. 67(d)). Further, PPB expects officers to develop and display, over the course of their practice of law enforcement, the skills and abilities that allow them to regularly resolve confrontations without resorting to force or the least amount of appropriate force (para. 66(a)). The Settlement Agreement provides a protocol for minimal or no use of force, for de-escalation and disengagement. The language for use of force is reasonable.

In order for the Settlement Agreement language to improve PPB's use of force policies, it must be codified in the PPB Directives. Therefore, the language in the Settlement Agreement must be unambiguous and clear. Also, PPB needs to be instructed that they must adopt all rather than some of the use of force policy as set out in the Settlement Agreement. In contrast, in the PPB's recently revised Use of Force policy, there is no language about not resorting to force at all as there is in the Settlement Agreement (*See* Directive 1010.00 December 2013). The Directive includes the less restrictive Constitutional Force Standard as a stand alone paragraph without indicating that the PPB standard is more stringent (Directive 1010.00, para. 2.2). Later, the Directive indicates that, "Members should be aware the Bureau's force policy is more restrictive than the constitutional standard and state law" (Directive 1010.00, para. 4.10) This PPB Directive should be squared up with the language of the Settlement Agreement. The PPB Directive is less restrictive in terms of the use of force. The Settlement Agreement is inadequate if it allows the PPB to draft new Use of Force Directive that does not comply with the terms of the Settlement Agreement. Your Honor or some other entity should direct the PPB to re-draft its Use of Force Directive to comport with the Settlement Agreement.

The Settlement Agreement discusses consequences to violating the use of force policies. "Objectively unreasonable uses of force shall result in corrective action and/or discipline, up to and including termination" (Para 67(d)). This is a strong provision in the Settlement Agreement that to be adequate must be enforceable.

<u>RECOMMENDATION:</u> THE ELECTRONIC CONTROL WEAPONS POLICY SHOULD NOT ALLOW THREE CONSECUTIVE CYCLES BECAUSE IT MAY INCREASE THE RISK OF SERIOUS INJURIES AND DEATH; THE ECW POLICY SHOULD NOT ALLOW GAPING EXCEPTIONS.

This section should be strengthened to more clearly protect people with mental illness or with perceived mental illness as well as others who are subject to ECW (Taser) use.

- Three ECW cycles (allowed in Settlement Agreement, para. 68(1)(f)) is too many for human health and safety.

According to the 2011 Electronic Control Weapon Guidelines (A Joint Project of: Police Executive Research Forum and Community Oriented Policing Services with US Department of Justice). The 2011 Electronic Control Weapon Guidelines state:

> **Medical Considerations: Repeated or multiple applications may increase risk of death**
>
> It is important to recognize that ECWs have been cited by medical authorities as a cause of, or contributing factor in, some deaths.[1] A number of factors appear to be associated with fatal and other serious outcomes. These factors include how the ECW was used and the physical or medical condition of the subject who received an ECW application. Indeed, in July 2010 the American Academy of Emergency Medicine issued a Clinical Practice Statement advising physicians that they should consider additional evaluation and treatment for individuals who experienced an ECW application longer than 15 seconds (Vilke et al. 2010).
>
> Although causation factors are not clear, the most common factors that appear to be associated with fatal and other serious outcomes include 1) repeated and multiple applications, 2) cycling time that exceeds 15 seconds in duration, whether the time is consecutive or cumulative, and 3) simultaneous applications by more than one ECW. **Officers must be trained to understand that repeated applications and continuous cycling of ECWs may**

[1] See amnesty International 2008b, which details more than 35 such cases based on autopsy reports.

increase the risk of death or serious injury and should be avoided.

Given the medical risks, officers should not be allowed to deploy three cycles of ECWs (*See* para.68(1)(f)). The Settlement Agreement defines more than two uses as a "serious use of force" (para. 58(7)).

- For an individual who may be Tasered, a verbal warning is critical. This offers the possibility that an individual is not Tasered because s/he complies with the police officer. Issuing a verbal warning should be the standard. Having an exception clause, "[u]nless it would present a danger to the officer or others" (para. 68(b)) unnecessarily and significantly waters down the warning requirement. The rule should require a warning. Officers should be allowed to present good cause for not using the warning.

- The rule that Tasers are prohibited from use on people in a mental health crisis is significantly weakened by the exception. It states that Tasers can be used on people in a mental health crisis "in exigent circumstances, and then only to avoid the use of a higher level of force" (para. 68-a). There should be a set rule. PPB officers can show they had good cause in exceptional circumstances if they use a Taser on a person in a mental health crisis.

The DOJ Letter of Findings states, "It is not surprising to us, then, that officers are using ECWs excessively and inappropriately, given the state of confusion amongst those responsible for reviewing uses of force" (page 16). The Settlement Agreement has many exceptions to Taser use policy. It, therefore, does not tighten up Taser policy sufficiently because an officer may be complying with the rule or with the exception. These Taser rules need to not have big loopholes—our community member's lives are in the balance. The Taser rules are inadequate to protect Portland citizens.

<u>RECOMMENDATION</u>: IN ASPIRING TO AVOID UNCONSTITUTIONAL EXCESSIVE USE OF FORCE, THE PPB SHOULD USE TRAINERS WHO HAVE NO DISCIPLINARY HISTORY OF USING EXCESSIVE FORCE.

PPB should ensure that officers who are selected to be trainers do not have a history of using excessive force. The Settlement Agreement is unreasonably lax in accepting officers who are not suited to be trainers. It states, "The trainer selection guidelines shall prohibit the selection of officers who have been subject to disciplinary action based upon the use of force or mistreatment of people with mental illness within the three (3) preceding years, or twice in the preceding five (5) years, and will take into account if a civil judgment has been rendered against the City in the last five (5) years based on the officers use of force" (para. 83).

Clearly, there are many Portland Police Bureau officers who have no history of using excessive force—they should be the trainers. The Settlement Agreement should state, "The trainer selection guidelines shall prohibit the selection of officers who have been subject to disciplinary action based upon the use of force or mistreatment of people with mental illness." It decreases community trust when an individual in the community has been the victim of excessive force by a specific Officer who is then the trainer to other PPB officers on appropriate use of force.

RECOMMENDATION: ENHANCED CRISIS INTERVENTION TRAINING IS A KEY COMPONENT; THE COMMUNITY SHOULD HAVE A ROLE IN SHAPING, PARTICIPATING IN AND EVALUATING THIS TRAINING.

DRO has been a member of the Addictions and Behavioral Health Unit (BHU) Advisory Committee (BHU). This committee has taken seriously its task of improving training for Enhanced Crisis Intervention Teams (ECIT). Community members, particularly those who have insight from interacting with the PPB officers, should be allowed to partake in the planning stages all the way through participating in the training. Thus far, community members have not been allowed to participate with this BHU Advisory Committee. It provides a lot more transparency to allow the community to participate—in some meaningful way—with the BHU Advisory Committee. This could include reviewing curriculum and making suggestions for change; participating in the training, for example, in the role-play scenarios, and evaluating the training afterwards for improvement.

We observed a one week long ECIT training and found that minimal force and de-escalation were emphasized. There was one panel for consumers of mental health services and one for family members of mental health services. These were effective. Given that the topic is interacting with people with mental health concerns and other disabilities, it makes sense for there to be more opportunity during the training for members of the PPB to interact with people with mental health concerns and other disabilities. Having people with mental health concerns in the role-play scenarios could help break down barriers. At the training we observed, there were no people with mental illness included in the role-play scenarios. Also, encouraging input from the community at all stages of the training is fair, reasonable and adequate. This should be part of the Settlement Agreement because not only does it go to establishing trust between the community and PPB, but it allows for the most critical information to be obtained.

DRO supports the training concepts stated in the Settlement Agreement, including: increase the use of role-playing including use of force decisions in interactions with people who have or are perceived to have mental illness;

emphasize de-escalation techniques, when appropriate, that encourage officers to make arrests without using force; provide training regarding an officer's duty to procure medical care; continue to train on proactive problem solving and to use, when appropriate, disengagement, waiting out a subject, requesting specialized units, including CIT officers and mental health professionals (para. 84). Also, shifting to person-centered language and removing the label "mentals" is progress (para.(a)(vi)).

<u>RECOMMENDATION</u>: IN ASPIRING TO AVOID UNCONSTITUTIONAL EXCESSIVE USE OF FORCE, THE PPB SHOULD USE TRAINERS FOR ITS MOBILE CRISIS PREVENTION TEAM WHO HAVE NO DISCIPLINARY HISTORY OF USING EXCESSIVE FORCE.

Again, the PPB should find participants for the mobile crisis prevention team who have not been subject to discipline based upon use of force or mistreatment of people with mental illness. Currently, the Settlement Agreement states, "No officers may participate in MCPT if they have been subject to disciplinary action based upon use of force or mistreatment of people with mental illness within the three years preceding the start of MCPT service, or during MCPT service" (para. 108). This should read, "No officers may participate in MCPT if they have been subject to disciplinary action based upon use of force or mistreatment of people with mental illness." This is fair and reasonable, given that people who are being served by the mobile crisis team should not have to interact with an officer who has a disciplinary record due to use of force or mistreatment of people with mental illness.

<u>RECOMMENDATION</u>: THE JUDGE AND/ OR THE DOJ SHOULD ASSIST IN SETTING OUT THE COMPONENTS TO ALLOW A MEANINGUL INDEPENDENT INVESTIGATION BY IPR BECAUSE THE SYSTEM IS BROKEN WITH POLICE INVESTIGATING POLICE.

The Settlement Agreement states, "Currently, both IPR (Independent Police Review) and PPB 's PSD (Professional Standards Division) have authority to conduct administrative investigations, provided that IPR interview of PPB Officers must only be conducted jointly with IA (Internal Affairs Unit of PPB's Professional Standards Division). Within 120 days of the Effective Date, the City will develop and implement a plan to reduce time and effort consumed in the redundant interview of witnesses by both IPR and IA, and enable ***meaningful independent investigation by IPR***, when IPR determines such independent investigation is necessary" (para. 128; Emphasis added to the original). IA is part of PPB; IPR is not. In order to be independent, IPR needs to conduct its investigation separate from IA. Otherwise, it is unfair and unreasonable and inadequate as it is police investigating police.

On January 8, 2014, City Council voted to create a process whereby the PPB sends a representative to IPR's interview of officers, in order to compel the officer to testify (Code 3.21.220). The IPR Director testified on October 18, 2013 that the IPR should be allowed to compel officer testimony on its own accord. The PPA asserted the members' collective bargaining rights prior to the January 8 compromise. This new system keeps in place the problematic tie between IPR and IA that disallows our community from having an independent investigation into police misconduct. The IPR has only conducted one independent investigation to date. However, they now have two additional IPR investigators. The Settlement Agreement should resolve this concern such that PPB officers are not investigated by police; such that there is an independent investigation; and such that IPR actually performs meaningful independent investigations. The community expects that the IPR can conduct an investigation without involving PPB employees other than the ones under suspicion of misconduct/ officer who witnessed the alleged misconduct.

Investigations into PPB officer misconduct are hindered by the "48 hour rule" (allowing 48 hours after deadly force incidents before officers are interviewed). The Settlement Agreement should require The City to change provisions of its existing collective bargaining contracts so that investigations can be more reasonable, timely and effective. It is certainly not best practices to wait around for two days before interviewing officers.

The Settlement Agreement calls for a disciplinary guide—which is described as being similar to sentencing guidelines in the criminal context (para. 137). This is a good idea to provide some uniformity to the type of misconduct and the sort of discipline, subject to mitigating and aggravating factors. To provide some predictability and consistency to discipline makes sense.

CONCLUSION

DRO appreciates the work that has occurred to arrive at this Settlement Agreement. Overall, it is positive for enhancing police accountability. The above cited areas can be addressed to make the Settlement Agreement fair, reasonable and adequate for people with disabilities in our community.

Thank you for your courtesies.

Sincerely,

/s/ *Jan E. Friedman*

Jan E. Friedman, Staff Attorney
Disability Rights Oregon