

NATIONAL LAWYERS GUILD PORTLAND, OREGON CHAPTER

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SUMMARY OF TESTIMONY BY PORTLAND CHAPTER NATIONAL LAWYERS GUILD ATTORNEY MARK KRAMER FAIRNESS HEARING - 02.18.14

INTRODUCTION

The NLG will testify about both specific and broad-based concerns it has with the Agreement As an organization that has long participated in police oversight both in policy matters and in litigation, the NLG's position is a product of the many years of the collective experience of its members and our clients with the Portland Police Bureau (PPB) in policy discussions, community forums and in litigation. As an overall matter, the NLG recognizes this proposed Agreement is an attempt to bring systemic change to a troubled system. However well intentioned the provisions of the Agreement are - and some will no doubt have positive and beneficial effects – the Agreement does not go far enough in some areas where it is most necessary to do so, in order to ensure true change will pervade the PPB. Accordingly, we urge the Court to reject the Agreement as it is currently constituted.

HEAVILY IMPACTED COMMUNITIES

The NLG has specific concerns with deficiencies in the proposed Agreement's failure to address the systemic inequalities which affect members of our community who are both members of the minority population and who suffer from mental health issues.

TRAINING AND POLICY

The Agreement fails to go far enough to address the PPB's historically problematic training and policy making. For years the PPB's training did not match its policy. Now, in an effort to get policy and training to be consistent, the PPB has rolled out a new use of force policy and began training before the use of force policy was finalized. The NLG is specifically concerned that the proposed settlement Agreement does not mandate that individuals with relevant life experience participate in both the development and implementation of training, which would go a long way to increase the efficacy of the training. Advocates for the mental health community, as well as community advocates, have provided this specific feedback to both the DOJ and the City for years, yet the Agreement fails to guarantee that those with experience with mental illness play a critical role in the delivery and implementation of training with regards to interactions with individuals with mental health issues. Likewise, the Agreement does not mandate

The NATIONAL LAWYERS GUILD is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization that shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests.

participation of those with such experience in the development or review of policies. In addition, the Annual Report required by the Agreement should require that the PPB solicit and include comments from the community. Paragraph 150.

For the reasons stated above, the Agreement fails to address longstanding concerns with PPB policy and training.

IPR and CRC

The Agreement fails to address the long standing concerns regarding what the DOJ acknowledges is the City's "byzantine" and largely ineffective oversight system. The proposed changes shorten the timeframe that IPR and the CRC have to resolve a case (at paragraph 121) and give the CRC, an entirely volunteer effort (with minimal financial and infrastructure support), 21 days to resolve an appeal. This is unrealistic, and members of the CRC have come out strongly against this unrealistic timeline. Moreover, the IPR, created in 2001 and tasked with the authority to conduct independent investigations, has not exercised its authority to investigate in-custody deaths, shootings, and serious incidents of use of force (or for that matter, any incidents at all). The Agreement is vague in its direction that IPR be able to conduct "meaningful investigations." Paragraph 128. For this Agreement to be adequate, **it should mandate that IPR to conduct independent investigations into significant uses of force**, and direct the City to fund IPR to perform that function. The Agreement addresses IPR only at its margins e.g., to the redundancy of witness interviews, rather than the IPR's authority to conduct meaningful and independent investigations.

We have provided the City with research and a legal opinion on the IPR's ability to compel officer testimony, that is to mandate officer cooperation in IPR interviews, but the City has declined to exercise this authority, instead choosing to have a PPB member in the room during IPR interviews to direct the officers to answer questions. This new process creates the appearance, and in some cases maybe the reality, of undue influence. The Agreement, rather than addressing some of the fundamental problems with IPR, like mandating resources to be provided to the IPR to conduct true independent investigation, merely directs the City to develop a plan to enable meaningful investigations, without giving sufficient direction to the City on how to do so. The NLG has been fighting this battle for more than 20 years without meaningful reform. With a concrete and express mandate that IPR conduct independent investigations and be provided the resources to do this, there can be no police accountability that will be accepted as credible by Portland residents. As such, the City's plan, as set forth in the Agreement, will inevitably fail.

In addition, the proposed settlement Agreement, at paragraph 43, solidifies the City's practice of not allowing appeals to the CRC of lethal force or in-custody deaths by specifically exempting these types of cases from the definition of "misconduct complaint." The IPR does not currently investigate in custody deaths or shootings – although they do have that authority-- and leaves the serious uses of force to Internal Affairs. If IPR is to investigate these cases, the proposed Agreement ensures that there will be no recourse for family members, for at least the next five years, through administrative channels to review such an incident. The DOJ points out that family members can simply sue in federal court. This

misses the point: many people do not utilize the legal system for any number of reasons, including cost. Many attorneys do not have the staff and resources to litigate such cases. The IPR was created to provide an administrative avenue for accountability for inappropriate uses of force and other police misconduct. A lawsuit will rarely if ever result in discipline of an officer; yet through the IPR and CRC process, the opportunity for accountability is cast more widely than an action for damages. We realize the irony of police misconduct lawyers taking this position, but we truly feel that many community members will be better served by an oversight and accountability system that does not rely on expensive and time consuming litigation which may result in a financial award, but no change in policy. **Because the proposed Agreement fails to address these issues, the community will continue to have little faith that there is true oversight over significant incidents, and true accountability and independence.**

As a final note on the administrative oversight process, the proposed settlement Agreement codifies a deferential standard of review for the CRC. The CRC currently uses a “reasonable person” standard. This has been roundly criticized as overly deferential for an appeals body and the standard of review should be whether the "preponderance of the evidence" supports the findings. Paragraphs 61, 135). In other words, the CRC should not be required to defer to the City's decision makers' interpretation. We have students representing CRC appellants in these hearings and have seen the CRC members often struggle with the degree of deference they must afford to the City, and such confusion may be avoided with a clearer standard. The City's hired expert Eileen Luna Firebaugh to review the IPR in 2008, and her report made the specific finding that the "reasonable person" standard is too complicated, and that CRC should be able to make their recommendations to the Bureau based on a preponderance of the evidence. This is another example where the public does not accept the current police accountability process as credible, unbiased, meaningful or effective and the Agreement does little to alter those shortcomings.

POLICE REVIEW BOARD

The Agreement does not address the lack of transparency in Police Review Board (PRB) hearings, and does not allow community members to attend the hearings. The PRB consists of 5-7 members, depending whether it is reviewing performance cases (generally, cases with one finding that an officer was out of policy) or excessive/deadly force cases. For either review, Bureau employees are the majority of the Committee: An Assistant Chief, the officer's commander, and 1-2 "peer" officers (3-4 members) are joined by the a senior IPR staff person and 1-2 community members (2-3 members).

The DOJ found it “curious” that a “complaining civilian, if one is involved in the incident being reviewed, is not permitted to attend PPB's presentation" (DOJ letter at p. 32). Yet, the p Agreement fails to allow the complainant (subject to the use of force), to participate or attend these hearings. The findings are made public, and can then be appealed to the CRC, but the complainant is at an extreme disadvantage for not being privy to discussions about why an event was in or out of policy. In addition, if the incident results in death, the surviving family members are left without recourse to appeal to the CRC. These processes should be made

more transparent and at the very least should include participation of affected community members.

Under the Agreement, both the PRB and CRC can ask Internal Affairs or IPR to conduct more investigation on a misconduct claim in order to generate meaningful findings. (paragraphs 132 and 136). But these sections only require the "investigating entity [to] make reasonable attempts to conduct the additional investigation within 10 business days or provided a written statement why additional time is needed." The Agreement does not mandate an investigation completed, or indicate what recourse the CRC or IPR has should the investigating body refuses to conduct additional investigation. Time and again, we've seen less than adequate responses from Internal Affairs and this Agreement does not address this problem. We agree with Copwatch that the Agreement should mandate that when IPR or CRC request more information, a response is mandatory.

ENFORCEMENT AND OVERSIGHT OF AGREEMENT

The Agreement calls for the City to hire a Compliance Officer/Community Liaison (COCL) to oversee the implementation. The COCL is tasked with oversight responsibility, will be collecting and analyzing voluminous data, and will chair the Community Oversight Advisory Board (COAB) Paragraph 161-65. Yet, the COCL has no means to communicate directly with the Court about the Agreement, but is in theory, the "expert" on the Agreement. For these reasons, the NLG urges the Court to appoint an independent monitor, who is accountable to the Court, rather than the City Council, and who will ensure compliance with the Agreement. (New York Mayor de Blasio just recently accepted a Federal District Court's recommendation for such a monitor in the settlement of its "stop and frisk" case.)

We also urge the Court to grant the AMA Coalition the authority to bring issues about the implementation of the Agreement directly to the Court.