THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 2:12-cv-01282-JLR **UNITED STATES' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE**

I. INTRODUCTION

Plaintiff United States of America ("DOJ") hereby responds to the Court's December 3, 2018 Order to Show Cause Whether the Court Should Find That the City Has Failed to Maintain Full and Effective Compliance with the Consent Decree. (Dkt. 504) ("Show Cause Order"). With the Court's leave (Dkt. 507), DOJ was able to review and consider the City's response to the Show Cause Order (Dkt. 512) prior to responding. Accordingly, at this time, DOJ is able to respond to the Court's questions regarding the impact of the Adley Shepherd matter/arbitration and the impact of the Seattle Police Officers Guild ("SPOG") collective bargaining agreement

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

("SPOG CBA") on the City's Accountability Ordinance and, therein, on the Consent Decree that governs this case, in full consideration of the relevant facts for each.[1]

First, DOJ has concluded that the use of force involving Officer Shepherd and the recent arbitration ruling regarding the same are not grounds to hold that the City has failed to sustain Full and Effective Compliance under the Consent Decree. The Consent Decree was negotiated and entered pursuant to DOJ's authority under 34 U.S.C. § 12601 (recodified from 28 U.S.C. § 14141) to seek equitable relief to eliminate a "pattern or practice" of alleged misconduct in a law enforcement agency that violates the Constitution or federal law. In keeping with that goal, DOJ and the Monitoring Team used rigorous assessments of randomized data and case samples to evaluate the City for systemic compliance with the terms of the Consent Decree during Phase I of this matter (the "initial compliance" phase). Likewise, for Phase II (the "sustained compliance" phase), the Parties and the Court agreed to evaluate the City's sustained compliance with the Consent Decree through a series of comprehensive audits designed to identify systemic problems. *See* (Dkt. 444 and 444-1) ("Sustainment Period Plan"); (Dkt. 448) (order approving plan). Because both the Consent Decree and the related Sustainment Period Plan focus on remedying and evaluating *systemic* failures, an individual incident of police misconduct is unlikely to affect the status of the City's sustainment of compliance with the Consent Decree. After reviewing the Shepherd arbitration decision and the City's response thereto, DOJ sees no justification for departing from this method of evaluation. Accordingly, DOJ requests that the

[1] DOJ's review was delayed by the lapse in federal government appropriations from December 21, 2018 to January 25, 2019 (35 days). By request, the Court moved the deadline for response to the Show Cause Order accordingly. *See* (Dkt. 517) (granting stay); (Dkt. 520) (lifting stay and setting new deadlines).

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

Court defer judgment on the City's sustainment of full and effective compliance until the completion of the sustainment audits.

However, in the course of its review, DOJ did become aware of a potential problem with a training that was previously reviewed and approved by DOJ and the Monitoring Team during Phase I of this matter. For the reasons discussed below, DOJ suggests that a re-evaluation of that training should be added to the Sustainment Period Plan to ensure that it continues to operate in the manner previously approved by the Parties and this Court.

Second, DOJ has concluded that the SPOG CBA's changes to the Accountability Ordinance (and specifically, its changes to the disciplinary review process), do not present a conflict with the Consent Decree. If those changes served to weaken accountability for officers in a manner that threatened to undermine the requirements of the Consent Decree (for instance by undermining the enforceability of rules related to use of force or bias policing), such changes could present a conflict with the Consent Decree. But based upon DOJ's review, that is not the case. The SPOG CBA terms related to the use of arbitration (and the burden of proof applied therein) are materially unchanged from the time period in which DOJ investigated SPD and the Consent Decree was entered. The Consent Decree did not mandate changes to either. Accordingly, the Court should not find that the new terms – which improve or, at worst, retain the accountability system of 2008 – conflict with or undermine the Consent Decree. Thus, because DOJ does not believe that the SPOG CBA's changes to the Accountability Ordinance create a conflict with the Consent Decree, DOJ recommends the Accountability Ordinance (as amended by the SPOG CBA) be permitted to proceed without judicial intervention.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

II. ARGUMENT

A. The Use of Force Involving Officer Shepherd and the Result of the Disciplinary Appeal Process In that Matter Do Not Impact the Current Status of SPD's Sustainment of Compliance with the Consent Decree

The Court has inquired whether "the events surrounding the DRB [Disciplinary Review Board]'s decision to reinstate . . . [SPD Officer Adley Shepherd] should lead the court to conclude that the City and the SPD have failed to maintain full and effective compliance with the Consent Decree during Phase II" (Dkt. 504). DOJ believes these events do not warrant such a conclusion.

The statutory authority for DOJ's 2011 investigation of the City of Seattle provides that DOJ may investigate a police force for a pattern or practice of violating the Constitution or other federal laws. 34 U.S.C. § 12601. It is not a statute intended to investigate and address individual incidents of police misconduct (except as they relate to a broader pattern of conduct). DOJ's 2011 investigation of the City of Seattle was conducted within that authority and the resulting Consent Decree was expressly designed to remedy the pattern or practice of excessive force discovered in the underlying investigation.

Likewise, the evaluation of the City's compliance with the Consent Decree has, and continues to be, conducted by evaluating SPD's policies and practices for systemic issues. In Phase I (the initial compliance phase of this matter), DOJ and the Monitoring Team conducted ten systemic assessments designed to cover all of the topic areas of the Consent Decree. Each audit relied upon statistically-significant samples of data from all geographic regions of the City over the course of several months. *See* (Dkts. 231, 247, 235, 259-1, 272, 351, 360, 374, 383, and 394). In Phase II (the sustainment phase of this matter), the City must lead its own audits of the

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

same topic areas with validation conducted by DOJ and the Monitoring Team. This process is guided by the Sustainment Plan and Matrix agreed to by the Parties and approved by the Court in March 2018. (Dkts. 444, 444-1, 448). Since that time, the Parties and Monitoring Team have been systemically evaluating each of the areas of the Consent Decree anew to determine if the City has been able to sustain compliance with the Consent Decree. *See* (Dkt. 497-1) (Force Reporting and Investigation); (Dkt. 497-2) (Supervision General); and (Dkt. 511) (Crisis Intervention). Individual incidents of officer misconduct or failure to comply with the terms of the Consent Decree are examined thoroughly in these evaluations and discussed amongst the Parties. However, unless there is reason to believe that the individual incident of misconduct reflects a systemic problem, an individual incident does not serve as the basis for finding a failure of sustained compliance.[2] After reviewing the arbitration decision involving Officer Shepherd, including the underlying documents, DOJ does not believe that this individual incident should impact the status of the City's sustained compliance with the Consent Decree.

First, the Shepherd incident is not part of the processes agreed to by the Parties and this Court for evaluating compliance with the Consent Decree. The Shepherd incident occurred on June 22, 2014. In Phase I, the Parties agreed to evaluate initial compliance with the terms of the Consent Decree with respect to officer use of force by evaluating incidents occurring between

[2] For example, in conducting their respective reviews of SPD's sustained compliance with respect to Crisis Intervention, DOJ and the Monitoring Team identified an incident in which an officer did not appropriately use de-escalation techniques and potentially used excessive force. *See* (Dkt. 511) at 41. However, in reviewing other use of force incidents involving people in crisis, the incident appeared to be an outlier, not part of a pattern or practice of policy violations. Further, SPD demonstrated appropriate identification of the officer's violations and made appropriate referrals to address the issues. Accordingly, it did not warrant a finding of non-compliance pursuant to the systemic standard applied in this matter.

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(206) 553-7970

July 2014 and October 2016. *See* (Dkt. 383). The time period was selected, in part, to fairly evaluate officer performance after the implementation of new force policies and training of officers on these new standards. *Id*. at 27.[3] The Phase I assessment led DOJ and the Monitor to conclude that the City had demonstrated initial compliance with respect to use of force. *Id.* at 6. During Phase II, officer use of force will be re-evaluated in the summer of 2019 (with a filing date set for October 31, 2019). *See* (Dkt. 444-1). However, because the goal of the evaluation will be to assess whether the City has sustained compliance since the original time period (July 2014 to October 2016), it will not involve cases occurring prior to July 2014, such as the Shepherd incident.

However, in order to fully answer the Court's questions in the Show Cause Order, DOJ reviewed the arbitration decision in the Officer Shepherd matter and the underlying documents. It seems clear from that review that (as SPD correctly concluded), Officer Shepherd himself was not in compliance with the use of force policies – specifically the policy prohibiting force from being used on a handcuffed subject absent "exceptional circumstances when the subject's actions must be immediately stopped to prevent injury, or escape, [or] destruction of property." *See* (Dkt. 107-1) at 7 (2013 Use of Force Policies). However, as noted, one incident is not necessarily reflective of a system-wide problem. Indeed, the SPD rules and systems mandated by the Consent Decree to catch and correct individual issues appeared to work as intended here: A policy forbidding the use of force on a handcuffed subject (except in exceptional circumstances) was in effect, as were policies requiring the reporting and review of force. *See*

[3] References to specific page numbers in filed pleadings refer to the docketed page number, not the original pagination of the document.

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

(Dkt. 107-1) at 7; (Dkt. 107-3) and (Dkt. 107-4). As a result of these policies, Officer Shepherd's conduct was immediately referred to the Office of Police Accountability ("OPA") by his immediate supervisor, which in turn confirmed a violation of policy and recommended the termination of Officer Shepherd. *See* (Dkt. 512) at 19; (Dkt. 512-6) at 11-12. The Chief of Police agreed with that recommendation and decided to terminate Officer Shepherd, the City defended the decision at arbitration and appealed the contrary result. *Id*. and (Dkt. 512-7). Thus, by all accounts the City handled this instance of officer misconduct in a manner consistent with its Consent Decree obligations. The fact that an arbitration panel, which is not controlled by the City, overturned the City's efforts to enforce its policies is not a fair indication of a failure by the City and SPD to hold officers accountable.[4] Accordingly, DOJ agrees with the City that the Officer Shepherd incident does not, and should not, impact the City's standing with respect to sustained compliance. Of course, if, during the 2019 Use of Force Audit, it becomes clear that problems present in the Officer Shepherd incident are also present in many other uses of force (for instance, if it is determined that numerous uses of force violated the use of force policy), DOJ will make an appropriate finding and recommendation to this Court. DOJ asks that the Court withhold judgment on the sustainment of the City's compliance until that time.

Finally, DOJ notes that one issue from the review of the Officer Shepherd matter does raise an issue with respect to Consent Decree compliance that bears further examination. The arbitrator in the Shepherd arbitration decision modified the Chief's termination to a 15-day

[4] To the extent the Court's question and concern relates not to the individual actions of Officer Shepherd or this specific arbitration decision, but to the arbitration system and standards that allowed for this outcome, that issue is discussed in Section B., *infra*.

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

suspension, in part, because of the testimony of an SPD training officer who stated that in his trainings (including one attended by Officer Shepherd) he does the following:

> I say the same thing to every class: "If someone hits you, what are you supposed to do to protect yourself? If they hit you, what do you do?" The whole class will say, "You hit them back." Then I say to the class, "How hard do we hit them?" The whole class will say, "As hard as you can." After that, I say, "What do we do next? What do we do after we stop the threat?" I'm prompting them. They'll say, "We modulate our force. We modulate our force to control it."

See (Dkt. 512-6) at 29. This instruction does not take into account circumstances in which a suspect was able to hit an officer, but does not pose a continuing and immediate risk of harm to that officer or anyone else. Failing to take account of such a possibility is inconsistent with both SPD policy (revised through the Consent Decree process) and the Constitution. Rather, for force to be appropriate, it must be objectively reasonable, necessary under the circumstances, and proportional to the threat or resistance of the subject. Here, and in other circumstances, counter-assaultive force may not always be reasonable, necessary, or proportional. For instance, when a subject assaults an officer and is immediately restrained by a fellow officer; when the assaulting subject is a child or elderly person; or when an officer is struck by a person who is already restrained and the officer may simply disengage from the person without danger to the officer or the public. Thus, the fact that an SPD trainer, according to his own testimony, instructed officers to always hit back as hard as an officer can indicates a possible failure to maintain compliance with the Consent Decree's requirements on use of force training. *See* (Dkt. 3-1) at 39 (Consent Decree requirement that SPD ensure trainings "incorporate, and are consistent with, the Constitution and all provisions of this Agreement").

During Phase I of this matter, DOJ and the Monitoring Team assisted in the development of SPD's trainings and audited the classroom instruction. At that time, DOJ and the Monitoring

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700 STEWART STREET, SUITE 5220
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(206) 553-7970

Team found the instruction to be consistent with the Consent Decree. *See* (Dkt. 191) (2015 Defensive Tactics Training Plan); (Dkt. 422) at 4. However, because the 2018 testimony of an SPD training officer in this matter has come to our attention and appears to be inconsistent with those terms, we propose re-attending the Defensive Tactics training to ensure that it continues to be compliant with the terms of the Consent Decree. The City is in agreement with this request and has committed to advising DOJ and the Monitoring Team of the next time it is scheduled in order for re-evaluation to occur. After attending the training, we plan to appraise the Court of whether it can be considered to have sustained compliance with the Consent Decree. DOJ will also examine this issue during the 2019 Use of Force Audit – specifically, whether there are indications that officers have been misapplying use of force requirements related to handcuffed individuals pursuant to the improper training standard discussed above. Again, should there be evidence of such issues, DOJ would appraise the Court at that time. Until then, no change in SPD's status regarding sustainment of compliance is warranted.

B. The SPOG CBA Changes to the Accountability Ordinance Do Not Present a Conflict with the Consent Decree

The Court also inquired as to whether the terms of the now-enacted SPOG CBA that modify the disciplinary review processes of the Accountability Ordinance conflict with the Consent Decree or "threaten to undermine the City's status as being in full and effective compliance with the Consent Decree." (Dkt. 504). DOJ believes these terms neither conflict with the Consent Decree nor threaten to undermine the City's compliance with it.

1. Background

The historical context of the Consent Decree, the City's Accountability Ordinance, and the SPOG CBA have already been extensively discussed by the Court, the City, and DOJ in its

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

previous filings. *See, e.g.*, (Dkt. 401) (addressing the Accountability Ordinance) and (Dkt. 490) (addressing the then-tentative agreement with SPOG). Only a few salient facts are worth repeating here. Accountability for officer misconduct was reviewed by DOJ during its 2011 investigation but largely excluded from the terms of the Consent Decree, with the exception of limited changes to OPA's procedures. *See* (Dkt. 3-1) at 50-52. Indeed, DOJ and the City entered a concurrent Memorandum of Understanding in which the Community Police Commission ("CPC") was required to *evaluate* the City's accountability systems. *See* MOU (available at https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/spd_mou_7-27-12.pdf). Under neither the Consent Decree nor the MOU was the City required to change the structure of its officer accountability system, let alone to make specific changes to it. Rather, the decision of whether and how to change the accountability systems was left to the City's own discretion.

> The [Community Police] Commission will review Seattle's current three-prong civilian oversight structure to determine if there are changes it would recommend for improving SPD accountability and transparency. Though the DOJ found the overall [accountability] system is sound, the Commission may consider alternative civilian oversight models and whether clarifications or changes in roles and responsibilities for the OPA Director, the OPA Auditor, and/or the OPA Review Board would improve the confidence of the community and officers in the system.

MOU at ¶ 15 (emphases added). The City now seeks to exercise that discretion through its Accountability Ordinance and collective bargaining agreements with its police force.

When the City passed the Accountability Ordinance it knew that many provisions would be required, pursuant to state labor law, to be bargained with the affected unions. Moreover, the City understood that bargaining almost always involves compromise. The only circumstance in which these typical operations of local governance and collective bargaining would raise

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

concerns for DOJ is if that bargaining lead to conflict with the Consent Decree that governs this matter. For instance, if either the Accountability Ordinance or the collective bargaining agreements with the police unions had the effect of making it more difficult for the City to hold officers accountable for misconduct related to the Consent Decree (*e.g.* excessive uses of force, biased policing), then there would be a potential conflict with the Consent Decree. Only two areas of the new SPOG CBA stand out as potentially having such an effect. For the reasons described herein, we have ultimately concluded that they do not.

2. Maintaining Arbitration as an Option for Review Does Not Conflict with the Consent Decree

The first area of potential conflict with the Consent Decree is the one flagged by the Court in the Show Cause Order – namely, maintaining arbitration as an option for disciplinary review. The option to arbitrate officer disciplinary decisions existed during both DOJ's investigation and its negotiation of the Consent Decree, and the Consent Decree does not mandate its removal. Accordingly, the Consent Decree leaves to the City's discretion whether to utilize an arbitration system. As further background on the history of the use or arbitration may elucidate this reasoning, it is provided in more detail below.

The SPOG CBA in effect from 2008 to 2010 provided that officer appeals of discipline could be adjudicated through either the use of a Disciplinary Review Board ("DRB") (the system used in the Officer Shepherd arbitration) or the Public Safety Civil Service Commission ("PSCSC"). *See* Declaration of Christina Fogg at Exhibit A ("2008 SPOG CBA") at 7.[5] In

[5] This provision remained unchanged in the SPOG CBA in effect from 2010-2014. *See* (Dkt. 512-3) at Article 3.1 (stricken language reflects language from 2010-2014 agreement).

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

2017, the City passed the Accountability Legislation that proposed to eliminate the DRB as an option, however, the City was required to bargain those terms and enter into a new collective bargaining agreement in order for them to take effect. *See* (Dkt. 396) at 24 (flagging the need for bargaining); (Dkt. 413) at 4 (providing conditional Court approval of the ordinance pending collective bargaining). In collective bargaining, the City did not eliminate the use of arbitration entirely, but did negotiate changes to the arbitration system. Most notably, the enacted 2018 SPOG CBA eliminates the use of the DRB. Instead, it offers two options for review of officer discipline: the PSCSC or arbitration by a single arbitrator. *See* (Dkt. 512-2) at 100. The single arbitrator system has notable differences from the previous DRB arbitrations. In the past, each arbitration had to be conducted by a board that included an arbitrator approved for that case by both the union and the City, potentially impacting the impartiality of the selected arbitrators. *See* (Dkt 512-3) at 14. Under the new system, arbitrators will be selected from a joint list of accredited arbitrators, with each party given the option of only one "strike" before receiving the next arbitrator in rotation. *See* (Dkt. 512-2) at 73. There is no evidence to suggest that the new system will have the result of making it *more* difficult to hold officers accountable for misconduct than under the prior, DOJ-reviewed, 2008 SPOG CBA processes. Accordingly, neither the City's decision to permit arbitration as an appeal option, nor the change to the arbitrator selection process conflict with the Consent Decree.

3. The Burden of Proof Provided for by the 2018 SPOG CBA Does Not Create a Conflict with the Consent Decree

The second area of potential conflict with the Consent Decree is the one that was previously flagged by DOJ when the CBA was still a tentative agreement – namely, Article 3.1, which provides language guiding the burden of proof to be applied by arbitrators in officer

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

appeals of discipline. *See* (Dkt. 490) at 7-9 (DOJ's preliminary discussion of the issue). DOJ has now been briefed by the City on this issue and has had the opportunity to review: (1) the SPOG CBA language regarding burden of proof from pre-2008, from 2008 to 2018, and the 2018 SPOG CBA; and (2) the arbitration decisions interpreting each standard. These sources are particularly instructive in understanding the history and purpose of the 2018 SPOG CBA's language on burden of proof, its likely impact on future arbitrations and, therein, any potential conflict with the Consent Decree's mandates. Based upon this review, DOJ concludes that the 2018 SPOG CBA does not present a conflict with the Consent Decree.

Prior to 2008, the City of Seattle's collective bargaining agreement with SPOG stated that discipline would only be imposed for "just cause," but did not otherwise specify any specific burden of proof to be applied in appeals of officer discipline. *See* Fogg Dec. at Exhibit H (2006 SPOG CBA) at 5. Based upon DOJ's research and consultation with experts in the field, this is not unusual. Many collective bargaining agreements with police departments do not expressly provide a burden of proof for disciplinary reviews. *See* Declaration of Professor Stephen Rushin at ¶¶ 2-3 (citing examples as the Portland Police Department, the Oakland Police Department, the Boise Police Department, and the Tacoma Police Department).

Absent explicit guidance, arbitrators use traditional principles of labor arbitration to guide their formulation of a burden of proof in each individual case. For example, in 2004, an arbitrator applying the just cause standard of the SPOG CBA explained:

> As traditionally applied, 'just cause' is a broad and elastic standard involving a balancing of interests and notions of fundamental fairness. Described in very general terms, the applicable standard is one of reasonableness . . . . It also involves consideration of procedural fairness, the presence of mitigating circumstances and the severity of the penalty imposed.

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(206) 553-7970

See Fogg Dec. at Exhibit B (Shelton Arbitration) at 27. The arbitrator further explained that this reasonableness standard influences the burden of proof selected by the arbitrator:

> The standard of proof normally required in labor arbitrations for contract interpretation issues and disciplinary action is a preponderance of the evidence. For some types of misconduct, particular that punishable by criminal law, a higher burdens [sic] of proof is often deemed reasonable. . . . Some arbitrators will apply the standard of "beyond a reasonable doubt,' but most use 'clear and convincing evidence.'

Id. at 28-29. In that particular arbitration, the arbitrator decided that because the allegations against the officer were related to "dishonesty" and because the result would be not only termination but likely an effective end to his career in law enforcement, "clear and convincing" was the appropriate standard. *Id.* at 29 (the arbitrator ultimately found that the City met this burden and upheld termination). Likewise, in another arbitration from the same year (involving a Seattle Police Management Association employee), the arbitrator similarly held that in reviewing the termination of an officer imposed for allegations of dishonesty, the use of clear and convincing standard was appropriate. *See* Fogg Dec. at Exhibit C (Krueger Arbitration) at 63 (also upholding termination).

In 2008, the City negotiated a new SPOG CBA. The outcome of the negotiations included the addition of language that had two effects: (1) the addition of a presumption of termination for officers who engaged in dishonesty; and (2) a requirement that such findings be supported by "clear and convincing" evidence. [6] The specific language states:

> In the case of an officer receiving a sustained complaint involving dishonesty in the course of the officer's official duties or relating to the administration of justice, a presumption of termination shall apply. For purposes of this presumption of

[6] Arguably this language in the 2008 SPOG CBA did not actually create a new effect, but rather codified a standard already being applied. *See* Fogg Dec. at Exhibit B (Shelton Arbitration) (2004) and Exhibit C (Krueger Arbitration) (2004).

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(206) 553-7970

> termination the Department must prove dishonesty by clear and convincing evidence.

Fogg Dec. at Exhibit A (2008 SPOG CBA); *see also* (Dkt. 512-3) (2013 SPOG CBA) at Article 3.1 (retaining the same standard). This standard governed arbitrations involving SPD officers from 2008 to 2018.

Around 2016, when the City was preparing its legislation to amend its police accountability systems, the City accepted input from several stakeholders regarding what changes would strengthen or improve accountability, including substantial input from the Community Police Commission. As a result of this input, the City proposed a version of Draft Legislation in 2017 that, by Court order, it vetted with this Court. *See* (Dkt. 320). At that time, the Court asked DOJ to opine regarding the impact of those options upon the Consent Decree. In response, DOJ opined that adding a "clear and convincing" burden "without any clear basis" could potentially undermine public confidence – a goal of the Consent Decree process. *See* (Dkt. 331) at 9-10. As discussed in our October 29, 2018 brief, this analysis was in error as it failed to account for the fact that the use of the clear and convincing standard (1) was not new; and (2) had a clear basis for inclusion. *See* (Dkt. 490) at 8-9. Namely, the use of the clear and convincing standard accompanied the addition of heightened accountability through the presumption of termination. The DOJ investigation and negotiated terms of the Consent Decree did not seek to change that tradeoff. Accordingly, its continued use would not, in fact, have posed a conflict with the Consent Decree. Regardless, however, the standard has now changed again.

Under the new SPOG CBA, finalized in 2018, the burden of proof in all disciplinary matters is deferred to the traditional principles governing arbitration:

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700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

> The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration. For example, and without limitation on other examples or applications, the parties agree that these principles include an elevated standard or review (i.e. – more than preponderance of the evidence) for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment.

See (Dkt. 512-2) (2018 SPOG CBA) at Article 3.1. In other words, the CBA effectively removes any mandate of burden of proof to arbitrators and, in its place, refers to the common law of arbitration, in essence returning SPD to the ranks of the large number of other police departments.

In order to anticipate the practical effect of this change, it is instructive to look at arbitrations involving police officers in Seattle that have occurred in the past 15 years. A review of these cases demonstrates that the heightened standard for stigmatizing offenses has already been in effect for some time. For example, in 2009, an arbitrator reviewing officer discipline for involvement in a hit and run accident stated as follows:

> I will . . . apply the quantum of proof I apply in every case in which an employee with substantial seniority is discharged. That is, while I do not believe that an Employer should be required to prove alleged misconduct beyond a reasonable doubt, a standard unions often suggest should be applied (at least when the alleged misconduct could be characterized as "criminal" or "dishonest"), I also do not believe that it is consistent with principles of just cause to deprive an employee with substantial seniority of his or her livelihood on the barest preponderance of evidence. Rather, I look for "convincing" proof of substantial wrongdoing of the kind generally recognized as grounds for summary discharge . . . .

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

See Fogg Dec. at Exhibit D (Marley Arbitration) at 12 (upholding termination).[7] Likewise, in 2016, an arbitrator reviewing discipline for an officer accused of bias policing explained:

> Because a substantial suspension was imposed on Officer Hunt, and also because at least one of the charges against her involves conduct that could be "stigmatizing" to her reputation in the community, particularly as a police officer, the Department should be held to a standard that requires something more than the barest preponderance of the evidence. That is, widely accepted principles of just cause require that a good officer with no prior disciplinary issues, such as Officer Hunt, should not be subjected to a significant disciplinary penalty unless serious misconduct has been established by convincing evidence, *i.e*. evidence from which the Board can conclude that it is substantially more likely than not that she is guilty of the policy violations alleged.

See Fogg Dec. at Exhibit G (Hunt Arbitration) at 7 (emphasis added). Notably, in the past 15 years, only six instances of officer termination have been reviewed at arbitration. The standard in each of these was consistent with the standard now codified in the 2018 SPOG CBA language and its application (under the DRB system) resulted in the termination of an officer being upheld in four of the six cases.

In light of this history, the likely effect of the 2018 SPOG CBA's changes to the disciplinary review processes of the Accountability Ordinance will be to codify the burden of proof analysis and application that has already been in effect in Seattle and across many other jurisdictions for years. While the City of Seattle may ultimately choose to push to further amend this system in future negotiations, whether to do so remains the City's prerogative. There is nothing in the Consent Decree that mandates the use of a certain burden of proof in reviewing

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[7] *See also* Fogg Dec. at Exhibit E (George Arbitration) at 19-20 *and* Exhibit F (Muhammad Arbitration) at 29 (both applying a "clear and convincing" burden to the termination decision based upon the employee's long tenure with the Department).

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

officer discipline. And, upon review, there is nothing to suggest that the option chosen by the City of Seattle will make disciplining officers for offenses related to Consent Decree topics (such as excessive use of force or biased policing) more difficult than in the past.

III. CONCLUSION

Accordingly, for the reasons discussed here and in prior briefs, the Court should conclude that the 2018 SPOG CBA's changes to the City's Accountability Ordinance do not conflict with the Consent Decree and, therefore, the Accountability Ordinance should be permitted to proceed without judicial intervention. Further, the Court should defer any decision regarding the City's success or failure in sustaining full and effective compliance pending the outcomes of the work set forth in the Sustainment Period Plan, with the sole addition of incorporating DOJ's request to re-audit the Defensive Tactics training in light of the developments discussed above.

DATED this 13th day of February, 2019.

For the UNITED STATES OF AMERICA:

BRIAN T. MORAN
United States Attorney for the
Western District of Washington

s/Christina Fogg
Kerry J. Keefe, Civil Chief
Christina Fogg, Assistant United States Attorney
United States Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone: (206) 553-7970
Fax: (206) 553-4073

ERIC S. DREIBAND
Assistant Attorney General
Civil Rights Division

s/Timothy Mygatt
Steven H. Rosenbaum, Chief
Timothy D. Mygatt, Deputy Chief
Jeffrey R. Murray, Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Avenue, NW
Washington, DC 20530
Phone: (202) 514-6255

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the following counsel of record:

Annette L Hayes	Annette.Hayes@usdoj.gov
Christina Fogg	Christina.Fogg@usdoj.gov
Gregory Colin Narver	gregory.narver@seattle.gov
Kerry Jane Keefe	kerry.keefe@usdoj.gov
Peter Samuel Holmes	peter.holmes@seattle.gov
Jeff Murray	jeff.murray@usdoj.gov
Rebecca Boatright	rebecca.boatright@seattle.gov
Ronald R. Ward	Ron@wardsmithlaw.com
Timothy D. Mygatt	timothy.mygatt@usdoj.gov
Michael K. Ryan	michael.ryan@seattle.gov
Carlton Seu	carlton.seu@seattle.gov
Gary T. Smith	gary.smith@seattle.gov
Hillary H. McClure	hillarym@vjmlaw.com
Kristina M. Detwiler	kdetwiler@unionattorneysnw.com

DATED this 13th day of February, 2019, at Seattle, King County, Washington.

s/Brittany Cirineo
Brittany Cirineo, Legal Assistant (Contractor)

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970