THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

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

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I. INTRODUCTION

When the Court found the City of Seattle ("City") in initial compliance with the Consent Decree, it cautioned that sustained compliance "require[s] dedication, hard work, creativity, flexibility, vigilance, endurance, and continued development and refinement of policies and procedures in accordance with constitutional principles."[1] In other words, initial compliance would not be durable without protecting the reforms that gave rise to that compliance.

Well before issuing its initial compliance order, the Court warned that collective bargaining on the Accountability Ordinance[2] and the Seattle Police Department ("SPD") accountability system could endanger the City's progress.[3] That warning was prescient. In negotiating collective bargaining agreements ("CBAs") with the Seattle Police Officers Guild ("SPOG") and the Seattle Police Management Association ("SPMA"), the City bargained away critical reforms from the Accountability Ordinance and other accountability system improvements. These reforms had been crafted carefully and deliberately, drawing on hard lessons over many years with the existing system.

In its response to the Court's Order to Show Cause, the City minimizes the impact of the SPOG CBA on accountability, particularly for serious misconduct, and how this may then affect the sustainability of other Consent Decree reforms. Notably, the City does not address the SPMA CBA (and the differences between the two CBAs), the impact of both CBAs on SPD

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[1] Order Finding Initial Compliance (Dkt. 439) at 14.
[2] *See* Accountability Ordinance (Dkt. 396-1).
[3] *See* Order Regarding Accountability Ordinance (Dkt. 413) at 2 (refusing to approve Accountability Ordinance prior to collective bargaining because "no provision of the Ordinance is categorically exempt from bargaining . . . [and because] the relevant unions may disagree with the City's assessment concerning which provisions of the Ordinance are subject to collective bargaining").

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policies, the Office of Police Accountability ("OPA") Manual, or the Executive Order on secondary employment. The Department of Justice ("DOJ") does not assess those impacts either.

Both parties ask the Court to measure the CBAs against standards such as whether the City is within its rights to agree to those changes, whether these contracts are better than the prior contracts in some ways, or whether other cities have CBAs with similar provisions. Instead, the Court should ask whether the CBAs will result in a less robust police accountability system *for this community* than that recommended and enacted in the Accountability Ordinance and other laws and policies that, taken together, form the accountability system.

The Community Police Commission ("CPC") as *amicus curiae* provides the following analysis to ensure that the Court has a different perspective than what the parties are providing. The CPC agrees with the Court that it is critically important to evaluate the effects of these contracts against the backdrop of the purpose and spirit of the Consent Decree. That was the reason the Consent Decree Memorandum of Understanding ("MOU") between the City and the DOJ required the CPC to lead an evaluation of the accountability system and make recommendations for improvements—because a stronger accountability system will instill public confidence. As then-U.S. Attorney Jenny Durkan wrote in 2014:

> Of the many important roles the CPC plays in the reform process, the holistic review of the accountability process required by the consent decree and MOU is pivotal. That work and the changes [to the accountability system that the CPC] will help craft with City leadership will be critical to successful reform of SPD.[4]

[4] *See* Declaration of Fé Lopez in Support of Community Police Commission's Response to Court's Order to Show Cause ("Lopez Decl.") ¶ 2, Ex. A.

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Accountability system improvements are not tangential to or separate from other Consent Decree reforms. A strong accountability system will help ensure that necessary reforms are sustained over time.

The years-long effort leading up to the Court's finding of initial compliance shows that lasting reform is hard to get. But the City's negotiations with SPOG and SPMA demonstrate that lasting reform is just as hard to keep. Accordingly, the CPC respectfully requests that Court conclude that revising the CBAs is a necessary precondition to sustained compliance under the Consent Decree.

II. ISSUES PRESENTED

The CPC responds to the questions and instructions of the Court as follows:

1. Is the Court's understanding of the foregoing events [regarding Officer Shepherd] accurate? If not, how is the Court's understanding of the foregoing events not accurate?

The Court's understanding of the Shepherd incident is correct. The events preceding the actual use of force are further cause for concern. *See* Section III.A.

2. Whether the events surrounding the DRB's decision to reinstate an SPD officer who punched a hand-cuffed subject who was sitting in a patrol car, and the new CBA's rejection of aspects of the Accountability Ordinance—including those aspects that would have replaced the DRB with the PSCSC and provided for a different standard of review—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?

The departures from the Accountability Ordinance (including intended reform of the disciplinary appeals process) and other accountability system reforms will make it harder to uphold findings of misconduct and appropriate discipline—undermining the authority of OPA and the Chief. This result threatens the Consent Decree's purpose of ensuring constitutional and effective policing in which the community of Seattle can have confidence. *See* Section III.B-C.

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3. Provide the Court with a detailed list of all the changes to the Accountability Ordinance or any other SPD policy or procedure that the new CBA with SPOG precipitated, how those changes either do or do not conflict with the Consent Decree under the standard articulated above, and whether those changes undermine or threaten to undermine the City's status as being in full and effective compliance with the Consent Decree.

The Declaration and Exhibits of Judge Anne Levinson (Ret.) ("Judge Levinson Decl.") provide a detailed analysis of these changes, and inventory the ways in which the SPOG and SPMA CBAs affect, conflict with, or compromise the Accountability Ordinance, the OPA Manual, and SPD policies. Judge Levinson was appointed by the Mayor and confirmed by the City Council to serve for two terms (six years) as the City's independent, external OPA Auditor (from 2010-2016), to review complaints and investigations of misconduct and make recommendations for oversight system improvements, and is an authority on police oversight. Because of Judge Levinson's expertise as an objective reviewer of Seattle's existing accountability system, familiarity with the national landscape regarding police accountability systems, contributions to the Accountability Ordinance and Executive Order, and recommendations issued in past years to enhance police accountability,[5] her conclusions on the likely implications of the current CBAs should be given great weight. *See* also Section III.B-C.

4. Provide the Court with a recommendation on how it should proceed under the Consent Decree in light of present circumstances, including but not limited to the changes to the Accountability Ordinance as a result of the CBA with SPOG.

The CPC disagrees with the position taken by the parties that no further action is needed to ensure continued compliance with the Consent Decree, and instead asks the Court to make clear that removing the barriers the CBAs present to the intended reform of Seattle's police

[5] *See* Judge Levinson Decl. at 2-5.

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accountability system is a condition to a successful conclusion of the Consent Decree process. *See* Section III.C.

III. ANALYSIS

The central issue this brief addresses is whether the SPOG and SPMA CBAs are barriers to sustained compliance under the Consent Decree. But first the CPC addresses the Court's questions relating to the Officer Adley Shepherd case.

A. The Court's understanding of the Shepherd incident is accurate, and the events preceding the use of force provide additional cause for concern.[6]

What follows is a summary of the incident that led Chief Kathleen O'Toole to dismiss Officer Shepherd, focusing on elements which seem particularly germane to community confidence and preservation of Consent Decree achievements on use of force and de-escalation.

Around 2 a.m. on June 22, 2014, Evelyn Shelby called 911 to report that her son, Robert Shelby, had received a threatening phone call from his girlfriend, Miyekko Durden-Bosley.[7] Officer Adley Shepherd arrived on the scene to interview Robert, and Miyekko arrived shortly thereafter. Miyekko offered to answer Officer Shepherd's questions, and repeatedly denied making any threats.[8] Robert corroborated Miyekko's denial, insisting that "[n]obody [expletive] threatened me, bro."[9]

When Robert began to yell loudly at his mother (because he was upset that she had called the police),[10] Officer Shepherd interjected, telling Robert that he was acting like a child and

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[6] The CPC does not "have access to any non-public information regarding [Officer Shepherd] or allegation[s] of misconduct or disciplinary action [against him]." Consent Decree (Dkt. 3-1) ¶ 12.

[7] *See* City of Seattle's Response to Court's Order to Show Cause ("City Br.") (Dkt. 512), Ex. F at 2.

[8] *See June 22nd In-Car video*, YouTube (Dec. 5, 2014) ("Dashcam Video"), https://www.youtube.com/watch?v=gdrvV5ZzIxg.

[9] City Br., Ex. F at 3.

[10] *Id.*

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expressing anger at the way Robert was yelling at his mother.[11] He then announced "my patience is done, it's done, it's over, so somebody's gonna go to jail,"[12] and intimated that this "somebody" would be chosen based on a game of "eeny meeny miny moe."[13]

Miyekko repeated that she had not threatened anyone, which apparently prompted Officer Shepherd to choose her as the arrestee.[14] After Officer Shepherd grabbed her, Miyekko said, "Please don't touch me."[15] She repeatedly asked him, "Why am I under arrest? Can you tell me why I'm under arrest?"[16] Robert—the person against whom the alleged threat was made—also objected strongly to the arrest.[17]

At the car door, Miyekko pleaded with Officer Shepherd to "please talk to me,"[18] but Officer Shepherd instead pushed her into his patrol car. She fell onto her back, swore, and attempted to kick Officer Shepherd (it is not clear whether she made contact).[19] Officer Shepherd then took a step backwards away from the car, yelled, "she kicked me," and retaliated by "lung[ing] back inside the vehicle and deliver[ing] a closed fist strike to [Miyekko]'s face

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[11] Dashcam Video at 0:40.
[12] *Id*. at 0:50.
[13] *Id*. at 0:55; *see also* Office of Professional Accountability, Closed Case Summary Complaint Number OPA #2014-0216 (Dec. 13, 2016) ("OPA Report") at 3, http://www.seattle.gov/Documents/Departments/OPA/ClosedCaseSummaries/OPA2014-0216ccs 12-13-16.pdf (confirming that Office Shepherd "said a phrase commonly used to indicate the use of chance to make a selection").
[14] Dashcam Video at 1:05.
[15] *Id*. at 1:10.
[16] *Id*. at 1:18-23.
[17] City Br., Ex. F at 4.
[18] Dashcam Video at 2:28.
[19] *Compare*, City Br., Ex. F at 4 (declaring it "uncontroverted that [Miyekko's] kick landed in Officer Shepherd's face), *with* OPA Report at 6 (finding only that it was "more likely than not that [her] right foot made some physical contact"), *and* Dashcam Video at 2:45 (neither contact nor lack of contact can be established).

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with such force that it fractured her eye socket and inflicted substantial soft tissue damage to her face."[20]

OPA investigated and ultimately found that "[h]itting the subject in the face with the amount of force employed by [Officer Shepherd] was unreasonable and excessive, given the totality of the circumstances."[21] OPA concluded that Officer Shepherd violated three separate policy provisions related to the use of force, and that termination of employment was the appropriate remedy.[22] Chief O'Toole agreed and expressed concern that Officer Shepherd's punch may have been an act of retaliation:

> I am unconvinced that your reaction was either a trained instinct or an unintentional response. Your instinctive movement away from the subject, and ability to process and formulate a verbal response prior to your physical response only reinforces this notion . . . . Moreover, the level of force you used was not insignificant—quite the opposite, in fact. Your force seriously injured the subject and could have been lethal.[23]

Chief O'Toole also observed that this was not the first time that Officer Shepherd had disregarded department policy with serious consequences.[24] In 2009, Officer Shepherd responded to a call reporting that a man, Valente Alvarez-Guerrero, had assaulted his roommate. Officer Shepherd arrested Mr. Alvarez-Guerrero, but apparently believed that the King County Jail would refuse to book him because he was scheduled to have surgery on his hand the following day. Officer Shepherd nevertheless called his supervisor and obtained authorization to

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[20] OPA Report at 5; *see also* Dashcam Video at 2:45-3:00; *id* at 3:18 ("[Y]ou punched me for no reason.").

[21] OPA Report at 4-5.

[22] *Id*. at 8.

[23] MYNorthwest, *Seattle Police Officer Fired for Punching Woman Tells His Side of the Story* (Nov. 22, 2016), http://mynorthwest.com/470124/seattle-police-officer-fired-for-punching-woman-tells-his-side-of-the-story/.

[24] City Br., Ex. F at 25.

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release the suspect. This violated department policy because supervisors are required to conduct screenings in-person prior to authorizing release. It also violated state law, which defines all fights between roommates (even those who are not romantically involved) as domestic violence and mandates that an arrestee be booked in such instances. But Officer Shepherd never told his supervisor that the victim was a roommate. And because the supervisor was not privy to this information, he erroneously authorized Mr. Alvarez-Guerrero's release. That same night, Mr. Alvarez-Guerrero fatally stabbed his roommate.[25]

1. How Officer Shepherd's case was reviewed on appeal.

Under the prior SPOG CBA, Officer Shepherd had the right to appeal his termination to the Disciplinary Review Board ("DRB"), a body comprised of three members: one appointed by the City, one by SPOG, and one "neutral" member, here, an arbitrator. Notably, the DRB *agreed* that Officer Shepherd had violated at least one department policy regarding the use of force against handcuffed individuals.[26] But instead of deferring to the Chief's termination decision, the DRB concluded that termination was not a proportionate penalty and ordered reinstatement with full back pay "less pay reflecting a 15-day unpaid suspension." The deciding vote was cast by the arbitrator member of the DRB. The union representative voted to reinstate Officer Shepherd, and the management representative voted to sustain the termination.[27]

The arbitrator who cast the deciding vote dismissed the Chief's conclusion that Officer Shepherd would not change his behavior and therefore was not safe to continue to employ as a

[25] Sara Jean Green, *Seattle Officers Appeal Discipline for Fatal Release Decision*, Seattle Times (May 11, 2010), https://www.seattletimes.com/seattle-news/seattle-officers-appeal-discipline-for-fatal-release-decision/.

[26] *See* City Br., Ex. F at 21.

[27] *Id*. at 30.

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sworn officer.[28] She also (1) brushed aside the Valente Alvarez-Guerrero incident as "quite [a] different matter[]," despite the Chief's conclusion that both incidents showed poor judgment, (2) determined that Officer Shepherd's lack of insight and adamant stance that he did nothing wrong weighed *in his favor* because, according to the arbitrator, his unremorseful posture showed that he had "an honest, but mistaken belief that he was following SPD policy," and (3) gave great weight to Officer Shepherd's employment record while discounting SPD leadership's assessment of that record.[29] The decision showed no deference to the Chief's judgment.[30]

2. The appeals process under the Accountability Ordinance would have differed in important ways and under the CBAs will be even less consistent with the Consent Decree's goal of public trust and confidence.

Officer Shepherd's disciplinary appeals process would have been much different under the Accountability Ordinance, which creates a transparent appeals process designed to instill public trust and confidence, critical ingredients to constitutional policing.

The DOJ takes the position that "there is nothing to suggest that the option chosen by the City of Seattle will make disciplining officers for offenses related to the Consent Decree (Use of Force or biased policing) more difficult than in the past."[31] This fails to address two important points. First, the CBAs abandon provisions that represented needed improvements over past practices that arose as part of the accountability system review called for under this Consent Decree and the associated MOU. Second, with the newly-negotiated requirement of a heightened standard in almost all officer termination cases, it has become more difficult to sustain discipline even compared to the prior situation under the former CBAs.

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[28] *Id*. at 26-27.
[29] *Id*.
[30] *Id*. at 21 (declining to follow "long line of arbitration rulings" stating that arbitrators should "only . . . modify penalties which are beyond the range of reasonableness").
[31] United States' Response to Court's Order to Show Cause (Dkt. 528) ("DOJ Br.") at 12.

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First, under the Accountability Ordinance, Officer Shepherd and SPOG would not have been allowed to choose their preferred appellate forum. They could not have chosen a path where the appellate decision-maker was an arbitrator whose selection they could have vetoed. Moreover, the proceedings would have been open to the public, making it more difficult for City officials and SPOG to delay issuance of the reinstatement decision until after the parties had updated the Court and the SPOG CBA had been approved by the City Council—a controversy that has come to light since the City submitted its brief.[32]

Under the Accountability Ordinance, the reviewing body would have been required to defer to the Chief unless it made an affirmative finding that the termination was not in good faith for cause, and then it would have been required to limit its order to that necessary to rectify the identified issue.[33] But under the CBAs, such deference is no longer required. As shown in the Shepherd case, when a decisionmaker does not afford *any* deference to the Chief's determination, reversal is much more likely.

Under the Accountability Ordinance, Officer Shepherd's disciplinary appeal would have taken place before a neutral three-member Public Safety Civil Service Commission ("PSCSC") appeals panel or a hearing officer with subject matter expertise designated by the PSCSC. The members of the panel or the hearing officer would have been appointed through a merit-based process, would not be allowed to be a current City employee or have been employed by SPD within the past 10 years, and could not have been de-selected for this case or the next case if they

[32] *See* Lewis Kamb & Steve Miletich, *Seattle, Police Union Delayed Release of Ruling to Reinstate Fired Officer Until After Labor Contract Was Approved*, Seattle Times (Jan. 14, 2019), https://www.seattletimes.com/seattle-news/city-police-union-delayed-release-of-ruling-to-reinstate-fired-officer-until-after-approval-of-contentious-new-police-contract/.

[33] *See* Judge Levinson Decl., Ex. A § 5.

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decided a case adversely to the union. Moreover, the PSCSC would have been bound to set timelines to help ensure less delay in accountability, and the public and media would not have been barred from the proceedings.[34]

Second, under the Accountability Ordinance, the required standard of review was a preponderance, which is what the DRB used in the Shepherd case (contrary to the DOJ's suggestion about prior practice).[35] But the CBAs will now require an arbitrator to use an undefined "elevated standard" to make and uphold a sustained disciplinary finding in all termination cases where the alleged offense is stigmatizing to the law enforcement officer—which would apply to all for-cause terminations, which are by their nature stigmatizing. In effect, this will require OPA and the Chief to apply an elevated standard in any case that may ultimately lead to termination, so as not to invite reversal. In this respect, the new CBAs do not just impede needed improvements, but they actually take a step back from the pre-existing system, making it harder to address all serious misconduct.

The net result (akin to what we saw in the Shepherd case other than the standard of review) is that under the appeals system mandated by the CBAs, employees and the unions will likely choose arbitration rather than the PSCSC.[36] Under the CBAs' arbitration path, the union can strike the selection of an arbitrator; the general rules of arbitration apply, which are not grounded on values of public trust and confidence particularly relevant to police misconduct matters; deference to the Chief's decision is not required, which means that the arbitrator can

[34] *See id.*, Ex. A § 6.
[35] *See* DOJ Br. at 16-17.
[36] Also, if the PSCSC were ever selected, it will still have an SPD employee as one of its three members because the SPOG CBA requires bargaining of any changes to the PSCSC's composition. *See* Judge Levinson Decl. at 30 n. 42.

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issue a sweeping order well beyond correcting any procedural error; the arbitrator must use an undefined heightened standard of review for any type of serious misconduct that might result in termination; and complainants, the public, and the media are prohibited from attending the hearing—eliminating the transparency that was so critical to the Accountability Ordinance.[37]

As Judge Levinson's Declaration describes, and as both the City and the DOJ filings confirm, these are the rules that have been set in place in police contracts across the country for decades. The City and the DOJ view this universality as a strength. But as Judge Levinson points out, the widespread proliferation of these provisions in CBAs explains why officers who appeal their terminations are often reinstated, regardless of proven misconduct, its seriousness, or its impact on community trust.[38] These sorts of contractual provisions are a big reason why meaningful police accountability has proven so elusive to so many communities, including our own. Simply put, the Shepherd case is not an anomaly, but rather a feature of a system designed to limit accountability. It is no surprise that SPOG wanted to hold onto that attribute; but from the perspective of the community, doing so reinstated a longstanding barrier to accountability.

The City and DOJ insist that the Shepherd reinstatement was erroneous but that the City should not be faulted for actions out of its control, especially because the City is appealing the decision.[39] But the issue is not just that an arbitrator ordered Shepherd reinstated, but that the

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[37] *See* Judge Levinson Decl., Exs. A & E.

[38] *See* Judge Levinson Decl. ¶¶ 23-30; *see also* Kimbriell Kelly, Wesley Lowery & Steven Rich, *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, Wash. Post (Aug. 3, 2017), https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm_term=.363c83a47f5b (describing study where the Washington Post "filed open records requests with the nation's 55 largest municipal and county police forces" and found "[m]ost of the officers regained their jobs when police chiefs were overruled by arbitrators" based on cited proportionality concerns).

[39] City Br. at 10-11; *see also* DOJ Br. at 7 ("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.").

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SPOG and SPMA CBAs retain (and by changing the burden of proof, actually worsen) attributes of an appeals system that are likely to result in more cases in which discipline is overturned on appeal. In fact, the CBAs may even cause a Chief not to order suspension or termination, even in the face of misconduct, due to the heightened standard and other barriers embedded in these contracts.

The DOJ refers to six instances of officer termination that have been reviewed at arbitration over the last 15 years, and points out that termination was upheld in four of these six.[40] But the two that were not upheld were terminations associated with the very issues implicated by the Consent Decree. And notably, the two that were not upheld were terminations associated with excessive force, used against individuals of color, who were hand-cuffed in the back of the officer's patrol car. These were also the only two cases that involved individuals subjected to police action and excessive force, not matters initiated administratively by SPD itself.[41] Given the limits on certiorari, the City cannot obtain an extraordinary writ every time this happens. Systemic reforms—like those in the Accountability Ordinance—are the only answer.

B. The SPOG and SPMA CBAs are barriers to sustained reform.

The Court has stated that effective accountability processes are essential to maintaining

[40] Judge Levinson's Declaration raised the issue that the City provided the Court with no record of disciplinary appeals to validate its judgment that the Shepherd case was an anomaly. That Declaration was signed in January 2019, prior to the DOJ's February 2019 filing that identifies six termination cases over 15 years. However, the DOJ also did not provide documentation validating this assertion. There is also no record from either party about the appeal status of all non-termination disciplinary cases and any pending cases still in the queue for an appellate decision, nor identification of cases where the Chief decided to not terminate or suspend due to burden of proof considerations.

[41] *See* Declaration of Christina Fogg in Support of the DOJ Br. (Dkt. 529).

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police reform,[42] and also has expressed concern about the potential negative impact of collective bargaining on the accountability system.[43] When the Court first issued its finding of full and effective compliance, it stated that "[i]f collective bargaining results in changes to the accountability ordinance that the court deems to be inconsistent with the Consent Decree, then the City's progress in Phase II will be imperiled."[44] The Court's concern was well founded. The SPOG CBA undercuts long-sought and publicly promised reforms to the accountability system in significant ways leaving myriad weaknesses and gaps.[45]

The City paints a different picture, describing the impact as limited.[46] In particular, the City overstates the degree to which the CBAs enhance chain of command authority,[47] and understates how the Chief's ability to suspend an employee without pay pending investigation in cases where active duty would compromise community safety or trust was sharply pared back from the Accountability Ordinance.[48] The City also fails to acknowledge how the CBAs

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[42] *See* Order to Show Cause (Dkt. 504) at 5 ("[E]nsuring that appropriate oversight and accountability mechanisms are in place is one of the cornerstones to securing constitutional and effective policing in this City beyond the life of the Consent Decree.").

[43] 7/18/17 Hearing Tr. (Dkt. 407) at 21-22.

[44] Order Finding Initial Compliance (Dkt. 439) at 15.

[45] The City's brief expressly contradicts the City Council's Resolution calling on the Court to examine specific concerns about the effect of certain contractual provisions, including Article 3.1 governing "[t]he standard of review and burden of proof in labor arbitration," Article 3.6.B-D governing "[t]he calculation, extension and/or re-calculation of the 180-day timeline for the [OPA] to investigate complaints of misconduct," and Appendix E.12 "[n]arrowing [the] legislated subpoena powers of the [OPA." *See* Seattle City Council, Resolution 31855 (Nov. 13, 2018), http://clerk.seattle.gov/~archives/Resolutions/Resn_31855.pdf. It is unlikely that, when the City Council expressed a desire for this Court to pass on the impact of those provisions, it expected the Seattle City Attorney to affirmatively argue that these same provisions are harmless.

[46] *See* City Br. at 5-9; *id*. Ex. E (itemizing limited areas in which the City agrees the SPOG contract supersedes the Accountability Ordinance and contending that CPC analyses previously circulated are incorrect and the Ordinance is unaffected on specific points).

[47] City Br. at 20.

[48] *Compare id*. at 19 (touting purported improvements), *with* Judge Levinson Decl. ¶ 40(K), *and* Judge Levinson Decl. at 27 n. 38 ("A key issue is that, in serious cases with ongoing investigations, it is likely that charging decisions may take more than 30 days, requiring the Chief to restore to active duty an officer who ultimately will be charged with serious law

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undermine the Chief's authority to impose and maintain discipline by (i) restoring arbitration on appeal from the Chief's decision, and (ii) introducing a new heightened standard to sustain termination if the alleged offense could be stigmatizing to the officer and make it more difficult to find other law enforcement employment.[49] The City defends these concessions—which contradict the Ordinance it passed—because other public employees can appeal to arbitrators. But police officers are not in the same position as other public employees. They have the power to use deadly force and deprive individuals of their liberty, and their employer is currently subject to a Consent Decree due to the need to ensure that police powers are exercised in a constitutional manner.

For its part, the DOJ minimizes the impacts of the City's decision to bargain away the Accountability Ordinance's reforms. According to the DOJ, the "only circumstance" where it would be concerned with a local law or CBA would be if it conflicted with the Consent Decree. But the DOJ agrees that if the CBAs have "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."[50] As detailed below, the CBAs do precisely that: they make it harder to hold officers accountable, including for misconduct related to the Consent Decree. Notably, while DOJ presently does not predict that accountability system weaknesses will compromise progress on the underlying issues in this case, former U.S. Attorney Jenny Durkan early on was very clear that improving the accountability system was a requirement to ensure lasting reform:

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violations. The Chief is in the best position to know when restoring an officer to active duty is inconsistent with public trust in light of all the circumstances.").

[49] *Compare* City Br. at 23-27, *with* Judge Levinson Decl. ¶¶ 42-43.

[50] DOJ Br. at 10-11.

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> As we told the Court yesterday: the accountability system is in need of wholesale review and significant reform. Too many layers have been grafted on over the years by law and practice. It is almost unthinkable that so many experienced people can have so much confusion over how things work. It is also unacceptable. Both the officers and the public must have a system that is transparent, certain and just. The question is not simply how does the City improve what exists, but how does it create and insist on what is needed [with respect to accountability improvements].[51]

Contrary to the DOJ's narrow analysis, the CBAs affect numerous provisions of the Accountability Ordinance and the accountability system, not just maintaining arbitration as an option for review and imposing a heightened burden of proof—the only two changes the DOJ calls out.[52]

1. The SPOG CBA purports to supersede or nullify any other City law or policy that, implicitly or explicitly, conflicts with its terms.

The SPOG CBA provides that it preempts the Accountability Ordinance (and any other City law) that it "conflicts with."[53] The City itself states that the "conflict with" language should be understood to mean *any inconsistency*.[54] Thus, the preemption may encompass not just explicit, intentional conflicts, but also the use of slightly different terms, ambiguous phrasing, the omission of clauses, and terms ordered or organized differently that an arbitrator might later find to have created a "conflict." Given the open-ended scope of this preemption clause, it is not possible to ascertain the full extent to which the SPOG CBA nullifies City laws and policies. In

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[51] Lopez Decl., Ex. A.

[52] As previously noted, all of the areas in which both the SPOG and SPMA CBAs depart from or compromise the Accountability Ordinance, and implicate the Executive Order on secondary employment, the OPA Manual, and SPD policies, are comprehensively detailed in the Exhibits to Judge Levinson's Declaration.

[53] *See* City Br., Ex. B at 71, Art. 18.2 ("[T]he parties [to the SPOG CBA] and the employees of the City are governed by applicable City Ordinances, and said Ordinances are paramount except where they conflict with the express provisions of this [SPOG] Agreement.").

[54] City Br. at 3-4 ("If a local law or regulation is inconsistent with a . . . CBA[], then the CBA supersedes."); *see also id.* ("[A] liberal construction should be given to all of RCW 41.56 [governing public employees' collective bargaining] and conflicts resolved in favor of the dominance of that chapter" (quoting *Rose v. Erickson*, 721 P.2d 969, 971 (Wash. 1986)).

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other words, the full impact of the CBAs on the accountability system, as well as on public perceptions of that impact, is unknown.

Adding to the ambiguity, SPOG has not committed in any forum—let alone through binding submissions—to refrain from interpretations that nullify aspects of the Accountability Ordinance or other law. The City does not speak for SPOG and SPMA; these other parties can and likely will take a more expansive view of the concessions they and their members gained through these agreements. Notably, the parties to the CBAs have not provided the Court with an inventory of which aspects of the Accountability Ordinance they consider preempted or in conflict with CBAs. While the City lists a few areas, SPOG has remained silent as to its interpretation, reserving the ability to contend later that much larger swathes of the Accountability Ordinance are abrogated. Additionally, the parties have not provided information about the various existing Memoranda of Agreement which the CBAs cite as still in effect.[55]

Indeed, the City contends that deviations from the Ordinance will play out in a benign fashion, and that many aspects of the Ordinance the CPC has flagged will "stand as enacted due to a lack of actual conflict with a CBA."[56] For instance, the City claims that "longstanding past practice regarding location of OPA interviews" resolves the apparent conflict between the Accountability Ordinance's instruction that "OPA shall be physically housed outside any SPD facility and be operationally independent of SPD in all respects," and the contract's instruction that "[a]ny [OPA] interview . . . shall take place at a Seattle Police facility."[57] In other words,

[55] *See* City Br., Ex. A at App. E (SPMA CBA); *id.*, Ex. E at App. F (SPOG CBA).
[56] *See* City Br., Ex. E (green highlighted provisions).
[57] *See* Judge Levinson Decl., Ex. A § 35.

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the City asks the Court to believe that the text of the CBA does not mean what it says—an interpretation by which SPOG or an arbitrator is unlikely to feel constrained.

History suggests that SPOG will zealously discharge its duty to its members by leveraging every ambiguity, omission, different word choice, or inconsistency as presenting a conflict with CBA terms; seeking to abrogate Accountability Ordinance provisions, other municipal law or subordinate policy bearing on accountability that do not expressly align with SPOG CBA terms.[58] Thus, the full scope of the contracts' impact is a matter of the unions' view, which is not before this Court.[59] The unions are in no way estopped from taking a much more expansive position about how much the Accountability Ordinance was eroded, and may have a duty to their members to do so when such an interpretation would advance a member's interest.[60] Judge Levinson's Declaration, informed by her closer acquaintance with the materials and with the approach taken by the unions in the past,[61] is a reliable guide to the likely range of these arguments.

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[58] This includes Mayor Burgess's 2017 Executive Order on secondary employment. *See* Office of the Mayor, Executive Order 2017-09: Reforming Secondary Employment at the Seattle Police Department (Sep. 27, 2017), http://www.seattle.gov/Documents/Departments/Mayor/Executive-Order-2017-09-Secondary-Employment.pdf. It also includes various EEO provisions, as well as a range of SPD policies now embedded in the OPA Manual and elsewhere. *See* Judge Levinson Decl. ¶¶ 65-66.

[59] The Court may wish to devise a mechanism to take sworn testimony from union representatives that either confirms their agreement with the City's analysis in their Exhibit E or confirms the CPC's point that the unions retain the prerogative to argue that the contracts supersede a much wider swath of Accountability Ordinance provisions.

[60] *See Diaz v. Int'l Longshore & Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007) (describing duty of fair representation requiring unions to "serve the interests of all members . . . with complete good faith and honesty") (citation omitted).

[61] Judge Levinson Decl. ¶¶ 5,12.

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2. Contrary to the suggestion of the City and DOJ, the CBAs are not consistent with the purpose of the Consent Decree.

The DOJ focuses on arbitration (discussed above) and the burden of proof and standard of review to be applied by arbitrators. The DOJ is correct that many police contracts across the country do not expressly set forth the required burden, and that absent explicit guidance arbitrators use traditional principles of labor arbitration to guide their approach in each case. And, as the DOJ's brief and the DRB cases included in their exhibits highlight, those traditional labor arbitration principles leave a wide berth for case-by-case discretion.

But the conclusion the City and DOJ draw from this context is that it is not inconsistent with the purposes of the Consent Decree for the City to embed an "elevated standard of review" for termination cases where the alleged offense is stigmatizing to a law enforcement officer, and otherwise rely on labor arbitration principles. In so doing, the parties argue that the way for the Court to assess this issue is to consider it a success that this approach is consistent with what police unions everywhere else have also been able to embed in their contracts, "in essence returning SPD to the ranks of the large number of other police departments."[62]

As Judge Levinson points out, that is the wrong conclusion to draw if one is prioritizing the public's interest.[63] First, arbitration conventions are not transparent or known to the public and are far from predictable. Experience in Seattle and other jurisdictions show that approaches differ from arbitrator to arbitrator (a fact the DOJ highlights in its brief and exhibits). Second, the City's rationale for adopting an "elevated" standard of review (apparently because arbitrators often use this elevated standard) ignores that the Accountability Ordinance eliminated arbitration

[62] DOJ Br. at 16.
[63] *See* Judge Levinson Decl. ¶¶ 42-43.

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for this and other reasons. Third, the course most consistent with public trust and confidence would have been for the City to remedy the vagueness and inconsistency in the standard of review used by arbitrators by *clearly requiring a preponderance standard and a deferential review standard in the CBAs* (which would have been consistent with the prior direction from the Court). That approach would have aligned with the Consent Decree.[64]

The City and the DOJ miss another important point. These CBAs don't just require a higher standard for dishonesty, or even for a narrow range of serious misconduct. The CBAs have in effect eliminated the preponderance standard for *all* serious misconduct. As Judge Levinson's Declaration makes clear, this will have untold ramifications for the public:

> The SPOG CBA mandates that an ambiguous "elevated" standard be used for cases that result in termination where the misconduct is "stigmatizing" and makes it "difficult for the employee to get other law enforcement employment." But nearly any misconduct for which an employee is fired could be viewed as meeting these conditions (and certainly the union and employee will assert that is the case whenever termination is imposed). The weakening in accountability then has a domino effect. De facto, the higher standard of review will also impose a higher burden of proof for OPA investigations and for Chief's initial decision for a wide span of misconduct cases. The preponderance of evidence will no longer be the burden of proof for any case of alleged misconduct that may lead to termination, because both the findings and disciplines now will only be sustained on review if they meet this undefined "elevated" standard of review. OPA will have to use this higher burden of proof for *any serious misconduct*—it won't be able to divine at the initiation of an investigation whether ultimately discipline will be warranted, whether that discipline might be termination, and whether that termination might be found to be "stigmatizing". The impact of this change to the accountability

[64] Under the CBAs' sliding-scale standard, it is impossible for the public to know what standard will apply until the arbitrators deliver their decision. The City's analysis neglects the values of clarity and consistency in results, both of which were served by firmly requiring adjudicators to use a preponderance standard consistent with prior direction from the Court. And, were an adjudicator to depart from the preponderance standard, the City would have been able to appeal under an abuse-of-discretion standard.

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> system is, of course, to the detriment of the public and complainants. Serious misconduct that heretofore needed to be proven by a preponderance of the evidence now must be proven by a higher standard, a standard that has yet to even be defined."[65]

With regard to using the heightened standard for dishonesty resulting in a presumption of termination, the DOJ says that it erred previously when it took issue with that heightened standard. Again, the CPC takes a different view, treating public trust and confidence as the touchstones. As Judge Levinson summarizes in her Declaration, "[t]he City describes this CBA approach as 'the City and SPOG agreed to treat dishonesty in the same manner as other cases of misconduct.' . . . This may be technically in compliance with the Court's earlier direction endorsing the recommendation to not have termination for dishonesty be subject to a different burden of proof than other misconduct, but it appears to be a significant departure from the Court's intention to strengthen the accountability system, not weaken it.'"[66]

Additionally, with regard to dishonesty, the parties do not address that the City agreed to retain the requirement that intentionality must be proven in order to sustain an allegation of dishonesty.[67] As the DRB itself said in the *Hunt* case the DOJ cites:

> For one thing, if intent were the proper standard, the Department and OPA (as well as DRBs like the present one) would forever be attempting to divine what is in an officer's heart, and there is no reliable way to make that kind of determination with any degree of accuracy.[68]

Accordingly, the CPC does not concur that the public and the Court can rely on the City's and the DOJ's analysis as to how much of the Accountability Ordinance and related systemic reforms survive the SPOG CBA.

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[65] Judge Levinson Decl. ¶ 41.
[66] *Id.* ¶ 43.
[67] *See* Judge Levinson Decl., Ex. A § 9.
[68] DOJ Br., Ex. G at 15.

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Moreover, Judge Levinson explains why it is important to understand how the SPMA CBA departs from the Accountability Ordinance in certain respects.[69] In particular, the SPMA CBA retains multiple disciplinary appeal avenues, including arbitration, and uses the same standard of review as applies under "established principles of labor arbitration."[70] And while the SPMA CBA nominally agrees that the Accountability Ordinance may be implemented except where not expressly abrogated, the impact of the SPOG CBA renders that agreement hollow because the Accountability Ordinance is now full of holes inflicted by the SPOG CBA.

3. The CBAs undermine the gains achieved under the Consent Decree.

Community confidence will suffer because the recommended oversight to address corruption in the secondary employment market for policing services will not be implemented. OPA's limited ability to ensure that both criminal and administrative investigations into serious misconduct—particularly when it has occurred in Seattle—can be conducted without compromising one another will not be improved;[71] if a complaint is not filed within four years, discipline will be barred even where dishonesty and certain types of excessive force or concealment have been proven;[72] employees of different ranks will still be treated differently;[73] and the Chief will continue to be forced to restore to active duty personnel who may have engaged in grave misconduct pending prosecutors' decisions about filing charges.[74] There are many other explicit concessions that do not align with strengthening public trust and confidence, and implicit concessions that will later be captured by the CBA's preemption clause (as any

[69] *See* Judge Levinson Decl. ¶¶ 31-37, 40, 42.
[70] *See* City Br., Ex. A at 32, Art. 16.1.
[71] *See* Judge Levinson Decl., Ex. A § 11.
[72] *Id.*, Ex. A § 13.
[73] *Id.*, Ex. A § 3.
[74] *Id.*, Ex. A § 12.

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inconsistency can be deemed a conflict and used to overturn a decision of the Chief, regardless of the minor nature of the contractual inconsistency and the significant nature of the misconduct). All of this means that accountability will be neither certain nor predictable.

The Settlement Agreement describes two different "paths" to full and effective compliance,[75] but the parties here "collaboratively chose[]" the policy-based path as opposed to the outcome-based path.[76] Consequently, any change to existing policy designed to implement reform, and any failure to implement anticipated system improvements, may imperil the City's continued compliance. The Settlement Agreement also made clear that "[a]t all times, the City and SPD will bear the burden of demonstrating substantial compliance with the Settlement Agreement."[77]

As Judge Levinson states in her Declaration describing some of the most impactful areas in which the Accountability Ordinance was compromised:

> Seattle is now considered at the national forefront for many of its policies, systems, and training reforms because of the Consent Decree. The City's approach to bringing the accountability system up to par with the other Consent Decree reforms was to pass the accountability ordinance and then to prioritize aligning the CBAs to it through bargaining. Unfortunately, with respect to the accountability system, in contrast with the other reforms implemented under the Consent Decree, the provisions in the current CBAs do not come close to best practices. Accountability system reforms as now changed by the CBAs pale in comparison to other reforms achieved under the Consent Decree…. To help ensure constitutional policing, appropriate oversight in which the community can place its trust is necessary. The accountability system must be effective. Seattle's system has many positive elements that others do not. But the CBAs before the Court impede Seattle from having a system the public can trust to work when the added safeguard of judicial oversight is gone, and regardless of who the Chief, Council, and Mayor may be.[78]

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[75] Order Finding Initial Compliance (Dkt. 439) at 2.
[76] *Id*. at 4 n.4.
[77] Settlement Agreement and Stipulated [Proposed] Order of Resolution (Dkt. 13) ¶ 223.
[78] Judge Levinson Decl. ¶¶ 76, 81-82.

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If the Court concludes, as the CPC believes, that these CBAs have frayed the accountability framework of which Seattle was justifiably proud just 18 months ago, the ramifications for other accomplishments during the Consent Decree period are substantial. Accountability processes are essential to safeguard other reforms and to reinforce the shift in culture that the Consent Decree has achieved.[79]

4. The SPOG CBA rejects reforms that addressed known issues with secondary employment.

In 2017, actual and potential corruption in the Seattle secondary market for off-duty policing services came to light when a contractor vying to break into the secondary employment market by happenstance received damning information from an SPD officer who described the existing system as akin to the Mafia, and observed that it was virtually immune to the efforts of SPD commanders to control or reform it.[80] Despite immediate statements of resolve by City leaders to get a hold of this situation and clean it up, the SPOG contract actually leaves it in place exactly as it has been since 1992, and insulates it from any change.

The potential for corruption, and the threat to public confidence and transparency posed by secondary employment practices, and the need for reforms, had been called out repeatedly by Judge Levinson when she was the OPA Auditor. That this issue remained unaddressed despite extensive media coverage of highly problematic practices,[81] and while the City was subject to the

[79] *See* Order to Show Cause (Dkt. 504) at 5 ("[E]nsuring that appropriate oversight and accountability mechanisms are in place is one of the cornerstones to securing constitutional and effective policing in this City beyond the life of the Consent Decree."); *see also* Judge Levinson Decl. ¶¶ 71-80.

[80] The CPC has attached an appendix which includes particularly illuminating "detailed notes of a street-corner conversation with uniformed off-duty . . . detective . . . who described the off-duty system in organized crime-terms—using the word 'mafia'—and said nobody would be allowed to interfere with it," following the article that includes the link to these notes. Mike Carter & Steve Miletich, *Seattle City Light Has Paid 7.8M To Off-Duty Cops In 'Unusual Relationship'*, Seattle Times (Oct. 8, 2017), https://www.seattletimes.com/seattle-news/seattle-city-light-has-paid-7-8m-to-off-duty-cops-in-unusual-relationship/.

[81] *See* Steve Miletich & Lewis Kamb, *Off-duty Work By SPD Officers Has Been An Issue For Years*, Seattle Times (Sept. 24, 2017), https://www.seattletimes.com/seattle-news/crime/off-duty-work-by-spd-officers-has-been-an-issue-for-years/; David Kroman, *When Cops Play*

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Court's supervision of police matters, was of great concern to the CPC, Judge Levinson, and some City leaders. In response, then-Mayor Burgess issued an Executive Order mandating a review process by the Seattle Department of Human Resources, the Seattle Information Technology Department, the City Budget Office, the Office of the Mayor's Legal Counsel, and the Department of Finance and Administrative Services, with implementation of their recommendations to follow.[82] Although such reforms were also called for in the Accountability Ordinance,[83] Mayor Burgess's Executive Order was intended to expedite these overdue corrections.

It was dismaying, and damaging to transparency and community confidence, to learn that the SPOG contract explicitly maintains a past provision that the secondary employment system will be as it was *in 1992*, and that the City is required *to bargain* for the very changes that the Accountability Ordinance and the Mayor's Executive Order otherwise *require*. It is evident from Labor Relations Policy Committee ("LRPC") documents provided to the CPC by the Mayor's Office that this derogation from the provisions of the Accountability Ordinance and the requirements of the Executive Order were not clearly called out for members of the LRPC or Councilmembers, who were instead led to believe that changes to the secondary employment program would be undertaken and there would be a re-opening to bargain only economic effects.[84] While the LRPC and Council may have been misled, there is now no question that the

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Security Guard, Whom Do They Serve?, Crosscut (Oct. 19, 2016), https://crosscut.com/2016/10/when-cops-play-security-guard-who-do-they-serve; Steve Miletich & Mike Carter, *Mayor Orders Seattle Police To Take Control of Officers' Lucrative Off-Duty Work Amid FBI Investigation*, Seattle Times (Sept. 28, 2017), https://www.seattletimes.com/seattle-news/mayor-orders-seattle-police-to-take-control-of-officers-off-duty-work-amid-fbi-investigation/; Heidi Groover, *Mayor Burgess Signs Executive Order To Stop Private Management of Cops' Off-Duty Work*, The Stranger (Sept. 27, 2017), https://tinyurl.com/y2vefzyg; Levi Pulkkinen, *As FBI Investigates Seattle Cops' Off-Duty Work, City Steps In*, Seattle PI (Sept. 27, 2017), https://www.seattlepi.com/local/article/As-FBI-investigates-Seattle-cops-off-duty-12234590.php.

[82] Office of the Mayor, Executive Order 2017-09: Reforming Secondary Employment at the Seattle Police Department (Sept. 27, 2017), http://www.seattle.gov/Documents/Departments/Mayor/Executive-Order-2017-09-Secondary-Employment.pdf.

[83] *See* City Br., Ex. E at § 3.29.430 (D)-(F).

[84] *See* Lopez Decl. ¶ 3, Ex. B (attaching relevant communications).

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secondary employment reforms in the Accountability Ordinance, and the Executive Order were nullified by the SPOG CBA, and the community is back to square one.

C. The Court should make clear that fixing what has gone off track with the CBAs, and undoing the impediments they embed to the intended reform of Seattle's police accountability system, is a necessary precondition to a successful resolution of the Consent Decree process.

The Court asked the parties and *amicus* to propose a way forward. The CPC submits that the changes discussed above and detailed in Judge Levinson's Declaration pose a threat to other progress achieved during the Consent Decree. As noted in the CPC's 2018 memorandum supporting a finding of full and effective compliance, we value that progress and commend those who collaborated to achieve it. We supported the Court's initial finding, do not lightly suggest suspending it, and sincerely hope the City can rectify the damage done to accountability reform in time to avert a reversal of that achievement. Despite our regret that we have come to this point, the CPC asks the Court to make explicit that the City must demonstrate that the damage done to accountability reform by the CBAs has been fully rectified before it can discharge its obligations in this case and bring the Court's supervision to a successful conclusion.

The City argues that it remains in full and effective compliance and that there is, therefore, nothing for the Court to do besides *approve* the weakened Accountability Ordinance.[85] According to both the City and DOJ there is no need for concern unless and until issues show up in compliance reports.[86] And even if that happens, the most the City will concede is that "if any of [its] compromises unexpectedly turn out to hinder accountability, they will be high priority goals in the next round of negotiations."[87] Put differently, the City's plan is "see how it goes and try again next time."

[85] City Br. at 30; *see also* DOJ Br. at 18 (requesting same).
[86] City Br. at 10, 15.
[87] *Id*. at 27.

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But there's no reason to believe the City will drive a harder bargain next time once the Consent Decree has been lifted. Now is the best opportunity to make key improvements. The community has been promised "next time" for far too many years.

U.S. Attorney Durkan was correct in 2014. This was and remains critical and cannot be kicked down the road until after the Consent Decree is lifted. The situation is an important one for community confidence. After the celebration and "mission accomplished" quality of City officials' participation in the Accountability Ordinance and the Executive Order on secondary employment—complete with a press conference on the steps of City Hall—it is jarring to find that City negotiators did not prioritize key reforms in that ordinance when negotiating with SPOG and that the advertised commitment to rectifying the secondary employment scandal was abandoned. Community members can be forgiven for sinking into cynicism should the situation remain unchanged.

Never before and likely never again have so many resources, community attention, and expertise been devoted to identifying the weaknesses in Seattle's existing accountability system and proposing improvements. If that much concentrated learning and effort, under the watchful eye of this Court, was insufficient to get changes in the high-profile areas of disciplinary appeals and secondary employment, the CPC is highly skeptical that "next time"—in 2021 and without judicial oversight—will go better.

This is a unique situation requiring the Court to craft a way forward that is reasonably likely to resolve these intractable dynamics. Courts enforcing consent decrees have wide latitude to take steps to effectuate the purpose of the decrees.[88] The Court should make clear that

[88] *See Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986) (acknowledging that "flexibility" to modify consent decrees "when experience with a consent decree reveals problems with its administration . . . is essential to the administration of comprehensive decrees arising out of complex litigation [and that] Courts have allowed modifications that retain the essential features and further the primary goals of such decrees while taking into account what is realistically achievable by the parties."); *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985) ("[The] power to modify in light of changed circumstances extends to the modification of consent decrees.").

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rectifying the damage done by the CBAs is a precondition to successful resolution of the Consent Decree process.[89] The CPC does not make its recommendation lightly. It recognizes that SPD has accomplished a great deal through dedicated effort in the months and years leading up to this Court's initial finding of full and effective compliance. But the community should not be asked to rely on an unenforceable promise to "do better" next time around.

IV. CONCLUSION

Real reform must be enduring and resilient. But in many ways both apparent (because they are enumerated) or forthcoming (under the preemption clause), reforms embedded in the Accountability Ordinance and other laws and policies have been materially weakened. Because accountability structures reinforce and sustain other reforms, in order to safeguard the many important accomplishments of the Consent Decree period, the CPC respectfully asks the Court to convey that the Consent Decree will not be resolved until the City establishes that the accountability system reforms have in fact been secured.

Officer Shepherd played "eeny meeny miny moe" with the law, fractured a woman's eye socket, and still kept his job. That incident illustrates how these rollbacks could limit the Chief's ability to ensure accountability moving forward. The Officer Shepherd order is not an outlier, but rather a feature of the old system that the City has agreed to bring back with these CBAs: a weakened accountability system that reliably will lead to outcomes that undermine the purposes of the Consent decree, including public confidence and transparency. That the City must resort to an extraordinary writ to the superior court to contest the Shepherd order demonstrates just how significant and damaging these rollbacks to accountability will be.

Accordingly, to safeguard the many important accomplishments of police reform, the CPC respectfully asks the Court to convey that the Consent Decree will not be resolved until the City establishes that the accountability system reforms have in fact been secured.

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[89] *See* Order Finding Initial Compliance (Dkt. 439) at 14 ("The court will not hesitate to restart the two-year sustainment period if SPD falls below the full and effective compliance standard set forth in the Consent Decree.").

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DATED: February 20, 2019

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 20, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

DATED this 20th day of February, 2019.

s/ David A. Perez
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APPENDIX

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Seattle City Light has paid $7.8M to off-duty cops in 'unusual relationship'

seattletimes.com/seattle-news/seattle-city-light-has-paid-7-8m-to-off-duty-cops-in-unusual-relationship/

A retired Seattle police officer's private company has exclusively billed Seattle City Light more than $7.8 million over the past five years to provide off-duty police officers for traffic control or security work, according to billing data obtained by The Seattle Times.

The company, Seattle's Finest Security & Traffic Control, has been chosen by utility crew chiefs for every job, even though another company, Seattle Security, also provides off-duty officers, the records show.

Details of the lucrative relationship between Seattle's Finest and City Light come at a time the FBI is investigating allegations of price-fixing and intimidation in the hiring of off-duty officers directing traffic at parking garages and construction sites.

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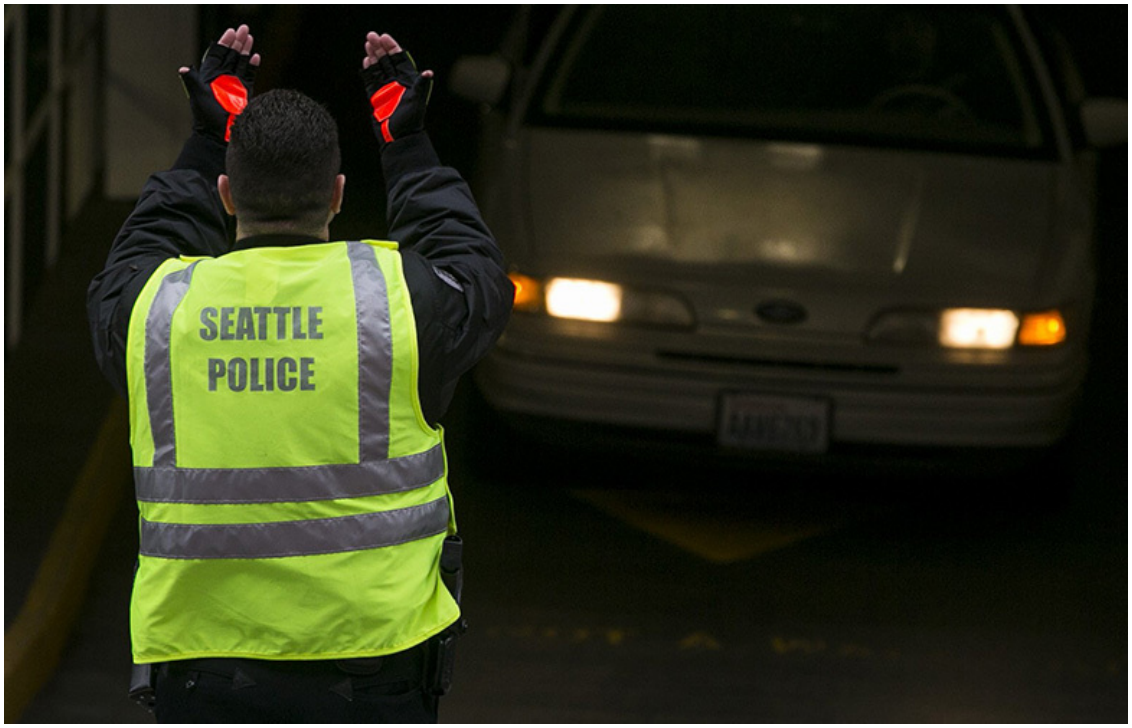

- Mayor orders Seattle police to take control of officers' off-duty work amid FBI investigation
- Off-duty work by SPD officers has been an issue for years

- Seattle police officials concerned about officers' off-duty work before FBI probe
- FBI investigating off-duty work by Seattle police at construction sites, parking garages
- 2005: How Seattle cops failed to police their own

The allegations, made by a new startup company, Blucadia, and echoed by some downtown business owners, have renewed longstanding concerns about a murky off-duty employment arrangement controlled by few companies with little oversight.

Alarmed by the developments, temporary Seattle Mayor Tim Burgess moved on Sept. 27 to wrest control of off-duty police work from the private sector and place it under the control of the Police Department. He appointed a task force to provide him specific recommendations by Nov. 14.

For years, much of the off-duty work has gone to Seattle's Finest, owned and operated by Raleigh Evans, a former 20-year Seattle police officer who formed the company in 2002 while still working for the department.

Seattle's Finest has provided officers for some of the city's biggest construction projects, including the Seattle seawall and First Hill streetcar, as well as for Seahawks and Sounders games, according to the company's website.

The other longtime company, Seattle Security, which is affiliated with the Seattle Police Officers' Guild (SPOG), has garnered additional jobs. Guild members also work for Seattle's Finest.

Evans did not respond to numerous requests for an interview. Earlier, he described Seattle's Finest and Seattle Security as "friendly competitors."

Records show Seattle's Finest has been the sole provider of off-duty officers to Seattle City Light and the city's Transportation Department since at least October 2012. No jobs were assigned to Seattle Security, the SPOG spinoff.

City Light spokesman Scott Thomsen said crew chiefs are given a choice to use either company when they need an off-duty officer for traffic control. City policy requires sworn officers to direct traffic around utility work sites, which are often located in the roadway.

Because of the often urgent nature of the need — downed power lines, for example — Seattle City Light is exempt from having to bid for the jobs, according to the city finance department.

Thomsen said the utility does not have a contract with either Seattle's Finest or Seattle Security, and that neither is a "preferred vendor," which requires a screening process.

"There are these two companies, and it's up to each crew chief to decide which company to pick," he said.

He could not explain why crew chiefs called Seattle's Finest for every job requiring an off-duty officer during that time period. City Light finance records show that between October 2012 and Sept. 28 of this year, Seattle's Finest submitted 2,674 invoices to City Light for payments totaling more than $7.8 million.

"There's been a long relationship," Thomsen said. "It looks like they (Seattle's Finest) tend to be the folks called first."

He said Seattle Security has never complained.

Seattle's Finest also provided off-duty officers to Seattle Department of Transportation crews, submitting invoices totaling an additional $445,753 since September 2015, and the city Parks Department, which paid $2,234.

By comparison, the finance department was able to identify a single payment of $236 to Seattle Security in the past two years by an unidentified city department, the records show.

Seattle's Finest and Seattle Security have a long and friendly relationship that has allowed both to operate in the local off-duty market, Guild President Kevin Stuckey, who represents more than 1,300 officers and sergeants, told The Times in an interview last month. Seattle's Finest is listed as a sponsor on the guild's website.

Stuckey couldn't be reached to discuss the City Light work.

In an earlier interview, Evans — the owner/operator of Seattle's Finest — said the companies were "friendly competitors."

When Blucadia emerged as a competitor to Seattle's Finest and Seattle Security last year — ultimately earning the endorsement of the Seattle Police Department — Evans asked a state licensing agency to investigate its credentials.

Earlier this year, Rob McDermott, Blucadia's chief executive officer, complained to Seattle police officials that his startup company was being blackballed by SPOG. He reported receiving a profane and intimidating call from Stuckey when he sought to discuss Blucadia's efforts to use Seattle officers.

Stuckey has acknowledged he lost his temper, saying McDermott relentlessly pursued him for a meeting and had been "condescending and rude." But SPOG has done nothing improper, he said.

In April, Seattle Police Chief Kathleen O'Toole referred Blucadia's allegations to the FBI. Word of the investigation didn't publicly surface until last month.

At that point, McDermott publicly disclosed detailed notes of a street-corner conversation with uniformed off-duty Officer MacGregor "Mac" Gordon, a detective and 32-year department veteran, who described the lucrative off-duty system in organized-crime terms — using the word "mafia" — and said nobody would be allowed to interfere with it. The conversation was witnessed by Drew Finley, a Blucadia co-founder and former Pierce County sheriff's deputy.

Gordon has acknowledged the conversation but said he was joking and that his comments were taken out of context.

McDermott's notes state that Gordon told him that officers would defend "the 'really cake jobs' such as Seattle City Light off-duty work."

"Yeah, we would really break some bones if those were messed with,'" Gordon reportedly said.

"Those jobs are a minimum of four hours, and most are done within an hour and a half," he said.

Evans has previously acknowledged in an interview that Seattle's Finest bills a minimum of four hours regardless of the duration of the work, because it's too difficult to get officers who live outside the city to come into Seattle for less. He declined to provide a minimum amount Seattle's Finest would charge for an officer, saying he didn't want to "tip off the competition."

According to Stuckey, the guild president, the union's contract requires officers be compensated $45 an hour for off-duty traffic-control work.

The Times reviewed a list of the nearly 3,000 City Light invoices, finding just five were for less than $200, and nearly a quarter under $1,000. The average invoice submitted to City Light by Seattle's Finest between 2012 and last month was $2,934.

"We need cops for traffic control," said Thomsen, the City Light spokesman, when asked about the four-hour minimum. "If they've outlined that as a minimum charge, then that's what we have to accept" without a contract in place.

"It is an unusual relationship, and you can certainly ask questions," he said.

Thomsen said he wasn't aware of Blucadia, which originally called itself CopsForHire.

The Olympia company, which describes itself as new model rooted in the gig economy, matches police officers with customers through a software program, much like Uber connects drivers to riders.

Last year, as Blucadia began discussions with the Seattle Police Department about a business relationship, Evans of Seattle's Finest filed his complaint in October 2016 with the state Department of Licensing.

"There is a company in Washington State using the name of 'Cops for Hire,' and selling themselves as a company employing off-duty officers for work within the State," the complaint said.

It alleged that CopsForHire is "not licensed as a private security company, as we are required to be."

The complaint also said CopsForHire shouldn't be allowed to use the word "Cops" in their name, noting Seattle's Finest had previously been barred from using the word "Police" because it might be viewed as a law-enforcement agency.

In a written response to the complaint, CopsForHire said it is not a law-enforcement organization.

"CopsForHire does not, nor will we ever hire or employ law enforcement officers," the company wrote to the Licensing Department, explaining it only serves as a connection for officers and customers.

The "Cops" issue was ultimately resolved when the company changed its name to Blucadia. The company says it did so for business reasons not related to the complaint.

The license issue remains under review, according to a Licensing Department spokeswoman, including a subpoena issued to Blucadia in March.

McDermott, the Blucadia CEO, declined to characterize Evans' actions. "I viewed his complaint as something he felt he needed to do, but I have really no way of interpreting or knowing what Raleigh's intentions were in doing so," McDermott said in an email.

Seattle police chose Blucadia as its preferred provider for off-duty work, giving the company a portal on the department's web page earlier this year.

Brian Maxey, the department's chief operating officer, endorsed Blucadia's system as simpler and more transparent.

The portal has been removed while the task force created by Burgess considers recommendations, although Blucadia may still sign up officers on its own.

LINKED
“DETAILED NOTES”

Also available directly at:
https://www.documentcloud.org/documents/4057339-SPD-Off-Duty-Notes.html

RE: **Notes from SPD Officer Mac Gordon**

Prepared by: **Drew Finley and Rob McDermott (both present in conversation)**

Date: **Conversation Date – April 4, 2017**

CONFIDENTIAL

- After a meeting with Seattle PD leadership we noticed an SPD officer directing traffic from the Columbia Tower underground parking garage and approached him to introduce ourselves at approximately 4:00 PM on April 4th 2017.

- We decided to speak with the officer in the hopes of gaining additional market insight about off-duty opportunities and how SPD manages them. We approached him and introduced ourselves, immediately disclosing that we were from CopsForHire, that Drew was the founder and Rob the CEO.

- He introduced himself as Officer Mac Gordon. He indicated he has been on the force for 32 years and working off-duty 31 years of that time.

- He was very polite and respectful. He said he had heard of our company, CopsForHire as recently as the previous Guild meeting.

- Without prompting, he continued to talk about our business model of managing off-duty services through the "Eighth Floor" (while pointing at the HQ building just up the block) and instantly stated "that was your first mistake". We asked why he said that – Officer Gordon's reply was that he doesn't "give a F**K" what they think about how off-duty is managed in this city. He's been here for thirty plus years and the 8th Floor has no idea how things are done.

- He then said, with an attempt at humor and arrogance; "F**k the 8th Floor, F**k anyone they talk to, and F**k anything they tell us to do!" He went on to say, "Starting with them is where you all screwed up from the beginning, but really you didn't understand the first thing about off-duty in Seattle", he went on to tell us that our approach made us laughable within SPOG.

- Around this point, Drew mentioned that he was a retired Pierce County deputy and had also worked about three years with King County Sheriff's Department. Drew talked about the many hours he had worked off-duty in Pierce County, and why we built our online solution the way we did.

- He then offered, "Yeah, we spoke about your company at a recent Guild meeting and the word was, working as a 1099-MISC was a really bad choice, and possibly illegal. Plus, we had no protection for insurance - it was not available and the officers were not protected if injured." In short, it was a strong "don't get caught up with these guys" message from the Guild.

- We then attempted to explain this was misinformation, and that we've worked hard to develop solutions that protect Cops, including a $500,000.00 liability policy that included litigation coverage as well as our supplemental accident insurance, both at no cost to Cops or Departments.

- Officer Gordon appeared to appreciate this information, allowing us to further explain other areas where he and others were apparently misinformed. We discussed how our Marketplace was fully automated. We were also very clear with him that we were not a staffing company, rather a technology company; hence the W-2 issues did not apply to us. Finally, we shared with him that we only work with commissioned officers and that no retired Cops are a part of the CopsForHire marketplace.

- Rob then asked if Andrew could provide Officer Gordon with further details about CopsForHire, specifically addressing misinformation that we know have been stated about us and shared with SPOG members directly. Rob asked if he would read that information and provide his feedback and comments. Officer Gordon agreed and it was at this point that he offered his business card and suggested that we could e-mail him directly with anything we wish for him to review and comment on. (email correspondence for reference attached)

- At this point, Officer Gordon relaxed quite a bit, and surprised us with about 30 additional minutes of non-stop, highly detailed discussion of how off-duty "really works in Seattle". He was adamant that off-duty was not a topic that was going to be controlled or changed by anyone. He referenced a lawsuit involving Seattle's Finest that "took care of that" a few years back. He went on to name the owner of Seattle's Finest by saying it was initiated by Raleigh Evans to defend their ability work off-duty on their own terms.

- He went further to explain that most large underground parking garages in the city have officers working them. He said that most cops are paid around $300 a month to "manage the garages before they even work one hour of off-duty". His quoted $300/month fee is a fee for simply managing the location. He described that the Manager usually has about 5 or 6 cops working under them, and that the Manager's responsibility is to make sure that every shift is covered. According to Officer Gordon, as Managers, some Cops earn $1,200-$1,500 per month without working a single shift. He indicated that he only runs two locations himself, so he is only making $600 a month in fees.

- He then embarked on a lengthy description of the underlying infrastructure of off-duty in Seattle. He said that he, and the guys that "manage the work" for off-duty are like "the Mafia," a term he used at least 5 times during the subsequent conversation. He said that those customers that need their work know this is the way it's done and everyone knows to not mess with them, or else "all hell breaks loose." He said to us, "it's been this way for 50 years, and it's not going to be changed by CopsForHire or the 8th floor that's for sure!"

- He stated that the Guild's primary interest was in the protection of the above-mentioned "management fees". At this point, he laughed and commented "the 8th floor has no idea how all this really works". He went further to clarify that Raleigh at Seattle's Finest understands these relationships, and works with the existing structure to make sure that "managers" get their fees, and helps them run the hours if they want his insurance coverage and to be W-2 employees. The job Officer Gordon was working at the time of our discussion was an example of this arrangement - he said he makes $300 a month for managing the job (one of 2 he manages), but at this point he revealed that the work still goes through Seattle's Finest. He said he has 5 guys he schedules. Most "managers" work with 5 to 6 guys in their group.

- Officer Gordon went further to explain that he earns $100/hr. for the Columbia Tower garage job every day he works the actual shifts at this location. Rob pushed back on the rate of $100 per hour, expressing to him that it seemed high for Seattle off-duty, he explained that it is actually $60/hr. for 4 hours, but he works only 2 of them, gets paid for 4 hours, and he takes $50 dollars x 4 hours billed for his 2 hours actually worked. Raleigh takes the remaining $10 dollars x 4 hours billed for running the work through his business. So in conclusion, he works 2 hours and takes pay for 4, and has 5 other guys that he splits the hours with weekly. In addition to this overcharged "hourly" rate, Officer Gordon also receives the management fee for this and one other location.

- We then asked about the customer's thoughts on paying for 4 hours and only having him there for 2 hours, he again laughed and said, "too bad for them, they know how it works, they don't need someone for 4 hours, I'm not standing around that long, and they pay the 4-hour minimum, that's how it works in this town"

- In reaction to Rob's comment that we were confident that the staffing companies were not going to be fans of CopsForHire. Officer Gordon explained that it was this group of "Managers" that "have a lot to lose" if CopsForHire becomes the primary method of running off-duty in Seattle. He went on to tell us that we've likely had no clue that they have really been the ones blocking us from making any progress within SPOG, not Raleigh at Seattle's Finest or anyone else.

- He continued using terms such as "mini mafia", "breaking legs", and repeatedly saying "F the 8th Floor" while describing what would happen if anyone would dare try to mess with their off-duty jobs. Officer Gordon went on to describe "really cake jobs" such as Seattle City Light off-duty work. He restated twice how these jobs were viewed. "Yeah, we would really break some bones if those were messed with, those jobs are a minimum of four hours, and most are done within an hour and a half. When the hole is filled back in we take off but get paid for the full 4 hours." He shared the rates on these City jobs are $90 an hour and $180 after hours and weekends and then re-emphasized that "No one is going to F**k with these jobs if they know what's good for them!"

- Referring to City Light and other City jobs he stressed again that it was the staffing companies like Seattle's Finest and SSI that did a great job of "training [those customers] that we are going to get paid a minimum, we are going to get paid more after hours and on weekends and holidays, so no one is going to mess with those jobs, or they are going to end up with broken knee caps."

- In response to a repeated concern over the hourly rates he was quoting, Officer Gordon then offered that he was "squeezing" the building owners for more money. He explained that whenever they wanted a pay raise, he would bypass the parking garage companies and go straight to the building managers. If they refused to pay more, he would threaten to leave and ensure no other cops would work the job. Officer Gordon said that within a day or two with no cop, the building manager would be calling back asking him to please return, quickly agreeing to any new rate. He indicated that getting to $90 per hour, before the current rate of $100, that this is exactly how it was done in a very matter of fact and arrogant tone.

- Officer Gordon went on to explain that this "squeezing" was so effective because it only takes one or two calls from building tenets waiting an hour or longer to exit a building to make a building manager cave to his demands. He went further to stress that although payment often comes from the parking companies that manage the garages, they never deal with those companies – leveraging with the building manager is so much more effective, since they need things to run smooth.

Conclusion:

The above notes capture a conversation that occurred when we happened upon a 32-year veteran of Seattle Police Department. He bragged about how neither we, nor anyone else were going to "f**k with fifty plus years of culture" in Seattle. He talked openly and freely – for about 45 minutes - with absolutely no fear and no belief that the current lack of oversight and transparency in off-duty would ever change.

Andrew Finley, as an 18-year law enforcement veteran, is experienced in and recognizes "cop talk" when he hears it. He can fully appreciate how some stories can be told in a colorful way to emphasize a point.

Officer Gordon's statements, however, both support and add important context to customer comments we've received regarding exploitative behaviors by both off-duty staffing agencies and Seattle Police. They reflect extortionist behavior and violate SPD policies on several levels. The behavior Officer Gordon described is considered "profiting from your position". Andrew, during his career, would expect to have been fired and/or prosecuted for such behavior. Andrew was never permitted to accept as much as a cup of coffee without the threat of being fired for abusing his position.

As disturbing as the implications of this conversation were, it did provide us with some much-needed insight. We now more fully understand the source of the resistance and pushback to Seattle Leadership's efforts to bring oversight, fairness and transparency to off-duty – even in the form of misinformation - from SPOG. Seattle's off-duty is not merely suffering from lack of oversight, transparency and policy enforcement, it is a disturbing source of corruption.

Seattle Police Department may not realize the extent of corruption within Seattle's rank and file with regards to off-duty work. Ultimately, this story will become exposed, become public and fuel even more community distrust and disrespect for law enforcement. Meanwhile, customers do not deserve this treatment at the hands of those sworn to serve and protect.

The whole of law enforcement suffers from the behavior of a few. Communities, customers, departments and cops themselves all lose. Seattle Police Department must demand immediate transparency and move to fully enforce policies that are in both their own best interests as well as the interests of communities they serve.

- Rob McDermott and Andrew Finley

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THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 2:12-cv-01282-JLR DECLARATION OF JUDGE ANNE LEVINSON (RET.) IN SUPPORT OF COMMUNITY POLICE COMMISSION'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE

DECLARATION OF JUDGE ANNE LEVINSON (RET.)

I. EXPERIENCE AND QUALIFICATIONS

1. I, Judge Anne Levinson (ret.), am over 18 years of age and competent to testify. This Declaration is based on my personal knowledge unless otherwise stated. It presents observations and conclusions reached based on my extensive experience in the field of police accountability and oversight, and specifically, my experience in that field in Seattle, as well as my review of pertinent documents and the City of Seattle's December 17, 2018 submission to this Court.

2. I served for several years in the executive and judicial branches of the City of Seattle (the City), appointed by Mayor Royer as a Special Assistant; by Mayor Rice as Legal Counsel, Chief of Staff, and Deputy Mayor; and by Mayor Schell as a Seattle Municipal Court judge. In each of those roles, I had responsibilities related to the Seattle Police Department (SPD) and worked with a number of SPD Chiefs, sworn staff of all ranks, civilian SPD personnel, community groups, and union leadership on operational matters, policy, training issues, community concerns, major incidents, and system reforms.

3. Unrelated to police accountability system reform, since leaving the bench, I have also led inter-disciplinary system reform efforts on a number of subjects including mental health courts, child welfare and juvenile justice, campaign finance, and implementation of laws regarding enforcement of civil protection orders and firearms relinquishment.

4. In mid-2010, I was appointed by Mayor McGinn to a three-year term as the City's Office of Police Accountability (OPA) Auditor.[1] I was re-appointed for a second three-year term in 2013, and served through the end of 2016, issuing a final report in the first quarter

[1] OPA was then called the Office of Professional Accountability. I was the City's fourth OPA Auditor. The first three OPA Auditors were Judge Terrence Carroll (ret.), former U.S. Attorney Kate Pflaumer, and Judge Michael Spearman (ret.).

of 2017. In 2017 and 2018, I also provided subject matter advice to King County's Office of Law Enforcement Oversight and the Community Police Commission (CPC). In 2018, I was awarded the Contribution to Oversight Award by the National Association for Civilian Oversight of Law Enforcement (NACOLE) at its annual conference.

5. As OPA Auditor, I served as a contracted independent expert with the City to review complaints and investigations of misconduct involving SPD personnel. I reviewed thousands of complaints and OPA investigations, and issued public reports twice each year to City officials, which included recommendations for strengthening the police accountability system.

6. As OPA Auditor, I also reviewed in detail SPD policies and the collective bargaining agreements (CBAs) with the Seattle Police Management Association (SPMA) and the Seattle Police Officers Guild (SPOG), observed many SPD and Washington State Criminal Justice Training Commission trainings, and helped draft the original OPA Operations and Training Manual (OPA Manual) and the updated 2016 OPA Manual. I regularly reviewed national research and talked with other subject matter experts who worked extensively on police accountability issues in other jurisdictions, and I participated in NACOLE presentations.

7. In February and March 2014, after it came to light that the then-Interim SPD Chief had changed findings or discipline in a number of cases, I conducted a special review of SPD's disciplinary system. Prior to my review, this critically important aspect of the accountability system had not been part of the work of the OPA Auditor (which by ordinance focused on review of OPA's complaint-handling and investigations). Although the review was limited in scope due to a lack of available information and a number of other externalities, I identified several long-standing problems with the City's disciplinary system, made

recommendations, and urged the City to move forward as soon as possible with reforms. Included among those 2014 recommendations were that the City:

A. Ensure that disciplinary and post-disciplinary processes and decision-making reflect the importance of public trust in, and employee respect for, the integrity of the police accountability system;

B. Eliminate multiple appeal routes and forum-shopping, as well as bias or the appearance of bias due to SPD employees ruling on disciplinary challenges, by replacing the Disciplinary Review Board (DRB) with subject matter-qualified hearing examiners under the supervision of the Public Safety Civil Service Commission (PSCSC), and modifying the PSCSC's composition to require merit-based selection;

C. Require all disciplinary appeal hearings be open to the public, complainants, and the media, for greater transparency;

D. Establish enforceable timelines that cannot be waived by mutual agreement absent exigent circumstances, to avoid having cases drag on for years, impeding system effectiveness and responsiveness;

E. Allow the OPA Director to recommend a meeting of the Chief with the complainant in the same timeframe that the Loudermill hearing is held for the employee, for those cases in which a balance of perspective and information would be beneficial;

F. Require the employee and bargaining unit representative to disclose during the OPA investigative process any witness or evidence they believe to be material or be foreclosed from later raising it in the Loudermill hearing or on appeal as a rationale for arguing the Chief did not have "just cause" for the disciplinary action;

G. Expand the requirement to provide notification whenever the Chief disagrees with the OPA Director's recommended finding(s), so that it includes not only

cases in which the Chief may have disagreed with the OPA Director's recommended findings, but also cases in which the *Chief's* findings or discipline are at any point later modified because of a disciplinary challenge, to increase transparency and ensure that accurate and timely information is provided to the public, complainants, and elected officials regarding final disciplinary outcomes;

H. Require SPD to use the City Attorney's Office (CAO) as counsel for disciplinary matters so that public interests are considered; and

I. Enact data systems and protocols to ensure retention and accuracy of records, and public reporting related to disciplinary appeals.

8. Many weaknesses and gaps in the accountability system and in SPD policies, practices, and training that undermined public trust and confidence related to excessive use of force, bias, and other issues identified in my semi-annual reports from 2010-2016 were long-standing and in need of reform for some time. Several report recommendations were ultimately addressed through the Settlement Agreement (hereinafter referred to as the Consent Decree) in the case before the Court. However, the disciplinary appeals recommendations were not. These and other reform recommendations that were not implemented through the Consent Decree were discussed by the CPC in meetings held in early 2014 and then incorporated into CPC accountability system recommendations made to the City in April 2014.

9. In 2014, I met with the Mayor's Office bargaining team and reviewed each recommendation, additional contractual issues I had identified, and any term in either the SPOG or SPMA CBA that would require amendment to achieve the intended reforms. I strongly recommended negotiating both CBAs in a manner to ensure substantively the same terms, so that accountability system policies and practices would be consistent for employees of all ranks.

10. In November 2014, Mayor Murray announced the City's support of the CPC's recommendations. The Mayor noted he would submit legislation to the City Council (Council) to implement the reforms and that any of the reforms that required bargaining would be addressed during labor negotiations.

11. After a prolonged period of discussion and debate among various City officials and staff, with whom I shared technical guidance throughout, legislation was submitted, and Ordinance No. 125315 ("accountability ordinance") was adopted by the Council on May 22, 2017 and signed by the Mayor on June 1, 2017. The core disciplinary system reforms, first recommended in my 2014 report, remained intact throughout the legislative process and were incorporated into the accountability ordinance.

12. Through the above-cited work, I have extensive knowledge of the City's police accountability system, the accountability ordinance and its provisions, and the SPOG and SPMA CBAs, and am thus qualified to assess how the current SPOG and SPMA CBAs are likely to impact the purposes of the Consent Decree—as articulated by the Court—including community trust and confidence.

II. EXHIBITS

13. Attached to this Declaration are true and correct copies of the following exhibits, the substance of which is incorporated into this Declaration:

A. **Exhibit A**: Accountability ordinance provisions, SPD policies and practices, and other ordinances or accountability system practices compromised by or in conflict with the CBAs, providing the Court with analysis and showing the City's stated position on each from its December 17, 2018 filing (Dkt. 512);

B. **Exhibit B**: Accountability system elements not listed by the City in its August 18, 2017 filing (Dkt. 412-1) as subjects to be bargained that CBAs affected or appear to have affected);

C. **Exhibit C**: CBA impacts in Exhibit A that also affect the OPA Manual;

D. **Exhibit D**: CBA impacts in Exhibit A that also affect SPD policies; and

E. **Exhibit E**: City's Exhibit I (Dkt. 512-9), annotated to provide additional information about SPOG and SPMA CBAs' changes to disciplinary and disciplinary appeals processes.

III. INTRODUCTION

14. In my opinion, both the SPOG and SPMA CBAs depart in significant ways from the accountability ordinance, and these departures raise concern as to whether the accountability system will be sufficiently effective and predictable to continue the positive trajectory established over the last several years under the Consent Decree. I concur with the CPC's position that the SPOG CBA fails "to prioritize and safeguard much of the progress made in the accountability ordinance and compromise[s] the core values and objectives of the Consent Decree, namely, transparency and promoting public confidence in the oversight mechanisms governing policing in Seattle"[2] and, for the reasons noted below, believe the same to hold true for the SPMA contract.

15. The reason for concern is not simply that the CBAs are different from the accountability ordinance that was passed unanimously and hailed by elected leaders as a landmark achievement, but rather because the departures represent a return toward the direction

[2] CPC comments on the tentative agreement between the City and SPOG (Dkt. 493-1) at 5. *See* also *Id*. at 4 (stating that the tentative agreement with SPOG "heavily compromise[s]" "the accountability system as a whole, including transparency to the public and the ability of the Chief of Police to effectively uphold reform values as she leads [SPD]").

of the status quo in areas of known weaknesses and gaps. In some respects, the CBAs also inject new inconsistencies and ambiguities that create more potential pitfalls for police accountability. I have deep reservations about the shortfalls in the CBAs and the impact now and in the future on public confidence.

16. The Court previously expressed concern that the collective bargaining process was essentially a "black hole" whose impact on the accountability ordinance and the SPD accountability system could not be predicted.[3] In my opinion, the Court's concern was borne out. The City provided a list to the Court of accountability ordinance provisions that the City intended to collectively bargain prior to implementation, as well as a list of accountability ordinance provisions the City stated would not require collective bargaining and would be fully implemented (which the Court had previously reviewed).[4] But the ratified CBAs show that the City significantly understated the number of affected accountability ordinance provisions and the breadth of the resulting impacts. Numerous accountability ordinance provisions, and other policies and practices not on the City's list submitted to the Court of items to be bargained, have now been affected by the CBAs.[5]

17. There are many CBA provisions that clearly conflict with the accountability ordinance or SPD policy and practices, and there are still other CBA provisions that are

[3] 7/18/17 Hearing Tr. (Dkt. 407) at 21-22.
[4] City's August 18, 2017 filing Dkt. 412-1 at 1-2 and Dkt. 412-2 at 1-3.
[5] For example, the City did not indicate to the Court that changes would be made to provisions that in fact were changed. Those changes include: all ranks will not be treated the same by the accountability system; employees can continue to use vacation time when ordered to serve days without pay as discipline; the Chief and the City Attorney will not have to publicly document when findings or discipline are changed at any time due to a disciplinary challenge so the complainant, public, and others would not be notified; the Chief will be required to take notes and disclose them to SPOG when meeting with a complainant prior to a Loudermill hearing; SPD will not be required to consult with the City Attorney regarding disciplinary appeals; OPA will be required to conduct interviews at an SPD (not OPA) facility; SPD's EEO investigations will have the same contractual constraints as OPA investigations; and civilian oversight officials will not provide technical expertise to the City for contract negotiations. *See* Exhibit B for a list of items that were not included in the City's August 18, 2017 submission to the Court, but which have since been changed by the CBAs, because of the CBAs' "shall prevail" language, whether intentionally bargained by the City or not.

ambiguous, meaning the full extent of any conflict cannot be understood without additional information from the City and the unions.[6]

18. The number and nature of the ambiguities are particularly concerning. As the City says in its filing,[7] the CBA terms that provide that the CBAs will prevail over City law whenever there is a conflict must be read to not only to include language in direct conflict, but also to include all CBA terms where the language is *inconsistent* with City law, including the accountability ordinance, (and presumably the Executive Order on secondary employment and SPD policies that are even less paramount than City law), unless the CBA clearly states otherwise. Without additional information—and including binding agreements by SPOG and SPMA as to the meaning of various provisions—it is impossible to ascertain how all of these CBA terms will affect sustained reform over time. Adding to this uncertainty, the City has not clearly articulated to the Court whether it intends to amend the accountability ordinance, and if so, which provisions it intends to amend,[8] or which SPD policies it intends to change (in its Court filing, the City did not identify any SPD policies as affected by the CBAs).[9] Moreover, the City does not stipulate that an amended accountability ordinance—were it to occur—would be binding on SPOG or SPMA in areas in which either union takes a different view of the CBAs' meaning from that of the City.

19. Based on my knowledge and experience of the police reform landscape and local and national dynamics, the CBA terms will determine, at least in part, whether the reforms put

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[6] *See* Ex. A. This chart also includes elements of the accountability system where the Court cannot determine if they are impacted, and to what extent, without a more comprehensive record. For example, the SPOG CBA in Appendix E refers to the parties agreeing to interpretations in italicized notes, but in several instances, italicized notes are then not included.

[7] *See* Dkt. 512 at 3-4.

[8] *See* Dkt. 512-5. The City states for various accountability ordinance provisions in conflict with the CBAs that "[The City] may amend" the accountability ordinance, "ordinance amendment possible, but unlikely," "no ordinance amendment anticipated," "amendment to ordinance does not appear to be necessary." The City does not state for any conflicting CBA provision that it "will amend" the accountability ordinance.

[9] *See* Ex. D, which lists CBA impacts to the accountability ordinance that also affect SPD policies.

in place under the Consent Decree are fully realized and sustained over time. Thus, it is critical that the CBAs not undermine accountability procedures that were carefully designed to deter unconstitutional and ineffective policing, and not put at risk reform measures the public believed had been gained by enactment of the accountability ordinance, including the commitment to implement through bargaining, following public discussion during an open legislative process.

20. As the U.S. Department of Justice (DOJ) noted in its December 16, 2011 report on its Investigation of the Seattle Police Department, Seattle's compliance with constitutional requirements regarding use of force, and with various civil rights laws, required strong and consistent oversight to remedy "a number of systemic deficiencies" and "understandable public concern" about "widely publicized incidents involving use of force by the police."[10] The DOJ recognized that "SPD's success depends upon recruiting the right officers, and then providing them with strong and consistent leadership, training, and *oversight*" (emphasis added).[11] The DOJ Report also stressed that strong accountability by supervisors and OPA, along with an effective Early Intervention System (EIS), were key to bringing the City into compliance with constitutional requirements regarding use of force. Instead, the CBAs change the disciplinary and disciplinary appeals processes *away from* effective deterrents and incentives regarding excessive force,[12] decreasing the likelihood of consistent, fair, and just disciplinary outcomes.

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[10] United States Department of Justice Civil Rights Division, Investigation of the Seattle Police Department, December 16, 2011, https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf at 2-3.

[11] *Id.* at 1.

[12] *See* Institute for Policy Research, August 5, 2018 at https://www.ipr.northwestern.edu/publications/docs/workingpapers/2018/wp-18-21.pdf (regarding a DOJ complaint and noting that the police officer involved in the shooting of a young man had a long history of civilian allegations, including 20 allegations in the five years leading up to the shooting). *See also The American Interest*, Vol. 13, No.6, May 8, 2018 at https://www.the-american-interest.com/2018/05/08/can-deterrence-theory-explain-the-stephon-clark-shooting/ (explaining the direct link between lack of deterrence and police misconduct that results from weakened police accountability under collective bargaining agreements).

And this is the case not just for excessive force, but for other types of misconduct that intersect with it and affect community trust and officer morale, such as dishonesty in its reporting. The CBA terms, as discussed in this Declaration and described in further detail in the Exhibits, impede effective oversight of the types of practices that gave rise to the Consent Decree and run counter to the Consent Decree objective to institute sustainable reforms.

21. The CBAs could be improved so that full and effective compliance with the Consent Decree is not jeopardized. It would not be difficult to revise the CBAs if the parties have a firm commitment to, and prioritize, the importance of an effective accountability system—including its discipline and disciplinary appeals processes—that strongly supports gains made throughout the Consent Decree process. Doing so will require the City to provide a more comprehensive account, including verifying union concurrence with the City's representations that changes to certain CBA terms are benign; revising the CBAs wherever necessary for clarity and precision so that the Chief's authority does not run the risk of frequent challenge based on interpretations of unclear contract language; and modifying CBA terms to align with the purposes of the Consent Decree and the accountability ordinance.

22. Because the CBAs diverge significantly from the Consent Decree's purposes and the reform provisions of the accountability ordinance, until changes are made to the terms of both CBAs, the City's full and effective compliance is uncertain. The Consent Decree said, "At all times, the City and SPD will bear the burden of demonstrating substantial compliance with the Settlement Agreement."[13] In my opinion, the City and SPD presently cannot meet that burden for the reasons stated in this Declaration.

[13] Settlement Agreement and Stipulation and Order for Modification and for Entry of Preliminary Approval of the Parties' Settlement Agreement and Stipulated Order of Resolution, Dkt. 13 ¶ 223 at 4.

IV. NATIONAL CONTEXT

23. CBAs should provide for fair wages, benefits, and good working conditions. But CBAs for police must do more. Police CBAs must also provide a framework to help ensure constitutional policing and community trust are paramount. Given the unique authority and role of police, police CBAs must prioritize accountability practices in which the public and employees can have confidence because they know that when misconduct occurs it is uniformly and consistently addressed in an effective, fair and transparent manner. However, as evident over many decades in cities and counties across the country, police CBAs instead often present intractable barriers to full and effective accountability. Unlike CBAs for other types of unions, police union contracts around the country historically have also been vehicles for rolling back or impeding accountability, transparency, and civilian oversight, damaging community trust in the police.[14]

24. Seattle is among many communities across the country familiar with how police accountability can be set aside behind the closed doors of collective bargaining.[15] This issue

[14] *See* Campaign Zero and its analysis of police union contracts around the U.S. at https://www.joincampaignzerio.org/contacts/; *The New Yorker*, September 19, 2016, "Why are Police Unions Blocking Reform" at https://www.newyorker.com/magazine/2016/09/19/why-are-police-unions-blocking-reform; *Reuters*, January 13, 2017, "Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline" at https://www.reuters.com/investigates/special-report/usa-police-unions/; *In These Times*, June 26, 2017, "How Chicago's Police Union Contract Ensures Abuses Remain in the Shadows" at http://inthesetimes.com/features/chicago_police_union_contract_reform.html; *In These Times*, June 21, 2016, "How Union Contracts Shield Police Departments from DOJ Reforms" at http://inthesetimes.com/features/police-killings-union-contracts.html; and *Vox*, May 26, 2015, "An Expert Explains Why It's So Hard to Hold Baltimore Police Accountable" at https://www.vox.com/2015/5/26/8662463/baltimore-police-accountability.

[15] *See* **Chicago**: *Chicago Tribune*, May 20, 2016, "Cops Traded Away Pay for Protection in Police Contracts" at https://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html; *We the Protesters*, July 20, 2015, "Chicago Police Department Police Accountability Contract Highlights" at https://www.dropbox.com/s/2o3dtucoap7fw7h/Chicago%20Police%20Contract%20Police%20Accountability%20Review%207.10.15.pdf?dl=0; **Albuquerque**: *We the Protesters*, July 20, 2015, "Albuquerque Police Department Police Accountability Contract Highlights" at https://www.dropbox.com/s/o80983zlasmwlu5/Albuquerque%20Police%20Contract%20Police%20Accountability%20Review%207.10.15.pdf?dl=0; **Portland**: *The Oregonian*, October 13, 2016, "Portland City Council Approves Police Contract Amity Unruly Protests" at https://www.oregonlive.com/portland/index.ssf/2016/10/portland_city_council_approves_27.html; **Los Angeles**: *ACLU Southern California*, November 29, 2018, "How Does a City Effectively Discipline Its Police?" at

before the Court is highlighted in a New York Times opinion piece by Jonathan Smith, a former senior litigator in the DOJ's Civil Rights Division, who played a key role in Seattle's Consent Decree. Smith noted, "In big cities, where police unions have political clout, rigid union contracts restricted the ability of police chiefs and civilian oversight bodies to tackle misconduct." Smith also highlighted the connection between excessive use of force by officers and police union CBAs that roll back reforms aimed at remedying that precise problem, writing, "The decline of public trust in the police we've seen after a string of incidents in Ferguson, Mo., Cleveland, New York and Baltimore has many causes. Policies like hot-spot policing and stop-and-frisk searches—outgrowths of the 'broken windows' law enforcement strategy—have put enormous pressures on minority and low-income communities. But the role played by police unions in shielding their members from accountability for excessive force has also contributed to the erosion of trust."[16] Many others have also noted the harm done by CBAs that weaken accountability by creating disciplinary processes highly favorable to police officers.[17]

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https://www.aclusocal.org/en/publications/towards-accountability-overcoming-lapds-flawed-disciplinary-process; **Spokane**: *Inlander*, December 27, 2018, "Why a Dispute Between Spokane Police and the Civilian Ombudsman is at a Standstill" at https://www.inlander.com/spokane/why-a-dispute-between-spokane-police-and-the-civilian-ombudsman-is-at-a-standstill/Content?oid=15661189; *The Spokesman-Review*, April 13, 2017, "Condon Pushes City Council to Pass Oversight Ordinance Before Police Union Contracts" at https://www.spokesman.com/stories/2017/apr/13/condon-pushes-city-council-to-pass-oversight-ordin/; and *The Spokesman-Review*, a number of stories on various dates at https://www.spokesman.com/tags/spokane-police-guild/.

[16] *The New York Times*, May 29, 2015, "Police Unions Must Not Block Reform" at https://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html.

[17] *See The News-Herald*, October 22, 2018, "Former Euclid Police Officer Getting His Job Back" at https://www.news-herald.com/news/cuyahoga-county/former-euclid-police-officer-getting-his-job-back/article_3369ef3e-d638-11e8-a545-3f8fae5ceef7.html regarding an arbitrator ordering the reinstatement of a Euclid, Ohio police officer with a history of excessive force after being fired by the mayor in the aftermath of an incident where he was captured on video punching an African American motorist multiple times during a traffic stop; *The Berkshire Eagle*, May 16, 2017, "Pittsfield Fights Arbiter's [sic] Decision to Reinstate Fired Police Officer" at https://www.berkshireeagle.com/stories/pittsfield-fights-arbiters-decision-to-reinstate-fired-police-officer,507527 regarding an arbitrator in Pittsfield, MA ordering the reinstatement of an officer despite dishonesty; *Honolulu Civil Beat*, May 24, 2018, "Honolulu Cop Fired for Domestic Violence Gets His Job Back" at https://www.civilbeat.org/2018/05/honolulu-cop-fired-for-domestic-violence-gets-his-job-back/, regarding an arbitrator ordering the reinstatement of a Honolulu police officer who was caught on videotape punching his girlfriend repeatedly in the head; *The Spokesman-Review,* January 10, 2012, "Ruling Overturns Deputy's Firing" at http://www.spokesman.com/stories/2012/jan/10/ruling-overturns-deputys-firing/ regarding an arbitrator

25. Stephen Rushin, Assistant Professor at Loyola University Chicago School of Law, Ph.D. and J.D., University of California Berkeley, who has studied police contracts nationally, explained the problem well in a Duke Law School Journal article: "Most states permit police officers to bargain collectively over the terms of their employment, including the content of internal disciplinary procedures. This means that police union contracts—largely negotiated outside of public view—shape the content of disciplinary procedures used by American police departments. By collecting and analyzing an original dataset of 178 union contracts from many of the nation's largest police departments, this Article shows how these agreements can frustrate police accountability efforts."[18]

26. The Washington Post analyzed thousands of cases and found that police chiefs are often forced to put officers who were fired for misconduct back on the streets. "Since 2006, the nation's largest police departments have fired at least 1,881 officers for misconduct that betrayed the public's trust, from cheating on overtime to unjustified shootings. But The Washington Post has found that departments have been forced to reinstate more than 450 officers after appeals required by union contracts. Most of the officers regained their jobs when police chiefs were overruled by arbitrators, typically lawyers hired to review the process."[19]

27. The Chicago Tribune described The Washington Post's findings this way: "The multiyear contracts negotiated by police unions ensure that any discipline may be appealed—

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overturning the firing of a deputy who was the subject of three internal investigations in less than a year, had retaliated, and had broken the law. The arbitrator, using arbitrator standards, overturned his firing because the "the criminal acts committed … did not put anyone's physical safety at risk" and the "acts were done out of the public view"; and NBC10, May 10, 2010 "FOP Throws Party for Reinstated Cops in Beating Case" at https://www.nbcphiladelphia.com/news/politics/FOP-Throws-Party-for-Reinstated-Cops-in-Beating-Case-88565017.html.

[18] *Duke Law Journal*, Volume 6, March 2017, "Police Union Contracts" at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&content=dlj.

[19] *The Washington Post*, August 3, 2017, "Fired/Rehired: Police Chiefs are Often Forced to Put Officers Fired for Misconduct Back on the Streets" at https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?noredirect=on&utm_term=.c80eb8c1c8de.

typically through arbitration, a process that brings in outside parties, often lawyers who specialize in labor law, to review the punishments and rule on the appeals. That is how police Sgt. John Blumenthal returned to work in Oklahoma City. On July 7, 2007, a man was lying handcuffed on the ground when Blumenthal ran up and kicked him in the head, according to several other officers. Blumenthal's fellow officers reported the incident to internal affairs, and months later Blumenthal was fired and convicted of misdemeanor assault and battery. Two years later, an arbitrator ordered the department to return Blumenthal to work. The reasons are unclear, because the records of the proceedings are not public. Today, Blumenthal, who did not respond to requests for comment, is a motorcycle officer. 'The message is huge,' said Oklahoma City Police Chief Bill Citty, who said he loses about 80 percent of arbitration cases. 'Officers know all they have to do is grieve it, arbitrate it and get their jobs back.'"[20]

28. The Chicago Tribune and ProPublica Illinois found that since 2010, 85 percent of disciplinary cases handled through the Chicago Police Department's grievance process led to officers receiving shorter suspensions or, in many cases, having their punishments overturned entirely, "undercutting the results of lengthy investigations and layers of review long after the public believes the cases were concluded." Officers were more likely to get their punishment overturned completely when the case went to an arbitrator, while they were more likely to see a reduction in discipline, or some of the findings tossed out through a settlement.[21]

29. The Atlantic Magazine's article, "How Police Unions and Arbitrators Keep Abusive Cops on the Street," put it this way: "There are, of course, police officers who are fired for egregious misbehavior by commanding officers who decide that a given abuse makes them

[20] *Chicago Tribune*, August 6, 2017, "Fired and Rehired: Hundreds of Officers Fired for Misconduct Returned to Policing" at https://www.chicagotribune.com/news/nationworld/ct-police-officers-misconduct-fired-rehired-20170805-story.html.

[21] *ProPublica Illinois*, December 14, 2017, "Chicago Police Win Big When Appealing Discipline: Analysis Shows Hundreds of Misconduct Findings Overturned" at https://www.propublica.org/article/chicago-police-grievances.

unfit for a badge and gun. Yet all over the U.S., police unions help many of those cops to get their jobs back, often via secretive appeals geared to protect labor rights rather than public safety. Cops deemed unqualified by their own bosses are put back on the streets. Their colleagues get the message that police all but impervious to termination."[22]

30. U.S. District Judge Thelton Henderson, overseeing the 2003 Oakland Police Department's Negotiated Settlement Agreement (NSA), reached the same conclusion in 2014. Eleven years into that case, he found that Oakland could no longer be considered in compliance with its reforms if its internal investigations were inadequate and if discipline was frequently overturned. He then ordered an investigation into why that City was consistently losing arbitration cases with officers who appealed discipline. Of 15 cases, discipline had been revoked in seven cases and reduced in five others. Judge Henderson, in his order upon receipt of that investigation, wrote that "imposition of discipline is meaningless if it is not final. Just like any failure to impose appropriate discipline by the (police) chief or city administrator, any reversal of appropriate discipline at arbitration undermines the very objectives of the (reform program)." He ended his order by stating, "The Court reiterates that its expectation is not that the City will prevail at every arbitration. However, as the Investigator's report makes abundantly clear, the City's approach to discipline is not based on the 'best available practices and procedures for police management' the City agreed to implement more than twelve years ago. NSA at 1. …It is difficult to imagine how, absent these steps, the goals of accountability and fair and consistent discipline—two of the foundations of the NSA—will ever be achieved."[23]

[22] *The Atlantic*, December 2, 2014, "How Police Unions and Arbitrators Keep Abusive Cops on the Street" at https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/.

[23] United States District Court Northern District of California, April 4, 2015 Order Re: Investigator's Report on Arbitrations at http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/oak052799.pdf.

V. THE IMPORTANCE OF THE SPMA CBA

31. The Court asked the parties to provide a detailed list of all the changes to the accountability ordinance or any other SPD policy or procedure that the new SPOG CBA precipitated, and how those changes either do or do not conflict with the Consent Decree's purposes.

32. Although the Court did not specifically raise it, because both the SPOG and SPMA CBAs impact the accountability ordinance in many ways, only some of which have been identified by the City, it is important that the Court evaluate the SPMA CBA as well (and the SPMA CBA also remains before the Court for its review).[24] For many years, the terms and conditions of the two CBAs have been different. The failure of the accountability system to apply the rules uniformly to employees of all ranks was a weakness highlighted for the City in the 2014 reform recommendations and subsequently addressed in the accountability ordinance. A central tenet of the accountability ordinance was that there should not be different rules for different ranks, which can impact effectiveness, certainty, fairness, and trust and confidence in the oversight mechanisms. In conflict with the accountability ordinance, neither CBA adopted this mandate.

33. While some SPMA CBA inconsistencies and conflicts are the same as those in the SPOG CBA, others are variations of SPOG provisions. In some instances, provisions in one CBA that counter the accountability ordinance are not reflected in the other CBA. Among the significant differences between the CBAs are:

A. Statute of limitations for imposing discipline;

[24] The SPOG CBA covers only Officers and Sergeants; the SPMA CBA covers Lieutenants and Captains.

B. Standard of review for disciplinary appeals, which then also affect burdens of proof to be used by OPA and the Chief for OPA investigations;

C. Calculation of 180-day deadlines which bar discipline if OPA investigations exceed that length of time (a bar the accountability ordinance eliminated but both CBAs have now restored);

D. Merit-based selection requirement for PSCSC Commissioners;

E. Disciplinary and disciplinary appeal deadlines;

F. Procedures for selecting arbitrators;

G. Preclusion of sworn investigators who are of lower rank than the employee being investigated, and preclusion of, or limitations on, civilian investigators for cases that may result in termination;

H. Allowance for a higher-ranking employee to answer an investigator's questions in writing, rather than in an in-person OPA interview; and

I. Establishment of a civilian secondary employment office governed by appropriate policies.[25]

34. Because of the materially different provisions in the SPOG and SPMA CBAs, OPA, SPD, the Office of Inspector General (OIG), and the CAO will have to handle complaints, investigations, discipline, and disciplinary appeals differently, depending on the rank of the involved employee. Doing so will complicate and make problematic OPA's management of investigations and the efficacy of the Court-approved OPA Manual. For example, if members from both unions are involved in an OPA investigation of a single incident, OPA's management of that investigation will have to apply different rules to SPMA and SPOG employees. If those

[25] *See* Ex. A (detailing impacts of both CBAs on the accountability system); Ex, D (listing those Ex. A impacts that also affect SPD policies); Ex. C (listing those Ex. A impacts that also affect the OPA Manual); Ex. E (providing more information about significant impacts both CBAs have on the disciplinary appeals system).

differences result in different outcomes, accountability and community trust will be impacted. Alternatively, OPA and the City may try to apply the same accountability standards as much as possible to all ranks, but that would require using weaker SPOG CBA accountability standards not only for SPOG members, but also for SPMA members, as well as using other weaker accountability elements in the SPMA CBA related to differences in how higher-ranking employees are treated.

35. An important objective during the Consent Decree process has been to strengthen the obligations and responsibilities of supervisors to help achieve the goal of sufficient oversight to prevent practices that had contributed in the past to a pattern and practice of constitutional violations. That means the accountability system must effectively address the supervisory responsibilities of higher ranks (including those covered by the SPMA CBA) such as ensuring accurate and timely review of use of force, reporting of possible misconduct, and compliance with training requirements. The accountability system should deter misconduct and incentivize constitutional and effective policing not just for line officers, but for their supervisors who are responsible for using proper deterrents and incentives.

36. At the time the SPMA CBA was approved, the City took the position that the ways in which the CBA differed from the accountability ordinance were acceptable because the SPMA CBA adopted all other aspects of the accountability ordinance. However, the value of SPMA's acceptance of most accountability ordinance provisions has since been largely lost because the SPOG CBA conflicts with so many of the accountability ordinance provisions, and its language will supersede the accountability ordinance language. Also, if the City amends the accountability ordinance to align with the SPOG CBA, the accountability ordinance will no longer include the original provisions that the SPMA CBA ratified when it agreed to implement most accountability ordinance provisions.

37. In its December 17, 2018 filing, the City referenced the SPMA CBA in its brief, but did not set forth for the Court in detail how the SPMA CBA also impacts the accountability ordinance, other aspects of the accountability system, and SPD policies. For example, the City's Exhibit I explains changes made by the SPOG CBA to the City's disciplinary and appeals processes, and the City's Exhibit E is an annotated version of the accountability ordinance intended to comprehensively reflect for the Court all impacts, but neither details the SPMA CBA impacts.

VI. BOTH CBAs AFFECT THE ACCOUNTABILITY SYSTEM AND CONSENT DECREE PURPOSES

38. The CBAs undercut many aspects of the accountability system and conflict with the purposes of the Consent Decree.

39. The City's description of conflicts between the CBAs and the accountability ordinance in its Dec 17, 2018 filing does not fully account for all of the areas with which the Court should be concerned, nor clearly explain how the City intends to address the impacts. The City's Exhibit I explaining changes to the disciplinary appeals system made by the SPOG CBA paints only part of the picture. The disciplinary appeals changes conflict with accountability system reforms to a much greater extent than described. And, as the Court knows, the disciplinary appeals system inadequacies had been clearly highlighted for the City.[26] There are also several non-disciplinary appeals accountability ordinance provisions affected by the CBAs that were not identified by the City in its brief or Exhibit E, and others the City identified as

[26] In his Third Semi-Annual Report, June 2014 (at 6 and 73), commenting on concerns I raised about Seattle's disciplinary and disciplinary appeals systems in my April 2014 special report, the Monitor characterized SPD's disciplinary system as "byzantine and arcane" and stated that "… the whole of the discipline system will likely need to be overhauled." Pete Holmes, the City Attorney, stated that the City settled the Whitlatch case in 2017 to avoid having a terminated officer re-instated, and noted "… the City must regain its ability to manage, discipline, and hold officers accountable without the impediments that have been inserted into collective bargaining agreements over the years. This case demonstrates the vital importance obtaining of new agreements with our police unions that fully embrace reforms achieved through the Consent Decree" at https://news.seattle.gov/2017/09/01/pete-holmes-why-i-settled-the-whitlatch-case/.

"not meaningfully impacted," when the change to the accountability ordinance provision will, in fact, weaken or make the accountability system less effective, transparent, timely, or fair. For those provisions the City agrees will have a significant impact, the City did not state with certainty whether it will change the accountability ordinance because of those impacts.

40. Examples of clear conflicts, some of which involve both CBAs and some of which involve one or the other, include:

A. Retaining problematic disciplinary appeals processes (detailed in the discussion of the Shepherd case below), such as closed hearings, employee peers as decision-makers, and not requiring timelines be met for each step of the process and back-up counsel be available to avoid having cases drag on for years, all of which undermine system effectiveness and responsiveness.[27] The CBA disciplinary appeals processes also retain multiple routes of appeal that, combined with other problematic provisions, will allow for different outcomes when different routes of appeal are selected by the employee or union;[28]

B. Using an undefined "elevated" standard of review—and thus an undefined elevated burden of proof—for an undetermined range of types of misconduct (any that might result in termination that might be considered "stigmatizing"), which in effect OPA will have to use for any investigation that appears to include serious misconduct that if proven might result in termination, and the Chief will also have to use for determining whether OPA has met its burden in its findings;

[27] *See, e.g.*, *Chicago Sun Times*, March 26, 2017, "The Watchdogs: Suspended Cop Skirts Punishment for 14 Years" at https://chicago.suntimes.com/news/the-watchdogs-suspended-cop-skirts-punishment-for-14-years/.

[28] All of the disciplinary and disciplinary appeals accountability ordinance provisions impacted by the CBAs are detailed in Exhibit E.

C. As noted above, having a host of different accountability processes for investigations involving sworn personnel of different ranks because of the differences between the CBAs;

D. Limiting civilian oversight when there are allegations of criminal misconduct, incidents which are often the most corrosive to public trust, while at the same time requiring the 180-day timeline to run during the criminal investigation, and tolling it only when the criminal misconduct occurs in a different jurisdiction, but not in Seattle;

E. Continuing to bar the imposition of discipline, regardless of the misconduct, if an investigation exceeds 180 days even by a single day, with unclear markers for how that timeline is to be calculated[29] and requiring union approval for extensions, when their duty of representation to members may preclude agreement;

F. Barring misconduct, including misconduct involving Type III Use of Force, dishonesty, or concealment other than by the employee from any potential discipline if the information comes to light too late or a member of the public is reluctant to initiate a complaint against a police officer, so that OPA is not able to initiate an investigation within four years after the incident;

G. Not explicitly prohibiting evidence that should be disclosed during an OPA investigation to be withheld and first raised in the due process (Loudermill) hearing or on appeal;

[29] *See* Dkt. 512-5 at 31 (City characterizing the 180-day timeline provisions in the CBAs as "fairly elaborate").

H. Making reform of the secondary employment system dependent on additional, future negotiations, further delaying the reforms, despite an Executive Order having been issued;

I. Not allowing the OPA Director or Inspector General to subpoena records if they are considered "personal records" of employees (the term is not defined, and thus could be interpreted to mean a wide range of records), so that OPA and OIG have even less authority than other City agencies that conduct administrative investigations;

J. Limiting the OPA Director's authority to establish the most effective mix of sworn and civilian investigative staff; limiting civilian investigators to only two, either limiting or foreclosing civilian investigators' involvement when allegations may result in termination; precluding sworn investigators from conducting investigations involving higher ranking employees; and limiting the OPA Director's authority to manage rotations and transfers of sworn staff;

K. Not allowing the Chief to suspend an officer without pay prior to the initiation of an OPA investigation where the allegations in an OPA complaint could, if true, lead to termination; or where the Chief determines that leave without pay is necessary for employee or public safety, or the security or confidentiality of law enforcement information; or where a gross misdemeanor is alleged (unless it involves "moral turpitude", or a sex or bias crime);[30]

[30] For every CBA provision at issue, the City argues the Court should only look at whether the provision reflects an improvement to the prior CBA, rather than look at how the CBA provisions are weaker than what was recommended and authorized in the accountability ordinance, do not deliver to the people of Seattle policing in which the community can have confidence, and thus conflict with Consent Decree purposes. For example, the City's December 17, 2018 filing (Dkt. 512 at 19) does not describe how the pre-investigation suspension provision of the CBA limits the Chief's authority, but instead describes it this way: "The CBA negotiations resulted in a number of operational and discipline-related improvements, including, first, the Chief's expanded authority to impose pre-investigation suspensions. The new CBA allows the Chief to suspend an officer *without pay* pending investigation for gross misdemeanors alleging moral turpitude, or a sex or bias crime, where the

L. Allowing accrued time, such as vacation time, to be used by an employee to satisfy disciplinary penalties that are supposed to be unpaid days off;

M. Not requiring SPD and OPA to retain SPD personnel files and OPA files longer than three years other than for Sustained findings, which makes less likely management will succeed in having discipline upheld on appeal by documenting the employee's full record,[31] while also preventing light to be shed on system failures identified through analysis of Not Sustained cases,[32]

N. Not requiring the public, oversight officials, elected officials, and complainants to be notified if the Chief's findings or discipline are changed later for any reason after being appealed;[33] and

misconduct could lead to termination. SPOG CBA Art. 3.3 (emphasis added [by City]). Previously, the Chief was only allowed to impose unpaid suspensions for charged felonies." *See* Ex. E for an analysis of the City's description to the Court in Dkt. 512-9 of disciplinary system elements described by the City as better than the status quo.

[31] *See The Guardian*, February 7, 2016, "Leaked Police Files Contain Guarantees Disciplinary Records will be Kept Secret" at https://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret; *The George Washington Law Review*, Vol. 85, No. 3, May 2017, "Police Unions," http://www.gwlr.org/wp-content/uploads/2017/07/85-Geo.-Wash.-L.-Rev.-712.pdf at 751 (discussing provisions of police union contracts that hamper reform efforts "Officer personnel files contain records of complaints and their outcomes. Issues concerning those files include whether the public should have access to any of them and, if so, what information should be disclosed. Additional issues include whether records should be expunged after a period of time and, if so, which records and for what length of time."); *The Los Angeles Times*, December 22, 2018, "Inglewood to Destroy More than 100 Police Shooting Records that Could Otherwise Become Public Under New California Law" at https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-city-of-inglewood-to-destroy-more-than-1545504782-htmlstory.html https://www.nydailynews.com/news/politics/ny-pol-50a-police-discipline-diallo-bell-garner-carr-20181223-story.html.

[32] The CBAs also do not preclude the removal of findings and associated discipline from personnel records as part of a negotiated resolution on appeal. Removing these records impedes transparency and makes it difficult for the Chief to show subsequently that she imposes discipline consistently in like cases or is following progressive discipline requirements.

[33] This is an example of a provision the City says was not impacted because the parties did not bargain it. Yet the plain language of the CBA that includes this provision does not include the same requirements as the accountability ordinance, so there is inconsistent or conflicting language, which means the CBA language supersedes the accountability ordinance provision.

O. The CBAs' "shall prevail" language and the failure to include a fair and effective accountability system as a stated purpose, both of which will then affect how CBA terms will later be interpreted when there is a dispute or disciplinary challenge.

41. With respect to one of the conflicts, the burden of proof, the Court has given direction to the parties in the past. The SPOG CBA not only continues to require a higher burden of proof for dishonesty that results in termination, it makes a broader set of misconduct allegations subject the same undefined "elevated" standard of review. The SPOG CBA mandates that an ambiguous "elevated" standard be used for cases that result in termination where the misconduct is "stigmatizing" and makes it "difficult for the employee to get other law enforcement employment."[34] But nearly any misconduct for which an employee is fired could be viewed as meeting these conditions (and certainly the union and employee will assert that is the case whenever termination is imposed). The weakening in accountability then has a domino effect. De facto, the higher standard of review will also impose a higher burden of proof for OPA investigations and for Chief's initial decision for a wide span of misconduct cases. The preponderance of evidence will no longer be the burden of proof for any case of alleged misconduct that may lead to termination, because both the findings and disciplines now will only be sustained on review if they meet this undefined "elevated" standard of review. OPA will have to use this higher burden of proof for *any serious misconduct*—it won't be able to divine at the initiation of an investigation whether ultimately discipline will be warranted, whether that discipline might be termination, and whether that termination might be found to be "stigmatizing". The impact of this change to the accountability system is, of course, to the detriment of the public and complainants. Serious misconduct that heretofore needed to be

[34] SPOG CBA, Article 3.1 at 10.

proven by a preponderance of the evidence now must be proven by a higher standard, a standard that has yet to even be defined.

42. The SPMA CBA doesn't state that a heightened standard is to be imposed for presumptive termination for dishonesty, referring instead to "established principles". However, considering the SPOG CBA's additional provision that the "established principles of labor arbitration" entail a heightened standard to sustain termination, it appears that the SPMA CBA is in fact embedding this same heightened standard of review without expressly stating it. If that is not the parties' intent, the preponderance standard should be expressly articulated to ensure the CBA does not mean a return to different standards for different types of misconduct, is clearly understood by all, and is not in fact heightened by conventions of arbitration, which are not transparent or known to the public, and are not predictable, since experience shows they may differ from arbitrator to arbitrator.

43. The City's stated rationale for adopting an "elevated" standard of review in the SPOG CBA was that the City had to do this, since in the view of the parties, frequently arbitrators use this elevated standard anyway, and should that occur, the City doesn't want to lose cases. The first problem with this rationale is that the accountability ordinance eliminated arbitration as an alternative route employees could choose, and if that gain had been prioritized through negotiations, rather than abandoned by negotiators, this argument would have been moot because arbitration dynamics would no longer be in play. Second, setting aside the direct conflict with the accountability ordinance, even if arbitration remained available, the two parties were free to contract for an arbitration framework that expressly applies a preponderance standard, which would have been consistent with the prior direction from this Court. Then, if an arbitrator does not abide by this contractual requirement, the correct course of action to protect the public interest would be for the City to appeal based on an abuse of discretion. That

approach would be consistent with the purposes of the Consent Decree. Instead, the CBAs embed an approach that in essence eliminates the preponderance standard for all serious misconduct. The Court has already expressed concern about SPD and the City using a higher burden of proof for dishonesty, as had been raised in the 2014 recommendations and addressed in the accountability ordinance. Instead of ensuring that was remedied, the CBA now enshrines a higher standard for an unknown number and type of misconduct cases, contrary to the Consent Decree's purpose of strengthening public trust and confidence. The City describes this CBA approach as "the City and SPOG agreed to treat dishonesty in the same manner as other cases of misconduct."[35] As I commented when asked about the attempted overturning of findings and discipline in several cases in 2014, this feels like reform in reverse. This may be technically in compliance with the Court's earlier direction endorsing the recommendation to not have termination for dishonesty be subject to a different burden of proof than other misconduct, but it appears to be a significant departure from the Court's intention to strengthen the accountability system, not weaken it.

44. When adopting the SPOG CBA, the Council also passed a resolution asking the Court to provide judicial review of a three of the conflicting provisions in the SPOG CBA for alignment with the Consent Decree,[36] and explained to the public and community leaders from the dais that because the Council had been advised that they could only vote up or down on the CBA, this was the only way the Council had to acknowledge that these terms might be problematic and to see if Court proceedings might provide an alternative venue for remedying the concerns. The City included the Council resolution in its December 17, 2018 filing, but did

[35] Dkt. 512 at 8.

[36] *See* Council resolution filed by the City (Dkt. 512-4 at 4) asking for judicial review of the SPOG CBA standard of review and burden of proof in labor arbitration; the calculation, extension and/or recalculation of the 180-day timeline; and the narrowing of legislated subpoena powers of OPA and OIG.

not ask for judicial review, instead stating that in the City's view these specific terms present no conflicts with the Consent Decree.[37]

45. If the accountability terms in the CBAs remain as agreed to by the City, it will be difficult for the Chief to terminate employees or maintain other disciplinary decisions, as she will contend with vague and shifting standards of review that erect barriers on imposing discipline when the evidence shows that the misconduct occurred, and with the disposition of arbitrators to reverse discipline involving high-profile cases. As the above list of contractual terms highlights, among other impediments, the police unions have negotiated removal of findings and discipline from personnel records, which will make it harder for the Chief to prove discipline was proportionate and even-handed in other cases; the appeals process will allow forum-shopping; require a higher burden of proof; will continue to be shielded from public view; there will continue to be less independent civilian oversight where there is criminal misconduct; if a complaint is not filed within four years, discipline will be barred even where dishonesty and certain types of excessive force or concealment have been proven; and the Chief will continue to be forced to restore to paid duty personnel who may have engaged in grave misconduct, pending prosecutors' decisions about filing charges.[38] All of the CBA terms noted above and in Exhibit A which are in conflict with the accountability ordinance can be expected undercut accountability and diminish public confidence.[39]

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[37] Dkt. 512 at 29.

[38] A key issue is that, in serious cases with ongoing investigations, it is likely that charging decisions may take more than 30 days, requiring the Chief to restore to active duty an officer who ultimately will be charged with serious law violations. The Chief is in the best position to know when restoring an officer to active duty is inconsistent with public trust in light of all the circumstances.

[39] Exhibit A lists in detail many aspects of the accountability system that are or appear to be negatively affected by one or both CBAs, cites the exact accountability ordinance language, and highlights for the Court why the CBA language addressing that subject conflicts with the purposes of the Consent Decree and the accountability ordinance.

VII. THE SHEPHERD CASE

46. The Shepherd case highlights the impact the CBAs' disciplinary provisions can have on delivering police services in which the public can have confidence.

47. Police contracts such as Seattle's CBAs that make it more likely termination will not be upheld in cases of serious misconduct, such as occurred in the Shepherd case, are a serious threat to public trust and confidence in SPD. In the Shepherd case, the Disciplinary Review Board ordered the City to reinstate an SPD officer who had inappropriately arrested and then punched a hand-cuffed subject while she was sitting in the officer's patrol car, causing her significant injuries. Based on my experience and knowledge of Seattle's accountability processes, the Court is correct that reforms in the accountability ordinance that are compromised by the CBAs would have substantially changed the process and standard of review by which this decision was made.[40] Since the disciplinary appeals provisions of the accountability ordinance have been effectively nullified by both CBAs allowing use of an arbitration route, there is every

[40] As noted in Exhibits A and E, these reforms included, among others:

(1) Eliminating multiple routes of appeal and forum-shopping by abrogating the Disciplinary Review Board, disciplinary appeal grievance procedures, and the use of arbitrators to which both parties must agree, for disciplinary challenges, and instead using hearing examiners on staff or under contract, under the supervision of the Public Safety Civil Service Commission (PSCSC), whose composition must be merit-based, also eliminating bias or perception of bias by no longer having an SPD employee Commissioner;

(2) Using a standard of review that would result in more accountability and predictability, and would strengthen the Chief's ability to uphold discipline rather than relying on varied approaches to appellate review used by individual arbitrators, with deference to the fact-finder, that the recommended decision and the final decision should affirm the disciplinary decision unless there is a finding specifically that the disciplinary decision was not in good faith for cause, in which case the decision-maker may reverse or modify the discipline only to the minimum extent necessary to achieve this standard;

(3) Ensuring that all hearings would be open to the public, complainants, and the media to enhance transparency;

(4) Requiring timelines be met for each step of the process and back-up counsel be available, so that cases would not continue to drag on for years, impeding the effectiveness and responsiveness of the system;

(5) No longer barring the imposition of discipline, regardless of the misconduct, if an investigation exceeds 180 days even by a single day, using unclear timelines and requiring union approval of extensions;

(6) No longer using a statute of limitations to bar the imposition of discipline if less than 5 years from the date of the incident, or if Type III Use of Force, dishonesty or concealment is involved;

(7) Ensuring that the OPA Director has full subpoena power, as other City agencies that conduct administrative investigations do; and

(8) Requiring that the public, oversight officials, elected officials, and complainants be notified if findings or discipline are changed at any point for any reason.

reason to expect a similar result if the Shepherd case occurred now. The CBAs retain multiple avenues of post-disciplinary appeal, allowing for forum-shopping, with different standards of review, two of which are not open to the public (arbitration and grievances), and centrally, re-introduce arbitration, which in Seattle (and nationally) has contributed enormously to undermining the role of discipline in establishing standards of performance and enforcing accountability expectations.

48. In a recent University of Pennsylvania Law review article, Stephen Rushin, recited with precision problems with disciplinary appeals practices elsewhere that are similar to those in Seattle:

> "This Article argues that police disciplinary appeals serve as an underappreciated barrier to officer accountability and organizational reform. Scholars and experts generally agree that rigorous enforcement of internal regulations within a police department promotes constitutional policing by deterring future misconduct and removing unfit officers from the streets. In recent years, though, a troubling pattern has emerged. Because of internal appeals procedures, police departments must often rehire or significantly reduce disciplinary sanctions against officers that have engaged in serious misconduct. But little legal research has comprehensively examined the appeals process available to officers facing disciplinary sanctions. By drawing on a dataset of 656 police union contracts, this Article empirically analyzes the disciplinary appeals process utilized in many of the largest American police departments. It shows that the vast majority of these departments give police officers the ability to appeal disciplinary sanctions through multiple levels of appellate review. At the end of this process, the majority of departments allow officers to appeal disciplinary sanctions to an arbitrator selected, in part, by the local police union or the aggrieved officer. Most jurisdictions give these arbitrators expansive authority to reconsider all factual and legal decisions related to the disciplinary matter. And police departments frequently ban members of the public from watching or participating in these appellate hearings. *While each of these appellate procedures may be individually defensible, they combine in many police departments to create a formidable barrier to officer accountability*." (emphasis added).[41]

[41] *University of Pennsylvania Law Review*, March 1, 2018, "Police Disciplinary Appeals" at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134718.

49. Because the SPOG and SPMA CBAs allow the police unions and employees to appeal the Chief's decisions regarding findings and discipline to an arbitrator rather than only to the PSCSC,[42] many reforms that serve the public interest were not retained. Instead, known issues with multiple appeal routes and the use of arbitration (complicated by contractual differences between the SPOG and SPMA CBAs) continue:

A. Different contractual terms and conditions apply depending on whether the PSCSC or arbitration is the appeal route taken. This in turn may lead to different outcomes for the same types of misconduct, potentially even the same misconduct occurring in a single incident, should employees choose different avenues for appeal, or should employees of different ranks be involved. No longer allowing forum-shopping, and no longer having potentially different outcomes for the same types of misconduct as a result, should be central tenets of the accountability system.

B. If the PSCSC is chosen (the only route authorized by the accountability ordinance), the decision-maker will use a preponderance standard, and deference will be given to the Chief's decision unless there is a specific finding that it was not in good faith for cause, in which case the ruling may only be that which is necessary to remedy the error. Hearings will be open, and timelines will be required.

C. If an arbitrator is used instead, the standard of review and burden of proof will be an undefined, but higher, standard, not a clearly defined preponderance standard, and no deference will be required, making the Chief's decision more likely not final and not binding.

[42] The SPOG CBA has also created the added barrier of requiring separate bargaining regarding the composition of the PSCSC, putting into question whether the practice of sworn employees having a role in appeals of discipline involving their peers, subordinates or supervisors will be ended. In contrast, the SPMA CBA adopted the reform.

D. The process of arbitrator selection allows union veto,[43] putting pressure on the decision-makers to act more favorably to the party with the prerogative to choose the path. (Arbitrator selection is "exactly the problem," according to Rushin. "In theory, arbitration is supposed to be a system with a neutral third party, but the way it's practically structured in a lot of cities can favor the officers because the arbitrators are a repeat player, so they have an incentive not to make anyone too angry. That's fine if you're just looking for compromise, but if you have an officer who truly does deserve to be fired, then it's not a great solution."[44])

E. Arbitrators will not be required to have subject matter expertise.

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[43] *See* SPOG CBA, Article 14.2 "Arbitration," F at 64. Under the SPOG CBA, arbitrators are selected as follows:

First the Guild and the City each submit a list of ten (10) acceptable arbitrators from among arbitrators either on the AAA and/or the Federal Mediation lists (no subject matter expertise required.) The only arbitrators automatically included on the List are those on both the Guild and City lists. Then the Guild and City each get to strike two names from the other's list (the first opportunity for the Guild to veto an arbitrator). As cases come up, the parties alternate who goes first (with the Guild starting for the first arbitration). The party going first will have the option to strike or accept the top name on the List (the second opportunity for the Guild to veto an arbitrator.) The other party then will have the option to strike or accept the top name on the List (the third opportunity for the Guild to veto an arbitrator). After each party has gone, the top name on the List will be the arbitrator that hears the grievance. (Note that any arbitrator struck by a party, or selected to hear a case, then rotates to the bottom of the list so they don't come up again until there have been sufficient cases to get to the bottom of the list.)

See SPMA CBA, Article 15.3 at 28. Under the SPMA CBA, arbitrators are selected as follows:

The parties will jointly request that the United States Federal Mediation and Conciliation Service (FMCS) provide a list of labor arbitrators in random order meeting the following qualifications: attorney; office in Washington or Oregon; and member of the National Academy of Arbitrators (no subject matter expertise required.) This will be the List used by the parties for arbitrator selection for the duration of the Agreement. Selection of an arbitrator will operate as follows:

A. The parties will alternate who goes first, starting with the Association going first in the first arbitration conducted under this Agreement.

B. The party going first will have the option to strike or accept the top name on the List. The other party then will have the option to strike or accept the top name on the List. After each party has gone, the top name on the List will be the arbitrator that hears the grievance.

C. The parties will continue sequentially down the List for all future arbitrations. If the parties get to the bottom of the List, they will jointly request that FMCS re-re-randomize the List. The parties will then start at the top of the re-randomized List.

[44] *Naples Daily News*, June 9, 2018, "Fired Police Officers Regain Their Jobs in Florida with Help of Arbitration" at https://www.naplesnews.com/story/news/special-reports/2018/06/09/appeals-system-puts-fired-florida-cops-back-street/500803002/.

F. The public, complainants, and the media will continue to be barred from all proceedings.

G. There will not be enforceable deadlines, meaning appellate processes may drag on for years, as has been the pattern.

50. Other accountability ordinance provisions changed by one or both CBAs (the statute of limitations, the 180-day timeline, and the narrowing of subpoena power, for example) may also affect the outcomes in future cases where excessive force is used, such as in the Shepherd case, regardless of the appellate route chosen.

51. The City describes the Shepherd case as a "…single, erroneous arbitration decision,"[45] yet offers no reason to conclude that this result is anomalous. To assess the City's assertion, the Court must have a complete account of disciplinary appeals challenges that may soon be made[46] or have been made by unions and their members during the course of the Consent Decree—the number of Chief's disciplinary decisions that were appealed, the result in each case, the contractual issues that were raised, how many of the challenged cases are still pending without final result, and so forth. Disciplinary appeals are frequent, and outcomes are often hidden from public view and occur long after the underlying incident. In my view, the Shepherd case is likely but one example of how appropriate discipline often cannot be imposed

[45] Dkt. 512 at 11.

[46] *See, e.g.*, several other incidents that received public attention in recent weeks. The Chief issued decisions about three involving dishonesty (OPA Case No. 17-0998, OPA Case No. 17-0982, and OPA Case No. 18-0243) and another involving unprofessionalism and unnecessary escalation (OPA Case No. 18-0144). The Chief terminated one of the officers found to be dishonest and imposed a 28-day suspension on another. A third officer was demoted and received a 15-day suspension (with five days held in abeyance). *See The Seattle Times,* December 19, 2018*, "*Memo: Seattle Police Union Official Called Sergeant's Public Retaliation Against Citizen Minor Misconduct" at https://www.seattletimes.com/seattle-news/crime/memo-seattle-police-union-official-called-sergeants-public-retaliation-against-citizen-minor-misconduct/. Another case involved a criminal misdemeanor assault charge against an officer, which was dismissed because the alleged victim could not be found. OPA has proceeded with an administrative investigation. *The Seattle Times*, December 21, 2018, "Assault Charge Dismissed Against Seattle Police Officer After Alleged Victim Vanished" at https://www.seattletimes.com/seattle-news/crime/assault-charge-dismissed-against-seattle-police-officer-after-alleged-victim-vanished/.

or sustained when excessive force or other serious misconduct occurs.[47] This is a pattern (arising from structural factors) that, to my understanding, has not changed since the 2014 disciplinary and disciplinary appeals recommendations were made to address it. That pattern could have been eliminated under the accountability ordinance, but will instead now continue due to provisions in the CBAs. Finally, regardless of how many discipline or termination cases have been overturned on appeal in Seattle, history teaches us that all it takes is one or two well-publicized reversals to once again undermine community trust and confidence.

52. The Shepherd case and others like it undermine the efficacy of the disciplinary system in deterring misconduct. There is no "clear message" sent by the Chief's imposition of a penalty[48] when employees are all too aware how long these cases drag out and if the Chief's decision is ultimately not upheld. Each case also has a devastating effect on community trust as they see the actions of the officer in video shown over and over again on the evening news and online, read headlines in the paper, and talk to their family members about how to avoid being injured or killed when stopped by law enforcement. These cases convey the message that police officers, with the power of life or death over civilians, are not held to the accountability

[47] For example, the Court is no doubt also aware of the Faust case, where the arbitrator and other members of the DRB overturned an eight-day suspension; the Whitlatch case, where an arbitrator's settlement after termination for biased policing cost taxpayers nearly $1.3 million dollars; the George case, where the arbitrator member of the DRB overturned the termination and instead ordered a 30-day suspension and directed the SPD to pay the officer $75,000 in back wages and benefits; and the cases at issue that led to my 2014 special report on the disciplinary system. See these related press stories: *The Seattle Times*, October 26, 2014, "Panel Overturns Suspension of SPD Officer in Use-of-Force Case" at https://www.seattletimes.com/seattle-news/panel-overturns-suspension-of-spd-officer-in-use-of-force-case/; *The Seattle Times*, August 31, 2017, "Police Commission Questions Payout to Fired Seattle Officer in Golf-Club Arrest" at https://www.seattletimes.com/seattle-news/crime/police-commission-questions-payout-to-fired-officer-in-golf-club-arrest/; *The Stranger*, July 1, 2015, "Time to Get Rid of the Seattle Police Department's Bad Cops" at https://www.thestranger.com/news/feature/2015/07/01/22478845/time-to-get-rid-of-the-seattle-police-departments-bad-cops; *The Seattle Times*, February 26, 2014, "Reversals of 6 SPD Misconduct Findings to be Re-Examined" at http://blogs.seattletimes.com/today/2014/02/reversals-of-6-spd-misconduct-findings-to-be-re-examined/?syndication=rssWashington; and *The Seattle Times*, February 24, 2014, "Special City Council Meeting to Focus on SPD Discipline" at http://blogs.seattletimes.com/today/2014/02/special-city-council-meeting-to-focus-on-spd-discipline/.

[48] *See* Dkt. 512 at 14 (City stating that "the Department sent a clear message to officers with its decision to terminate Shepherd …").

standards to which, in the aftermath of the Ferguson, Missouri events, the City said in 2014 it was committed. These standards were enshrined in law and the public was promised that, where bargaining was required, the City would bargain so that these reforms could be fully implemented. The City argues that even if it loses its appeal in the Shepherd case and must return the officer to active duty, no harm will be done because the officer will be placed only in non-patrol and non-training roles. One is hard pressed to understand how doing so comports with the Consent Decree purposes of enhancing trust and confidence and eliminating excessive use of force, given the City's judgment that it would be a risk to have this officer carry a gun and be on the streets, yet the City will continue to pay him and possibly employ him until he retires, thereafter paying his full pension. This is an individual who the public is being told cannot be trusted to do the job, but who the City will continue to employ as a sworn officer. This will be noticed by the public and by his peers, and will have ramifications for both.

53. The City also argues that the Shepherd case occurred in 2014, when the use of force policies and training changes mandated by the Consent Decree were not what they are today,[49] but it should be noted that SPOG is still arguing in 2018 that the actions Shepherd took were appropriate, and the disciplinary appeals record in the case indicates that other SPD personnel involved in setting policy and conducting training concur with Shepherd's actions, as did the SPOG member on the DRB.[50]

54. Further, there is another important aspect of this 2014 case that will continue to be a factor in future cases due to the CBAs' retention of arbitrators and concomitant standard of review. In the Shepherd case, part of the arbitrator's rationale for overturning the firing was that in the arbitrator's view, public attention to the case put additional political pressure on the Chief,

[49] *See* Dkt. 512 at 12.
[50] Disciplinary Review Board's Opinion and Award in Appeal of Adley Shepherd, V.B.h.

which in turn resulted in the Chief making her decision based on that pressure, without just cause. The decision-maker would not have been permitted to substitute their judgment for that of the Chief under the standard of review set forth in the accountability ordinance.[51] It will, however, continue to be allowed under the CBAs, as permitted arbitrator discretion. This threatens the Chief's ability to sustain her disciplinary decisions, since other recommendations made in recent years and adopted by SPD and OPA were to ensure *greater* public awareness and *added* transparency of serious misconduct cases. Under those reforms, serious incidents of misconduct *will* be a focus of public concern, which based on the precedent set in the Shepherd case, could now be reason for arbitrators to overturn the Chief's disciplinary decisions. The public is left with a Hobson's choice—if the system supports transparency, daylighting, and community advocacy, the public will have to accept that disciplinary decisions to ensure accountability may be overturned, based on the rationale used in the Shepherd case that public awareness and engagement reduces the Chief's ability to justly determine appropriate discipline.

55. The City states that the SPOG CBA takes a good step (and one that had been recommended in 2014) in eliminating the DRB. But that was only one element of the needed disciplinary appeals reforms, as detailed in Exhibits A and E attached to this Declaration. The City also shares the view of the police unions that it would be untenable to deny officers the option of arbitration since other types of City employees and other police officers across the country have it. This contravenes the City's assurances that it went into bargaining fully committed to implementing the reforms secured in the accountability ordinance and championed to the public—one of which was the elimination of arbitration.

[51] The accountability ordinance set forth a standard of review that would result in more accountability and predictability, and would strengthen the Chief's ability to uphold discipline. It required deference to the fact-finder, that the recommended decision and the final decision should affirm the disciplinary decision unless there is a finding specifically that the disciplinary decision was not in good faith for cause, in which case the decision-maker may reverse or modify the discipline only to the minimum extent necessary to achieve this standard.

56. The City's assertion that arbitration must be retained for police disciplinary appeals because other types of City employees have it is puzzling, given that officers should and do have substantially different accountability mechanisms. This rationale suggests there should also not be an extensive police accountability system and a Consent Decree, regardless of the Constitutional implications, the unique nature of policing, the power law enforcement has to use force, including deadly force, to seize individuals against their will through physical compulsion, and the historical patterns of abuse of police authority that occurred here and throughout the nation.

57. The City's assertion that it would be untenable not to allow arbitration because police across the country use it, is similarly perplexing. The fact that police departments across the country have been constrained by contracts that mandate the same flawed approaches to discipline for decades is precisely the problem that needs to be remedied. Taking the City's point to its logical conclusion, the City should not have reformed its Use of Force policies or training either, since other officers across the country were still using policies and training that did not require de-escalation and other best practices, and thus it would not be fair to hold Seattle officers to different standards that better serve the public interest.

VIII. IMPACTS OF UNCERTAIN OR AMBIGUOUS CBA PROVISIONS

58. The CBAs also have many terms that will be grounds for disputes and challenges, adding uncertainty, unpredictability, delay and cost to the public. In many areas, the CBAs, particularly the SPOG CBA, use vague or ambiguous language, include only part of an accountability ordinance provision, phrase a requirement differently than the accountability ordinance, or have other drafting issues which make it impossible to know how a decision-maker will interpret the provision when there is a challenge by an employee and union. In these areas, the decision-maker will have to look to the plain language of the CBAs, regardless of the

City's intent, because the CBAs also contain provisions that the CBAs will supersede City ordinances whenever there are conflicts,[52] and, as the City states in its filing,[53] case law provides that this applies not only where there is direct conflict, but also where there is any inconsistency. Because of this, in many places where the CBAs are not entirely clear, one cannot discern which aspects of the accountability ordinance are now in effect, which have been superseded, and which SPD policies and other City ordinances are affected and how. Thus, future uncertainty and unpredictability is likely. As a result, SPD supervisors, OPA, OIG, employees, and complainants do not have clarity about which rules of the road should in fact be followed.

59. Contractual preemption language is routinely used. However, as used in these CBAs, particularly the SPOG CBA, it may extensively damage the effectiveness of the accountability ordinance, impact other City ordinances, Executive Orders, and SPD policies, and will reduce community confidence, certainty, predictability, and transparency. It gives great power to arbitrators to review discipline and decide after the fact whether the accountability ordinance and other legal provisions were binding or whether they were superseded by a CBA.

60. The gaps, ambiguities, and inconsistencies in the CBAs benefit those challenging discipline and are detrimental to the public. In contracts, precision and clarity matter. No private entity would think contracts drafted in the manner of the CBAs would sufficiently protect their interests. The public should be equally concerned about how well their interests are being protected, since a seemingly minor contractual issue can be used to challenge and overturn disciplinary decisions regarding any type of misconduct, no matter how serious. This is

[52] *See* Article 18.2 and Appendix E.3 in the SPOG CBA and Article 12.2 and Appendix B "Accountability Legislation" in the SPMA CBA.

[53] *See* Dkt. 512 at 3-4: "If a local law or regulation is inconsistent with a collective bargaining agreement (CBA), then the CBA supersedes" and citing associated cases. *See also Peninsula School Dist. No. 401 v. Public School Employees of Peninsula*, 130 Wn.2d 401, 924 P.2d 13 (1996), finding public employee contract language prevailed over statutory limitation, and that how contract provisions apply was left to be interpreted and decided by the arbitrator, not court.

particularly problematic given the long history of collateral damage when disciplinary decisions made by a Chief are overturned based on an arbitrator's interpretations of contractual terms. As the Court well knows, such successful challenges have repercussions for community trust that last for decades, particularly when the underlying misconduct was excessive force, bias, or criminal in nature.

61. Where there are inconsistencies or conflicts between the CBAs and the accountability ordinance, frequently one cannot discern whether an omission in the CBAs was accidental or intentional, whether the parties intended a provision in the CBA to be different from that in City ordinance and thus the CBA's exact language should prevail, or whether, to the contrary, the parties did not include a phrase or clause from an accountability ordinance provision because they intended the accountability ordinance language to remain operative. Nor can one know with certainty whether the parties agreed that "in conflict with" also means "inconsistent with," as the City asserted in its brief, and thus an even larger number of provisions were intended to be modified or eliminated. Still other provisions are in conflict with current City law simply because they were not updated in the CBAs.

62. Further, in discussing the CBAs with the CPC and others after the SPOG CBA was submitted to the Council, the Mayor's Office explained that the Mayor may not ask the Council to amend the accountability ordinance, since the CBAs clearly state that the CBA language prevails. This raises the specter of an accountability ordinance remaining on the books with some of its provisions effective, others having been superseded, and still others where only when they are specifically challenged will it become known which other provisions have also been superseded.

63. In its filing, the City noted that, for some of the CBA provisions where a concern was raised because the language is inconsistent with the accountability ordinance, the City did

not bargain the issue and the parties agreed that the City has the authority to implement that accountability ordinance provision unilaterally. The City's position is that each of these accountability ordinance provisions is still in effect as adopted.[54] Unfortunately, because the parties left in old CBA language which now conflicts with the accountability ordinance, the plain language of the CBA will still supersede, regardless of the City's intention. The City cannot preclude its unions from asserting that position in arbitration and it will often be in employee-appellants' interests to do so. Similarly, the City's negotiating team have shared their perspective with the CPC and community advocates that they should not be concerned with these provisions because "the parties know what they meant" and "we (the City) know they (the union) don't plan to challenge that." Again, good intentions aside, personal understandings do not provide the public any measure of institutional safeguards, let alone clarity and transparency.[55]

64. This is further complicated by the City's August 18, 2017 filing to the Court that stated "As to every provision not on the List (of items to be bargained)—most of the Ordinance—the City will begin or continue implementing those provisions without awaiting further bargaining."[56] The City then bargained some accountability ordinance provisions not on that list, and the SPOG CBA language now is not the same as the accountability ordinance language. Thus, this City filing states certain accountability ordinance provisions would be

[54] *See* Dkt. 512-5. The City cites as not bargained an accountability ordinance provision that gives SPD authority to set performance standards and take into account OPA history in assignment to and transfer from specialty assignments, *id.* at 88; and one that requires inclusion in the OPA file and disclosure to complainants, the public, the City Attorney, and oversight entities of changes in findings or discipline made by the Chief, and also requires notifications when discipline or findings are later changed as a result of an appeal, *id.* at 34.

[55] Note that the City also stated that concerns had been raised for two other accountability ordinance provisions that the City did not bargain, but concerns were not raised for these - provisions for a meeting between the OPA Director and the Chief when the Chief disagrees with the OPA Director's findings and for the Chief to issue within 30 days of her decision a written statement of the material reasons for findings that differ from those of the OPA Director.

[56] Dkt. 412 at 4.

implemented as presented to the Court, but the SPOG CBA provides otherwise (because the CBA language prevails).

65. Here are some examples where the CBAs are unclear:

A. Did the parties intend to change SPD's policy (5.001 – Standards & Duties) requiring employees to be truthful, complete, and accurate in all aspects of their law enforcement responsibilities, to instead limit that obligation to only OPA investigations, as the CBAs' contract language can now be interpreted to mean?

B. Did the parties intend to require OPA to conduct its interviews in SPD facilities, in contravention of OPA's operational independence (including physically separate space), as the specific language of the SPOG CBA now requires?

C. Did the parties intend to only bar discipline from being imposed if concealment is done by the employee, but not if the employee's supervisor or peer conceals the employee's misconduct, as the CBAs' plain language states?

D. What constitutes "personal records" of employees and employees' families that per the CBAs are now not within the subpoena authority of OPA and OIG? Are medical records, bank records, travel records, child protective services investigation records excluded?

E. When the SPOG CBA states that OPA must assign a sworn investigator for misconduct investigations that may result in termination, did the parties mean that OPA's civilian investigators may not be involved in any manner in those cases, or did they mean that a civilian investigator must be paired with a sworn investigator, and if so, for which aspects of the investigation?

F. When the provision on non-discrimination was not amended in the SPOG CBA, did the parties intend that those employees who are in protected classes covered in

the City's non-discrimination law, but not included in the CBA language, were to no longer have those protections from discrimination?

G. When the CBAs state that SPD or the Department shall take an action that in recent years has been the responsibility of OPA, did the parties mean to return OPA's independent authority to SPD or did they just not update the language that was in place from years ago?

66. Other areas of uncertainty in the CBAs include:[57]

A. The SPOG CBA cites an agreement of the parties on the OPA Manual but does not describe the terms of that agreement.

B. The SPMA CBA refers to a separate agreement regarding the CPC, the terms of which are also not disclosed.

C. There are other side agreements (MOAs) between SPD and the unions still in effect. The MOAs are listed by name in the CBAs, but the relevant terms and conditions in the MOAs that involve accountability are not provided. It is important that all terms in the MOAs are fully reviewed, and that any in conflict with the accountability ordinance or CBA terms be daylighted.[58] The terms of MOAs may set additional, different, or conflicting obligations that weaken accountability. Predictability and certainty are undermined if there are also MOA terms and conditions in play that are opaque to the public and can be used to challenge disciplinary decisions in the future.

D. Both CBAs limit rapid adjudication to a pilot, and both the rapid adjudication and the mediation CBA terms include elements for these programs that are

[57] *See* Ex. A.

[58] The accountability ordinance required ongoing MOAs to be incorporated into the CBAs. The intent was for MOA terms to be incorporated, not simply a list of MOA titles.

inconsistent with prior recommendations from the oversight entities and provisions in the accountability ordinance.[59] The CBAs also do not include the accountability ordinance mandate that the oversight entities participate in developing and refining those programs. These provisions are examples of either the City not understanding the intention of the accountability ordinance reform or taking the position that since the parties did not intend to change the accountability ordinance provisions, the different language in the CBA should be disregarded.

E. The CBAs provide for additional negotiations on a range of topics ("re-openers").[60] The SPOG CBA states that "[t]he parties have agreed to re-open the Agreement on some topics …"[61] While that CBA stipulates a number of specific areas of the accountability ordinance, including, notably, allowing a re-opener on secondary employment reforms, there are no specifics identifying the intent, scope, and timelines associated with each re-opener topic. The SPMA CBA does not identify any specific areas for re-opening associated with accountability. Neither CBA lists all re-opener topics to which the parties agreed at the time the CBAs were negotiated. Additional information and parameters are needed to help ensure that re-openers do not result in further weakening or delay of accountability reforms. As well, technical advisors should be utilized when the parties negotiate these.

F. The lack of clarity with respect to management of secondary employment is also particularly problematic since reform of this program has been needed for years and was again in the spotlight after whistleblower reports in 2017 of apparent corruption

[59] For example, still requiring the complainant to give up any right to pursue a complaint as a condition of agreeing to mediation, regardless of whether there is ultimately a good faith effort by the employee to participate.
[60] *See* Ex. A.
[61] SPOG CBA, Article 21.4-21.7 at 74; Appendix E.12 (3.29.125.E and 3.29.240.K at 84, 3.29.420.A.7.a at 91, 3.29.420.A.7.b at 91; and Appendix H at 96).

in the procurement and compensation of secondary work for SPD employees. The City agreed to let the secondary employment situation remain as it has been since 1992, securing only the right to re-open negotiations on this topic. This was despite years of OPA Auditor recommendations for reform,[62] incorporation in the accountability ordinance, referral of allegations to the FBI, media coverage,[63] and finally a Mayoral Executive Order.[64] The City's Labor Relations Policy Committee (LRPC) records recently provided to the CPC in response to their October 2018 request show that City negotiators gradually slid backwards, initially holding the line on the City's need to make substantial changes, but eventually accepting pre-existing contract language cementing in place procedures for secondary employment that have been used since 1992. The accountability ordinance was direct, "After consulting with and receiving input from OIG, OPA, and CPC, SPD shall establish an internal office, directed and staffed by civilians, to manage the secondary employment of its employees. The policies, rules, and procedures for secondary employment shall be consistent with SPD and City ethical standards, and all other SPD policies shall apply when employees perform secondary employment work." (The SPMA CBA acknowledges "the City's ability to regulate and manage secondary employment through an internal office."[65])

The recommended reforms were in response to a long history of egregious situations and apparent corruption, which came to public attention well into the Consent

[62] *See The Seattle Times,* September 24, 2017, "Off-Duty Work by SPD Officers Has Been An Issue for Years" at https://www.seattletimes.com/seattle-news/crime/off-duty-work-by-spd-officers-has-been-an-issue-for-years/.

[63] *See The Seattle Times,* September 21, 2017, "Seattle Police Officials Concerned About Officers' Off-Duty Work Before FBI Probe" at https://www.seattletimes.com/seattle-news/crime/seattle-police-officials-concerned-about-officers-off-duty-work-before-fbi-probe/.

[64] *See The Seattle Times,* September 27, 2017, "Mayor Orders Seattle Police To Take Control of Officers' Lucrative Off-Duty Work Amid FBI Investigation" at https://www.seattletimes.com/seattle-news/mayor-orders-seattle-police-to-take-control-of-officers-off-duty-work-amid-fbi-investigation/.

[65] SPMA CBA, Appendix B, "Secondary Employment," at 52.

Decree process after revelations of corruption in mid-2017, due to practices that simply were not consistent with ethical norms, a culture of accountability, and wise use of taxpayer dollars.[66] Secondary employment reforms were to be implemented in 2017 pursuant to an Executive Order by then-Mayor Burgess, following recommendations from the Ethics & Elections Commission, the City Auditor, the OPA Auditor, and the CPC. These reforms were to address real and perceived conflicts of interest, internal problems among employees competing for business, the need for appropriate supervisory review and management, and to adopt technological opportunities.

The recommendations included eliminating the practice of having secondary employment work managed outside SPD, often by current employees acting through their private businesses created for this purpose or through contracts between the employee and a private business; making clear that video recording, use of force, professionalism, and all other policies apply when employees perform secondary employment work; creating an internal civilian-led and civilian-staffed office; and establishing clear and unambiguous policies, rules, and procedures consistent with strong ethics and a sound organizational culture.

The City stated in its December 17, 2018 filing that "expectations regarding secondary employment restrictions [were] not negotiated, except for reopener to allow for bargaining once City develops proposals regarding secondary employment. No change to Ordinance anticipated."[67] In other words, the City is saying that the accountability ordinance is unchanged, yet the City has obligated itself to further

[66] *See The Seattle Times*, September 20, 2017, "FBI Investigating Off-Duty Work by Seattle Police at Construction Sites, Parking Garages" at https://www.seattletimes.com/seattle-news/crime/fbi-investigating-off-duty-work-by-seattle-police-at-construction-sites-parking-garages/.

[67] Dkt. 512-5 at 88.

bargaining before it can implement the already long overdue reform mandated by the accountability ordinance and by Executive Order, with no assurance whatsoever that this will be achieved.

67. The City is correct that new structures and many operational mandates concerning OPA, OIG, and CPC in the accountability ordinance remain mostly intact (many of these, including the system audit authority of the OIG, were not mandatory subjects of bargaining to begin with). Nonetheless, the CBAs eliminate, modify, or cast into doubt a large number of the other reforms designed to strengthen the accountability system.

68. Further, it appears from the City's December 17, 2018 filing that in several instances, the City's negotiators may not have understood the rationale for the accountability ordinance provision, nor the ramifications of concessions on both actual outcomes and on community confidence.[68] For example, in the City's Exhibit E, it says that the SPOG CBA "clarified … that no criminal investigations will be conducted by OPA" and required "continuation of 180-day clock during 'contemporaneous' OPA and external criminal investigation[s].[69] However, the intended reforms were not about that. They were to provide greater civilian oversight by the OPA Director to ensure the quality and timeliness of both administrative and criminal investigations, to appropriately toll timelines involving allegations of criminal misconduct when there is not a simultaneous administrative investigation, and to apply the same tolling whether the criminal investigation is conducted by SPD or another law

[68] The City continues to state that the CPC was consulted as part of the City's bargaining (*see* Dkt. 512 at 5). The CPC has asked the City on several occasions to stop making this assertion, since the CPC was not brought in to provide technical expertise about effects on the accountability system or the accountability ordinance in the negotiating process. The CPC was consulted during bargaining solely about accepting a single, minor concession concerning the CPC's ability to engage in independent advocacy in the state legislature, to which the CPC has not objected.

[69] Dkt. 512-5 at 20 and 32.

enforcement agency. The City does not mention that the SPOG CBA removes the OPA Director from participating in the decision-making process as to whether SPD should conduct the criminal investigation (and if so, which unit) or whether it should be referred to an outside agency (and if so, which agency).[70] Further, the SPOG CBA states that the Department, not OPA, will determine whether there are simultaneous administrative and criminal investigations. The Consent Decree's purpose of strengthening public trust and confidence is certainly not fulfilled by providing OPA full authority for less serious misconduct, while minimizing its role for any allegation involving criminal misconduct.

69. Another example of this can be found in the City's Exhibit E which states, "3.29.420(A)(2)(b) [was] modified by SPOG CBA provision making SPD—not employee—responsible for 10-day notification period for right to due-process hearing. City may amend Ordinance."[71] Yet the purpose of this provision was to help address delays in disciplinary appeals by requiring the *employee* to notify SPD and the CAO within 10 days if the employee wishes to appeal (SPD already provides the employee information about appellate rights). There is no relationship between this accountability ordinance provision and the CBA modification identified by the City as having met the ordinance requirement because it requires SPD to provide the employee notice of due process rights.

70. One of the core principles underlying the accountability ordinance was to provide the public greater clarity and predictability, and to ensure the sustainment of a strong accountability system over time, particularly once the Court is no longer involved, regardless of

[70] A current example of this contractual barrier was seen just recently when the OPA Director had to resort to issuing a press release advocating that a law enforcement agency other than SPD be assigned to conduct the criminal review of a 2018 New Year's Eve officer-involved shooting. The Director will not be permitted to coordinate the administrative and criminal investigations to help ensure the quality and timeliness of both, and the 180-day timeline will not be tolled while the criminal investigation is conducted.

[71] Dkt. 512-5 at 85.

changes in leadership among elected officials and their staffs, members of the City's labor negotiating team, SPD and OPA management, or the elected officers of SPOG and SPMA. The parties had four years to draft clear and precise contracts that were consistent with the Consent Decree. Neither the public nor the Court should have to rely on the "we know what we meant" school of contract drafting. The CBAs have many gray areas, which may result in additional public costs and delays each time there is a challenge to a finding or discipline imposed by the Chief. Without a doubt, they will result in uncertainty. The Court, SPD commanders, the oversight bodies, and the public will be left to guess what language a reviewing body, likely an arbitrator, will later decide is to be applied. It is difficult, if not impossible, to know which aspects of the accountability system will still be standing when the dust clears.

IX. CBA IMPACTS ON SPD POLICY AND PRACTICE AND ON OPA MANUAL

71. The Court asked for briefing on SPD polices impacted as well, but the City did not address that issue. SPD policies or procedures impacted by the CBAs[72] are listed in Exhibit D and include:

A. Management of, and policies for, Secondary Employment;

B. Policy regarding accurate and honest communications;

C. EEO investigation practices that now must abide by the same OPA investigation constraints in the CBAs;

D. EIS and progressive and consistent disciplinary practices that rely on comprehensive records retention;

E. Management authority to order mandatory transfers;

[72] Note that SPD Policy 2.050 requires "amendment of all written directives and procedures to coincide with terms of CBAs."

F. Elimination of the requirement that employees may not withhold information during an OPA investigation and first disclose it at the Loudermill hearing or on appeal; and

G. The public's payment of the Guild President's salary.

72. The OPA Manual, which has been before the Court for the duration of the Consent Decree process, is also significantly affected by the CBAs. Exhibit C attached to this Declaration lists examples of 21 provisions in the accountability ordinance that are in conflict with the terms of one or both CBAs that are relevant to the OPA Manual (or appear to be in conflict with, and about which the Court needs additional information to make that determination).

73. The Consent Decree required that OPA update the OPA Manual to formalize its procedures, best practices, and training requirements. It also detailed policies, procedures, and protocols that are to be included in the OPA Manual. An OPA Manual was initially approved by the Court on July 10, 2014,[73] and a revised OPA Manual, updating those protocols, was approved on March 16, 2016.[74] Further updates presumably must be brought back to the Court for approval of any changes until this case is concluded or the City obtains further relief from the Court. Because the OPA Manual details OPA processes, it must address the issues that derive from any changes to the accountability ordinance due to conflicts with either CBA, as well as the differing terms between the two CBAs.

[73] *See* Dkt. 161.

[74] *See* Dkt. 258. In 2016, the Court approved revisions to the OPA Manual with one exception. *Id.* at 2. ("Until such time as the court has entered final approval of the parties' Settlement Agreement and Stipulated Order of Resolution, as modified on September 21, 2012 (*see* Dkt. ## 8, 13) ("Settlement Agreement"), any alternative appeal process under the CBA[s] must be approved by the court prior to utilization of that alternative appeal process by an SPD employee.").

74. In my opinion, having reviewed thousands of OPA complaints and investigations, a critically important purpose of the OPA Manual is to ensure fidelity to adopted reforms in OPA processes over time, especially once the Court no longer has an oversight role, and to ensure consistent use of best practices to avoid returning to OPA practices that raised concerns in the past. A great deal of the detail in the current OPA Manual was intentionally included because the approach to intake, complaint handling, and investigations in the past at times diverged from best practices. It is also important that the OPA Manual set forth expectations with sufficient detail so that the Court can measure OPA performance, and so that OPA itself, the OIG, and the CPC can measure OPA performance once Court oversight has concluded. The OPA Manual also serves to document the operationalization of all relevant accountability ordinance requirements and should be a foundation for OPA staff orientation, training, and performance reviews. Finally, the OPA Manual should be a resource for complainants, the public, SPD employees, and oversight entities for understanding OPA processes.

75. When the OPA Manual is next submitted for Court approval, the Court may be asked to approve a much-reduced and simplified version, based on the view that details in the accountability ordinance can be a source for information previously located in the OPA Manual. However, the accountability ordinance has now been affected by the CBA divergences from it, and the Mayor's Office has said that they may not ask the Council to amend the accountability ordinance. So, for an investigator, employee, member of the public or others to understand OPA processes, in addition to referring to the OPA Manual, one must also look to the accountability ordinance, then to the CBAs for guidance concerning CBA provisions that supersede those of the accountability ordinance. Even if it were true that, hypothetically, a streamlined OPA Manual, the accountability ordinance, and the CBAs together document all the information and

requirements associated with OPA processes, this approach is problematic and undermines transparency. And, in some areas, the SPOG and SPMA CBA provisions conflict with one another. So, not only will it be necessary to consult multiple sources to determine the rules, but because some CBA language is unclear, the rules will, in effect, remain uncertain. OPA, complainants, supervisors, employees, oversight entities, and the public will not have a single, concise, definitive roadmap of how the accountability system works. Consulting up to four different sources, interpreting confusing language, and attempting to reconcile differences among them on a case-by-case basis will lead to inconsistent application of the rules, make less certain the fairness of the system, and undermine community confidence in its legitimacy.

X. LOSS OF ACCOUNTABILITY SYSTEM REFORMS THREATENS OTHER CONSENT DECREE ACHIEVEMENTS AND PROBLEMS ARE UNLIKELY TO BE ADDRESSED AFTER THE CONSENT DECREE ENDS

76. The City asserts that because it has done well implementing many Consent Decree reforms, ongoing compliance with the Consent Decree is secure, regardless of the CBAs and their impact on the accountability system. The City is rightly proud of the improvements achieved under the Consent Decree. But the CBAs play a critical role in whether those improvements will be preserved and built upon, or whether, after the sustainment period, failures will undercut those other gains once the Court is no longer involved. That is why measuring the likelihood of ongoing compliance through the lens of the changes made to the accountability system, rather than through the lens of comparing CBA terms to prior CBAs, as the City asks the Court to do,[75] is so important. Seattle is now considered at the national forefront for many of its policies, systems, and training reforms because of the Consent Decree. The City's approach to bringing the accountability system up to par with the other Consent

[75] Dkt. 512 at 15.

Decree reforms was to pass the accountability ordinance and then to prioritize aligning the CBAs to it through bargaining. Unfortunately, with respect to the accountability system, in contrast with the other reforms implemented under the Consent Decree, the provisions in the current CBAs do not come close to best practices. Accountability system reforms as now changed by the CBAs pale in comparison to other reforms achieved under the Consent Decree.

77. The City's stated rationale in asking the Court to maintain its finding of full and effective compliance, despite the CBAs' provisions that undermine compliance with the Consent Decree, is that: 1) the City was required to collectively bargain; 2) these CBAs are better than the previous CBAs; 3) other important gains were made in bargaining; 4) bargaining is give and take and incremental; 4) the community shouldn't expect to "get it all" in one round; 5) more can be obtained in bargaining in the future; and 6) indeed, more gains will be made "next time." For these reasons, the City indicates that it is unreasonable to expect full or more extensive implementation of the accountability ordinance as well. If reform were truly prioritized, the City's duty to collectively bargain, and its duty to ensure constitutional and effective policing enhancing the trust and confidence of the community, would not be mutually exclusive propositions. Community advocates have tried to address accountability system policy issues for years and have always been frustrated by the City's failure to resolve them in bargaining. The decades-long failure of the City to do so continues to contribute to ongoing community distrust, but the City's message today is the same as in the past—"more accountability reforms will be achieved next time."[76] It is clear from the history of police union

[76] ACLU Washington, Seattle: ACLU Urges Greater Police Accountability, News Release, November 7, 2003, Testimony of Julya Hampton, Legal Program Director, ACLU of WA, before the Seattle City Council Committee on Fire, Courts and Technology November 18, 2003 Public Hearing on Police Accountability and the Collective Bargaining Process (at https://www.aclu-wa.org/news/seattle-aclu-urges-greater-police-accountability):

> I would like to thank members of the City Council for the opportunity to present ACLU's wish list on police accountability. From the vantage point of almost two decades of observation, and countless meetings with

bargaining that structural or systemic factors prevent accomplishing these changes, since despite the efforts of different officials over the years, the result has been continued contractual barriers to improved accountability. Due to the Consent Decree and the MOU between Seattle and the United States, unprecedented effort, attention, and resources have been directed at accountability system improvements during the last several years, and there has been ongoing judicial oversight through the Consent Decree process, so failure to accomplish key reforms during this period does not give one confidence that they will be achieved "next time". The key reason that these recommended reforms to the accountability system were placed in an ordinance, along with ordinance provisions requiring alignment of CBAs, was to ensure the reforms would be sustained over time, bolstered, not diminished by the CBAs, to help prevent recurring breakdowns. Codifying the reforms meant that they would more likely be sustained under new OPA Directors, Chiefs, and elected officials. By making these reforms law, the intent was that public could have confidence in the permanence of an improved accountability system and rest more assured that any efforts to weaken the system would have to be made by a vote of elected officials taken only after public debate in which community members would have a voice.

78. Due to the pragmatic and consensus-building approach supported by community advocates in Seattle, in contrast to some other jurisdictions, the accountability ordinance did not represent radical change, but did secure many long-recommended reforms. The accountability

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local officials and their staff, the single most important overriding message I would like to leave with you is the following: "stop the giveaways." By this I mean, the City should stop giving away in the collective bargaining process the public's ability to establish a stronger and more effective police accountability system. The ACLU for years has questioned the City's penchant for giving the police officers' union too much control of the police department's disciplinary system, and extraordinary control of accountability mechanisms in particular. The tendency of City officials to engage in unwarranted giveaways is particularly troublesome when the concessions involve accountability proposals that are not subject to mandatory bargaining. These nonmandatory issues should not be incorporated into the labor talks because doing so ensures they will become hostage to the cumbersome collective bargaining process.

ordinance provisions aimed to remedy specific well-documented problems and impediments, stemming from numerous real-life cases encountered under Seattle's existing system over many years. For more than two years, civilian oversight experts and community advocates negotiated with City officials to make long-needed system improvements in ways that best served the public, could be supported by SPD, were fair to employees, and would be consistent with the goals of the Consent Decree, in particular, enhancing community trust. Many provisions were more moderate than some experts and advocates preferred.[77] The accountability ordinance language was carefully crafted to ensure fidelity to those many months of discussions. Thus, the City's failure to prioritize, respect, and achieve the expected results of a pragmatic and moderate approach is particularly damaging to community trust.

79. Recognizing the critical importance of police accountability, the unique power of law enforcement, and the obligations of the Consent Decree, the City took the unusual approach of adopting an ordinance ahead of collective bargaining. The City's elected leaders took pains to explain to the labor community that they understood this was not the normal manner in which collective bargaining proceeds. The City leaders also committed to the community that they would prioritize and safeguard the progress made in the accountability ordinance and strengthen the City's ability to sustain reform. All those involved understood that collective bargaining was part of the process. The City clearly communicated its commitment to prioritize comprehensive accountability system reforms in bargaining. The accountability ordinance was to be the baseline for the City's position, not the ceiling from which the City would then make

[77] For example, some community advocates would have liked to see much more authority in a community-based body, such as the power to hire and fire the Chief, conduct investigations, eliminate sworn personnel from OPA, and install a formal complainant appeal process, as other jurisdictions have done.

"calculated compromises."[78] Indeed, that is why specific language stating this intention was included in the accountability ordinance, made necessary by the unique nature of policing and the importance of staying in compliance with the Consent Decree.[79]

80. One of the principle purposes of the Consent Decree is to deliver to the people of Seattle policing in which the community can have confidence.[80] Yet, the parties did not include ensuring an effective accountability system as a stated purpose of either CBA. The accountability ordinance says:

> "The police are granted extraordinary power to maintain the public peace, including the power of arrest and statutory authority under RCW 9A.16.040 to use deadly force in the performance of their duties under specific circumstances. Public trust in the appropriate use of those powers is bolstered by having a police oversight system that reflects community input and values. It is The City of Seattle's intent to ensure by law a comprehensive and sustainable approach to independent oversight of the Seattle Police Department (SPD) that enhances the trust and confidence of the community, and that builds an effective police department that respects the civil and constitutional rights of the people of Seattle. The purpose of this Chapter 3.29 is to provide the authority necessary for that oversight to be as effective as possible."[81]

In contrast, the stated purpose in the SPOG CBA is limited to establishing fair and reasonable compensation and working conditions, and effective public safety services. Further, while the

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[78] However, the City viewed the accountability ordinance provisions as contingent. *See* Dkt. 512 at 27 ("… the City made calculated compromises to achieve gains in accountability; if any of those compromises unexpectedly turn out to hinder accountability, they will be high priority goals in the next round of negotiations").

[79] SMC 3.29.510.A ("… Timely and comprehensive implementation of this ordinance constitutes significant and essential governmental interests of the City, including but not limited to (a) instituting a comprehensive and lasting civilian and community oversight system that ensures that police services are delivered to the people of Seattle in a manner that fully complies with the United States Constitution, the Washington State Constitution and laws of the United States, State of Washington and City of Seattle; (b) implementing directives from the federal court, the U.S. Department of Justice, and the federal monitor; (c) ensuring effective and efficient delivery of law enforcement services; and (d) enhancing public trust and confidence in SPD and its employees. For these reasons, the City shall take whatever steps are necessary to fulfill all legal prerequisites within 30 days of Mayoral signature of this ordinance, or as soon as practicable thereafter, *including negotiating with its police unions to update all affected collective bargaining agreements so that the agreements each conform to and are fully consistent with the provisions and obligations of this ordinance, in a manner that allows for the earliest possible implementation to fulfill the purposes of this Chapter 3.29.*") (emphasis added)

[80] Dkt. 504 at 4-5.

[81] SMC 3.29.010.A.

SPOG CBA states that the parties recognize the importance of proceeding with implementation of the Ordinance,[82] the CBA cites only the need to protect the interests of SPOG and the City, not the need to protect the public's interests.[83] Similarly, the stated purpose of the SPMA CBA is limited to setting forth the wages, hours, and other conditions of employment for its members.[84] Police unions are not required to prioritize the interests of the public and the achievement of a credible accountability system, though they should. City leaders under the Consent Decree, however, are required to do so. The limited purposes identified in both CBAs, which will be looked to when contractual challenges are decided, does not reflect that commitment.

XI. CONCLUSION

81. As the Court has said, "ensuring that appropriate oversight and accountability mechanisms are in place is one of the cornerstones to securing constitutional and effective policing in this City beyond the life of the Consent Decree" and "getting this aspect of reform right may well be a linchpin to the long-term success of this entire process."[85]

82. To help ensure constitutional policing, appropriate oversight in which the community can place its trust is necessary. The accountability system must be effective. Seattle's system has many positive elements that others do not. But the CBAs before the Court impede Seattle from having a system the public can trust to work when the added safeguard of judicial oversight is gone, and regardless of who the Chief, Council, and Mayor may be. If the CBAs were aligned with the purposes of the Consent Decree, serious misconduct, including criminal misconduct, would not have less civilian oversight than other types of misconduct. The

[82] SPOG CBA, Appendix E, "Accountability Legislation" at 80.
[83] SPOG CBA, Preamble at iii.
[84] SPMA CBA at iii.
[85] Dkt. 504 at 5.

imposition of discipline for proven misconduct would not be dependent on which path to appeal the employee chooses, or allow arbitrators to substitute their judgment for that of the Chief. Disciplinary appeals would not be decided by individuals without subject matter expertise, who may be peers of the employee appealing or who have to be approved by the union. The public, the OPA Director, and the Chief would not have to guess what the burden of proof and standard of review for sustaining the Chief's decisions on discipline will be. The imposition of discipline would not be barred for misconduct whenever an investigation takes a single day more than 180 days or any time misconduct involving dishonesty, Type III Use of Force, or concealment by others comes to light. The public, media, and complainants would not be refused entry if they wish to observe appellate hearings. Accountability would not differ because of an employee's rank. The City would have full authority to appropriately manage and oversee off-duty employment. The OPA Director would be allowed to select and manage the work of civilian investigators. All records would be kept, the Chief could place an employee on leave when warranted, discipline of days without pay would result in actual days without pay, and the public, policymakers, and complainants would be notified when discipline or findings are later changed. And it would be a system where contractual terms are clear, understandable, and consistent with the interests of the public, and where future arbitrator interpretations do not put run the risk of further weakening the accountability system.

83. Certainty that other reforms achieved through the Consent Decree will be sustained over time is now diminished by these give-backs and by the breadth of ways the CBA terms may be used to challenge the Chief's authority, delay outcomes, and create other obstacles that will impede accountability.

84. And for those who argue that any concerns can be remedied by future bargaining, the City's long history (and that of cities throughout the country) of allowing these kinds of

barriers to remain in the police CBAs, year after year, over decades, and again this time, does not provide reassurance. These four years of bargaining, while the City has been under a Consent Decree, had committed in the law itself to bargain in a manner that would allow for full implementation of the accountability ordinance, had told the public that specific reforms had been achieved, had provided significant improvement in employee wages, and had benefited from the considerable dedicated efforts and expertise of community leaders, still did not result in the elimination of long-standing contractual impediments to accountability. The terms of the CBAs already known to be in conflict with the accountability ordinance and with SPD policy and practice, and those terms whose effects are unclear, do not portend well for community trust and confidence. Indeed, the packed Council chambers, the letter from the leaders of 24 community groups,[86] and the intense public debate about whether the SPOG CBA should have been ratified by the Council shined a spotlight on this point.

85. If accountability improvements had been appropriately prioritized, the CBAs would, as the unanimously adopted accountability ordinance intended, help ensure the reforms gained through the Consent Decree process are sustained over time, and public trust and confidence in SPD is increased. In my opinion, the CBAs before the Court instead are likely to undermine or compromise those very reforms.

[86] *See* November 8, 2018 letter to the City Council from 24 community organizations before adoption of the SPOG CBA: "The accountability system is so weakened by these departures from the ordinance in the tentative contract that we cannot agree to its adoption. …The accountability measures included in the Ordinance drew on years of community experience, research on national best practices, the expertise of legal professionals and the OPA Auditor…. These [past accountability system] breakdowns led to well publicized scandals that resulted from accountability system deficiencies, which further eroded public trust in the accountability system."

I swear or affirm under penalty of perjury that the within and foregoing declaration which was made on the date indicated below in Seattle, Washington, is true and correct.

DATED this 29th day of January, 2019, at Seattle, Washington.

The Honorable Anne Levinson (ret.)

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 20, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

DATED this 20th day of February, 2019.

s/ David A. Perez
DPerez@perkinscoie.com

EXHIBIT A

Accountability Ordinance Provisions, SPD Policies and Practices, and Other Ordinances or Accountability System Practices Compromised by or in Conflict with the CBAs

Exhibit A to the Declaration of Judge Anne Levinson (ret.)
Accountability Ordinance (Ordinance) Provisions, SPD Policies and Practices, and Other Ordinances or Accountability System Practices Compromised by or in Conflict with the CBAs, Providing the Court with Analysis and Showing the City's Stated Position on Each From its December 17, 2018 Filing (Dkt. 512)

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
1. The SPOG CBA requires that CBA language prevails over any City ordinance whenever the CBA conflicts with an ordinance provision. The SPMA CBA states that City ordinances are paramount except where they conflict with the express CBA provisions. The City's position is that if there is any inconsistency (not just direct conflict) between the Ordinance and CBA language, the CBA language supersedes.		
3.29.500 A. In the event of a conflict between the provisions of this Chapter 3.29 and any other City ordinance, the provisions of this Chapter 3.29 shall govern. 3.29.510 A. Provisions of the ordinance introduced as Council Bill 118969 subject to the Public Employees' Collective Bargaining Act, chapter 41.56 RCW, shall not be effective until the City completes its collective bargaining obligations. As noted in Section 3.29.010, the police are granted extraordinary power to maintain the public peace, including the power of arrest and statutory authority under RCW 9A.16.040 to use deadly force in the performance of their duties under specific circumstances. Timely and comprehensive implementation of this ordinance constitutes significant and	<u>CBA Citation</u> SPOG: See Article 18.2 and Appendix E.3 SPMA: See Article 12.2 and Appendix B Accountability Legislation <u>Analysis</u> SPOG The CBA terms that the CBAs will prevail over City law whenever there is a conflict also include all CBA terms where the language is in any way *inconsistent* with City law (and presumably the Executive Order on secondary employment and SPD policies that are even less paramount than City law), unless the CBA clearly states otherwise. Contracts are normally written with greater clarity, so that one can readily determine those provisions that are in conflict or inconsistent with laws or other legal requirements. In the SPOG CBA, however, there are many ambiguous provisions; and others that carry forward part, but not all, of the relevant Ordinance language related to a particular CBA provision. One cannot discern whether the omission of certain Ordinance language was accidental or was intentional — did the parties intend that a provision in the CBA different from that in any City ordinance would be "in conflict with" the Ordinance, and thus the CBA's exact language should prevail, or did they not include a phrase or clause from an Ordinance provision because they were intending to have Ordinance language remain operative? Did the parties also agree that "in conflict with" means "inconsistent with", and thus an even larger number of provisions were intended	City Position: Substantive Impact. The City states: "3.29.500 [was] not adopted by either SPMA or SPOG. City may amend Ordinance." The City also takes the position that the CBA pre-emption "in conflict" language refers to any *inconsistent* language, not just language where there is a direct conflict: "… If a local law or regulation is inconsistent with a collective bargaining agreement (CBA), then the CBA supersedes." (Dkt. 512 at 3-4.)

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
essential governmental interests of the City, including but not limited to (a) instituting a comprehensive and lasting civilian and community oversight system that ensures that police services are delivered to the people of Seattle in a manner that fully complies with the United States Constitution, the Washington State Constitution and laws of the United States, State of Washington and City of Seattle; (b) implementing directives from the federal court, the U.S. Department of Justice, and the federal monitor; (c) ensuring effective and efficient delivery of law enforcement services; and (d) enhancing public trust and confidence in SPD and its employees. *For these reasons, the City shall take whatever steps are necessary to fulfill all legal prerequisites within 30 days of Mayoral signature of this ordinance, or as soon as practicable thereafter, including negotiating with its police unions to update all affected collective bargaining agreements so that the agreements each conform to and are fully consistent with the provisions and obligations of this ordinance, in a manner that allows for the earliest possible implementation to fulfill the*	to be modified or eliminated by the CBA? Still other provisions are in conflict with current law simply because they were not updated in the CBAs. And for others, the City states that the CBA term was not bargained. Nonetheless, it was left in the CBA and it is inconsistent with the Ordinance or SPD policy. Regardless of the reason, or the City's intent, each of these types of conflicts or inconsistencies throughout the CBA benefits those challenging discipline, to the detriment of the public. The preemption language thus makes it difficult for the Court and all those involved with the accountability system to ascertain which ordinance provisions and SPD policies and practices are still in effect, which have been modified, and in what way. It also gives great power to arbitrators (which the CBAs continue to authorize in contravention of the Ordinance) whenever an employee or union challenges a disciplinary action taken by the Chief. The arbitrator will decide whether the relevant Ordinance and other legal provisions were binding, or whether they were superseded by CBA language because it is in some way inconsistent. And the arbitrator may look to the CBA intent language, which is silent on the importance of an effective accountability system (see 2. below). This is further complicated by the City's August 18, 2017 submission to the Court stating that provisions of the Ordinance were effective upon adoption unless included on their list to the Court of those provisions that needed to be bargained. The City then bargained some of Ordinance provisions not on that list, and that CBA language now also differs from the Ordinance language. There was no communication to the Court or to the community that City policymakers did not intend to abide by the Ordinance provision that the union CBAs would "each conform to and [be] fully consistent with the provisions and obligations of this ordinance" as expressly stated in 3.29.510. Without additional information— including binding agreements by SPOG and SPMA as to the meaning of various provisions—it is impossible to ascertain how all of the CBA terms that have language inconsistent with City law will affect sustained reform over time. The City negotiators have told the Community Police Commission (CPC) and community advocates that they should not be concerned	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
purposes of this Chapter 3.29. (emphasis added)	with these provisions because "the parties know what they meant" and "we know they don't plan to challenge that." This approach is contrary to the goals of achieving greater clarity and sustaining a strong system over time, particularly once the Court is no longer involved, and regardless of changes in leadership among elected officials, SPD and OPA management, or Guild officers. These provisions create many gray areas, and will result in additional public costs and delays each time there is a challenge to a finding or discipline imposed by the Chief. The Court, SPD commanders, the oversight bodies, and the public will be left to guess what language a reviewing body will later decide is to be applied. It is difficult or impossible to know what rules to follow and to conform to legal obligations when it is unclear what source of law will be determined to be in effect until after the fact. SPMA As noted in this chart, there are not as many conflicting or inconsistent terms in the SPMA CBA as in the SPOG CBA, but they are still numerous, and their impact is still difficult to ascertain. They require a different analysis, because the SPMA language provides that all City ordinances prevail except where they conflict with "the express provisions" of the CBA, and states that "in accordance with [results of bargaining incorporated into Article 16], the City may implement the Accountability Ordinance."	
2. Ensuring a fair and effective accountability system is not a stated purpose in either CBA, which will affect how all of the ambiguous provisions will later be interpreted whenever there is a dispute or disciplinary challenge.		
3.29.010 A. The police are granted extraordinary power to maintain the public peace, including the power of arrest and statutory authority under RCW 9A.16.040 to use deadly force in the performance of their duties under specific circumstances. Public trust in the appropriate use of those powers is	<u>CBA Citation</u> SPOG: See Preamble and Appendix E, 1st paragraph at 80; Article 14.2, Step 4, Arbitration SPMA: See Page iii; Article 15.6 A <u>Analysis</u> SPOG/SPMA Neither CBA mentions the Ordinance's purpose language, or even references having a fair and effective accountability system as a purpose. The stated purpose of the SPOG CBA is limited to establishing fair and reasonable compensation and	City Position: Ordinance Unchanged. The City states: "3.29.010 is unchanged by CBAs. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
bolstered by having a police oversight system that reflects community input and values. It is The City of Seattle's intent to ensure by law a comprehensive and sustainable approach to independent oversight of the Seattle Police Department (SPD) that enhances the trust and confidence of the community, and that builds an effective police department that respects the civil and constitutional rights of the people of Seattle. The purpose of this Chapter 3.29 is to provide the authority necessary for that oversight to be as effective as possible.	working conditions, and effective public safety services. The stated purpose of the SPMA CBA is limited to "setting forth the wages, hours and other conditions of employment" for its members. Either the Ordinance language should be expressly included in the CBAs' statements of purpose, or at minimum, among the CBAs' stated purposes should be "to ensure the police accountability system is as effective as possible." Further, the CBAs state that, "The arbitrator shall have no power to render a decision that will add to, subtract from, or alter, change, or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration." (The 'all other matters' phrase is in SPOG, but not SPMA CBA.) Also, in Appendix E of the SPOG CBA, which concerns additional Ordinance terms the parties agreed to change through the CBA, the CBA cites only the need to protect the interests of SPOG and the City, not the need to protect the public's interest. This issue will come into play when an appellate decision-maker endeavors to interpret the intent of any CBA provision where the language is inconsistent or in conflict with City ordinance. In addition, since the importance of an effective accountability system is not referenced in the CBAs, arbitrators may also find conflicts based on other contractual ambiguities not identified in this chart.	
3. The CBAs do not ensure all ranks are treated equally in the accountability system.		
3.29.100 D. OPA policies and practices shall be applied uniformly regardless of rank or position.	<u>CBA Citation</u> SPOG: No specific citation(s) – many terms differ from SPMA CBA terms SPMA: Only one specific citation (See Article 16.4.A), but many other terms differ from SPOG terms <u>Analysis</u> SPOG/SPMA While some SPMA CBA inconsistencies and conflicts mirror those of the SPOG CBA, others are variations of SPOG provisions. In some instances, there are provisions in one CBA that counter the Ordinance that are not reflected in the other CBA. Importantly, neither CBA adopts Ordinance provisions that accountability policies	The City didn't cite 3.29.100.D as a provision where the CBAs and the Ordinance are in conflict.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	and practices be applied uniformly so that the public and SPD employees can rely on accountability processes that treat all employees the same, regardless of rank. Among the significant differences between the CBAs are: the calculation of 180-day deadlines which bar discipline if OPA investigations exceed that length of time; the description of the standard of review for appeals, which then also affects burdens of proof to be used by OPA and the Chief; the statute of limitations for imposing discipline; disciplinary and disciplinary appeal deadlines; procedures for selecting arbitrators; who may investigate cases that may result in termination; who may investigate cases involving an employee with a rank above sergeant; allowing a higher-ranking employee to answer an investigator's questions in writing, rather than in an in-person OPA interview; and eliminating bias or the appearance of bias by requiring merit-based selection to the PSCSC and no longer having SPD employees rule on disciplinary appeals of peers, supervisors or subordinates. These materially different provisions mean OPA, SPD, OIG, and the City Attorney's Office (CAO) will have to handle complaints, investigations, discipline, and disciplinary appeals differently, depending on the rank of the involved employee. Doing so will complicate and make problematic OPA's management of investigations and the efficacy of the Court-approved OPA Manual. For example, if members from both unions are involved in an OPA investigation of a single incident, OPA's management of that investigation will have to apply different rules to SPMA and SPOG employees. If those differences result in different outcomes, accountability and community trust will be impacted. Alternatively, OPA and the City may try to apply the same accountability standards as much as possible to all ranks, but that would require using weaker SPOG CBA accountability standards not only for SPOG members, but also for SPMA members, as well as using other weaker accountability elements in the SPMA CBA related to differences in how higher-ranking employees are treated. At the time the SPMA CBA was approved, the City took the position that the ways the CBA differed from the Ordinance were acceptable because SPMA agreed to accept all other aspects of the Ordinance. However, the value of SPMA's	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	acceptance of most Ordinance provisions has now been largely lost because the SPOG CBA conflicts with so many Ordinance provisions and thus preempts them. And as noted above, if the City chooses to adopt a uniform system as much as possible, then the SPOG CBA language will prevail for all ranks. In essence, SPMA members will also receive the benefits of the SPOG CBA terms which serve the public less well, and the public will have received nothing in return. In addition, if the City amends the Ordinance to align with the SPOG CBA, the Ordinance will no longer include the original provisions that the SPMA CBA ratified when it agreed to implement most Ordinance provisions. The SPMA CBA provision that misconduct allegations involving SPMA members in whole or in part may not be investigated by any of OPA's sworn investigators (since all are sergeants, a lower rank) is also inconsistent with the Ordinance objective that the OPA Director should have authority to assign investigators based on needed expertise, workload, and other factors to help ensure the highest quality and most timely investigations. The CBA allows "civilians permanently assigned to OPA" to conduct these investigations if those civilians replaced captains or lieutenants, but this provision leaves unclear whether the OIG will be able to conduct an investigation where OPA has a conflict, since OIG staff are not "civilians permanently assigned to OPA."	
4. Failure to incorporate disciplinary appeal reforms: ▪The CBAs maintain use of arbitration and grievances for disciplinary challenges, in addition to the PSCSC, thus continuing to allow forum-shopping.		
3.29.420 A.6. All appeals related to employee discipline shall be governed by this Chapter 3.29 and Chapter 4.08 … 3.29.420 A.7.a. All appeals related to SPD employee discipline shall be … heard by PSCSC. A.7.c. Oral reprimands, written reprimands, "sustained" findings that	<u>CBA Citation</u> SPOG: See Articles 3.2, 14.1, and Appendix E.12 (3.29.420.7.a at 91 and 3.29.420.A.7.c at 92) SPMA: See Articles 15.1, 15.2 Step 3 Arbitration, 15.14, 16.1, and 16.5.Q <u>Analysis</u> SPOG/SPMA In 2014, after the then-Interim Chief changed previously determined findings or discipline in a number of cases, a special review of the disciplinary system was conducted. The review identified several long-standing problems and included a number of recommended reforms to discipline and disciplinary appeals processes,	City Position: Substantive Impact. The City states: "3.29.420.A.6 [was] not adopted by either SPOG or SPMA CBAs. City may amend Ordinance to allow for arbitration, in addition to civil service appeal rights under 4.08."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
are not accompanied by formal disciplinary measures, and alleged procedural violations may be processed through grievance processes established by the City Personnel Rules or by Collective Bargaining Agreements, but no grievance procedure may result in any alteration of the discipline imposed by the Chief. Such grievances are not subject to arbitration and may not be appealed to the PSCSC or any other forum. 4.08.070 J. [The PSCSC shall] hear and determine appeals or complaints respecting the administration of this Chapter 4.08, including, but not limited to, all appeals affecting discipline of SPD employees defined in subsection 4.08.060.A. In hearing police discipline cases, the Commission may delegate its authority to conduct hearing appeals to a hearing officer that it retains, or to a hearing officer in the City of Seattle Office of the Hearing Examiner, subject to Commission review. Any hearing officer shall have appropriate expertise and objectivity regarding police disciplinary decisions.	which were later codified in the Ordinance. The CBAs do not retain these reforms, creating a significant barrier to effective accountability. Among those discipline and disciplinary appeals processes reforms in the Ordinance was elimination of multiple routes of appeal, making the PSCSC with assigned hearing examiners the single appellate route, and eliminating forum-shopping. Because the CBAs did not adopt that reform—the employee is still permitted to instead choose to use grievance and arbitration processes to challenge discipline—all the other reforms that were tied to the PSCSC single route of appeal (see # 6-8 below) will not be in effect for those other forums, which may result in potentially different outcomes for the same types of misconduct. Employees and unions will "forum-shop" in an effort to improve the chances the discipline imposed by the Chief will be overturned. For a number of reasons, arbitration will be the likely route of appeal, just as the Disciplinary Review Board (DRB) was in the past. (The DRB was expressly created in a prior CBA so that venue could be chosen instead of the PSCSC, and union practice has been to not support or financially assist an employee who chooses the PSCSC route, in order to discourage use of that forum.) See also Exhibit E for ways the disciplinary appeals reforms in the Ordinance have been abrogated or undercut by the CBAs.	The City didn't cite 3.29.420.A.7.a re "all appeals shall be heard by PSCSC" as a provision where the CBAs and the Ordinance are in conflict. The City states: "3.29.420.A.7.c requiring imposition of discipline even in cases of successful grievances [was] not adopted in SPOG CBA, which permits full grievance rights. SPMA CBA similarly contains no limitation regarding outcome of discipline-related grievances. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
5. Failure to incorporate disciplinary appeal reforms: "A preponderance of the evidence" for the burden of proof and the standard of review will no longer be the standard for a wide range of serious misconduct, including dishonesty.		
	CBA Citation SPOG: See Article 3.1 SPMA: See Article 16.1 Analysis SPOG/SPMA **Standard of Review and Burden of Proof**. The City's filing discusses the changes made to the standard of review, but does not fully explain how significant the negative impact to the public is. First, it is not just the standard of review for serious misconduct that has been changed; de facto the burden of proof has also been changed. Second, it will make misconduct harder to prove not just for a few types of misconduct, but potentially for all serious misconduct. **Standard of Review.** As noted above, the CBAs allow employees to forum-shop, choosing an alternative route of arbitration to challenge discipline if they wish. The CBAs then also provide that the arbitrator must use a different, higher standard of review for an undefined range of types of misconduct if arbitration is chosen. Arbitrators also will have broad authority to reconsider all factual and legal decisions related to the disciplinary matter and will use for SPOG, "an elevated standard of review based on established labor arbitration principles" for any misconduct that results in termination that is "stigmatizing" and "makes it difficult for the employee to get other law enforcement employment" or, for SPMA, "established principles of arbitration." The SPMA CBA doesn't explicitly provide for a heightened standard, but does say the standards to be used "are to be consistent with established principles of arbitration," which appears, without expressly stating it, to embed the same undefined heightened and broad standard of review as the SPOG does. In contrast, if the employee appeals through the PSCSC (the single route provided for in the Ordinance), a standard of review intended to result in more accountability and predictability and to strengthen the Chief's ability to uphold	The City states: "3.29.135.F differs from SPOG and SPMA CBAs. Both agreements require evidentiary standard to be consistent with 'established principles of labor arbitration.' SPOG articulates an elevated evidentiary standard for stigmatizing termination cases. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	discipline will apply. It requires deference to the fact-finder (the Chief), requiring the final decision affirm the disciplinary decision unless there is a specific finding that the disciplinary decision was not in good faith for cause. If that finding is made, the appellate decision-maker may reverse or modify the discipline only to the minimum extent necessary to achieve this standard. The City's stated rationale for agreeing to change the standard of review was that they had to do so, since, in the view of the parties, arbitrators frequently use an elevated standard anyway, and should that occur, the City does not want to lose cases. This would not have been an issue had the City retained the ordinance's single appeals path and the standard of review set forth. Even after allowing arbitration to remain available (in direct conflict with the ordinance), the City still could have required an arbitration framework that expressly applies a preponderance standard, which would have been consistent with prior direction from this Court. Then, if an arbitrator does not abide by the explicit contractual requirement, the correct course of action to protect the public's interest would be to appeal based on an abuse of discretion. An approach consistent with the purposes of the Consent Decree would not have: 1) continued to allow a reviewer to substitute their judgment for that of the Chief with no limitation on the degree to which the Chief's decision can be modified; 2) required a higher standard of review if the route provided for in the ordinance is not chosen; 3) left the standard undefined; and 4) used language that means that higher standard will now be required for a wide range of serious misconduct. The preponderance standard should be expressly provided for in each CBA to ensure the CBAs do not result in a return to different standards for different types of misconduct, accountability for serious misconduct is not weakened, the standard is clearly understood by all and is not, in fact, heightened by conventions of arbitration, which are not transparent or known to the public, and are not predictable, since experience has shown they may differ from arbitrator to arbitrator. **Burden of Proof.** Even more concerning, OPA will now be required to use this higher standard for its burden of proof for *any investigation involving serious*	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	misconduct, as will the Chief in her decision-making. They will have to do so, whether the parties intended it or not, because OPA will not know when it commences an investigation which route of appeal may ultimately be chosen by the employee if discipline is later imposed, won't know if the discipline will be termination, and, if so, whether the termination will be determined by the arbitrator to be a "stigmatizing" type that "makes it difficult for the employee to get other law enforcement employment", which are the types of misconduct cases that under the CBAs are no longer subject to a preponderance standard of review. A "preponderance of the evidence" has always been the burden of proof for misconduct findings and associated discipline. In the case of termination for a first instance of dishonesty, a higher standard ("clear and convincing") was applied in recent years, in accordance with a MOA entered into between the City and SPOG, when the presumption of termination was agreed to. The ordinance eliminated that, returning to a preponderance standard for all misconduct findings and discipline. The Court expressed concern about SPD and the City using a higher burden of proof for dishonesty, and affirmed the approach taken in the ordinance. Instead, the City is asking the Court not only to accept a higher standard for misconduct involving dishonesty that results in termination, but also for a wider range of misconduct that results in termination. The City describes this CBA approach as "the City and SPOG agreed to treat dishonesty in the same manner as other cases of misconduct."	
6. Failure to incorporate disciplinary appeal reforms: ▪The SPOG CBA does not prohibit City employees or recent SPD employees from being on the PSCSC, and neither the SPOG nor SPMA CBA require all appellate decision-makers to have subject matter expertise.		
3.29.420 A.7.b. The PSCSC shall be composed of three Commissioners, none of whom shall be current City employees or individuals employed by SPD within the past ten years, who are selected and qualified in accordance with subsection	<u>CBA Citation</u> SPOG: See Appendix E.12 (3.29.A.7.b at 91) SPMA: See Article 16.4.Q <u>Analysis</u> SPOG/SPMA The revised composition of the PSCSC (not allowing City employees or anyone employed by SPD within the past ten years) and the requirement that	City Position: Substantive impact for not adopting reforms to PSCSC composition. The City didn't cite 4.08.040.B re PSCSC's composition as a provision where the CBAs and the Ordinance are in conflict.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
4.08.040.A. 4.08.040 A. There is created a Public Safety Civil Service Commission composed of three members. Two members shall be appointed by the Mayor and one by the City Council. Commissioners shall be selected using merit-based criteria and shall have appropriate expertise and objectivity regarding disciplinary and promotional decisions. The Commissioners' terms shall be staggered; initial terms shall be for one year for one Mayoral appointment, two years for the Council appointment, and three years for the second Mayoral appointment. Subsequently, the term of each Commissioner shall be three full years. Each term shall commence on January 1, and appointments to fill vacancies shall be for the unexpired term. A Commissioner shall be eligible to serve three full terms plus any time spent filling a vacancy for an unexpired term or a shortened initial term. Two Commissioners shall constitute a quorum. Commissioners may receive compensation for their services as may be fixed from time to time by ordinance. The term of the first Commissioners appointed after the effective date of the ordinance	Commissioners have subject matter expertise were Ordinance reforms intended to better ensure impartial, arms-length review by individuals with appropriate expertise, selected on the basis of merit, and appointed for fixed terms (not affected by any rulings they might make). As before, under the Ordinance, these PSCSC decision-makers are to be appointed by City officials. The SPOG CBA does not retain these Ordinance provisions for the PSCSC. The SPOG CBA requires future bargaining concerning the composition of the PSCSC, which puts in question whether the practice of sworn employees having a role in discipline appeals involving their peers, subordinates, or superiors will be ended. The SPMA CBA expressly agrees to these PSCSC reforms, but they cannot be put in place without SPOG's agreement. The separate arbitration appeal route allowed in both CBAs does not require the arbitrators to have subject matter expertise, provides multiple opportunities for the unions to veto selection of arbitrators, and adds delay. Both CBAs allow the parties to select arbitrators from a list negotiated in advance, requiring only that the listed arbitrators have AAA and/or FMCS credentials, not any particular background in police disciplinary cases. The process of arbitrator selection allows the union to strike one or more names at the top of the list, which moves the arbitrator to the bottom of the list for future selection. As has been seen nationally, the arbitrator selection process for police disciplinary appeals is inherently problematic. There is an incentive for the arbitrator to compromise or otherwise decide in such a way that the arbitrator's selection will not be vetoed for a future case by either party. This is a particular risk in cases where an arbitrator must determine whether an officer's misconduct warrants termination, which are cases involving the most serious types of misconduct. See Exhibit E for additional detail about the CBAs' arbitrator selection processes and see the Declaration for additional analysis of how arbitration in police disciplinary appeals has undermined public trust and confidence in Seattle and nationally.	The City states: "3.29.420.A.7.b [was] not adopted, subject to further negotiation with all affected unions … City may amend the Ordinance." The City states: "4.08.040.A change to PSCSC composition, eliminating employee-elected commissioner, [was] not adopted, subject to further negotiation with all affected unions … City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
introduced as Council Bill 118969 shall begin at the time of appointment, but shall be deemed to begin for the purpose of calculating term length on the following January 1. Commissioners who will continue to hold office after the effective date of the ordinance introduced as Council Bill 118969 may continue to hold their positions until those first terms begin; they may also be reappointed by the Mayor or Council in accordance with this subsection 4.08.040.A. B. Current City of Seattle employees, as well as individuals employed by SPD within the past ten years, shall be ineligible for the office of Commissioner.		
7. Failure to incorporate disciplinary appeal reforms: ▪If certain employees choose arbitration, their hearings will bar access by the public, complainants, and the media.		
3.29.420 A.7.a. All appeals related to SPD employee discipline shall be open to the public.	<u>CBA Citation</u> SPOG: See Article 7.9 requiring a re-opener; and Article 14.2 Step 4 (E) requiring arbitrators to use AAA voluntary labor arbitration regulations unless stipulated otherwise by the parties SPMA: Does not have a provision on open or closed hearings, but see Article 15.6 (D) requiring arbitrators to use the same AAA voluntary labor arbitration regulations for hearing procedures <u>Analysis</u> SPOG/SPMA The Ordinance requires all disciplinary appeals hearings to be open to the public (including complainants and media.) By convention, arbitration hearings and	City Position: Substantive Impact. The City states: "3.29.A.7.a requirement that all appeals are open to the public is not adopted for grievance arbitration proceedings under SPOG and SPMA CBAs. SPOG agrees to a partial reopener for SPOG regarding public's attendance at grievance

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	grievance processes are closed to the public, complainants, and media. The CBA provisions on hearings did not retain the Ordinance requirement that all hearings must be open to the public. The CBAs instead stipulated elsewhere that arbitrators must use AAA voluntary labor arbitration regulations. With regard to barring the public from hearings, those regulations state: "The arbitrator and the AAA shall maintain the privacy of the hearing unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party, during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives." The language appears to be internally inconsistent when applied to police accountability. Certainly the public and complainants have a direct interest in the outcome, yet they may be barred if they are not considered a party. This is another instance where the lack of language anywhere in the CBAs about a purpose of ensuring an effective accountability system and protecting the public's interest will come into play. The SPOG CBA also provides for a partial re-opener to require additional bargaining on whether arbitration hearings will be open to the public. Taken together with the arbitration regulations, one has to infer that the parties did not intend for the Ordinance provisions to take effect, even though they did not include any specific language to the contrary in the relevant CBA provisions on hearings. Nonetheless, the City states that it is not likely the City will amend the Ordinance to address this conflict. The SPMA CBA provisions on hearings are also silent about whether hearings are open or closed and there is no reference to a re-opener, which should mean the Ordinance provision requiring open hearings is fully effective for both arbitration and PSCSC appeals involving SPMA members. But the CBA also includes elsewhere the provision requiring arbitrators to use AAA regulations. It is unclear how the parties will interpret the obligation for open hearings when an appeal involves both SPOG and SPMA members.	proceedings. Ordinance amendment possible, but unlikely."

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Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
8. Failure to incorporate disciplinary appeal reforms: ▪Timelines for appeals, intended to reduce delays in appellate proceedings and final resolution, will now differ depending on the appellate route chosen by the employee.		
3.29.420 A.2. g. The Public Safety Civil Service Commission (PSCSC) shall adhere to the timelines set forth in Chapter 4.08. 4.08.105 A.1. Any employee removed, suspended, demoted, or discharged may within ten days from the date of electronic service of the final disciplinary decision by the Chief of Police, file with the Commission a written notice of appeal. The notice of appeal may be filed electronically, and the employee shall submit copies of this notice to the City Attorney and the Chief of Police. A.2. The Commission shall ensure that a hearing is conducted as soon as practicable, but in no event later than three months after submission of the notice of appeal. The hearing shall be confined to the determination of whether the employee's removal, suspension, demotion, or discharge was made in good faith for cause. A.3. … The Commission will review the recommended decision and, within 30 days of the oral argument, issue a final	<u>CBA Citation</u> SPOG: See Articles 14.2 Step 3 Discipline Grievance, 14.2 Step 4 at 62, 14.2 Step 4 Arbitration at 63, 14.2.D Arbitration at 64, and 14.4 SPMA: See Articles 15.2 Step 2-3, 15.6.D, and 15.7 <u>Analysis</u> SPOG/SPMA To address long-standing patterns of months or years of delay for outcomes when discipline and/or findings are appealed, the Ordinance stipulates deadlines related to disciplinary and appeal processes (10 days for the employee to file a notice of appeal; the hearing held within three months; the ruling issued within 30 days of oral argument; and hearings and related deadlines not delayed more than two weeks due to the unavailability of the City's or the employee's union representative or legal counsel). Frequent delays prevent timely resolution of complaints and don't meet the test of a strong accountability system, as complainants, the public, other employees, and SPD management are left not knowing if the Chief's decision will be upheld. When the outcome of a complaint does not occur until years after the complaint is filed, even when the outcome is the imposition of discipline, accountability for the community is diminished and the extended uncertainty is not ideal for effective management of the Department. Because the CBAs still allow multiple avenues of appeal, these deadlines will not apply if arbitration is chosen by the employee or union; instead the CBA deadlines will apply. For example, under the SPOG CBA, arbitration hearings will "generally" be conducted within 90 calendar days "from the date the arbitrator provides potential dates to the parties," but the parties may extend the timeline without limitation to account for availability. In addition to not establishing a definitive timeline and allowing extensions, the 90-day start date is from when the arbitrator	City Position: Ordinance Unchanged. The City didn't cite 3.29.420.A.2.g which repeats 4.08.105 Ordinance language re appeal deadlines as a provision where the CBAs and the Ordinance are inconsistent. The City states: "4.08.105 is unchanged by collective bargaining. Note that the Grievance Procedures – in Article 14 of SPOG CBA and Article 15 of SPMA CBA -- apply only to disciplinary and contract grievance brought by the Unions, not to disciplinary appeals brought by the employee to the Public Safety Civil Service Commission. No change in Ordinance anticipated."

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Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
determination whether the disciplinary decision was in good faith for cause, giving deference to the factual findings of the Hearing Officer. Both the recommended decision and the final decision should affirm the disciplinary decision unless the Commission specifically finds that the disciplinary decision was not in good faith for cause, in which case the Commission may reverse or modify the discipline to the minimum extent necessary to achieve this standard. A.5. Any failure by the City to adhere to a deadline in this Chapter 4.08 will not, in itself, invalidate the Chief's disciplinary decision. The Commission may, however, consider missed deadlines in in determining whether the disciplinary decision is in good faith for cause. B. … Hearings and related deadlines shall not be delayed more than two weeks due to the unavailability of the City's or the employee's union representative or legal counsel.	sends hearing dates, not from the date the case is first referred. The Ordinance provides for contracted or staff hearing examiners and limits extensions due to unavailability to two weeks to help to cut down on delays that occur frequently for police arbitration appeals. The SPMA CBA does not reference any timelines for when an arbitration hearing will be conducted, or provisions for extensions.	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
9. The CBA provisions stating that employees must be complete and truthful in OPA investigations preempt SPD policy requiring honesty in all communications, and the CBAs define dishonesty as *intentionally* providing false information or incomplete responses to specific questions regarding material facts, instead of using an objective standard.		
3.29.135 F. Termination is the presumed discipline for a finding of material dishonesty based on the same evidentiary standard used for any other allegation of misconduct.	<u>CBA Citation</u> SPOG: See Article 3.1 SPMA: See Article 16.1 <u>Analysis</u> SPOG/SPMA Both CBAs retain the Ordinance provision that a presumption of termination applies in cases in which an officer is found to be dishonest. However, both CBAs limit the employee's obligation to communicate completely and truthfully to only OPA investigations, not to all communications. There should be absolutely no question that employees must be complete and truthful in *all* communications, (e.g. employees must be truthful when completing incident reports, conducting use of force reviews, testifying in court, etc.) as SPD Policy 5.001 requires. The narrow CBA language has wide implications given the large number of people detained and arrested with supporting police reports and testimony each year. And, whether intentional or not, the narrow CBA language will apply due to the CBA "shall prevail" language. As a result, SPD policy requirements for honesty would be limited to those communications described in the CBAs as related to "investigations" and "allegations," which will undercut the Chief's ability to hold officers accountable for complete and truthful incident reports, use of force reports, witness testimony, and any other verbal and written communication, thereby diminishing public trust and confidence. Also, both CBAs define dishonesty as intentionally providing false information which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding material facts, requiring OPA to prove intentionality, rather than using an objective standard.	The City states: "3.29.135.F [was] supplemented by SPOG CBA to include definition of 'material dishonesty'. No Ordinance amendment anticipated." The City didn't cite limiting employees' obligation to be complete and honest as CBA provisions inconsistent with SPD policy (and that the CBA language supersedes SPD policy). The City also didn't cite the CBA inconsistency of requiring dishonesty be proven to be intentional.

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Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
10. The CBAs continue to bar the imposition of discipline, regardless of the misconduct, if an investigation exceeds 180 days even by a single day. The calculation of the timeline and extensions are unclear and union approval of extensions is required.		
3.29.130 B. The time period in which investigations must be completed by OPA is 180 days. The time period begins on the date OPA initiates or receives a complaint. The time period ends on the date the OPA Director issues proposed findings. E. If an OPA interview of a named or witness employee must be postponed due to the unavailability of the interviewee or the interviewee's labor representative, the additional number of days needed to accommodate the schedule of the employee or the employee's bargaining representative shall not be counted as part of the 180-day investigation period. F. If the OPA Director position becomes vacant due to unforeseen exigent circumstances, the 180-day period shall be extended by 60 days to permit the designation of an interim OPA Director and the initiation of the appointment process for a permanent OPA Director. 3.29.135 C. If an investigation time limit as set forth in Section 3.29.130 has been exceeded, within 30 days of the final	<u>CBA Citation</u> SPOG: See Articles 3.6.B, 3.6.C, and 3.6.D SPMA: See Articles 16.4.C, and 16.4.C.2-C.5 <u>Analysis</u> SPOG/SPMA **180-day bar.** The Ordinance intentionally did not state that the imposition of discipline was to be tied to the 180-day timeline, instead requiring OPA to document and report every case in which 180 days was exceeded and the reason(s) why. The intention was to maintain the goal of timely investigations by requiring documentation similar to that required when the Chief's decision differs from the OPA Director's recommended finding or when a finding or discipline is later changed (transparency and performance expectations), while eliminating the loss of accountability when an investigation misses the 180-day window, even by a single day. Additionally, the Ordinance was very specific and concrete in defining the timeline, in setting forth the circumstances under which the deadline could be extended, the length of time allowed for those extensions, and when the 180-day period was to be paused (including during criminal investigations), in order to eliminate any ambiguity about the timeline and related rules (see immediately below). These reforms better support accountability, so that even if discipline were to remain tied to the 180-day period, the greater clarity would result in fewer challenges based on its calculation. **Start and end of 180-day clock.** In the Ordinance, the start date to the 180-day timeline is when OPA receives or initiates a complaint and the end date is when the OPA Director issues proposed findings. Instead, the SPOG CBA makes start date distinctions based on whether it is a formal complaint, the seriousness of the allegations, when the complaint in entered in Blue Team, and whether OPA or OIG personnel are at an incident (3.6.B (i)-(v)). The SPOG CBA makes the end date the date the proposed Disciplinary Action Report (DAR) is issued (and the DAR is issued by SPD, not OPA, so the 180-day deadline can still be missed by delay in actions	City Position: Substantive impact. The City states: "3.29.130.B differs from SPOG and SPMA CBAs. Both Agreements contain fairly elaborate rules for initiating and tolling the 180-day clock. City may amend Ordinance." The City states: "3.29.130.E and F differs from SPOG CBA, which retains … provision requiring SPD to make a request for extension of timelines, which will not be unreasonably denied by SPOG. Negotiated reasons for extensions differ slightly from those in Ordinance but include a catch-all provision for unforeseen circumstances. City may amend Ordinance." The City didn't cite 3.29.135.C as a provision where the CBAs and the Ordinance are in conflict.

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certification of the investigation by the OPA Director, the OPA Director shall make a written statement of the nature of the allegations in the complaint and the reason or reasons why the time limit was exceeded. This requirement applies whether the OPA Director recommended the complaint be sustained, not sustained, or declined to make a recommendation because the time limit had been exceeded. The written statement shall be included in the OPA case file and provided to the Mayor, the Council President and the Chair of the public safety committee, the City Attorney, the Inspector General, and the CPC Executive Director, and included in a communication with the complainant and the public.	not under OPA's control, as has happened in the past). The Inspector General has noted that in the event the OIG undertakes an OPA conflict investigation, potential issues with the time calculation would apply to OIG. In addition, the OIG has authority to request or direct further investigation (3.29.260.D). The Inspector General has noted that in those cases, OPA must resubmit the case to the OIG for certification before the OPA Director may issue proposed findings. The OIG's ability to timely certify, as well as the amount of time left for OPA to issue findings, will be negatively impacted by the CBA provisions related to the 180-day period. The SPMA CBA language defining the 180-day investigation period is generally consistent with the Ordinance. **180-day extensions.** When extensions apply, the length of time allowed for those extensions under the CBAs is ambiguous. As well, both CBAs require union approval of extensions, which undercuts OPA's authority, and the unions' duty of representation may narrow when such extensions would be agreed to. Decisions about whether an extension should be granted and for how long can also be challenged as contractual violations. Given the frequency of challenges to discipline based on whether the 180-day timeline was exceeded, retaining 180 days as a bar to discipline and allowing challenges to extension decisions will continue to result in a lack of clarity, and lessen accountability, fairness, and community confidence. In two places, Article 3.6.B of the SPOG CBA ties the timeline to "verdicts" or "guilty pleas" but does not account for other types of dispositions. In Article 3.6.D of the SPOG CBA, the first sentence, as well as the phrase "and a community member later complains" mean there will be different approaches to the timeline calculation based on who the complainant is. Also, this is limited to Type II use of force. Similarly, Article 3.6.D.1 includes a clause that effectively limits the start date recalculation to community member complaints.	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
11. Failure to incorporate reforms related to investigations of criminal misconduct: ▪The CBAs continue to limit OPA's authority in investigations of criminal misconduct, which often involve the most serious types of misconduct.		
3.29.100 G. OPA's jurisdiction shall include all types of possible misconduct. In complaints alleging criminal misconduct, OPA shall have the responsibility to coordinate investigations with criminal investigators external to OPA and prosecutors on a case-by-case basis to ensure that the most effective, thorough, and rigorous criminal and administrative investigations are conducted.	<u>CBA Citation</u> SPOG: See Article 3.7 and Appendix E.12 (3.29.100.G at 82) SPMA: See Article 16.5.B <u>Analysis</u> SPOG/SPMA The CBAs do not retain an important Ordinance reform that OPA's jurisdiction should include all types of possible misconduct, in order to ensure *greater* civilian oversight, not *less*, of investigations involving allegations of criminal misconduct. In complaints alleging criminal misconduct, OPA should have the responsibility to coordinate investigations with criminal investigators external to OPA and prosecutors on a case-by-case basis to ensure that the most thorough and timely criminal and administrative investigations are conducted. This is an area where partial incorporation in the CBAs of language from the Ordinance and representations of the parties have made OPA's authority unclear and thus subject to challenge. The CBAs do not incorporate a key clause from the Ordinance ("… to ensure that the most effective, thorough, and rigorous criminal and administrative investigations are conducted."), so the intended scope of OPA's role appears to have been scaled back from that in the Ordinance. This raises the question as to whether these cases, which often involve the most serious types of misconduct, will be subject to challenge when the OPA Director takes steps to protect the quality and timeliness of the OPA investigation. The SPOG CBA appears to limit OPA's role to coordinating only scheduling (i.e., monitoring the status and progress of the case) with criminal investigators and prosecutors, while the SPMA CBA limits OPA's authority to coordinate with criminal prosecutors to only cases involving concurrent OPA and criminal investigations. The SPOG CBA also states that the Department (rather than OPA) will determine whether there are simultaneous OPA and criminal investigations	City Position: No Substantive Impact. The City states: "3.29.100.G clarified by SPOG and SPMA CBAs, confirming that no criminal investigations will be conducted by OPA. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	and does not require the OPA Director's agreement in deciding whether an investigation will be conducted by SPD or an external law enforcement agency. These limitations undercut a major reform. The lack of civilian oversight of criminal investigations, which often involve the most serious allegations, has always been a serious weakness in Seattle's system. When an allegation involves possible criminal acts, OPA has been limited to referring the complaint to SPD (which infrequently refers such cases to another law enforcement agency for investigation). OPA then waits for the criminal investigation to be completed and referred back to OPA. OPA cannot help ensure that important questions or evidence related to the OPA investigation are addressed as part of that initial investigation, or address the quality, nature, or length of time of the criminal investigation. If the criminal investigation is not thorough or timely, the OPA investigation is often compromised (e.g., evidence is no longer available, witnesses' memories fade over time, or there is limited time left in OPA's 180-day investigation window). The intended reform was to provide the OPA Director the authority to consult with the criminal investigator and prosecuting attorney at the beginning of all cases involving allegations of criminal misconduct to determine the most effective approach for achieving thorough and rigorous criminal and OPA investigations. The OPA Director should make the decision as to whether the investigations run concurrently or not, whether an outside law enforcement agency should investigate, and how the timing of notification and witness interviews should be managed. This is another area where the Consent Decree's purpose of public trust and confidence can be undercut when an employee engaged in possible criminal misconduct cannot be properly held accountable. OPA is responsible for making sure that happens, yet does not have clear authority to do so. It is difficult to see how the public interest is served by providing OPA full authority for only for lower levels of misconduct, while minimizing its role when there is an allegation involving criminal misconduct.	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
12. Failure to incorporate reforms related to investigations of criminal misconduct: ▪The SPOG CBA forecloses OPA authority, yet requires that the 180-day timeline continues to run, when allegations are referred for criminal investigation, other than when the misconduct occurred in a different jurisdiction or is under review by a prosecutor.		
3.29.130 G. In cases involving possible criminal actions, if an OPA administrative investigation is not commenced or is paused due to a criminal investigation, that time shall not be counted as part of the 180-day investigation period, and shall be documented in an administrative intake or investigation follow-up log in the investigation file. The OPA administrative investigation shall be paused as long as is necessary so that neither the OPA administrative nor the criminal investigation of the same incident is compromised. The 180-day clock shall resume whenever any administrative investigation steps are taken by OPA.	<u>CBA Citation</u> SPOG: See Articles 3.6.B.2, 3.6.C.1, and 3.7 SPMA: See Article 16.4.C.1 <u>Analysis</u> SPOG The SPOG CBA does not adopt a key Ordinance reform that the 180-day clock should be automatically paused any time criminal allegations are referred by OPA to a law enforcement agency for investigation and the administrative investigation is on hold. The reform was to make sure that the timeline is paused whenever a case is outside of OPA's control, not just for the period of time when the prosecutor reviews the case for a filing decision after the criminal investigation is completed. If the other two related reforms had been secured as intended (OPA having authority to oversee all misconduct investigations to ensure the quality and timeliness of investigations involving criminal allegations; and not tying the 180-day timeline to the authority to discipline), this failure to pause the clock would be of less consequence. The SPOG CBA also treats the same criminal misconduct allegations differently by allowing the timeline to be tolled if the misconduct occurred "in another jurisdiction." Thus, if the misconduct occurs in Seattle, less time is allowed for the criminal and administrative investigations to be completed. As with other CBA provisions that do not appear to serve the public, it is difficult to understand how a provision that lessens civilian oversight and the time needed to investigate serious allegations which occurred in Seattle represent good public policy. The OPA Director is required to obtain SPOG approval of any needed extension to the 180-day timeline, but whether that approval will be granted is uncertain given the union's duty of representation. In addition, the OPA Director is not given	City Position: No Substantive Impact. The City states: "3.29.130.G [was] modified by SPOG Agreement … requiring continuation of 180-day clock during contemporaneous OPA and external criminal investigation. OPA may suspend investigation during external criminal investigation and OPA clock then tolled. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	discretion to make the decision as to whether SPD or another agency will conduct the criminal investigation. SPMA The SPMA CBA expressly adopts the Ordinance tolling reforms for allegations of criminal misconduct.	
13. The SPOG CBA sets a four-year statute of limitations and provides for a limited set of exceptions. Discipline for serious misconduct, including dishonesty and Type III use of force, is barred if the complaint is made more than four years after the incident, and the statute of limitations is still a bar to accountability when misconduct is concealed by peers, supervisors, or subordinates.		
3.29.420 A.5. No disciplinary action will result from a complaint of misconduct where the misconduct comes to the attention of OPA more than five years after the date of the alleged misconduct, except where the alleged misconduct involves criminal law violations, dishonesty, or Type III Force, as defined in the SPD policy manual or by applicable laws, or where the alleged act of misconduct was concealed.	<u>CBA Citation</u> SPOG: See Article 3.6.G and Appendix E.12 (3.29.420.A.5 at 89) SPMA: See Article 16.4.I <u>Analysis</u> SPOG The SPOG CBA does not adopt the Ordinance reforms to the statute of limitations. The statute of limitations was to be extended from three years to five years for most misconduct cases, and eliminated altogether for certain more serious types of misconduct, in order to retain accountability. Limitations on the ability to ensure accountability for serious misconduct leads to the loss of public trust. The SPOG CBA lowers the limit to four years, and removes the exceptions for dishonesty, Type III Force, and concealed acts of misconduct where a peer, superior, or subordinate conceals the misconduct (retaining it only for concealment by the named employee). This means the statute of limitations still applies and employees may not be held accountable for several types of serious misconduct. As with other CBA provisions that do not appear to serve the public, it is difficult to understand what public purpose is served by these CBA provisions. Note also that 3.6.G.3 regarding extensions of the time period when there is an adverse court ruling, does not state to whom the disposition is adverse. SPMA The SPMA CBA expressly adopts the Ordinance statute of limitation reforms.	City Position: Substantive Impact for reducing to four years and for applying time limit to Type III Use of Force. The City didn't cite re also applying time limit to concealment only if done by named employee as a provision where the CBAs and the Ordinance are inconsistent. The City states: "3.29.420.A.5 [was] modified by SPOG CBA, reducing limitations period to four years. City may amend Ordinance." The City states that "3.29.420.A.5 extension of limitations period in cases of Type III Force [was] not adopted in SPOG CBA. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
14. The SPOG CBA requires secondary employment reforms be bargained, further delaying this long overdue reform, despite an Executive Order having been issued.		
3.29.430 D. After consulting with and receiving input from OIG, OPA, and CPC, SPD shall establish an internal office, directed and staffed by civilians, to manage the secondary employment of its employees. The policies, rules, and procedures for secondary employment shall be consistent with SPD and City ethical standards, and all other SPD policies shall apply when employees perform secondary employment work.	<u>CBA Citation</u> SPOG: See Articles 7.9 and 21.5 SPMA: See Appendix B Secondary Employment <u>Analysis</u> SPOG The SPOG CBA provides for a re-opener to bargain secondary employment and expressly sets the terms and conditions for secondary employment to terms and conditions in effect in 1992. This concession is a setback to a critical accountability reform. (Secondary employment is not an employment right and should not have been incorporated in the CBA to begin with, thus making it subject to bargaining.) In response to egregious situations and apparent corruption coming to light recently and a history of problems addressed in repeated recommendations over the years, secondary employment reforms were to be implemented in 2017 pursuant to an Executive Order by then-Mayor Burgess and recommendations from the Ethics & Elections Commission, the City Auditor, the OPA Auditor, and the CPC. These reforms addressed real and perceived conflicts of interest, internal problems among employees competing for business, the need for appropriate supervisory review and management, and technological opportunities. The recommendations included eliminating the practice of having secondary employment work managed outside SPD, often by current employees acting through their private businesses created for this purpose or through contracts between the employee and a private business; making clear that video recording, use of force, professionalism, and all other policies apply when employees perform secondary employment work; creating an internal civilian-led and civilian-staffed office; and establishing clear and unambiguous policies, rules, and procedures consistent with strong ethics and a sound organizational culture. SPMA The SPMA CBA acknowledges “the City’s ability to regulate and manage secondary employment through an internal office.”	City Position: Ordinance Unchanged and Contract Re-opener to be Negotiated. The City states: “3.29.430 expectations regarding secondary employment restrictions [were] not negotiated, except for reopener to allow for bargaining once City develops proposals regarding secondary employment. No change to Ordinance anticipated.”

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
15. The SPOG CBA does not provide OPA and OIG full subpoena authority.		
3.29.125 E. When necessary, the OPA Director may issue a subpoena at any stage in an investigation if evidence or testimony material to the investigation is not provided to OPA voluntarily, in order to compel witnesses to produce such evidence or testimony. If the subpoenaed individual or entity does not respond to the request in a timely manner, the OPA Director may ask for the assistance of the City Attorney to pursue enforcement of the subpoena through a court of competent jurisdiction. 3.29.240 K. [IG authority to] issue a subpoena if evidence or testimony necessary to perform the duties of OIG set forth in this Chapter 3.29 is not provided voluntarily, in order to compel witnesses to produce such evidence or testimony. If the subpoenaed individual or entity does not respond to the request in a timely manner, the Inspector General may ask for the assistance of the City Attorney to pursue enforcement of the subpoena through a court of competent jurisdiction.	<u>CBA Citation</u> SPOG: See Appendix E.12 (3.29.125.E and 3.29.240.K at 84) SPMA: None <u>Analysis</u> SPOG The SPOG CBA provides only for limited OPA and OIG subpoena power, prohibiting issuance of subpoenas to SPOG members, their family members, or for their "personal records". If "personal records" is interpreted to include bank records, medical records, and the like, this exclusion covers a significant amount of potentially important information. The CBA also states that "… the City [will] further [review] questions concerning the authority and potential need for OPA and the OIG to issue such subpoenas" prior to possibly re-opening the CBA to bargain OPA and OIG subpoena power. The recommendation for subpoena authority was made before the City began bargaining back in 2014. The City should not still need additional time to answer any questions about the authority of OPA and OIG to issue subpoenas. Also, the City's Office for Civil Rights and the City's Ethics & Elections Commission have had for a number of years full administrative subpoena authority for administrative investigations involving all other City employees. SPMA The SPMA CBA is silent with respect subpoena authority and, therefore, the Ordinance provisions apply.	City Position: Substantive Impact. The City states that "3.29.125 [was] restricted by SPOG CBA. OPA Director may not subpoena employees or employee family members. Further, 'personal records' of employee exempted from third-party subpoena power. City may amend Ordinance to limit subpoena power of OPA Director." The City states: "3.29.240.K [was] restricted by SPOG CBA. Inspector General may not subpoena employees or employee family members. Further, 'personal records' of employee exempted from third-party subpoena power. City may amend Ordinance to limit subpoena power of IG." The SPOG CBA provides for further City review prior to possible re-opener to bargain subpoena power.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
16. The CBAs do not provide that all relevant OPA and SPD personnel records be retained, or that all records be retained for the time period recommended to better ensure accountability.		
3.29.440 E. All SPD personnel and OPA case files shall be retained as long as the employee is employed by the City, plus either six years or as long as any action related to that employee is ongoing, whichever is longer. SPD personnel files shall contain all associated records, including Equal Employment Opportunity complaints, and disciplinary records, litigation records, and decertification records; and OPA complaint files shall contain all associated records, including investigation records, Supervisor Action referrals and outcomes, Rapid Adjudication records, and referrals and outcomes of mediations. Records of written reprimands or other disciplinary actions shall not be removed from employee personnel files.	<u>CBA Citation</u> SPOG: See Article 3.6.L SPMA: See Article 16.4.N <u>Analysis</u> SPOG/SPMA The CBAs do not retain the entirety of the Ordinance's record retention reforms, which included setting the same longer retention period for all OPA files (including both sustained and not sustained findings) and SPD personnel files, and describing specifically which files must be retained. The CBAs adopt the retention period in the Ordinance only for cases resulting in sustained findings, and do not specifically mandate retention of SPD personnel files nor the other files listed in the Ordinance. In the past, because records were retained for shorter periods of time, and all files were not retained, the City's accountability to the public was at times diminished, and SPD management's ability to have discipline upheld on appeal because it had established progressive discipline and could prove comparable treatment of like cases was compromised. In addition, cases where findings are not sustained may help shed light on systemic failures in the disciplinary system. The City should also preclude the removal of findings and associated discipline from personnel records as part of any negotiated resolution on appeal. Removing these records impedes transparency and makes it difficult for the Chief to show subsequently that she imposes discipline consistently in like cases or is following progressive discipline requirements. Note also that although records are kept electronically, the SPMA CBA states OPA shall maintain a record showing which files have been removed from the OPA office, the date of removal, who accessed the files, and to where the files have been transferred.	City Position: No Substantive Impact. The City states: "3.29.440.E [was] modified by SPOG CBA, which allows for removal of non-sustained OPA cases in 3-4 years (or longer if retained by OIG). Also modified by SPMA CBA, allowing removal of not-sustained cases in 7-8 years. Ordinance retention for sustained cases enacted in both CBAs. Ordinance may be amended."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
17. The SPOG CBA limits the OPA Director's authority to establish the most effective mix of sworn and civilian investigative staff, limits civilian investigators to only two, and either limits or forecloses civilian investigators involvement when allegations may result in termination.		
3.29.140 A. The OPA Director and the Deputy Director shall be civilians and, within 18 months of the effective date of the ordinance introduced as Council Bill 118969, all investigative supervisors shall be civilian. B. All OPA staff working directly with SPD supervisors to support the handling of minor violations and public access to the accountability system shall be civilians. C. Within 12 months of the effective date of the ordinance introduced as Council Bill 118969, intake and investigator personnel shall be entirely civilian or a mix of civilian and sworn, in whatever staffing configuration best provides for continuity, flexibility, leadership opportunity, and specialized expertise, and supports public trust in the complaint-handling process. D. All staff shall have the requisite skills and abilities necessary for OPA to fulfill its duties and obligations as set forth in this Chapter 3.29 and for OPA's operational effectiveness. No civilian staff shall be required to have sworn experience and no civilian staff shall	<u>CBA Citation</u> SPOG: See Appendix D, Article 7.10 SPMA: See Appendix B Civilianization <u>Analysis</u> SPOG The SPOG CBA limit to two civilian investigators is inconsistent with the Ordinance reform, which provided the OPA Director discretion to establish an appropriate mix of civilian and sworn staff to balance competing needs, handle investigations efficiently, and maintain an effective complement of staff with differing expertise and perspectives. Having civilians take complaints at intake offers complainants an alternative to sworn staff. Civilian investigators and investigation supervisors enhance trust; provide continuity and staffing flexibility; and add specialized expertise with non-law enforcement perspectives. The expertise and perspective of sworn staff is also important, and an OPA assignment is valuable for moving up the chain of command. In the Ordinance, while the OPA Director collaborates with the Chief in determining rotations of OPA's sworn staff, the OPA Director maintains managerial authority for both civilian and sworn OPA staff. In addition, SPOG'S limit on the number of civilian investigators could last far beyond the current expiration date of the CBA, since the CBA continues after expiration until a new agreement is in place. SPOG CBA Article 7.10 stipulates that "non-sworn personnel shall neither be dispatched to, nor assigned as a primary unit to, investigate any criminal activity." Note that pursuant to the Consent Decree, OPA civilian staff are routinely involved at Force Investigation Team call-outs and with Type III Use of Force incidents. Some of these may involve allegations of criminal activity. Also problematic is that the CBA language in Appendix D states that "Any case that reasonably could lead to termination will have a sworn investigator assigned to the	City Position: No Substantive Impact. The City states: "3.29.140 provisions related to civilianization [were] supplemented by SPOG CBA to more specifically identify primary duties of civilian and sworn inspectors; mix of sworn and civilian determined through negotiation. SPMA Agreement allows civilianization of supervisors but retains restriction on lower-ranked sworn investigators conducting investigation of SPMA members. No Ordinance amendment anticipated." The City states: "3.29.140.E [was] supplemented by SPOG CBA to ensure rotations are accomplished in accordance with other provisions of Agreement. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
have been formerly employed by SPD as a sworn officer. E. The OPA Director and the Chief shall collaborate with the goal that the rotations of sworn staff into and out of OPA are done in such a way as to maintain continuity and expertise, professionalism, orderly case management, and the operational effectiveness of both OPA and SPD, pursuant to subsection 3.29.430.G. F. The appropriate level of civilianization of OPA intake and investigator personnel shall be evaluated by OIG pursuant to Section 3.29.240. G. OPA investigators and investigative supervisors shall receive training by professional instructors outside SPD in best practices in administrative and police practices investigations. OPA investigators and investigative supervisors shall also receive in-house training on current SPD and OPA policies and procedures.	case." This either means OPA may not use a civilian investigator or it means that OPA must pair a civilian with a sworn investigator (for which aspects of the investigation is unstated). The intent of the parties is unclear, which means whichever approach OPA takes will be open to challenge. Either way, it undercuts the intended reform to use civilian investigators in the manner that best serves the public. It means that for the most serious types of allegations, OPA will not be more accessible to complainants who do not trust sworn investigators, which was one of the goals of civilianization. Civilian investigators also offer expertise and perspectives different than those of sworn investigators and help lessen the challenges inherent in requiring a sergeant investigator lead an investigation that may result in the firing of a colleague or superior. As the Inspector General has noted, since OIG staff are civilians, this language is potentially inconsistent with the OIG's obligation to investigate serious misconduct allegations in those situations where OPA is conflicted out. Note that at the start of Appendix E.12 of the SPOG CBA it states "The parties have also reached the following understandings on specific sections of the Ordinance. For ease of reference, the relevant language from the section is included . . . followed by the agreement of the parties in italics." Ordinance sections 3.29.120.B and 3.29.140.E are cited in Appendix E.12, but there is no italicized summary of the parties' agreement. SPMA The City's articulated rationale for the concession limiting the civilian investigators to two in the SPOG CBA, rather than leaving it to the discretion of the OPA Director as set forth in the Ordinance, was that the City was required to approach it that way in bargaining. But the City could have approached civilianization in the SPOG CBA as was done in the SPMA CBA for civilianization of the OPA lieutenant and captain positions.	

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
18. The SPOG CBA limits the OPA Director's authority to manage rotations and transfers of sworn staff, not providing the OPA Director the discretion to determine the most effective mix of sworn and civilian investigators.		
3.29.120 B. [OPA Director authority to] hire, supervise, and discharge OPA civilian staff, and supervise and transfer out of OPA any sworn staff assigned to OPA. OPA staff shall collectively have the requisite credentials, skills, and abilities to fulfill the duties and obligations of OPA set forth in this Chapter 3.29. 3.29.430 G. The Chief shall collaborate with the OPA Director with the goal that sworn staff assigned to OPA have requisite skills and abilities and with the goal that the rotations of sworn staff into and out of OPA are done in such a way as to maintain OPA's operational effectiveness. To fill such a sworn staff vacancy, the Chief and the OPA Director should solicit volunteers to be assigned to OPA for two-year periods. If there are no volunteers or the OPA Director does not select from those who volunteer, the Chief shall provide the OPA Director with a list of ten acting sergeants or sergeants from which the OPA Director may select OPA personnel to fill intake and investigator positions. Should the OPA Director	<u>CBA Citation</u> SPOG: See Appendix D.5 and Appendix E.12 (3.29.120.B, 3.29.140.E, and 3.29.430.G at 83) SPMA: None <u>Analysis</u> SPOG The SPOG CBA appears to suggest that the parties intend to repeal this section of the Ordinance, replacing it with transfer language in the CBA's Appendix D. If so, this CBA provision is inconsistent with the Ordinance because it unduly limits the authority of the OPA Director to determine the most effective mix of staff. SPMA The SPMA CBA is silent with respect to managing transfers in and out of OPA and, therefore, the Ordinance provisions apply.	City Position: No Substantive Impact. The City states: "3.29.120 [was] clarified by SPOG CBA, acknowledging that transfer procedures will continue to comply with CBA. No Ordinance change likely." The City states: "3.29.430.G [was] clarified by SPOG CBA, which requires rotations comply with other restrictions of CBA. No change to Ordinance anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
initially decline to select personnel from this list, the Chief shall provide the OPA Director with a second list of ten additional acting sergeants or sergeants for consideration. If a second list is provided, the OPA Director may select personnel from either list, or from among volunteers.		
19. The SPOG CBA allows accrued time, such as vacation time, to be used by an employee to satisfy disciplinary penalties that are supposed to be unpaid days off.		
3.29.420 A.8. SPD employees shall not use any type of accrued time balances to be compensated while satisfying a disciplinary penalty that includes an unpaid suspension.	<u>CBA Citation</u> SPOG: See Article 3.4 and Appendix E.12 (3.29.420.A.8 at 90) SPMA: None <u>Analysis</u> SPOG The SPOG CBA continues to permit accrued time balances to be used to satisfy a disciplinary penalty of less than eight days. The CBA only prohibits the use of accrued time when the suspension is for eight or more days, and even then allows the use of accrued time "if precluding such use . . . negatively affects the employee's pension/medical benefit." The Ordinance did not allow the use of accrued time to satisfy disciplinary penalties that are supposed to be days without pay. SPMA The SPMA CBA is silent with respect to the use of accrued time balances in satisfying disciplinary penalties and, therefore, the Ordinance provisions apply.	City Position: No Substantive Impact. The City states: "3.29.420.A.8 [was] not specifically adopted in light of past practice, i.e. all use of paid vacation to serve suspensions is left to the discretion of the Chief of Police. Amendment to Ordinance does not appear to be necessary."
20. The CBAs allow evidence that should have been disclosed during an OPA investigation to be first raised in the due process hearing or on appeal.		
3.29.130 I. To ensure the integrity and thoroughness of investigations, and the appropriateness of disciplinary decisions, if at any point during an OPA	<u>CBA Citation</u> SPOG: See Article 3.5.F and Appendix E.12 (3.29.130.I at 86) SPMA: See Article 16.4.P	City Position: Substantive Impact for allowing evidence that should have been disclosed previously to be disclosed at due process hearing or at appeal.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
investigation the named employee or the named employee's bargaining representative becomes aware of any witness or evidence that the named employee or the employee's bargaining representative believes to be material, they shall disclose it as soon as is practicable to OPA, or shall otherwise be foreclosed from raising it later in a due process hearing, grievance, or appeal. Information not disclosed prior to a due process hearing, grievance, or appeal shall not be allowed into the record after the OPA investigation has concluded if it was known to the named employee or the named employee's bargaining representative during the OPA investigation, and if OPA offered the employee an opportunity to discuss any additional information and suggest any additional witnesses during the course of the employee's OPA interview. J. If further investigation is initiated because new information is brought forward during an OPA interview or a due process hearing, or because of any additional investigation directed by OIG, the 180-day investigation time period shall be extended by 60 days.	<u>Analysis</u> SPOG Appendix E.12 of the SPOG CBA does not adopt the Ordinance reform to preclude new information from being raised in the due process hearing or on appeal if known by the employee or SPOG and not disclosed during the OPA investigation. Under Article 3.5.F, the SPOG CBA also unduly limits time extensions for investigating new material evidence, countering the Ordinance provision that allows 60 additional days, to ensure sufficient time for OPA to follow-up on any new evidence presented at the due process hearing and for OPA's additional investigation to be certified by the OIG. SPMA The SPMA CBA language appears to conform to some of the reform measures in this Ordinance provision. However, while the CBA language forecloses raising previously known information at arbitration or appeal, it does not foreclose raising it at the due process hearing. Also, there are conflicting references in the CBA to information being known "at the time of the OPA interview" vs. known "during the OPA investigation," which need to be clarified.	No Substantive Impact for revising time extension allowed for investigating new evidence. The City states: "3.29.130.I [was] not adopted in SPOG CBA; [was] modified by SPMA CBA. City may amend Ordinance." The City states: "3.29.130.J [was] clarified in SPOG CBA, clearly extending 180-day deadline for 60 days less any time then remaining on the 180-day clock. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
21. The CBAs do not give the Chief managerial latitude to place employees on leave without pay when the Chief determines it is necessary.		
3.29.420 A.4. The Chief shall have the authority to place an SPD employee on leave without pay prior to the initiation or completion of an OPA administrative investigation where the employee has been charged with a felony or gross misdemeanor; where the allegations in an OPA complaint could, if true, lead to termination; or where the Chief otherwise determines that leave without pay is necessary for employee or public safety, or security or confidentiality of law enforcement information. In any case of such leave without pay, the employee shall be entitled to back pay if reinstated, less any amounts representing a sustained penalty of suspension.	<u>CBA Citation</u> SPOG: See Article 3.3 Indefinite Suspensions SPMA: See Article 16.3 <u>Analysis</u> SPOG/SPMA The CBAs do not retain the Ordinance reform that: "The Chief shall have the authority to place an SPD employee on leave without pay prior to the initiation or completion of an OPA administrative investigation where the employee has been charged with a felony or a gross misdemeanor; where the allegations in an OPA complaint could, if true, lead to termination; or where the Chief otherwise determines that leave without pay is necessary for employee or public safety, or security or confidentiality of law enforcement information." The SPOG CBA limits the Chief's authority to place an SPD employee on unpaid leave to those charged with commission of a felony or a gross misdemeanor involving "moral turpitude, or a sex or bias crime," greatly narrowing the types of misconduct for which the Chief may place an employee on leave for longer than 30 days. This undercuts the intended reform and no longer gives the Chief appropriate managerial discretion in determining the need for such leave. Also, most serious criminal cases will not be charged within 30 days, placing the Chief in a difficult position in these especially high visibility cases in which a filing decision hasn't been reached, but criminal charges may ultimately result. The SPMA CBA does not narrow the type of gross misdemeanors as the SPOG CBA does, but the SPMA CBA also does not include the rest of the Ordinance provision which allows the Chief to take this action for allegations that may result in termination, or because placing someone on leave is necessary for employee or public safety, or security or confidentiality of law enforcement information.	City Position: Substantive Impact. The City states: "3.29.420.A.4 [was] modified by SPOG CBA, restricting unpaid, temporary suspensions to specified circumstances. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
22. The SPOG CBA undercuts management authority to set performance standards and take into account OPA history in assignment to and transfer from specialty assignments.		
3.29.430 E. SPD shall adopt consistent standards that underscore the organizational expectations for performance and accountability as part of the application process for all specialty units, in addition to any unique expertise required by these units, such as field training, special weapons and tactics, crime scene investigation, and the sexual assault unit. In order to be considered for these assignments, the employee's performance appraisal record and OPA history must meet certain standards and SPD policy must allow for removal from that assignment if certain triggering events or ongoing concerns mean the employee is no longer meeting performance or accountability standards."	<u>CBA Citation</u> SPOG: See Articles 7.4.G and 7.4.4 SPMA: See Articles 10.1 and 10.2 <u>Analysis</u> SPOG The SPOG CBA conflicts with an important Ordinance reform that gave management authority to set and use performance standards that take into account OPA history in making specialty assignments and that allow immediate transfer out of specialty units employees whose conduct warrants transfer. The CBA requires a detailed explanation, reviewed and approved by the Chain of Command and the Department's Human Resource Director (or designee), be given to the employee, including specific actions the employee can take to address concerns. It also states that the employee will have "normally" no less than thirty days and no more than ninety days to address any deficiency. This undercuts the Chief's authority to immediately transfer an employee when warranted by sustained findings of misconduct. Also, mandatory transfers were not addressed in the SPOG CBA. The SPOG CBA is silent on management authority to move sergeants and officers, unlike the SPMA CBA. The City says there was no necessity to bargain, and "no change in Ordinance anticipated." However, the SPOG CBA is inconsistent with the Ordinance provision, and per the CBA's "shall prevail" language (see 1.above), the plain language of the SPOG CBA supersedes the Ordinance language. SPMA The Management Rights language in the SPMA CBA is in alignment with these Ordinance provisions with respect to assignment to and transfer from specialty units, as well as to mandatory transfers. Management has the authority to move captains and lieutenants at-will so they gain experience in different units, different	City Position: Ordinance Unchanged. The City states: "3.29.430.E standards for specialty units [were] not negotiated; no necessity to bargain. No change to Ordinance anticipated." The City states: "3.29.430.E policy for removal from specialty assignments [was] supplemented in SPOG CBA. No change to Ordinance anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	parts of the city, etc. and assign these staff in ways that match their skills and abilities to SPD's need to provide effective policing services.	
23. The SPOG CBA diminishes the certainty of other timelines intended to reduce delays.		
3.29.420 A.2. To help ensure timeliness, the following deadlines shall apply to the disciplinary and appeal processes: A.2.b. SPD shall provide a copy of any proposed Disciplinary Action Report or successor disciplinary action document to the affected employee via electronic communication. If the employee seeks a due-process meeting with the Chief or the Chief's designee, the employee must communicate that request to the Chief's office electronically within 10 days of the date of receipt of the disciplinary action document. A.2.c. The Chief or the Chief's designee shall hold the due process meeting within 30 days of the employee's request. A.2.d. The Chief or the employee may request one reasonable postponement of the due-process meeting, not to exceed two weeks from the date of the originally scheduled meeting. A.2.e. The Chief shall issue a final disciplinary decision within two weeks of the due-process meeting. This	<u>CBA Citation</u> SPOG: See Article 3.5.A SPMA: None <u>Analysis</u> SPOG The SPOG CBA does not adopt the deadlines detailed in the Ordinance, such as the requirement that the employee notify the Chief's office within 10 days if requesting a due process hearing. In fact, in the City's filing, they state that the parties have interpreted this provision instead as a Department obligation to notify the employee of that right within 10 days of receiving the DAR from the Chief. The Department has always notified employees of their right as part of the DAR. The problem that had been identified and was addressed in the Ordinance was that one way to reduce delay was to require the employee to request a hearing within 10 days. The CBA is consistent with the Ordinance regarding the 30-day window for holding the due process hearing, but undercuts the intended reform by allowing the parties to agree to extend the due process hearing "based on extenuating circumstances," with no limit on that extension.	City Position: No Substantive Impact for making SPD—not employee—responsible for due process hearing request within 10 days. City Position: No Substantive Impact for allowing due process hearing extension. The City states: "3.29.420.A.2.b [was] modified by SPOG CBA provision making SPD -- not the employee -- responsible for 10-day notification period for right to due-process hearing. The City may amend Ordinance." The City states: "3.29.420.A.2.c deadline [was] modified by SPOG CBA, allowing extension of time for due-process hearing in extenuating circumstances. City may amend the Ordinance." The City didn't cite 3.29.420.A.2.d or 3.29.420.A.2.e as provisions where the SPOG CBA and the Ordinance are inconsistent.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
decision may be delivered electronically, with an electronic copy sent to the employee's collective bargaining representative.		
24. The SPOG CBA does not ensure complainant anonymity and may not allow investigation of allegations identified after classification.		
3.29.130 A. OPA shall notify named employees, the Captain or equivalent of the named employees, and the bargaining unit of the named employees within 30 days of receiving directly or by referral a complaint of possible misconduct or policy violation. The notice shall by default not include the name and address of the complainant, unless the complainant gives OPA written consent for disclosure after OPA communicates to the complainant a full explanation of the potential consequences of disclosure. The notice shall confirm the complaint and enumerate allegations that allow the named employees to begin to prepare for the OPA investigation; however, if OPA subsequently identifies additional allegations not listed in the 30-day notice, these may also be addressed in the investigation.	<u>CBA Citation</u> SPOG: See Articles 3.6.A and F.2, 3.12.C.1, and Appendix H, 1st paragraph SPMA: See Article 16.4.B <u>Analysis</u> SPOG The Ordinance provides that notices not include the name and address of the complainant (unless the complainant gives written consent) because doing so could have a chilling effect. The CBA language is unclear: 1) Article 3.1.A requires a copy of the complaint be given to the named employee and SPOG. In doing so, in some instances, the complainant may be identified to them; and 2) Article 3.12.C.1 is ambiguous. While the latter Article may be intended to refer to the address of the incident, including "name" suggests it refers to the name of the complainant. Further, in Appendix H, the CBA obliquely indicates that some complaints may be anonymous, while noting that "the issue of how OPA should deal with them when providing information" is a re-opener. The CBA also does not expressly incorporate an Ordinance provision allowing OPA to investigate additional allegations not listed in the 30-day notice. By not doing so, the CBA appears to have rejected this reform. SPMA The CBA does not include language that might require OPA to divulge the identity of the complainant to the named employee. The CBA language is consistent with the Ordinance provision that allows identification and investigation of additional allegations after the 30-day notice.	City Position: Substantive Impact. The City states: "3.29.130.A differs from SPOG and SPMA CBAs. SPOG lengthens 5-day notice period from calendar days … to business days; adds specificity regarding contents of the 5-day notice; clarifies EEO procedures. SPMA CBA requires 10-day notifications and 30-day classification report. City may amend Ordinance."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
25. The CBAs do not require inclusion in the OPA file or disclosure to complainants, the public, the City Attorney, and oversight entities of changes in findings or discipline made by the Chief, or require any notifications or public transparency when discipline or findings are later changed as a result of an appeal.		
3.29.100 J.1. Maintaining frequent and regular communications with complainants and named employees about the status of their investigations, including information to complainants about disciplinary appeal and grievance processes and any outcomes that result in the modification of final findings and discipline determinations. 3.29.135 B. If the Chief decides not to follow one or more of the OPA Director's written recommendations on findings following an OPA investigation, the Chief shall provide a written statement of the material reasons for the decision within 30 days of the Chief's decision on the disposition of the complaint. If the basis for the action is personal, involving family or health-related circumstances about the named employee, the statement shall refer to "personal circumstances" as the basis. The written statement shall be provided to the Mayor, the Council President and the Chair of the public safety committee, the City Attorney, the OPA Director, the Inspector	<u>CBA Citation</u> SPOG: See Article 3.5.G SPMA: See Article 16.6.7 <u>Analysis</u> SPOG/SPMA The CBAs are inconsistent in several ways with the intended reform to ensure sufficient transparency when the Chief finds differently than the OPA Director or when a finding or disciplinary decision is overturned on appeal. Neither CBA retains the requirement for communicating changes to complainants, and for reporting out to the public when these changes occur. Also, neither CBA keeps the requirement that this information be retained in the OPA case file, or the requirement that this public reporting must occur by the City Attorney where *either findings or discipline* are changed *at any point later in the process pursuant to a grievance or appeal* (as just occurred in the recent case noted by the Court in its order). The SPOG CBA does not include the Ordinance requirements to notify the City Council President and Chair of the Council's Public Safety Committee, specifically, or the City Attorney, the Inspector General, and the CPC Executive Director when these changes occur. The SPMA CBA is similar, but the notice is to be provided only to the OPA Director, the Mayor, and the City Council (also without specifying who on the Council). As with other disciplinary system reforms in the Ordinance, these improvements in transparency and accountability were adopted to address serious problems identified in a 2014 disciplinary system review conducted after several disciplinary decisions were overturned by the then-Interim Chief. The City states that this Ordinance provision wasn't bargained and can be implemented unilaterally. Even if that was the City's intent, by leaving the existing language in the CBAs, the CBAs are inconsistent with the Ordinance provision, and	City Position: Ordinance Unchanged re official reporting of changes to OPA recommendations. The City didn't cite 3.29.100.J.1 as a provision where the CBAs and the Ordinance are inconsistent. The City states: "3.29.135.B needs no modification. Three-day [sic] timeline for disagreement letter not addressed in collective bargaining and can be unilaterally implemented." The City states: "3.29.135.B needs no modification. Provisions related to reporting not addressed in collective bargaining and can be unilaterally implemented."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
General, and the CPC Executive Director, and be included in the OPA case file and in a communication with the complainant and the public. If any findings or discipline resulting from an investigation are changed pursuant to an appeal or grievance, this responsibility shall rest with the City Attorney.	per the CBAs' "shall prevail" language (see 1. above), the plain language of the CBAs now must be read to supersede the Ordinance language.	
26. The CBAs do not include the terms of ongoing separate agreements, so that any impacts can be known. (Note: *Possible* impact; the Court needs additional information.)		
3.29.460 B. The terms of all collective bargaining agreements for SPD employees, along with any separate agreements entered into by SPD or the City in response to an unfair labor practice complaint, settlement of grievance or appeal, or for other reasons, including those previously reached, shall be clearly and transparently provided to the public, by posting on the SPD website. C. Whenever collective bargaining occurs, any separate agreements in place affecting ongoing practices or processes which were entered into by SPD or the City in response to an unfair labor practice complaint, settlement of grievance or appeal, or for any other reasons, shall be incorporated into the new or updated collective bargaining	<u>CBA Citation</u> SPOG: See Appendix E.12 (3.29.460.B and 3.29.460.C at 91) SPMA: See Appendix E <u>Analysis</u> SPOG/SPMA Listing the names of separate agreements in the CBAs does not help the Court, policymakers, and the public to be fully apprised of all relevant terms and conditions in those agreements that involve accountability. It is important that all terms in these agreements are fully reviewed, and that any in conflict with other CBA terms or with any City ordinance be daylighted. The terms of these separate agreements may set additional, different, or conflicting obligations that weaken accountability. Predictability and certainty are undermined if it is unclear whether other terms and conditions apply that can be used to challenge disciplinary decisions for an unknown array of types of cases. The City's response is only in relation to the SPOG CBA, and it incorrectly states what the SPOG CBA clearly says, which is that the agreements listed are "ongoing practices or processes." Understanding the terms of the still operational MOAs is even more important given that any MOA provisions now will prevail over any City ordinance, per the	City Position: No Substantive Impact re incorporating separate agreements into CBAs. The City didn't cite re posting CBAs and separate agreements on website as provisions where the CBAs and the Ordinance are inconsistent. The City states: "4.29.460.C [was] clarified by SPOG CBA, ensuring continuation of standard labor practice for use of older Memoranda as evidence, rather than as an enforceable agreement. No change to Ordinance anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
agreement or shall be eliminated.	"shall prevail" language of the CBA. Some examples of accountability issues with current separate agreements between SPOG and the City that needed to be addressed in the SPOG CBA include: • Limitations on the use and review of in-car video for improving performance, for auditing, or other purposes; • References to Firearms Review Board, and Officer-Involved Shootings review processes, including ensuring appropriate OPA and OIG attendance and involvement; • Limitations on promotions from any of the top five scorers, regardless of order; • The decision-making process for, and length of, assignments of sworn personnel to OPA; • Limitations on uses of holding cell video; and • Limitations on due process hearing attendance. Also of concern is this language in the SPOG CBA that allows inoperative MOAs to still be used in a disciplinary challenge: "… while the failure to incorporate an agreement involving an ongoing practice or process means that the agreement can no longer be enforced through the CBA, any such former agreement may still be relied upon for historical purposes or as evidence of past practice …" Note also that the SPOG CBA refers to side agreements listed in Appendix G, but this isn't correct – they are listed in Appendix F.	
27. The CBAs do not adopt recommendations to establish an effective mediation program and do not provide for consultation with the CPC and OIG in reforming the program.		
3.29.100 F. OPA shall have the authority to address complaints of police misconduct through investigation, Supervisor Action referral, mediation, Rapid Adjudication, or other alternative resolution processes, as well as through	<u>CBA Citation</u> SPOG: See Article 3.10.A-C and Appendix E.8 SPMA: See Article 16.7	City Position: Ordinance Unchanged. The City states: "3.29.100.F remains in effect … No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
Management Action findings and Training Referrals. Management Action findings may be made for either Sustained or Not Sustained complaints of misconduct. 3.29.120 D. Oversee and strengthen the effectiveness of OPA investigations, Supervisor Action referrals, mediation, Rapid Adjudication, and other alternative resolution processes, as well as Management Actions and Training Referrals. The OPA Director shall, in consultation with CPC and OIG, make and maintain a fair and effective mediation program and a fair and effective Rapid Adjudication process.	<u>Analysis</u> SPOG/SPMA The Ordinance language was intended to ensure that OPA had the full authority to develop and use alternatives to investigations, and would work with the CPC and OIG to implement recommendations that had been made over the years by the civilian oversight bodies for mediation. Prior recommendations for the mediation program were intended to address obstacles that had resulted in few complainants participating in mediation, such as a requirement that the officer agree to participate and the complainant give up the option of possible discipline, even if the officer doesn't participate in a meaningful way; extended periods before mediation occurs; and the formal nature of the process, often in a downtown law firm, rather than in a community agency or other more informal setting. These recommendations, including consulting with the CPC and OIG on needed program improvements and presumably governing policies, are not incorporated in either CBA. The policies and processes in the CBAs for how mediation is conducted are not fully detailed, and either do not include or are not aligned with previous recommended reforms. In Appendix E.8, the SPOG CBA states that "[t]he City agrees that [the Mediation program set forth in the Agreement] meet[s] the goals of the Ordinance." This is only true if the OPA Director makes needed improvements to the Mediation program. Note that drafting errors in the CBAs should be corrected (the inadvertent removal of "complaints" from a sentence in the SPOG CBA and the substitution of "deferred" for "referred" in several instances in both CBAs.)	The City states: "3.29.120 remains in effect. SPOG and SPMA CBAs incorporate parties' agreements regarding Rapid Adjudication and Mediation. No Ordinance amendment anticipated."
28. The CBAs provide for only a pilot rapid adjudication program, do not adopt some recommendations to establish an effective program, and do not provide for consultation with the CPC and OIG in establishing the program.		
3.29.100 F. OPA shall have the authority to address complaints of police misconduct through investigation,	<u>CBA Citation</u> SPOG: See Article 3.11.A, B.1-2, C, D, and Appendix E.8 SPMA: See Article 16.8.A-E	City Position: Ordinance Unchanged. The City states: "3.29.100.F

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
Supervisor Action referral, mediation, Rapid Adjudication, or other alternative resolution processes, as well as through Management Action findings and Training Referrals. Management Action findings may be made for either Sustained or Not Sustained complaints of misconduct. 3.29.120 D. Oversee and strengthen the effectiveness of OPA investigations, Supervisor Action referrals, mediation, Rapid Adjudication, and other alternative resolution processes, as well as Management Actions and Training Referrals. The OPA Director shall, in consultation with CPC and OIG, make and maintain a fair and effective mediation program and a fair and effective Rapid Adjudication process.	<u>Analysis</u> SPOG/SPMA The Ordinance provides for Rapid Adjudication (RA) to quickly resolve certain types of cases of misconduct. RA's quick resolution is often is better for all involved; ties accountability to the behavior sooner, which is an important principle of effectiveness; and saves time and resources for other investigations. In RA, the named employee immediately acknowledges a policy violation and appropriate discipline is imposed without an investigation. For example, if an employee failed to get a required approval, meet annual training requirements, complete a supervisory use of force review within the mandated timeline, or use in-car video, there would be an expedited process for acknowledging the violation, with appropriate discipline imposed using a discipline matrix, and with no appeals allowed. It would also help strengthen SPD's culture of accountability, making it clear that acknowledging mistakes is encouraged. For this reason, the employee's file would reflect resolution through the RA alternative. RA could have been piloted when first recommended in January 2014 so that it then could have been fully implemented in the union contacts. Full implementation will now again be delayed, limited to just a pilot project governed by practices outlined in each CBA that are not entirely consistent with those recommended. Also, under the Ordinance, the OPA Director is to take steps to establish a fair and effective RA program (and presumably its governing policies), doing so in consultation with CPC and OIG. However, neither CBA refers to RA program development work to be undertaken by OPA in consultation with CPC and OIG, nor do they include certain key RA elements. Both stipulate provisions that counter or undermine the intended reform. For example, the SPOG CBA allows employees to appeal RAs to the Chief, and both CBAs allow employees to reject the RA discipline and opt instead for an OPA investigation, do not provide for use of a pre-determined discipline matrix, and do not require RA resolutions to be documented in employee files.	remains in effect … No Ordinance amendment anticipated." The City states: "3.29.120 remains in effect. SPOG and SPMA CBAs incorporate parties' agreements regarding Rapid Adjudication and Mediation. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	In Appendix E.8, the SPOG CBA states that "[t]he City agrees that [the Rapid Adjudication program set forth in the Agreement] meet[s] the goals of the Ordinance." This is only true if the RA program were no longer just a pilot and incorporated the recommended elements.	
29. The SPOG CBA limits SPD's authority to use civilians in a range of SPD managerial and operations positions.		
3.29.430 B. To support operational efficiency and excellence, SPD may employ civilians with specialized skills and expertise to perform any SPD management and operational functions, including, but not limited to, training, human resources, technology, budget and finance, crime analysis, recruiting, hiring, and testing, which in the judgment of the Chief do not require law enforcement sworn personnel, allowing SPD the ability to more flexibly deploy civilian and sworn resources to best meet both its administrative and law enforcement needs.	<u>CBA Citation</u> SPOG: See Appendix G Civilianization of the SPD Human Resources Sergeant Position SPMA: See Articles 10.1 and 10.2 <u>Analysis</u> SPOG The SPOG CBA expressly limits civilianization of SPD positions outside of OPA to the SPD Human Resources Sergeant position. This is inconsistent with the Ordinance provisions that allowed SPD greater authority and flexibility in filling a range of managerial and operational positions. SPMA The broad Management Rights language in the SPMA CBA aligns with these Ordinance provisions.	The City didn't cite 3.29.430.B as a provision where the CBAs and the Ordinance are inconsistent.
30. The SPOG CBA requires the Chief to take notes and share them with SPOG when meeting with a complainant prior to making a discipline decision.		
3.29.125 G. In cases where a Sustained finding has been recommended by the OPA Director and hearing from the complainant would help the Chief better understand the significance of the concern or weigh issues of credibility, the OPA Director may	<u>CBA Citation</u> SPOG: See Appendix E.12 (3.29.125.G at 85) SPMA: None <u>Analysis</u> SPOG The SPOG CBA requires the Chief to take notes and share them with the Guild if the Chief meets with the complainant. This will not further trust in the system's fairness. The Chief is not required to take notes and share them with the public	City Position: No Substantive Impact. The City states: "3.29.125.G [was] supplemented by SPOG CBA, which adds provision requiring taking and retaining notes. No Ordinance amendment anticipated."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
recommend that the Chief meet with the complainant prior to the Chief making final findings and disciplinary decisions.	when the Chief meets with the named employee and/or the SPOG union representative. Requiring this for meetings with complainants may make it less likely that this option is used by Chiefs and may have a chilling effect for the complainant. (Note that the City's response does not state that the CBA requires that these materials be provided to SPOG.)	
31. The SPOG CBA requires OPA to share its investigation plans with SPOG.		
3.29.125 F. Every OPA investigation shall have an investigation plan approved by the OPA Director or the OPA Director's designee prior to the initiation of an investigation.	CBA Citation SPOG: See Appendix E.12, (3.29.125.F at 84 SPMA: None Analysis SPOG The SPOG CBA requires the Guild be given OPA's investigation plan prior to the due process hearing. This will not further trust in the system's fairness. SPMA The SPMA CBA is silent with respect to OPA investigation plans and, therefore, the Ordinance provisions apply. The Ordinance does not include a requirement that the investigation plan be shared with SPOG and SPMA.	City Position: No Substantive Impact. The City states: "3.29.125.F [was] supplemented by SPOG CBA, which adds provision requiring retention of investigation plan and production to SPOG. No Ordinance amendment anticipated."
32. The SPOG CBA cites an agreement of the parties on the OPA Manual, but it does not state the specifics of that agreement.		
3.29.120 E. [OPA Director authority to] ensure OPA policies and practices are detailed in, and in compliance with, the OPA Manual, which shall be updated at least annually. Such updates shall be done in accordance with a process established by the OPA Director that provides for consultation and input by OIG and CPC prior to final adoption of any updates.	CBA Citation SPOG: See Appendix E.12 (3.29.120.E at 83) SPMA: None Analysis SPOG This Ordinance provision summarizes what is to be in the OPA Manual and notes that OPA will establish a process for updating it. At the start of Appendix E.12 of the SPOG CBA, it states "The parties have also reached the following understandings on specific sections of the Ordinance. For ease of reference, the relevant language from the section is included . . . followed by the agreement of the parties in italics." The section is cited in Appendix E.12 but there is no italicized summary of the parties' agreement. The City's response that the agreement	City Position: Ordinance Unchanged. The City states: "3.29.120.E [was] clarified by SPOG CBA, acknowledging that policies and procedures related to OPA staffing comply with CBA restrictions on transfers. No Ordinance change necessary."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	concerned the application of CBA restrictions on transfers is helpful, but the terms of that agreement are not in the CBA. SPMA The SPMA CBA is silent with respect to the OPA Manual and, therefore, the Ordinance provisions apply.	
33. Other Area Requiring Attention: The SPMA CBA refers to a separate agreement regarding the CPC, the terms of which are not known.		
Subchapter III Community Police Commission	<u>CBA Citation</u> SPOG: None SPMA: See Appendix E <u>Analysis</u> SPMA The SPMA CBA references a separate agreement regarding the formation of the CPC. It is presumed SPMA intends the Ordinance provisions related to the Office of the Community Police Commission and the Community Police Commission to apply. If this is true, it is important to either remove this separate agreement or ensure it is consistent with the Ordinance provisions governing the formation and operations of the CPC.	The City didn't address this.
34. The SPOG CBA does not make clear that the CAO represents SPD in disciplinary challenges.		
3.29.420 A.9. The City Attorney's Office shall determine legal representation for SPD in disciplinary challenges. The City, including SPD, shall not settle or resolve grievances or disciplinary appeals without the approval of the City Attorney's Office.	<u>CBA Citation</u> SPOG: See Appendix E.12 (3.29.420.A.9 at 90) SPMA: None <u>Analysis</u> SPOG The intent of the Ordinance reform was to clearly and expressly mandate the role of the CAO in representing the City in disciplinary challenges and settlements to ensure that the interests of the public are adequately protected. This has been an issue in the past when SPD entered into agreements or responded to initial steps of disciplinary appeals without consultation with the CAO. As the City states, the CBA does not limit the City Attorney's role, but the CBA does not make clear that no agreements may be entered into with the approval of the CAO.	City Position: No Substantive Impact. The City states: "3.29.420.A.9 [was] supplemented to ensure continued ability for SPOG and SPD to resolve grievances. No change to Ordinance anticipated because SPOG CBA does not limit City Attorney's role."

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	SPMA The SPMA CBA is silent with respect to representing the City in disciplinary challenges and settlements and, therefore, the Ordinance provisions apply.	
35. The SPOG CBA requires OPA interviews to be conducted in an SPD facility.		
3.29.105 A. OPA shall be physically housed outside any SPD facility and be operationally independent of SPD in all respects. OPA's location and communications shall reflect its independence and impartiality.	<u>CBA Citation</u> SPOG: See Article 3.12.C.3 SPMA: None <u>Analysis</u> SPOG For public trust and independence, as well as OPA operational effectiveness, interviews are intentionally not conducted in an SPD facility, but are conducted in OPA's office, which is intentionally located outside of SPD. This sentence should have said: "[a]ny interview … shall take place at OPA or at another location selected by OPA …" The CBA language on its face appears to be in direct conflict with the Ordinance. The CPC and community leaders have been told by City negotiators that SPOG assured them privately that the Guild nonetheless understands that interviews will be conducted at OPA. If true, this "understanding" is unenforceable. If OPA conducts interviews at OPA, SPOG could appeal any resulting discipline to an arbitrator saying OPA violated their member's rights under the CBA. The plain CBA language, in contrast to the stated private understanding and agreement to continue interviews at OPA, undermines transparency and makes the rules unclear for everyone. SPMA The SPMA CBA is silent with respect to where OPA interviews are to be held and, therefore, the Ordinance provisions apply.	City Position: Ordinance Unchanged. The City states: "3.29.105.A not affected by Agreements. Police Officer Bill of Rights provision in SPOG CBA not amended to remove 'SPD facility' in light of longstanding past practice regarding location of OPA interviews. OPA activities occur in separate OPA offices, rather than operational SPD facilities, although all OPA offices are considered SPD facilities."
36. The SPOG CBA allows employees terminated for cause to purchase their service weapons, while the Ordinance bars such employees from later obtaining a concealed carry license under the Law Enforcement Officers Safety Act.		
3.29.440 F. For sworn employees who are terminated or resign in lieu of	<u>CBA Citation</u> SPOG: See Appendix C.1.B SPMA: None	City Position: Ordinance Unchanged.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
termination, such that the employee was or would have been separated from SPD for cause and at the time of separation was not "in good standing," SPD shall include documentation in SPD personnel and OPA case files verifying … (d) that the Chief did not or will not grant any request under the Law Enforcement Officers Safety Act to carry a concealed firearm. The latter two actions shall also be taken and documentation included in the SPD personnel and OPA case files whenever a sworn employee resigns or retires with a pending complaint and does not fulfill an obligation to fully participate in an OPA investigation.	Analysis SPOG Appendix C.1.B of the SPOG CBA should apply only to employees who retire in good standing. Concealed carry privileges should be granted under rules of the Law Enforcement Officers Safety Act, including having retired in good standing. These caveats should be made explicit in the CBA to ensure consistency with reforms in the Ordinance. Similarly, the option for secondary employment or retiree employment should only apply to employees who retire in good standing. SPMA The SPMA CBA is silent with respect to the purchasing of service weapons by retirees and, therefore, the Ordinance provisions apply.	The City states: "3.29.440.F restriction on purchasing service weapon [was] not specifically adopted in CBAs in light of discretion afforded SPD to deny such purchases. No change in Ordinance needed."
37. Other Area Requiring Attention: The CBAs do not recognize the advisory role of accountability system entities in providing expertise in setting the City's bargaining agenda and for ongoing guidance during negotiations. (Note: *Possible* impact; the Court needs additional information.)		
3.29.460 A. Those who provide civilian oversight of the police accountability system shall be consulted in the formation of the City's collective bargaining agenda for the purpose of ensuring their recommendations with collective bargaining implications are thoughtfully considered and the ramifications of alternative proposals are understood. These individuals shall be subject to the same confidentiality provisions as any	CBA Citation SPOG: None SPMA: None Analysis SPOG/SPMA Bargaining should begin again relatively soon since the SPMA CBA ends in December 2019 and the SPOG CBA ends in December 2020. It will be important to follow through on the commitment to have technical advisors with accountability system expertise advise the City, as was provided for in the Ordinance (3.29.460.A). CM Herbold has also drafted proposed legislation which provides for these technical advisors to not only inform the City's bargaining agenda, but to	The City didn't address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
member of the Labor Relations Policy Committee.	give advice to the City on an ongoing basis throughout the bargaining process. Given the significant impact that the CBA has on accountability processes and structures, it is important that this process change be fully implemented in the next round of negotiations. Requiring that the City inform and continuously consult these technical advisors throughout bargaining as a requirement of the Consent Decree in no way compromises the rights of labor organizations, who of course may utilize their own experts. Note also that SMC 4.04.120 allows the Labor Relations Policy Committee to designate "other persons" to assist the City's negotiations.	
38. Other Area Requiring Attention: The SPOG CBA extends the problematic terms for OPA investigations to EEO investigations.		
	<u>CBA Citation</u> SPOG: See Article 3.13.D SPMA: See Article 16.9 <u>Analysis</u> SPOG/SPMA The CBAs concerning investigations of misconduct complaints conflict with Ordinance reforms. The CBAs compound the concerns identified by applying those same provisions not just to OPA investigations, but now also to EEO investigations.	The City describes the change as "EEO investigation responsibilities and procedures enumerated" which does not accurately describe the change.
39. Other Area Requiring Attention: The CBAs do not disclose all collective bargaining re-opener topics and timelines, and do not recognize the advisory role of accountability system entities in providing expertise in these discussions. (Note: *Possible* impact; the Court needs additional information.)		
	<u>CBA Citation</u> SPOG: See Articles 21.4-21.7, Appendix E.12 (3.29.125.E and 3.29.240.K at 84, 3.29.420.A.7.a at 91, 3.29.420.A.7.b at 91), and Appendix H, 1st paragraph at 96) SPMA: None <u>Analysis</u> SPOG/SPMA Neither CBA documents all re-opener topics. For the sake of public transparency, certainty and predictability, the CBAs should identify all re-opener topics known at the time the CBAs were effective and the scope, scale and timing of further CBA	The City didn't address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	changes that might occur due to the re-opener process. Also, if new topics arise, these should be timely and publicly disclosed. Any re-openers related to the accountability system should be considered and addressed using the expertise of accountability system technical advisors. Re-openers should not include any items that weaken or eliminate reforms in the Ordinance. For example, several specific re-opener topics identified in the SPOG CBA concern accountability: • Whether disciplinary hearings will be open to the public; • Whether the composition of the PSCSC will be changed; • How the confidentiality of complainants will be protected when complaint classification information is provided to named employees; and • Whether OPA and OIG will have full subpoena power. Also, the Ordinance refers to steps to be taken to develop a community complaint process, so the list of re-opener topics for both SPOG and SPMA should provide for bargaining related to establishing this process.	
40. Other Area Requiring Attention: There are inaccuracies in the CBAs, including improper references to responsible entities.		
	<u>CBA Citation</u> No specific citations – these inaccuracies are throughout both CBAs. <u>Analysis</u> There are inaccurate references throughout the CBAs to “City”, “SPD”, or “Department” when the proper reference should be to “OPA,” and references in the SPMA CBA to “command staff” rather than “OPA supervisors.” For example, the SPOG CBA retains old CBA language that incorrectly states that “the City” provides information and requests extensions from SPOG, but it is OPA that provides this information and requests extensions. There is also an incorrect reference in the SPOG CBA to the Department (SPD) conducting OPA investigations. The SPOG CBA also stipulates that the Department determines if a case is suitable for mediation and that the mediator informs the Department about whether an employee participated in a mediation in good faith. It is OPA	The City didn’t address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	that determines if a case is suitable for mediation and the mediator informs OPA about the good faith participation of employees. These inaccuracies are not a minor technical issue because of the preemption provisions in each CBA – the express language of the CBA is to prevail, regardless of what the Ordinance, SPD policy or the OPA Manual says, or what the intent of the parties might be. OPA is to be entirely independent of SPD in its operations, and the public needs to have trust in that independence. Section citations and drafting errors throughout the CBAs should be corrected, given the preemption provisions, which combined with the frequency of disciplinary challenges, make clarity, accuracy and precision particularly important.	
41. Other Area Requiring Attention: There are inaccuracies in the SPOG CBA concerning SPD investigative units.		
	CBA Citation SPOG: See Appendix G Office of Inspector General at Firearms Review Boards at 94 SPMA: None Analysis SPOG Language in the SPOG CBA should be updated to make sure it correctly references the names of all currently constituted boards to which the OIG has access. SPMA The SPMA CBA does not have a corresponding section related to OIG attendance at SPD investigative units or boards.	The City didn't address this.
42. Other Area Requiring Attention: There are inaccuracies in the SPOG CBA concerning City law.		
	CBA Citation SPOG: See Article 4.4 SPMA: None Analysis SPOG Non-discrimination language in the SPOG CBA should be updated to conform to City law, which includes protected classes not identified in the SPOG CBA.	The City didn't address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	SPMA The SPMA CBA does not reference non-discrimination requirements.	
43. Other Area Requiring Attention: The SPOG CBA language is overly broad in defining when Garrity should be used.		
	<u>CBA Citation</u> SPOG: See Appendix E.10 SPMA: None <u>Analysis</u> SPOG The SPOG CBA language is overly broad. As has been noted over the years, Garrity advisements should only be used when appropriate. SPMA The SPMA CBA does not reference Garrity.	The City didn't address this.
44. Other Area Requiring Attention: The status of SPMA and City bargaining of body-worn video (or, if complete, the final agreement) should be made public.		
	<u>CBA Citation</u> SPOG: None SPMA: See Appendix B Body-Worn Video <u>Analysis</u> SPMA An update is needed on the status of SPD's policy with respect to requiring any SPMA members to wear BWV, and if any bargaining has been underway or, if complete, the terms reached. Any such agreement should be shared with the Court, policymakers, oversight entities, and the public.	The City didn't address this.
45. Other Area Requiring Attention: The SPOG CBA provisions for the City's contribution to paying the salary of the SPOG President appears problematic.		
	<u>CBA Citation</u> SPOG: See Article 1.4 SPMA: See Article 1.4.1	The City didn't address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	Analysis SPOG Under the SPOG CBA, the City (in other words, the public), continues to pay 78% of the SPOG President's salary, including all time spent in labor-management meetings, addressing grievances, and "other such duties." And, the greater amount of time spent by SPOG on these functions, the more it costs the public. SPMA The SPMA CBA does not include provisions for the City to pay the SPMA President's salary. It states that SPMA will reimburse the Employer for the hourly rate of pay, including premium pay, for time the President or a designee spends attending legislative hearings and/or conducting business for SPMA. Up to 15 work days are allowed for conducting such business.	
46. Other Area Requiring Attention: The SPOG CBA does not establish who is responsible for paying for the resolution of disputes concerning the salary of the SPOG President.		
	CBA Citation SPOG: See Article 1.4 SPMA: Not applicable Analysis SPOG The SPOG CBA does not state whether the cost of dispute resolution is also paid by the City (that is, the public).	The City didn't address this.
47. Other Area Requiring Attention: The SPOG CBA does not give supervisors authority to approve or manage SPOG representative's time requests.		
	CBA Citation SPOG: See Article 1.5.A SPMA: None Analysis SPOG The SPOG CBA does not give supervisors authority to approve or manage SPOG representative time requests to help ensure the SPOG-related tasks don't negatively impact assigned duties and don't consume an excessive amount of	The City didn't address this.

SPOG and/or SPMA CBA Provisions in Conflict with Accountability System		
Ordinance Language	CBA Citations and Analysis	City Position (Docket 512-5)
	time. The CBA language suggests the supervisor's role is simply to provide the time sheet and grant the time requested. It is unclear if this language aligns with the employer's authority in Article 1.5.B of the CBA. SPMA The SPMA does not contain any provisions related to time needed to represent SPMA members alleged to have engaged in misconduct.	
48. Other Area Requiring Attention: SPD Policy 2.050 requires amendment of all written directives and procedures to align with terms of CBAs.		
	<u>SPD Policy 2.050 – Collective Bargaining</u> II. Contract Management A. The Chief of Police or designee will: 1. Obtain a written, signed copy of labor agreements. 2. Review and amend, if necessary, all written directives and procedures to coincide with the terms of the labor agreements. 3. Disseminate information relative to a new labor agreement, including modifications to existing agreements, to managers and supervisors of bargaining unit employees.	The City didn't address this.

EXHIBIT B

Accountability System Elements
Not Listed by the City as Subjects to be Bargained
That CBAs Affected or Appear to Have Affected

Exhibit B to the Declaration of Judge Anne Levinson (ret.)
Accountability System Elements Not Listed by the City in its August 18, 2017 filing (Dkt. 412-1)
As Subjects to be Bargained That CBAs Affected or Appear to Have Affected

Exhibit A Chart #	CBA Impacts in Exhibit A Not Listed in the City's Filing of Subjects to Be Bargained
1	The SPOG CBA requires that CBA language prevails over any City ordinance whenever the CBA conflicts with an ordinance provision. The SPMA CBA states that City ordinances are paramount except where they conflict with the express CBA provisions. The City's position is that if there is any inconsistency (not just direct conflict) between the Ordinance and CBA language, the CBA language supersedes.
2	Ensuring a fair and effective accountability system is not a stated purpose in either CBA, which will affect how all of the ambiguous provisions will later be interpreted whenever there is dispute or disciplinary challenge.
3	The CBAs do not ensure all ranks are treated equally in the accountability system.
19	The SPOG CBA allows accrued time, such as vacation time, to be used by an employee to satisfy disciplinary penalties that are supposed to be unpaid days off.
25	The CBAs do not require inclusion in the OPA file or disclosure to complainants, the public, the City Attorney, and oversight entities of changes in findings or discipline made by the Chief, or require any notifications or public transparency when discipline or findings are later changed as a result of an appeal.
26	The CBAs do not include the terms of ongoing separate agreements, so that any impacts can be known. (Note: *Possible* impact; the Court needs additional information.)
30	The SPOG CBA requires the Chief to take notes and share them with SPOG when meeting with a complainant prior to making a discipline decision.
31	The SPOG CBA requires OPA to share its investigation plans with SPOG.
32	The SPOG CBA cites an agreement of the parties on the OPA Manual, but it does not state the specifics of that agreement.
33	Other Area Requiring Attention: The SPMA CBA refers to a separate agreement regarding the CPC, the terms of which are not known.
34	The SPOG CBA does not make clear that the CAO represents SPD in disciplinary challenges.
35	The SPOG CBA requires OPA interviews to be conducted in an SPD facility.
37	Other Area Requiring Attention: The CBAs do not recognize the advisory role of accountability system entities in providing expertise in setting the City's bargaining agenda and for ongoing guidance during negotiations. (Note: *Possible* impact; the Court needs additional information.)
38	Other Area Requiring Attention: The SPOG CBA extends the problematic terms for OPA investigations to EEO investigations.
40	Other Area Requiring Attention: There are inaccuracies in the CBAs, including improper references to responsible entities.

Exhibit A Chart #	CBA Impacts in Exhibit A Not Listed in the City's Filing of Subjects to Be Bargained
41	Other Area Requiring Attention: There are inaccuracies in the SPOG CBA concerning SPD investigative units.
42	Other Area Requiring Attention: There are inaccuracies in the SPOG CBA concerning City law.
43	Other Area Requiring Attention: The SPOG CBA language is overly broad in defining when Garrity should be used.

EXHIBIT C

CBA Impacts in Exhibit A
That Also Affect The OPA Manual

Exhibit C to the Declaration of Judge Anne Levinson (ret.)
CBA Impacts in Exhibit A That Also Affect The OPA Manual

Exhibit A Chart #	CBA Impacts in Exhibit A That Also Affect The OPA Manual
3	The CBAs do not ensure all ranks are treated equally in the accountability system.
5	Failure to incorporate disciplinary appeal reforms: "A preponderance of the evidence" for the burden of proof and the standard of review will no longer be the standard for a wide range of serious misconduct, including dishonesty.
9	Failure to incorporate disciplinary appeal reforms: The CBA provisions stating that employees must be complete and truthful in OPA investigations preempt SPD policy requiring honesty in all communications, and the CBAs define dishonesty as *intentionally* providing false information or incomplete responses to specific questions regarding material facts, instead of using an objective standard.
10	The CBAs continue to bar the imposition of discipline, regardless of the misconduct, if an investigation exceeds 180 days even by a single day. The calculation of the timeline and extensions are unclear and union approval of extensions is required.
11	Failure to incorporate reforms related to investigations of criminal misconduct: The CBAs continue to limit OPA's authority in investigations of criminal misconduct, which often involve the most serious types of misconduct.
12	Failure to incorporate reforms related to investigations of criminal misconduct: The SPOG CBA forecloses OPA authority, yet requires that the 180-day timeline continues to run, when allegations are referred for criminal investigation, other than when the misconduct occurred in a different jurisdiction or is under review by a prosecutor.
13	The SPOG CBA sets a four-year statute of limitations and provides for a limited set of exceptions. Discipline for serious misconduct, including dishonesty and Type III use of force, is barred if the complaint is made more than four years after the incident, and the statute of limitations is still a bar to accountability when misconduct is concealed by peers, supervisors, or subordinates.
15	The SPOG CBA does not provide OPA and OIG full subpoena authority.
16	The CBAs do not provide that all relevant OPA and SPD personnel records be retained, or that all records be retained for the time period recommended, to better ensure accountability.
17	The SPOG CBA limits the OPA Director's authority to establish the most effective mix of sworn and civilian investigative staff, limits civilian investigators to only two, and either limits or forecloses civilian investigators involvement when allegations may result in termination.
20	The CBAs allow evidence that should have been disclosed during an OPA investigation to be first raised in the due process hearing or on appeal.
24	The SPOG CBA does not ensure complainant anonymity and may not allow investigation of allegations identified after classification.

Exhibit A Chart #	CBA Impacts in Exhibit A That Also Affect The OPA Manual
25	The CBAs do not require inclusion in the OPA file or disclosure to complainants, the public, the City Attorney, and oversight entities of changes in findings or discipline made by the Chief, or require any notifications or public transparency when discipline or findings are later changed as a result of an appeal.
27	The CBAs do not adopt recommendations to establish an effective mediation program and do not provide for consultation with the CPC and OIG in reforming the program.
28	The CBAs provide for only a pilot rapid adjudication program, do not adopt some recommendations to establish an effective program, and do not provide for consultation with the CPC and OIG in establishing the program.
31	The SPOG CBA requires OPA to share its investigation plans with SPOG.
32	The SPOG CBA cites an agreement of the parties on the OPA Manual, but it does not state the specifics of that agreement.
35	The SPOG CBA requires OPA interviews to be conducted in an SPD facility.
39	Other Area Requiring Attention: The CBAs do not disclose all collective bargaining re-opener topics and timelines, and do not recognize the advisory role of accountability system entities in providing expertise in these discussions. (Note: *Possible* impact; the Court needs additional information.)
40	Other Area Requiring Attention: There are inaccuracies in the CBAs, including improper references to responsible entities.
43	Other Area Requiring Attention: The SPOG CBA language is overly broad in defining when Garrity should be used.

EXHIBIT D

CBA Impacts in Exhibit A That Also Affect SPD Policies

Exhibit D to the Declaration of Judge Anne Levinson (ret.)
CBA Impacts in Exhibit A That Also Affect SPD Policies

Exhibit A Chart #	CBA Impacts in Exhibit A That Also Affect SPD Policies
5	Failure to incorporate disciplinary appeal reforms: "A preponderance of the evidence" for the burden of proof and the standard of review will no longer be the standard for a wide range of serious misconduct, including dishonesty.
9	The CBA provisions stating that employees must be complete and truthful in OPA investigations preempt SPD policy requiring honesty in all communications, and the CBAs define dishonesty as *intentionally* providing false information or incomplete responses to specific questions regarding material facts, instead of using an objective standard.
14	The SPOG CBA requires secondary employment reforms be bargained, further delaying this long overdue reform, despite an Executive Order having been issued.
16	The CBAs do not provide that all relevant OPA and SPD personnel records be retained, or that all records be retained for the time period recommended, to better ensure accountability.
20	The CBAs allow evidence that should have been disclosed during an OPA investigation to be first raised in the due process hearing or on appeal.
23	The SPOG CBA diminishes the certainty of other timelines intended to reduce delays.
26	The CBAs do not include the terms of ongoing separate agreements, so that any impacts can be known. (Note: *Possible* impact; the Court needs additional information.)
38	Other Area Requiring Attention: The SPOG CBA extends the problematic terms for OPA investigations to EEO investigations.
39	Other Area Requiring Attention: The CBAs do not disclose all collective bargaining re-opener topics and timelines, and do not recognize the advisory role of accountability system entities in providing expertise in these discussions. (Note: *Possible* impact; the Court needs additional information.)
41	Other Area Requiring Attention: There are inaccuracies in the SPOG CBA concerning SPD investigative units.
44	Other Area Requiring Attention: The status of SPMA and City bargaining of body-worn video (or, if complete, the final agreement) should be made public.
48	Other Area Requiring Attention: SPD Policy 2.050 requires amendment of all written directives and procedures to align with terms of CBAs.

EXHIBIT E

City's Exhibit I (Dkt. 512-9),
Annotated to Provide Additional Information
About SPOG and SPMA CBAs' Changes to
Disciplinary and Disciplinary Appeals Processes

Exhibit E to the Declaration of Judge Anne Levinson (ret.)
City's Exhibit I (Dkt. 512-9), Annotated to Provide Additional Information
About SPOG and SPMA CBAs' Changes to Disciplinary and Disciplinary Appeals Processes

The columns with green headers are verbatim from City's Exhibit I, Dkt. 512-9. The comments column provides the Court additional information.

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
1.	Disciplinary appeal avenues	Disciplinary Review Board (DRB) or Public Safety Civil Service Commission (PSCSC)(3.5.H)	Arbitration or PSCSC (14.1)	In 2014, after the then Interim-Chief changed previously determined findings or discipline in a number of cases, a special review of the disciplinary system was conducted. The review identified several long-standing problems and included a number of recommended reforms to discipline and disciplinary appeals processes, which were later codified in the accountability ordinance. The CBAs do not retain these reforms, creating a significant barrier to effective accountability. Among those discipline and disciplinary appeals processes reforms in the ordinance was elimination of multiple routes of appeal, making the PSCSC with assigned hearing examiners the single appellate route, and eliminating forum-shopping. Because the CBAs did not adopt that reform—the employee is still permitted to instead choose to use grievance and arbitration processes to challenge discipline—all the other reforms that were tied to the PSCSC single route of appeal will not be in effect for those other forums, which may result in potentially different outcomes for the same types of misconduct. Employees and unions will "forum-shop" in an effort to improve the chances the discipline imposed by the Chief will be overturned. For a number of reasons, arbitration will be the likely route of appeal, just as the Disciplinary Review Board (DRB) was in the past. (The DRB was expressly created in a prior CBA so that venue could be chosen instead of the PSCSC, and union practice has been to not support or financially assist an employee who chooses the PSCSC route, in order to discourage use of that forum.)

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
2.	Arbitrator selection	Arbitrator (neutral member of DRB) selected from a pool of 5 identified arbitrators (App. E.V.)	Process for creating pool created by sharing a list of 10 arbitrators, keeping agreed names, allowing each party to strike 2 names from other party's list. List randomized and then limited strike options for each case. (14.F)	The accountability ordinance reforms were intended to better ensure impartial, arms-length review by individuals with appropriate expertise, selected on the basis of merit, and appointed for fixed terms (not affected by any rulings they may make). The arbitration appeal route does not require arbitrators to have subject matter expertise, provides multiple opportunities for the unions to veto selection of arbitrators, and adds delay. Both CBAs allow the parties to select arbitrators from a list negotiated in advance, requiring only that the listed arbitrators have AAA and/or FMCS credentials, not any particular background in police disciplinary cases. The process of arbitrator selection allows the union to strike one or more names at the top of the list, which moves the arbitrator to the bottom of the list for future selection.[2] As has been seen nationally, the arbitrator selection process for police disciplinary appeals is inherently problematic. There is an incentive for the arbitrator to compromise or otherwise decide in such a way that the arbitrator's selection will not be vetoed for a future case by either party. This is a particular risk in cases where an arbitrator must determine whether an officer's misconduct warrants termination, which are cases involving the most serious types of misconduct.
3.	Arbitration hearing record	None	Hearings to be audio recorded, with transcript costs born [sic] by requesting party or split evenly (14.11)	The PSCSC requires a record of all hearings. See 4.08.100.C: "The Commission shall cause to be made a record of all such hearings. Upon request, the Commission shall furnish such record to the employee."
4.	Quantum of proof in arbitration	Not addressed, apart from dishonesty (3.1)	"Established principles of labor arbitration" for all cases, including "elevated standard" when termination for stigmatizing reasons (3.1)	Standard of Review and Burden of Proof. The City's filing discusses the changes made to the standard of review, but does not fully explain how significant the negative impact to the public is. First, it is not just the standard of review for serious misconduct that has been changed; de facto the burden of proof has also been

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				changed. Second, it will make misconduct harder to prove not just for a few types of misconduct, but potentially for all serious misconduct. Standard of Review. As noted above, the CBAs allow employees to forum-shop, choosing an alternative route of arbitration to challenge discipline if they wish. The CBAs then also provide that the arbitrator must use a different, higher standard of review for an undefined range of types of misconduct if arbitration is chosen. Arbitrators also will have broad authority to reconsider all factual and legal decisions related to the disciplinary matter and will use for SPOG, "an elevated standard of review based on established labor arbitration principles" for any misconduct that results in termination that is "stigmatizing" and "makes it difficult for the employee to get other law enforcement employment" or, for SPMA, "established principles of arbitration." The SPMA CBA doesn't explicitly provide for a heightened standard, but does say the standards to be used "are to be consistent with established principles of arbitration," which appears, without expressly stating it, to embed the same undefined heightened and broad standard of review as the SPOG does. In contrast, if the employee appeals through the PSCSC (the single route provided for in the Ordinance), a standard of review intended to result in more accountability and predictability and to strengthen the Chief's ability to uphold discipline will apply. It requires deference to the fact-finder (the Chief), requiring the final decision affirm the disciplinary decision unless there is a specific finding that the disciplinary decision was not in good faith for cause. If that finding is made, the appellate decision-maker may reverse or modify the discipline only to the minimum extent necessary to achieve this standard. The City's stated rationale for agreeing to change the standard of review was that they had to do so, since, in the view of the parties,

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				arbitrators frequently use an elevated standard anyway, and should that occur, the City does not want to lose cases. This would not have been an issue had the City retained the ordinance's single appeals path and the standard of review set forth. Even after allowing arbitration to remain available (in direct conflict with the ordinance), the City still could have required an arbitration framework that expressly applies a preponderance standard, which would have been consistent with prior direction from this Court. Then, if an arbitrator does not abide by the explicit contractual requirement, the correct course of action to protect the public's interest would be to appeal based on an abuse of discretion. An approach consistent with the purposes of the Consent Decree would not have: 1) continued to allow a reviewer to substitute their judgment for that of the Chief with no limitation on the degree to which the Chief's decision can be modified; 2) required a higher standard of review if the route provided for in the ordinance is not chosen; 3) left the standard undefined; and 4) used language that means that higher standard will now be required for a wide range of serious misconduct. The preponderance standard should be expressly provided for in each CBA to ensure the CBAs do not result in a return to different standards for different types of misconduct, accountability for serious misconduct is not weakened, the standard is clearly understood by all and is not, in fact, heightened by conventions of arbitration, which are not transparent or known to the public, and are not predictable, since experience has shown they may differ from arbitrator to arbitrator. Burden of Proof. Even more concerning, OPA will now be required to use this higher standard for its burden of proof for any investigation involving serious misconduct, as will the Chief in her decision-making. They will have to do so, whether the parties intended it or not, because OPA will not know when it commences an investigation which route of appeal may ultimately be chosen

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				by the employee if discipline is later imposed, won't know if the discipline will be termination, and, if so, whether the termination will be determined by the arbitrator to be a "stigmatizing" type that "makes it difficult for the employee to get other law enforcement employment", which are the types of misconduct cases that under the CBAs are no longer subject to a preponderance standard of review. A "preponderance of the evidence" has always been the burden of proof for misconduct findings and associated discipline. In the case of termination for a first instance of dishonesty, a higher standard ("clear and convincing") was applied in recent years, in accordance with a MOA entered into between the City and SPOG, when the presumption of termination was agreed to. The ordinance eliminated that, returning to a preponderance standard for all misconduct findings and discipline. The Court expressed concern about SPD and the City using a higher burden of proof for dishonesty, and affirmed the approach taken in the ordinance. Instead, the City is asking the Court not only to accept a higher standard for misconduct involving dishonesty that results in termination, but also for a wider range of misconduct that results in termination. The City describes this CBA approach as "the City and SPOG agreed to treat dishonesty in the same manner as other cases of misconduct."
5.	Dishonesty	Presumption of termination; provable by clear and convincing evidence (3.1)	Presumption of termination; provable by standards used in labor arbitration (3.1)	See also comments in row 4. Both CBAs retain the Ordinance provision that a presumption of termination applies in cases in which an officer is found to be dishonest. However, both CBAs limit the employee's obligation to communicate completely and truthfully to only OPA investigations, not to all communications. There should be absolutely no question that employees must be complete and truthful in all communications, (e.g. employees must be truthful when completing incident reports, conducting use of force reviews,

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				testifying in court, etc.) as SPD Policy 5.001 requires. The narrow CBA language has wide implications given the large number of people detained and arrested with supporting police reports and testimony each year. And, whether intentional or not, the narrow CBA language will apply due to the CBA "shall prevail" language. As a result, SPD policy requirements for honesty would be limited to those communications described in the CBAs as related to "investigations" and "allegations," which will undercut the Chief's ability to hold officers accountable for complete and truthful incident reports, use of force reports, witness testimony, and any other verbal and written communication, thereby diminishing public trust and confidence. Also, both CBAs define dishonesty as intentionally providing false information which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding material facts, requiring OPA to prove intentionality, rather than using an objective standard.
6.	Suspension (pre-investigation)	Allowed when employee accused of felony (3.3)	Allowed when employee accused of felony or a gross misdemeanor involving moral turpitude, sex crime, or bias crime when termination possible (3.3)	The CBAs do not retain the accountability ordinance reform that: "The Chief shall have the authority to place an SPD employee on leave without pay prior to the initiation or completion of an OPA administrative investigation where the employee has been charged with a felony or a gross misdemeanor; where the allegations in an OPA complaint could, if true, lead to termination; or where the Chief otherwise determines that leave without pay is necessary for employee or public safety, or security or confidentiality of law enforcement information." The SPOG CBA limits the Chief's authority to place an SPD employee on unpaid leave to those charged with commission of a felony or a gross misdemeanor involving "moral turpitude, or a sex or bias crime," greatly narrowing the types of misconduct for which the Chief may place an employee on leave without pay for longer than 30 days. This undercuts the intended reform and no

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				longer gives the Chief appropriate managerial discretion in determining the need for such leave. Also, most serious criminal cases will not be charged within 30 days, placing the Chief in a difficult position in these especially high visibility cases in which a filing decision hasn't been reached but criminal charges may ultimately result. The SPMA CBA does not narrow the type of gross misdemeanors as the SPOG CBA does, but the SPMA CBA also does not include the rest of the ordinance provision which allows the Chief to take this action for allegations that may result in termination, or because placing someone on leave is necessary for employee or public safety, or security or confidentiality of law enforcement information.
7.	Civilians in OPA	None	Two civilians replace sergeants, with specified procedures for replacement and transfer (App. D)	The SPOG CBA limit on the number of civilian investigators is inconsistent with the accountability ordinance reform, which provided the OPA Director discretion to establish an appropriate mix of civilian and sworn staff to balance competing needs, handle investigations efficiently, and maintain an effective complement of staff with differing expertise and perspectives. Having civilians take complaints at intake offers complainants an alternative to sworn staff. Civilian investigators and investigation supervisors enhance trust; provide continuity and staffing flexibility; and add specialized expertise with non-law enforcement perspectives. The expertise and perspective of sworn staff is also important, and an OPA assignment is valuable for moving up the chain of command. In the ordinance, while the OPA Director collaborates with the Chief in determining rotations of OPA's sworn staff, the OPA Director maintains managerial authority for both civilian and sworn OPA staff. In addition, the limit of two civilian investigators could last far beyond the current expiration date of the CBA, since the CBA continues after expiration until a new agreement is in place.

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				Also problematic is that the CBA language in Appendix D states that "Any case that reasonably could lead to termination will have a sworn investigator assigned to the case." This either means OPA may not use a civilian investigator or it means that OPA must pair a civilian with a sworn investigator (for which aspects of the investigation is unstated). The intent of the parties is unclear, which means whichever approach OPA takes will be open to challenge. Either way, it undercuts the intended reform to use civilian investigators in the manner that best serves the public. It means that for the most serious types of allegations, OPA will not be more accessible to complainants who do not trust sworn investigators, which was one of the goals of civilianization. Civilian investigators also offer expertise and perspectives different than those of sworn investigators and help lessen the challenges inherent in requiring a sergeant investigator lead an investigation that may result in the firing of a colleague or superior. As the Inspector General has noted, since OIG staff are civilians, this language is potentially inconsistent with the OIG's obligation to investigate serious misconduct allegations in those situations where OPA is conflicted out. Note that at the start of Appendix E.12 of the SPOG CBA it states "The parties have also reached the following understandings on specific sections of the Ordinance. For ease of reference, the relevant language from the section is included . . . followed by the agreement of the parties in italics." Ordinance sections 3.29.120.B and 3.29.140.E are cited in Appendix E.12, but there is no italicized summary of the parties' agreement. The City's articulated rationale for the concession limiting the civilian investigators to two in the SPOG CBA, rather than leaving it to the discretion of the OPA Director as set forth in the ordinance, was that the City was required to approach it that way in bargaining. But the City could have approached civilianization in

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				the SPOG CBA as was done in the SPMA CBA for civilianization of the OPA lieutenant and captain positions. With respect to Article 7.10 of the SPOG CBA, it should be noted that pursuant to the Consent Decree, OPA civilian staff are routinely involved at Force Investigation Team call-outs and with Type III Use of Force incidents. Some of these may involve allegations of criminal activity.
8.	Loudermill notice timing	None	Employee to be provided notice of Loudermill right within 10 days of disciplinary decision (3.5.A)	The SPOG CBA does not adopt the deadlines detailed in the accountability ordinance, such as the requirement that the employee notify the Chief's office within 10 days if requesting a due process hearing. In fact, in the City's filing, they state that the parties have interpreted the provision instead as an obligation for the Department to notify the employee of that right within 10 days of receiving the Disciplinary Action Report (DAR) from the Chief. The Department has always notified employees of their right as part of the DAR. The problem that had been identified and was addressed in the ordinance was that one way to reduce delay was to require the employee to request a hearing within 10 days.
9.	Loudermill hearing date	None	Loudermill hearing should occur within 30 days, but can be extended by agreement (3.5.F)	The SPOG CBA is consistent with the accountability ordinance in regard to the 30-day window for holding the due process hearing, but then undercuts the intended reform by allowing the parties to agree to extend the due process hearing "based on extenuating circumstances," with no limit for that extension.
10.	Loudermill attendees	No provision	Representatives from OIG and City Attorney's Office may attend (3.5.D)	
11.	Post-Loudermill timeline	None	Chief must make a good-faith effort to make a decision within 10 days of Loudermill hearing (3.5.F)	
12.	180-day deadline, Post-Loudermill	No provision	60 days added to 180-day deadline when OPA investigates further as a result	Appendix E.12 of the SPOG CBA does not adopt the accountability ordinance reform to preclude new information from being raised in the due process hearing or on appeal if known by the employee

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
			of information obtained in Loudermill hearing (3.5.F)	or SPOG and not disclosed during the OPA investigation. Under Article 3.5.F, the SPOG CBA also unduly limits time extensions for investigating new material evidence, countering the ordinance provision that allows 60 additional days, to ensure sufficient time for OPA to follow-up on any new evidence presented at the due process hearing and for OPA's additional investigation to be certified by the OIG. The SPMA CBA language appears to conform to some of the reform measures in this ordinance provision. However, while this CBA language forecloses raising previously known information at arbitration or appeal, it does not foreclose raising it at the due process hearing. Also, there are conflicting references in the CBA to information being known "at the time of the OPA interview" vs. known "during the OPA investigation," which need to be clarified.
13.	Notice of OPA investigation	5-day notice to employee of complaint; 30-day classification report (3.6.A)	Retain 5- and 30-day system; enumeration of classification report contents, including identification of policies at issue and description of alleged actions by employee (3.6.A)	The accountability ordinance provides that notices not include the name and address of the complainant (unless the complainant gives written consent) because doing so could have a chilling effect. The SPOG CBA language is unclear: 1) Article 3.1.A requires a copy of the complaint be given to the named employee and SPOG. In doing so, in some instances, the complainant may be identified to them; and 2) Article 3.12.C.1 is ambiguous. While the latter Article may be intended to refer to the address of the incident, including "name" suggests it refers to the name of the complainant. Further, in Appendix H, the CBA obliquely indicates that some complaints may be anonymous, while noting that "the issue of how OPA should deal with them when providing information" is a re-opener. The SPOG CBA also does not expressly incorporate an ordinance provision expressly allowing OPA to investigate additional allegations not listed in the 30-day notice. By not doing so, the CBA appears to have rejected this reform.

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				The SPMA CBA does not include language that might require OPA to divulge the identity of the complainant to the named employee. The CBA language is consistent with the ordinance provision that allows identification and investigation of additional allegations after the 30-day notice.
14.	Attendance at OPA interviews	Limited to employee, Guild representative, two OPA investigators, and one OPA command staff member (3.6.F.5)	Expanded to include OPA Director, OPA Lieutenant and Captain (or civilian replacement), and OIG representative (3.6.F.5)	
15.	180-day deadline—Initiation	Either— • Date complaint received by OPA, or • Date supervisor becomes aware of misconduct (3.6.B and Memorandum of Agreement)	Earliest of — • Receipt/initiation of a complaint by OPA; • Receipt/initiation of a formal complaint by a sworn supervisor alleging facts that, if true, could without more constitute a serious act of misconduct violation, as long as the supervisor forwards the matter to OPA within forty-eight (48) hours of receipt. For cases of less than serious acts of misconduct, the 180 Start Date will begin with the receipt of information where the supervisor takes documented action to handle the complaint (for example a documentation in the	**180-day bar.** The accountability ordinance intentionally did not state that the imposition of discipline was to be tied to the 180-day timeline, instead requiring OPA to document and report every case in which 180 days was exceeded and the reason(s) why. The intention was to maintain the goal of timely investigations by requiring documentation similar to that required when the Chief's decision differs from the OPA Director's recommended finding or when a finding or discipline is later changed (transparency and performance expectations), while eliminating the loss of accountability when an investigation misses the 180-day window, even by a single day. Additionally, the ordinance was very specific and concrete in defining the timeline, in setting forth the circumstances under which the deadline could be extended, the length of time allowed for those extensions, and when the 180-day period was to be paused (including during criminal investigations), in order to eliminate any ambiguity about the timeline and related rules (see immediately below). These reforms better support accountability, so that even if discipline were to remain tied to the 180-day period, the greater clarity would result in fewer challenges based on its calculation. **Start and end of 180-day clock.** In the ordinance, the start date to the 180-day timeline is when OPA receives or initiates a complaint and the end date is when the OPA Director issues proposed

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			performance appraisal system); • For incidents submitted to the Chain of Command in Blue Team (or its successor), fourteen (14) days after the date on which the initial supervisor submits the incident for review to the Chain of Command; • OPA personnel present at the scene of an incident; or • If the Office of the Inspector General (OIG) is present at the scene of an incident at which OPA is not present, and if OIG subsequently files a complaint growing out of the incident, the date of the incident (3.6.B)	findings. Instead, the SPOG CBA makes start date distinctions based on whether it is a formal complaint, the seriousness of the allegations, when the complaint in entered in Blue Team, whether OPA or OIG personnel are at an incident. (3.6.B (i)-(v)). The SPOG CBA makes the end date the date the proposed Disciplinary Action Report (DAR) is issued; the DAR is issued by SPD, not OPA, so the 180-day deadline can still be missed by delay in actions not under OPA's control, as has happened in the past. The Inspector General has noted that in the event the OIG undertakes an OPA conflict investigation, potential issues with the time calculation would apply to OIG. In addition, the OIG has authority to request or direct further investigation (3.29.260.D). The Inspector General has noted that in those cases, OPA must resubmit the case to the OIG for certification before the OPA Director may issue proposed findings. The OIG's ability to timely certify, as well as the amount of time left for OPA to issue findings, will be negatively impacted by the CBA provisions related to the 180-day period. The SPMA CBA language defining the 180-day investigation period is generally consistent with the ordinance. **180-day extensions.** When extensions apply, the length of time allowed for those extensions under the CBAs is ambiguous. As well, both CBAs require union approval of extensions, which undercuts OPA's authority, and the unions' duty of representation may narrow when such extensions would be agreed to. Given the frequency of challenges to discipline based on whether the 180-day timeline was exceeded, retaining 180 days as a bar to discipline and allowing challenges to extension decisions will continue to result in a lack of clarity, and lessen accountability, fairness, and community confidence. In two places, Article 3.6.B of the SPOG CBA ties the timeline to

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				"verdicts" or "guilty pleas" but does not account for other types of dispositions. In Article 3.6.D of the SPOG CBA, the first sentence, as well as the phrase "and a community member later complains" mean there will be different approaches to the timeline calculation based on who the complainant is. Also, this is limited to Type II use of force. Similarly, Article 3.6.D.1 includes a clause that effectively limits the start date recalculation to community member complaints.
16.	180-day deadline—re- initiation	None	For serious misconduct, 180-day timeline begins with discovery of newly discovered material evidence (3.6.B)	See comments in row 15.
17.	180-day deadline—requests for extension	Requests for extension not to be unreasonably denied if delay caused by— • Witness unavailability • Other reasons beyond SPD's control (3.6.C.1)	Requests for extension not to be unreasonably denied if delay caused by— • Witness or named employee unavailability • Vacancy in OPA Director position • Unavailability of Guild representative • Complex criminal investigation • Other reasons beyond SPD's control (3.6.C.1)	See comments in row 15.
18.	180-day deadline—OPA requests for extension	None	OPA may request extension(s) (3.6.F.2, 3)	See comments in row 15.
19.	180-day deadline—	None	For complaints by community members, 180-days may be	See comments in row 15.

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
	recalculation		recalculated in cases of serious misconduct (Type II use of force, bias, pursuit violations) that should have been identified by chain of command (3.6.D)	
20.	Deadline in cases of criminal conviction	Within 45 days of conviction (3.6.B)	Within 45 days of judicial acceptance of plea or sentencing (3.6.B)	The SPOG CBA does not adopt a key accountability ordinance reform that the 180-day clock should be automatically paused any time criminal allegations are referred by OPA to a law enforcement agency for investigation and the administrative investigation is on hold. The reform was to make sure that the timeline is paused whenever a case is outside of OPA's control, not just for the period of time when the prosecutor reviews the case for a filing decision after the criminal investigation is completed. If the other two related reforms had been secured as intended (OPA having authority to oversee all misconduct investigations, to ensure the quality and timeliness of investigations involving criminal allegations; and not tying the 180-day timeline to the authority to discipline), this failure to pause the clock would be of much less consequence. The SPOG CBA also treats allegations of the same criminal misconduct allegations differently by allowing the timeline to be tolled if the misconduct occurred "in another jurisdiction." Thus, if the misconduct occurs in Seattle, less time is allowed for the criminal and administrative investigations to be completed. As with other CBA provisions that do not appear to serve the public, it is difficult to understand how a provision that lessens civilian oversight and the time needed to investigate serious allegations which occurred in Seattle represent good public policy. The OPA Director is required to obtain SPOG approval of any needed extension to the 180-day timeline, but whether that approval will be granted is uncertain given the union's duty of

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				representation. In addition, the OPA Director is not given discretion to make the decision as to whether SPD or another agency will conduct the criminal investigation. The SPMA CBA expressly adopts the ordinance tolling reforms for allegations of criminal misconduct.
21.	Limitations period	Three years (3.6.G)	Four years (3.6.G)	The SPOG CBA does not adopt the accountability ordinance reforms to the statute of limitations. The statute of limitations was to be extended from three years to five years for most misconduct cases, and eliminated altogether for certain more serious types of misconduct, so that accountability is retained. This reform was to help make sure action can be taken in cases of significant misconduct, in order to retain accountability. The SPOG CBA lowers it to four years, and removes the exceptions for dishonesty, Type III Force, and concealed acts of misconduct where a peer, supervisor, or subordinate conceals the misconduct (retaining it only for concealment by the named employee). This means the statute of limitations still applies and employees may not be held accountable for several types of serious misconduct. As with other CBA provisions that do not appear to serve the public, it is difficult to understand what public purpose is served by these CBA provisions. Note also that 3.6.G.3 regarding extensions of the time period when there is an adverse court ruling, does not state to whom the disposition is adverse. The SPMA CBA expressly adopts the ordinance statute of limitation reforms.
22.	Access to OPA files	Limited to specified individuals and groups (3.6.H)	Access expanded to include OIG, Deputy Chiefs, City Attorney's Office, and CPC (closed files only) (3.6.H)	

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
23.	OPA file logs	OPA to retain records of OPA file removal (3.6.I).	OPA to use IA-Pro to retain records of file access (3.6.I)	
24.	OPA file retention	All case files retained for three years after investigation, unless pending legal proceedings make it appropriate to retain longer (3.6.L)	Files in sustained cases retained for duration of employee's career plus 6 years. Files in not-sustained cases retained for 3 years in addition to current year. OIG may retain not-sustained files if de-identified. (3.6.L)	The CBAs do not retain the entirety of the accountability ordinance's record retention reforms, which included setting the same longer retention period for all OPA files (including both sustained and not sustained findings) and SPD personnel files, and describing specifically which files must be retained. The CBAs adopt the retention period in the ordinance only for cases resulting in sustained findings, and do not specifically mandate retention of SPD personnel files nor the other files listed in the ordinance. In the past, because records were retained for shorter periods of time, and all files were not retained, the City's accountability to the public was at times diminished, and SPD management's ability to have discipline upheld on appeal because it had established progressive discipline and could prove comparable treatment of like cases was compromised. In addition, cases where findings are not sustained may help shed light on systemic failures in the disciplinary system. The City should also preclude the removal of findings and associated discipline from personnel records as part of any negotiated resolution on appeal. Removing these records impedes transparency and makes it difficult for the Chief to show subsequently that she imposes discipline consistently in like cases or is following progressive discipline requirements. Note also that although records are kept electronically, the SPMA CBA states OPA shall maintain a record showing which files have been removed from the OPA office, the date of removal, who accessed the files, and to where the files have been transferred.
25.	Conduct of criminal investigations	OPA to determine specialty unit for criminal investigations (3.7)	Chief determines specialty unit for criminal investigations, may refer to	The CBAs do not retain an important accountability ordinance reform that OPA's jurisdiction should include all types of possible misconduct, in order to ensure *greater* civilian oversight, *not less*,

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
			outside agency in cases of conflict and other unusual circumstances (3.7)	of investigations involving allegations of criminal misconduct. In complaints alleging criminal misconduct, OPA should have the responsibility to coordinate investigations with criminal investigators external to OPA and prosecutors on a case-by-case basis to ensure that the most thorough and timely criminal and administrative investigations are conducted. This is an area where partial incorporation in the CBAs of language from the ordinance and representations of the parties have created ambiguity regarding OPA's authority. The CBAs do not incorporate a key clause from the ordinance ("… to ensure that the most effective, thorough, and rigorous criminal and administrative investigations are conducted."), so the intended scope of OPA's role appears to be scaled back from that in the ordinance. This raises concerns regarding whether these cases, which often involve the most serious types of misconduct, will be subject to challenge when the OPA Director takes steps to provide sufficient oversight to protect the quality and timeliness of the OPA investigation. The SPOG CBA appears to limit OPA's role to coordinating only scheduling (i.e., monitoring the status and progress of the case) with criminal investigators and prosecutors, while the SPMA CBA limits OPA's authority to coordinate with criminal prosecutors to only cases involving concurrent OPA and criminal investigations. The SPOG CBA also states that the Department (rather than OPA) will determine whether there are simultaneous OPA and criminal investigations and does not require the OPA Director's agreement in deciding whether an investigation will be conducted by SPD or an external law enforcement agency. These limitations undercut a major reform. The lack of civilian oversight of criminal investigations, which often involve the most serious allegations, has always been a serious weakness in Seattle's system. When an allegation involves possible criminal

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				acts, OPA has been limited to referring the complaint to SPD (which infrequently refers such cases to another law enforcement agency for investigation). OPA then waits for the criminal investigation to be completed and referred back to OPA. OPA cannot help ensure that important questions or evidence related to the OPA investigation are addressed as part of that initial investigation, or address the quality, nature, or length of time of the criminal investigation. If the criminal investigation is not thorough or timely, the OPA investigation is often compromised (e.g., evidence is no longer available, witnesses' memories fade over time, or there is limited time left in OPA's 180-day investigation window). The intended reform was to provide the OPA Director the authority to consult with the criminal investigator and prosecuting attorney at the beginning of all cases involving allegations of criminal misconduct to determine the most effective approach for achieving thorough and rigorous criminal and OPA investigations. The OPA Director should be able to make the decision as to whether the investigations run concurrently or not, whether an outside law enforcement agency should investigate, and how the timing of notification and witness interviews should be managed. This is another area where the Consent Decree's purpose of public trust and confidence can be undercut when an employee engaged in possible criminal misconduct cannot be properly held accountable. OPA is responsible for making sure that happens, yet does not have the clear authority to do so. It is difficult to see how the public interest is served by providing OPA full authority for only for lower levels of misconduct, while minimizing its role when there is an allegation involving criminal misconduct.
26.	OPA role in criminal investigations	No involvement (3.7)	OPA may communicate about status, but will not direct or influence criminal investigations (3.7)	See comments in row 25.

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
27.	Frontline investigations	None	Procedures established for minor policy violations investigated by chain of command (3.8)	
28.	Mediation	Voluntary mediation program established (3.10)	Mediation process modified to better articulated commitment to mediation; inquire regarding officer's interest in mediation at outset of case; tolling of 180-day deadline (3.10)	The accountability ordinance language was intended to ensure that OPA had the full authority to develop and use alternatives to investigations, and would work with the CPC and OIG to implement recommendations that had been made over the years by the civilian oversight bodies for mediation. Prior recommendations for the mediation program were intended to address obstacles that had resulted in few complainants participating in mediation, such as a requirement that the officer agree to participate and the complainant give up the option of possible discipline, even if the officer doesn't participate in a meaningful way; extended periods before mediation occurs; and the formal nature of the process, often in a downtown law firm, rather than in a community agency or other more informal setting. These recommendations, including consulting with the CPC and OIG on needed program improvements and presumably governing policies, are not incorporated in either CBA. In addition, the previous CBA requirements for mediation that conflict with the recommendations that were made were not amended or removed, so they will continue to limit the reforms that can be made by OPA even though the Council believes that they addressed those obstacles to mediation through the ordinance provisions. In Appendix E.8, the SPOG CBA states that "[t]he City agrees that [the Mediation program set forth in the Agreement] meet[s] the goals of the Ordinance." This is incorrect, given the mediation provisions left in the CBAs that are in conflict with recommended reforms. Note that drafting errors in the CBAs should be corrected (the

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				inadvertent removal of "complaints" from a sentence in the SPOG CBA and the substitution of "deferred" for "referred" in several instances in both CBAs).
29.	Rapid Adjudication	None	Rapid Adjudication pilot program established (3.11)	The accountability ordinance provides for Rapid Adjudication (RA) to quickly resolve certain types of cases of misconduct. RA's quick resolution is better for all involved; ties accountability to the behavior sooner, which is an important principle of effectiveness; and saves time and resources for other investigations. In RA, the named employee immediately acknowledges a policy violation and appropriate discipline is imposed without an investigation. For example, if an employee failed to get a required approval, meet annual training requirements, complete a supervisory use of force review within the mandated timeline, or use in-car video, there would be an expedited process for acknowledging the violation, with appropriate discipline imposed using a discipline matrix, and with no appeals allowed. It would also help strengthen SPD's culture of accountability, making it clear that acknowledging mistakes is encouraged. For this reason, the employee's file would reflect resolution through the RA alternative. RA could have been piloted when first recommended in January 2014 so that it then could have been fully implemented in the union contacts. Full implementation will now again be delayed, limited to just a pilot project governed by practices outlined in each CBA that are not entirely consistent with those recommended. Also, under the ordinance, the OPA Director is to take steps to establish a fair and effective RA program (and presumably its governing policies), doing so in consultation with CPC and OIG. However, neither CBA refers to RA program development work to be undertaken by OPA in consultation with CPC and OIG, nor do they include certain key RA elements. Both CBAs stipulate provisions that counter or undermine the intended reform. For

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				example, the SPOG CBA allows employees to appeal RAs to the Chief, and both CBAs allow employees to reject the RA discipline and opt instead for an OPA investigation, do not provide for use of a pre-determined discipline matrix, and do not require RA resolutions to be documented in employee files. In Appendix E.8, the SPOG CBA states that "[t]he City agrees that [the Rapid Adjudication program set forth in the Agreement] meet[s] the goals of the Ordinance." As with mediation, this is incorrect, given the provisions in the CBAs that are in conflict with recommended elements, and the limitation to a pilot.
30.	EEO investigations	None	EEO investigation responsibilities and procedures enumerated (3.12)	The CBAs concerning investigations of misconduct complaints conflict with accountability ordinance reforms. The CBAs compound the concerns identified by applying those same provisions not just to OPA investigations, but now also to EEO investigations.
31.	Performance-based transfers	None	Procedure for performance-based transfers established (7.4.4)	The SPOG CBA conflicts with an important accountability ordinance reform that gave management authority to set and use performance standards that take into account OPA history in making specialty assignments and that allow immediate transfer out of specialty units employees whose conduct warrants transfer. The CBA requires a detailed explanation, reviewed and approved by the Chain of Command and the Department's Human Resource Director (or designee), be given to the employee, including specific actions the employee can take to address concerns. It also states that the employee will have "normally" no less than thirty days and no more than ninety days to address any deficiency. This undercuts the Chief's authority to transfer an employee when warranted by Sustained findings of misconduct. Also, mandatory transfers were not addressed in the SPOG CBA. The SPOG CBA is silent on management authority to move sergeants and officers, unlike the SPMA CBA.

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				The Management Rights language in the SPMA CBA is in alignment with these ordinance provisions with respect to assignment to and transfer from specialty units, as well as to mandatory transfers. Management has the authority to move captains and lieutenants at-will so they gain experience in different units, different parts of the city, etc. and assign these staff in ways that match their skills and abilities to SPD's need to provide effective policing services.
32.	Secondary employment	Permitted, subject to 1992 terms and conditions (7.9)	Same, but with reopener allowing bargaining of changes mid-contract (7.9)	The SPOG CBA provides for a re-opener to bargain secondary employment and expressly sets the terms and conditions for secondary employment to terms and conditions in effect in 1992. This concession is a setback to a critical accountability reform. (Secondary employment is not an employment right and should not have been incorporated in the CBA to begin with, thus making it subject to bargaining.) In response to egregious situations and apparent corruption coming to light recently and a history of problems addressed in repeated recommendations over the years, secondary employment reforms were to be implemented in 2017 pursuant to an Executive Order by then-Mayor Burgess and recommendations from the Ethics & Elections Commission, the City Auditor, the OPA Auditor, and the CPC. These reforms addressed real and perceived conflicts of interest, internal problems among employees competing for business, the need for appropriate supervisory review and management, and technological opportunities. The recommendations included eliminating the practice of having secondary employment work managed outside SPD, often by current employees acting through their private businesses created for this purpose or through contracts between the employee and a private business; making clear that video recording, use of force, professionalism, and all other policies apply when employees perform secondary employment work; creating an internal civilian-led and civilian-staffed office; and establishing clear and

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
				unambiguous policies, rules, and procedures consistent with strong ethics and a sound organizational culture. The SPMA CBA acknowledges "the City's ability to regulate and manage secondary employment through an internal office."
33.	Disciplinary arbitration timeline	Arbitration to occur within 90 days of referral to American Arbitration Association (14)	Arbitration within 90 days of receiving potential hearing dates from arbitrator, requests for extension not unreasonably denied (14)	To address long-standing patterns of months or years of delay for outcomes when discipline and/or findings are appealed, the accountability ordinance stipulates specific deadlines related to disciplinary and appeal processes (10 days for the employee to file a notice of appeal; the hearing held within three months; the ruling issued within 30 days of oral argument; and hearings and related deadlines not delayed more than two weeks due to the unavailability of the City's or the employee's union representative or legal counsel). Because the CBAs still allow multiple avenues of appeal, those deadlines will not apply if arbitration is chosen by the employee or union; instead any CBA deadlines will apply. Under the SPOG CBA, arbitration hearings will "generally" be conducted within 90 calendar days "from the date the arbitrator provides potential dates to the parties," but the parties may extend the timeline without limitation to account for availability. In addition to not establishing a definitive timeline and allowing extensions, the 90 days start date is from the date the arbitrator sends hearing dates, not from the date the case is first referred. The ordinance provides for contracted or staff hearing examiners and limits extensions due to "unavailability" to two weeks to help to cut down on delays that occur frequently for police arbitration appeals. The SPMA CBA does not reference any timelines for when an arbitration hearing will be conducted, or provisions for extensions.
34.	Arbitrator selection	Arbitrator (neutral member of DRB) selected from a pool of 5 identified arbitrators (App. E.V.)	Process for creating pool created by sharing a list of 10 arbitrators, keeping agreed names, allowing each party to	Note: this row is the same as row 2 above.

	Area[1]	2010-2014 SPOG CBA	2015-2020 SPOG CBA	Comments on CBAs' Impact on Accountability & Public Trust and Confidence
			strike 2 names from other party's list. List randomized and then limited strike options for each case. (14.F)	
35.	Arbitration hearing record	None	Hearings to be audio recorded, with transcript costs born [sic] by requesting party or split evenly (14.11)	Note: this row is the same as row 3 above.

[1] A few other CBA changes to the City's disciplinary and disciplinary appeals processes that the City did not include in its Exhibit I:

- The SPOG CBA continues to allow accrued time, such as vacation time, to be used by an employee to satisfy disciplinary penalties that are supposed to be unpaid for discipline of less than 8 days, and when the suspension is for eight or more days, and allows the use of accrued time "if precluding such use . . . negatively affects the employee's pension/medical benefit."
- The SPOG CBA provides only for limited OPA and OIG subpoena power, prohibiting issuance of subpoenas to SPOG members, their family members, or for their personal records. If the CBA is interpreted to include bank records, medical records, and the like as "personal records," this exclusion covers a significant amount of potentially important information.
- The SPOG CBA limits the OPA Director's authority to manage rotations and transfers of sworn staff, not providing the OPA Director the discretion to determine the most effective mix of sworn and civilian investigators in OPA.
- The SPOG CBA requires the Chief to take notes and share them with the Guild if the Chief meets with the complainant prior to the Loudermill hearing to directly from the complainant when recommended by the OPA Director.
- The SPOG CBA does not make clear that the City Attorney's Office shall represent SPD in disciplinary challenges (a reform to ensure that the interests of the public are adequately protected and to address past practices of SPD settling challenges without appropriate consultation).
- The SPMA CBA prohibits The SPMA CBA prohibits any of OPA's sworn investigators (since all are sergeants, a lower rank) from conducting investigations involving SPMA members, rather than allowing the OPA Director to assign investigators based on needed expertise, workload, and other factors to help ensure the highest quality and most timely investigations.
- The SPMA CBA allows higher-ranking employees to answer an investigator's questions in writing, rather than requiring an in-person OPA interview.

- The CBAs do not require inclusion in the OPA file or disclosure to complainants, the public, the City Attorney, and oversight entities of changes in findings or discipline made by the Chief, or require any notifications or public transparency when discipline or findings are later changed as a result of an appeal.

[2] Under the SPOG CBA (see p. 73), arbitrators are selected as follows:

First the Guild and the City each submit a list of ten (10) acceptable arbitrators from among arbitrators either on the AAA and/or the Federal Mediation lists (no subject matter expertise required.) The only arbitrators automatically included on the List are those on both the Guild and City lists. Then the Guild and City each get to strike two names from the other's list (the first opportunity for the Guild to veto an arbitrator.) As cases come up, the parties alternate who goes first (with the Guild starting for the first arbitration.) The party going first will have the option to strike or accept the top name on the List (the second opportunity for the Guild to veto an arbitrator.) The other party then will have the option to strike or accept the top name on the List (the third opportunity for the Guild to veto an arbitrator.) After each party has gone, the top name on the List will be the arbitrator that hears the grievance. [Note that any arbitrator struck by a party, or selected to hear a case, then rotates to the bottom of the list so they don't come up again until there have been sufficient cases to get to the bottom of the list.]

Under the SPMA CBA (see p. 36), arbitrators are selected as follows:

The parties will jointly request that the United States Federal Mediation and Conciliation Service (FMCS) provide a list of labor arbitrators in random order meeting the following qualifications: attorney; office in Washington or Oregon; and member of the National Academy of Arbitrators (no subject matter expertise required.) This will be the List used by the parties for arbitrator selection for the duration of the Agreement. Selection of an arbitrator will operate as follows:

A. The parties will alternate who goes first, starting with the Association going first in the first arbitration conducted under this Agreement.

B. The party going first will have the option to strike or accept the top name on the List. The other party then will have the option to strike or accept the top name on the List. After each party has gone, the top name on the List will be the arbitrator that hears the grievance.

C. The parties will continue sequentially down the List for all future arbitrations. If the parties get to the bottom of the List, they will jointly request that FMCS re-re-randomize the List. The parties will then start at the top of the re-randomized List.

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 2:12-cv-01282-JLR DECLARATION OF FE LOPEZ IN SUPPORT OF COMMUNITY POLICE COMMISSION'S RESPONSE TO COURT'S ORDER TO SHOW CAUSE

Perkins Coie LLP
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I, Fé Lopez, hereby declare:

I have personal knowledge of the facts stated below and am competent to testify regarding the same.

1. I am the Executive Director of the Community Police Commission ("CPC"), *amicus curiae* in this matter.

2. Attached as **Exhibit A** is a true and correct copy of an email kept in CPC records, which was sent by then-U.S. Attorney Jenny Durkan on April 4, 2014 to the then-co-chairs of the CPC, as well as other recipients. The email is titled "Re: OPA Auditor Special Review of SPD Disciplinary Practices—April 3, 2014."

3. Attached as **Exhibit B** are excerpts from documents that the CPC received in late 2018 from the Mayor's Office in response to requests for Labor Relations Policy Committee ("LRPC") communications pertaining to the Seattle Police Officers Guild ("SPOG") contract. The excerpts include status reports on the SPOG collective bargaining agreement, with portions related to secondary employment issues highlighted in (dark) yellow. In my view, these status reports indicate that the Accountability Ordinance provisions related to secondary employment would go into effect and only be subject to re-opening to bargain economic effects.

4. Attached as **Exhibit C** is the request in response to which the documents in Exhibit B were provided.

EXECUTED this 19th day of February 2019, at Seattle, Washington.

Fé Lopez

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on February 20, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

DATED this 20th day of February, 2019.

s/ David A. Perez
DPerez@perkinscoie.com

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EXHIBIT A

From: **Durkan, Jenny A. (USAWAW)** <Jenny.A.Durkan@usdoj.gov>
Date: Fri, Apr 4, 2014 at 8:24 AM
Subject: Re: OPA Auditor Special Review of SPD Disciplinary Practices - April 3, 2014
To: auditor <auditor@levco.com>
Cc: Merrick Bobb <MerrickBobb@parc.info>, Peter Ehrlichman <ehrlichman.peter@dorsey.com>, Ron Ward <Ron@wardsmithlaw.com>, Marnie MacDiarmid <gremar2@aol.com>, Diaz, Michael (USAWAW) <Michael.Diaz@usdoj.gov>, Lisa Daugaard <lisa.daugaard@defender.org>, Diane Narasaki <dianen@acrs.org>, Sarah K Morehead <Sarah.Morehead@seattle.gov>, Jean Boler <Jean.Boler@seattle.gov>, Hyeok Kim <Hyeok.Kim@seattle.gov>, Keefe, Kerry (USAWAW) <Kerry.Keefe@usdoj.gov>, JENNY DURKAN <jdurkan@mac.com>

Anne,

Thank you for sending this, and for taking the time to make thoughtful recommendations. Your input and assistance since we began our investigation three years ago has been important on many levels. Indeed, your work and that of previous auditors was very important in moving reform forward.

Without question, that work, various recent reviews by the City Council and by Chief Melekian and our own experience over the last three years only confirms the conclusions of the DOJ report. As we told the Court yesterday: the accountability system is in need of wholesale review and significant reform. Too many layers have been grafted on over the years by law and practice. It is almost unthinkable that so many experienced people can have so much confusion over how things work. It is also unacceptable. Both the officers and the public must have a system that is transparent, certain and just. The question is not simply how does the City improve what exists, but how does it create and insist on what is needed.

Moreover, as you know, in a healthy organization, discipline is only a part of any accountability system, and should perhaps be the smallest part. The SPD system has for too long cast too much solely through the lens of misconduct and discipline. The work we have done over the last many months works to shift the culture to emphasize organizational and individual improvement through thoughtful and candid review of both individual incidents and systemic practices. This conscious, continual improvement is one of the most important features of the Use of Force Review Board and other changes under the consent decree. It is also why the role of first line supervisors (sergeants) is critical. Mentoring, training, correction and improvement cannot be relegated solely to the academy or street skills classes. It must happen on every shift.

Of the many important roles the CPC plays in the reform process, the holistic review of the accountability process required by the consent decree and MOU is pivotal. That work and the changes it will help craft with City leadership will be critical to successful reform of SPD.

We know the CPC and all parts of the City leadership have received input from many quarters on these topics, and have begun active engagement of the community for its views. Your recommendations will undoubtedly be an important part of the robust and diverse dialogue ahead.

Again, thank you for your continued commitment as we move forward in implementing the agreements.

Best,

Jenny

EXHIBIT B

12

Overview for LRPC on SPOG TA

October 10, 2018

1.4 Guild President Pay. Guild will pay 22% of the cost, with remainder paid by City. Appropriate percentage will be reviewed annually.

3.1 Burden of Proof. Delete requirement that appeal of dishonesty requires clear and convincing evidence. The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration.

3.3 Indefinite Suspensions. Expands the ability of the Chief to impose an indefinite suspension. In addition to felonies, the Chief can suspend an officer without pay pending investigation for a gross misdemeanor involving moral turpitude, or a sex or bias crime, where the allegation if true could lead to termination.

3.5F New Evidence Produced at the Due Process Hearing. The 180 Day Clock will be extended so that OPA has at least 60 days to investigate any material new evidence produced at the hearing.

3.5 H (old) Disciplinary Review Board. Deleted from the CBA.

3.6A Classifications. This section is intended to simplify the burden on OPA in the notice and classification process. The initial notice is now due in 5 business days rather than 5 calendar days. In addition, OPA is no longer required to specify each specific policy and rule the employee might have violated. Rather, OPA can reference the general potential policy violations, and provide a summary of the alleged misconduct.

3.6B Determining the 180 Day Start Date. See Tab A.

3.6B (2) Criminal Investigations. Makes it clear that the 180 Day Clock is tolled when a county prosecutor is reviewing a matter, and not just city, state or federal prosecutors, as in the current contract.

3.6C 180 Day Extension Requests. Expands the reasons why an extension request can be made by the city, and in the event of a denial requires the SPOG put the reason(s) for denial in writing.

3.6F (5) OPA Interviews. OIG can attend all OPA interviews.

3.6G Statute of Limitations. Extended from 3 to 4 years (note that 5 years is in the Ordinance). Parties agreed on a relatively broad interpretation of the "conceals acts of misconduct" exception. Type III use of force is not included on the list of exceptions.

3.6L Files Retention. Sustained files may be retained for the duration of employment plus six years. Not sustained files may be retained for three years plus the remainder of the current year.

3.7 Criminal Investigations. Clarifies that OPA may communicate with and provide coordination to those conducting criminal investigations about the status and progress of the investigation, but may not direct or influence the conduct of the criminal investigation. Current contract prohibits any coordination between OPA and the criminal investigators.

3.8 Frontline Investigations. For investigations conducted by the Chain of Command (limited to minor policy violations), this section establishes a process for the conduct of the investigation. The process makes clear that the more formal processes required for OPA investigations do not apply. If the matter is referred to OPA, then the more formal procedures kick in.

3.10 Mediation. This section seeks to enhance the use of mediation, and also make it clear that if an officer does not participate in good faith as determined by the Mediator, the matter will be returned to OPA for investigation and possible discipline. Under the current CBA the officer receives a supervisory referral, but can't be disciplined.

3.11 Rapid Adjudication. A new system allowing for the rapid adjudication of matters in which the officer agrees to waive a formal investigation and accept discipline. While either the officer or OPA may initiate the process, both the OPA and the officer must agree before the process is utilized.

3.13 EEO Investigations. This new section of the CBA recognizes the ability of the City to have EEO matters investigated under the oversight of SPD HR, and allows the City to utilize outside civilian investigators to conduct the investigation.

4.2C Written Reprimands. Deletes the requirement in the CBA that after three years an employee may request that written reprimands be removed from the personnel file.

7.4.4 Performance Based Transfers. Establishes a process allowing SPD to transfer employees for performance reasons after providing notice and an opportunity to improve.

7.13 Performance Appraisal Review. Revises the process for reviewing a performance appraisal. Most significantly, the final decision will be made by the SPD HR Director, and will no longer be determined by chance.

14. Grievance Procedure. This article substantially revises the grievance procedure, which will now be utilized for discipline cases rather than the DRB. The process for selecting arbitrators has been modified in order to better ensure the availability of independent arbitrators, and to avoid the ability to "game" the selection process.

21.5 Secondary Employment. The City can reopen the CBA for purposes of changes related to secondary employment. The Guild can bargain on any economic impacts arising out of the changes sought by the City.

21.6 Gender/Race Workforce Equity. The City can reopen the CBA at any time.

Appendix A - Body Worn Video. The Guild has agreed to implementation of BWV, and acceptance of the Department Policy. The language makes clear that the determination of which units wear BWV will be made by the Department. Employees assigned to wear BWV will receive a 2% premium.

Appendix D – Civilians in OPA. This appendix allows the City to civilianize two Sergeant investigator positions in OPA. The determination of when this occurs is within the discretion of the City.

Appendix E – Accountability Legislation. See Tab B.

Appendix F - MOU Incorporation. Pursuant to the Ordinance, this appendix incorporates the outstanding MOU's that will remain operative.

Appendix G – Miscellaneous.

Civilianization – The SPD HR Sergeant position may be civilianized by the City.

Janus Compliance – The parties will revise the CBA to bring it into compliance immediately following ratification.

OIG at Firearms Review Board. Ensures the OIG will have the same access and participation as the Monitor.

ULP's. The Guild will withdraw all pending Unfair Labor Practices, which includes their challenges to the Accountability Ordinance and to BWV, and an assertion that OPA skimmed bargaining unit work when changing the intake process.

Washington Paid Family and Medical Leave. Provides a process for bargaining once the State provides more information through rules/regulations.

Appendix H. Classification Report Examples. This section provides guidance in terms of the disclosure to the officer made by OPA in the Classification Report. It also recognizes that some complainants will wish to remain anonymous. To the extent issues arise in terms of the notice provided employees in matters involving an anonymous complainant, either party can re-open the CBA.

Not in my electronic file

LRPC Update on SPOG
Summary of SPOG Bargaining

Dated: August 15, 2018

Civilianization - 2 OPA investigator positions

Civilianization - SPD HR Sergeant position

Re-opener- Approval of Gender/Race Workforce Equity Reopener Language

Body Worn Video. The Guild has agreed to implementation of BWV, and acceptance of the Department Policy. The language makes clear that the determination of which Units wear BWV will be made by the Department.

Guild President Pay: Guild will pay 22% of the cost, with remainder paid by City. Appropriate percentage can be reviewed annually.

Transfers – new section allowing Department to make performance-based transfers, after providing notice, and allowing the Department to make the final decision over where the officer will be transferred.

Disciplinary Review Board (DRB). The DRB has been removed from the contract, with all matters now resolved through the PSCSC or arbitration.

Arbitration. The parties have agreed upon a procedure for selection of arbitrators that will avoid concerns about Guild gamesmanship, and also ensure the timely selection of arbitrators.

Performance Appraisal Review – removal of existing system that resolves disputes concerning performance reviews by lot. New system allows final decision to be made by SPD HR Director.

Secondary Employment. City can reopen the CBA for purposes of changes related to secondary employment at its discretion.

Public Safety Civil Service Commission. The Guild will participate in negotiations with the other public safety unions concerning changes to the PSCSC.

ULP's. Withdrawal of all pending Unfair Labor Practices

4

LRPC UPDATE on SPOG AND ACCOUTABILITY

Status Report – August 15, 2018

Open Issues

3.29.130 (I) Office of Police Accountability – Classification and investigation timelines

Places an obligation on any named employee or his/her union that becomes aware of any witness or evidence that is material to an investigation, to disclose it to OPA. Information not disclosed prior to a due process hearing, grievance, or appeal shall not be allowed into the record after the OPA investigation has concluded if it was known to the named employee or the named employee's bargaining representative during the OPA investigation, and if OPA offered the employee an opportunity to discuss any additional information and suggest any additional witnesses during the course of the employee's OPA interview.

- **Sometimes referred to the "no-gotcha" provision of the Ordinance.**
- **Goal is to avoid having an employee or the Guild with-hold exculpatory evidence from OPA and the Chief, and then surprise the City with it at arbitration or the PSCSC.**
- **Status: still open.**

3.29.300 Community Police Commission established – Functions and authority

E. Identify and advocate for reforms to state laws that will enhance public trust and confidence in policing and the criminal justice system. Such advocacy may include, but is not limited to, reforms related to the referral of certain criminal cases to independent prosecutorial authorities, officer de-certification, **pension benefits for employees who do not separate from SPD "in good standing,"** and the standards for arbitrators to override termination decisions by the Chief.

- **The Guild wants all of the examples struck. Since these are merely examples of advocacy, there is no substantive reason to insist on retaining this language; rather the issue is primarily one of optics.**

- **The best option is to talk with CPC and work out mutually acceptable language that makes it clear the City is not in any way seeking to restrict or impede the ability of the CPC to engage in advocacy, and with which the CPC is comfortable.**
- **Status: Still open.**

3.6 G. – Statute of Limitations. City wants to expand the limitations period to five years from three years, and expand the exceptions (for which there is no limitation).

- **Given the significant process improvements in the investigation of use of force, perhaps keep exceptions as is and extend the current 3 year limitation to 5 years.**
- **Status: TTA on 4 years, still working on the exceptions list.**
- **Open issue: Dishonesty, or where the named employee conceals acts of misconduct**

Matters Resolved Since Last LRPC Meeting

3.29.420 A(7)(c). Disciplinary, grievance, and appeals policies and processes

Oral reprimands, written reprimands, "sustained" findings that are not accompanied by formal disciplinary measures, and alleged procedural violations may be processed through grievance processes established by the City Personnel Rules or by Collective Bargaining Agreements, but no grievance procedure may result in any alteration of the discipline imposed by the Chief. Such grievances are not subject to arbitration and may not be appealed to the PSCSC or any other forum.

- **See above on written warnings. It is also not clear how the prohibition on allowing the grievance procedure to alter discipline imposed by the Chief will work in practice. What happens if the Guild raises issues causing the City HR/LR and the CAO to agree that the City will not prevail in arbitration/Civil Service?**
- **TTA allowing changes to be made in the Chief's decision as part of the grievance process, but recognizing the right of the City to establish internal review processes prior to reaching agreement.**

Secondary Employment Re-opener – the Guild wanted to open "wages and benefits" if the City re-opens on secondary employment.

- **Stick with City proposal that Guild can bargain any economic impacts resulting from a change in secondary employment. (TTA)**

Civilianization in OPA – City seeks 3 civilian investigators in OPA, Guild will accept 2 civilian investigators and also allow civilianization of the HR Sgt. position in SPD Human Resources.

- **Go with 2 OPA investigators and the HR Sgt. (TTA)**

3.3 Indefinite Suspensions – Guild is OK with unpaid indefinite suspensions for gross misdemeanors involving moral turpitude, or a sex or bias crime, with the exception of when the underlying charge is filed by the City.

- **Potential high visibility issue. Even though it does not arise very often, continue to pursue. TTA on language allowing City to suspend without pay based on specified gross misdemeanor charges filed by the City, with caveat that if drop the charges or found not guilty back-pay is reinstated with statutory interest.**

3.6 B (3) Tolling of the 180-Day Clock when a matter is being criminally investigated – Guild is fine with tolling when another jurisdiction investigates, but wants the clock running if Seattle investigates, or sends the investigation to another jurisdiction for investigation.

- **Continue to pursue. TTA on language allowing City to request extension of 180 Day Clock when City investigates criminal matters. Guild may not unreasonably deny such requests. In cases when another agency conducts the investigation, the clock is tolled pending that investigation.**

3.29.420 A(7)(b) Disciplinary, grievance, and appeals policies and processes

The PSCSC shall be composed of three Commissioners, none of whom shall be current City employees or individuals employed by SPD within the past ten years, who are selected and qualified in accordance with subsection 4.08.040.A

- **Given that the City has agreed to arbitration, is this change still important? One alternative is make the Ordinance change providing that a Hearing Examiner will conduct the hearing (which the Guild has expressed opposition to, but allow the police and fire unions to continue making one appointment.**
- **TTA on language providing that Guild agrees to bargain with other public safety unions on the PSCSC changes.**

LRPC UPDATE on SPOG NEGOTIATIONS

Final TA on Accountability Issues Discussed at the August 15, 2018 LRPC Meeting

Secondary Employment Re-opener – the Guild sought to open "wages and benefits" if the City re-opens on secondary employment.

- Only economic impacts resulting from a change in secondary employment can be re-opened by the Guild.

Civilianization in OPA

- The City attains the right to civilianize 2 OPA investigator positions now performed by SPOG Sergeants, and also the work performed by the SPD HR Sgt.
- The decision of when these changes will be made is within the discretion of the City.

3.3 Indefinite Suspensions - On indefinite suspensions used for investigative purposes which do not result in termination of employment or reduction in rank, the resultant punishment shall not exceed thirty (30) days including the investigative time incorporated within the indefinite suspension. However, if an employee has been charged with the commission of a felony or a gross misdemeanor involving either moral turpitude, or a sex or bias crime, where the allegation if true could lead to termination, the Employer may indefinitely suspend that employee beyond thirty (30) days as long as the length of such suspension is in accord with all applicable Public Safety Civil Service Rules. In the event the gross misdemeanor charges are filed by the City, and are subsequently dropped or the employee is acquitted, the backpay withheld from the employee shall be repaid, with statutory interest. The Guild will be notified when the Department intends to indefinitely suspend an employee. The Guild has the right to request a meeting with the Chief to discuss the suspension. The meeting will occur within fifteen (15) days of the request. If the charges are dropped or lessened to a charge that does not meet the qualifications above, there is a plea or verdict to a lesser charge that does not meet the qualifications above, or in the case of a hung jury where charges are not refiled, the employee shall be immediately returned to paid status. An employee covered by this Agreement shall not suffer any loss of wages or benefits while on indefinite suspension if a determination of other than sustained: ~~exonerated, unfounded, or not sustained~~ is made by the Chief of Police. In those cases where an employee covered by this Agreement appeals the disciplinary action of the Chief of Police, the Chief of Police shall abide by the decision resulting from an appeal as provided by law with regard to back pay or lost benefits.

Commencement of the 180 Day Clock - the TA substantially modifies Section 3.6B, which determines when the 180 Day Clock Starts:

B. Except in cases where the employee is physically or medically unavailable to participate in the internal investigation, no discipline may result from the investigation if the investigation of the complaint is not completed within one-hundred eighty (180) days after the 180 day start date (the "180 Start Date")~~receipt of the complaint by the OPA or by a Department sworn supervisor~~, or (if submitted to the prosecutor within one hundred eighty (180) days) thirty (30) days after receipt of a decline notice from a prosecuting authority or a verdict in criminal trial, whichever is later. The 180 Start Date begins on the earliest of the following:

i) Receipt/initiation of a complaint by the OPA;
ii) Receipt/initiation of a formal complaint by a sworn supervisor alleging facts that, if true, could without more constitute a serious act of misconduct violation, as long as the supervisor forwards the matter to OPA within forty-eight (48) hours of receipt. For cases of less than serious acts of misconduct, the 180 Start Date will begin with the receipt of information where the supervisor takes documented action to handle the complaint (for example a documentation in the performance appraisal system);
iii) For incidents submitted to the Chain of Command in Blue Team (or its successor), fourteen (14) days after the date on which the initial supervisor submits the incident for review to the Chain of Command;
iv) OPA personnel present at the scene of an incident; or
v) If OIG is present at the scene of an incident at which OPA is not present, and if OIG subsequently files a complaint growing out of the incident, the date of the incident.

Provided, however, in the case of a criminal conviction, nothing shall prevent the Department from taking appropriate disciplinary action within forty-five (45) days, and on the basis of, the judicial acceptance of a guilty plea (or judicial equivalent such as nolo contendere) or sentencing for a criminal conviction.

For purposes of (iii) above, if following a Blue Team entry, the Chain of Command concludes that no misconduct occurred, and then material new evidence (including video) is provided at a later date that suggests serious misconduct did occur, then a new 180 Start Date is triggered on the date that the new material evidence of serious misconduct is provided.

Re-calculation of the 180 Day Clock. The TA also created a new Section 3.6D that allows for the "re-calculation" of the 180 Day Clock in certain circumstances:

D. 180 Start Date Re-calculation

When a community member complains about an incident, the OPA will generally investigate even in situations where the 180 day period for investigation may have expired. In the event an incident that was or should have been determined to be a Type II Use of Force, Bias, or Pursuit is entered into Blue Team, reviewed by the Chain of Command, the Chain of Command does not forward the incident to OPA, and a community member later complains, the OPA may initiate the following process to determine whether a re-calculation of the 180 Start Date is appropriate.

1. If OPA's investigation results in an OPA recommended finding that: (i) serious misconduct occurred, and that (ii) the serious misconduct was or should have been determined by the Chain of Command to be a violation of the Type II Use of Force, Bias, or Pursuit policy (or policies), OPA may request in writing that the 180 Start Date be recalculated to commence effective on the day of the community member's complaint. Such requests may not be unreasonably denied by the Guild. In the event the Guild denies the re-calculation, the Guild shall explain in writing the reason for the denial, and the matter will be resolved by the Chief, as provided below. If OPA recommends a finding that the serious misconduct described above occurred, it will forward its recommendations to the Chief. After reviewing OPA's recommendations, and offering a due process hearing where required, the Chief will determine in writing whether the matter was appropriate for re-calculation, and if so, whether the findings of OPA should be sustained and discipline imposed. The Chief's decision on re-calculation as well as any discipline issued are subject to arbitration.

2. In the event a Bias or Pursuit incident entered into Blue Team is recalculated pursuant to (D 1) above, and there was a Type I Use of Force in the same incident that was serious misconduct, which was not previously reported to OPA, then the recalculated 180 Start Date

from the Bias/Pursuit incident will be applied to the Type I Use of Force.

Changes Related to Tolling the 180-Day Clock

3.6B (2) In addition to those circumstances defined in subsection B.1, above, the one-hundred eighty (180) day time period will be suspended when a complaint involving alleged criminal conduct is being reviewed by a prosecuting authority or is being prosecuted at the city, state, county, or federal level or if the alleged conduct occurred in another jurisdiction and is being criminally investigated or prosecuted in that jurisdiction.

3.6C 180 Day Extension Requests

1. The Department may request and the Guild will not unreasonably deny an extension of: (1) the thirty (30) day period for furnishing the employee a classification report, if the complaint was not referred by the sworn supervisor to his/her Cchain of Ccommand or the OPA in a timely manner; (2) the one-hundred eighty (180) day time restriction if the Department has made the request before the one-hundred eighty (180) day time period has expired; has exercised due diligence in conducting the investigation of the complaint; and is unable to complete the investigation due to one of the following reasons: i) the unavailability of witnesses/named employee; ii) the unavailability of a Guild representative; iii) the OPA Director position becomes vacant due to unforeseen exigent circumstances; iv) when a complex criminal investigation conducted by the City takes an unusually long period of time to complete, and the City has exercised due diligence during the investigation; or v) other reasons beyond the control of the Department. A request for an extension due to the unavailability of witnesses must be supported by a showing by the Department that the witnesses are expected to become available within a reasonable period of time. The City's request for an extension will be in writing. The Guild will respond to the request in writing, providing the basis for denial, and recognizing that the determination will be based on the information provided to it.

2. The Department may request an extension for reasons other than the reasons listed above; however, any denial shall not be subject to subsection C1 above. Any approval or denial of a request for an extension other than the reasons listed in C1 shall be non-precedential.

3. Nothing in this section prohibits the OPA from requesting more than one extension during the course of an investigation.

4. In determining whether an extension request under C1 was appropriately denied, the factors to be considered are the good faith of the parties, the facts and circumstances surrounding the request, and the information provided to the Guild by the City.

3.6 G. – Statute of Limitations. G. Timing of Investigations -- No disciplinary action will result from a complaint of misconduct where the complaint is made to the ~~Internal Investigations~~ OPA ~~Section~~ more than ~~three~~four (4) years after the date of the incident which gave rise to the complaint, except:

1. In cases of criminal allegations, or

2. where the named employee conceals acts of misconduct, or

3. for a period of thirty (30) days following a final adverse disposition in civil litigation alleging intentional misconduct by an officer.

NOTE: *The parties agree that the phrase "where the named employee conceals acts of misconduct" includes but is not limited to misconduct where an employee fraudulently completes a timesheet because such act conceals the actual amount of time that was worked."*

3.29.130 (I) Office of Police Accountability – Classification and investigation timelines

Places an obligation on any named employee or his/her union that becomes aware of any witness or evidence that is material to an investigation, to disclose it to OPA. Information not disclosed prior to a due process hearing, grievance, or appeal shall not be allowed into the record after the OPA investigation has concluded if it was known to the named employee or the named employee's bargaining representative during the OPA investigation, and if OPA offered the employee an opportunity to discuss any additional information and suggest any additional witnesses during the course of the employee's OPA interview.

Resolution: *The City agrees that this section will not be implemented during the term of this Agreement (including any holdover period). Instead, the parties will implement the following provisions. This agreement does not in any way change or impact the application of any evidentiary standards applicable in grievance arbitration. In the interest of the Chief receiving relevant information prior to making a disciplinary decision, the parties have agreed that in the event new material evidence is presented to the Chief at a due process hearing, the Chief may return the matter to OPA, and the 180-day period will be extended to allow the OPA to investigate the new evidence and provide it to the Chief (see Article 3.5F) of the Agreement). Additionally, in order to minimize the likelihood that either party is unduly surprised at an appeal hearing, the parties agree that fifteen days prior to a discipline appeal hearing, each party will disclose any experts not previously used in the due process hearing or the grievance procedure.*

3.29.300 Community Police Commission established – Functions and authority

E. Identify and advocate for reforms to state laws that will enhance public trust and confidence in policing and the criminal justice system. Such advocacy may include, but is not limited to, reforms related to the referral of certain criminal cases to independent prosecutorial authorities, officer de-certification, pension benefits for employees who do not separate from SPD "in good standing," and the standards for arbitrators to override termination decisions by the Chief.

Resolution: *While the Guild recognizes the right of the CPC to engage in advocacy, the Guild is concerned that inclusion of the examples in this section of the Ordinance could be perceived as support by the Guild for these examples. Recognizing the need to get the Ordinance in place, the City agrees it will remove the second sentence from the Ordinance. In so doing, the City reaffirms its support of CPC's authority to identify and advocate for reforms to state laws that will enhance public trust and confidence in policing and the criminal justice system, as explicitly provided for in the first sentence of this section of the Ordinance, which will remain in place as written.*

The Guild and the City further confirm that nothing in their agreement on this issue is intended to restrict or limit CPC advocacy.

3.29.420 A(7)(c). Disciplinary, grievance, and appeals policies and processes

Oral reprimands, written reprimands, "sustained" findings that are not accompanied by formal disciplinary measures, and alleged procedural violations may be processed through grievance processes established by the City Personnel Rules or by Collective Bargaining Agreements, but no grievance procedure may result in any alteration of the discipline imposed by the Chief. Such grievances are not subject to arbitration and may not be appealed to the PSCSC or any other forum.

Resolution: *The City agrees that this section of the Ordinance shall not change the scope of matters that are subject to the grievance procedure and arbitration under the Agreement and to challenge/hearings under the PSCSC. In addition, the City confirms that operation of the grievance procedure and PSCSC can result in the alteration of discipline imposed by the Chief. Both parties recognize the right of the other party to utilize internal review processes prior to entering into a settlement of a grievance or a PSCSC appeal.*

3.29.420 A(7)(b) Disciplinary, grievance, and appeals policies and processes

The PSCSC shall be composed of three Commissioners, none of whom shall be current City employees or individuals employed by SPD within the past ten years, who are selected and qualified in accordance with subsection 4.08.040.A

- The Guild agrees to bargain with the three other public safety unions on the PSCSC changes.
- In the event the other public safety unions refuse to engage in joint bargaining, the City can re-open the Agreement with SPOG on changes to the PSCSC.

EXHIBIT C

Seattle
Community
Police Commission

Our city. Our safety.
Our police. Better together.

December 6, 2018

VIA EMAIL

Dear Council President Harrell,

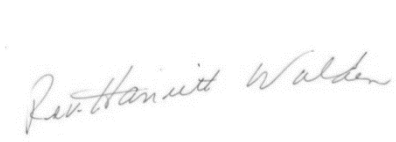
As you know, the Community Police Commission, as well as other parties, is in ongoing dialogue with Judge Robart with respect to the impact of the SPOG and SPMA collective bargaining agreements on various Seattle ordinances and provisions related to police accountability. In connection with that work, the CPC requests that the City Council and the Labor Relations Policy Committee produce the records specified below, and ask that these be expedited:

1. All bargaining guidance and parameters issued to City negotiators involved in bargaining with SPOG under Executive Order 01-14 (City Labor Negotiations and Standard Operating Procedure) from the Executive Order's signing in September 2014 until the present;
2. All documents describing the responsibilities of City negotiators or members of the LRPC generally or specifically in connection with SPOG negotiations;
3. All documents relating to formal or informal decisions made by the LRPC and background materials provided to LRPC members in connection with decision-making;
4. All drafts of the TA (including earlier drafts of the document) provided to the LRPC or descriptions of such drafts provided to the LRPC, indicating the date on which such documents were provided and to whom; and
5. All documents analyzing variations between the 2017 accountability ordinance and any draft of the TA.

We make these requests under SMC 3.29.330(D) ("Without the necessity of making a public disclosure request, CPC may request and shall timely receive from other City departments and offices, including SPD, information relevant to its duties under this Chapter 3.29 that would be disclosed if requested under the Public Records Act"), and pursuant to our understanding that, after a tentative agreement (TA) is reached, bargaining documents become public Based on the resolution that Council adopted in connection with the TA, and based on the Federal Court proceeding and the Court's Order, the TA's impact on the 2017 Accountability Ordinance, as well as other City law (EEO provisions and measures pursuant to executive order to rectify secondary employment abuses), will be discussed in coming weeks with Judge Robart. Therefore, time is of the essence, and we respectfully request that the materials be provided as soon as possible.

We note that we requested certain LRPC materials from Ian Warner, counsel for Mayor Durkan, on October 23. It is our current understanding that the materials are in the custody and control of the LRPC, however.

Sincerely,



Rev. Harriett Walden, Co-Chair
Community Police Commission

Isaac Ruiz, Co-Chair
Community Police Commission

Cc:

Mayor Jenny Durkan
Ian Warner, General Counsel to the Mayor
Councilmember Sally Bagshaw, District 7
Councilmember Lorena González, District 9
Councilmember Lisa Herbold, District 1
Councilmember Rob Johnson, District 4
Councilmember Debora Juarez, District 5
Councilmember Teresa Mosqueda, District 8
Councilmember Mike O'Brien, District 6
Councilmember Kshama Sawant, District 3
City Budget Office Director Ben Noble
SDHR Director (Acting) Susan McNab
Seattle Community Police Commission