BRINGING A PLASTIC MALLET TO HAMMER IN A PROBLEM NAIL:
US DOJ/CITY OF PORTLAND AGREEMENT DOESN'T GO FAR ENOUGH
an analysis by Portland Copwatch
October 31, 2012

Below are comments from Portland Copwatch on the US Department of Justice (DOJ) Agreement with the City of Portland regarding changes to the Portland Police Bureau (PPB) and other agencies to alleviate the pattern and practice of excessive use of force. In making these comments, we referred back to a number of documents, most significantly the DOJ's findings letter to the City dated September 13 and the AMA Coalition/Portland Copwatch recommendations based on those findings. Some of this information was sent previously on October 28; this is a more definitive document.

GENERAL COMMENTS--Promising Changes, But Still, Questions

While we overall are concerned that the changes in the Agreement do not go far enough and/or are ambiguous enough for the City to avoid fulfilling the intent of the proposals, there are several items that appear to be in favor of community accountability and transparency.

--One of the best recommended changes is for police to de-escalate their use of violence as the resistance from the subject(s) decreases (paragraph 67-c). Often, officers take out their frustrations on someone they feel has disrespected or tried to injure them.

--Another encouraging prospect is that officers who are found in civil court to have violated someone's rights will be subject to an Internal Affairs (IA) investigation, which presumes they are guilty of misconduct unless the evidence shows they are not (paragraph 132-iii). If the case has already been investigated and found in policy, an examination to find more evidence will be done (paragraph 132-iv). If no new evidence is found, IA and the Independent Police Review Division (IPR) need to explain the discrepancy (paragraph 132-v). We hope that this explanation will be made public, since the officer's allegations will already be in the public sphere due to the trial.

--It is important that the community is being asked to participate in choosing the Compliance Officer/Community Liaison (COCL--paragraph 158). Though we'd prefer the COCL to be entirely independent, having him/her responsive to the entire City Council is better than being under just one person's auspices.

--The document states explicitly that all PPB reports related to the Agreement will be public (paragraph 156), which seems to extend to the COCL's quarterly reports (paragraph 160) and the PPB's Compliance Coordinator status reports (paragraph 173). What isn't clear is whether presentation of the Professional Standards Division (PSD) Inspector reports to the Training Advisory Council (paragraph 74) and the COCL's semi annual outcome assessments (paragraph 170) will be public.

--We are encouraged that the COCL's outcome assessments require analysis of sustained force complaints, including by demographic group, and especially by the source of the complaint, as Bureau-initiated complaints have far higher sustain rates the Community-initiated ones. In fact, there have only been a handful of Community-based force complaints sustained in the entire 10+ years since the IPR was created.

--It is a good idea for the Chief to assess the effectiveness of new policies 180 days after initiation and annually thereafter (paragraph 168). Frequently, new policies go into effect and are never revisited. We recommend that the Chief's assessments be made public and allow for public feedback, including from groups such as the Citizen Review Committee (CRC).

--While it is buried in a strange place in the Agreement, we are glad that Supervisors will be trained to conduct annual performance reviews on officers (paragraph 85-b-ii). We hope this means that such reviews will also be mandated.

--We have also been concerned for years that officers who discharge firearms at animals are not investigated for possible wrongdoing. The definition of "Critical firearm discharge," which only exempts practice shooting and accidental discharges (paragraph 19), tied with the definition of "Serious use of force" (paragraph 58), indicates that these acts of violence will be treated more seriously to cull out officers looking for an excuse to fire a gun.

--We applaud the Agreement's broad admonishment of officers using offensive epithets (including "mentals") and that the prohibition extends to internal communication (paragraph 85-a-v).*

--It is a good step forward to call for more information to be released to people who file complaints about misconduct (paragraph 138) including any remedial steps taken after a finding is reached (paragraph 139). We hope this means that at least complainants will receive their own police reports without having to pay for them.

--The policy to prohibit retaliation against anyone involved in a complaint against police (paragraph 129) should be expanded to their family members, as many families of police deadly force victims can tell you.

GENERAL COMMENTS--Concerns

--It is of great concern that all previous communications are not to be considered when interpreting this document (paragraph 3). There are many recommendations made by the Dept. of Justice that are not reflected in the final document. In fact, we would like to see any and all correspondence from the City Attorney's office, the Portland Police Association, the Auditor's office and the IPR to the DOJ, since their fingerprints appear to be all over the weakest parts of the Agreement.

--It is discouraging that despite efforts to include the community in this process, the Agreement explicitly excludes anyone but the DOJ or the City from having standing to challenge the enforcement in court (paragraph 5).

--Many of the provisions do not go far enough, and the Agreement is slated to last for five years (paragraph 175). We hope this does not mean that the DOJ expects the people of Portland to suffer through inadequate use of force training and policies, and our "Byzantine" accountability system that is de facto endorsed in this Agreement, for that long.

--We want to echo our colleagues at the Mental Health Association of Portland (MHAP) who pointed out that the Agreement doesn't do enough to allow Portland to fire officers who have used excessive force, including deadly force. The section on discipline wisely calls for a system to be set up to be fair and consistent, but doesn't call for terminating officers for egregious rights violations (paragraph 136).

--The Agreement does not order the City to change provisions of existing collective bargaining contracts which are inhibiting effective investigations and disciplinary action. Instead, it defers to the "just cause" provisions of the contract (paragraph 130c), acknowledges that some changes may take time because of bargaining issues (paragraph 177), and asks the City to keep DOJ apprised of negotiations (paragraph 186). What our community needs is a law or a court order that removes the public policy provisions of what is supposed to be a labor contract from the PPA (and PPCOA) document. We hope the DOJ and/or the City (or the PPA itself) will give us an answer about how much the PPA influenced the terms of the Agreement.

--Generally speaking, the Agreement creates more levels of Bureaucracy, rather than streamlining the accountability system it critiqued in the findings letter. A new Inspector in the PSD, a Compliance Coordinator, a COCL who will chair a Community Oversight Advisory Board (COAB), an Addictions and Behavioral Health Unit (ABHU) with its own Advisory Board, the continuation of the CRC and the Police Review Board (PRB) with little changes to their structure, composition or authority... it makes one's head spin thinking of making a flowchart to graph it all.

----To be fair, it appears that the ABHU advisory board (paragraphs 90-95) will likely replace the current Crisis Intervention Training (CIT) advisory board. The Agreement implies, but isn't explicit, that the ABHU board will have access to the actual training curricula and materials that the CIT board does not (paragraph 97); we hope that they will, or the board will be ineffective.**

----While we have our complaints about the Community/Police Relations Committee (CPRC) of the Human Rights Commission, we are seriously concerned about the idea of replacing them with the COAB rather than selecting a committee specific to the Agreement to oversee its implementation (and yes, this is a suggestion that a new body would be better than using or modifying an existing one). While slow-moving and somewhat compromised by its PPB voting members, the CPRC has at least helped move the Bureau to where it admits that institutional racism exists and is creating a program to educate officers and confront implicit bias in the system. The CPRC was also charged with following up on the Racial Profiling Committee's work on traffic and pedestrian stop data. Since the Agreement has jettisoned all mentions of race relations that were in the findings letter (DOJ pp. 38-40) it seems a further insult to communities of color to disband the CPRC to focus on changes mostly tailored to help people with mental health issues (we acknowledge, of course, that there is some overlap).

----On that note, the CPRC previously conducted a survey of police outreach efforts (paragraph 145c), which may save the COAB some time.

----We also share the concern with MHAP that people living with mental illnesses may not be able to attain a seat on the COAB using the systems outlined in the Agreement (paragraphs 141 and 144); that might also extend to others who are not treated fairly in our society including women, LGBQT community members, immigrants and people of color.

--It is also of concern that the COCL has tremendous responsibilities and abilities to collect and synthesize data (paragraphs 159-163 and others), but has no power before the federal court when recommending changes to the Agreement (paragraph 162).

--While we appreciate that some forward movement has been happening under Chief Reese, we're a bit concerned by the inclusion of the statement that "The United States feels that the continuity of management and effort is essential for timely compliance with the terms of this Agreement" (paragraph 8). Along with unresponsiveness to recommendations, violent crackdown on the Occupy protests, and ongoing racial disparity in traffic stops and other police actions, the Chief has not diversified his command staff despite community input (AMA 2012.3).

USE OF FORCE

For detailed comments on our Use of Force concerns, please also refer to the comments we sent to Chief Reese and the DOJ regarding the Force, Deadly Force and Taser draft directives on October 22.

--The Taser*** directive will continue to have loopholes allowing police to zap people more than two times (paragraph 68, though paragraph 58 defines more than two uses as a "serious use of force"), use Tasers on handcuffed subjects, and otherwise use Tasers during certain (but vaguely defined) exceptional circumstances.

----For example, paragraph 68-a prohibits the use of Tasers on people in mental health crisis "except in exigent circumstances, and the only to avoid the use of a higher level of force." Paragraph 68-d prohibits use by multiple officers on the same person "except where lethal force would be permitted."**** Paragraph 68-f tells officers to "avoid" using more than three Taser cycles "unless exigent circumstances warrant use." And 68-g says they can use Tasers on handcuffed or otherwise restrained people "to prevent them from causing serious physical injury... or if lesser attempts of control have been ineffective." The Inspector and the COCL are explicitly asked to allow for such exceptions (paragraph 75-b-iv). We've seen the 9th Circuit decisions on Taser use, and we feel the PPB should have far more stringent limits put on them. While the DOJ opened the door for "exigent circumstances" exceptions in the findings letter (DOJ p. 16), we were hoping that so many loopholes would not be accommodated.

----In addition, paragraph 68-b creates over-broad exceptions for giving verbal warnings before Taser use.

--We do, however, appreciate that officers are asked to allow the subject to comply with the officer before re-activating a Taser (paragraph 68-e).

--We are glad to see the DOJ defining lethal force to include strikes to the head, neck or throat with hard objects (paragraph 38) and serious use of force (paragraph 58-iv) to include head, neck and throat strikes. It's curious that carotid holds are included, as they were banned in Portland after police choked to death an innocent (African American) security guard they mistook for a criminal in 1985.

USE OF FORCE--Medical Treatment

--The Agreement discusses medical treatment in the vaguest of terms; once under "ECW" use (paragraph 68-c), calling for officers to follow medical protocols, and once under supervisory responsibilities (paragraph 70-c) calling for supervisors to ensure medical attention to the subject. A supervisor might not get onto the scene soon enough if a civilian needs urgent care. We expected a strong change to policy, based on this recommendation from the findings letter: "There should be a bright line rule that whenever an injury occurs or whenever a subject complains of an injury, EMS is summoned. PPB should review its data to determine if officers are routinely procuring medical care at the earliest opportunity and, if not, revise its policies and training accordingly." (DOJ p. 37)

CRISIS INTERVENTION

--As we wrote in our analysis of the Bureau's proposed new policies, we support the idea of a hybrid CIT model that includes all officers being trained (paragraphs 96-97) but also specific skilled members being an "on call" CIT Team (paragraphs 98-104), with the caveat that the existence of such Teams should not relieve members of their responsibility to de-escalate and use their own training to resolve situations without violence. Jose Mejia Poot was shot when the second set of officers came to the mental hospital he was in, after the first set which included a CIT-trained officer had gone off duty. Nobody wants to see a repeat of that scenario.

--We also encourage that in addition to asking for volunteers for CIT teams (paragraph 99), the Bureau should seek out those officers known to have excellent communication and de-escalation skills.

--While it is appropriate to highlight successes of the CIT program (paragraph 103), it should not be done to divert attention away from incidents gone wrong, or the systemic use of violence by the police.

--Although we agree that no officers who have been found out of policy for force or other mistreatment of people with mental illnesses should be allowed to be on the CIT Teams (paragraph 100), the fact is that very few officers are ever disciplined for such actions. In fact, the men who killed James Chasse, Jr. in 2006 had their discipline (for failing to bring him to the hospital after tasering him) overturned.

TRAINING (new topic in Agreement)

--We have the same concern about the exclusion criteria for trainers as we do for the CIT Team; the bar is set too high, since very few officers will be disqualified using the criteria currently established regarding sustained complaints (paragraph 84).

--We urge the DOJ to specify that the Training Division's consideration of public input not be limited to the Training Advisory Council (paragraph 80-f).

--It is not clear whether the reference to incorporating changes based on "concerns reflected in court decisions" (paragraph 80-g) means the results of lawsuits against the PPB or, for example, US Supreme Court decisions, or, perhaps, and preferably, both.

--The Division's criteria for changes should not only look at "law enforcement trends" (paragraph 80-i) but also the history of Portland Police to avoid re-introducing problematic tactics.

--We support the ideas of role playing (paragraph 85-a-i), incorporating de-escalation into making arrests without force (paragraph 85-a-ii) and teaching tactics such as disengaging, waiting, and calling for appropriate backup units (not necessarily for more firepower--paragraph 85-a-iii).

--Teaching officers how force could lead to civil liability (paragraph 85-a-iv) would be more meaningful if the lawsuit payouts in Portland came out of their pockets or their budget, rather than from the City's insurance fund.

EMPLOYEE INFORMATION SYSTEM (was: EARLY INTERVENTION SYSTEM)

--We appreciate the changes proposed in the Agreement to make the Employee Information System (EIS) more of a tool to identify "at risk employees" (paragraph 115) and to add to existing thresholds that trigger command review, though only one example, three uses of force in one month, is being implemented (paragraph 118). It is our understanding that the IPR currently has access to the EIS and can monitor its use; we hope that such external oversight will be included in any final Agreement as integral to the effectiveness of the system.

--We hope that the steps proposed will allow patterns found in the EIS to be used for counseling or discipline, as recommended by the AMA Coalition and Portland Copwatch in our letter to DOJ (AMA 2012.1).

MISCONDUCT INVESTIGATION

--The Agreement talks about invoking "Garrity" rights, which would mean the possibility of compelling officers to testify on scene in exchange for their protection from being criminally prosecuted (paragraph 123). However, the explicit idea of getting rid of the PPA's so-called "48-hour rule" mentioned in the findings letter (DOJ p. 31) is gone.

--The Agreement implies that IPR will continue to be allowed to determine whether they will conduct independent investigations, and only vaguely asks that policies be changed so such investigations will be "meaningful" (paragraph 127). The same paragraph calls for an end to duplication of effort to interview _witnesses_ by both IA and IPR, after talking about IPR's dependence on IA to interview _officers_. We hope this is pointing toward IPR sitting in on initial investigations and asking questions to _both_ officers and witnesses, and/or conducting the investigation _instead_ of IA, rather than as a means to shut IPR out of the process, which is one possible interpretation.

--The DOJ seems content to have Supervisors head to the scene of uses of force to conduct investigations (paragraph 70), but fails to acknowledge two issues of concern: 1) that a civilian review board investigator should also be sent to the scene to be sure the supervisor doesn't try to minimize or rationalize the officer's actions (AMA recommendation 2012.2) and 2) that the new line Sergeants hired to support this protocol (paragraph 71) are in the same collective bargaining unit as the line officers. Until the Sergeants are removed from the Portland Police Association (PPA) and put in the Portland Police Commanding Officers Association (PPCOA), this policy presents a conflict of interest.

--We strongly agree with the imperative to investigate all Use of Force complaints (paragraph 128), though we hope there will be a formal appeal process to challenge the IPR's decision that "clear and convincing evidence" excludes certain cases. We are disappointed that the DOJ's recommendation in the findings letter that "all allegations which, if true, would amount to a violation of policy should be investigated" (DOJ p. 28) did not make its way into the Agreement.

MISCONDUCT INVESTIGATION--Discipline

--It is extremely discouraging to read the DOJ state that "unreasonable force may result in discipline" (paragraph 67-d). In what instance would DOJ proposed that such force _not_ result in discipline?

MISCONDUCT INVESTIGATION--Review Boards

Beyond the comments made in this section, we support all the comments made by the League of Women Voters regarding the Agreement.

--Rather than create a solution for when CRC asks for more investigation and the Bureau and the IPR refuse (DOJ findings letter recommendation #10, p. 41), the report restricts CRC to making one request for more investigation (paragraph 135), presumably at the Case File Review level, but not, we hope, preventing another request during an appeals hearing. (The Agreement is also ambiguous as to whether that means only one aspect of the complaint can be reinvestigated, rather than one broad request for several aspects being made.)

----Similarly, there is no recourse/remedy offered if the PRB asks for more investigation by IA or IPR and is refused (paragraph 131).

--While moving toward an integrated accountability system, assigning one CRC member (on a rotating basis) to sit on Police Review Boards involving deadly force (paragraph 130-a/b), but then restricting them from talking about the case (paragraphs 130-c, d-iii, and e-v) voids any transparency or ability to bring lessons learned from the PRB to the CRC or the public.

----The Police Review Board will remain closed not just to the public, but also to the person against whom the force was used; the only changes proposed (paragraphs 130-131) do not remedy this issue that DOJ noted in its report (on page 33).

----It is unclear what is meant by concurrent administrative and criminal investigations being subject to "tolling period... as necessary to meet the CRC or PRB recommendation to further investigate" (paragraph 121).

----Hidden in the definitions section, the DOJ is explicitly endorsing the current standard of review used by the CRC, the "reasonable person" standard (paragraph 61) , when outside experts (the 2008 Luna-Firebaugh report), repeated community input (the 2010 Police Oversight Stakeholder report, AMA Coalition, etc.) and the CRC itself have asked for that standard to be changed.

----It's also not clear why the Agreement states that "The City and PPB agree that the CRC may find the outcome of an investigation is unreasonable if the CRC finds the findings are not supported by the evidence" (paragraph 134). The standard is to determine whether a reasonable person could come to the same finding as the commander, which is not the same as saying the outcome is unreasonable. Furthermore, there is no apparent purpose to this paragraph other than to affirm (or weaken) the current standard. Similarly, the definition paragraph refers to the "evidence developed by the investigation," which is not part of the City ordinance... it only refers to "the evidence" (Portland City Code 3.21.010-S). It's not appropriate for the City to use the Agreement to modify the meaning of the Code.

----The Agreement explicitly prohibits appeals to the CRC by people who survive police shootings or the survivors of a death in custody victim about the findings regarding whether an officer committed misconduct (paragraph 43-- also in the definitions section, a poor place to be setting policy). After the IPR refused an appeal from the father of Keaton Otis, we had hoped the DOJ would force the City to follow its own policies. After all, the DOJ wrote: "there exists no apparent prohibition on CRC's consideration of officer accountability incidents involving in-custody deaths or officer-related deaths" (DOJ p. 34).

---Appeals to CRC will be required to be disposed of in 21 days, within the 180 timeline to complete investigations (paragraph 120). Under the current structure, the appellant has 30 days to appeal a finding, at which point the CRC needs to hold a "Case File Review" (after reading the entire investigative file) the month before holding a hearing. This would mean that the maximum amount of time to complete an investigation and assign findings would be 113 days, assuming the CRC needs one week to read the files (30 days to appeal + 7 days to read + CRC Case File Review + 30 days to next meeting), which is not realistic. The volunteers on CRC already are pushed to their limit on time invested, so unless a new structure is devised, this timeline needs to be re-worked.

---One item we do support: the CRC will be expanded to 11 members (paragraph 133). However, we wonder why the City would keep the quorum at 5 members on an 11 member board (Portland City Code 3.21.090-A-1). Perhaps the lower quorum will allow the CRC to split into smaller panels to hear more appeals.

--We wonder what happened to the DOJ's strong recommendation in the report (DOJ p. 30) to add "unfounded" to the existing list of possible findings used in outcomes of administrative investigations. While that idea is absent in the Agreement, it instead refers to the COCL analyzing the rate of "sustained, not sustained, exonerated" findings (paragraph 170-e-ii). Does this mean that the Bureau is replacing the ambiguous "Unproven" finding with "Not Sustained" instead of splitting it into the clearer "Insufficient Evidence" and "Unfounded" findings recommended by the community, the Luna-Firebaugh report and the DOJ?

--The item stating that CRC members have to limit terms on the Police Review Board to three years (paragraph 130-g) is incorrect; PRB members can serve up to two 3-year terms plus any partial term they are appointed to fill (Portland City Code 3.20.140-C-1-a-[1]-[a]).

--While we welcome the idea of complainants being able to track the progress of their complaints on line (paragraph 137), having such information available for anyone in the community to see with confidential information redacted would be even better.

COMMUNITY ENGAGEMENT AND OUTREACH:

--As mentioned above, we are concerned about the lack of attention to race relations in the Agreement, considering the findings letter.

----The COCL's semi-annual assessments are supposed to include demographic data connected to use of force, force complaints, and sustained force complaints (paragraph 170-a-ii through iv).

----The only other mention in the report comes is calling for outreach work to be done by the COAB to use the PPB's demographic data to tailor outreach and community policing (paragraph 146).

----However, CIT Team data collection is to include name, age, gender, and address but not race (paragraph 104-b).

----The entire formal recommendation by DOJ (#9) that the Bureau track every citizen contact as a way to build community trust is absent from the Agreement (DOJ p. 41), as is the informal recommendation to create a policy around when to initiate stops and go beyond "mere conversation" (DOJ p. 40).

----One of the programs that has disproportionately targeted African Americans, the Service Coordination Team, is being hailed and embedded into permanent City policy by the Agreement (paragraph 111). While we applaud getting people into treatment rather than jail, we question whether such social service triage should be done by the police rather than appropriate agencies (similar to the remedies being proposed vis a vis mental health), and why money is available for people who have criminal records to get treatment, but not others who may seek it.

--We welcome the data on lawsuit payouts being included in the COCL semi-annual reviews, but urge the DOJ to replace the term "settlement" with "settlements, judgments, and jury awards" (paragraph 170-e-v). After the James Chasse settlement in 2010, very few lawsuit payouts have been brought up publicly to Council, likely because they are being entered as judgments and are thus not subject to Council review. (City law requires any payment over $5000 to be agreed to by a majority of Council.)

--It's a nice idea to have the police present their annual report in each of the City's precincts (paragraph 148), but there need to be civil rights or oversight organizations present to augment any claims they make about force, "biased-free policing" and people's rights and responsibilities when stopped by police. In an ideal world, the police would be interested in ensuring people know their rights (such as the rights to remain silent and ask for an attorney), but the reality is that they are trained to circumvent those rights to solve crimes and gather information.

CONCLUSION:

While the Agreement has a few items that can help Portland move forward, it needs serious revisions before being entered into court and locking us in to inadequate reforms for as long as five years. Furthermore, we believe that our organization has a lot to offer in terms of oversight of any changes made, but would not want to serve on the COAB if our task would be to ensure implementation of this Agreement as written. There are too many people who have suffered too long to see yet another chance for real change be squandered by compromise.

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footnotes

*--The Illegal Gun Exclusion Zone oversight group recently accepted the Bureau's use of the term "black-style gangs" based on that term being "standard nationwide." When Portland Copwatch pointed out that this means the first thing officers seek out is skin color rather than violence or guns, the group seemed to understand our concern.

**--Note: the ABHU is asked to put out a status report within 240 days, but not to make ongoing reports (paragraph 95).

***--We dislike the term "Electronic Control Weapon" because it implies that officers should use stun guns to "control" a person's behavior, rather than the more accurate and neutral "Conductive Energy Weapons" generic term.

****--If this policy had been in place before Keaton Otis was killed, the three officers Tasering him before he allegedly pulled out a gun would have been disciplined.