

Date: Fri, 12 Jan 2018 14:25:57 -0800 From: Portland Copwatch
To: Mary Austad Cc: "Rosenbaum-COCL, Dennis" , Brian Buehler, Jonas Geissler, Seth Wayne, Jaclyn Menditch, Jared Hager, Laura Cowall, Janice Adeloyle, newsmedia, Portland Copwatch
Subject: **COMMENTS on Dept of Justice and Compliance Officer Reports- Case No. 3:12-cv-02265-SI**

To: Hon. Judge Michael Simon
US District Court
Portland, OR

re: Case No. 3:12-cv-02265-SI

Judge Simon:

In October, 2016 at the Status Conference on US vs. City of Portland, you offered to read anything from Portland Copwatch (PCW) that we might be willing to send. We have refrained from sharing our many ongoing analyses related to the Department of Justice (DOJ) Agreement with the City, but as a new Status Conference approaches wished to share these thoughts. Below is our analysis of the DOJ's compliance assessment from December 2017 (http://media.oregonlive.com/portland_impact/other/DOJ2017DECcompliancereport.pdf) , including a comparison between the Compliance Officer/ Community Liaison (COCL) Assessment/Outcome report (<http://www.cocl-coab.org/library/Reports-memos/draft-compliance-and-outcome-assessment-report>) and the DOJ's report. We are also sending a copy of our analysis of the COCL's draft report, to which minor (mostly editorial) changes were made based on some of our comments; it can be found on our website at http://www.portlandcopwatch.org/COCL_semiannual1017_pcw.pdf .

The first thing we have to call attention to in the DOJ's compliance report (hereafter "DOJ report") is the astoundingly incorrect statement that the Portland Police Bureau (PPB) "has had fewer lethal force events in the years since our investigation began" (p. 64).

A quick check of our records shows this:

2011 - 5 incidents (the year the investigation began):
2012 - 6 incidents
2013 - 2 incidents
2014 - 4 incidents
2015 - 6 incidents
2016 - 2 incidents + off-duty shooting by Chief
2017 - 5 incidents

So you can see this statement is outrageous in its content, made more so by the fact that most of those shot at or killed had mental health issues of some kind. Undue force against such persons is why the DOJ found Portland was violating the Constitution. Moreover, in 2017 the PPB shot at three young African American men, a number unmatched in records going back 16 years.* Considering one reason the community wanted the DOJ to investigate was the death of Aaron Campbell (January 2010), which was shortly followed by the death of Keaton Otis (May 2010), from a statistical and community standpoint the DOJ is just plain wrong.

Another part of the DOJ report that stands out: in their analysis of why the Community Oversight Advisory Board (COAB) failed (pp. 74-75), they never mention one of the major changes proposed to the new board-- the removal of the COCL as the chair of the community group. It was the COCL acting as chair that led to much of the dysfunction.

It's also of note that neither the COCL nor the DOJ mention the community's role in stopping the policy around interviews after deadly force from becoming worse than before the court was asked to intervene (p. 63). After the City bargained to get rid of the "48 hour rule," the District Attorney put the kibosh on compelling officer interviews within two days of shootings, saying it would inevitably corrupt the criminal investigation. The City was close to adopting a rule (Directive), posted by the Bureau just before the July 4 holiday, which would have delayed interviews for up to 10 times the two days in the old collective bargaining contract-- after the grand jury was concluded. Because Portland Copwatch and enhanced amicus Albina Ministerial Alliance (AMA) Coalition for Justice and Police Reform called foul, the National Lawyers Guild and ACLU of Oregon weighed in, and the City relented. It's also troubling that the DA made the City wait over 6 weeks to interview the officers involved in the death of Terrell Johnson, but the DOJ made no comment about the delay (p. 64).

To try to keep things as short and clear as possible, we now analyze the changes we found between the compliance ratings in last year's reports and this year's, including those areas where the DOJ and COCL do not seem to agree. This covers 43 individual or bundled paragraphs and does NOT include the other areas where both DOJ and COCL already agreed but did not change their ratings.

A) For the following seven paragraphs, both the DOJ and COCL agreed the City went from Partial to Substantial compliance:

72 (Use of Force Supervisor checklist), 97 (Crisis Intervention training [CIT] to all officers), 98 (40 hours of CIT), 111 (make a policy to transfer custody of people in crisis), 114 (create triage for Bureau of Emergency Communications [BOEC]), 125 (separate witnesses at deadly force scenes and issue communications restrictions), and 133 (if there is a finding of civil liability, conduct an administrative investigation).

This last topic is of great concern, as the Bureau had to be prodded to open an investigation into the beating of Michael Cox, which took place in 2011, after a jury awarded over \$500,000 in the case in 2014. The investigation was not completed until late 2016 (p. 70). The DOJ dryly reports that only one of the three officers was found out of policy by the internal investigation (for unauthorized blows to the head), while an officer who used a Taser four times was within the existing policy at the time, justified because the cop thought Mr. Cox was going to hit another officer. The case closed out sometime around September 2017-- well over six years after the incident, and three years after the jury finding. It is baffling why the City, then, is found to be in Substantial compliance.

Oddly, DOJ says there are no auditable records to prove officers are getting 40 hours of training, yet they still rated paragraph 98 Substantial.

B1) In these eight paragraphs, the DOJ and COCL both agreed that the City is in Partial compliance, with the DOJ having changed its rating:

101 (prohibits officers being on the Enhanced Crisis Intervention Team [ECIT] for certain misconduct), 105 (documenting ECIT calls), 108 (same as 101 for Behavioral Health Response Team [BHRT]), 120 (hire second Employee Information System [EIS] administrator), 130 (prohibit retaliation), 131 (Police Review Board [PRB] guidelines), and 141 (creation of the COAB) plus 142-145 (other COAB guidelines).

Of some interest:

--paragraphs 101, 105 and 108 previously were not rated by DOJ for lack of data;

--paragraphs 120 and 131 moved from Substantial to Partial compliance, a step backward (bringing the rating system into question); and

--paragraphs 130 and 141-145 were previously rated as "Non-Compliance" by DOJ.

It seems odd that the Portland Committee on Community Engaged Policing (PCCEP) has barely gotten past the concept stage, yet the City is being given a Partial compliance rating by both reviewing bodies. We also must note that the DOJ quotes the Agreement saying that COAB could "independently assess the implementation of the Agreement" (p. 74) then claims PCCEP has the same power to "independently assess the Agreement" (but not its implementation).

B2) In paragraph 124 (making sure compelled statements comply with the Garrity ruling), there was also agreement about Partial compliance, but COCL changed its rating from Minimal compliance to Partial.

B3) In paragraph 152 (COAB to meet with officials), both DOJ and COCL changed their ratings from Non-compliance and Minimal compliance, respectively, to Partial compliance, which could be reflective of the fact that the Mayor, for the first time, met with COAB at its final meeting in January. However, since the Agreement called for meetings with numerous other persons and bodies two times a year-- and Mayor Wheeler's visit was to tell COAB their terms were not being renewed and they were being dissolved-- these ratings are too generous.

C) Both the DOJ and COCL found Substantial compliance in these eleven paragraphs, with one party or the other changing their rating:

89 (creation of a drop-off/walk-in center for mental health), 96 (Behavioral Health Unit [BHU] and BOEC status reports to BHU Advisory Committee [BHUAC]), 102 (train ECIT before deploying), 103 (ECIT officers on regular duty until dispatched), 104 (highlight ECIT work), 118-119 (sets thresholds for EIS to flag problem officers), 126 (witness officers' on scene statements for deadly force), 127 (involved officer on-scene walk throughs), 135-136 (Citizen Review Committee [CRC] can declare findings unreasonable, send cases back for more investigation), and 138-140 (Independent Police Review [IPR] communications with complainants).

For paragraphs 89, 96, 113, and 118, the DOJ changed from Partial to Substantial. In 102, 103, 104, 126, 127, 135-136, and 138-140, the COCL changed from Partial to Substantial.

PCW noted in the COCL analysis, and repeats here, that while many paragraphs are listed in Partial compliance (or not rated) because programs or data collection have not been in place long enough, it is extremely troubling that both parties consider the opening of the Unity Center to satisfy the requirements of Paragraph 89. The mental health facility was not fully functional until May 2017, meaning it has been operating less than one year even as we write this. It would seem a longer time frame would be needed to see if it is meeting expectations. (Similarly, analysis of paragraph 111 on custody transfer policies says it "seems to be working well" even though that policy has only been in place for a few months.)

The idea that the Bureau is in compliance for asking involved officers to do walk throughs in deadly force cases (127) is laughable, as no single officer has agreed to do so in the several years they have been asked under the Agreement's terms.

Paragraphs 138-140 include the concept of sharing information with the complainant for transparency's sake. DOJ repeats the City's claim that state law prohibits sharing any information other than the complainant's own documents and interviews, but doesn't cite any statute or conduct any analysis. Hiding behind such narrow interpretations of the law helps create distrust of the system.

D) In the following five paragraphs, the DOJ finds the City in Substantial compliance, but the COCL only finds Partial compliance:

84 (training officers and supervisors-- DOJ finds officer training Substantial but Supervisors' Partial), 86 (quarterly Use of Force data presented to Training Advisory Council [TAC]), 100 (have 60-80 officers on the ECIT), 129 (investigate all force allegations), and 132 (PRB can send cases back for more investigation).

With regard to presentations of Force data (86), Portland Copwatch has attended nearly every TAC meeting and finds the presentations by the Bureau lacking. They tend to spend more time talking about how the data are collected than what is contained in them. While one or two TAC members will occasionally raise questions about disparities in how often, for instance, African Americans are targeted, these discussions are not probing or robust as the Agreement promises. We're surprised, therefore, that DOJ, having seen such a shallow analysis at a TAC meeting, gives the stronger rating here than the COCL, which has been to several such presentations. We're not sure what the report means when it states the Force Inspector reported on problematic Use of Force at the May 2017 meeting.**

The reason for the disagreement on 100 is the COCL rightly notes the number of ECIT officers is required to be data-driven, and there aren't enough data to measure to assess that number.

With paragraph 129, the DOJ cites at least two cases where supervisors didn't send Use of Force allegations to Internal Affairs for review, leading to questions why they would then give a Substantial rating.

Despite PCW repeatedly noting that City Code does not include the requirement for the Bureau to further investigate a case if the PRB orders them to, DOJ finds paragraph 132 in Substantial compliance as well.

E) In these nine paragraphs, either the DOJ or the COCL did not rate the City for compliance:

78 (training on constitutional rights), 88 (working with mental health partners), 93 (use data from BHU to fix problems), 99 (CIT should follow the "Memphis Model"), 117 (use EIS data to analyze supervisors and units), 151 (COAB can make recommendations by majority vote), 153 (US Attorney invited to COAB meetings), 154 (COAB meetings must be public), 155 (City trains COAB members).

In paragraphs 78, 151, 153, 154, and 155 the COCL did not issue ratings (versus DOJ's Partial ratings), which would probably have been the better choice for DOJ in the latter ones referring to the now-defunct COAB. In 88, the DOJ did not measure compliance as it is an aspirational paragraph, while the COCL, which made similar comments previously, found the City in Substantial compliance. DOJ found there weren't enough data to assess 93, 99, or 117, while the COCL found Substantial compliance with 93 (quite a difference between these findings!), and Partial compliance with the others.

The DOJ's ratings of paragraphs 151, 153 and 155 actually went down from Substantial to Partial, while 154 inexplicably went up from Non-compliance to Partial compliance even as the PCCEP is being permitted to meet behind closed doors.

F) The last point of interest: the DOJ changed from Substantial to Partial and the COCL doing the opposite on paragraph 122, regarding the Bureau holding concurrent criminal and administrative investigations of officer conduct.

This disconnect illustrates that the sought-after reforms are not meeting everyone's expectations, so we need to count on an impartial observer such as your Honor to sort this all out.

Other items of note:

--The DOJ calls attention to the Bureau's excessive use of force in crowd control situations, noting there is not enough de-escalation, limited review of reports generated (p. 3), and in some cases supervisors found there was too much force used (p. 5). PCW would like more details on these cases, especially to know whether they went to the Police Review Board and resulted in discipline.

--The DOJ report agrees with the COCL's assessment that officers yelling at people is not a form of de-escalation (p. 6). However, we are concerned the DOJ suggests using the terminology "event de-escalation" and "force de-escalation" rather than using PCW's idea to talk about de-escalation of an overall encounter and "mitigation of force" once force has been used.

--The DOJ calls out the Bureau for allowing officers to use Tasers continuously on civilians and claim it was not only in policy but in line with the Agreement (p. 9).

--There is a mention on page 15 about injuries due to patrol vehicles identified by After Action Reports, but doesn't make clear this was about people who hit their heads on some kind of bolt in the police cars. The Bureau has allegedly addressed this issue (per a report to the TAC in November).

--PCW is thankful that DOJ has asked for crowd-related Use of Force data to be included in quarterly reports, even if they are listed separately (p. 20), and cautioned the Bureau to be sure training provided by Taser's manufacturer doesn't conflict with Portland's policy (p. 26).

--On the other hand, the report gives a Substantial compliance rating on paragraph 79 (updating the Training plan), noting input from the DOJ, COCL and TAC, but nothing about input from the COAB or the general public.

--It is good to learn that the Bureau took out the "us vs. them" language that was in the 2016 training (p. 27), and now emphasizes that officers are barred from using choke holds (p. 33).

--It is troubling to learn that BOEC stopped tracking calls they believe have a mental health component because of concerns about stigma (p. 93). We agree with DOJ they must be able to find a way to track this information to see whether any of the reforms are effective.

--It's not clear how the ECIT presenting to a conference in San Diego-- linked to paragraph 104's requirement to highlight their work-- benefits the local community. In the analysis of 103 it is noted that many people in Portland do not know they can call on the ECIT. There's also mention of the US Attorney giving an award to the Bureau for its Behavioral Health work, which is similar to when Barack Obama got the Nobel Peace Prize before he was even President. The jury is still out on whether the City has complied with the changes being required, perhaps once full compliance has been in place for a year as the Agreement suggests would be the earliest for one party to award the other.

--PCW has noted before that the Employee Information System (once known as the Early Warning System) was supposedly in place and working in the year 2000. Here we are at the end of 2017 and the DOJ says that only 16-47% of officers flagged by the EIS were called to the attention of their supervisors (p. 55). Since some 78% of cases are because of Force issues, these numbers are alarmingly low. DOJ adds that they found instances where supervisors condoned officer behavior before any investigation was done into possible misconduct (p. 56).

--We have written repeatedly that the definition of the "Unfounded" finding should not be "false or devoid of fact" (p. 59), but rather the old definition of "the available facts of the investigation do not support the allegation" (2007 PPB Directive 330.00). This is far less derogatory toward the complainant.

--While it is true that the Auditor is independently elected, and one could argue the IPR (not being part of the PPB) is not directly subject to the DOJ Agreement, it is troubling to learn that: (a) IPR did not report criminal allegations to the Bureau in three cases (with six week, two week, and nine day delays-p. 62), and (b) that IPR doesn't provide regular data to DOJ (p. 71/paragraphs 135-136).

--The report reveals that the community-confidence shattering idea of having IPR and Internal Affairs train together came from the DOJ, adding that the OIR group, which is supposed to be neutrally reporting on PPB's deadly force cases, is helping with that training (p. 66).

--The DOJ rates the Bureau in Partial compliance with paragraph 150, which requires them to create and publicly share an annual report, even though there was none created in 2017 and the publicity for meetings in 2016 was so poor that PCW never heard about them (p. 79).

Finally, we note here that the COCL completed analysis and ratings for 10 paragraphs that the DOJ did not address (158, 159, 165, 166, 169-171, 176, 177 and 190).

We thank the judge for giving voice to the community at the last Conference Hearing and hope that the City's outlandish filing of an appeal (writ) to the Ninth Circuit (which has now been withdrawn) does not deter from more community input.

--dan handelman and other members of
Portland Copwatch

*- However, none of the three African American men shot at in 2001 died from the incidents.

**-- The Bureau went into a bit more detail in the January 2018 meeting, which is both outside the scope of the two reviews and was not attended by the DOJ or Chicago COCL team.