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August 24, 2012

Hon. Susie Morgan
Judge, Section "E"
United States District Court
Eastern District of Louisiana
500 Poydras St., Room C508
New Orleans, LA 70130

BY HAND DELIVERY

Re: USA v. City of New Orleans
USDC, EDLA No. 12-1924 'E'(2)
Our File No. 8253

Dear Judge Morgan:

Crescent City Lodge No. 2, Fraternal Order of Police, Incorporated and its acting President Walter Powers (collectively "FOP") thank the Court for the opportunity to provide comments on the proposed Consent Decree. Many of the concerns and comments below were expressed to the FOP by individual officers who only wish the best for the New Orleans Police Department ("NOPD") and, in that vein, have provided constructive criticism regarding certain aspects of the Consent Decree.

Crescent City Lodge No. 2, Fraternal Order of Police, Incorporated is a nonprofit corporation organized and existing under the laws of the State of Louisiana, and is the New Orleans lodge of the Fraternal Order of Police, the world's largest organization of sworn law enforcement officers which represents over 325,000 members in more than 2,100 lodges. The FOP is the largest organization representing officers of the New Orleans Police Department with a membership of nearly 90% of the active, full time members of the New Orleans Police Department. Its purpose is to improve the working conditions of law enforcement officers and the safety of those they serve through education, legislation, information, community involvement, and employee representation and to protect and secure the laws and work of its law enforcement members. FOP represents its members in civil, criminal and civil service matters and represents them collectively before the Superintendent of Police, the Mayor of the City of New Orleans, the New Orleans City Council and the Louisiana legislature, among other entities.

The FOP, while not a recognized union as the City of New Orleans ("City") has refused to allow the members of the NOPD the right to collectively bargain, has a long history of representing

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its members and working to advance their interests. It has filed lawsuits on behalf of its members regarding many issues over the years, such as officer pay and disclosure of records relating to law enforcement officers. In addition, the FOP provides representation to its officers in their interactions with the New Orleans Police Department, including but not limited to disciplinary matters, in addition to civil service appeals and civil and criminal litigation. Its representatives appear regularly before the Civil Service Commission and, when appropriate, before the Mayor and his department heads as well as the City Council and the Louisiana legislature. The FOP also has regular meetings with the Superintendent of Police.

As of August 9, 2012 there were 1292 commissioned members of the New Orleans Police Department, counting all from the Superintendent down to the 28 graduating from New Orleans Police Academy – who are now designated as Police Field Recruits. Of those 1292 New Orleans police officers, 1124 are active members of the FOP. Only 168 officers are not members of the FOP. The next largest organization is PANO, with only 552 members. There are a number of officers which belong to both organizations.

As the organization that represents the vast majority of the NOPD officers and based on the long history of the Fraternal Order of Police in representing police officers and advocating for their interests, the FOP is uniquely qualified to set forth the position of the officers of the NOPD herein.

The FOP understands and agree with the need to reform the NOPD through the Consent Decree. Its members are dedicated to their service to this community. They live here. Their families live here. They raise their children here. They have a real, vested interest in improving the image of the Department and making the Department a better place to work. They are committed to improving the image of the Department. The FOP is not opposed to the entry of the Consent Decree as such. The FOP appreciates and recognizes that the Consent Decree will be the vehicle to assist with improving and modernizing the Department. However, the Consent Decree in its present form has a number of issues which the FOP believes should be addressed to make it a better product, one which the FOP and the officers of the NOPD can embrace and use as a blueprint going forward.

One general comment that applies to the entire proposed Consent Decree is that where it calls for any document to be submitted to the DOJ and the Monitor, it should also provide for submission to the FOP for review and comment. For instance, in paragraph 21-23, the NOPD agrees to submit new and revised policies, procedures and manuals to DOJ and the Monitor. The FOP should be able to review, comment and object if the policy or procedure impacts an officers constitutional rights, the Louisiana Constitution, Civil Service or La. R.S. 40:2531, the Law Enforcement Officers' Bill of Rights.

Our specific comments are as follows:

Paragraph 9 - This provides that the Agreement (really should read Consent Decree) is enforceable only by the Parties, *i.e.* the USA and the City. It goes on to state that “[n]o person or

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entity is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action. Accordingly, **no person or entity may assert any claim or right as a beneficiary or protected class under this Agreement.**" Paragraph 9, emphasis added. There is no provision whatsoever for the officers who are directly affected to enforce the Consent Decree or otherwise judicially assert violations of the Consent Decree. The officers who are directly affected should not have their rights removed by this provision.

Paragraph 27 (k) - This subsection provides for a supervisor to inspect and observe subjects for injuries or complaints of pain and requires the administration of first aid until professional medical care providers are on the scene. What training and equipment will the police department provide to front line officers to achieve this objective? As it currently stands, officers are not issued any medical equipment including gloves, etc.

Paragraph 29 - Does the use of force policy and protocol for weapons that this Paragraph calls for include knives carried by police officers as a tool rather than a weapon (cutting crash victims out of seatbelts, etc.)?

Paragraph 43 - As this is worded this seems to prevent the use of canines in retrieving suspects from under a residence. Is the alternative for a police officer to crawl under the residence to retrieve suspects who refuse to come out after repeated verbal commands to do so?

Paragraph 67 - Will the police officer be allowed to view his ECW camera footage prior to completing the use of force statement? If so how will this occur prior to the end of a tour of duty for Officers who work nights / weekends as the downloading of this footage can only be done at the Academy by trained instructors?

Paragraph 69 - This prohibits totally the use of Oloresin Capiscum Spray (pepper spray) by on-duty officers, including those working Secondary Employment. This removes a valuable tool in the use of force continuum for police officers. Other consent decrees, such as that in Seattle introduced three days after the proposed Consent Decree herein, actually embrace its use as an intermediate tool on the use of force continuum. If pepper spray is removed, an officer may be forced to escalate to a much higher force level than is currently necessary, such as an impact weapon, placing the officer and the potential suspect at greater risk. If the TASER (referred to in the Consent Decree as an "ECW") is viewed as a substitute, there are 430 or so officers who are not TASER certified. Further, the device is not 100% effective all of the time and may malfunction. One example is if an officer encounters a vicious dog. Right now he can use pepper spray to stop the dog. If that is removed from the use of force continuum he will have to use deadlier force (ECW weapons are not reliable on dogs due to fur and the spread of the probes). This will result in either dead or injured dogs when they could have been saved by the use of pepper spray.

Paragraph 78 - Requiring a detailed use of force statement prior to end of tour of duty will result in poorly recalled details and may infringe on a police officer's rights. Force incidents,

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especially critical force incidents are not easily recalled immediately following the force encounter. A recent study by Dr. P.A. Lewis of the School of Psychological Sciences at England's University of Manchester which appeared in the medical journal *Neuropsychologia*¹ found subjects were able to recall details and information with more detail after a sleep cycle than the subjects who were forced to remain awake. A study reported in the FBI Law Enforcement Bulletin, Vol. 71, No. 10 (October 2002)² ("FBI Bulletin") recognized that, given the "quirky" nature of perception and memory, expecting officers to have perfect recall of any event is not realistic. If an officer's recollection of an event is not a totally accurate representation of reality, it does not necessarily mean that the officer is lying or trying to engage in a cover-up. It goes on to recommend:

Often, however, it is best for officers to sleep first and give their statements later. This does not preclude their providing enough brief information during an immediate on-scene "walk-through" to get the investigation started. But, investigators must conduct these initial sessions in a sensitive manner that does not compromise the officers' legal rights.³

The International Association of Chiefs of Police ("IACP") ratified its *Officer Involved Shooting Guidelines*⁴ in 2009. That publication directly addresses critical incident reporting and states, in no uncertain terms, that the officer not produce a use of force or incident report immediately after the incident:

4.1. Shootings and other use-of-force incidents can result in heightened physical and emotional reactions for the participants. It is *recommended that officers involved in such incidents be given a minimum three days leave, either administrative or through regular days off, in order to marshal their natural coping skills to manage the emotional impact of the incident prior to return to duty or the preparation of a use-of-force or incident report.* Those who were present at the scene but did not discharge their weapons may also be

¹Keeping time in your sleep: Overnight consolidation of temporal rhythm, *Neuropsychologia*, Vol 49, pp. 115-153 (May 2011), http://walkerlab.berkeley.edu/reprints/Lewis-Walker_Npsych_2011.pdf

²<http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2002-pdfs/oct02leb.pdf/view>

³FBI Bulletin, p. 22.

⁴http://theiacp.org/psych_services_section/pdfs/Psych-OfficerInvolvedShooting.pdf. A copy is attached for the Court's ready reference.

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emotionally impacted by the incident and may benefit from a period of administrative leave. It is important that officers and the public understand that administrative leave is a routine procedure and not a disciplinary suspension.⁵

Immediate reporting of use of force, or any critical incident, will in all probability result in an inaccurate report. Further, requiring a full report before the end of shift potentially subjects an officer to violations of his legal rights as the statements can be used in later administrative and/or criminal investigations. The FOP recommends that the Consent Decree be modified to address and incorporate the procedures set forth by the IACP.

Paragraph 79 - "Officers shall be subject to disciplinary action for material omissions or inaccuracies in their Force Statements." See concerns about Paragraph 78 regarding the requirement that police officers complete their Force Statements prior to the completion of their shifts and the probability that this will lead to inadvertent omissions or inaccuracies for which the officer, by this Paragraph, is responsible. Additionally there is no consideration for officers who are in extraordinary circumstances, *i.e.* a SWAT officer who is engaged in a barricaded subject situation for twelve hours, at the end of which he/she is forced to use deadly force. This officer is now forced to give a statement, with no omissions without regard for their level of fatigue or issues with perception as recognized by the FBI and the IACP. Further, what Constitutional protections does the officer have against self incrimination and does this directive violate those rights? Does it violate the Police Officer's Bill of Rights, La. R.S. 40:2531? Does it violate *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967)? There seems to be no distinction between compelled and voluntary statements made by officers who use force. Again, the FOP recommends that the Consent Decree be modified to address these issues and address and incorporate the procedures set forth by the IACP.

Paragraph 83 - Supervisors shall "review and approve use of force reports prior to the end of the shift during which the Level 1 force was used." This is not feasible given the department's lack of overtime and lack of manpower. Officers and supervisors will be rushed to finish a document which could be used against them later in both disciplinary hearings as well as possible criminal proceedings. Not only will the officer be forced to make split second decisions regarding the use of force, but they will also be forced to make rash decisions regarding the documentation of the use of force. Is the intent of this policy to document force fully and properly or is expediency the only concern of the Consent Decree? Also see comments regarding Paragraphs 78 and 79. The FOP believes that this Paragraph should be modified in accordance with the concerns expressed in the comments to Paragraphs 78 and 79.

⁵*Officer Involved Shooting Guidelines*, Section 4 Investigative Period, Paragraph 4.1, p. 3, emphasis added.

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Paragraph 99 - Who investigates the murder of police officers when the suspect is injured? As it currently stands the Homicide Unit still investigates these incidents. What other agency will do the investigation in the circumstances set out in this Paragraph? The agency should be specified.

Paragraph 105(d) - Are investigators allowed to use taped statements in lieu of written statements from citizens? Many people are unable to articulate facts and circumstances in written form and are more comfortable providing it in verbal form.

Paragraph 136 - Investigative supervisors are not always working when Detectives obtain warrants. This will hinder the process of getting a search warrant and is unnecessary as the review of a warrant by a Magistrate Commissioner is a requirement of law.

Paragraph 143 - Arrests for begging/vagrancy (54-411; 14:107) have been ruled unconstitutional by appeals courts.

Paragraph 145 - "Officers shall complete all arrest reports before the end of shift" There are no exceptions to this given the way it is currently worded (the "exceptional circumstances" exception appears to apply only to supervisor's review of the report). Often officers receive detailed, complex investigations near the end of their shifts, *i.e.* a barroom is robbed, a shoplifter fights the employee of the business, etc. These reports often take time and attention to detail to craft them. This provision of the Consent Decree does not take this into account. This will force officers to write less detailed, less accurate reports solely for the sake of expediency. This time crunch could lead to unintentional consequences including inadvertent violations of defendants' rights such as the exclusion of *Brady* material in an arrest report. Further, see comments above re critical incidents in discussion of Paragraphs 78 and 79 and the modifications suggested by FOP.

Paragraph 149 (h) - "if a vehicle stop, whether the driver or any passenger was required to exit the vehicle, and reason." The Supreme Court has established that officers have the right to order passengers/drivers out of vehicles for officer safety concerns. These requests are completely constitutional and do not require an articulable reason for them. The inherent danger of a traffic stop is reason enough for the request. [*Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) and *Maryland v. Wilson*, 519 U. S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)]

Paragraph 171 - Double blind lineup procedures require manpower which may not be available. The current policy of the Detective Bureau is that the lineup identification process must be recorded in its entirety. If the purpose is to prevent the violation of suspect's rights by preventing "suggestive" lineup procedures, the recording of the entire lineup process certainly allows a Judge to determine if the lineup procedure was suggestive. Additionally allowing the person presenting the lineup to do so, but in a way in which he/she does not know what photographs are being looked at by the witness, is another procedure other jurisdictions have used successfully (Garrett; 2011; *Convicting the Innocent*; Cambridge, MA; Harvard University Press). In this manner described by Garrett, the victim is presented an envelope containing six photographs in random order. The victim

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is instructed to review each photograph and make their selection without sharing that selection with the investigator. The victim then signs the photographs and places them back into the envelope. The investigator, although present, does not know who the victim has selected until he/she reviews the photographs in the envelope at a later time. Garrett even mentions one of the reasons departments have used this method is due to manpower considerations. Garrett offers this as an alternative to double blind line up procedures which is his preferred method of eyewitness photographic identification.

Paragraph 248 - The proposed Training Advisory Committee should have a police employee representative of the rank and file to bring to the table practical concerns.

Paragraphs 295 thorough 304 - Section XIV entitled "Performance Evaluations and Promotions" seeks to insert subjective criteria into the current, merit-based promotion process administered by Civil Service. While performance evaluations may be a useful tool in assessing and determining the need for training, in the end they are subjective. Further, these provisions that inject subjective criteria into this area and give the Superintendent more control over promotions are in derogation of what brought the Civil Service system in Louisiana and New Orleans about.

Civil Service was developed and enshrined in the Louisiana Constitution to prevent employees from being subjected to the "spoils system" and give them protection from the whims of their employer. It has a myriad of functions, from setting hiring, pay and promotional policies and procedures, among other things, to acting as the first level of appeals for employee discipline. The rules of the Civil Service Commission have the force and effect of law. However, it is not the mechanism that will provide input by employees into the myriad of changes being promoted by the Consent Decree that include many more topics than the responsibilities encompassed by Civil Service, as the Civil Service Commission does not approve changes to the NOPD internal procedures, which encompass the great bulk of the proposed Consent Decree. Further, under the present Civil Service Commission rules, the only input an employee or their representative is allowed at meetings is three minutes to address any particular issue.

The Consent Decree speaks of the NOPD working with Civil Service in this area. However, this Court should be aware that the term "civil service" is somewhat misleading in the Consent Decree. There are two entities which could be "civil service" in New Orleans. One is the Civil Service department, which is an agency of city government. These are the people that the NOPD would interface with to develop new policies and procedures. One would assume that since this department is, like the NOPD, a city agency that it would be amenable to whatever the NOPD proposes (and the Consent Decree mandates). However, the Civil Service department has no power to implement anything. That power is reserved to the Civil Service Commission, which is not a City agency but instead is based in the Louisiana Constitution, Article X. It is an autonomous body over which the City is supposed to have no control.

It is the City who invited the Department of Justice to New Orleans to perfect a Consent

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Decree. The City wants to use the Consent Decree to legitimize its agenda to make changes that it would have difficulty achieving otherwise, potentially leading people like the Civil Service Commission and state legislators (a reality which the FOP has already encountered) to believe that they have to make the changes set forth in the Consent Decree, even though those changes are aspirational and not binding on it as it is not an "official, agency, employee or officer" of the City. The mayor has publicly stated that he wants to "release all city employees and hire them back into newly defined positions as a "reform" of civil service."⁶ Further, the City has hired a consultant to work with the Civil Service Reform Committee (which has no police officer representatives on it) and FOP understand that it will shortly unveil a proposal to transfer all employment functions to a human resources department run by an unclassified employee and essentially shrink Civil Service to nothing more than a record keeping function. He will undoubtedly point to the Consent Decree as the reason for this change.

Paragraph 310 - The proposed ratio of one sergeant to eight officers is too large. Given the amount of additional administrative and investigative mandates of the Consent Decree, as well as from practical experience, the ratio should be much lower, on the order of one sergeant to no more than five officers. The National Institute of Management Standards finds that this level is optimal.

Paragraph 316 - 326 - Section XV(C) Early Warning System. The issue that the FOP has with this section is not the Early Warning System *per se*. Rather, the concern is with the impact it will have on the privacy rights of the officers. Paragraph 323 states that "[n]o individual within NOPD shall have access to individually identifiable information that is maintained only within the EWS and is about an officer not within that individual's direct command, except as necessary for investigative, technological, or auditing purposes." While access to those in the NOPD is restricted, the same may not be the case for the purposes of the Louisiana Public Records Act, La. R.S. 44:1, *et seq.*

Section XVI - Secondary Employment System. As the FOP has stated in its Memoranda filed herein, what this has to do with constitutional policing is questionable, to say the least. The stated purpose of this Section is to insure that "officers' and other NOPD employees' off-duty secondary employment does not compromise or interfere with the integrity and effectiveness of NOPD employees' primary work as sworn police officers serving the entire New Orleans community." By the terms of this Section, "secondary employment" means what has been referred to as "paid details." Paragraph 364 limits this to twenty-four hours per seven day work week. Paragraph 365 provides that "[n]o employee, including Reserve officers, shall work more than 16 hours within a 24 hour period." Presumably the reason for the limitation is to make sure the police officers do not work excessive time at their secondary employment which may result in insufficient time for rest between shifts. However, if this is indeed the intent, then why doesn't the section also address other outside employment which is not related to law enforcement? Is this because this would stretch the

⁶http://www.nola.com/politics/index.ssf/2011/04/mayor_mitch_landrieu_outlines.html

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supposed connection to “constitutional policing” to the breaking point? This Section has no relation to the stated purpose of the Consent Decree, constitutional policing, and should not be a part of the Consent Decree.

Paragraph 333 - This establishes the “Coordinating Director” for secondary employment. It provides that “[t]he Director shall be an unclassified civil servant appointed by and serving at the pleasure of the Mayor, shall remain independent from actual or perceived influence by NOPD.” The FOP submits that this is impossible to achieve if the Director is an unclassified employee (he cannot be unclassified and be a civil servant, as the two are contradictory). If he is unclassified, he cannot be independent of NOPD, as the Superintendent serves at the pleasure of the Mayor and the NOPD is under the Mayor’s practical control. The only way the Director can be free from NOPD influence is if he is indeed a civil servant, which means he must be a classified employee protected by Civil Service.

Paragraph 340 - This establishes a rotation system, which provides that no police officer may work recurring secondary employment more than 365 days for the same employer. While the paragraph also provides that the Director may grant exceptions, the fact remains that many businesses do not want a “generic” police officer on their premises. They have officers who may have worked for them for many years and understand their business and its requirements. This provision may actually reduce opportunities for secondary employment if the NOPD or the Director dictates which officer the business receives instead of letting the business make the decision, as it does with all employees.

Paragraph 375 - Reporting misconduct. This paragraph requires any officer who observes or becomes aware of misconduct to report it to a supervisor or to PIB. However, how is the officer certain of misconduct in marginal situations? If an officer sees something which he may not see as misconduct but is later in hindsight determined to be so, should he be penalized for an error in judgment as opposed to deliberate failure to report?

Paragraph 383 - “Sting Audits.” This Paragraph would appear to authorize entrapment, which an officer would not be able to do otherwise. Is something that is illegal for an officer to do with regard to a suspect now legal for the NOPD to do with regard to its employees?

Paragraphs 402 and 403 - Amendment of La. R.S. 40:2531 (“Bill of Rights”). The Consent Decree mandates that the NOPD and the City attempt to have the Bill of Rights amended to provide a “reasonable timeframe” for completion of administrative investigations. It goes on to state that all investigations be completed “within the time limits mandated by state law and within 90 days of the receipt of the complaint” but permits up to 120 days if an extension is granted. It then mandates that the NOPD has 30 days to impose discipline, except in cases of extenuating circumstances, where the time frame is increased to 60 days.

If the intent is to amend the Bill of Rights to permit an initial 90 day investigative period

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(rather than the current 60) and to add a 30 day extension for a total of 120 days, and if the intent is to further amend the Bill of Rights to provide for a time frame for imposition of discipline, then the FOP has no problem with these proposals. However, if the intent is to increase the investigative period to more than 120 days, the FOP does have a problem with that. Four months should be ample time to investigate allegations of misconduct. Again, this is an area where the City, which has attempted on numerous occasions to amend the Bill of Rights to increase the time for investigations and has failed each time, obviously wants to use the Consent Decree to tell legislators that a Federal decree mandates that they, the legislators, change the law.

Further the "tolling period" is not anywhere in current law, but only in some court decisions from only one circuit, the Louisiana Fourth Circuit Court of Appeal. Elsewhere in the state, departments run concurrent investigations using two separate investigators. One does not see what the other is doing. This allows the criminal investigation to take as long as needed while fulfilling the mandate of the Bill of Rights regarding the time frame to complete an administrative investigation.

Paragraph 411 - This reflects current NOPD procedure regarding criminal and administrative investigations of the same officer. The Consent Decree should reflect the police officer's rights under *Garrity, supra* not to provide a compelled statement in a criminal investigation and that a compelled administrative statement wherein he cannot assert his Fifth Amendment rights cannot be used against the officer.

Section XVIII - Transparency and Oversight. The FOP believes that the best way for this to be insured is to give police officers an opportunity to participate in the process. Accordingly, the United States Attorney Criminal Justice Coordination Group should include a representative of the members of the NOPD, not just someone on the command staff who does not represent the rank and file officers.

Paragraph 435 - This Paragraph requires each NOPD officers to attend two community meetings in their district for the first two years. As this is a requirement of employment, it should be on duty or paid overtime. However, the Consent Decree is silent on this. In this area, and indeed in any area that requires officers to do anything other than their normal tour of duty, the Consent Decree should specify that this is paid time (see discussion of Fair Labor Standards Act, , 29 U.S.C. §201, *et seq.*, below).

Paragraph 448 - This requires the Monitor to conduct assessments to measure whether implementation of the Consent Decree is resulting in constitutional policing. It has a number of areas to be considered, but nowhere does it mention that the Monitor is to consider in any way the views and experiences of individual police officers. Rather, it appears to be statistic driven only, which the FOP believes does not give a full measure of what this Paragraph is attempting to accomplish.

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Paragraph 450 - 453 - These Paragraphs requires the Monitor to complete a plan for conducting the outcome assessments referred to in Paragraphs 448 and 449 and to submit it to the Parties for review. They further provide for modification of the plan, again subject to the Parties' approval. The FOP believes that the officers should have a voice in this as they are the ultimate individuals affected by this Consent Decree. Accordingly the FOP should be involved in this process on their behalf.

Paragraph 454 - Review of Use of Force and Misconduct Investigations. As long as this complies with applicable precedent and state law, *i.e.*, the Bill of Rights, the FOP does not have an issue with this provision.

Paragraph 455 - This Paragraph allows the Monitor to make recommendations to change the Consent Decree, among other things. Again, the FOP believes that since this Agreement is binding on the members of the NOPD they should be involved in its confection, implementation and any changes that may take place down the road by involving the FOP in the process as well.

Paragraph 456 - The comprehensive two year assessment should require the input of and an analysis of the impact to the officers of the NOPD. Further, since this provides a vehicle for amending the Consent Decree, the officers of the NOPD should be involved, as set forth above.

Paragraph 458 - Draft copies of reports should also be provided to the FOP for comment as well to allow the input of the officers of the NOPD for the reasons stated above.

Paragraph 460 and 461 - This provides for regular meetings with the USA and the City as well as meetings with community stakeholders. There is no mention of meetings with either the FOP or the members of the NOPD. For the reasons stated above, the FOP should be included in the monthly meetings set forth in Paragraph 460 and the Monitor should be required to meet with the FOP and the members of the NOPD to get their input in the same manner as required in Paragraph 461.

Paragraph 487 - This Paragraph allows the City and the DOJ to jointly stipulate to make changes, modifications and amendments to the Consent Decree which become effective without Court action 45 days after a joint motion addressing the changes is filed. It further provides for the ability to suspend portions of the Consent Decree. Again, as the FOP has stated throughout this process, this leaves out any participation by those most affected by the Consent Decree, namely the NOPD officer. It allows continuation of the "steamroller" tactics heretofore employed by the DOJ and the City, affecting the rights of officers without any representation or participation whatsoever. This provision and, indeed, all such provisions of the Consent Decree should be amended in such a fashion that the rights of the officers will be protected. The FOP should be involved in all such provisions so that the rights of the officers of the NOPD will be protected and their voices heard.

Aside from comments on what is in the proposed Consent Decree, the FOP wishes to point

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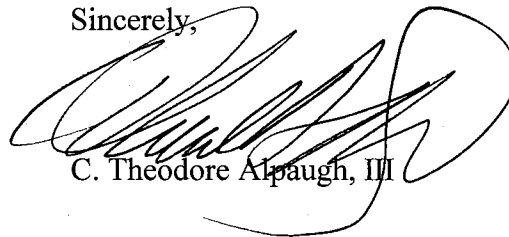
out two areas which it discussed with the DOJ but which are not encompassed within the proposed Consent Decree. These are issues regarding manpower and compliance with the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* ("FLSA"), particularly in the area of overtime.

Chief Serpas has publicly stated the NOPD need 1575 police officers. Today we have less than 1290. While the Consent Decree has provisions regarding new recruit classes, the usual recruit class of thirty takes about six months to complete the Academy. This limits the recruit classes to at most two a year graduating sixty officers, assuming all recruits complete the Academy, which historically does not happen. This amount of new officers does not keep up with the historical attrition rate of the NOPD, which is 75-125 officers per year. The Consent Decree will in all probability increase this, if for no other reason that it changes the rules regarding Secondary Employment which may force officers into retirement simply for financial reasons.

Violations of the FLSA are also a concern. Currently officers are routinely forced to work overtime which, to a large extent, is uncompensated or is undercompensated. One of the most frequent reasons that officers are told to work uncompensated overtime is to have reports completed. The requirement of the Consent Decree that all reports will be completed by end of shift will no doubt exacerbate this violation of Federal law. If the DOJ and the City are serious about following Federal law in this Consent Decree, they should insert provisions to insure that the NOPD complies with the FLSA.

The FOP thanks the Court for providing the opportunity to comment on the proposed Consent Decree. Please let us know if you need any further information regarding the position of the FOP and the comments set forth herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Theodore Alpaugh, III', written over a circular scribble.

C. Theodore Alpaugh, III

CTA/at
Attachment

Officer-Involved Shooting Guidelines

Ratified by the IACP Police Psychological Services Section
Denver, Colorado, 2009

1. Purpose

- 1.1 These guidelines were developed to provide information and recommendations to public safety agencies and mental health providers for the purpose of constructively supporting officers involved in shootings and other use-of-force incidents that may trigger the investigative process. Many of these recommendations can also be applied to other potentially distressing critical incidents. The field experience of members of the IACP Police Psychological Services Section, along with scientific research, suggests that following these guidelines can reduce the probability of long-lasting psychological problems resulting from such incidents. These guidelines are not meant to be a rigid protocol and may be adapted according to agency size and funding, as well as applicable state and local laws.

2. Pre-Incident Preparation

- 2.1. Officers and administrations should be made aware of the emotional, psychological, and behavioral residuals often associated with officer-involved shootings. Agencies are encouraged to train all agency personnel in posttraumatic reactions and appropriate ways to respond to employees who have been involved in a potentially traumatic incident. Trainings should include what to expect personally, departmentally, and legally after a shooting or other significant use-of-force incident.
- 2.2. Prior to any shooting incident, it is strongly recommended that the agency establish a working relationship with one or more trained, qualified, licensed mental health professionals experienced in the law enforcement culture as well as in providing post-shooting intervention. The department should notify this mental health resource as soon as possible following an officer-involved shooting, so that a post-shooting intervention can be facilitated.
- 2.3. All officers should be asked to complete a form indicating the names and contact numbers of family members and significant others whom they would like to be notified in the event that they are injured on duty and are unable to contact them personally. Officers should also identify two or three fellow officers, in order of preference, whom they have chosen to contact their family and significant others. This information should be routinely reviewed by all officers on an annual basis. Officers should be assured that the information they place on the document is safe from review by unauthorized personnel, and is readily available at the time of an incident.

3. At the Scene and Immediately Following

- 3.1. Immediately after an incident, provide physical first aid and communicate emotional support and reassurance to involved officers and other personnel. This support should be focused on calming physical and emotional stress and supporting the officers' sense of safety.
- 3.2. Involved officers should be encouraged to step immediately away from the scene and any media attention and be sensitively transitioned to a safe and supportive environment. Instead of driving themselves, they should be provided with transportation. If returning immediately to the department is not practical, they should be allowed to choose another appropriately private and safe remote location. Above all, officers should not be isolated. Instead, they should be accompanied by supportive peers and supervisors who can assist them in following agency policies regarding talking about the incident before the initial investigative interviews. If officers themselves have an immediate need to talk about the incident, they should be encouraged to do so solely with individuals with whom they have legally privileged confidentiality. Consider both the officers' preferences and the integrity of the investigation when deciding if and when the officers are to return to the scene.
- 3.3. Following a shooting incident, officers may feel vulnerable if unarmed, especially when they are in uniform. If an officer's firearm has been taken as evidence, a replacement weapon should be immediately provided as a sign of support, confidence, and trust unless there is an objective basis for questioning the officer's fitness for duty. In addition to replacing the officer's weapon, it is recommended that a peer (ideally trained in peer support; see *IACP PPSS Peer Support Guidelines*, or has previously gone through an officer-involved shooting while employed with the agency) be assigned to the officer immediately following the incident to provide support and security. Officers should be kept informed of when their weapon is likely to be returned.
- 3.4. Officers should be provided with the opportunity to contact their family members as soon as possible. It is best for the officers themselves to contact their families. It is therefore prudent that no contact be made with family members before the officers have had this opportunity. If this opportunity is significantly delayed, or officers are injured and unable to call themselves, then individuals who preferably know the families and have been previously chosen by the officers should call as soon as possible. Offers to call other support people such as friends, family members, chaplains, and so on, should be made to ensure that the family members have their support system mobilized. Family members who wish to be with injured officers should be offered transportation in lieu of driving themselves.

- 3.4.1. Officers not involved in the incident, but on duty, should attempt to contact their families and advise them that a shooting incident has occurred, but that they were not involved.
- 3.5. The investigative process and concerns over legal and administrative consequences are often the most stressful parts of an officer-involved shooting for involved personnel. During the first few hours, a designated peer, union representative and/or supervisor should explain to officers what is likely to happen administratively and the reasons behind the required administrative actions. A written summary of administrative and investigative procedures should be provided to all officers during their initial training and again within the first few hours after a shooting incident. During this potentially emotional and confusing time, officers may also wish to consult legal advisers of their choice for further education. Within the initial two days, educate involved officers on the protocol of the investigation as well as any potential actions by the media, grand jury, or review board. It is preferable that these steps be taken prior to any formal investigative interviews. It is equally important that, over time, officers be made aware of the progress of the investigation.
- 3.6. It would be helpful to provide officers and their significant others with written information that reviews physical and psychological reactions to shooting incidents. Topics covered should include what to expect, how to support each other, coping strategies, and whom to contact for further assistance. These may be the same handouts provided to newly hired officers (see 2.1).

4. Investigative Period

- 4.1. Shootings and other use-of-force incidents can result in heightened physical and emotional reactions for the participants. It is recommended that officers involved in such incidents be given a minimum three days leave, either administrative or through regular days off, in order to marshal their natural coping skills to manage the emotional impact of the incident prior to return to duty or the preparation of a use-of-force or incident report. Those who were present at the scene but did not discharge their weapons may also be emotionally impacted by the incident and may benefit from a period of administrative leave. It is important that officers and the public understand that administrative leave is a routine procedure and not a disciplinary suspension.
- 4.2. While officers may be asked to provide pertinent information soon after a shooting to aid the initial investigative process, it is suggested that they have some recovery time before providing a full formal statement. Depending on the nature of the incident and the emotional status of the officers, this can range from a few hours to several days. Officers will often benefit from at least one night's sleep prior to being interviewed. Officers who have been afforded these opportunities are likely to provide more coherent and accurate statements. Providing a secure

setting, insulated from the press and curious coworkers, is important during the interview process.

- 4.3. During the course of a post-shooting investigation, potential legal and emotional difficulties may arise for officers involved in subsequent critical incidents. When appropriate, it is recommended that officers and agencies work together in considering temporary duty assignments, if available, that will lessen the likelihood that officers will be involved in subsequent use-of-force incidents during on-going investigations.
- 4.4. If officers have published home telephone numbers, it may be advisable to have friends or voicemail screen telephone calls to prevent any harassing or threatening calls from reaching officers or family members.
- 4.5. Talking with peers who have had similar experiences can be quite helpful for officers involved in significant use-of-force incidents. Often these personnel respond immediately on scene to provide support and psychological first aid. Peer support personnel may also be an asset by participating in group interventions in conjunction with a mental health professional and in providing follow-up support. Family members of officers involved in shootings may also benefit from peer support particularly from the family members of those who have previously been involved in shootings or other life-threatening events. The formation and administrative backing of peer support and outreach teams for officers and family members may prove to be a wise investment prior to an officer-involved shooting. Peer support should only be ancillary to intervention by a mental health professional and should never take its place. (Please see *LACP PPSS Peer Support Guidelines* for information concerning the development and use of peer support teams.)
- 4.6. Personal concern and support for officers involved in significant use-of-force incidents, communicated from high-ranking administrators, can provide an extra measure of reassurance and comfort. The administrator does not have to comment on the situation, or make further statements regarding legal or departmental resolution, but can show concern and empathy for the officers during this stressful experience. These contacts, whether in person or via telephone, should be made as soon as possible after the incident.
- 4.7. As soon as is practical, a designated and informed person should brief the officers' supervisors and team, followed by the agency as a whole, about the shooting. Efforts should be taken to make sure distributed information is accurate. This practice will reduce the number of questions asked and criticisms of those involved, and will also help to quell any rumors that may have arisen. Further, agencies should make every effort to expedite the completion of administrative and criminal investigations, keep the officers informed, and notify them of the outcomes as soon as possible.

- 4.8. Significant use-of-force investigations are complex events involving an array of law enforcement and other government agencies. Continued communication between all parties throughout the course of an investigation protects involved officers by mitigating misunderstandings and conflict among the many different interests.
- 4.9. Members of the community, including the media, may benefit from education regarding procedures and protocols related to police use of force. It is recommended that police agencies assist the community in these efforts by providing information about factors involved in police use of force such as officer safety issues and pertinent laws.
- 4.10. Lengthy investigations can cause distress to officers. Agencies should make every effort to expedite the completion of administrative and criminal investigations. While investigations are pending, supervisors should maintain regular contact with officers and keep them apprised of any pertinent developments.

5. Post-Shooting Interventions

- 5.1. Post-shooting interventions should be conducted only by licensed mental health professionals trained and experienced in working with law enforcement personnel. Care should be taken in selecting a mental health professional to ensure that he or she is well versed in the law enforcement culture and has knowledge and experience in the treatment of traumatized individuals.
- 5.2. Some officers would choose not to participate in the post-shooting interventions provided by qualified mental health professionals, yet when required to attend, they often find it helpful. In addition, some may be unaware of the potential impact of the incident and choose not to attend. For these reasons, it is recommended that officers be required to attend one individual post-shooting intervention so they can, at a minimum, be provided with basic education and coping skills to better manage their reactions. While officers may be required to attend at least one mandatory session, this does not mean that it should be mandatory for them to discuss the event or how they feel with the mental health professional. Any participation beyond attendance should be voluntary on the part of the officers.
- 5.3. After a life-threatening incident, officers frequently are most concerned about how they reacted physiologically and emotionally, and whether these reactions were "normal." Post-shooting interventions should be primarily educative as this reassurance reduces worry, anxiety, and negative self-assessment. Much of the time the normalization and education provided during the post-shooting intervention affords sufficient support to facilitate individual coping mechanisms. If not adequately addressed, however, these reactions may lead to more severe and chronic problems requiring treatment services.

- 5.4. The initial post-shooting intervention should occur within one week after the shooting incident. The initial goal should be to reduce stress, assess and “normalize” any problematic post-incident reactions and provide education regarding stress reduction and self-care. Particular attention should be paid to maintaining sleep functioning, accessing social support, and minimizing or abstaining from alcohol use.
- 5.5. It is recommended that officers not be required to return to work immediately following a post-shooting intervention session.
- 5.6. A single contact with a mental health professional may prove to be inadequate for officers who have been severely affected by an event. Also, a subset of officers may experience delayed onset of problems. The mental health professional should informally assess, for the sole purpose of voluntary referral, which officers may need additional or alternative types of support to further their recovery process. Follow-up sessions should be made available to every involved officer and, if appropriate, referrals may be offered for further treatment and/or to peer support or chaplaincy programs.
- 5.7. Because delayed reactions may occur, all officers receiving an initial post-shooting intervention should receive follow-up contact by the mental health professional either via phone or e-mail sometime within the first four months post-incident. In addition, contact should be made prior to the first anniversary of the incident.
- 5.8. It should be made clear that the individual post-shooting intervention is a confidential and legally privileged communication between the mental health professional and the officers involved. No information about the content of these sessions should be released without the officer’s written authorization.
- 5.9. Life-threatening use-of-force incidents also have the potential to emotionally impact an officer’s significant others, who often can provide valuable support to officers following these incidents. Therefore, it can be beneficial for all concerned to include significant others in the psychological debriefing process. It is recommended that consideration be given to inviting significant others to accompany officers to individual post-shooting interventions. If significant others are invited, officers may have specific preferences about individual versus joint sessions, and mental health providers should give serious consideration to such preferences. The decision to conduct individual debriefings followed by joint debriefings, or joint debriefings alone, should be decided by the officer and mental health provider.
- 5.10. It should be made clear to all involved personnel, supervisors, and the community at large that officers’ fitness-for-duty should not be brought into question by virtue of their involvement in shooting incidents. Post-shooting psychological interventions are separate and distinct from any fitness-for-duty assessments or

administrative or investigative procedures that may follow. This does not preclude a supervisor from requesting a formal fitness-for-duty evaluation based upon objective concerns about an officer's ability to perform his or her duties. However, the mere fact of being involved in a shooting does not necessitate such an evaluation prior to return to duty. (Please see *IACP PPSS Psychological Fitness-for-Duty Evaluation Guidelines* for information concerning the criteria and procedures for these evaluations.)

- 5.11. If a fitness-for-duty evaluation is requested, it should not be conducted by the mental health professional who provided the post-shooting intervention. However, as part of the post-shooting intervention, the mental health professional can assist officers in making decisions concerning returning to duty. Officers maintain the right to privilege and confidentiality regarding such communications unless otherwise waived (e.g., in the context of a workers' compensation claim).
- 5.12. Group psychological interventions may be beneficial following incidents involving multiple personnel. All officers directly involved in the shooting incident should receive an initial individual intervention prior to the group session. Participants should be limited to persons who were involved in the event and attendance should be strictly voluntary. Additional individual counseling referrals should be available for those needing or wanting further assistance.
- 5.13. Group sessions should be jointly facilitated by one or more mental health professionals experienced in working with law enforcement and trained peer support personnel. The confidentiality of group sessions should be respected and some states provide a degree of legal privilege to sanctioned peer support groups. Regardless of local laws, when information is processed in group settings, the risk of a breach of confidentiality is greater than in individual sessions conducted by licensed mental health professionals with whom officers have legal privilege. Although it is recommended that attendance at group sessions be voluntary, if attendance is mandated, any participation should be at the discretion of each officer (see 5.2).
- 5.14. Agencies should consider the impact of use-of-force incidents on all other involved emergency service personnel (including dispatchers) and provide appropriate interventions consistent with these guidelines.