





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

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

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

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

2 Included among those 2014 recommendations were that the City:

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

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

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

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

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

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

23           G.     Expand the requirement to provide notification whenever the Chief  
24 disagrees with the OPA Director's recommended finding(s), so that it includes not only  
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1 cases in which the Chief may have disagreed with the OPA Director's recommended  
2 findings, but also cases in which the *Chief's* findings or discipline are at any point later  
3 modified because of a disciplinary challenge, to increase transparency and ensure that  
4 accurate and timely information is provided to the public, complainants, and elected  
5 officials regarding final disciplinary outcomes;

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

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

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

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21 9. In 2014, I met with the Mayor's Office bargaining team and reviewed each  
22 recommendation, additional contractual issues I had identified, and any term in either the SPOG  
23 or SPMA CBA that would require amendment to achieve the intended reforms. I strongly  
24 recommended negotiating both CBAs in a manner to ensure substantively the same terms, so  
25 that accountability system policies and practices would be consistent for employees of all ranks.  
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1 of the status quo in areas of known weaknesses and gaps. In some respects, the CBAs also inject  
2 new inconsistencies and ambiguities that create more potential pitfalls for police accountability.  
3 I have deep reservations about the shortfalls in the CBAs and the impact now and in the future  
4 on public confidence.

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

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

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20 <sup>3</sup> 7/18/17 Hearing Tr. (Dkt. 407) at 21-22.

21 <sup>4</sup> City’s August 18, 2017 filing Dkt. 412-1 at 1-2 and Dkt. 412-2 at 1-3.

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

1 ambiguous, meaning the full extent of any conflict cannot be understood without additional  
2 information from the City and the unions.<sup>6</sup>

3         18. The number and nature of the ambiguities are particularly concerning. As the  
4 City says in its filing,<sup>7</sup> the CBA terms that provide that the CBAs will prevail over City law  
5 whenever there is a conflict must be read to not only to include language in direct conflict, but  
6 also to include all CBA terms where the language is *inconsistent* with City law, including the  
7 accountability ordinance, (and presumably the Executive Order on secondary employment and  
8 SPD policies that are even less paramount than City law), unless the CBA clearly states  
9 otherwise. Without additional information—and including binding agreements by SPOG and  
10 SPMA as to the meaning of various provisions—it is impossible to ascertain how all of these  
11 CBA terms will affect sustained reform over time. Adding to this uncertainty, the City has not  
12 clearly articulated to the Court whether it intends to amend the accountability ordinance, and if  
13 so, which provisions it intends to amend,<sup>8</sup> or which SPD policies it intends to change (in its  
14 Court filing, the City did not identify any SPD policies as affected by the CBAs).<sup>9</sup> Moreover,  
15 the City does not stipulate that an amended accountability ordinance—were it to occur—would  
16 be binding on SPOG or SPMA in areas in which either union takes a different view of the  
17 CBAs’ meaning from that of the City.  
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20         19. Based on my knowledge and experience of the police reform landscape and local  
21 and national dynamics, the CBA terms will determine, at least in part, whether the reforms put  
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23 <sup>6</sup> See Ex. A. This chart also includes elements of the accountability system where the Court cannot determine if  
24 they are impacted, and to what extent, without a more comprehensive record. For example, the SPOG CBA in  
Appendix E refers to the parties agreeing to interpretations in italicized notes, but in several instances, italicized  
notes are then not included.

25 <sup>7</sup> See Dkt. 512 at 3-4.

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

<sup>9</sup> See Ex. D, which lists CBA impacts to the accountability ordinance that also affect SPD policies.

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

7  
8 20. As the U.S. Department of Justice (DOJ) noted in its December 16, 2011 report  
9 on its Investigation of the Seattle Police Department, Seattle’s compliance with constitutional  
10 requirements regarding use of force, and with various civil rights laws, required strong and  
11 consistent oversight to remedy “a number of systemic deficiencies” and “understandable public  
12 concern” about “widely publicized incidents involving use of force by the police.”<sup>10</sup> The DOJ  
13 recognized that “SPD’s success depends upon recruiting the right officers, and then providing  
14 them with strong and consistent leadership, training, and *oversight*” (emphasis added).<sup>11</sup> The  
15 DOJ Report also stressed that strong accountability by supervisors and OPA, along with an  
16 effective Early Intervention System (EIS), were key to bringing the City into compliance with  
17 constitutional requirements regarding use of force. Instead, the CBAs change the disciplinary  
18 and disciplinary appeals processes *away from* effective deterrents and incentives regarding  
19 excessive force,<sup>12</sup> decreasing the likelihood of consistent, fair, and just disciplinary outcomes.  
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22  
23 <sup>10</sup> United States Department of Justice Civil Rights Division, Investigation of the Seattle Police Department,  
December 16, 2011, [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd\\_findletter\\_12-16-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf)  
at 2-3.

24 <sup>11</sup> *Id.* at 1.

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

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

6  
7 21. The CBAs could be improved so that full and effective compliance with the  
8 Consent Decree is not jeopardized. It would not be difficult to revise the CBAs if the parties  
9 have a firm commitment to, and prioritize, the importance of an effective accountability  
10 system—including its discipline and disciplinary appeals processes—that strongly supports  
11 gains made throughout the Consent Decree process. Doing so will require the City to provide a  
12 more comprehensive account, including verifying union concurrence with the City’s  
13 representations that changes to certain CBA terms are benign; revising the CBAs wherever  
14 necessary for clarity and precision so that the Chief’s authority does not run the risk of frequent  
15 challenge based on interpretations of unclear contract language; and modifying CBA terms to  
16 align with the purposes of the Consent Decree and the accountability ordinance.

17  
18 22. Because the CBAs diverge significantly from the Consent Decree’s purposes and  
19 the reform provisions of the accountability ordinance, until changes are made to the terms of  
20 both CBAs, the City’s full and effective compliance is uncertain. The Consent Decree said, “At  
21 all times, the City and SPD will bear the burden of demonstrating substantial compliance with  
22 the Settlement Agreement.”<sup>13</sup> In my opinion, the City and SPD presently cannot meet that  
23 burden for the reasons stated in this Declaration.

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<sup>13</sup> Settlement Agreement and Stipulation and Order for Modification and for Entry of Preliminary Approval of the Parties’ Settlement Agreement and Stipulated Order of Resolution, Dkt. 13 ¶ 223 at 4.

#### IV. NATIONAL CONTEXT

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

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

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

<sup>15</sup> See **Chicago**: *Chicago Tribune*, May 20, 2016, “Cops Traded Away Pay for Protection in Police Contracts” at <https://www.chicagotribune.com/news/local/breaking/ct-chicago-police-contracts-fop-20160520-story.html>; *We the Protesters*, July 20, 2015, “Chicago Police Department Police Accountability Contract Highlights” at <https://www.dropbox.com/s/2o3dtucoap7fw7h/Chicago%20Police%20Contract%20Police%20Accountability%20Review%207.10.15.pdf?dl=0>; **Albuquerque**: *We the Protesters*, July 20, 2015, “Albuquerque Police Department Police Accountability Contract Highlights” at <https://www.dropbox.com/s/o80983zlasmlu5/Albuquerque%20Police%20Contract%20Police%20Accountability%20Review%207.10.15.pdf?dl=0>; **Portland**: *The Oregonian*, October 13, 2016, “Portland City Council Approves Police Contract Amid Unruly Protests” at [https://www.oregonlive.com/portland/index.ssf/2016/10/portland\\_city\\_council\\_approves\\_27.html](https://www.oregonlive.com/portland/index.ssf/2016/10/portland_city_council_approves_27.html); **Los Angeles**: *ACLU Southern California*, November 29, 2018, “How Does a City Effectively Discipline Its Police?” at

1 before the Court is highlighted in a New York Times opinion piece by Jonathan Smith, a former  
2 senior litigator in the DOJ's Civil Rights Division, who played a key role in Seattle's Consent  
3 Decree. Smith noted, "In big cities, where police unions have political clout, rigid union  
4 contracts restricted the ability of police chiefs and civilian oversight bodies to tackle  
5 misconduct." Smith also highlighted the connection between excessive use of force by officers  
6 and police union CBAs that roll back reforms aimed at remedying that precise problem, writing,  
7 "The decline of public trust in the police we've seen after a string of incidents in Ferguson, Mo.,  
8 Cleveland, New York and Baltimore has many causes. Policies like hot-spot policing and stop-  
9 and-frisk searches—outgrowths of the 'broken windows' law enforcement strategy—have put  
10 enormous pressures on minority and low-income communities. But the role played by police  
11 unions in shielding their members from accountability for excessive force has also contributed  
12 to the erosion of trust."<sup>16</sup> Many others have also noted the harm done by CBAs that weaken  
13 accountability by creating disciplinary processes highly favorable to police officers.<sup>17</sup>  
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16 <https://www.aclusocal.org/en/publications/towards-accountability-overcoming-lapds-flawed-disciplinary-process>;  
17 **Spokane: Inlander**, December 27, 2018, "Why a Dispute Between Spokane Police and the Civilian Ombudsman  
18 is at a Standstill" at <https://www.inlander.com/spokane/why-a-dispute-between-spokane-police-and-the-civilian-ombudsman-is-at-a-standstill/Content?oid=15661189>; *The Spokesman-Review*, April 13, 2017, "Condon Pushes  
19 City Council to Pass Oversight Ordinance Before Police Union Contracts" at <https://www.spokesman.com/stories/2017/apr/13/condon-pushes-city-council-to-pass-oversight-ordin/>; and *The  
20 Spokesman-Review*, a number of stories on various dates at [https://www.spokesman.com/tags/spokane-police-  
21 guild/](https://www.spokesman.com/tags/spokane-police-guild/).

22 <sup>16</sup> *The New York Times*, May 29, 2015, "Police Unions Must Not Block Reform" at

23 <https://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html>.

24 <sup>17</sup> See *The News-Herald*, October 22, 2018, "Former Euclid Police Officer Getting His Job Back" at

25 [https://www.news-herald.com/news/cuyahoga-county/former-euclid-police-officer-getting-his-job-  
26 back/article\\_3369ef3e-d638-11e8-a545-3f8fae5ceef7.html](https://www.news-herald.com/news/cuyahoga-county/former-euclid-police-officer-getting-his-job-back/article_3369ef3e-d638-11e8-a545-3f8fae5ceef7.html) regarding an arbitrator ordering the reinstatement of a

Euclid, Ohio police officer with a history of excessive force after being fired by the mayor in the aftermath of an  
incident where he was [captured on video](#) punching an African American motorist multiple times during a traffic  
stop; *The Berkshire Eagle*, May 16, 2017, "Pittsfield Fights Arbitrator's [sic] Decision to Reinstate Fired Police  
Officer" at [https://www.berkshireeagle.com/stories/pittsfield-fights-arbiters-decision-to-reinstate-fired-police-  
officer,507527](https://www.berkshireeagle.com/stories/pittsfield-fights-arbiters-decision-to-reinstate-fired-police-officer,507527) regarding an arbitrator in Pittsfield, MA ordering the reinstatement of an officer despite

dishonesty; *Honolulu Civil Beat*, May 24, 2018, "Honolulu Cop Fired for Domestic Violence Gets His Job Back"  
at <https://www.civilbeat.org/2018/05/honolulu-cop-fired-for-domestic-violence-gets-his-job-back/>, regarding an  
arbitrator ordering the reinstatement of a Honolulu police officer who was caught on videotape punching his  
girlfriend repeatedly in the head; *The Spokesman-Review*, January 10, 2012, "Ruling Overturns Deputy's Firing"  
at <http://www.spokesman.com/stories/2012/jan/10/ruling-overturms-deputys-firing/> regarding an arbitrator

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

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

19           27.     The Chicago Tribune described The Washington Post’s findings this way: “The  
20 multiyear contracts negotiated by police unions ensure that any discipline may be appealed—  
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22           overturning the firing of a deputy who was the subject of three internal investigations in less than a year, had  
23 retaliated, and had broken the law. The arbitrator, using arbitrator standards, overturned his firing because the  
24 “the criminal acts committed ... did not put anyone’s physical safety at risk” and the “acts were done out of the  
25 public view”; and NBC10, May 10, 2010 “FOP Throws Party for Reinstated Cops in Beating Case” at  
<https://www.nbcphiladelphia.com/news/politics/FOP-Throws-Party-for-Reinstated-Cops-in-Beating-Case-88565017.html>.

25 <sup>18</sup> *Duke Law Journal*, Volume 6, March 2017, “Police Union Contracts” at

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3890&content=dlj>.

26 <sup>19</sup> *The Washington Post*, August 3, 2017, “Fired/Rehired: Police Chiefs are Often Forced to Put Officers Fired for  
Misconduct Back on the Streets” at [https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?noredirect=on&utm\\_term=.c80eb8c1c8de](https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?noredirect=on&utm_term=.c80eb8c1c8de).

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

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

21         29. The Atlantic Magazine's article, "How Police Unions and Arbitrators Keep  
22 Abusive Cops on the Street," put it this way: "There are, of course, police officers who are fired  
23 for egregious misbehavior by commanding officers who decide that a given abuse makes them  
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25 <sup>20</sup> *Chicago Tribune*, August 6, 2017, "Fired and Rehired: Hundreds of Officers Fired for Misconduct Returned to  
26 Policing" at <https://www.chicagotribune.com/news/nationworld/ct-police-officers-misconduct-fired-rehired-20170805-story.html>.

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

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

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

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25 <sup>22</sup> *The Atlantic*, December 2, 2014, “How Police Unions and Arbitrators Keep Abusive Cops on the Street” at  
26 <https://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>.

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



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

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

6 D. Merit-based selection requirement for PSCSC Commissioners;

7 E. Disciplinary and disciplinary appeal deadlines;

8 F. Procedures for selecting arbitrators;

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

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

14 I. Establishment of a civilian secondary employment office governed by  
15 appropriate policies.<sup>25</sup>

16 34. Because of the materially different provisions in the SPOG and SPMA CBAs,  
17 OPA, SPD, the Office of Inspector General (OIG), and the CAO will have to handle complaints,  
18 investigations, discipline, and disciplinary appeals differently, depending on the rank of the  
19 involved employee. Doing so will complicate and make problematic OPA's management of  
20 investigations and the efficacy of the Court-approved OPA Manual. For example, if members  
21 from both unions are involved in an OPA investigation of a single incident, OPA's management  
22 of that investigation will have to apply different rules to SPMA and SPOG employees. If those  
23  
24  
25

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

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

7  
8 35. An important objective during the Consent Decree process has been to strengthen  
9 the obligations and responsibilities of supervisors to help achieve the goal of sufficient oversight  
10 to prevent practices that had contributed in the past to a pattern and practice of constitutional  
11 violations. That means the accountability system must effectively address the supervisory  
12 responsibilities of higher ranks (including those covered by the SPMA CBA) such as ensuring  
13 accurate and timely review of use of force, reporting of possible misconduct, and compliance  
14 with training requirements. The accountability system should deter misconduct and incentivize  
15 constitutional and effective policing not just for line officers, but for their supervisors who are  
16 responsible for using proper deterrents and incentives.

17  
18 36. At the time the SPMA CBA was approved, the City took the position that the  
19 ways in which the CBA differed from the accountability ordinance were acceptable because the  
20 SPMA CBA adopted all other aspects of the accountability ordinance. However, the value of  
21 SPMA's acceptance of most accountability ordinance provisions has since been largely lost  
22 because the SPOG CBA conflicts with so many of the accountability ordinance provisions, and  
23 its language will supersede the accountability ordinance language. Also, if the City amends the  
24 accountability ordinance to align with the SPOG CBA, the accountability ordinance will no  
25 longer include the original provisions that the SPMA CBA ratified when it agreed to implement  
26 most accountability ordinance provisions.

1           37.     In its December 17, 2018 filing, the City referenced the SPMA CBA in its brief,  
2 but did not set forth for the Court in detail how the SPMA CBA also impacts the accountability  
3 ordinance, other aspects of the accountability system, and SPD policies. For example, the City’s  
4 Exhibit I explains changes made by the SPOG CBA to the City’s disciplinary and appeals  
5 processes, and the City’s Exhibit E is an annotated version of the accountability ordinance  
6 intended to comprehensively reflect for the Court all impacts, but neither details the SPMA  
7 CBA impacts.  
8

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

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

13           39.     The City’s description of conflicts between the CBAs and the accountability  
14 ordinance in its Dec 17, 2018 filing does not fully account for all of the areas with which the  
15 Court should be concerned, nor clearly explain how the City intends to address the impacts. The  
16 City’s Exhibit I explaining changes to the disciplinary appeals system made by the SPOG CBA  
17 paints only part of the picture. The disciplinary appeals changes conflict with accountability  
18 system reforms to a much greater extent than described. And, as the Court knows, the  
19 disciplinary appeals system inadequacies had been clearly highlighted for the City.<sup>26</sup> There are  
20 also several non-disciplinary appeals accountability ordinance provisions affected by the CBAs  
21 that were not identified by the City in its brief or Exhibit E, and others the City identified as  
22

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

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

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

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

15 B. Using an undefined “elevated” standard of review—and thus an  
16 undefined elevated burden of proof—for an undetermined range of types of misconduct  
17 (any that might result in termination that might be considered “stigmatizing”), which in  
18 effect OPA will have to use for any investigation that appears to include serious  
19 misconduct that if proven might result in termination, and the Chief will also have to use  
20 for determining whether OPA has met its burden in its findings;  
21  
22  
23  
24

25  
26 <sup>27</sup> See, e.g., *Chicago Sun Times*, March 26, 2017, “The Watchdogs: Suspended Cop Skirts Punishment for 14  
Years” at <https://chicago.suntimes.com/news/the-watchdogs-suspended-cop-skirts-punishment-for-14-years/>.

<sup>28</sup> All of the disciplinary and disciplinary appeals accountability ordinance provisions impacted by the CBAs are  
detailed in Exhibit E.

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

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

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

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

18 G. Not explicitly prohibiting evidence that should be disclosed during an  
19 OPA investigation to be withheld and first raised in the due process (Loudermill) hearing  
20 or on appeal;  
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<sup>29</sup> See Dkt. 512-5 at 31 (City characterizing the 180-day timeline provisions in the CBAs as “fairly elaborate”).

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

4 I. Not allowing the OPA Director or Inspector General to subpoena records  
5 if they are considered “personal records” of employees (the term is not defined, and thus  
6 could be interpreted to mean a wide range of records), so that OPA and OIG have even  
7 less authority than other City agencies that conduct administrative investigations;  
8

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

15 K. Not allowing the Chief to suspend an officer without pay prior to the  
16 initiation of an OPA investigation where the allegations in an OPA complaint could, if  
17 true, lead to termination; or where the Chief determines that leave without pay is  
18 necessary for employee or public safety, or the security or confidentiality of law  
19 enforcement information; or where a gross misdemeanor is alleged (unless it involves  
20 “moral turpitude”, or a sex or bias crime);<sup>30</sup>  
21

22  
23 <sup>30</sup> For every CBA provision at issue, the City argues the Court should only look at whether the provision reflects an  
24 improvement to the prior CBA, rather than look at how the CBA provisions are weaker than what was  
25 recommended and authorized in the accountability ordinance, do not deliver to the people of Seattle policing in  
26 which the community can have confidence, and thus conflict with Consent Decree purposes. For example, the  
City’s December 17, 2018 filing (Dkt. 512 at 19) does not describe how the pre-investigation suspension  
provision of the CBA limits the Chief’s authority, but instead describes it this way: “The CBA negotiations  
resulted in a number of operational and discipline-related improvements, including, first, the Chief’s expanded  
authority to impose pre-investigation suspensions. The new CBA allows the Chief to suspend an officer *without*  
*pay* pending investigation for gross misdemeanors alleging moral turpitude, or a sex or bias crime, where the

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

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

8 N. Not requiring the public, oversight officials, elected officials, and  
9 complainants to be notified if the Chief's findings or discipline are changed later for any  
10 reason after being appealed;<sup>33</sup> and  
11

12  
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15 \_\_\_\_\_  
16 misconduct could lead to termination. SPOG CBA Art. 3.3 (emphasis added [by City]). Previously, the Chief was  
17 only allowed to impose unpaid suspensions for charged felonies." See Ex. E for an analysis of the City's  
18 description to the Court in Dkt. 512-9 of disciplinary system elements described by the City as better than the  
19 status quo.

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

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

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

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

4           41.     With respect to one of the conflicts, the burden of proof, the Court has given  
5           direction to the parties in the past. The SPOG CBA not only continues to require a higher  
6           burden of proof for dishonesty that results in termination, it makes a broader set of misconduct  
7           allegations subject the same undefined “elevated” standard of review. The SPOG CBA  
8           mandates that an ambiguous “elevated” standard be used for cases that result in termination  
9           where the misconduct is “stigmatizing” and makes it “difficult for the employee to get other law  
10          enforcement employment.”<sup>34</sup> But nearly any misconduct for which an employee is fired could  
11          be viewed as meeting these conditions (and certainly the union and employee will assert that is  
12          the case whenever termination is imposed). The weakening in accountability then has a domino  
13          effect. De facto, the higher standard of review will also impose a higher burden of proof for  
14          OPA investigations and for Chief’s initial decision for a wide span of misconduct cases. The  
15          preponderance of evidence will no longer be the burden of proof for any case of alleged  
16          misconduct that may lead to termination, because both the findings and disciplines now will  
17          only be sustained on review if they meet this undefined “elevated” standard of review. OPA will  
18          have to use this higher burden of proof for *any serious misconduct*—it won’t be able to divine at  
19          the initiation of an investigation whether ultimately discipline will be warranted, whether that  
20          discipline might be termination, and whether that termination might be found to be  
21          “stigmatizing”. The impact of this change to the accountability system is, of course, to the  
22          detriment of the public and complainants. Serious misconduct that heretofore needed to be  
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<sup>34</sup> SPOG CBA, Article 3.1 at 10.

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

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

13  
14         43. The City's stated rationale for adopting an "elevated" standard of review in the  
15 SPOG CBA was that the City had to do this, since in the view of the parties, frequently  
16 arbitrators use this elevated standard anyway, and should that occur, the City doesn't want to  
17 lose cases. The first problem with this rationale is that the accountability ordinance eliminated  
18 arbitration as an alternative route employees could choose, and if that gain had been prioritized  
19 through negotiations, rather than abandoned by negotiators, this argument would have been  
20 moot because arbitration dynamics would no longer be in play. Second, setting aside the direct  
21 conflict with the accountability ordinance, even if arbitration remained available, the two parties  
22 were free to contract for an arbitration framework that expressly applies a preponderance  
23 standard, which would have been consistent with the prior direction from this Court. Then, if an  
24 arbitrator does not abide by this contractual requirement, the correct course of action to protect  
25 the public interest would be for the City to appeal based on an abuse of discretion. That  
26

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

16 44. When adopting the SPOG CBA, the Council also passed a resolution asking the  
17 Court to provide judicial review of a three of the conflicting provisions in the SPOG CBA for  
18 alignment with the Consent Decree,<sup>36</sup> and explained to the public and community leaders from  
19 the dais that because the Council had been advised that they could only vote up or down on the  
20 CBA, this was the only way the Council had to acknowledge that these terms might be  
21 problematic and to see if Court proceedings might provide an alternative venue for remedying  
22 the concerns. The City included the Council resolution in its December 17, 2018 filing, but did  
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25 <sup>35</sup> Dkt. 512 at 8.

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

1 not ask for judicial review, instead stating that in the City's view these specific terms present no  
2 conflicts with the Consent Decree.<sup>37</sup>

3         45. If the accountability terms in the CBAs remain as agreed to by the City, it will be  
4 difficult for the Chief to terminate employees or maintain other disciplinary decisions, as she  
5 will contend with vague and shifting standards of review that erect barriers on imposing  
6 discipline when the evidence shows that the misconduct occurred, and with the disposition of  
7 arbitrators to reverse discipline involving high-profile cases. As the above list of contractual  
8 terms highlights, among other impediments, the police unions have negotiated removal of  
9 findings and discipline from personnel records, which will make it harder for the Chief to prove  
10 discipline was proportionate and even-handed in other cases; the appeals process will allow  
11 forum-shopping; require a higher burden of proof; will continue to be shielded from public  
12 view; there will continue to be less independent civilian oversight where there is criminal  
13 misconduct; if a complaint is not filed within four years, discipline will be barred even where  
14 dishonesty and certain types of excessive force or concealment have been proven; and the Chief  
15 will continue to be forced to restore to paid duty personnel who may have engaged in grave  
16 misconduct, pending prosecutors' decisions about filing charges.<sup>38</sup> All of the CBA terms noted  
17 above and in Exhibit A which are in conflict with the accountability ordinance can be expected  
18 undercut accountability and diminish public confidence.<sup>39</sup>  
19  
20  
21  
22

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23 <sup>37</sup> Dkt. 512 at 29.

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

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

1 **VII. THE SHEPHERD CASE**

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

4 47. Police contracts such as Seattle's CBAs that make it more likely termination will  
5 not be upheld in cases of serious misconduct, such as occurred in the Shepherd case, are a  
6 serious threat to public trust and confidence in SPD. In the Shepherd case, the Disciplinary  
7 Review Board ordered the City to reinstate an SPD officer who had inappropriately arrested and  
8 then punched a hand-cuffed subject while she was sitting in the officer's patrol car, causing her  
9 significant injuries. Based on my experience and knowledge of Seattle's accountability  
10 processes, the Court is correct that reforms in the accountability ordinance that are compromised  
11 by the CBAs would have substantially changed the process and standard of review by which this  
12 decision was made.<sup>40</sup> Since the disciplinary appeals provisions of the accountability ordinance  
13 have been effectively nullified by both CBAs allowing use of an arbitration route, there is every  
14

15  
16 <sup>40</sup> As noted in Exhibits A and E, these reforms included, among others:

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

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

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

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

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

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

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

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

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

7  
8 48. In a recent University of Pennsylvania Law review article, Stephen Rushin,  
9 recited with precision problems with disciplinary appeals practices elsewhere that are similar to  
10 those in Seattle:

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

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<sup>41</sup> *University of Pennsylvania Law Review*, March 1, 2018, “Police Disciplinary Appeals” at  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3134718](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134718).

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

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

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

18           C.     If an arbitrator is used instead, the standard of review and burden of proof  
19 will be an undefined, but higher, standard, not a clearly defined preponderance standard,  
20 and no deference will be required, making the Chief's decision more likely not final and  
21 not binding.  
22  
23  
24

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

1           D.       The process of arbitrator selection allows union veto,<sup>43</sup> putting pressure  
 2           on the decision-makers to act more favorably to the party with the prerogative to choose  
 3           the path. (Arbitrator selection is “exactly the problem,” according to Rushin. “In theory,  
 4           arbitration is supposed to be a system with a neutral third party, but the way it’s  
 5           practically structured in a lot of cities can favor the officers because the arbitrators are a  
 6           repeat player, so they have an incentive not to make anyone too angry. That’s fine if  
 7           you’re just looking for compromise, but if you have an officer who truly does deserve to  
 8           be fired, then it’s not a great solution.”<sup>44</sup>)  
 9

10           E.       Arbitrators will not be required to have subject matter expertise.  
 11  
 12

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13 <sup>43</sup> See SPOG CBA, Article 14.2 “Arbitration,” F at 64. Under the SPOG CBA, arbitrators are selected as follows:  
 14 First the Guild and the City each submit a list of ten (10) acceptable arbitrators from among arbitrators either on  
 15 the AAA and/or the Federal Mediation lists (no subject matter expertise required.) The only arbitrators  
 16 automatically included on the List are those on both the Guild and City lists. Then the Guild and City each get to  
 17 strike two names from the other’s list (the first opportunity for the Guild to veto an arbitrator). As cases come up,  
 18 the parties alternate who goes first (with the Guild starting for the first arbitration). The party going first will  
 have the option to strike or accept the top name on the List (the second opportunity for the Guild to veto an  
 arbitrator.) The other party then will have the option to strike or accept the top name on the List (the third  
 opportunity for the Guild to veto an arbitrator). After each party has gone, the top name on the List will be the  
 arbitrator that hears the grievance. (Note that any arbitrator struck by a party, or selected to hear a case, then  
 rotates to the bottom of the list so they don’t come up again until there have been sufficient cases to get to the  
 bottom of the list.)

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

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

- 22 A. The parties will alternate who goes first, starting with the Association going first in the first arbitration  
 conducted under this Agreement.
- 23 B. The party going first will have the option to strike or accept the top name on the List. The other party then  
 will have the option to strike or accept the top name on the List. After each party has gone, the top name  
 on the List will be the arbitrator that hears the grievance.
- 24 C. The parties will continue sequentially down the List for all future arbitrations. If the parties get to the  
 25 bottom of the List, they will jointly request that FMCS re-re-randomize the List. The parties will then start  
 at the top of the re-randomized List.

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

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

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

5 50. Other accountability ordinance provisions changed by one or both CBAs (the  
6 statute of limitations, the 180-day timeline, and the narrowing of subpoena power, for example)  
7 may also affect the outcomes in future cases where excessive force is used, such as in the  
8 Shepherd case, regardless of the appellate route chosen.  
9

10 51. The City describes the Shepherd case as a "...single, erroneous arbitration  
11 decision,"<sup>45</sup> yet offers no reason to conclude that this result is anomalous. To assess the City's  
12 assertion, the Court must have a complete account of disciplinary appeals challenges that may  
13 soon be made<sup>46</sup> or have been made by unions and their members during the course of the  
14 Consent Decree—the number of Chief's disciplinary decisions that were appealed, the result in  
15 each case, the contractual issues that were raised, how many of the challenged cases are still  
16 pending without final result, and so forth. Disciplinary appeals are frequent, and outcomes are  
17 often hidden from public view and occur long after the underlying incident. In my view, the  
18 Shepherd case is likely but one example of how appropriate discipline often cannot be imposed  
19

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20 <sup>45</sup> Dkt. 512 at 11.

21 <sup>46</sup> See, e.g., several other incidents that received public attention in recent weeks. The Chief issued decisions about  
22 three involving dishonesty (OPA Case No. 17-0998, OPA Case No. 17-0982, and OPA Case No. 18-0243) and  
23 another involving unprofessionalism and unnecessary escalation (OPA Case No. 18-0144). The Chief terminated  
24 one of the officers found to be dishonest and imposed a 28-day suspension on another. A third officer was  
25 demoted and received a 15-day suspension (with five days held in abeyance). See *The Seattle Times*, December  
26 19, 2018, "Memo: Seattle Police Union Official Called Sergeant's Public Retaliation Against Citizen Minor  
Misconduct" at <https://www.seattletimes.com/seattle-news/crime/memo-seattle-police-union-official-called-sergeants-public-retaliation-against-citizen-minor-misconduct/>. Another case involved a criminal misdemeanor  
assault charge against an officer, which was dismissed because the alleged victim could not be found. OPA has  
proceeded with an administrative investigation. *The Seattle Times*, December 21, 2018, "Assault Charge  
Dismissed Against Seattle Police Officer After Alleged Victim Vanished" at  
<https://www.seattletimes.com/seattle-news/crime/assault-charge-dismissed-against-seattle-police-officer-after-alleged-victim-vanished/>.

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

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

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18  
19 <sup>47</sup> For example, the Court is no doubt also aware of the Faust case, where the arbitrator and other members of the  
20 DRB overturned an eight-day suspension; the Whitlatch case, where an arbitrator’s settlement after termination  
21 for biased policing cost taxpayers nearly \$1.3 million dollars; the George case, where the arbitrator member of  
22 the DRB overturned the termination and instead ordered a 30-day suspension and directed the SPD to pay the  
23 officer \$75,000 in back wages and benefits; and the cases at issue that led to my 2014 special report on the  
24 disciplinary system. See these related press stories: *The Seattle Times*, October 26, 2014, “Panel Overturns  
25 Suspension of SPD Officer in Use-of-Force Case” at <https://www.seattletimes.com/seattle-news/panel-overturns-suspension-of-spd-officer-in-use-of-force-case/>; *The Seattle Times*, August 31, 2017, “Police Commission  
26 Questions Payout to Fired Seattle Officer in Golf-Club Arrest” at <https://www.seattletimes.com/seattle-news/crime/police-commission-questions-payout-to-fired-officer-in-golf-club-arrest/>; *The Stranger*, July 1, 2015,  
“Time to Get Rid of the Seattle Police Department’s Bad Cops” at <https://www.thestranger.com/news/feature/2015/07/01/22478845/time-to-get-rid-of-the-seattle-police-departments-bad-cops>; *The Seattle Times*, February 26, 2014, “Reversals of 6 SPD Misconduct Findings to be Re-Examined” at <http://blogs.seattletimes.com/today/2014/02/reversals-of-6-spd-misconduct-findings-to-be-re-examined/?syndication=rss&Washington>; and *The Seattle Times*, February 24, 2014, “Special City Council Meeting to Focus on SPD Discipline” at <http://blogs.seattletimes.com/today/2014/02/special-city-council-meeting-to-focus-on-spd-discipline/>.

<sup>48</sup> See Dkt. 512 at 14 (City stating that “the Department sent a clear message to officers with its decision to terminate Shepherd ...”).

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

13  
14         53.     The City also argues that the Shepherd case occurred in 2014, when the use of  
15 force policies and training changes mandated by the Consent Decree were not what they are  
16 today,<sup>49</sup> but it should be noted that SPOG is still arguing in 2018 that the actions Shepherd took  
17 were appropriate, and the disciplinary appeals record in the case indicates that other SPD  
18 personnel involved in setting policy and conducting training concur with Shepherd's actions, as  
19 did the SPOG member on the DRB.<sup>50</sup>

20  
21         54.     Further, there is another important aspect of this 2014 case that will continue to  
22 be a factor in future cases due to the CBAs' retention of arbitrators and concomitant standard of  
23 review. In the Shepherd case, part of the arbitrator's rationale for overturning the firing was that  
24 in the arbitrator's view, public attention to the case put additional political pressure on the Chief,  
25

26  

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<sup>49</sup> See Dkt. 512 at 12.

<sup>50</sup> Disciplinary Review Board's Opinion and Award in Appeal of Adley Shepherd, V.B.h.

1 which in turn resulted in the Chief making her decision based on that pressure, without just  
2 cause. The decision-maker would not have been permitted to substitute their judgment for that  
3 of the Chief under the standard of review set forth in the accountability ordinance.<sup>51</sup> It will,  
4 however, continue to be allowed under the CBAs, as permitted arbitrator discretion. This  
5 threatens the Chief's ability to sustain her disciplinary decisions, since other recommendations  
6 made in recent years and adopted by SPD and OPA were to ensure *greater* public awareness  
7 and *added* transparency of serious misconduct cases. Under those reforms, serious incidents of  
8 misconduct *will* be a focus of public concern, which based on the precedent set in the Shepherd  
9 case, could now be reason for arbitrators to overturn the Chief's disciplinary decisions. The  
10 public is left with a Hobson's choice—if the system supports transparency, daylighting, and  
11 community advocacy, the public will have to accept that disciplinary decisions to ensure  
12 accountability may be overturned, based on the rationale used in the Shepherd case that public  
13 awareness and engagement reduces the Chief's ability to justly determine appropriate discipline.  
14

15         55. The City states that the SPOG CBA takes a good step (and one that had been  
16 recommended in 2014) in eliminating the DRB. But that was only one element of the needed  
17 disciplinary appeals reforms, as detailed in Exhibits A and E attached to this Declaration. The  
18 City also shares the view of the police unions that it would be untenable to deny officers the  
19 option of arbitration since other types of City employees and other police officers across the  
20 country have it. This contravenes the City's assurances that it went into bargaining fully  
21 committed to implementing the reforms secured in the accountability ordinance and championed  
22 to the public—one of which was the elimination of arbitration.  
23

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24  
25 <sup>51</sup> The accountability ordinance set forth a standard of review that would result in more accountability and  
26 predictability, and would strengthen the Chief's ability to uphold discipline. It required deference to the fact-  
finder, that the recommended decision and the final decision should affirm the disciplinary decision unless there  
is a finding specifically that the disciplinary decision was not in good faith for cause, in which case the decision-  
maker may reverse or modify the discipline only to the minimum extent necessary to achieve this standard.

1           56.     The City's assertion that arbitration must be retained for police disciplinary  
2 appeals because other types of City employees have it is puzzling, given that officers should and  
3 do have substantially different accountability mechanisms. This rationale suggests there should  
4 also not be an extensive police accountability system and a Consent Decree, regardless of the  
5 Constitutional implications, the unique nature of policing, the power law enforcement has to use  
6 force, including deadly force, to seize individuals against their will through physical  
7 compulsion, and the historical patterns of abuse of police authority that occurred here and  
8 throughout the nation.  
9

10           57.     The City's assertion that it would be untenable not to allow arbitration because  
11 police across the country use it, is similarly perplexing. The fact that police departments across  
12 the country have been constrained by contracts that mandate the same flawed approaches to  
13 discipline for decades is precisely the problem that needs to be remedied. Taking the City's  
14 point to its logical conclusion, the City should not have reformed its Use of Force policies or  
15 training either, since other officers across the country were still using policies and training that  
16 did not require de-escalation and other best practices, and thus it would not be fair to hold  
17 Seattle officers to different standards that better serve the public interest.  
18

#### 19           **VIII. IMPACTS OF UNCERTAIN OR AMBIGUOUS CBA PROVISIONS**

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

1 City's intent, because the CBAs also contain provisions that the CBAs will supersede City  
2 ordinances whenever there are conflicts,<sup>52</sup> and, as the City states in its filing,<sup>53</sup> case law provides  
3 that this applies not only where there is direct conflict, but also where there is any inconsistency.  
4 Because of this, in many places where the CBAs are not entirely clear, one cannot discern which  
5 aspects of the accountability ordinance are now in effect, which have been superseded, and  
6 which SPD policies and other City ordinances are affected and how. Thus, future uncertainty  
7 and unpredictability is likely. As a result, SPD supervisors, OPA, OIG, employees, and  
8 complainants do not have clarity about which rules of the road should in fact be followed.  
9

10 59. Contractual preemption language is routinely used. However, as used in these  
11 CBAs, particularly the SPOG CBA, it may extensively damage the effectiveness of the  
12 accountability ordinance, impact other City ordinances, Executive Orders, and SPD policies,  
13 and will reduce community confidence, certainty, predictability, and transparency. It gives great  
14 power to arbitrators to review discipline and decide after the fact whether the accountability  
15 ordinance and other legal provisions were binding or whether they were superseded by a CBA.  
16

17 60. The gaps, ambiguities, and inconsistencies in the CBAs benefit those challenging  
18 discipline and are detrimental to the public. In contracts, precision and clarity matter. No private  
19 entity would think contracts drafted in the manner of the CBAs would sufficiently protect their  
20 interests. The public should be equally concerned about how well their interests are being  
21 protected, since a seemingly minor contractual issue can be used to challenge and overturn  
22 disciplinary decisions regarding any type of misconduct, no matter how serious. This is  
23

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24 <sup>52</sup> See Article 18.2 and Appendix E.3 in the SPOG CBA and Article 12.2 and Appendix B "Accountability  
25 Legislation" in the SPMA CBA.

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

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

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

16  
17           62.     Further, in discussing the CBAs with the CPC and others after the SPOG CBA  
18 was submitted to the Council, the Mayor's Office explained that the Mayor may not ask the  
19 Council to amend the accountability ordinance, since the CBAs clearly state that the CBA  
20 language prevails. This raises the specter of an accountability ordinance remaining on the books  
21 with some of its provisions effective, others having been superseded, and still others where only  
22 when they are specifically challenged will it become known which other provisions have also  
23 been superseded.

24  
25           63.     In its filing, the City noted that, for some of the CBA provisions where a concern  
26 was raised because the language is inconsistent with the accountability ordinance, the City did

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

14           64. This is further complicated by the City’s August 18, 2017 filing to the Court that  
15 stated “As to every provision not on the List (of items to be bargained)—most of the  
16 Ordinance—the City will begin or continue implementing those provisions without awaiting  
17 further bargaining.”<sup>56</sup> The City then bargained some accountability ordinance provisions not on  
18 that list, and the SPOG CBA language now is not the same as the accountability ordinance  
19 language. Thus, this City filing states certain accountability ordinance provisions would be  
20

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

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

<sup>56</sup> Dkt. 412 at 4.

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

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

4 A. Did the parties intend to change SPD's policy (5.001 – Standards &  
5 Duties) requiring employees to be truthful, complete, and accurate in all aspects of their  
6 law enforcement responsibilities, to instead limit that obligation to only OPA  
7 investigations, as the CBAs' contract language can now be interpreted to mean?  
8

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

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

15 D. What constitutes "personal records" of employees and employees'  
16 families that per the CBAs are now not within the subpoena authority of OPA and OIG?  
17 Are medical records, bank records, travel records, child protective services investigation  
18 records excluded?  
19

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

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

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

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

7  
8 66. Other areas of uncertainty in the CBAs include:<sup>57</sup>

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

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

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

21  
22 D. Both CBAs limit rapid adjudication to a pilot, and both the rapid  
23 adjudication and the mediation CBA terms include elements for these programs that are  
24

25 \_\_\_\_\_  
<sup>57</sup> See Ex. A.

26 <sup>58</sup> The accountability ordinance required ongoing MOAs to be incorporated into the CBAs. The intent was for  
MOA terms to be incorporated, not simply a list of MOA titles.

1 inconsistent with prior recommendations from the oversight entities and provisions in  
2 the accountability ordinance.<sup>59</sup> The CBAs also do not include the accountability  
3 ordinance mandate that the oversight entities participate in developing and refining those  
4 programs. These provisions are examples of either the City not understanding the  
5 intention of the accountability ordinance reform or taking the position that since the  
6 parties did not intend to change the accountability ordinance provisions, the different  
7 language in the CBA should be disregarded.  
8

9 E. The CBAs provide for additional negotiations on a range of topics (“re-  
10 openers”).<sup>60</sup> The SPOG CBA states that “[t]he parties have agreed to re-open the  
11 Agreement on some topics ...”<sup>61</sup> While that CBA stipulates a number of specific areas of  
12 the accountability ordinance, including, notably, allowing a re-opener on secondary  
13 employment reforms, there are no specifics identifying the intent, scope, and timelines  
14 associated with each re-opener topic. The SPMA CBA does not identify any specific  
15 areas for re-opening associated with accountability. Neither CBA lists all re-opener  
16 topics to which the parties agreed at the time the CBAs were negotiated. Additional  
17 information and parameters are needed to help ensure that re-openers do not result in  
18 further weakening or delay of accountability reforms. As well, technical advisors should  
19 be utilized when the parties negotiate these.  
20

21 F. The lack of clarity with respect to management of secondary employment  
22 is also particularly problematic since reform of this program has been needed for years  
23 and was again in the spotlight after whistleblower reports in 2017 of apparent corruption  
24

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25 <sup>59</sup> For example, still requiring the complainant to give up any right to pursue a complaint as a condition of agreeing  
to mediation, regardless of whether there is ultimately a good faith effort by the employee to participate.

26 <sup>60</sup> See Ex. A.

<sup>61</sup> SPOG CBA, Article 21.4-21.7 at 74; Appendix E.12 (3.29.125.E and 3.29.240.K at 84, 3.29.420.A.7.a at 91,  
3.29.420.A.7.b at 91; and Appendix H at 96).

1 in the procurement and compensation of secondary work for SPD employees. The City  
2 agreed to let the secondary employment situation remain as it has been since 1992,  
3 securing only the right to re-open negotiations on this topic. This was despite years of  
4 OPA Auditor recommendations for reform,<sup>62</sup> incorporation in the accountability  
5 ordinance, referral of allegations to the FBI, media coverage,<sup>63</sup> and finally a Mayoral  
6 Executive Order.<sup>64</sup> The City's Labor Relations Policy Committee (LRPC) records  
7 recently provided to the CPC in response to their October 2018 request show that City  
8 negotiators gradually slid backwards, initially holding the line on the City's need to  
9 make substantial changes, but eventually accepting pre-existing contract language  
10 cementing in place procedures for secondary employment that have been used since  
11 1992. The accountability ordinance was direct, "After consulting with and receiving  
12 input from OIG, OPA, and CPC, SPD shall establish an internal office, directed and  
13 staffed by civilians, to manage the secondary employment of its employees. The  
14 policies, rules, and procedures for secondary employment shall be consistent with SPD  
15 and City ethical standards, and all other SPD policies shall apply when employees  
16 perform secondary employment work." (The SPMA CBA acknowledges "the City's  
17 ability to regulate and manage secondary employment through an internal office."<sup>65</sup>)

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20 The recommended reforms were in response to a long history of egregious  
21 situations and apparent corruption, which came to public attention well into the Consent  
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23 <sup>62</sup> See *The Seattle Times*, September 24, 2017, "Off-Duty Work by SPD Officers Has Been An Issue for Years" at  
<https://www.seattletimes.com/seattle-news/crime/off-duty-work-by-spd-officers-has-been-an-issue-for-years/>.

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

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

26 <sup>65</sup> SPMA CBA, Appendix B, "Secondary Employment," at 52.

1 Decree process after revelations of corruption in mid-2017, due to practices that simply  
2 were not consistent with ethical norms, a culture of accountability, and wise use of  
3 taxpayer dollars.<sup>66</sup> Secondary employment reforms were to be implemented in 2017  
4 pursuant to an Executive Order by then-Mayor Burgess, following recommendations  
5 from the Ethics & Elections Commission, the City Auditor, the OPA Auditor, and the  
6 CPC. These reforms were to address real and perceived conflicts of interest, internal  
7 problems among employees competing for business, the need for appropriate  
8 supervisory review and management, and to adopt technological opportunities.  
9

10 The recommendations included eliminating the practice of having secondary  
11 employment work managed outside SPD, often by current employees acting through  
12 their private businesses created for this purpose or through contracts between the  
13 employee and a private business; making clear that video recording, use of force,  
14 professionalism, and all other policies apply when employees perform secondary  
15 employment work; creating an internal civilian-led and civilian-staffed office; and  
16 establishing clear and unambiguous policies, rules, and procedures consistent with  
17 strong ethics and a sound organizational culture.  
18

19 The City stated in its December 17, 2018 filing that “expectations regarding  
20 secondary employment restrictions [were] not negotiated, except for reopener to allow  
21 for bargaining once City develops proposals regarding secondary employment. No  
22 change to Ordinance anticipated.”<sup>67</sup> In other words, the City is saying that the  
23 accountability ordinance is unchanged, yet the City has obligated itself to further  
24

25  
26 <sup>66</sup> See *The Seattle Times*, September 20, 2017, “FBI Investigating Off-Duty Work by Seattle Police at Construction Sites, Parking Garages” at <https://www.seattletimes.com/seattle-news/crime/fbi-investigating-off-duty-work-by-seattle-police-at-construction-sites-parking-garages/>.

<sup>67</sup> Dkt. 512-5 at 88.

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

4 67. The City is correct that new structures and many operational mandates  
5 concerning OPA, OIG, and CPC in the accountability ordinance remain mostly intact (many of  
6 these, including the system audit authority of the OIG, were not mandatory subjects of  
7 bargaining to begin with). Nonetheless, the CBAs eliminate, modify, or cast into doubt a large  
8 number of the other reforms designed to strengthen the accountability system.  
9

10 68. Further, it appears from the City's December 17, 2018 filing that in several  
11 instances, the City's negotiators may not have understood the rationale for the accountability  
12 ordinance provision, nor the ramifications of concessions on both actual outcomes and on  
13 community confidence.<sup>68</sup> For example, in the City's Exhibit E, it says that the SPOG CBA  
14 "clarified ... that no criminal investigations will be conducted by OPA" and required  
15 "continuation of 180-day clock during 'contemporaneous' OPA and external criminal  
16 investigation[s]."<sup>69</sup> However, the intended reforms were not about that. They were to provide  
17 greater civilian oversight by the OPA Director to ensure the quality and timeliness of both  
18 administrative and criminal investigations, to appropriately toll timelines involving allegations  
19 of criminal misconduct when there is not a simultaneous administrative investigation, and to  
20 apply the same tolling whether the criminal investigation is conducted by SPD or another law  
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24 <sup>68</sup> The City continues to state that the CPC was consulted as part of the City's bargaining (*see* Dkt. 512 at 5). The  
25 CPC has asked the City on several occasions to stop making this assertion, since the CPC was not brought in to  
26 provide technical expertise about effects on the accountability system or the accountability ordinance in the  
negotiating process. The CPC was consulted during bargaining solely about accepting a single, minor concession  
concerning the CPC's ability to engage in independent advocacy in the state legislature, to which the CPC has  
not objected.

<sup>69</sup> Dkt. 512-5 at 20 and 32.

1 enforcement agency. The City does not mention that the SPOG CBA removes the OPA Director  
2 from participating in the decision-making process as to whether SPD should conduct the  
3 criminal investigation (and if so, which unit) or whether it should be referred to an outside  
4 agency (and if so, which agency).<sup>70</sup> Further, the SPOG CBA states that the Department, not  
5 OPA, will determine whether there are simultaneous administrative and criminal investigations.  
6 The Consent Decree's purpose of strengthening public trust and confidence is certainly not  
7 fulfilled by providing OPA full authority for less serious misconduct, while minimizing its role  
8 for any allegation involving criminal misconduct.  
9

10         69. Another example of this can be found in the City's Exhibit E which states,  
11 "3.29.420(A)(2)(b) [was] modified by SPOG CBA provision making SPD—not employee—  
12 responsible for 10-day notification period for right to due-process hearing. City may amend  
13 Ordinance."<sup>71</sup> Yet the purpose of this provision was to help address delays in disciplinary  
14 appeals by requiring the *employee* to notify SPD and the CAO within 10 days if the employee  
15 wishes to appeal (SPD already provides the employee information about appellate rights). There  
16 is no relationship between this accountability ordinance provision and the CBA modification  
17 identified by the City as having met the ordinance requirement because it requires SPD to  
18 provide the employee notice of due process rights.  
19

20         70. One of the core principles underlying the accountability ordinance was to provide  
21 the public greater clarity and predictability, and to ensure the sustainment of a strong  
22 accountability system over time, particularly once the Court is no longer involved, regardless of  
23

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

<sup>71</sup> Dkt. 512-5 at 85.

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

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

12 **IX. CBA IMPACTS ON SPD POLICY AND PRACTICE AND ON OPA MANUAL**  
13 71. The Court asked for briefing on SPD policies impacted as well, but the City did  
14 not address that issue. SPD policies or procedures impacted by the CBAs<sup>72</sup> are listed in Exhibit  
15 D and include:

- 16 A. Management of, and policies for, Secondary Employment;  
17 B. Policy regarding accurate and honest communications;  
18 C. EEO investigation practices that now must abide by the same OPA  
19 investigation constraints in the CBAs;  
20 D. EIS and progressive and consistent disciplinary practices that rely on  
21 comprehensive records retention;  
22 E. Management authority to order mandatory transfers;  
23  
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25  
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<sup>72</sup> Note that SPD Policy 2.050 requires “amendment of all written directives and procedures to coincide with terms of CBAs.”

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

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

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

11 73. The Consent Decree required that OPA update the OPA Manual to formalize its  
12 procedures, best practices, and training requirements. It also detailed policies, procedures, and  
13 protocols that are to be included in the OPA Manual. An OPA Manual was initially approved by  
14 the Court on July 10, 2014,<sup>73</sup> and a revised OPA Manual, updating those protocols, was  
15 approved on March 16, 2016.<sup>74</sup> Further updates presumably must be brought back to the Court  
16 for approval of any changes until this case is concluded or the City obtains further relief from  
17 the Court. Because the OPA Manual details OPA processes, it must address the issues that  
18 derive from any changes to the accountability ordinance due to conflicts with either CBA, as  
19 well as the differing terms between the two CBAs.  
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<sup>73</sup> See Dkt. 161.

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

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

15  
16           75.     When the OPA Manual is next submitted for Court approval, the Court may be  
17 asked to approve a much-reduced and simplified version, based on the view that details in the  
18 accountability ordinance can be a source for information previously located in the OPA Manual.  
19 However, the accountability ordinance has now been affected by the CBA divergences from it,  
20 and the Mayor's Office has said that they may not ask the Council to amend the accountability  
21 ordinance. So, for an investigator, employee, member of the public or others to understand OPA  
22 processes, in addition to referring to the OPA Manual, one must also look to the accountability  
23 ordinance, then to the CBAs for guidance concerning CBA provisions that supersede those of  
24 the accountability ordinance. Even if it were true that, hypothetically, a streamlined OPA  
25 Manual, the accountability ordinance, and the CBAs together document all the information and  
26

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

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

14 76. The City asserts that because it has done well implementing many Consent  
15 Decree reforms, ongoing compliance with the Consent Decree is secure, regardless of the CBAs  
16 and their impact on the accountability system. The City is rightly proud of the improvements  
17 achieved under the Consent Decree. But the CBAs play a critical role in whether those  
18 improvements will be preserved and built upon, or whether, after the sustainment period,  
19 failures will undercut those other gains once the Court is no longer involved. That is why  
20 measuring the likelihood of ongoing compliance through the lens of the changes made to the  
21 accountability system, rather than through the lens of comparing CBA terms to prior CBAs, as  
22 the City asks the Court to do,<sup>75</sup> is so important. Seattle is now considered at the national  
23 forefront for many of its policies, systems, and training reforms because of the Consent Decree.  
24 The City's approach to bringing the accountability system up to par with the other Consent  
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<sup>75</sup> Dkt. 512 at 15.

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

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

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23  
24 <sup>76</sup> ACLU Washington, Seattle: ACLU Urges Greater Police Accountability, News Release, November 7, 2003,  
25 Testimony of Julya Hampton, Legal Program Director, ACLU of WA, before the Seattle City Council Committee  
26 on Fire, Courts and Technology November 18, 2003 Public Hearing on Police Accountability and the Collective  
Bargaining Process (at <https://www.aclu-wa.org/news/seattle-aclu-urges-greater-police-accountability>):

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

1 bargaining that structural or systemic factors prevent accomplishing these changes, since despite  
2 the efforts of different officials over the years, the result has been continued contractual barriers  
3 to improved accountability. Due to the Consent Decree and the MOU between Seattle and the  
4 United States, unprecedented effort, attention, and resources have been directed at  
5 accountability system improvements during the last several years, and there has been ongoing  
6 judicial oversight through the Consent Decree process, so failure to accomplish key reforms  
7 during this period does not give one confidence that they will be achieved “next time”. The key  
8 reason that these recommended reforms to the accountability system were placed in an  
9 ordinance, along with ordinance provisions requiring alignment of CBAs, was to ensure the  
10 reforms would be sustained over time, bolstered, not diminished by the CBAs, to help prevent  
11 recurring breakdowns. Codifying the reforms meant that they would more likely be sustained  
12 under new OPA Directors, Chiefs, and elected officials. By making these reforms law, the intent  
13 was that public could have confidence in the permanence of an improved accountability system  
14 and rest more assured that any efforts to weaken the system would have to be made by a vote of  
15 elected officials taken only after public debate in which community members would have a  
16 voice.  
17

18  
19 78. Due to the pragmatic and consensus-building approach supported by community  
20 advocates in Seattle, in contrast to some other jurisdictions, the accountability ordinance did not  
21 represent radical change, but did secure many long-recommended reforms. The accountability  
22

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

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

12         79. Recognizing the critical importance of police accountability, the unique power of  
13 law enforcement, and the obligations of the Consent Decree, the City took the unusual approach  
14 of adopting an ordinance ahead of collective bargaining. The City's elected leaders took pains to  
15 explain to the labor community that they understood this was not the normal manner in which  
16 collective bargaining proceeds. The City leaders also committed to the community that they  
17 would prioritize and safeguard the progress made in the accountability ordinance and strengthen  
18 the City's ability to sustain reform. All those involved understood that collective bargaining was  
19 part of the process. The City clearly communicated its commitment to prioritize comprehensive  
20 accountability system reforms in bargaining. The accountability ordinance was to be the  
21 baseline for the City's position, not the ceiling from which the City would then make  
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26 <sup>77</sup> For example, some community advocates would have liked to see much more authority in a community-based  
body, such as the power to hire and fire the Chief, conduct investigations, eliminate sworn personnel from OPA,  
and install a formal complainant appeal process, as other jurisdictions have done.

1 “calculated compromises.”<sup>78</sup> Indeed, that is why specific language stating this intention was  
 2 included in the accountability ordinance, made necessary by the unique nature of policing and  
 3 the importance of staying in compliance with the Consent Decree.<sup>79</sup>

4 80. One of the principle purposes of the Consent Decree is to deliver to the people of  
 5 Seattle policing in which the community can have confidence.<sup>80</sup> Yet, the parties did not include  
 6 ensuring an effective accountability system as a stated purpose of either CBA. The  
 7 accountability ordinance says:  
 8

9 “The police are granted extraordinary power to maintain the public peace,  
 10 including the power of arrest and statutory authority under RCW  
 11 9A.16.040 to use deadly force in the performance of their duties under  
 12 specific circumstances. Public trust in the appropriate use of those powers  
 13 is bolstered by having a police oversight system that reflects community  
 14 input and values. It is The City of Seattle’s intent to ensure by law a  
 15 comprehensive and sustainable approach to independent oversight of the  
 Seattle Police Department (SPD) that enhances the trust and confidence  
 of the community, and that builds an effective police department that  
 respects the civil and constitutional rights of the people of Seattle. The  
 purpose of this Chapter 3.29 is to provide the authority necessary for that  
 oversight to be as effective as possible.”<sup>81</sup>

16 In contrast, the stated purpose in the SPOG CBA is limited to establishing fair and reasonable  
 17 compensation and working conditions, and effective public safety services. Further, while the  
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19 <sup>78</sup> However, the City viewed the accountability ordinance provisions as contingent. *See* Dkt. 512 at 27 (“... the City  
 20 made calculated compromises to achieve gains in accountability; if any of those compromises unexpectedly turn  
 out to hinder accountability, they will be high priority goals in the next round of negotiations”).

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

26 <sup>80</sup> Dkt. 504 at 4-5.

<sup>81</sup> SMC 3.29.010.A.

1 SPOG CBA states that the parties recognize the importance of proceeding with implementation  
2 of the Ordinance,<sup>82</sup> the CBA cites only the need to protect the interests of SPOG and the City,  
3 not the need to protect the public’s interests.<sup>83</sup> Similarly, the stated purpose of the SPMA CBA  
4 is limited to setting forth the wages, hours, and other conditions of employment for its  
5 members.<sup>84</sup> Police unions are not required to prioritize the interests of the public and the  
6 achievement of a credible accountability system, though they should. City leaders under the  
7 Consent Decree, however, are required to do so. The limited purposes identified in both CBAs,  
8 which will be looked to when contractual challenges are decided, does not reflect that  
9 commitment.  
10

## 11 XI. CONCLUSION

12 81. As the Court has said, “ensuring that appropriate oversight and accountability  
13 mechanisms are in place is one of the cornerstones to securing constitutional and effective  
14 policing in this City beyond the life of the Consent Decree” and “getting this aspect of reform  
15 right may well be a linchpin to the long-term success of this entire process.”<sup>85</sup>  
16

17 82. To help ensure constitutional policing, appropriate oversight in which the  
18 community can place its trust is necessary. The accountability system must be effective.  
19 Seattle’s system has many positive elements that others do not. But the CBAs before the Court  
20 impede Seattle from having a system the public can trust to work when the added safeguard of  
21 judicial oversight is gone, and regardless of who the Chief, Council, and Mayor may be. If the  
22 CBAs were aligned with the purposes of the Consent Decree, serious misconduct, including  
23 criminal misconduct, would not have less civilian oversight than other types of misconduct. The  
24

25 \_\_\_\_\_  
26 <sup>82</sup> SPOG CBA, Appendix E, “Accountability Legislation” at 80.

<sup>83</sup> SPOG CBA, Preamble at iii.

<sup>84</sup> SPMA CBA at iii.

<sup>85</sup> Dkt. 504 at 5.

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

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

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

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

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

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

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

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

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8                   The Honorable Anne Levinson (ret.)

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**CERTIFICATE OF SERVICE**

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

DATED this 20th day of February, 2019.

s/ David A. Perez  
DPerez@perkinscoie.com

CERTIFICATE OF SERVICE  
(No. 2:12-cv-01282-JLR ) -2