

MEMORANDUM OF AGREEMENT

Between the United States Department of Justice
and the
City of Buffalo, New York and
the Buffalo Police Department,
the Police Benevolent Association, Inc., and
the American Federation of State, County, and Municipal Employees Local 264

September 19, 2002

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Agreement**INTRODUCTION**

1. This Agreement is entered into by the United States Department of Justice ("DOJ"), the City of Buffalo and its police department (collectively referred to as "BPD"), the Police Benevolent Association, Inc. ("PBA"), and the American Federation of State, County, and Municipal Employees Local 264 ("Local 264").
2. The purpose of this Agreement is to provide for a cooperative effort by DOJ, the City, the BPD, the PBA and Local 264 to establish management practices by the City and BPD that promote lawful use of

chemical agent propellant ("CAP") spray and community support for the BPD and its officers. Entry of this Agreement is in the public interest since it provides for management practices consistent with the best standards of police practices.

3. This Agreement is effectuated pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.

4. This Agreement resolves the DOJ's investigation, undertaken pursuant to 42 U.S.C. § 14141, into the BPD's use of CAP spray. DOJ, the City, BPD, PBA, and Local 264 have worked together in this investigation to establish a model for the best police practices in the use of CAP spray in the City of Buffalo. The goal of each of the parties has been, and remains, providing the best police service to the City of Buffalo and its citizens and residents. DOJ expresses its gratitude to the City, the BPD, the PBA, the Local 264, and the officers of the BPD for their cooperation and assistance throughout the process of building the model of best police practices for the City as embodied by this cooperative Agreement. The City, the BPD, the PBA, and the Local 264 express their gratitude to DOJ for its welcome assistance in making the recommendations and proposing the improvements that have led to the provision of better police service in the City of Buffalo. DOJ acknowledges that BPD has voluntarily instituted many of the initiatives proposed by the DOJ, as well as its own independent initiatives, and has shared information with DOJ that enabled DOJ to make those productive proposals. The parties believe that this Agreement will continue the progress already well underway.

5. Nothing in this Agreement alters the lawful authority of BPD officers to use CAP spray in carrying out their law enforcement duties in a manner consistent with the United States and New York State Constitutions and federal and state law. Furthermore, nothing in this Agreement is intended to alter past, current, or future judicial interpretation of the constitutional standards for the use of force by law enforcement personnel, including the use of CAP spray. The DOJ and BPD also acknowledge that the proper use of CAP spray is a useful tool in law enforcement.

6. Nothing in this Agreement shall be construed as an acknowledgment, agreement, admission, statement or evidence of liability of the City, the BPD or any of its officers or officials, the PBA, or the Local 264 under 42 U.S.C. § 14141. Nor shall the Agreement constitute or be construed as an acknowledgment, agreement, admission, statement or evidence of any violation of applicable law or of the existence of a pattern or practice of conduct by law enforcement officers of the City that deprives persons of rights, privileges, and immunities secured or protected by the Constitution and laws of the United States. Nor does the Agreement constitute an admission that any individual complaint reviewed by DOJ was meritorious or improperly addressed by BPD.

7. This Agreement is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees and successors. No person, class or entity is intended to be a third party beneficiary of the provisions of this Agreement for purposes of any civil, criminal or administrative action or proceeding, and accordingly, no person, class or entity may assert any claim or right as a beneficiary in such action or proceeding. Nothing in this Agreement shall be construed to impair the right of any person or organization to seek relief against the City for conduct by BPD officers.

8. The City, by and through its officials, agents, employees, and successors, shall not engage in a pattern or practice by BPD officers of using CAP spray that deprives persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States.

9. No prior communications, oral or written, or prior drafts shall be relevant or admissible for

purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.

10. The signatures below of the officials representing the DOJ, the City, the BPD, the PBA, and the Local 264 signify that the parties have given final approval to this Agreement. The effective date of the Agreement shall be the date it is signed by the last official of any party executing the Agreement.

DEFINITIONS

11. The following definitions apply to this Agreement:

A. The term "investigation history" means a summary of all criminal and administrative investigations, including Professional Standards Division ("PSD") investigations, of a particular officer and a summary, with a narrative description of the allegations, and discipline determined and imposed, if any.

B. The terms "document" and "record" shall be interpreted to include "writings and recordings" as defined by Federal Rule of Evidence 1001(1).

C. The term "field training officer" or "FTO" means an experienced police officer whose responsibilities include providing on-the-job training and supervision of probationary police officers.

D. The term "officer" means any law enforcement officer employed by the BPD, including police officers, supervisors and senior supervisors, and cellblock attendants employed in the BPD cellblock.

E. The term "supervisor" means a sworn police officer holding the rank of detective sergeant, lieutenant, assistant chief of detectives, captain, or inspector. The term "senior supervisor" means a sworn police officer holding the rank of chief, deputy commissioner, and the commissioner.

F. The term "district" means a geographic subdivision of the City of Buffalo used by the BPD to delineate the jurisdiction of each police station.

G. The term "non-disciplinary corrective action" means non-disciplinary action taken by a supervisor to enable or encourage an officer to modify his or her performance. It may include oral or written educational counseling, training, increased field supervision for a specified time period, voluntary professional assistance/evaluation or voluntary referral to the Employee Assistance Program.

H. A "complaint" means an allegation of an act or omission which if proven true would be misconduct or incompetence. For purposes of this Agreement, a complaint does not mean an allegation of employment discrimination.

I. The term "use of force" means a reportable use of force as defined by BPD Training Bulletin number 2002-02 (Use of Force Report).

POLICIES AND PROCEDURES

12. The BPD shall continue to follow and enforce the following General Order and Training Bulletins

which were all effective on or before April 8, 2002 and include detailed policies and procedures for the use of force, use of force reporting, and use of CAP spray: General Order number 2002-02 (Use of Force Report Requirement); and Training Bulletins numbered 2002-01 (Use of Force), 2002-02 (Use of Force Report), and 2002-03 (Use of Chemical Agent Projectors Spray). The BPD shall obtain approval from the Reviewer and DOJ for any proposed changes to this General Order and these Training Bulletins during the term of this Agreement.

13. The requirements of this paragraph apply so long as the City has any role in prisoner processing. The BPD shall continue to maintain a working camera in the prisoner processing room in Central Booking (or wherever this processing occurs in any location controlled by the City) along with a monitor for that camera in at least one location customarily staffed by a supervisor on a 24/7 basis. The BPD shall install a working camera, that can be viewed from a monitor, in the elevator which is located directly opposite Central Booking that is used to transfer processed prisoners to the BPD cellblock (or in any other elevator used for this same purpose that is controlled by the City) and that can be viewed from a monitor. Whenever the circumstances and timing of the incident allow, and to the extent that videotaping does not put any person in danger, the BPD shall videotape all uses of CAP spray in the BPD cellblock, including any conduct forming the factual basis for using the spray. The recordings on these cellblock tapes shall be maintained for at least 3 years. All equipment required by this paragraph shall be maintained in good working order.

TRAINING

14. The BPD shall continue to provide officers with at least 8 hours of training on the use of CAP spray prior to authorizing an officer to carry and use CAP spray. The training shall be revised to include discussion and role plays of situations in which use of CAP spray is and is not permissible and how to assess relevant factors before using CAP spray. BPD shall provide training to officers already authorized to use CAP spray on the policies and procedures concerning CAP spray in accordance with General Order number 2002-02 (Use of Force Report Requirement) and Training Bulletins numbered 2002-01 (Use of Force), 2002-02 (Use of Force Report), and 2002-03 (Use of Chemical Agent Projectors Spray).

15. The BPD shall continue to train all officers in the use of verbal de-escalation techniques as an alternative to the use of CAP spray and other uses of force as defined by General Order number 2002-02 (Use of Force Report Requirement), and shall incorporate such techniques into all other training that implicates the use of force. Such training shall include specific examples of situations that do not require the use of force or CAP spray, but may be commonly mishandled, resulting in force or CAP spray being used.

16. The BPD shall continue to provide all officers with periodic training in integrity and ethics. This training shall cover the duties of truthfulness, the importance of avoiding misconduct, and professionalism. The BPD shall instruct all officers in the PSD complaint process and their obligation to cooperate with PSD investigations.

17. If the BPD implements a Field Training Officer (FTO) program, the BPD shall require FTOs to evaluate and instruct probationary police officers based on the appropriateness of their use of CAP spray, if applicable.

18. The BPD shall maintain written records documenting all training, reflected in this Agreement, of officers. At a minimum, these records shall reflect the name of the officer, the dates of the training, the general subject matter of the training (including lesson plans where available), and whether the training was completed satisfactorily. Whenever training results from a claim of alleged improper use CAP

spray, a record of completion of the training will be maintained in the PSD file to the extent allowed by law or collective bargaining agreements.

19. The BPD shall provide training to all current and future officers concerning the requirements of this Agreement as they pertain to reporting or documenting all use of force as defined by General Order number 2002-02 (Use of Force Report Requirement) and as they pertain to the complaint and investigation process.

MANAGEMENT AND SUPERVISION

20. The BPD shall implement a system(s) for tracking and analyzing officer use of force and complaints within twelve (12) months of entry of this Agreement.

A. The system(s) shall collect and record, at a minimum, the following information:

1. incidents involving a use of force that result in a complaint investigation: subject officer name and identification number; witness officer name and identification number; summary of the complaint/incident; file number; status of the investigation; disposition; discipline; non-disciplinary corrective action; description of injuries alleged/sustained and any BPD action to provide treatment for those injuries; and contact information for all officers and complainants;

2. incidents involving a reportable use of force: officer name and unique identification number; witness officer name and identification number; date of incident; description of incident with sufficient detail to permit a meaningful supervisory review of the justification for the use of force; identification of each specific type of force used and the effectiveness of each type of force used; for uses of CAP spray, a description of the number of bursts of CAP spray and the area of the body sprayed; name of the person against whom force was used; description of injury to subject and officer, if any, resulting from the use of force; medical treatment, including decontamination if CAP spray was used; and whether the individual against whom force was used was arrested or issued a citation or summons, and if so, the arrest report or citation number;

3. each officer's investigation history; and

4. A description of all civil or administrative claims filed against an officer arising from BPD operations; a description of all other known civil or administrative claims to which the officer is a named party and which involve allegations of untruthfulness, physical force, or assault.

B. The system(s) shall have, at a minimum, the capability to retrieve information by any of the categories in the database(s), and perform statistical analyses of such information, 1) for an individual officer, and for districts, shifts, or special units of officers; and 2) by incident or groups of incidents (e.g., all CAP spray incidents).

C. Data regarding an officer shall be maintained in the system for at least seven years during that officer's employment with the BPD and in accordance with the minimum periods set forth in New York State's record retention regulations after the officer leaves the

BPD. Whenever a complaint rises to the level of disciplinary charges, the BPD shall continue its current practice of maintaining those records indefinitely. Data that does not identify an officer, or where officer identifying information can be removed, shall be maintained for at least the duration of this Agreement so that aggregate statistical analysis can be performed. The City and BPD shall input all available data into the complaint tracking system for the two (2) years prior to the effective date of this Agreement.

D. Within six (6) months of the effective date of this Agreement, the BPD shall develop a written protocol governing the use of the tracking system(s). This protocol shall specify, at a minimum: (i) threshold number and type of incidents and/or complaints per officer triggering mandatory review by senior supervisors, (ii) the frequency of additional routine reviews (e.g., routine reviews by senior supervisors of use of force and complaint data for officers under their command), (iii) the follow-up actions to be taken by BPD senior supervisors based on information in the system(s) (including meeting with the officer and/or the officer's supervisor and recommending non-disciplinary corrective action); and (iv) quality assurance checks of data input. The City shall provide this protocol to the United States for review and approval at least 30 days prior to its implementation. If the parties are unable to agree on a written protocol, the Reviewer, described later in this Agreement, shall have final authority to determine the protocol.

E. The BPD shall ensure that information is entered into the system database accurately and timely, and is maintained in a secure and confidential manner as allowed or required by law.

F. The BPD shall provide officers with an annual opportunity to review, and correct errors in, tracking system information regarding them, except regarding open or ongoing investigations or cases.

21. As described below, the BPD shall conduct regular audits and reviews of all reportable uses of force by officers. BPD supervisors and senior supervisors shall act on this data, including requiring non-disciplinary corrective actions consistent with the applicable collective bargaining agreement in force on the effective date of this Agreement, with the goal of preventing the use of excessive force.

A. Each use of force report prepared as required by General Order number 2002-02 (Use of Force Report Requirement) shall be reviewed by the reporting officer's chain of command within ten (10) days of the use of force. Supervisors shall refer to PSD, which will analyze the form to determine whether to open an investigation, all incidents where a use of force report reasonably indicates a possible violation of BPD policies or state or federal law or where a use of force results in an injury requiring medical treatment.

B. BPD senior supervisors shall analyze use of force data on a quarterly, cumulative basis to detect trends in BPD use of force (including CAP spray). BPD senior supervisors shall act on this data to determine whether BPD officers are engaging in appropriate uses of CAP spray. The analysis shall include a review by officer, groups of officers, injury, and type of force used, and as required by the established protocol.

C. Senior supervisors responsible for developing training for BPD officers shall review appropriate data regarding use of force and related complaints to develop training needs for the BPD.

22. The BPD shall conduct regular audits and reviews of officers' investigation histories. BPD supervisors and senior supervisors shall act on this data, including requiring non-disciplinary action, with the goal of preventing misconduct by officers. BPD senior supervisors shall analyze complaint data from the complaint tracking system on a quarterly, cumulative basis to detect trends of BPD officer complaints.

23. After evaluating the most recent quarterly complaint tracking system reports described above and evaluating an officer's investigation history, the BPD shall provide non-disciplinary corrective action, where appropriate and so long as it does not violate the applicable collective bargaining agreement in force on the effective date of this Agreement, to officers as identified using the protocol developed: (i) against whom at least three (3) complaints containing allegations of similar types of misconduct (e.g., excessive force, improper search and seizure, or criminal activity) have been initiated within the last two years, regardless of whether the complaints are sustained (except that anonymous complaints need not be considered unless sustained); or (ii) against whom at least four complaints of any kind have been initiated within the last two years, regardless of whether the complaints were sustained (except that anonymous complaints need not be considered unless sustained).

24. To the extent allowed under the applicable collective bargaining agreement in force on the effective date of this Agreement, the BPD shall require every officer to notify the BPD when he or she, whether on- or off-duty, has been arrested or criminally charged. To the extent not already allowed under the applicable collective bargaining agreement in force on the effective date of this Agreement, the City shall initiate negotiations, and shall bargain in good faith, for the right to require every officer to notify the BPD when he or she, whether on- or off-duty, has been arrested or criminally charged. (This Agreement does not impose upon the PBA and Local 264, as organizations, any duty to notify the BPD of these events.)

The City and BPD management shall monitor all known civil litigation involving allegations of untruthfulness, or physical force and all known criminal prosecutions of officers.

A. BPD shall discipline (subject to applicable provisions in the collective bargaining agreements in force on the effective date of this Agreement) and, unless the discipline is termination, provide appropriate non-disciplinary corrective action to officers found guilty or liable by a court or jury of acts that would be misconduct or incompetence.

B. PSD shall independently investigate, and BPD shall make findings, and take any appropriate disciplinary or non-disciplinary action on all incidents giving rise to such civil litigation, which arises from officers' actions within the scope of their employment, or prosecution where the court or jury does not find the officer guilty or liable, regardless of whether the complaint is withdrawn or settled.

C. A brief written summary of such litigation and investigations shall be included in the officer's investigation history.

COMPLAINT AND INVESTIGATION PROCESS

Quality Assurance

25. The BPD shall track all open complaint investigations to assure that investigations are completed within 45 days of receipt of the complaint by PSD, unless documented extensions are granted by the Commissioner. Open investigations shall be tracked from the event that began the investigation to the

final action resolving the investigation. Complaint investigations shall be tracked using a uniform numbering system.

26. The BPD shall publish, and shall make available at various places evenly distributed throughout the city, pamphlets describing the PSD complaint process.

27. PSD shall create a manual concerning PSD policies and investigative procedures (including complaint receipt, report writing, other relevant policies and procedures, locating witnesses, investigative and interview techniques, and objective bases on which to make credibility determinations). This manual shall include, at a minimum, a description of the investigative process and procedures to be used in carrying out that process. The City shall make the PSD manual of policies and procedures available for inspection by the public and officers at PSD headquarters and at each BPD facility, except those portions of the manual, that if made public, would compromise the ability of the BPD to conduct its law enforcement activities. The City shall ensure that all PSD investigators receive adequate training in these policies and procedures to enable them to carry out their duties.

28. The BPD shall continue to encourage highly-qualified candidates to become PSD police investigators. The BPD shall continue to select PSD police investigators based on their previous superior performance as police officers, including management potential, commitment to police integrity, and cultural-community sensitivity.

Filing a Complaint

29. Complainants may initiate a complaint against an officer either in person or by telephone, mail, or facsimile transmission. Complainants shall not be required to file a complaint "form" to initiate an investigation. Forms shall be available at all police stations and completed complaint forms shall be forwarded to the PSD within three (3) working days.

30. Officers shall inform any individual who indicates a desire to file a complaint of the means by which a complaint may be filed. BPD employees may not refuse to accept a complaint or attempt to dissuade a person from filing a complaint for any reason.

31. No complainant shall be required to make an appointment or to go to a police station, any police building or PSD office to provide a statement. If complainants or witnesses are uncomfortable or unavailable to be interviewed at PSD offices during business hours, PSD investigators shall offer to interview them at alternate sites and times, e.g. at residences or places of business, and during reasonable weekend or after business hours.

32. A complainant may file an anonymous verbal or written complaint. PSD shall accept and investigate complaints filed by individuals other than the alleged victim of misconduct or incompetence (third-party complaints). PSD shall ask anonymous and third-party complainants for corroborating evidence. PSD shall investigate anonymous and third-party complaints to the extent the information collected allows PSD to determine whether the complaint is corroborated.

33. The BPD complaint intake form shall be revised to include greater space in which to describe the relevant incident. PSD investigators shall document in that space, and attached pages as necessary, all of the relevant facts and circumstances of the incident, as described during the initial interview of the complainant.

34. To the extent allowed under the applicable collective bargaining agreement in force on the

effective date of this Agreement, the City shall require officers to report misconduct by other officers. To the extent not already allowed under the applicable collective bargaining agreement in force on the effective date of this Agreement, the City shall initiate negotiations and shall bargain in good faith for the right to require officers to report misconduct by other officers. Where reporting is required, misconduct by fellow officers shall be reported directly to PSD or through an officer's chain of command. Where reporting is required, the BPD shall discipline (subject to applicable provisions in the applicable collective bargaining agreement in force on the effective date of this Agreement), when appropriate, any officer who observes misconduct by another officer and fails to report it promptly to a supervisor or to PSD. The BPD shall discipline any officer who is proven to have provided knowingly false information in a complaint investigation or any report or log.

35. The BPD shall not close an investigation based on an external complaint or any investigation based on a complaint of excessive force without rendering a disposition solely because the complainant withdraws the complaint, is unavailable or not able to be located to make a statement, accepts an Adjournment in Contemplation of Dismissal ("ACD"), or is convicted of any charge arising from the incident to which the complaint relates. PSD shall investigate such complaints to the extent information collected allows PSD to determine whether the complaint can be corroborated.

36. BPD officers shall continue to be required to provide their name and badge number to any individual who requests it.

Investigating Complaints

37. PSD shall investigate all complaints alleging improper use of CAP spray or improper use of force where fists, kicks, or weapons are used or where the improper use of force results in apparent or evident physical injury or visible physical trauma -- except officer-involved shootings and uses of deadly force for which the BPD Major Crimes Unit shall have primary investigative responsibility. PSD shall monitor and be responsible for the progress and completeness of all complaint investigations. The City shall not permit any BPD officer to attempt to settle or resolve a PSD complaint involving excessive force through any means other than the PSD investigation. Nothing in this paragraph shall limit the authority of the Corporation Counsel, or an officer's private counsel, to settle legal claims at his/her discretion.

38. The complaint intake officer shall prepare a written description of all visible injuries and arrange for those injuries to be video-taped or photographed, with the subject's consent, as soon as practical. In instances where there is a claim that an individual was subjected to the use of CAP spray where the BPD disputes the use of the spray and where the complaint is filed within one week of the use of the spray, the complaint intake officer shall make arrangements for the subject to be placed under an ultra-violet light to detect dye, and shall document the result, including the location on the subject's body and/or clothing where dye was found to be present.

39. In complaints involving improper use of CAP spray or improper use of force where fists, kicks, or weapons are used or where the improper use of force results in apparent or evident physical injury or visible physical trauma, PSD investigators shall individually interview each subject and witness officer, including any supervisor and senior supervisor officers. All interviews of complainants, subject officers, witness officers, and other witnesses shall be tape-recorded and transcribed. Brief, immediate "thumb-nail sketch" conversations which may be necessary to gain understanding of an incident and "minor clarification" follow-up conversations (so long as the follow-up conversation does not address a matter significant or material to the incident) of persons may be taken without being tape-recorded or transcribed. Interview tapes shall be maintained and kept as part of the PSD investigative file. If a complainant or witness refuses to be tape-recorded, then PSD shall prepare a written narrative of the

statement to be signed by the complainant or witness. PSD shall not conduct group interviews. PSD shall not accept a "P-73" (interdepartmental memo) or written statement from any officer in lieu of an interview. PSD investigators shall have the authority and responsibility to question all interviewees and to challenge their versions of the facts. This paragraph shall not apply to cases of officer-involved shootings or uses of deadly physical force where the Major Crimes Unit has primary investigative jurisdiction.

40. During a PSD investigation, supervisors and senior supervisors who are present on the scene or called to the scene, shall be required to detail their handling of any matters during and after the alleged incident and their observations of the complainant and accused officers and any actions taken by the supervisor or senior supervisor.

41. Whenever appropriate, and especially when the evidence on hand is insufficient to conduct a complete investigation of the complaint, PSD investigators shall canvass the scene of an incident for witnesses as soon as possible after receiving a complaint.

42. PSD shall aggressively collect all appropriate evidence to document each complaint, and any injury of a complainant, including medical records and photographs of injuries. PSD shall not require complainants or other witnesses to provide evidence that PSD itself reasonably can obtain. In cases in which the complainant has obtained medical treatment other than that provided by the BPD, PSD shall ask complainants to sign release forms, but shall not require a complainant to do so.

43. PSD shall review all notices of claim and summonses and complaints regarding any allegation of improper use of CAP spray or improper use of force where fists, kicks, or weapons are used or where the improper use of force results in demonstrable physical injury or visible physical trauma, and then (i) open an investigation if one has not been opened previously unless barred by an applicable statute of limitations, (ii) once or if an investigation on the matter is opened, use any information from readily available transcripts and documents, including General Municipal Law §50-h hearing transcripts, to assist in further investigation of the matter, or (iii) to the extent any contractual time limit or statute of limitations has not expired, if an investigation has already been closed but discipline has not yet been imposed, reopen it and investigate further based on information obtained from the transcripts and documents. Nothing in this paragraph shall compel the City to order or purchase non- 50-h transcripts from outside sources.

44. PSD shall assess the propriety of all officer conduct during an incident it investigates, regardless of whether the complainant specifically articulated that conduct as part of his or her complaint. If during the course of a PSD investigation, the PSD investigator has reason to believe that misconduct other than that alleged by the complainant has occurred, PSD must investigate and report with respect to such misconduct unless the misconduct is strictly of an administrative nature (e.g., dress code violations, hours of work) and the Commissioner determines that further investigation is not warranted.

45. At the conclusion of each investigation, PSD shall prepare a synopsis and checklist of the evidence gathered during the investigation (including an explanation for the absence of any evidence), evidence relevant to credibility determinations, and the accused officer's investigation history. This synopsis and checklist shall be made a part of the investigation file.

Resolving the Complaint

46. The BPD shall make findings regarding administrative complaint investigations using a "preponderance of the evidence" standard. The BPD shall resolve investigations using the following

classifications: "Sustained"; "Unfounded"; "Not sustained"; "Exonerated"; or "Other with explanation." Any finding of "Other with explanation" must be reviewed by the Reviewer to determine the appropriateness of such a finding.

47. In making credibility determinations, the BPD shall consider, at a minimum, the following factors: (i) the officer's investigation history (if relevant to his or her credibility in the investigation); (ii) the complainant's or witness's criminal history (if relevant to his or her credibility in the investigation); and, (iii) other credible facts suggesting a propensity for untruthfulness of the persons involved or credibility of the complaint in general.

48. After final determination of any use of force complaint that results in a finding other than "Sustained", a copy of the final disposition and reasons for it (including any credibility determinations), shall be placed in the PSD file.

49. The BPD shall take all necessary steps to impose appropriate discipline (subject to applicable provisions in the applicable collective bargaining agreement in force on the effective date of this Agreement) on each officer against whom a complaint is sustained as soon as possible after its final disposition, whether by way of plea or decision after hearing. Except where the discipline is termination, non-disciplinary corrective action shall also be provided to each officer against whom a complaint is ultimately sustained, where appropriate and where permitted by the applicable collective bargaining agreement in force on the effective date of this Agreement; where a complaint is disposed of by other means, the BPD shall consider providing appropriate non-disciplinary corrective actions.

50. For each officer against whom a complaint is sustained after final determination, the amount of discipline sought to be imposed shall in part be determined by considering an officer's prior record of ultimately sustained complaints and any information contained in those files as well as the immediate sustained allegation of complaint (to the extent permitted by the applicable collective bargaining agreement in force on the effective date of this Agreement).

51. When imposing discipline, the BPD shall record in its PSD records the name of the officer, the discipline determined, the date(s) discipline was imposed, any PSD file number or other related cross-references, and the reason or reasons for the particular penalty imposed or sought to be imposed. A copy of this record shall be placed in the appropriate PSD complaint file. All sustained complaints must be easily retrievable from these PSD records.

52. PSD shall issue a public semi-annual statistical report of investigations filed with PSD. For unresolved allegations, the reports shall include numbers of open investigations by category. For cases reviewed by the Commissioner during that period, the reports shall include the number of cases by categories and disposition of each charge. For any cases ultimately sustained during that period, the reports shall include the dates each case was opened and resolved, the categories of complaint including each charge, dispositions of all charges, and any resulting discipline.

REVIEWER

53. The City shall maintain a Reviewer throughout the life of this Agreement. Within 90 days after the effective date of this Agreement, the parties shall select an independent Reviewer who shall review and report to the parties on a quarterly basis the City's implementation of and compliance with the following provisions of this Agreement: paragraphs 12-15, 18 as they relate to the use of CAP spray, 25, 29-33, 35, 38-45, 47-51 as they relate to use of force complaints, 20-23, 37, 46, and 54-57, 61. The City shall report to the parties on a quarterly basis the City's implementation of and compliance with all other

provisions, paragraphs, or portions of paragraphs, in this Agreement. The Reviewer shall not be retained (on a paid or unpaid basis) by any current or future litigant or claimant in a claim or suit against the City or its officers. The Reviewer will not issue statements or make findings with regard to any act or omission of the City, the BPD, or their agents or representatives, except as required by the terms of this Agreement. The Reviewer may testify in any case brought by any party to this Agreement regarding any matter relating to the implementation, enforcement, or dissolution of this Agreement. The Reviewer, however, will not testify in any other litigation or proceeding with regard to any act or omission of the City, the BPD, or any of their agents, representatives, or employees related to this Agreement or regarding any matter or subject that the Reviewer may have received knowledge of as a result of his or her performance under this Agreement. Unless agreed to by all parties, the Reviewer will not accept employment or provide consulting services related to his responsibilities under this Agreement, including but not limited to being retained (on a paid or unpaid basis) by any current or future litigant or claimant, or such litigant's or claimant's attorney, in connection with a claim or suit against the City or its departments, officers, agents or employees. The Reviewer will not be liable for any claim, lawsuit, or demand arising out of the Reviewer's performance pursuant to this Agreement. Provided, however, that this paragraph does not apply to any proceeding before a court related to performance of contracts or subcontracts for monitoring this Agreement. DOJ commits to supporting, whether as a party, an amicus, or in some other meaningful fashion, any reasonable effort by any party to prevent the Reviewer from giving sworn testimony in any such litigation or proceeding should any party asks DOJ to do so.

The Reviewer shall be acceptable to all parties. If the parties are unable to agree on a Reviewer, each party shall submit two names, along with resumes or curricula vitae and cost proposals, to a third party neutral, selected with the assistance of the Federal Mediation and Conciliation Service, and the third party neutral shall appoint the Reviewer from among the names submitted.

54. The Reviewer shall perform quality assurance checks of PSD use of force investigations. The City shall provide the Reviewer with full access to all BPD staff, documents, databases, and records that the Reviewer deems necessary to fulfill his or her duties, as defined below. The Reviewer shall review and evaluate the following information, and file with the parties a quarterly report describing the review and analysis of:

- A. Statistical information, trends, and patterns, in BPD officers' use of CAP spray and other uses of force;
- B. All PSD investigations into potential improper uses of force, and all non-disciplinary corrective action and disciplinary records resulting from such incidents. The City shall forward all PSD final reports and all disciplinary and training records for such investigations to the Reviewer immediately upon their completion.
- C. Statistical information on the number of BPD use of force complaint investigations, the timeliness of the investigations, the disposition, and any non-disciplinary corrective action taken.

55. The Reviewer shall be afforded the opportunity to review any complaint investigation alleging improper use of CAP spray prior to final adjudication. The Reviewer may evaluate the investigation and may provide written recommendations for conducting additional investigation.

56. The City and BPD shall maintain all records necessary to document their compliance with all terms of this Agreement. The City and BPD shall also maintain any and all records required by or developed under this Agreement.

57. During all times of this Agreement, the United States and the Reviewer shall have unrestricted access to all BPD staff, facilities, and documents (including databases), and, upon request made to the City Attorney, receive copies of any documents and any databases relating to the implementation of this Agreement except for documents: (a) covered by the attorney-client privilege; (b) prepared in anticipation of litigation or for trial where disclosure would reveal the mental impressions, conclusions, opinions, or legal theories of an attorney for the City, or (c) containing information that might disclose the identity of a confidential informant. Should the City decline to provide the DOJ or the Reviewer with access to a document based on any of these grounds, the City will provide the Reviewer and DOJ with a log describing the document. The Reviewer shall retain any non-public information in a confidential manner and shall not disclose any non-public information to any person or entity, other than a court or DOJ, absent written notice to the City and either written consent by the City or a court order authorizing disclosure. Before the City provides any such written consent to the Reviewer, the City must first provide the PBA and the Local 264 written notice if any non-public information sought to be disclosed identifies any officer covered by the applicable collective bargaining agreement in force on the effective date of this Agreement.

58. The Reviewer shall only have the duties, responsibilities, and authority conferred by this Agreement. The Reviewer shall not, and is not intended to, replace or take over the role and duties of the Mayor, City Council, Police Commissioner, or any other police or City official. 59. The Reviewer may offer the City and BPD technical assistance regarding compliance with this Agreement. The Reviewer may not modify, amend, diminish, or expand this Agreement.

60. In auditing the implementation of this Agreement, the Reviewer shall maintain regular contact with the parties.

COMPLIANCE

61. Except where otherwise specifically indicated, the City shall implement all provisions of this Agreement within 90 days after the effective date of this Agreement.

62. The signatures below of the officials representing the DOJ, the City of Buffalo, the BPD, the PBA, and Local 264 signify that these parties have given their final approval to this Agreement. The effective date of the Agreement shall be the date it is signed by the last official of any party executing the Agreement. The Agreement shall remain in effect for three years, subject to the provisions below.

A. The City and BPD may request, of DOJ, to terminate this Agreement if the Reviewer finds that the City has been in substantial compliance with the terms of this Agreement for a period of no less than two years, even if the two years of substantial compliance occur before the three-year anniversary of this Agreement. DOJ shall not unreasonably refuse termination of this Agreement, either before or after the three-year anniversary, and shall bear the burden of demonstrating that its refusal to terminate is reasonable.

B. This Agreement will terminate on the three-year anniversary of the effective date of the Agreement if DOJ agrees that BPD and the City have substantially complied with each provision of this Agreement and maintained substantial compliance for a period of no less than one year. The burden shall be on the City and BPD to demonstrate that it has fully and faithfully implemented all provisions of this Agreement and maintained substantial compliance for a period of no less than one year.

C. For purposes of this paragraph, "substantial compliance" means there has been

performance of the material terms of the Agreement. Materiality shall be determined by reference to the overall objectives of the Agreement. Noncompliance with mere technicalities, or temporary failure during a period of otherwise sustained compliance, will not constitute failure to maintain substantial compliance. At the same time, temporary compliance during a period of otherwise sustained noncompliance shall not constitute substantial compliance.

MODIFICATIONS & SEVERABILITY

63. No changes, modifications, or amendments of this Agreement shall be effective unless the parties agree in writing.

64. The parties agree to defend the provisions of this Agreement. The Parties shall notify each other of any court or administrative challenge to this Agreement. In the event any provision of this Settlement Agreement is challenged in any local or state court, removal to a federal court shall be sought.

65. This Agreement is enforceable through specific performance in Federal Court. Failure by any party to enforce this entire Agreement or any provision thereof with respect to any deadline or any other provision herein shall not be construed as a waiver of its right to enforce other deadlines and provisions of this Agreement.

66. In the event any party fails to fulfill any obligation under this Agreement, prior to initiating any court proceeding to remedy such failure, the party shall give written notice of the failure to the other parties. The parties shall have 45 days from receipt of such notice to discuss the alleged failure and resolve it. At the end of the 45-day period, in the event the noticing party determines that the alleged failure has not been resolved, the noticing party may, without further notice to the parties, file an action in the United States District Court for the Western District of New York (the "Federal Court Action") against the party or parties for breach of contract and any other appropriate causes of action and may seek specific performance and any other appropriate form of relief.

67. In connection with the Federal Court Action, the parties agree as follows:

A. The parties shall stipulate to in personam jurisdiction and to venue in the Western District of New York.

B. The City agrees that service by hand delivery of the summons, complaint, and any other documents required to be filed in connection with the initiation of the Federal Court Action upon the Corporation Counsel of the City shall be deemed good and sufficient service upon the City. The unions agree that service by hand delivery of the summons, complaint, and any other documents required to be filed in connection with the initiation of the Federal Court Action upon the union president or legal counsel to the union president shall be deemed good and sufficient service upon the union. DOJ agrees that service by hand delivery of the summons, complaint, and any other documents required to be filed in connection with the initiation of the Federal Court Action upon the Chief of the Special Litigation Section of the Civil Rights Division shall be deemed good and sufficient service upon the DOJ.

C. The parties hereby waive the right to file, and agree not to file or otherwise assert, any motion to dismiss (except for failure to state a claim or failure to meet the service requirements of paragraph 67(b)), to stay or otherwise defer, a Federal Court Action

alleging a failure to fulfill any obligation under this Agreement.

D. The parties agree to a trial of the Federal Court Action alleging a failure to fulfill any obligation under this Agreement commencing (a) 120 days after service of the summons and complaint as set forth above, or (b) the Court's earliest availability, whichever is later. Pursuant to Fed. Civ. Pro. R 26(d), the parties agree that discovery in the Federal Court Action alleging a failure to fulfill any obligation under this Agreement may begin within 15 days after service of the summons and complaint. The parties agree to submit all discovery requests and to schedule all depositions within 75 days after the service of the summons and complaint.

68. In the event the Court finds that any party has engaged in a material breach of the Agreement, the parties hereby stipulate that they shall move jointly for the Court to enter the Agreement (and any modifications that have been made pursuant to paragraph 63) as an order of the Court and to retain jurisdiction over the Agreement to resolve any and all disputes arising out of the Agreement.

69. Nothing in this Agreement shall preclude DOJ from filing an action against the BPD under any provision of federal law, except that this Agreement precludes DOJ from filing a claim under 42 U.S.C. § 14141 alleging a pattern or practice of excessive force or the improper use of CAP spray, when any such claim or claims are predicated on incidents that occurred before the effective date of this Agreement. The United States represents that as of the effective date of this Agreement, the City and the BPD are not the subject of any other investigation or action by the Department of Justice under 42 U.S.C §§ 3789d, 2000d, or 14141.

70. In the event any provision of this Agreement is declared invalid for any reason by a Court of competent jurisdiction, said finding shall not affect the remaining provisions of this Agreement.

For the United States Department of Justice:

Ralph F. Boyd
Assistant Attorney General
Civil Rights Division

Steven H. Rosenbaum
Chief
Donna M. Murphy
Deputy Chief
Blaise Supler
Senior Trial Attorney
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66400
Washington, D.C. 20035-6400
202-616-1959

For the City of Buffalo and the Buffalo Police Department:

Hon. Anthony M. Masiello
Mayor

City of Buffalo
201 City Hall
Buffalo, New York 14202
(716)851-4841

Hon. Rocco J. Diina
Police Commissioner
Buffalo Police Department
City of Buffalo
74 Franklin Street
Buffalo, New York 14202
(716) 851-4571

For the PBA:

Robert Meegan
President
Police Benevolent Association, Inc.
74 Franklin Street
Buffalo, New York 14202
(716) 851-4501

Thomas H. Burton
Attorney for the PBA
716 Brisbane Building
Buffalo, New York 14203-2194
(716) 853-2888

For the Local 264:

William D. McGuire
President
AFSCME Local 264
120 Delaware Avenue
Suite 428
Buffalo, NY 14202
716-852-0883