

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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8	UNITED STATES OF AMERICA,)	Case No. 2:12-cv-01282-JLR
9)	
10	Plaintiff,)	CITY’S SUPPLEMENTAL BRIEF RE
11	v.)	MOTION (DKT. #419) TO DECLARE IT
12	CITY OF SEATTLE,)	IN FULL & EFFECTIVE COMPLIANCE
13)	WITH THE CONSENT DECREE
	Defendant.)	Noted For: December 8, 2017
)	Oral Argument Requested

The Court’s November 20 order (Dkt. #424) calls for information related to the death of Charleena Lyles on June 18 of this year. That incident deserves more attention, in a forum dedicated to it, than can be paid in a 10-page supplemental brief on “full and effective compliance,” a term of art under the Consent Decree. Ms. Lyles’s tragic death deserves much more attention, which it will receive from both within the City and without. For now, the City of Seattle submits this supplemental brief in accordance with the Court’s order.

I. Introduction

Neither the City’s recent collective bargaining agreement with the Seattle Police Management Association (“SPMA”) nor the conclusion of the Seattle Police Department’s Force Review Board (“FRB”) review of the officer-involved shooting death of Charleena Lyles should impact the Court’s

1 decision on the City’s September 29 motion. For the reasons stated in that motion, the Court should
 2 declare the City in “full and effective compliance” with the Consent Decree. That was the City’s
 3 position when it filed the motion;¹ it is the City’s position today.

4 Both events, however, illustrate that a “full and effective compliance” ruling will not end the
 5 City’s obligations under the Consent Decree. The SPMA contract shows that SPD’s captains and
 6 lieutenants embrace most of the reforms of the City’s recent police accountability ordinance
 7 (“Ordinance,” Dkt. #396-1), including turning over the supervision of the police misconduct
 8 investigators at the City’s Office of Police Accountability (“OPA”) to civilians. Johnson Decl., Ex. C,
 9 Tab 3 (SPMA contract, Appx. B, “Civilianization”). That contract is an important step, but not the
 10 final step, toward fulfilling the City’s commitment to completing collective bargaining, before the end
 11 of this case, over the Ordinance and other policies (like body-worn video) that will make it easier for
 12 SPD to meet its obligations under the Decree. City Mot. (Dkt. #419) at 6. Today’s FRB report is not
 13 the end of the inquiry (from both within the City and without) into Ms. Lyles’s death, the events leading
 14 to it, and the City’s response. The Consent Decree and this Court’s oversight will not terminate until
 15 the City has demonstrated to the satisfaction of the Court (with input from the DOJ and the Monitor)
 16 that it has sustained compliance after a declaration of “full and effective compliance.” The Court will
 17 have the opportunity during the sustainment period to determine to what extent Ms. Lyles’s death and
 18 the City’s response to it bears on the City’s compliance with the Consent Decree.

19 **II. FRB Report on the Officer-Involved Shooting of Charleena Lyles**

20 The Court asked whether it correctly understood, “based on news reports, that on Tuesday,

21 ¹ City Mot. (Dkt. #419) at 18 (“Although the City has already stated its commitment to allowing the Court to complete
 22 that review [of the accountability ordinance] before the termination of the Decree, the Decree does not make the
 23 Court’s review a condition of ‘full and effective compliance.’”); *see also id.* at 20-21 (“[I]nquiries [into Ms. Lyles’s
 death] should not undermine the Monitor’s conclusions based on past data, conclusions that show that SPD has
 achieved full and effective compliance with every requirement of the Consent Decree. ... [T]he Monitor can and
 should address [any systemic SPD issues revealed by Ms. Lyles’s death] during the sustainment period.”).

1 November 14, 2017, the [FRB] found, by a unanimous vote, the fatal shooting of Ms. Charleena Lyles
 2 to be reasonable, proportional, and within SPD policy.” Nov. 20 ord. (Dkt. #424) at 2. The short answer
 3 is that the FRB convened on November 14 to consider the results of the investigation of SPD’s Force
 4 Investigation Team (“FIT”) into the death of Ms. Lyles. Among the many questions the FRB answered
 5 was whether the two officers who shot Ms. Lyles used force that was “Reasonable, Necessary, and
 6 Proportional” within the meaning of SPD’s Court-approved use-of-force policy. Johnson Decl. Ex. A
 7 (FRB Deliberations Guide at 4, question 3(a)), Ex. B, Tab 2 (Seattle Police Manual (“SPM”)
 8 8.200(1)).² The FRB concluded that the officers’ use of force met that standard.³ Boatright Decl.,
 9 Ex. A. The longer answer is that the FRB, in accordance with policies and procedures that have evolved
 10 at the urging of the Monitor and with the Court’s approval, answered many more questions than the
 11 one the Court identified, and fulfilled its obligations to discuss and make recommendations to SPD
 12 about issues and questions that its review raised. Johnson Decl. Ex. A (FRB Deliberations Guide);
 13 Boatright Decl., Ex. A (FRB report). And the answer to a question perhaps implicit in the November
 14 20 order (and a question of many in the Seattle community) is that even if the events leading to Ms.
 15 Lyles’s death were within policy, that does not mean that SPD or other entities and officials within the
 16 City believe that the shooting was anything less than a tragedy. It does not mean that SPD or the City
 17 will cease efforts to examine the incident fully, to work to prevent similar tragedies, and to build the
 18 trust of a community shaken not only by this incident, but by a national spotlight on police shootings.

19
 20 _____
 21 ² The City has attached relevant sections of the Seattle Police Manual to the Declaration of Josh Johnson, filed today.
 The Manual is available in its entirety at <http://www.seattle.gov/police-manual>.

22 ³ In accordance with Court-approved policies, the FRB deliberates privately. Johnson Decl., Ex. B, Tab 5 (SPM 8.500-
 POL-4(7) (listing permitted participants and observers at FRB deliberations). The Consent Decree grants the DOJ and
 23 the Monitor’s team the right to observe FRB proceedings, including deliberations. Although the FRB makes findings
 by majority vote, *id.* (SPM 8.500-POL-4(6)), it has never memorialized vote counts in reports of its proceedings, and
 does not intend to change that practice. Boatright Decl. ¶ 4. Because the Court has asked that SPD address a leaked
 media report, Nov. 20 ord. (Dkt. #424) at 2, SPD confirms that the vote in this case was unanimous. *Id.*

1 The FRB report contains the Board's recommendations to SPD, but there are more recommendations
2 and reforms to come.

3 Before placing the FRB report in context, the City answers the Court's remaining question:
4 what impact should the FRB's report have on the Court's consideration of the City's motion for full
5 and effective compliance? The report should not influence the Court's ruling. The City's motion is
6 based on the City's compliance with the Consent Decree as measured by the Monitor's assessments of
7 the City's progress before Ms. Lyles's death. City Mot. (Dkt. #419) at 20-21. The Consent Decree and
8 this Court's oversight will not terminate until the City has demonstrated to the satisfaction of the Court
9 (with input from the DOJ and the Monitor) that it has sustained compliance after a declaration of "full
10 and effective compliance." City Mot. (Dkt. #419) at 4-5 (addressing Consent' Decree's compliance
11 phase and termination). If Ms. Lyles's death or the City's response to it demonstrate, along with other
12 evidence, that SPD has failed to comply with one or more requirements of the Decree, the Court can
13 make that determination on a complete record at that time.

14 Given the Court's interest in the FRB report, some context for FIT, FRB, and its report may be
15 useful. At the inception of the Consent Decree in 2012, SPD's *Firearms* Review Board provided the
16 sole internal review of officer-involved shootings, and SPD's homicide unit investigated those
17 shootings. Consent Decree ¶¶ 37, 112. At the urging of the Monitor, who repeatedly criticized the
18 Firearms Review Board and homicide investigations in officer-involved shootings, SPD adopted and
19 refined its current policy, in which the Force Review Board reviews all of SPD's most serious uses of
20 force (so-called "Type III" force), and does so based on the investigations conducted by FIT.⁴ The

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22 ⁴ The Monitor's semiannual reports chronicle both its criticism of the Firearms Review Board process and SPD's
23 evolution, in consultation with the Monitor and the parties, toward the current roles of FIT and the FRB. 2nd
Semiannual Rep. (Dkt. #114) at 19-20, 31-39; 4th Semiannual Rep. (Dkt. #187) at 37-40. That evolution is ongoing.
The Community Police Commission continues to work with SPD and other stakeholders to evaluate a more public-
facing FRB and the possibility of outside investigations of serious uses of force by SPD officers.

1 investigative work of FIT and the constitution and deliberation of the FRB are governed by Court- and
2 Monitor-approved policies. Johnson Decl. Ex. B, Tab 4 (SPM 8.400 POL-4) (policy for FIT
3 investigation of Type III uses of force); Ex. B, Tab 5 (SPM 8.500 POL-4) (FRB policy), both approved
4 in Jul. 27, 2015 ord. (Dkt. 225); Dec. 13, 2016 ord. (Dkt. #341) (approving procedural manual for FIT).

5 In accordance with those policies, FRB deliberations follow a template consisting of questions
6 on tactics and decision making (including compliance with SPD policies unrelated to the use of force),
7 whether the officer complied with SPD's Court-approved de-escalation policy,⁵ whether the officer's
8 use of force complied with the individual components of SPD's Court-approved use-of-force policy,⁶
9 whether supervisors present for the use of force or responding to the scene of the use of force followed
10 policies, and whether FIT's investigation was thorough, complete, and otherwise in compliance with
11 policy. Johnson Decl., Ex. A (FRB Deliberations Template). For each of those questions focused on
12 officers' actions, the template guides FRB to refer any potential policy violations to the Office of Police
13 Accountability ("OPA") for an investigation that may result in officer discipline, but also to consider
14 referrals to other units of SPD for follow-up. *Id.* Finally, the template concludes with "Other Board
15 Recommendations," a mandate that FRB reflect on "issues raised or lessons learned during th[e]
16 incident," with options to refer recommendations to SPD's Audit, Policy, and Research Section, its
17 Training unit, to a segment of SPD's chain of command, or to any other SPD unit. *Id.*

18 The FRB report released today includes a discussion, based on the FIT investigation, of the
19 events leading to Ms. Lyles's death as well as a discussion of the FRB's answers to the questions from
20 the template, FRB's recommendations, and its reasons for not making other recommendations.

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22 ⁵ Johnson Decl., Ex. B, Tab 1 (SPM 8.100), approved at Jul. 27, 2015 ord. (Dkt. #225).

23 ⁶ Johnson Decl., Ex. B, Tab 2 (SPM 8.200), approved at Jul. 27, 2015 ord. (Dkt. #225).

1 Boatright Decl., Ex. A. The City will not, in the few pages the Court allotted for this supplemental
 2 brief, attempt to summarize the FRB report or the material SPD has released today and in the days
 3 following Ms. Lyles's death.⁷ The report memorializes FRB's perspective on this tragedy. It is not the
 4 only perspective, even within the City.⁸

5 Although the FRB is SPD's internal mechanism for review of a significant use of force, it is
 6 not the City's final word. OPA and the Community Police Commission ("CPC") will continue the
 7 City's inquiry into Ms. Lyles's death and the lessons the City, SPD, and the Seattle community might
 8 learn. OPA is not only responsible for disciplinary investigations into officer misconduct,⁹ it can make
 9 "Management Action" recommendations to SPD, an important source of outside perspective on how
 10 SPD policies or training might evolve in response to any incident. Ordinance (Dkt. #396-1) at 19-20
 11 (§ 3.29.100(F), (H)); *see also id.* at 37 (§ 3.29.145(C)) (requiring OPA to post online "Management
 12 Action recommendations" as well as SPD's mandatory responses). Although CPC takes no role in the
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14 ⁷ Within days after Ms. Lyles's death, SPD published on its "SPD Blotter" website transcripts of the interviews of
 15 both officers involved in the shooting, the recording of Ms. Lyles's 911 call, dashcam video and audio, surveillance
 16 video from the hallway outside Ms. Lyles's apartment unit, a diagram of that unit, and several photos. Today's report
 includes additional material from the FIT investigation, including FIT's report and the Crime Scene Investigations
 unit's report. Boatright Decl., Ex. A.

17 ⁸ The City Attorney has a perspective as well, and looks forward to assisting City partners as they address some of the
 18 most significant concerns that have arisen in the wake of Ms. Lyles's death. Although the officers who responded to
 19 her burglary call on June 18 were alerted to the circumstances of Ms. Lyles's interaction with SPD officers on June 5,
 20 SPD could evaluate the feasibility of alerting officers to more extensive information where it can be collected and
 21 made available. It could also evaluate how officers might have planned better for their encounter with Ms. Lyles,
 given what they knew of the June 5 incident. The officers commendably recognized the potential perception of
 discrimination or abuse of power had its officers chosen to preemptively search a woman who was reporting a crime,
 was not suspected of a crime, and who exhibited no signs of crisis until seconds before officers fired shots, but SPD
 could examine its Court-approved search policy in light of what the officers knew when they encountered Ms. Lyles.
 Finally, SPD could consider an outside analysis of its policies and training for responding to threats from people armed
 with knives and other edged weapons. A substantial segment of the public believes that officers can do more to disarm
 knife-wielding suspects without resorting to lethal force. An external analysis of possible tactics might help SPD and
 the public as they examine their assumptions on that issue.

22 ⁹ Before the FRB convened, SPD referred to OPA a misconduct complaint based on one of the officers' failure to
 23 carry his taser during his encounter with Ms. Lyles. Boatright Decl., Ex. A (FRB report at 4 n.8). Although SPD does
 not mandate that any officer become certified to carry a taser, it mandates that officers who are certified carry their
 tasers while on duty. Johnson Decl., Ex. B, Tab 3 (SPM 8.300-POL-3(3)).

1 review of individual investigations, *id.* at 76-77 (§ 3.29.360(H)), it has authority to provide input to all
2 City entities, including SPD, on “SPD policies and practices of significance to the public,” *id.* at 66-
3 67 (§ 3.29.300(C)), and has responsibility for monitoring the implementation of its recommendations
4 and those of the OPA Director and OIG, *id.* at 76-77 (§ 3.29.360(E)). For example, even before the
5 FRB’s report, CPC was prepared to advocate for review of the effectiveness of tasers or other
6 “alternative strategies for disarming a person who appears to be armed with a knife,” and to help bring
7 clarity to the Seattle community about whether those options exist. CPC ltr. (Dkt. #421-1) at 2.

8 Finally, the City and the many voices within it will not have the last word on Ms. Lyles’s death.
9 As Ms. Lyles’s estate’s recent motion to intervene in this action (Dkt. #427) highlights, there are two
10 cases in Washington’s courts (an King County District Court inquest into her death, and her estate’s
11 suit against the City and the two officers who shot her) that will adjudicate the events leading to her
12 death and whether anyone is liable. This case, focused on ending any pattern or practice of the use of
13 excessive force by SPD officers rather than on any single event, should not become a substitute for
14 those forums.

15 **III. City’s New Collective Bargaining Agreement with SPMA**

16 The Court is correct in its understanding that the City Council approved a new collective
17 bargaining agreement between the City and SPMA on November 13, 2017. Nov. 20 ord. (Dkt. #424)
18 at 1-2. On that date, the City Council passed Ordinance 125441, making necessary budget
19 appropriations and authorizing the Mayor to execute a collective bargaining agreement that SPMA’s
20 membership had approved. SPMA’s membership embraced most of the Ordinance, including allowing
21 civilians at OPA to conduct disciplinary investigations of SPMA members, agreeing to allow civilian
22 supervisors to replace its captains and lieutenants as supervisors of OPA’s investigators, and accepting
23 changes to disciplinary procedures. Johnson Decl., Ex. C, Tabs 2-3 (SPMA contract, Art. 16.4(A)-(H),

1 Appx. B). The Mayor executed the contract on November 17. *Id.*

2 The Court asked whether the contract “contains a provision for arbitration that may have an
3 impact on the police accountability ordinance” that the City filed with the Court (Dkt. # 396-1) on June
4 21. Nov. 20 ord. (Dkt. #424) at 2. It does. As the City Attorney stated in his November 20 letter:

5 The most significant departure [between the SPMA contract and the police
6 accountability ordinance], and the one that has drawn the most public attention, is that
7 whereas the ordinance allows an officer to appeal a disciplinary decision only to the
Public Safety Civil Service Commission, the agreement permits SPMA members, like
all union members in the City, the additional option to appeal discipline to an
arbitrator.

8 Nov. 20 ltr. (Dkt. #425). *Compare* Ordinance (Dkt. #396-1) at 86-87 (§ 3.29.420(A)(6)-(7)), at 99-100
9 (§ 4.08.070(J)) *with* Johnson Decl., Ex. C, Tab 1 (SPMA contract, Art. 15.1-15.3). Unlike SPMA’s
10 previous labor agreement, arbitrators are to be chosen solely from a list of labor arbitrators maintained
11 by the United States Federal Mediation and Conciliation Service, an improvement over SPMA’s
12 previous contract, in which the parties could unilaterally reject arbitrators from an ever-expanding list,
13 widely viewed as an advantage for the appealing employee. *Compare* Johnson Decl., Ex. C, Tab 1
14 (SPMA contract, Art. 15.3), *with* Johnson Decl., Ex. D (previous SPMA contract, Art. 15.2).

15 Barring unforeseen developments, the City Council and Mayor will amend the Ordinance so
16 that it is consistent with the SPMA contract. Whether those amendments come relatively soon or await
17 the results of the City’s ongoing bargaining with the Seattle Police Officers Guild (“SPOG”)¹⁰ is a
18 decision for the City’s legislative and executive officials.

19 The SPMA contract should not impact the Court’s consideration of the City’s motion for full
20 and effective compliance. Nov. 20 ord. (Dkt. #424) at 2. The Consent Decree imposes no specific
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22 _____
23 ¹⁰ Although the Court is familiar with the two unions representing the City’s sworn SPD officers, having offered them
the opportunity to appear in this action, Dec. 16, 2016 ord. (Dkt. #342) at 2, the City notes that SPMA is the smaller
of the two, representing SPD’s captains and lieutenants. SPOG represents SPD’s sergeants and line officers.

1 requirements on the City's police accountability entities, save for a few targeted obligations that OPA
2 has already satisfied. City Mot. (Dkt. # 419) at 17-18 & Appx. A n.3. It also imposes no obligations
3 on the City's process for imposing discipline or appealing it. Neither the DOJ nor the Monitor have
4 contended that any version of the City's officer discipline system, from its state at the inception of the
5 Consent Decree to its evolution through the Ordinance and the SPMA contract, violates the Consent
6 Decree or applicable law. The City's agreement with SPMA for an improved arbitration alternative
7 for disciplinary appeals does not bear on the City's compliance with the Consent Decree.

8 The City has two outstanding obligations to the Court with respect to the SPMA Agreement.
9 First, it is committed to completing the process that it began last year, earning the Court's confirmation
10 that the Ordinance's reorganization of existing police accountability entities and creation of new ones
11 is consistent with the Consent Decree. Consent Decree ¶ 219. The Court has chosen to "await the final
12 version [of the Ordinance] that is ultimately implemented following collective bargaining." Sept. 7,
13 2017 ord. (Dkt. #413) at 3. As the City Attorney noted in his November 20 letter, the City has not
14 asked the Court to review the City's incremental steps in bargaining and implementing the Ordinance,
15 following "the Court's instruction to seek review only if 'the parties believe such review is necessary
16 to keep the reform process moving forward.'" Nov. 20 letter (Dkt. 425) (quoting Sept. 7 ord. (Dkt.
17 #413) at 4).

18 The City's second outstanding obligation is compliance with the Court's March 16, 2016 order,
19 which requires the City to seek the Court's authorization before an employee uses a new "alternative
20 appeal process" created under a collective bargaining agreement. Mar. 16, 2016 ord. (Dkt. #278) at 2-
21 3. There are no currently pending appeals of discipline from SPMA members. Johnson Decl. ¶ 6.
22 Should an SPMA member pursue an appeal and seek to arbitrate it in accordance with the new SPMA
23

1 contract, the City will move for authorization from the Court.¹¹

2 The Court asked only about the SPMA contract's arbitration clause. Nov. 20 ord. (Dkt. #425)
 3 at 2. Although the SPMA contract embraces the Ordinance for the most part, there are other differences
 4 between the contract and the Ordinance. Nov. 20 ltr. (Dkt. #425); *see also* Johnson Decl., Because the
 5 Court has not asked, the City will not catalog SPMA's acceptance of important terms of the Ordinance,
 6 although it notes that Article 16 of the contract (Johnson Decl., Ex. C, Tab 2) expressly adopts most
 7 of the Ordinance's disciplinary provisions. The CPC has scrutinized the contract and is in the process
 8 of raising concerns to City officials about those instances in which it does not adopt the Ordinance or
 9 is subject to an interpretation that is inconsistent with the Ordinance.

10 **IV. Conclusion**

11 Neither the FRB Report on Ms. Lyles's death nor the City's recent breakthrough with SPMA
 12 should impact the Court's consideration of the City's motion for full and effective compliance. For the
 13 reasons stated in that motion, and the responses to it from the DOJ and CPC, the City renews its request
 14 that the Court grant its motion, declare that the City has achieved full and effective compliance with
 15 the Consent Decree, and order the parties and Monitor to prepare a plan for discharging their
 16 obligations during the sustainment period.

17 DATED this 8th day of December, 2017.

18 For the CITY OF SEATTLE

19 *s/Josh Johnson*

20 Josh Johnson

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23 ¹¹ SPOG continues to use the disciplinary review board ("DRB") alternative from its most recent collective bargaining agreement. The City understands the Court's March 16, 2016 order (Dkt. #278) requiring approval of alternative disciplinary appeal procedures in collective bargaining agreements to apply only to new agreements.

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED this 8th day of December, 2017, at Seattle, King County, Washington.

*s/*Josh Johnson _____
Josh Johnson, Assistant City Attorney