

CITIZEN REVIEW COMMITTEE

Community Oversight of Portland Police Bureau

Jamie Troy, Chair

Message: 503-823-0926

Fax: 503-823-3530

TTD: 503-823-6868

E-mail: crc@portlandoregon.gov
www.portlandoregon.gov/auditor/ipr

Minutes
Citizen Review Committee
November 7, 2012
Date Approved: December 5, 2012

Meeting Location: Lovejoy Room, Portland City Hall

Chair Troy called the meeting to order at 5:34 pm.

Introductions and Welcome

Citizen Review Committee (CRC) Members Present: Jamie Troy (Chair); Michael Bigham (Vice-chair), Jeff Bissonnette (Recorder), David Denecke, Rodney Paris, Dr. Rochelle Silver, Steve Yarosh

CRC Member Absent: K.A. Lalsingh (excused)

Appeal Process Advisor (APA): Sherelle Owens

City staff: Mary-Beth Baptista, Director, Independent Police Review (IPR); Constantin Severe, Assistant Director, IPR; Rachel Mortimer, Assistant Program Manager, IPR; Derek Reinke, Senior Management Analyst, IPR; Linley Rees, Deputy City Attorney; David Woboril, Deputy City Attorney

Portland Police Bureau (PPB): Captain Dave Famous, Professional Standards Division; Lieutenant Larry Graham, Internal Affairs (IA); Lieutenant Jamie Resch, East Precinct;

Community and Media: Dan Handelman, Portland Copwatch and Flying Focus Video; Debbie Aiona (League of Women Voters); Kalei Luyben, Ted Luyben, Ann Brayfield; Denis Theriault, Portland Mercury (Others whose names were not intelligible on the recording.)

Approval of Minutes of the 10/3/12 CRC Meeting

A motion was made by Mr. Denecke and seconded by Mr. Bigham to approve the minutes of the 5/2/12 CRC meeting. The motion passed 6-0, with one abstention (Dr. Silver)

IPR Director's Report (Director Baptista)

(See attached.)

Chair Troy requested that in the future CRC members be notified in advance when the NACOLE Conference is scheduled so that any CRC members who desire to attend at their own expense may make arrangements to do so.

CRC Chair's Report (Chair Troy)

Chair Troy: "As your Chair, I had contact with Mr. Pruitt, who also had contact with Director Baptista, to receive his resignation. I was very sad to have that communicated. Mr. Pruitt was a valuable member of the Committee, and I know that he took his duty with us seriously and that he has some things on his plate right now which are preventing him from being with us."

Chair Troy reported that beyond talking to Mr. Pruitt about his resignation, and beyond his work on the Crowd Control Workgroup, he has had a lot of communications with folks about the Department of Justice (DOJ) recommendations, and he wanted to make sure that we had some discussion about that this evening under Old Business.

Appeal Hearing for IPR Case #2008-C-0270/2012-X-0004

Chair Troy introduced the participants for the Appeal Hearing. The appellant was not able to attend the appeal hearing but was available by speaker phone. The appellant's attorney, Mr. Benjamin Haile, and APA Sherelle Owens were present. Lieutenant Resch of East Precinct was present to represent the Police Bureau's decision maker. The involved officer was not present for the hearing.

Chair Troy reminded participants that the names of the appellant and the involved officer should not be used at the hearing. Chair Troy stated a case file review of this case was previously held in which CRC had requested additional investigation, and Internal Affairs (IA) had complied with this request.

Chair Troy described the appeal process.

Mr. Denecke presented the CRC appeal summary.

Ms. Owens (APA) and Mr. Haile made statements on behalf of the appellant. The appellant stated that she had nothing to add.

There was no one present to make a statement on behalf of Officer A.

Lieutenant Graham presented a summary of the IA investigation.

Lieutenant Resch presented an explanation of the Command Staff findings

Mr. Denecke summarized the allegation and finding relating to this appeal and the options available to CRC.

Mr. Woboril addressed some questions that had been posed by Mr. Denecke to the City Attorney's Office.

Mr. Denecke: "The question which I posed to you, which is under 1010.20, is whether in an arrest which is not lawful, *any* force can be used in the conduct of such an arrest; and then the question I posed to you was directly from the statute ORS 161.235, which says – this is when force may be used under state statute – 'Use of physical force in making an arrest or in preventing an escape.' So the question is whether the arrest which justifies the use of force must be a lawful arrest."

Mr. Woboril (excerpts): "That gets us into a lot of legal concepts. My name's David Woboril. I'm with the City Attorney's Office. I'm not here as an advocate for any position. The City Attorney asked me to come and provide information on the legal concepts the CRC had questioned. I think that the principal issue in people's minds right now is whether the two events, the entry and the arrest, are contingent in some way: whether the nature of the first event affects whether or not the second event is in or out of policy.

"Let me explain my background. The reason I was asked out here, I did criminal defense for a number of years. I know the rules of criminal procedure pretty well. I also litigated the constitutionality of police events for a number of years. I've been involved in policy writing since.

"There are ideas in these different spheres – those three different spheres – that people might want to apply in a different sphere from which they come. In the criminal procedure world, there is a concept called the Exclusionary Rule. The courts feel that if there's a constitutional violation by police during an investigation – during interaction with somebody – and evidence flows from that, the courts are not going to allow that evidence into the trial of the case or the decision making of the case. It's a rule about the admissibility of evidence. You heard Lieutenant Resch earlier talk about the concept of 'fruit of the poisonous tree.' The courts see that anything that derives from, flows from, a constitutional violation is poison to them. There are exceptions, of course, but that's the rule they want to apply in decisions, and that's in a criminal prosecution context.

"In determining whether a particular act by a police officer is constitutional or not, we don't have that contingency of relationship. The courts take them separately. In the force context, the Supreme Court has clearly said that the lead-in to the decision in particular about whether to use force doesn't affect the validity or the constitutionality of that decision one way or the other. The decision about force has to be judged from the moment the decision to use force is made, in the context of the totality of circumstances, from the perspective of a reasonable officer at the scene.

"There's an exception. There's a very critical exception to that, and that is precipitation. If an officer creates the situation that forces the officer to use force, that is seen by the courts as a constitutional violation. The classic example is the officer steps in front of

the speeding car and has to shoot at the driver in order to protect the officer's life. The officer precipitated that crisis by doing something tactically incorrect in nature.

"So, in this situation, the Police Bureau's policy does not link the two events, and the constitutional law doesn't link the two events. Both the courts and the Police Bureau's policy would look at them separately, as IA indicated they did. The arrest, it turns out, can happen anywhere. If the police had encountered the appellant out on the street somewhere, it would be a lawful arrest. The judge has authorized taking the appellant into custody..., and that is not location dependent.

"Now, crossing the threshold *is* location dependent. There are rules about crossing thresholds to make an arrest. There are very few circumstances in which officers can cross a threshold to make a warrantless arrest. In Oregon, and this applies mostly across the country, officers can go across that threshold if they have a search warrant authorizing them to do that, if they have an arrest warrant, and it is the home of the subject of the warrant.... There are some circumstances, like hot pursuit, when an officer has probable cause to believe someone has committed a crime, the pursuit starts, and the person, in order to avoid the police, goes across the threshold, officers can follow. There are certain exigencies. Officers come up to a house, they have probable cause to believe a crime is being committed inside of the house, and there's certain exigencies for safety, they can go in – if there's destruction of evidence happening, or if there's escape happening.

"There is consent to go over the threshold, and there are certain community caretaking authorities. If officers come up to a house, and they realize someone's being brutalized inside, they can go across in order to deliver safety and security – to help people out. Same with health problems. Portland officers regularly go into people's homes, worried that people suffering medical emergencies inside are dead. Those are community caretaking entries that have nothing to do with crime.

"The policy that drives the law of arrest in Oregon is that we have agreed among ourselves that when there's a reason to arrest, whether we think it's right or not, that we dispute whether the arrest is righteous or not in court, and don't engage in physical struggle at the time. Much better, the courts think, to hash it out in court than to do it right there. That applies whether or not the arrest in the end turns out to be lawful. There may be defects in the arrest, but we all have responsibility to submit to the arrest.

"The Portland Police Bureau is certainly critical and has managed in the past officers who felt that impulse to go across the threshold. It's a big deal for them. It is not a trivial thing, and it's a very, very serious thing that can't happen, because the Bureau certainly does not want – the City Attorney sure doesn't want – fights in hallways when the officer shouldn't have been there in the first place. But as far as the legal connection or the policy connection between the entry and the struggle that occurs inside, there isn't a contingent relationship."

Mr. Bissonnette asked Director Baptista to comment on how she came to her decision on this case. Director Baptista stated although it was found that the officer reached

across the threshold to make an arrest, she did not find it to be a reasonable conclusion that the officer precipitated the level of force that was used. Looking at the totality of the circumstances, she believes that the force that was used was reasonable to make an arrest.

Mr. Woboril explained the Police Bureau's current use of force policy.

CRC discussion took place at this point, followed by public comment by Mr. Handelman.

Ms. Owens, Mr. Haile, and the appellant provided rebuttal comments.

Ms. Rees explained CRC's standard of review.

Dr. Silver made a motion to challenge the Police Bureau's finding on the allegation regarding the use of excessive force and to recommend a finding of Sustained.

Dr. Silver supported her motion as follows: "I want to support it in two ways. We're using a reasonable person standard. The reasonable person who was making the findings on two allegations first found that Allegation number one, the going over the threshold, was also exonerated until Captain Famous pointed out that the current law does not allow that. So that reasonable person was going to defend going over the threshold and then is now defending the use of force, which is the grasp. The grab is a use of excessive force, and so I don't believe a reasonable person could have come to a finding of exonerated."

Mr. Denecke seconded Dr. Silver's motion and stated the following:

"I've been in a quandary also over this question of the reasonable decision of the command staff, and although I think the command staff... although we have to look at the findings of the command staff in terms of the amount of force used, the question of what the directive means is something which we have to decide ourselves. And I'm quite concerned that the directive says that 'the force shall be used to accomplish the following official purposes: lawfully take a person into custody.' And in this case, this was not a lawful taking of a person into custody."

Mr. Yarosh responded as follows:

"I think that's absolutely incorrect... I think that we've already gone over this, and [Mr. Woboril] has explained to us that these are separate Fourth Amendment challenges. The fact that there was an unlawful entry does not mean that the force used was excessive. If that were the case, then every time a Terry stop was found to be unlawful, the patting down would be excessive force. Every time an arrest would be unlawful, the cuffing would be excessive force. It's an outrageous interpretation, and it's contrary to what the City Attorney told us."

Director Baptista asked to clarify the legal position that Mr. Woboril had presented earlier.

Director Baptista: "What he said consistently tonight is the arrest was not unlawful. The entering was. Those are two separate things. There was probable cause, so the arrest was lawful. The entering in which to make that arrest was what is a violation of the policy, not unlawful arrest. The arrest is still lawful. The remedy is, 'Now that I've violated your constitutional right, walked in the door to arrest you, everything I got from that is thrown out.' So it doesn't mean that everything that proceeds from that point forward isn't lawful."

The motion failed to pass by a vote of 2 in favor and 5 against.

Yes: Denecke, Silver

No: Bigham, Bissonnette, Paris, Troy, Yarosh

Chair Troy made a motion to affirm the Police Bureau's finding of Exonerated with a Debriefing. Mr. Bissonnette seconded the motion.

Mr. Bissonnette: "I'd like to say that this is the classic example of getting into the head of the decision maker; and even though I think that the policy needs to be changed, I think that to separate these things and call that totality of circumstance is somewhat ridiculous, but that's the card we have dealt. I was right on the edge of an Unproven, but I just couldn't get there, and so I'd just like to say two things. It does have a 'with debriefing.' I hope that the officer's debriefing includes things that he might have done beyond reaching into the door and asking some questions and getting some more information, and again, talking about de-escalation tactics. And then, just to comment on the disposition letter that was sent to the appellant: it really isn't very helpful. I think that saying that the first allegation is Sustained, the second allegation is Exonerated with a Debriefing and quoting the Bureau policy answers the question, but we've had two or three hours of discussion here, and probably another paragraph or two explaining some of that might have been helpful to the appellant. And so I encourage both IA and IPR to think about how this is read from a lay person's point of view.

Mr. Paris: "The situation that happened on that day does trouble me. I definitely think there was some bad decisions made by the officer. However, based on our standard of review, based on the current use of force policy, I just don't see how grabbing the appellant could be considered an excessive use of force in this situation."

The motion carried by a vote of 5 in favor and 2 against.

Yes: Bigham, Bissonnette, Paris, Troy, Yarosh

No: Denecke, Silver

Given the late hour Chair Troy deferred discussion of policy issues to the next meeting.

Old Business

CRC Response to DOJ report on Portland Police Bureau

Dr. Silver: "One of the issues that comes up for us is to complete appeals within 21 days, and I believe that the DOJ thinks that with an eleven-person committee and only a five-person quorum that somehow we can split up and do these things real fast, but I don't see how it can happen. I mean, each one of us needs to read the case. IPR and IA are very accommodating, but generally you can only read it from 8 to 5, and it's hard for some people to get down here, and so on. And if the case is thick, and then we have questions, and so on, it takes a long time. Then the APA, according to our rules, has to meet with the person I think twice. First we have to find an APA. They have to agree, then they have to make an arrangement with the appellant..., and anyway, I don't think it's possible to do a good job, using our procedure, in 21 days. We could, I suppose, change our procedure, but the procedure as it stands, it's just not going to be workable that fast." Dr. Silver thought that the time period for appeals needs to be at least 60 days.

Chair Troy: "I think there's also another restriction on CRC about how many times we can ask for additional investigation. I mean, the thing I don't really understand about these recommendations is DOJ requested our input one time. They set a date for that meeting. I put over hearings so that I could clear my schedule to attend that meeting, and then they changed the meeting to a different date, so that I was not able to attend the meeting. And I guess it's an efficiency perspective from them, but it seems like it was done without a lot of input from CRC as to whether or not it was workable. And because I wasn't a party to our second meeting, I don't know if there were a lot of discussions between CRC members and DOJ about our timelines or our requests for additional investigation."

Mr. Denecke: "There was no discussion about the process that I recall."

Director Baptista: "After the letter came out on September 14th there were at least three publicized conference calls where they asked for community input."

Chair Troy: "One of which occurred, I think, during the middle of our CRC meeting." I think they were originally only going to do one, so then there was a second one. I believe Ms. Lalsingh participated in that, although she's not here. It just does strike me as odd that we would be relegated to just sitting in a conference call, but when they're specifically looking at the citizen oversight of the Portland Police Bureau and changing our timelines, I don't know how these recommendations were made without more at least discussion with the body that exists as to why they believe it's necessary, what we think about that, et cetera.... I can't say that I really understand what this agreement is,

it's a lawsuit that's filed and settled, and I'm not sure on what the enforcement mechanism is for the CRC."

Mr. Bissonnette: "I just want to get this clear... the report that came out... had sort of broad things about the Police Bureau and interaction with the community and focused on the mentally ill and that sort of thing. What we're talking about now is the agreement, and not the report. And I think that the agreement was announced a week ago, maybe a little bit more... so then I guess what the Director just said, which troubles me even more, is what the City is committing to on our behalf, and without a lot of consultation, and so my comment somewhat facetiously to a few of you this evening is that if a Service Improvement Opportunity can't be done in under 80 or 90 days, I don't know how appeals can."

Chair Troy: "...If the City and DOJ believe that there should continue to be citizen oversight of police conduct, and they are genuine in that belief, then I think they need to revisit how volunteers, some of whom are full-time employees, could meet that timeline. And maybe one of the outcomes is that we will have only retired individuals on the Citizen Review Committee, because those individuals have more time. I know that IPR did want a broad coalition of committee members on here. They wanted diversity on the committee. I think that diversity is very helpful to this process and that different viewpoints are very helpful to this process. That will be eliminated with the current timeline, and if it comes to pass that that's how it is, I plan to tender my resignation. I can't do it. And I don't say that like jumping up and down, and I'm not excited about that. I just think that I take my volunteer time here seriously, and I know my other community members do, and if we're going to do this with integrity and listen to people, it cannot happen in that rushed of a process."

Chair Troy asked if anyone on CRC thought that 21 days is a reasonable time period.

Mr. Yarosh: "I think that maybe they're operating under the misapprehension that we are compensated, that we're paid. And I think what we need to do is amend the agreement to reflect that understanding."

By consensus, Dr. Silver and Vice-chair Bigham were given permission to represent the entire CRC in giving testimony the following day to the City Council about the DOJ agreement and recommending that a minimum of 60 days be allowed for appeals. Chair Troy agreed to write a letter to this effect.

CRC Recruitment

Director Baptista said that the DOJ agreement has provisions that change the role and number of CRC members. She said that she cannot commit on when to begin the CRC recruitment process until it is clear how many new positions will need to be recruited for.

Captain Famous and Lieutenant Graham gave an update on the further investigation that is being conducted at the request of CRC on a previous appeal.

New Business

None

Workgroup Updates

Crowd Control Workgroup (Mr. Paris): The workgroup has been continuing to gather information from experts and the public. There will be a meeting later this month with a representative from the City Attorney's Office to discuss their view of legal standards surrounding the First Amendment, policy, and state and federal law around these issues. The date of the next meeting is not yet finalized.

Outreach Workgroup (Dr. Silver): The CRC's equity training will take place on Saturday from 9:00 a.m. to 12:30 p.m. at the Multnomah Arts Center. On Tuesday night 11/13/12 the CRC will be holding a community forum in conjunction with Race Talks beginning at 7:00 p.m. at Kennedy School. The next workgroup meeting is scheduled for 12/5/12 at 4:00 p.m. in the Audit Service's Library.

Recruitment, Retention, and Promotion Workgroup (Mr. Yarosh): The workgroup meets on the second Friday of each month. The workgroup last met on 10/19/12. There were two guest speakers, Professor Renauer of Portland State University and former Hillsboro Police Chief Ron Louie. Both will return for the next meeting, which is scheduled for 11/16/12 at 10:00 a.m. in the Auditor's Conference Room.

Recurring Audit Workgroup (Mr. Bissonnette): The workgroup is working on completing its entering work so they can complete its analysis of dismissals.

Use of Deadly Force Workgroup (Mr. Denecke): Plans to meet with members of the Training Division were postponed due to the proposed changes in policies. The workgroup members prepared comments on their own personal perspectives on Directives 1010.10 and 1010.20, which were formulated into a letter to DOJ and City Council. Mr. Denecke will send a copy of the letter to all CRC members.

Public Comments

Ms. Aiona: expressed concerns about DOJ's 21-day timeline for appeals.

Mr. Handelman: commented that the Mayor intervened on the case in which IA had declined CRC's request for more investigation. He commented on tonight's appeal hearing and the Taser report that will be presented to City Council tomorrow.

An unidentified person made a public comment regarding the DOJ agreement.

Wrap-up Comments

Vice-chair Bigham announced that he and Dr. Silver would be presenting the Taser/Less Lethal Workgroup report to Council tomorrow. He recommended that the City send a CRC representative to NACOLE every year.

Adjournment

Chair Troy adjourned the meeting at 9:20 p.m.