

AMENDED MEMORANDUM OF AGREEMENT

Between the United States Department of Justice

and the

City of Buffalo, New York and

the Buffalo Police Department, and

the Police Benevolent Association, Inc.

July 9, 2007

Amended Memorandum of Agreement
Between the United States Department of Justice
and the City of Buffalo, New York
the Buffalo Police Department, and
the Police Benevolent Association, Inc.

INTRODUCTION

1. The United States Department of Justice (“DOJ”), the City of Buffalo and its police department (collectively referred to as “BPD”), and the Police Benevolent Association, Inc. (“PBA”) have, pursuant to paragraph 63 of the Memorandum of Agreement (“Agreement”) signed on September 19, 2002, agreed to modify the terms of the Agreement to narrow the issues and finalize the parties’ efforts to develop management practices consistent with the best standards of police practices.
2. The purpose of this Amended Agreement is to continue the cooperative effort of the DOJ, the City, the BPD and the PBA 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.
3. This Amended Agreement is effectuated pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.
4. The parties have worked cooperatively to implement the September 19, 2002 Memorandum of Agreement and all parties have contributed to the substantial progress

that the BPD has made in striving to provide the best police service to the City of Buffalo and its citizens. This Amended Agreement will continue the substantial progress that the BPD has achieved.

5. Nothing in this Amended 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 Amended 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 Amended 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, or the PBA 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. The Agreement and this Amended Agreement are 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 the Agreement and the Amended 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 the Agreement and the Amended 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 and the PBA signify that the parties have given final approval to this Amended Agreement effective of the date signed by the last official of any party executing the Amended 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 “officer” means any law enforcement officer employed by the BPD, including police officers , and supervisors and senior supervisors.
- d. 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.
- e. The term “district” means a geographic subdivision of the City of Buffalo used by the BPD to delineate the jurisdiction of each police station.
- f. 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.

- g. 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.
- h. 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.

TRAINING

- 13. 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).

14. 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. 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.
15. The BPD shall maintain written records documenting all training, reflected in this Amended 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.

16. 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

17. The BPD shall implement a system(s) for tracking and analyzing all uses of force and complaints. The system(s) shall collect and record, at a minimum, the following:
 - 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.
- 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.

- d. The BPD shall continue to follow its written protocol governing the use of the tracking system(s). This protocol specifies: (i) the 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.
 - e. 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.
18. 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.
19. 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.
20. BPD senior supervisors shall analyze complaint data from the complaint tracking system on a quarterly, cumulative basis to detect trends of BPD officer complaints. 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).

COMPLAINT AND INVESTIGATION PROCESS

Quality Assurance

22. 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.

23. The Professional Standards Division (“PSD”) shall continue to maintain its manual concerning PSD policies and procedures (including complaint receipt, report writing, locating witnesses, investigative and interview techniques). The City shall insure that all PSD investigators receive adequate training in these policies and procedures to enable them to carry out these duties.

Filing A Complaint

24. 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.
25. 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, 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.

Investigating Complaints

26. PSD shall investigate all complaints alleging improper use of CAP spray or improper use of force. PSD shall complete the investigation in a reasonable period of time, but in any event, not more than 120 days. PSD shall monitor and be responsible for the progress and completeness of all complaint investigations. 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. 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.

27. 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.
28. 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.
29. 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.
30. 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 and open an investigation where appropriate.

31. 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).
32. 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

33. 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"; or "Exonerated".
34. 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. In addition, the BPD shall make reasonable credibility determinations, with no automatic preference given to an officer's statement over a non-officer's statement or discounting a witness's statement merely because the witness has some connection to the subject or complainant.

35. A copy of the final disposition and reasons for it (including any credibility determinations), shall be placed in the PSD file.
36. 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.
37. 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).

38. 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.
39. PSD shall issue a public semi-annual statistical report of all use of force investigations during the previous two years and their status and disposition.

AGREEMENT COORDINATOR

40. The parties agree that the BPD will hire and retain, or reassign a current BPD employee or independent contractor for the duration of this Amended Agreement, to serve as a full-time BPD Agreement Coordinator. The Agreement Coordinator will serve as a liaison between the BPD, the Reviewer, and DOJ, and will assist with the BPD's compliance with this Amended Agreement. At a minimum, the Agreement Coordinator will:
coordinate the BPD's compliance and implementation efforts; facilitate the provision of data, documents and other access to BPD employee and material to the Reviewer and DOJ as needed; ensure that all documents and records are maintained as provided in this Amended Agreement; and assist in assigning implementation tasks to BPD personnel, as directed by the Commissioner of Police or his designee. The BPD Agreement Coordinator will take primary responsibility for collecting the information the Reviewer

requires to carry out the terms of this Amended Agreement. The Amended Coordinator will be appointed before the first meeting held under provision 50.

REVIEWER

41. The City shall continue to maintain the Reviewer appointed in the September 19, 2002 Memorandum of Agreement throughout the life of this Amended Agreement to report to the parties on a quarterly basis the City's implementation of and compliance with this Amended 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 Amended Agreement. The Reviewer may testify in any case brought by any party to this Amended Agreement regarding any matter relating to the implementation, enforcement, or dissolution the Agreement or of this Amended 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 the Agreement or this Amended Agreement or regarding any matter or subject that the Reviewer may have received knowledge of as a result of his or her performance under the Agreement or this Amended Agreement. Unless agreed to by all parties, the Reviewer will not accept employment or provide consulting services related to his responsibilities under the Agreement or this Amended 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 the Agreement or this Amended Agreement. Provided, however, that this paragraph does not apply to any proceeding before a court related to performance of contracts or subcontracts for monitoring the Agreement or Amended 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.

42. Should the current Reviewer be replaced by mutual agreement of all parties, 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.
43. 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.
44. The Reviewer will ensure that quarterly review reports are succinct, user-friendly, documents containing information regarding the progress for each Amended Agreement provision during the quarter at issue, with particular attention to any effort needed by the parties to achieve “substantial compliance” as that term is defined in this Amended Agreement. Any historical compliance information included in the report will be contained in an attached index.
45. At least ten business days before filing a report, the Reviewer shall provide a copy of the draft to the parties for input as to whether any factual errors were made or whether any sensitive data is disclosed. The Reviewer shall consider the parties’ responses and make appropriate changes, if any, before issuing the report.

46. 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.
47. The Reviewer shall only have the duties, responsibilities, and authority conferred by this Amended 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.
48. The Reviewer may offer the City and BPD technical assistance regarding compliance with this Amended Agreement. The Reviewer may not modify, amend, diminish, or expand this Amended Agreement.
49. In auditing the implementation of this Amended Agreement, the Reviewer shall maintain regular contact with the parties.

MONTHLY MEETINGS

50. For the duration of this Agreement, the Reviewer, the BPD's 1st Deputy Police Commissioner and other BPD representatives, including the Agreement Coordinator, representatives from DOJ, and a PBA representative will conference each month to discuss the status of implementation of this Amended Agreement, in order to address issues impeding implementation or delaying substantial compliance.
51. The Reviewer will propose an agenda for each monthly conference and circulate it among the parties one week prior to the conference date. Upon receiving the draft

agenda, each party may offer the Reviewer suggestions for additions to the conference agenda.

TECHNICAL ASSISTANCE

52. The DOJ will provide the BPD with technical assistance, to the level it deems appropriate, to facilitate completion of the Amended Agreement in a timely manner.

COMPLIANCE

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

TERMINATION

55. This Amended Agreement shall terminate under the following conditions:
- a. This Amended Agreement will terminate on the one-year anniversary of the effective date of the Amended Agreement. This Amended Agreement will terminate prior to the one-year anniversary of the effective date of the Agreement if the City and BPD are in substantial compliance with each provision. The burden for termination prior to the one-year anniversary shall be on the City and BPD to demonstrate that it has fully and faithfully implemented all provisions of this Amended Agreement, and the DOJ shall not unreasonably refuse to terminate this Amended Agreement.
 - b. For purposes of this paragraph, “substantial compliance” means there has been performance of the material terms of the Amended Agreement. Materiality shall be determined by reference to the overall objectives of the Amended 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

56. No changes, modifications, or amendments of this Amended Agreement shall be effective unless the parties agree in writing.
57. The parties agree to defend the provisions of this Amended Agreement. The Parties shall notify each other of any court or administrative challenge to this Amended Agreement. In the event any provision of this Amended Agreement is challenged in any local or state court, removal to a federal court shall be sought.
58. This Amended 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.
59. In the event any party fails to fulfill any obligation under this Amended 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.

60. 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 PBA 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 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), 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 of the summons and complaint.
61. In the event the Court finds that any party has engaged in a material breach of the Agreement or Amended Agreement, the parties hereby stipulate that they shall move jointly for the Court to enter the Agreement and Amended Agreement (and any modifications that have been made) as an order of the Court and to retain jurisdiction over the Agreement or Amended Agreement to resolve any and all disputes arising out of the Agreement or the Amended Agreement.
62. Nothing in this Amended Agreement shall preclude after the service DOJ from filing an action against the BPD under any provision of federal law, except that the Agreement and the Amended Agreement preclude 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 the Agreement. The United States represents that as of the effective date of the Agreement and the Amended 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.

63. In the event any provision of this Amended Agreement is declared invalid for any reason by a Court of competent jurisdiction, said finding shall not affect the remaining provisions of this Amended Agreement.
64. The City shall implement all provisions of this Agreement immediately after the effective date of this Agreement.

FOR THE UNITED STATES:

DATE _____

/s/ Wan J. Kim

WAN J. KIM
Assistant Attorney General
Civil Rights Division

/s/ Shanetta Y. Cutlar

SHANETTA Y. CUTLAR
Chief
Special Litigation Section
Civil Rights Division

/s/ Tammie M. Gregg

TAMMIE M. GREGG
Principal Deputy Chief
Special Litigation Section
Civil Rights Division

/s/ Gregory Gonzalez

GREGORY GONZALEZ
COREY M. SANDERS
Trial Attorneys
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 305-2941 (telephone)
(202) 514-6903 (facsimile)

**FOR THE CITY OF BUFFALO,
NEW YORK, AND ITS OFFICES,
AGENCIES, AND DEPARTMENTS,
AND THE POLICE BENEVOLENT
ASSOCIATION, INC.**

DATE _____

/s/ Byron Brown

Byron Brown
Mayor of Buffalo
201 City Hall
Buffalo, New York 14202
(716) 851-4841 (telephone)
(716) 851-4791 (facsimile)

/s/ Robert Meegan

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

/s/ H. McCarthy Gipson

H. MCCARTHY GIPSON
Commissioner of Police
Buffalo Police Department
74 Franklin Street
Buffalo, New York 14202
(716) 851-4571 (telephone)

/s/ Thomas H. Burto

THOMAS H. BURTON
716 Brisbane Building
Buffalo, New York 14203
(716) 853-2888 (telephone)
(716) 852-2892 (facsimile)

/s/ Matthew C. Vanvessem

MATTHEW C. VANVESSEM
Jaeckle Fleischmann & Mugel, LLP
12 Fountain Plaza
Buffalo, New York 14202-2292
(716) 856-0600 (telephone)
(716) 856-0432 (facsimile)