

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 1:15-CV-01046
	)	
Plaintiff,	)	
	)	JUDGE SOLOMON OLIVER, JR.
vs.	)	
	)	
CITY OF CLEVELAND,	)	<b><u>CITY OF CLEVELAND’S</u></b>
	)	<b><u>MOTION REGARDING CHARTER</u></b>
Defendant.	)	<b><u>AMENDMENTS</u></b>

**INTRODUCTION**

On November 2, 2021, the Cleveland voters adopted amendments to existing Charter Sections 115-1 through 115-4 which address the Police Review Board (PRB) and Office of Professional Standards (OPS). In the same Charter amendment the voters adopted new Section 115-5 establishing a Community Police Commission and outlining its duties, and new Section 119-1 titled “Discipline of Police.” The City respects the decision of the electors of the City who voted on November 2, 2021 and strives to fulfill its obligations.

This Motion is submitted under the newly adopted Charter Section 115-5 that requires the Director of Law, under a provision titled “Consent Decree modification,” to move the Court “to modify the federal Consent Decree in *United States v. Cleveland* to incorporate the amended and new sections and ensure that the voter’s intentions are given full effect. Until the Decree is modified to incorporate the amended and new sections, the

Commission will prioritize fulfilling duties required under the Decree over the additional duties this Section establishes.”

This provision, which is designed to make the Consent Decree conform to the Charter amendment, is at odds with the Court-ordered Consent Decree that requires any new law affecting the Consent Decree to be consistent with the Decree. Although the Charter amendment contains “voter findings” that “there is a need to “strengthen the police reform initiated by, but grossly insufficient in, the Consent Decree,” the Charter amendment recognizes that the Consent Decree controls until the Consent Decree is amended to include the Charter changes.

The Consent Decree at paragraph 13 provides:

This Agreement is binding upon all Parties hereto, by and through their officials, agents, employees, and successors. If the City establishes or reorganizes a government agency or entity whose function includes overseeing, regulating, accrediting, investigating, or otherwise reviewing the operations of CDP [Cleveland Department of Police] or any aspect thereof, the City agrees to ensure that these functions and entities are consistent with the terms of this Agreement and will incorporate the terms of this Agreement into the oversight, regulator, accreditation, investigation, or review functions of the government agency or entity as necessary to ensure consistency.

Additionally, the consent Decree requires the City to defend its provisions at paragraph 399 and to require compliance with it by City officers, employees, agencies, assigns, or successors at paragraph 400. Paragraph 399 states:

The Parties agree to defend the provisions of this Agreement including in collective bargaining. The Parties will notify each other of any court, union, or administrative challenge to this Agreement. In the event any provision of this Agreement is challenged in any city or state court, the Parties will seek removal to Federal Court.

Paragraph 400 states:

The City and CDP [Cleveland Division of Police] agree to require compliance with this Agreement by their respective officers, employees, agencies, assigns, or successors.

The November 2, 2021 adopted Charter amendments establish or reorganize Cleveland government agencies whose functions include overseeing, regulating, accrediting, investigating, or otherwise reviewing the operations of the Police Division. As addressed in this Motion, the adopted Charter amendments are not “consistent with the terms of” the Consent Decree. The Consent Decree addresses modification to the Agreement at paragraph 398, providing that the City and the Department of Justice (DOJ) “may jointly agree to make changes, modifications, and amendments to this Agreement, which will be effective if approved by the Court.”

In filing this Motion, the City is striving to fulfill its obligation under the Charter amendment. In conjunction with that, it is important to understand where the Charter amendment conflicts or intersects with the Consent Decree, the collective bargaining agreements with the two unions, and other legal authorities, including other Charter provisions. The following outlines the changes adopted by the voters on November 2, 2021, and notes where those changes intersect with or differ from the Consent Decree, the two collective bargaining agreements, and other legal authorities.<sup>1</sup>

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<sup>1</sup> The identification of conflicts and intersections with the Consent Decree, the collective bargaining agreements, or other laws may not be exhaustive and there may be other conflicts and intersections not identified here.

**GENERAL PROVISIONS RELEVANT TO CONSISTENCY**

The Consent Decree noted in its Introduction, “This Agreement does not alter the Cleveland Charter provisions regarding control and supervision of the police force. The Mayor of Cleveland and Director of Public Safety retain their authority over CDP and the Chief of CDP retains authority to oversee the operations of CDP.” The Consent Decree further states at paragraph 8, “This Agreement is not intended to limit the lawful authority of the Mayor of Cleveland over the CDP or the lawful authority of the Chief of Police to oversee the operations of CDP.” As addressed below the provisions in the adopted Charter amendments affect the control and authority of the Mayor and Police Chief as that control and authority was understood by the parties when they entered into the Agreement that was adopted by the Court as the Consent Decree. In other words, the Charter provisions that existed at the time the Consent Decree was negotiated and adopted informed the provisions in the Consent Decree.

It is important to note that the Consent Decree was entered as a Court order in June of 2015. During the past six years, the DOJ, the Monitor, and the Court have been involved in the implementation of the Consent Decree and the assessment of the City’s compliance with it. The Monitor’s role under the Consent Decree is stated generally in paragraph 350:

The Parties will jointly select an Independent Monitor (“Monitor”) who will assess and report whether the requirements of this Agreement have been implemented, and whether this implementation is resulting in constitutional and effective policing, professional treatment of individuals, and increased community trust of CDP. The Monitor will work with the Parties to identify and address any barriers to compliance.

The Monitor's duties are discussed in more detail in paragraphs 360 through 384.

Throughout the past six years, the Monitor and the Court have had final authority over the policies and training required under the Consent Decree. See paragraph 360. The Monitor's duties going forward primarily concern compliance. Any modification to the Consent Decree would disrupt compliance with and assessment under the Consent Decree midstream.

The newly adopted Charter Section 115-5 establishing the new Community Police Commission<sup>2</sup> also provides, "Where conflicts exist, this Charter Section supersedes and controls over any previously adopted provisions in the Charter, Cleveland Codified Ordinances, or collective-bargaining agreements."<sup>3</sup> There is not a similar provision addressing such conflicts in the amended Sections 115-1 through 115-4 and new section 119-1, thus those sections have not been given supremacy by the Charter amendment over conflicting Charter sections, Codified Ordinances, or collective bargaining agreements.

There are several places in the Charter amendment where discretion, without guidance or appropriate definitions, is given to the Police Review Board and the new Police Commission. Additionally, both the Police Review Board and the new Police

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<sup>2</sup> The existing Community Police Commission established under Section 16 of the Consent Decree is a separate entity from the newly created Commission and was not established pursuant to the newly enacted Section 115-5 of the Charter.

<sup>3</sup> If a matter pertains to the subjects listed in ORC 4117.10(A), the collective bargaining agreement addressing that matter prevails over conflicting laws. "The provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule Charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for laws specifically exempted by R.C. 4117.10(A)." *Swenton v. Gorden*, 8<sup>TH</sup> Dist. Cuyahoga Nos. 70860, 70864, 1997 Ohio App. LEXIS 508, at \*11-12 (Feb. 13, 1997) (citing *Mayfield Hts. Fire Fighters Assn., Local 1500 I.A.F.F. v. DeJohn*, 87 Ohio App.3d 358, 361, 622 N.E.2d 380 (8<sup>th</sup> Dist. 1993)). See also, *City of Rocky River v. State Emp. Rels. Bd.*, 43 Ohio St.3d 1 (1989).

Commission are given authority to determine penalties for failure to obey a subpoena if the Cleveland City Council does not do so. These provisions raise issues of unlawful delegation of legislative authority. Ohio Courts have long held that legislative powers cannot be delegated to administrative bodies or agencies. In 1937, the Ohio Supreme court held:

As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but, when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.

*Matz v. J.L. Cutis Cartage Co.*, 132 Ohio St. 271, ¶7 of the syllabus (1937). The Court further explained,

It is an accepted doctrine in our constitutional law that the lawmaking prerogative is a sovereign power conferred by the people upon the legislative branch of the government, in a state or the nation, and cannot be delegated to other officers, board or commission, or branch of government. Thus neither the Congress of the United States nor the general Assembly of Ohio can delegate its legislative power, but may confer administrative power on an executive, a board or commission.

*Id.* At 279.

Additionally, conferring general rule-making power does not solve the problem.

Without restrictions on the commission's power, rules and regulations of whatever kind could be adopted by it without notice and changed overnight. The result would be that statutory law would lose its significance and legal rights would be grounded in great measure upon the readily alterable rules and regulations of boards and commissions. Thus the constitutional right of referendum would be denied, government would be given over to the despotic rule of administrative authorities, and bureaucracy would run wild.

*Id.* At 280-281.

More recent Courts have discussed these issues. In *State ex rel. Meshel v. Keip*, 66 Ohio St.2d 379 (1981), the Court stated:

It is, of course, necessary that administrative bodies. . .be able to exercise discretion. Consequently, a distinction has traditionally been made between the delegation of legislative authority and the conferring of discretionary administrative authority. In an opinion by Judge Ranney in Cincinnati, W. & Z. R.R. Co. v. Commrs. of Clinton County (1852), 1 Ohio St. 77, this court held, at pages 88-89:

“ \* \* \* The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”

As a result of this distinction, it has been consistently held that there must be some discernable limits on the actions of administrative bodies or officers. Blue Cross v. Ratchford (1980), 64 Ohio St.2d 256, 416 N.E.2d 614; Weber v. Bd. of Health (1947), 148 Ohio St. 389, 74 N.E.2d 331; *Matz*, supra.

Historically this court required that specific standards be established over administrative action, and recognized as exceptions to this requirement cases in which the discretion to be exercised related to a police power and those where it was ***impossible or impractical*** to provide standards. *Matz*, supra. In *Ratchford*, however, we adopted a more flexible approach, holding in the syllabus of that case:

“A statute does not unconstitutionally delegate legislative power if it establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of the discretion can be reviewed effectively.”

*State ex rel. Meshel v. Keip* at 385-386.

### **NEWLY ADOPTED CHARTER PROVISIONS**

On the ballot at the election on November 2, 2021, the electors of the City of Cleveland were asked whether Charter Sections 115-1, 115-2, 115-3, and 115-4 should be amended and whether new Sections 115-5 and 119-1 should be adopted. A copy of the

Ordinance providing that the amendments and new provisions be placed on the ballot and stating the amendments and new provisions is attached as Exhibit A. The proposed amendments and new sections received more than a majority of the votes cast and thus became effective immediately upon adoption.

**I. SECTION 115-1, OFFICE OF PROFESSIONAL STANDARDS**

Section 115-1, which addresses the Office of Professional Standards (“OPS”), was amended to provide that the Office of Professional Standards now reports to the Civilian Police Review Board (“PRB”), that the Board is responsible for appointing the OPS administrator and investigators, and that the “Chief, police force, and executive head of the police force<sup>4</sup> must provide all assistance that the Board and Office of Professional Standards request to enable the Board and Office to carry out their duties.” It further provides, “This includes prompt production of all information and records requested, in no case in more than 30 days.” Before the provision was amended, OPS was in the office of the Public Safety Director and the Public Safety Director appointed the administrator and investigators in the office.

**II. SECTION 115-2, CIVILIAN POLICE REVIEW BOARD**

Section 115-2, which addresses the Civilian Police Review Board (“PRB”), previously was amended in 2016 in compliance with paragraph 230 of the Consent Decree which provides, “Within 120 days of the effective Date, in consultation with the

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<sup>4</sup> The executive head of the police force is the Mayor unless the Police Force is placed in a department, then the director of the department shall be the executive head under the direction of the Mayor. Charter Section 115. The Police Force was placed in the Department of Public Safety. See Codified Ordinance Chapter 135, specifically Section 135.01. For ease of reference, “Public Safety Director” or “Safety Director” will be used in place of “executive head of the police force.”

Commission, the Mayor will work with the City Council to develop an ordinance to place a Charter Amendment on the ballot that would ensure that the members of PRB are appointed in a transparent manner, are representative of the diverse communities within Cleveland, and allow the chair and vice chair of PRB, to each serve for a term of one year, to be selected from among the members by a majority vote of PRB's membership." To fulfill the requirement that the PRB members represent the diverse communities within Cleveland, the 2016 amendment provided, "Each of the police districts shall be represented by at least one (1) citizen who resides in that district. At least one member of the Board shall be between the ages of 18 and 30 at the time of appointment. . . ."

On November 2, 2021, Section 115-2 was amended to strike the sentence requiring that each police district be represented by a citizen who resides in the district and thus the requirement that there be a member from each police district. The amendment added a sentence stating, "No more than one Board member may be a resident of the same police district unless the City establishes fewer than nine districts." Because Cleveland has fewer than nine police districts, this sentence is not relevant and there now is no requirement that the Board include a citizen from each police district. The recent amendment contains a statement that the "Board shall consist of nine members who represent Cleveland's diverse communities." There is no further guidance "to ensure," that representation of Cleveland's diverse communities is achieved as is required in the Consent Decree.

Additionally, the recent amendment struck the requirement that a person between the ages of 18 and 30 be appointed to the PRB, but states, "At least one Board member should, where reasonably feasible, be between the ages of 18 and 30 at the time of

appointment.” The recent amendment also imposes further qualifications for some members of the Board. The new language now provides, “At least two members should be attorneys with experience representing victims of police misconduct or criminally prosecuting police misconduct.” Section 115-2 also was amended to provide, “The Board and its Office of Professional Standards must receive a budget totaling at least 1.0% of the budget allocated to the police force.”

### **III. SECTION 115-3, BOARD’S POWERS AND DUTIES**

Section 115-3, which addresses the powers and duties of the PRB, was amended to allow the PRB to receive, cause investigation of, and recommend resolution of matters brought “on its own complaint based on information that comes to its attention.”

Additionally, the following paragraph was added:

“It is not a proper consideration for the Board and its Office of Professional Standards to choose not to investigate particular allegations of police officer or Division of Police employee misconduct based on the fact or belief that another investigative agency, including the Division of Police’s Office of Internal Affairs, or that some other non-federal law-enforcement agency, is investigating or has already investigated and concluded that no misconduct or something less serious than the misconduct a complainant alleged took place. The Board and its Office of Professional Standards must never defer to the division of Police or outside, non-federal law-enforcement authorities in investigating allegations of police misconduct and must act independently, consistent with their mission of exercising civilian control and accountability over the police force.”

This paragraph is a change from the prior Charter language of Section 115-4 that had restricted OPS from investigating criminal proceedings stating:

“[T]he officer or employee in charge of administering the Office of Professional Standards shall cause a full and complete investigation to be made of each complaint filed with the Board, except complaints which relate to matters or occurrences that are the subject of pending criminal proceedings.” (Emphasis added).

This paragraph conflicts with the OPS operations manual developed in compliance with Consent Decree paragraph 200 and approved by the Court on March 6, 2017. (Dkt. 114, Order).

Section 115-3 was further amended to allow the Board itself to establish penalties for a refusal to obey a subpoena issued by the PRB if the City Council does not establish penalties. Furthermore, the former requirement that proposed rules of the Board “shall take effect fifteen (15) days after their publication in the *City Record*” was deleted in the Charter amendment.

#### **IV. SECTION 115-4, INVESTIGATION AND DISPOSITION OF COMPLAINTS**

Section 115-4, addressing investigation and disposition of complaints, was amended extensively on November 2, 2021. Under the former version of Section 115-4 that was adopted in 1988, the PRB recommended action on a sustained complaint to the Police Chief. The section outlined a process for the PRB to appeal to the Safety Director if the Board did not concur with the discipline decision of the Chief if it differed from the PRB recommended action. Under the amendments adopted on November 2, 2021,

If the Board decides that discipline should be imposed on the officers or employees under the Chief of Police’s management and control, the Board will submit its fact findings and recommendations to the Chief.

The Section continues:

The Chief and [Safety Director] must presume to be correct and defer to the Board’s fact findings and recommendations, absent affirmative proof by clear-and-convincing evidence that the findings and recommendations are clearly erroneous. Absent such proof, within ten days after receiving the Board’s fact findings and recommendations the Chief or [Safety Director] must impose at least the minimum discipline that the Board has recommended.

However, if the Chief or the Safety Director presents “affirmative proof by clear-and-convincing evidence” that the PRB’s recommendation is erroneous, the amended language authorizes the Board, if it does not agree, to overrule the Chief or Safety Director at its discretion.

[T]he Board. . . may, in its discretion overrule the Chief or [Public Safety Director], and order either of them to discipline the officer or employee, up to and including termination. The Chief or [Safety Director] must then comply.

Adopted Section 115-4 further gives the Community Police Commission, as created in new Charter Section 115-5, the authority “to make the final decision for the City about whether to impose officer discipline where it was not imposed, or to increase discipline when the Commission deems it insufficient.” And, the Chief, the Safety Director, and the Board “must notify complainants of their right to seek ultimate review by that Commission.”

These provisions modifying the PRB relationship with the Chief concerning PRB recommended discipline differ from paragraphs 241 and 242 of the Consent Decree and the process in the manual for OPS/PRB accepted by the Court.

Additionally, the provisions differ from the existing collective bargaining agreements (“CBA”) with the two police unions, the Cleveland Police Patrolmen’s Association (CPPA) and the Fraternal Order of Police (FOP). The CBAs require that discipline be based on an internal investigation within the department of Public Safety, outline that the Chief may suspend an officer for ten days or less with the Director of Public Safety responsible for more severe disciplinary penalties, and provide, “No

arbitrator or other party shall substitute his judgment for the judgment of the Chief of Police or the Director of Public Safety in applying discipline.”

Additionally, the amended section asserts, “Precedents, patterns or practices, and discipline predating this Section’s effective date cannot constitute clear-and-convincing evidence justifying any decision by the chief or executive head of the police force to impose lesser discipline than what the Board recommends, or no discipline.” The Consent Decree at paragraphs 245, 246, and 248 address imposition of discipline and the disciplinary matrix that was approved by the Court on January 24, 2018 (Dkt. 182) and as modified on August 27, 2019 (Dkt. 277).

Amended Section 115-4 also provides:

Termination will be the presumed discipline for racist, sexist, anti-LGBTQ+, anti-immigrant, national-origin-based, or otherwise bigoted conduct, slurs, or language used in the course and scope of employment, or, if the officer of Division of Police employee’s language is on a matter of public concern, where that officer or division of Police employee’s interest in commenting on matters of public concern does not outweigh the City’s interests, as an employer, in promoting the efficiency of the public services it performs through its employees [subject to an outlined balancing test].

Adopted Section 115-4 further states “The Board will ensure, through the Department of Law as appropriate, that complainants’ viewpoints are heard in any arbitration process following discipline.” It also places a similar responsibility on other City officials,

The Chief, the [Safety Director], the Board, and Community Police Commission must timely and consistently notify complainants about, and afford complainants, the right to be heard in every step of the disciplinary process, without limitation, from investigation, and through hearings, reviews and internal appeals, arbitrations, and court proceedings. Complainants cannot be excluded from being informed about or from being heard during these processes, and have a right to intervene.

Generally, the Cleveland Charter would not control Federal or State court jurisdiction and rules, or the procedures and rules of other tribunals.

Additionally, the amended section provides, “The Board, complainants, and any City taxpayer may take legal action to enforce all terms in all Charter sections related to the Board.” Again, the Cleveland Charter would not control or take precedence over either Federal or State court jurisdiction and rules.

The amended section also provides, “the Board may opt, if it deems the Director of Law to have a conflict of interest, to engage outside counsel at the Department of Law’s expense.” The current Cleveland Charter at Section 83 states that the Law Director

shall be the legal advisor of and attorney and counsel for the City, and for all officers and departments thereof in matters relating to their official duties. He shall prosecute or defend all suits for and in behalf of the City, and shall prepare all contracts, bonds and other instruments in writing in which the City is concerned and shall endorse on each his approval of the form and correctness thereof.

The Police Review Board is a board of the City. Only the Law Director may prosecute or defend suits on behalf of the City. Unlike Section 115-5, this Section 115-4 does not contain a statement that the provisions supersede and control over previously adopted provisions in the Charter.

#### **V. SECTION 115-5, COMMUNITY POLICE COMMISSION**

Paragraph 15 of the Consent Decree provides that Cleveland establish a Community Police Commission (CPC) “consisting of 13 members who represent the many and diverse communities in Cleveland.” The current Commission has the following mandate:

- a. to make recommendations to the chief of Police and the City, including the Mayor and the City Council, on policies and practices related to community and problem-oriented policing, bias-free policing, and police transparency;
- b. to work with the many communities that make up Cleveland for the purpose of developing recommendations for police practices that reflect an understanding of the values and priorities of Cleveland residents; and
- c. to report to the City and community as a whole and to provide transparency on police department reforms.

Notably the Commission under the Consent Decree had no authority beyond making recommendations.

The Commission under the Consent Decree could include individuals who reside or work within the City of Cleveland. New Charter Section 115-5 establishes a new Community Police Commission “as an independent municipal commission, with an executive director nominated by the Commission and appointed by the Mayor” with additional significant authority beyond the making of recommendations. Because the Charter amendment establishes a new, permanent City Commission, its members must be residents of the City as required by Charter section 74. In upholding R.C. Section 9.481, the Ohio Supreme Court struck down residency requirements for full-time employees only. That statute has no effect on City residency requirements otherwise established by the Charter for part-time employees and board and commission members who are not full or part-time employees. See e.g. *Youngstown v. State*, 7th Dist. Mahoning No. 07-MA-223, 2009-Ohio-5679, ¶ 30 (The court recognizes R.C. 9.481 draws a distinction between full-time employees who may live where they choose and others who may be subjected to a residency requirement).

Although new Section 115-5 states that it supersedes and controls over any previously adopted provisions in the Charter, Codified Ordinances, and collective-

bargaining agreements where a conflict exists, there is no conflict with Charter section 74's requirement that members of the newly created Commission be residents of the City because Section 115-5 does not address residency.

**A. Composition of the New Cleveland Police Commission**

There are 13 members, including three police-association members, who should broadly represent the racial, social, economic, and cultural interests of the City, including those of the racial-minority, immigrant/refugee, LGBTQ+, youth, faith, business, and other communities. At least two members must represent community organizations focused on civil rights issues and at least one member must be, represent, or be knowledgeable of at least one of the following five categories:

1. the issues of those who are limited-English speakers, homeless, or who have mental-illness and substance-abuse disorders;
2. those who have been directly impacted by police violence, or be a family member of a person who has been killed by police;
3. those who have been incarcerated and exonerated where police were involved in the wrongful conviction or incarceration;
4. gun-violence survivors or be a family member of a person killed by gun violence;
5. an attorney with experience representing victims of police misconduct or criminally prosecuting police misconduct.

With the exception of the police representatives, no member may have served within five years before appointment as a law-enforcement officer, have ever been an employee of the City's Division of Police or Department of Public Safety, or have been a

City employee within the previous year. Where feasible, the Mayor will seek to appoint at least one member between the ages of 18 and 30.

The police representatives must have a background relevant to police-community relations with no record of police misconduct, whether adjudicated or not, or career records or personal history requiring designation or disclosure under U.S. Supreme Court precedent requiring disclosure to criminal defendants.

Members serve for a maximum of four, four-year terms.

The Consent Decree at paragraph 16 outlines the composition requirements of the Community Police Commission created under the Consent Decree. The composition requirements and appointment process in paragraph 16 differ from the new Charter provision.

**B. Appointment and Removal of Non-Police Members of the New CPC**

The Mayor appoints the members of the new CPC after “an open and fair application process” with approval of the majority of Council. Three of those appointments must be nominated by Council and when vacancies arise the Mayor may designate one or more of the categories listed in A. above for nomination by Council. A non-police member may be removed for malfeasance, misfeasance, nonfeasance, or gross neglect of duty by the Mayor after a public hearing before the Mayor, if requested. The Council may override a mayoral removal by a two-thirds vote.

**C. Appointment and Removal of Police Members of the New CPC**

The Mayor may appoint no more than three representatives of police associations and those members may be removed by the Mayor for any reason and may be removed by the Police Commission for any reason by a majority vote of the non-police members. The

Charter provision specifically states that for the police members, “consistent opposition to police accountability and the Commission’s mission and duties should cause” removal.

The proposed Charter amendment does not establish guidelines for the Commission to determine what “consistent opposition” means.

**D. Duties and Authority of the New CPC**

The new Police Commission’s duties and authority include, but are not limited to 28 separately stated duties:

**1. Designating the CPC as the Final Authority on All Police Discipline.**

The new Charter section states that the Commission is the final authority on all discipline.

It states:

Serving as the final City authority on whether the discipline of police officers imposed or not imposed by the Chief of Police, [Safety Director], or Civilian Police Review Board is sufficient, with the discretionary authority, with due process afforded to a subject officer, to order that the Chief and [Safety Director] increase discipline; and to order that they impose discipline where none was imposed. The commission may, at its discretion, and upon notice, hold evidentiary hearings to review individual officer discipline following any proceedings and decisions by the Chief of Police, [Safety Director], and, as applicable, the Civilian Police Review Board. Any order by the Commission to increase or impose discipline will be final and the chief and executive head of the police force must follow it.

Under the Charter language in place when the Consent Decree was finalized, the Police Chief had the exclusive right to suspend any officers or employees in the classified service under the Chief’s management and control for ten days or less and the Public Safety Director was authorized to impose stricter discipline. As noted above, the Consent Decree specifically states that it does not alter those Charter provisions regarding the Chief’s authority. Additionally, over the past six years the Court has approved manuals and policies that recognize and rely on the final discipline authority remaining with the

Chief and Safety Director. Additionally, these provisions differ from the collective bargaining agreements with the two police unions. The CBAs outline that the Chief may suspend an officer for ten days or less with the Director of Public Safety responsible for more severe disciplinary penalties, and provide, “No arbitrator or other party shall substitute his judgment for the judgment of the Chief of Police or the Director of Public Safety in applying discipline.”

**2. Decreasing Discipline.** The Commission may order the Police Chief to decrease discipline, but only when the Commission determines that the officer is facing retaliation for protected activity or for whistleblowing about misconduct in the Police Division. This provision raises the same concerns about intersection with the Consent Decree and CBAs identified in the preceding paragraph number 1.

**3. Interview and Recommend Police Commander and Inspector General.** The new Charter section authorizes the Commission to interview and recommend candidates for police commander and inspector general to the Mayor. The current City Charter at section 116 provides that the Mayor appoints commanders from among persons recommended by the Chief of Police with the concurrence of the Public Safety Director.

**4. Subpoenas and Penalties.** Without any stated restrictions, the amendment authorizes the Commission to compel, through subpoena the attendance of witnesses and the production of evidence that it deems necessary for the performance of its duties. The Charter amendment provides that the Council may provide the penalty for contempt for refusing to obey the subpoenas and if Council does not provide for a penalty, the Commission itself shall provide for the penalty.

**5. The Commission as the Final Authority over Police Recruiting, Policies, Applications, and Examinations.** The new Charter section provides that the new Commission has final authority over establishing Police recruiting policies, applications, and examinations, including screening for bias. Under the current Charter, which this section purports to supersede if it conflicts, the Civil Service Commission determines qualifications and examinations. Under the Ohio Constitution at Article XV, Section 10, “Appointments and promotions in the civil service of the . . . cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.” The City of Cleveland has laws providing for enforcement of civil service provisions. Under the Current Charter, the Civil Service Commission is obligated to make rules for “the standardized classifications in the classified service of the City,” for “open competitive tests to ascertain the merit and fitness of all applicants for appointments in the competitive class,” and for “the rejection of candidates or those eligible who fail to comply with reasonable requirements as to moral, psychological, or physical character.” Charter section 128 (a), (b), and (e). Prior to the effectiveness of its rules, the Civil Service Commission shall print the proposed rules and give an opportunity “for a public hearing thereon to be held after reasonable notice thereof.” Charter section 127. The new Commission’s rulemaking authority has no provision requiring a hearing. The Consent Decree addresses recruitment and hiring in paragraphs 300 to 311. On February 20, 2019 the Court approved CDP’s Recruitment and Hiring Plan. (Dkt. 239, Order).

**6. Bias Screening and Training.** Under the new section, the Commission establishes bias-screening and training for existing police officers. The Consent Decree addresses bias-free policing at paragraphs 35 through 44. The Consent Decree addresses CDP's training at paragraphs 269-290. Paragraph 36 provides that the City "will integrate bias-free policing principles into its management, policies and procedures, job descriptions, recruitment, training, personnel evaluations, resource deployment, tactics, and accountability systems." Over the past six years, the Court has approved various policies and training curricula based on the Monitor's evaluation for compliance with paragraphs 35 through 44 and the general training paragraphs in the Consent Decree. See e.g. the Court's Order of July 26, 2019 wherein the Court approved CDP's bias-free training for 2019.

**7. Final Authority on Police Policies, Procedures, and Training Regimens.** The new Charter section provides that the Commission has "final authority over Police policies, procedures, and training regimens." The Charter at Section 116, which was in place when the Consent Decree was finalized, provides that the Police Chief shall have exclusive control of the stationing and transfer of the police force under rules and regulations as may be established by the Mayor or the Safety Director. As noted in item 6 above, the Consent Decree addresses training in the Bias-Free Policing section and the Training section. The Consent Decree requires a written training plan that is subject to a review and approval process that involves the DOJ, the Monitor, and the Court. Paragraph 271 of the Consent Decree.

Additionally, the Consent Decree at paragraphs 341 through 349 addresses Policies in general and requires specifically at paragraph 342 that CDP "develop, revise,

and implement policies and procedures to fully incorporate the terms of this Agreement and comply with applicable law.” Numerous Police policies have been developed, revised, and implemented with approval of the Court. Examples of the many and varied policy areas addressed and approved during the Consent Decree are those addressing Use of Force, Crisis Intervention, Bias Free Policing, Community and Problem Oriented Policing, Search and Seizure, Discipline, Investigatory Stops, Strip Searches, Domestic Violence, and Interactions with Youth. All policies require training, and the great majority of that required training has been completed.

**8. Training Audits.** The Commission is to audit and verify police training. Under the Consent Decree, the DOJ and the Monitor are tasked with auditing and verifying police training.

**9. CPC Maintains *Brady/Giglio* List and Public Accountability for Failure to Follow.** The new section provides that the Commission maintains its own *Brady/Giglio* list and authorizes it to ensure that the Police and municipal, county, state, and federal prosecutors disclose the information on the list in both criminal and civil cases where the officers are witnesses or parties. The amendment further provides that the Commission devise a means of public accountability for failure by the Police, the Chief, the Department of Law, and the county prosecutor, or others to track, identify, maintain, organize, and disclose that information. The Commission is to undertake such duty as to all current officers, including information that predates the effective date of the Charter amendment.

**10. CPC May Direct the PRB to Investigate.** The Commission directs the Police Review Board to investigate the conduct of every police officer against whom a

lawsuit has been threatened or filed or for whom the City has paid a settlement to obtain a liability release, or against whom there has been a court judgment for alleged misconduct. This is a change from current OPS/PRB investigation authority which involves misconduct complaints received from civilians.

**11. Propose and Advocate for Legislation.** The Commission proposes and advocates for legislation or regulations to Council, the State of Ohio, other legislative and regulatory authorities, and offers views on the City's, Mayor's, Police Chief's, and Public Safety Department's legislative agendas consistent with the Charter amendment.

**12. Community Outreach.** The Commission engages in community outreach concerning police-community relations, police policies and practices, the police-accountability system, and other matters consistent with the purposes of the authorizing Charter language.

**13. Maintain Connections.** The Commission maintains connection and collaboration with representatives of disenfranchised communities and other community groups.

**14. Provide Feedback.** The Commission provides Police, OPS, the Police Review Board, Internal Affairs, and other City law enforcement and police accountability entities with community feedback.

**15. Provide Technical Assistance.** The Commission provides technical assistance to the Police division, OPS, IA, PRB and other law enforcement and police accountability entities.

**16. Provide Independent Judgment and Analysis with Penalties for Interference or Non-Cooperation by any Person.** The new section provides that the

Commission exercises independent judgment and offers critical analysis in the performance of its duties without interference or non-cooperation from any person group, or organization including the Police Chief, the Public Safety Director, the Mayor, any Police Division employee and any other city official. The amendment further states, “City employees who violate this provision may be subject to dismissal, discipline, or censure consistent with city and state laws.” There is no definition of “interference” or “non-cooperation.”

**Note:** A separate provision in Section 115-5 creating the new Police Commission provides, “The Chief of Police, all Division of Police employees, and the [Public Safety Director] must fully cooperate with the Commission in performing all of its duties. Failure to do so is a terminable offense and the Commission may seek injunctive relief for failures.” There is no definition of “cooperate” or the mechanism to be employed for terminating the Chief, Director, or CDP employees. The Commission is not a separate legal entity. State and Federal laws control court jurisdiction.

**17. Information Must be Provided.** The Commission may request and “timely” receive information relevant to its duties from other City departments and offices.

**18. Review Policies, Data and Records and Advising.** The Commission reviews policy, data, and records to advise the Mayor, and other City departments on policing issues.

**19. Publish reports.** The Commission periodically publishes reports, recommendations, and notices.

**20. Audit and Investigate Investigations and Discipline, including Those that are Closed.** The Commission performs audits and broad investigations into CDP investigative processes, closed investigations, and closed discipline cases. The Consent Decree allows the Monitor to evaluate police investigations and investigative processes. Additionally, the Consent Decree provides for a Force Review Board at paragraphs 124 through 130. The Force Review Board “serves as a quality control mechanism for uses of force and force investigations and to appraise use of force incidents from a tactics, training, policy, and agency improvement perspective.” To fulfill this goal, the Force Review Board reviews investigations into use of force. Additionally, the Consent Decree requires the City to establish a Police Inspector General whose duties include auditing compliance with policies and procedures and conducting investigations. See paragraphs 250 through 256.

**21. Identify and Propose Systemic Improvement.** The Commission identifies and proposes opportunities for systemic improvements. The Consent Decree tasks both the Force Review Board and the Police Inspector General with these duties.

**22. Access Un-redacted Complaints and Files.** The Commission may access un-redacted complaints against officers and un-redacted files of all closed investigations, except for LEADS-type information and information covered by the Ohio Personal Information Systems Act.

**23. Protect Confidentiality.** The Commission is obligated to protect confidential, nonpublic records from disclosure.

**24. Hire Its Own Lawyers.** The Commission may hire outside legal services, at the Law Department’s expense, when it determines, in its discretion, that there is a

conflict of interest between its mission and representation from the Law Department. The Charter provides at Section 83, The Director of Law

shall be the legal advisor of and attorney and counsel for the City, and for all officers and departments thereof in matters relating to their official duties. He shall prosecute or defend all suits for and in behalf of the City, and shall prepare all contracts, bonds and other instruments in writing in which the City is concerned and shall endorse on each his approval of the form and correctness thereof.

The Commission is a board of the City and its members are officers of the City. The Law Director is the sole legal advisor for the City. The Commission is not a separate legal entity.

**25. Elicit Public Comment.** The Commission elicits public comment on police policy issues.

**26. Make Grants.** The Commission is authorized to make grants to community-based violence-prevention, restorative-justice, and mediation programs to reduce the need for police activity. The proposed amendment does not state that further Council authority is necessary.

**27. Adopt Rules.** The Commission adopts rules for its procedures and operations that are sufficient for efficient and effective execution of its duties. There is no guidance provided for those rules and no requirement for public hearing, publication, or comment.

**28. Other Consistent Duties.** “Exercising, without limitation, other duties consistent with the Commission’s broad purposes of exercising stronger civilian control and accountability over the Division of Police, that are consistent with this Charter.”

There is no further explanation regarding this broad authorization or how it may potentially impact on the Consent Decree and the City Charter.

#### **E. Compensation and Mandatory Increases**

The amendment mandates that the Council establish annual compensation for Commission members of no less than \$7200 adjusted annually by the Consumer Price Index (CPI) and reimburse the members for reasonable Commission-related business expenses.

#### **F. Executive Director and Staff**

The amendment mandates a minimum staff level for the new CPC. The Commission nominates its executive director who is appointed by the Mayor as an unclassified employee. The executive director may not have ever been employed in the Division of Police. The Mayor may recommend the executive director's removal for just cause subject to a confirmation by a two-thirds majority of the Commission. The Commission may on its own remove the executive director with or without cause by a two-thirds vote. The executive director shall have at least one assistant, who is to be unclassified, and a minimum support staff of three classified, noncompetitive positions. The amendment gives the executive director, with support from the Department of Human Resources, the ability to determine classifications and job descriptions. Under the current Charter, which is a law of the City providing for enforcement of the Ohio Constitution's civil service provision, the Civil Service Commission determines classifications, duties, and whether a position is in the competitive or noncompetitive classes of the classified service. The competitive class is for positions for which it is practicable to determine the merit and fitness of applicants by competitive tests. The

noncompetitive class includes positions requiring specialized training or skills requiring certification, licenses, or specialized qualifications. The Civil Service Commission also determines rules for suspension, demotion, or discharge.

#### **G. Executive Director Duties**

Under the Commission's direction, the executive director has the authority and responsibility to do eleven stated items, which include:

**1. Oversee and manage the office.**

**2. Hire supervise, and discharge employees.** There is no further mention of whether the City's existing Civil Service laws and rules must be followed.

**3. Execute, administer, modify, and enforce agreements.** "Execute, administer, modify, and enforce such agreements as the executive director may deem necessary to implement programs and carry out the Commission's duties; apply for grants and donations for Commission programs; and solicit and use volunteer services."

Cleveland's current Charter provides that all contracts involving any expenditure in excess of \$50,000 is to be authorized by an ordinance of Council and that contracts shall be made with the lowest and best bidder except in certain circumstances. The proposed amendment does not state that further Council authority is necessary.

**4. Represent the Commission.** Represent the Commission to provide testimony and expertise to other city departments and offices, and other organizations on issues of constitutional policing.

**5. Create an annual budget.** "Create an annual budget and advocate for operational resources. The City will provide additional staff and resources not outlined in this section that it deems sufficient to enable the Commission to perform its duties."

**6. Manage preparation of the Commission's budget.** New Section 115-5

states:

Manage the preparation of the Commission's proposed budget, and submit an annual budget request to the Mayor. The Mayor and Council will appropriate the office of the Commission's budget in a budget-control level independent of any other City department. The Director of Finance may review the budget request for lawfulness and reasonableness and make recommendations for improvement to the draft budget. No person in the executive branch will exercise discretionary authority to make changes to the proposed budget to which the Commission does not agree. Commissioners and the Executive Director may advocate for resources directly to Council members or the Council during the budget process and throughout the year.

The Consent Decree provides at paragraph 22 that the budget for the commission appointed under the Consent Decree "will be visible as a separate line item in the budget proposal that is submitted annually pursuant to the Charter to the Cleveland City Council with the appropriations ordinance. The Parties [the DOJ and the City] will endeavor to secure private funding for the Commission as appropriate. The Monitor will analyze the Commission's budget and advise the Parties and the Court as to whether it affords sufficient independence and resources to meet the terms of this Agreement." Current Charter section 38 requires the Mayor to prepare a Mayor's estimated budget that includes certain information, including the itemized expense for each department, comparisons of estimates from the two prior years, reasons for proposed increases or decreases in expenditures, itemization of debt, anticipated revenue, and other information requested by Council. Charter section 39 provides for an appropriation ordinance based on that estimate with a schedule showing what was refused or added to the Mayor's estimate by the Council after public hearings.

**7. Contracts and expenditures.** “Authorize necessary expenditures, and enter into contracts for professional and other services in accordance with the adopted budget, develop and manage programs, and undertake authorized activities.” This section does not state that further Council authority is necessary.

**8. Serve as secretary.** “Serve as Secretary of the Commission and of any advisory committee or subcommittee the Commission may create.”

**9. Maintain contacts with community groups.** In the area of regulation of the City’s police force and community-police relations, the executive director maintains contacts with community groups concerned with constitutional policing, social justice, and public safety and reports to the Commission regarding those groups; and serves as a resource for data on community policing, law enforcement, social justice, and racial justice.

**10. Implement the Commission’s decisions.** Implement the Commission’s decisions and, at the Commission’s direction, work with other City departments to improve law-enforcement services and police accountability; work to remove inequalities related to minority-group or other status related to law enforcement; conduct educational activities that will lead to better community-police relations.

**11. Further authority and duties.** “Exercise such other and further authority and duties as this Section prescribes.”

**H. Mandatory Budget Appropriation for the New Police Commission**

The amendment mandates that the Council appropriate no less than \$1 million annually for the CPC, with an annual increase of the greater of the CPI or the percentage increase in the Police Division budget, unless the Commission itself requests a lower

budget. Additionally, the proposed amendment mandates that the Council appropriate an amount equal to 0.5% of the Police budget to the Commission to fund grants to violence prevention, restorative justice, and mediation programs at its discretion. The proposed Charter does not state that further Council authority is necessary to make those grants.

### **I. Open Meetings and Public Comment**

Commission meetings are open to the public and shall provide an opportunity for public comment.

## **VI. SECTION 119-1, DISCIPLINE OF POLICE**

This new section states that the Chief of Police has the exclusive right to discipline police and Police Division employees, but states that this right is “subject to the higher authority of the Civilian Police Review Board and the Community Police Commission.” Additionally, “Before disciplining any officer or employee of the police force, the Chief of Police must ascertain whether a complaint on file with the Civilian Police Review Board relates to the conduct of the officer or employee in question.” If it does, the Chief “must not discipline the officer or employee unless the Civilian Police Review Board concurs with the Chief’s decision. . . .”

Under the Charter provision in place when the Consent Decree was finalized, the Police Chief had the exclusive right to suspend any officers or employees in the classified service under the Chief’s management and control for ten days or less and the Public Safety Director was authorized to impose stricter discipline. As noted above, the Consent Decree specifically states that it does not alter those Charter provisions regarding the Chief’s authority. Additionally, over the past six years the Court has approved manuals and policies relying on the final authority of the Chief and Safety Director. Additionally,

this new section differs from the collective bargaining agreements with the two police unions, which agreements outline that the Chief may suspend for ten days or less and the Director of Public Safety is responsible for more severe disciplinary penalties, and that provide, “No arbitrator or other party shall substitute his judgment for the judgment of the Chief of Police or the Director of Public Safety in applying discipline.”

### **CONCLUSION**

As stated above, this Motion is made pursuant to the directive in the newly adopted Charter amendment. The City desires to fulfill the will of the voters. Intersections with and differences from the Consent Decree, collective bargaining agreements, the Cleveland Charter, and other legal authorities are noted because conflict and other legal issues must be resolved in order to incorporate the amended and new sections into the Consent Decree, if that is what the Court orders.

Respectfully submitted,

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Counsel for the City of Cleveland

**CERTIFICATE OF SERVICE**

The undersigned certifies that the City of Cleveland's Motion Regarding Charter Amendments was filed electronically on December 2, 2021. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. The Monitor and Department of Justice have been electronically delivered a copy of this filing.

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