Adopted November 17, 2020

REPORT OF BURLINGTON POLICE COMMISSION IN RESPONSE TO RESOLUTION 4.20 REGARDING STRONGER DISCIPLINARY MEASURES IN POLICE ENCOUNTERS INVOLVING BRUTAL OR EXCESSIVE FORCE

I. Introduction

In a resolution relating to protesters and public safety, the Burlington City Council unanimously passed Resolution 4.02 on September 8, 2020, which was signed by Mayor Weinberger on September 21, 2020 (the "Resolution"). Through this Resolution, the City Council acknowledged the need to change current policies regarding discipline and oversight of Burlington Police Officers and requested:

1) That the City Council's Charter Change Committee review options for who makes and reviews police disciplinary decisions and report on the various options to the full Council in October 2020; and
2) That the Police Commission begin a review and analysis of impediments to stronger disciplinary measures in police encounters involving brutal or excessive force and recommendations for modifications, with a report back to City Council by November 30, 2020.

Officers can only be held accountable for conduct that is in violation of department policies, orders, or training. Department policies that govern discretionary judgments by officers are difficult to formulate precisely, so that a significant challenge to changing how officer discipline happens is ensuring that BPD policies are sufficiently clear.

The following reflects the Burlington Police Commission's review and analysis of impediments to stronger disciplinary measures in such encounters, along with our recommendations, if any, for modifications.

II. Review and Analysis

A. Agreement between City of Burlington and the Burlington Police Officers' Association, Effective Dates July 1, 2018 – June 30, 2022 ("BPOA Contract")

1. Statement of Intent and Just Cause

The BPOA Contract's Statement of Intent espouses as effective a disciplinary system that is "fair, rational, timely, and consistent, reflects the values of the Department and the community, protects the rights of citizens and officers, promotes respect and trust within the Department and the Community, and results in a culture of public accountability, individual responsibility, and

maintenance of the highest standards of professionalism." BPOA Contract, Article XV, Section 15.1 Statement of Intent.

The BPOA Contract further recognizes the value of "addressing performance and minor disciplinary matters as opportunities for individual and organizational growth and development, . . ." The disciplinary system is premised upon addressing issues related to performance and minor disciplinary matters "through counseling, early intervention, and education." *Id.* Discipline must be with "just cause" sufficient to warrant the discipline and the degree of proposed punishment under the Collective Bargaining Agreement. *Id.*

The standard for just cause includes the notion that officers have notice as to what conduct warrants certain levels or types of corrective or disciplinary action. Such notice is typically conveyed through Department training and policies, along with applicable laws. Just cause also means that any corrective or disciplinary action applied to an officer must be reasonably related in scope to the officer's conduct and to past practices of the Department. As pertains to the officer's conduct, this means that a lower-level infraction (defined below) typically would not justify disciplinary action per se (according to the BPOA Contract). The severity of the imposed corrective or disciplinary action should correlate to the severity of the officer's actions.

Just cause also includes the consideration of past practices in the Department. The rationale is that officers must have notice as to what conduct or level of conduct has been met with what level of corrective or disciplinary action. For example, if, in the past, an officer received a one-day suspension for taking non-contraband from the evidence room, then any officer who subsequently committed a similar act should, under the concept of just cause, be given a similar suspension of one day.

To prevent just cause from placing limitations on the corrective or disciplinary action that may be imposed, we recommend that the BPOA Contract and applicable policies be revised to state explicitly that conduct that might have been redressed through certain corrective or disciplinary action in the past can be treated differently going forward. The importance with just cause is that the officers have due notice of such changes vis-à-vis past practices.

2. Factors to Consider in Corrective and Disciplinary Action

The BPOA Contract identified the following inexhaustive list of factors to consider when choosing to coach, train, mentor, provide performance counseling, or to discipline employees:

- the employee's motivation/intent for the infraction or error;
- the degree of harm caused;
- the employee's level of experience; and

- the employee's past record of performance and conduct.

Id., at Section 15.2 Factors.

The Continuum of Infractions identified in the BPOA Contracts are identified by reference to varying levels:

- **Lower-level** infractions of policy and procedure typically result in coaching, training, and counseling prior to imposing discipline. These types of infractions do not generally result in a formal Administrative Review or Internal Investigation. Examples of lower-level infractions could include: tardiness; misuse of sick time; late paperwork that does not adversely impact a case; care and maintenance of equipment; rudeness; etc.
- **Mid-level** infractions or repetitive lower-level infractions are generally handled at the lowest possible level beginning with a letter or reprimand or admonishment, and progressing into more substantial discipline such as suspension. Examples of mid-level infractions could include repetitive lower-level issues; carelessness with firearms; gratuities (small); low-level neglect of duty such as absences or falling asleep on a night shift; more substantial courtesy matters; etc.
- **Higher-level** infractions may result in more substantial discipline. These kinds of infractions could include things such as veracity issues; harassment; excessive force; knowing associations with targets of investigation or criminals; abuse of authority; failure to follow orders; political activity restrictions; etc.

Id.

The BPOA Contract recognizes that lower-level infractions, absent aggravating circumstances, typically result in non-disciplinary actions. Such non-disciplinary action includes, but is not limited to:

- Education;
- Training/Retraining;
- Verbal or written performance counseling or coaching; or
- Referrals to professional counseling.

If, on the other hand, disciplinary action is warranted, such action includes, but is not limited to:

- Written reprimand;
- Reassignment;
- Suspension or forfeiture of pay; or
- Dismissal.

Id.

3. Retention of Records

When a non-disciplinary entry is made in an officer's performance file, the entry is retained in the file for a maximum of one year from the date of entry. Such entries "are generally non-disciplinary matters such as short notations of verbal counseling or training; performance plans; letters of counseling or coaching; or other non-disciplinary documents." *Id*., Section 15.3 Retention of Records.

The rules that apply to disciplinary records, absent additional discipline being imposed during certain defined time frames, are:

- Letters of reprimand and any other discipline short of suspension are maintained in personnel files for a maximum of one (1) year from the date of the event/conduct.
- Disciplinary actions resulting in a suspension are maintained in personnel files for a maximum of three (3) years from the date of the event/conduct.
- Records relating to significant discipline not resulting in termination but triggering a suspension of two weeks or more, including but not limited to sexual harassment; significant issues related to response to resistance/use of force, any criminal activity; and veracity may be maintained for a longer period of time specified at the time the discipline is imposed.

Based on these rules, one could have a pattern of conduct that has been met with suspensions, and yet these no longer appear in the officer's personnel file—despite a troubling pattern of conduct. These restrictive records retention limitations, arguably an additional impediment to stronger disciplinary measures, should be reviewed and reconsidered when negotiating the next BPOA contract.

B. Chief of Police

While the Police Commission has previously identified the limitations imposed by a system where the Chief of Police has the unfettered authority to hire and fire police officers, subject to appeal to the Burlington Police Commission and where neither the Mayor nor the City Council has the authority to hire or fire police officers, we are not addressing that paradigm in this Report, as we understand that the City Council's Charter Committee is undertaking that review pursuant to Resolution 4.02 request that the "Charter Change Committee review options for who makes and reviews police disciplinary decisions."

C. Staffing Pressures

A potential concern relates to staffing needs. We note that to date none of the members of the current Commission has observed this to factor into a disciplinary decision, but we anticipate that it could play a role moving forward. Removing an officer from active service as a result of disciplinary action more than likely presents challenges to the Department to adequately meet

its staffing needs. One could speculate that the challenges will only increase as the Department's staffing levels fall. This may be remedied in the long term when and if certain call-types to the Department are diverted to other community resources, but in the short term this could become an issue. Staffing needs, while valid Department concerns, should not play a role in appropriate discipline.

D. BPD Directives – Use of Force

One important development in 2020 with respect to policing in Burlington is the Police Commission and BPD working to overhaul the Department's Use of Force directive, Department Directive DD05: Response to Resistance / Use of Force. The Directive relied upon the use of force standard established by the United States Supreme Court in *Graham v. Connor*, 490 U.S. 386, 396 (1989). In *Graham*, the Supreme Court held that an officer's use of force is not excessive if it is "objectively reasonable" under the circumstances - would an objectively reasonable officer on the scene and under the circumstances think the amount of force used was reasonable. This standard, applied at the time of the excessive force investigations involving Officers Bellevance, Campbell, and Corrow, required that officers' conduct be reviewed subject to the *Graham* standard—would an objectively reasonable officer on the scene and under the circumstances think the amount of force used was reasonable. It would not have been enough for the Chief to think that he would have handled each interaction differently, if the officer's actions met this objectively reasonable standard.

In February 2020, the Special Committee to Review Community Policing Practices submitted its written report to the City Council, wherein the Special Committee recommended in relevant part that Directive DD05 be updated to include at least the following features:

- The updated policy should clearly articulate and provide officers clear guidance on the BPD's general philosophy about use of force, including that de-escalation should always be prioritized whenever it is safe and feasible to do so, and that officers should always be expected to use the lowest level of force appropriate to achieve officers' legal objectives;
- The updated policy should emphasize that all uses of force should be proportional;
- The updated policy should articulate that officer behavior can escalate the level of force needed to respond to a situation, and should sanction such officer behavior when unnecessary or unreasonable;
- In drafting the updated policy, it should be carefully considered whether the appropriate standard for improper use of force is that it is "unnecessary" or that it is "unreasonable", and if it is determined that the appropriate standard be "unreasonable", the updated Use of Force policy should make explicit that BPD's interpretation of reasonable behavior is not determined by the court's interpretation of reasonable behavior;
- The updated policy should articulate that officers have an affirmative duty to intervene if they witness the use of excessive force;

- The updated policy should articulate that officers have an affirmative duty to care for persons in their custody.

The Police Commission and BPD reviewed and updated Directive DD05 accordingly, so that the new Use of Force Guidelines reflect all of the foregoing recommendations. This new policy allows for the discipline of officers who would not otherwise have been subject to discipline under the Graham standard.

On October 7, 2020, Act 165, an act relating to a statewide standard and policy for law enforcement use of force, became Vermont law. The ACLU of Vermont described the new law as . . . "the best statewide police use of force standard in the nation."

Notably, the law includes several provisions regarding Use of Force and Deadly Force. This portion of the law goes into effect on July 1, 2021, and provides in pertinent part that, "[w]hether the decision by a law enforcement officer to use force was objectively reasonable shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances. A law enforcement officer's failure to use feasible and reasonable alternatives to force shall be a consideration for whether its use was objectively reasonable." Act 165, Section 1, 20 V.S.A. § 2368(b)(4).

The updated BPD Directive DD05 and Act 165 significantly change the landscape for reviewing an officer's decision to use force.

The Police Commission will be working with the Department to determine whether Act 165 requires further revisions to the Department's Use of Force Directives in order to render it consistent with Act 165 to the extent it is not already.

E. De-escalation

A policy or directive may require that officers deescalate whenever possible, but that requirement will not have a practical effect unless officers also know that a use of force which was not preceded by de-escalation (as possible), will not be supported by the Department. Policies requiring de-escalation need to be robust and enforceable because law enforcement agencies are likely inclined to support officer discretionary judgment about the use of force. BPD's Use of Force policy (DD05) in effect until June 2020 mentioned de-escalation, but it was not robust. The current policy, Directive DD05, is certainly more robust, but enforcement will be vital.

In summary, the current BPOA Contract, and past disciplinary practices, provide significant hurdles to stronger disciplinary measures in police encounters involving brutal or excessive force. The recent revisions to the Department Directive DD05 have strengthened the ability to address brutal or excessive force, as will Act 165, but it is our opinion that the BPOA Contract must be revised in its next term, to provide sufficiently clear rules and notice regarding officer conduct, and Directive DD05 must be properly enforced.

Respectfully submitted,

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