

NATIONAL LAWYERS GUILD
PORTLAND, OREGON CHAPTER



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Mayor and Police Commissioner Ted Wheeler
1221 SW 4th Avenue, Room 340
Portland, OR 97204

27 January, 2017

RE: Portland Police Bureau's Crowd Control Activities on Jan. 20, 2017

Dear Mayor Wheeler,

On January 20, the Portland Police Bureau once again used excessive and unreasonable force on a crowd of largely peaceful people in a manner all too reminiscent of other such egregious displays of force by the PPB. As incoming Mayor and Police Commissioner, we want to ensure that you are aware of the longstanding problems in the Portland Police Department concerning inappropriate use of force as crowd control.

As a starting point, the Portland Police Bureau should approach crowd control with the intent of deescalating conflict, and ensuring safety for the most possible number of people. In direct contrast to this approach, several incidents on the evening of January 20 the Portland Police escalated conflicts by the PPB's use of indiscriminate and unnecessary force. Among these are:

- 1) Use of broadcast pepper spray on a large crowd, which included several children,¹ on the west side of the Burnside bridge *before* orders to disperse were given in any way that was audible to the crowd;
- 2) Unnecessary confusion created by ordering people *into* Pioneer Courthouse Square, followed almost immediately by ordering people *out of* Pioneer Square, creating an unsafe and chaotic situation for all the people in and around the Square
- 3) Indiscriminate use of tear gas, flash grenades and rubber bullets on a non-violent crowd, which resulted in substantial injuries to many people – including a facial injury to a 55-year old music professor, leg injuries to a man who was not involved in the march, and targeting Legal Observers with rubber bullets.

We write on behalf of the Portland Chapter of the National Lawyers Guild to urge you to respond to these incidents by reconsidering recommendations made by the Guild in response to similar incidents

¹ The children exposed to pepper spray included the seven-year old son of one of the authors of this letter, and his nine-year old friend.

several years ago (we shared this with the City again in 2011 during the Occupy Portland movement, and it seems as if a refresher is necessary). We request that you meet with Guild representatives as soon as possible to discuss these recommendations.

In 2007, the NW Constitutional Rights Center (“NWCRC”) and the Portland Chapter of the National Lawyers Guild (“NLG”) conducted a study of the Portland Police Bureau (“PPB”)’s response to demonstrations and published a report entitled **Whose Streets? -- Recommendations to the Portland Police Bureau for Responding to First Amendment Assemblies** (“Report”)(attached in email).

The Report made the following recommendations:

1. Officers shall not use pepper spray at First Amendment assemblies.
2. Officers shall not use less-lethal munitions at First Amendment assemblies.
3. The Bureau should abolish the use of horses for crowd control at First Amendment assemblies.
4. The Bureau shall not photograph or videotape protestors engaging in First Amendment activities and will not place plainclothes officers in the crowd.
5. The Bureau, to the extent possible, should respond to unforeseen demonstrations that take place on sidewalks, streets or in public parks in the same manner as events that have been coordinated with the Bureau beforehand.
6. The Bureau’s crowd control policy should have clear language indicating when police can declare an unlawful assembly and the methods they must use to declare an assembly unlawful.
7. Officers should not penetrate a crowd to make an arrest unless the targeted individual has engaged in serious criminal conduct.

At that time, report author and staff attorney for the NWCRC Shauna Curphey met with then-Assistant Chief Lynnae Berg and Assistant City Attorney David Worbril regarding the seven recommendations in the Report and specific changes to PPB policies on crowd management. The recommendations in the Report were largely ignored by the City and the PPB, and the problematic crowd control behavior of the PPB has continued.

The Bureau’s actions on January 20 provide another opportunity to revisit these recommendations and for you, as our new Mayor and Police Commissioner, to move forward with long overdue changes to the PPB’s crowd control policies.

For example, the Report recommends the use of pepper spray and mounted patrol be prohibited during First Amendment assemblies. The current PPB crowd control policy and less lethal weapons policy both fail to prohibit the use of less lethal weapons and mounted patrol to disperse crowds. The policy is silent as to use of use of mounted patrol for crowd control, and the use of pepper spray is permitted in crowd control situations even where demonstrators are engaged in non-violent passive resistance.

As per the PPB Crowd Control Policy, broadcast spraying of pepper “should be avoided unless there is a crowd surge that threatens to overcome police lines.” While we appreciate the fact that this policy discourages broadcast spraying, it still happens – and happened again on Friday night where it is far from clear that the crowd threatened to overcome police lines, and no order to disperse had been

broadcast. Indeed, even if the people at the front of the march were pressing against the police line, this is no reason for the hundreds of people who were **not** at the front to also be subjected to chemical weapons.

As stated in the Report, Pepper spray causes upper respiratory inflammation, and it “may have detrimental effects on people with preexisting respiratory problems.” A University of Texas study of in-custody deaths following pepper spray use concluded that exposure to pepper spray was a contributing cause of death in 2 of the 63 fatalities. Both cases involved people with asthma. In addition, the Ninth Circuit has held that pepper spray is a “dangerous weapon” under criminal sentencing guidelines because it is “capable of inflicting death or serious bodily injury” when used against individuals with asthma.

Pepper spray also poses greater risk to children, the elderly and people with chronic lung disease and certain eye conditions. In addition, “Most people cannot physically keep their eyes open after being sprayed ... unless they actually hold apart their eyelids with their fingertips. Fear and disorientation often result from this temporary blindness.” Though this may be appropriate when an arrestee poses a threat of imminent injury to an officer, it is dangerous and inappropriate in a crowd control situation, because pepper “can induce a state of panic in the crowd.” Moreover, pepper spray poses a risk to innocent bystanders because it cannot be contained once it is dispersed. These risks led at least one expert to conclude that “that use of pepper spray for crowd control is inconsistent with good public health policy.” *Report at p. 10.*

Pepper spray should only be used in situations where specific individuals are engaged in criminal acts posing risk of physical injury or in aggressive physical resistance. The Ninth Circuit has recognized that the intrusion caused by pepper spray is “more than minimal.” *Headwaters Forest Defense v. Humboldt County*, 240 F.3d 1185, 1200 (9th Cir. 2000) vacated and remanded on other grounds, *County of Humboldt v. Headwaters Forest Defense*, 534 U.S. 801 (2001). In addition, the Ninth Circuit has held that pepper spray is a “dangerous weapon” under criminal sentencing guidelines because it is “capable of inflicting death or serious bodily injury.” *United States v. Neill*, 133 F.3d 943, 949 (9th Cir. 1999). Thus, officers need a strong interest to warrant the use of pepper spray. *Headwaters Forest Defense*, 240 F.3d at 1205.

Similarly, the widespread use of rubber bullets and stun grenades on Friday evening was an unnecessary and improper use of force. Many individuals were injured from impact munitions on Friday night, and it appears most were *not* specific targets. Impact munitions stun or otherwise temporarily incapacitate an individual. Unfortunately, police departments have limited systematic information on the circumstances in which officers have used impact munitions or the physical effects such weapons have on people in the field. A 2004 survey of law enforcement agencies’ use of impact munitions in 373 incidents revealed that 8 individuals died as a result of their use. In most of the deaths, police fired on individuals who were less than 30 feet away. Though safer “less-lethal” technologies have since been developed, this study confirms these weapons are not ‘less lethal’ in a literal sense “because none can be guaranteed to avoid serious injury or death.” Indeed, in November, a 21-year old water protector at Standing Rock was so severely injured by a stun grenade that she may lose her arm.

Further, the PPB’s Use of Force policy recognizes that the mere presence of uniformed bureau members is a show of force. The current policy fails to account for the reality of most First Amendment

assemblies in Portland, including the recent inaugural march: police presence in riot gear has a strong tendency to cause a non-violent crowd to feel threatened, thereby escalating the intensity and inflaming the passions of participants who feel their First Amendment Rights to free speech and assembly are being actively and unjustly deterred or threatened by an overly zealous PPB response.

The NLG calls upon the City and the PPB to implement the changes recommended in 2007, including a prohibition on use of pepper spray and mounted patrol during crowd control situations, and that the PPB's policies must institutionalize what Chief Reese has recognized: that First Amendment assemblies in Portland are largely non-violent and most do not need police presence at all.

The humanitarian and constitutional reasons that the PPB should not deploy indiscriminate use of force in First Amendment assemblies are vitally important to the health of our city. Mayor Wheeler, there is also a pragmatic financial reason to curb the PPB's aggressive behavior. As reported in the Portland Mercury (Oct. 20, 2011), the City of Portland has paid out more than \$10 million to some 1,000 claimants in police misconduct litigation from 1991 through summer 2011 plus \$9.9 million more in legal fees, and the number has continued to rise. With people dying on the streets, and Donald Trump threatening to cut federal funding to Sanctuary Cities, the City of Portland needs its money for other pressing issues. When the Portland Police Bureau focuses on deescalating interactions with the public, especially in crowd control interventions, the City does not expose itself to liability for excessive use of force complaints and litigation.

Please review the Report and recommendations from 2007, and consider these critiques of the PPB's crowd control policies and actions. We will follow up with your office shortly to set up a meeting with you to discuss these recommendations, and look forward to continuing to work with you on these vital issues.

Sincerely,

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