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PRIVILEGED AND CONFIDENTIAL¹

TO: The Honorable Detroit City Council

FROM: David Whitaker, Director
Legislative Policy Division Staff

DATE: January 4, 2021

RE: **DPD Contract Review**

Council Member Scott Benson asked the Legislative Policy Division (LPD) as well as the City Law Department to “provide a review of Detroit Police Department contracts in order to identify language and clauses that prevent police officers . . . from being held accountable for actions that cause mistrust between law enforcement and the public, are counter to standard operating procedures, and rules and regulations.” LPD reviewed the most recent Master Agreements between the City of Detroit and the Detroit Police Officers Association (DPOA), the Detroit Police Lieutenants and Sergeants Association (DPLSA), and the Detroit Police Command Officers Association (DPCOA), **dated 2014 – 2019.**² This memorandum is submitted in response to that request, noting LPD’s inability to address this complex analysis in the depth required. A more nuanced review will require input from entities experienced in the negotiation of law enforcement contracts.

Background

The videotaped murder of George Floyd by members of the Minneapolis, Minnesota police force in May 2020 prompted a national (and, in fact, international) reaction of long pent up rage against brutal and systemic police misconduct toward communities of color. Protests in Detroit and other cities and localities across the country were sometimes met with heavy handed

¹ This memorandum is submitted under privilege due to the sensitivity of the subject matter, as well as the likelihood that these contracts are currently under negotiation.

² Expired contracts generally remain operational until the adoption, ratification, and approval of new contracts.

responses by local police. The subsequent resounding calls for police reform grew nationwide, shining a spotlight on the role of collective bargaining agreements in maintaining an insular culture within many police communities.

Investigative studies of the impact of police union contracts in shielding rogue officers from discipline³ have thus gained new traction in 2020. The December 23, 2020 print edition of the New York Times featured a frontpage above the fold article, continued on two full pages of the front section of the paper, entitled *The Way Cities Lost Oversight of Their Police*, in which Detroit’s police union contracts figure prominently in the reporting.⁴ According to the Times reporting, Detroit’s union contracts, negotiated in the aftermath of the 1967 uprising, were regarded as a “blueprint for union negotiations across the country”, noting that the unions “leveraged fears of lawlessness and an era of high crime to win disciplinary constraints.” In fact, this rationale – the threat of lawlessness, particularly by “outside agitators” – remains a common theme in 2020.

Studies of police union contracts around the country have identified specific troublesome provisions that undermine accountability and block transparency. A particularly concise analysis has been undertaken by “#NixThe6”, as part of a national campaign compiling a large database of analyses of contracts from large and small communities with the aim of ending police violence. The campaign “focuses on six ways police unions obstruct, delay or defeat local efforts to hold police accountable and reimagine public safety.”⁵ See, <https://nixthe6.org/>. The six common provisions raising concern provide the following protections for officers: 1) purging disciplinary records after one or two years; 2) restricting and delaying interrogations by a supervisory officer when an incident could lead to criminal charges; 3) providing officers with access to investigatory information when the officer is under investigation; 4) disqualifying complaints (this objection was not found in any of Detroit’s police contracts); 5) requiring the City to pay for alleged misconduct; and 6) limiting oversight and discipline by the City, particularly through arbitration proceedings. A review of Detroit’s DPD contracts in light of these six factors is below.

I. Review of DPOA Contract

The Master Agreement Between the City of Detroit and the Detroit Police Officers Association (DPOA), effective 2014-2019, contains five of the six provisions identified as problematic above. The contract language limits the disciplinary authority of the Chief through binding arbitration, buries evidence of misconduct, provides officers under investigation 48 hours of lead time to spin and polish testimony before an investigatory interview, allows the officer

³ See, for example, <https://www.reuters.com/investigates/special-report/usa-police-unions/>, a 2017 study from Reuters, entitled, *Protecting the Blue: Across the U.S., police contracts shield officers from scrutiny and discipline*. Also, Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017), Available at: <http://scholarship.law.duke.edu/dlj/vol66/iss6/1>; Kate Levine, *Discipline and Policing*, St. John’s University School of Law (2019), Available at https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1294&context=faculty_publications

⁴ See, <https://www.nytimes.com/2020/12/22/us/police-misconduct-discipline.html?searchResultPosition=1>.

⁵ The six demands of the campaign seek to prevent union contracts that block accountability, prevent rehiring of officers fired for misconduct, abolish “police bill of rights”, restrict union influence over police budgets, curb the ability of unions buying political power, and prevent negotiation of contracts without community representation.

access to contrary testimony during an investigation of the officer's conduct, requires the City to compensate and defend an officer unless and until bad faith can be shown or activity outside of the the scope of the officer's job duties, and throughout the many levels of disciplinary red tape, keeps the public in the dark. Much of the language speaks for itself. The sections are reproduced below.

Section 8. Arbitration: 3. It will be within the authority of the arbitrator to make a decision binding upon the parties regarding the interpretation, application, or enforcement of the Agreement.

Section 9. Discipline: G. Chief's Authority. The Chief of Police, at his or her sole discretion, may rescind or mitigate any disciplinary action at any step of the disciplinary process including, but not limited to, after the conclusion of an arbitration. However, the Chief of Police shall have no authority to increase any disciplinary action after the conclusion of an arbitration. (*Note the specific limitations on oversight/discipline.*)

H. Written reprimands will remain in employees' files for a period of time not to exceed two (2) years from the date of issuance of the reprimand.

I. Informal Counseling. The Department may conduct informal counseling sessions concerning minor misconducts, actions, or omissions. Such counseling sessions will not be considered disciplinary action, but the substance of the counseling session may be reduced to writing and added to an Employee's file for up to one (1) year.

Section 9. E. Expedited Arbitration. To the extent that a dispute regarding a suspension of more than three (3) days or the discharge of an Employee cannot be resolved through the Chief's Hearing or mediation (if applicable), an Employee, with the approval of the Association, will have the right to appeal the disciplinary action to expedited arbitration. The disciplinary action must be appealed to arbitration by providing written notice to the Department within seven (7) days of the date of the decision resulting from the Chief's Hearing.

Section 15. Leaves of Absence: 2. Any member convicted of a misdemeanor crime of domestic violence will be carried working in an administrative restricted duty capacity at any work location as determined by management for nine (9) months from the date of conviction in order to permit the member to have the conviction reversed, pardoned, set aside or expunged, or if the disqualification is removed because of a change in legislation or the act is invalidated. Requires the City to pay for personal misconduct.

Section 16. Employees' Right – Investigative Procedures:

J. Whenever a member is being questioned or interviewed by his/her Commanding Officer and/or the Department or by any of its units or bureaus, for any reason which could lead to criminal actions or charges, such questioning or interview shall be conducted under the following conditions:

1. The investigative interview shall be conducted at a reasonable hour, preferably at a time when the member is on duty, unless the seriousness of the questioning is of such a degree that an immediate investigative interview is required.

2. No investigative interview shall begin until the member has been notified that he/she has a right to have counsel or an officer of the Association present.

3. An Employee will be given forty-eight (48) hours written notice prior to an investigative interview in a non-criminal investigation, except in cases of emergency. In non-criminal investigations, the Employee shall be supplied with a copy of any complaints that have been

filed against him/her and all relevant information at the time he/she is ordered to appear at the investigative interview.

In those instances where a command level investigation of an informal citizen's complaint, as opposed to those on DPD 512, progresses to the point where a written statement is ordered, the officer will be provided with an inter-office memorandum stating the complaint made against him, the identity of the person who filed the complaint, and the specific questions that the investigating supervisor wants answered. This shall include investigations delegated to the command to handle from other departmental agencies, such as the Internal Controls Bureau.

4. Employees required to be interviewed by the Professional Standard Bureau will be given forty-eight (48) hours written notice prior to the investigative interview.

8. Neither the home address nor the photograph of any member suspected of any wrongdoing shall be given to the press or the news media without the written consent of the member.

K. Interrogation recording – The complete investigative interview of the member, including a notation of all recess periods, shall be recorded and there shall be no unrecorded questions or statements. At the request of the member, a copy of the investigative interview shall be furnished to him. *Arguably gives officers unfair access to information.*

M. The Investigative staff of the Board of Police Commissioners will have the right to question and interview Employees and such right will in no way abridge or change the rights of Employees under this Agreement or under any Local, State, or Federal law or the Constitution of the United States, or State of Michigan.

In no event will any recommendations or actions resulting from such investigative interview or questioning lead to any discipline outside or inconsistent with any discipline procedures or discipline matters maintained in this Agreement or as may be established and maintained by the Department in accordance with this Agreement.

Further, no Employee, after he/she has been once disciplined by the Department, will be re-disciplined, for any reason whatever for any matters arising out of the same set of facts and circumstances surrounding the first disciplinary action.

Section 27. Legal Representation and Indemnification:

The City will provide legal counsel and pay any costs and judgments that arise out of lawsuits filed against Employees alleging any act committed while said Employee was in the good faith performance of his duties. A contrary determination by the City is not final and binding as provided by the Municipal Code of the City of Detroit but is subject to review by an arbitration panel under the grievance arbitration provisions of this Agreement. Pending a final determination of whether or not the Employee is entitled to defense and indemnification by the City, the City shall promptly undertake such defense on behalf of such Employee.

II. Review of DPLSA Contract

The Master Agreement between the City of Detroit and the Detroit Police Lieutenants and Sergeants Association (DPLSA), effective 2014-2019, contains four of the six provisions identified as problematic.

Erases misconduct records –

Section 10. Discipline Procedure:

F. Chief's Authority. The Chief of Police, at his or her sole discretion, may rescind or mitigate any disciplinary action at any step of the disciplinary process including, but not limited to, after the conclusion of an arbitration. However, the Chief of Police shall have no authority to increase any disciplinary action after the conclusion of an arbitration.

G. Written Reprimand. All written reprimands will be issued and implemented as soon as practicable following an investigation. Written reprimands will remain in Employees' files for a period of time not to exceed two (2) years.

H. Informal Counseling. The Department may conduct informal counseling sessions concerning minor misconducts, actions, or omissions. Such counseling sessions will not be considered disciplinary action, but the substance of the counseling session may be reduced to writing and added to an Employee's file for up to one (1) year.

Restricts/Delays Interrogations –

Section 11. Employees' Rights:

J. Whenever an Employee is under investigation or subjected to interrogation by his Commanding Officer and/or the Department or by any of its units or bureaus, for any reason which could lead to criminal actions or charges, such investigation or interrogation shall be conducted under the following conditions:

1. The interrogation shall be conducted at a reasonable hour, preferably at a time when the Employee is on duty, unless the seriousness of the investigation is of such a degree that an immediate interrogation is required.

(Note the officer is, therefore, compensated for the interrogation.)

Requires City pay for misconduct –

Section 13. Legal Counsel:

The City will provide legal counsel and pay any costs and judgments that arise out of lawsuits filed against Employees of the Detroit Lieutenants and Sergeants' Association alleging any act committed while said Employee was in the good faith performance of his duties. A contrary determination by the City is not final and binding as provided by the Municipal Code of the City of Detroit but is subject to review by an arbitration panel under the grievance arbitration provisions of this Agreement.

The City shall promptly undertake the defense of an action on behalf of an Employee pending determination of the "good faith" question.

Limits oversight/discipline by allowing appeal via binding arbitration and limiting the Chief's disciplinary authority –

Section 9. Arbitration:

D. 6. The decision of the arbitrator will be final and binding on the Employee and the Department, subject to the Chief's Authority to rescind or mitigate discipline as set forth in Section F.

F. Chief's Authority. The Chief of Police, at his or her sole discretion, may rescind or mitigate any disciplinary action at any step of the disciplinary process including, but not limited to, after the conclusion of an arbitration. However, the Chief of Police shall have no authority to increase any disciplinary action after the conclusion of an arbitration.

Section 11. Employees' Rights:

J. 4. Neither the home address nor the photograph of any Employee suspected of any wrongdoing shall be given to the press or the news media without the written consent of the Employee.

K. The complete interrogation of the Employee, including a notation of all recess periods, shall be recorded and there shall be no unrecorded questions or statements. At the request of the Employee, a copy of the interrogation shall be furnished to him.

M. In no event will any recommendations or actions resulting from such interrogation or investigation lead to any discipline outside or inconsistent with any discipline procedures or discipline matters maintained in this Agreement.

Section 20. Leaves of Absence:

F. 2. Any Employee convicted of a misdemeanor crime of domestic violence will be carried working in an administrative restricted duty capacity at any work location as determined by management for nine (9) months from the date of conviction in order to permit the Employee to have the conviction reversed, pardoned, set aside, or expunged, or if the disqualification is removed because of a change in legislation or the act is invalidated.

3. If the conviction has not been removed after nine (9) months, the Employee will be placed on a three (3) month unpaid leave of absence.

Section 26. Court Time:

E. An Employee subject to disciplinary suspension pursuant to Article 10 may elect to use compensatory time, deducted from him/her compensatory time bank, in lieu of the loss of actual work days resulting from the suspension.

III. Review of Detroit Police Command Officers Contract

The Master Agreement between the City of Detroit and the Detroit Police Command Officers Association (DPCOA), effective 2014-2019, contains two of the six provisions identified as problematic.

Requires City pay for misconduct -

Section 11. Legal Counsel:

The City will provide legal counsel and pay any costs and judgments that arise out of lawsuits filed against Employees of the Detroit Police Command Officers' Association alleging any act committed while said Employee was in the good faith performance of his/her duties.

The City shall promptly undertake the defense of an action on behalf of an Employee pending determination of the "good faith" question.

Limits oversight/discipline by allowing appeal via binding arbitration and limiting the Chief's disciplinary authority -

Section 8. Discipline Procedure:

B. 6. The decision of the arbitrator will be final and binding on the Employee and the Department. If the arbitrator's decision requires that the Employee be reinstated to his/her position within the Department, the Chief of Police retains the right to demote the Employee in his/her sole discretion, as set forth in Section A.2. above.

Conclusion

The contract provisions identified above have likely been the subject of renegotiation many times during the decades since the late 1960s. To truly understand the impact of these provisions, and why they have been the focus of investigation as well as continuously defended by union negotiators, a much fuller discussion with true subject matter experts is essential. Should the Council have further questions, LPD will respond.