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**Subject:** Item #3, Mtg. of July 1st -- Resolution on DGO Revision Deadlines  
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Dear Commissioners,

With Cal DOJ blasting the SFPD earlier this year for the slow progress on USDOJ COPS reforms... with the Commission's Vice President recently describing the 61 of the 272 recommended reforms achieved thus far as a "drop in the bucket" ... with that pace of reform, if continued, meaning it would be another *dozen* years until all of the COPS reforms are implemented... with the protracted process for DGO revision and adoption clearly thwarting the "timely implementation of DGO reform" (just as the USDOJ COPS Office predicted almost four years ago would happen it not remedied)... the Police Commission is certainly more than justified in its effort to set some new, shortened deadlines to speed up the process.

***My question is why the proposed resolution sets deadlines for everyone else in the process but contains no deadlines at all for the part of the process the Commission itself controls and that has so often led to exasperating and legally unnecessary delays in implementing new DGOs that have been carefully crafted and fully vetted in working groups (that include SFPOA participation), subjected to scrutiny and discussion at public hearings and fully adopted by the Police Commission. Why is the Police Commission holding the SFPD and DPA accountable for adhering to strict deadlines (as it should) if it is not willing to hold itself to similar deadlines about whether and how long it will allow the SFPOA to delay full implementation during prolonged "meet and confer" discussions that, in many cases, are legally unnecessary under state labor law and that, therefore, are not implicated by either the SFPOA's contract or their interest arbitration rights in the City Charter.***

The Police Commission controls the meet and confer process over its DGOs. When discussing DGOs with the SFPOA, the DHR works for the Police Commission and must follow your direction. ***The proposed resolution shortening deadlines in the DGO process for others will do little good if the Police Commission is unwilling to start to exercise greater control over the meet and confer process, to hold itself accountable for avoiding unnecessary meet and confer delays that the Commission inexplicably continues to indulge, to set similar target deadlines for any meet and confer sessions that do take place and that ensures the Commission finally starts to fully exercise its managerial rights to adopt and implement its policy decisions in a far more timely manner.***

### **DELAYED IMPLEMENTATION OF BIAS-FREE POLICING D.G.O.**

For example, the proposed resolution imposes a 45-day deadline on the SFPD and DPA to complete the DGO concurrence process. Fine. But ***it's already been 42 days since the Police Commission adopted the long-awaited revision of its Bias-Free Policing DGO*** (5.17) with, among other things, the important new "bias by proxy" provisions. This DGO was the product of years of collaborative discussions. Why is its implementation still being delayed?

Two weeks ago, the Chief said it was "unfortunate" he could not yet implement it. On June 3rd, the Commission Vice President rightly boasted about this new policy but failed to tell the public it was not yet being implemented and that, apparently, there is no public information or projected timeline for when it might be. As it has done before, ***the Police Commission has seemingly sent this critical DGO into the black hole of meet and confer talks with no public information provided for when it might finally re-emerge and in what state.***

Why is this DGO even in meet and confer talks with the SFPOA at all? Every single change and new provision addresses fundamental police-community relations issues and is carefully designed (after extensive discussion and debate) to minimize racial profiling and other types of biased policing. These are ***exactly*** the types of policy provisions that California courts have long held are managerial prerogatives under state labor law rather than mandatory subjects of bargaining (and possible arbitration in San Francisco in the event of an impasse) -- topics that are ***not*** appropriate for closed door meet and confer bargaining with a police union. If that wasn't clear before, it certainly should be after the Police Commission's legal victories less than two years ago in the SFPOA's frivolous litigation over the alleged scope of their right to delay the implementation of policies they may oppose, hope to change or want to arbitrate. (See *San Francisco Police Officers Association v. San Francisco Police Commission* - <https://law.justia.com/cases/california/court-of-appeal/2018/a151654.html> .)

Has anyone seriously claimed that the changes in DGO 5.17 are mandatory subjects of bargaining under state labor law given the reasoning in *SFPOA* and other cases about police policy-makers managerial rights to set and define such important policy provisions? (Who? When?) And if no one contests that these provisions are merely ***permissive*** subjects of bargaining -- meaning you can choose not to delay implementation with little if any risk of adverse consequences -- and since it was already subject to extensive working group discussions and a public hearing, why are you choosing to delay implementation at all... much less for an indefinite period of time already lasting six weeks?

In short, what policy provisions in your Bias-Free Policing DGO does the SFPOA oppose or want changed... and why would you even care given that organization's long-time role in creating and enforcing an internal culture that has too often tolerated and denied the very existence of bias in SFPD? (After all, this is the organization that has -- among lots of other things -- repeatedly flung highly personal insults at the African American Chief of Police... that has tried to bully African American elected officials one of whom is now the Mayor... that persistently denied the very existence of any systemic bias in the SFPD... that attacked the President of the Officers for Justice for acknowledging and speaking out about that bias... that made light of the Black Lives Matter movement by publishing a photo of a dog captioned "Black Labs Matter"... and, that went far out of its way to spend hundreds of thousands of dollars on lawyers trying to keep officers found to have exchanged horrifically racist, sexist and homophobic messages on the force even though the bylaws for the SFPOA Legal Defense Fund ostensibly limits the use of its resources to defense of conduct that occurs in the normal scope of police officer duties. In stark contrast, just days ago when San Jose police officers were found to have posted racist messages on-line, the San Jose Police Officers Association quickly announced those officers would be banned from their union and receive no legal assistance whatsoever. Not the SFPOA. When facing the same sort of situation, the SFPOA circled the wagons, defended the indefensible and kept those officers in the SFPD and on the public payroll for years.) ***If there is no good legal reason for doing so*** -- for treating them any differently than any other organization or individual that already worked very long and hard on this new policy -- ***why would the Police Commission choose to delay***

***implementation of its Bias-Free Policing DGO to give them preferential treatment?***

At that same May 20, 2020, meeting the Police Commission voted to adopt but not implement its Bias-Free Policing DGO, it re-approved three other DGOs and finally authorized their implementation. DGO 11.07, "Prohibiting Discrimination, Harassment and Intimidation" had already been approved on January 15th and the meet and confer process resulted in no changes. Given that, why was it necessary to delay implementation at all, especially while the Commission was unable to meet for more than three months? DGO 6.03, "Underwater Diving Operations," and DGO 11.10, "Physical Fitness Evaluation Program," had been originally adopted on December 11, 2019 and February 13, 2019 (!) respectively. Even if these DGOs involved mandatory subjects of bargaining and the six and 15 months delays prior to their implementation is explainable, did the Commission track their progress and seek and publicly report information about why it was taking so long?

**THE DELAYS CRITICIZED BY U.S.D.O.J. WERE CAUSED BY MEET AND CONFER ABUSES NOT CONCURRENCE ISSUES**

More importantly, remember *why* USDOJ COPS called on the Commission to expedite the DGO adoption and implementation process in the first place (at pg. 151) --

*"The Police Commission's authority over DGOs supports one of the core concepts of "co-produced policing" as identified in the Final Report of the President's Task Force on 21st Century Policing. **Public input, participation, knowledge, and understanding of police procedures is one way for the SFPD to hold itself accountable to the public. However, as shown through the protracted time it has taken to implement the body-worn camera policy and update the use of force policy, efforts at transparency have been impacted by existing organizational practices.**"*

Most of the delays in fully adopting and finally implementing *those* policies were due to ridiculously protracted and ultimately counterproductive meet and confer sessions. In the case of the body worn camera DGO, after a collaborative process (involving SFPOA) led to the adoption of the DGO in late 2015, both the public and Police Commission became openly and vocally frustrated by how long the process dragged on through the entire first half of 2016. Eventually the policy emerged in a somewhat watered-down state, was re-adopted, only to face widespread non-compliance upon implementation... which caused *more* revisions to make crystal clear the Commission and Chief really did mean what the policy said and had intended from the start... only to learn two weeks ago that during the raid of Brian Carmody's residence in the Jeff Adachi leak investigation the Captain and commanding officer of the Risk Management Office -- which controls Internal Affairs and is charged with *enforcing* the DGOs (!) -- had ordered officers to ignore the clear terms of that policy and turn their cameras off while executing that search warrant. (<https://www.sfchronicle.com/crime/article/San-Francisco-police-turned-off-body-cameras-15349795.php> .)

At the start of the collaborative process used to craft the new use of force DGO, the ACLU wrote the Police Commission pointing out the long-standing, crystal clear case law holding that changes in police use of force policies are managerial prerogatives and not mandatory subjects of bargaining. The ACLU asked for a commitment -- which it did not receive -- that, especially since the POA was a full and active participant in the working group developing the policy, the POA not be provided a separate opportunity to delay implementation and seek further changes in meet and confer talks after the Commission adopted the policy. In the

meantime, two more people were killed in avoidable SFPD shootings -- including Jessica Williams who was killed while trying to escape in a car. During a carefully constructed hearing in June 2016, the Police Commission heard extensive arguments from the POA for why the new DGO should allegedly *not* include complete bans on use of the carotid hold and on shooting at moving vehicles. The Commission rejected their arguments but, notwithstanding the palpable sense of urgency around implementing the new DGO as soon as possible so that more lives would not be lost with officers *still* operating under outdated and now discredited policy provisions, the Commission rejected renewed arguments from the ACLU and others that the policy not be sent into the black hole of meet and confer -- especially since there was no compromise available between the complete bans (which were the USDOJ and PERF clear recommendations) and the exceptions to the bans the POA sought. (What was the point of more talks when the Commission had already fully considered and rejected the POA's arguments?) Three months later, the Commission again entertained pleas from the ACLU in writing and at a hearing demanding the legally unnecessary talks end so the policy could finally be implemented. Again, the Commission refused to implement its policy and allowed the talks to continue. The month after that, the USDOJ COPS report was released criticizing the Commission and SFPD (per the above) for the protracted DGO implementation delays still playing out at that point. Still, the Commission delayed implementation of the policy and continued the talks with the POA for two more months... time which the POA used to whip up internal resistance to the new DGO and to mount a cynically-misleading ad campaign targeting the Commission President personally for backing the reforms. ( <https://www.sfgate.com/bayarea/article/SF-police-union-s-ad-slamming-proposed-gun-10659351.php> .)

The policy was finally re-adopted and ordered implemented more than six months after it had been initially adopted. The SFPOA sued the Commission to block the policy and lost at every level -- exactly as had been clear from the very start would happen given the clarity of the case law. ***That's the protracted DGO revision and implementation process the USDOJ COPS report had criticized. It's fine to address the front-end concurrence part of the process with the proposed resolution but that's not responsive to the even worse -- and more undermining -- back-end implementation delays caused by the City's often-legally unnecessary and still seemingly completely unscrutinized meet and confer practices.***

## **YOU WON THE S.F.P.O.A. LITIGATION ABOUT MEET AND CONFER -- WHY DO YOU ACT LIKE YOU LOST?**

The SFPOA lost their suit against the Police Commission over these issues two years ago. You won. ***Has the Commission publicly discussed the implications of that victory for reducing these confounding meet and confer delays and how you can and should expedite the policy adoption and implementation process going forward? If not, why not?***

As we learned in a story written and published yesterday by the Bay Area Society for Professional Journalists' 2019 "Journalist of the Year," Joe Eskenazi, the City Attorney's Office inexplicably recently failed to tell the President of the Board of Supervisors about the SFPOA v. San Francisco Police Commission decision... leaving him with the mistaken impression that the SFPOA has a plausible labor rights argument to stall and keep a much-needed charter revision off of this November's ballot even though it would not and could not lead directly to any change in officers' working conditions.

( <https://missionlocal.org/2020/06/san-francisco-has-beaten-its-police-union-in-every-venue-why-does-the-city-still-defer-to-it/> .) Eskenazi writes --

\*\*\*\* "(T)he POA can still wield power — and induce the city to defer to it. Even when the city needn't. And shouldn't....

"[A key passage](#) from the Court of Appeal's 2018 decision (in *SFPOA vs. SF Police Commission*):

*Moreover, compelling the City to arbitrate issues surrounding the new use of force policy before it can be implemented would defeat the purpose of requiring cities to make fundamental managerial or policy decisions independently. That is because it would essentially allow the [POA] to hold the policy in abeyance indefinitely... .*

**In short, the POA is still being given more deference here than a series of judges have ruled it needs to be given. Perhaps old habits die hard.**

**The POA will always stand athwart our city government and yell, “meet and confer.” Our city government needs to get in the habit of yelling back, “stop.”**  
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## **BIG CITY REFORM CHIEFS BACK RE-EXAMINATION OF EXAGGERATED LABOR RIGHTS CLAIMS**

The problem of police unions being treated like they have labor rights they do not -- being provided legally unnecessary opportunities to delay or water down reforms -- is not unique to San Francisco. In their open letter issued after the killing of George Floyd signed by SFPD Chief Scott and most of the top reform-oriented law enforcement executives in the country, the Major Cities Chiefs Association explained that -- "The balance of labor and management is often out of calibration" and called for re-examination of laws and police union contracts that are undermining the ability to manage large police agencies. ([https://www.majorcitieschiefs.com/pdf/news/mcca\\_open\\_letter\\_update.pdf](https://www.majorcitieschiefs.com/pdf/news/mcca_open_letter_update.pdf) .) Sometimes that balance is "out of whack" because of disciplinary arbitration rights. Sometimes, as in San Francisco, it's because far too much deference has been given to police union demands to delay or water down policy reforms in labor talks.

Your proposed resolution with new concurrence deadlines will not impact the worst and most easily avoidable delays in the DGO adoption and implementation process. Only a careful, public re-examination of how, why and when the Commission is using the meet and confer process -- especially in the wake of its court victories over the SFPOA -- will restore the balance Chief Scott and his MCCA colleagues were seeking and that *you* should be seeking and speaking out about too if you're truly serious about trying to drastically speed the pace of reform.

## **DISENTANGLING THE "MEET AND CONFER" QUAGMIRE FOR THE SAKE OF REFORM, FAIRNESS & TRANSPARENCY**

***Quite simply, the Commission should resolve to prioritize: (1) sending fewer DGOs to meet and confer; (2) for shorter periods of time; (3) with greater transparency and tracking; (4) with a more informed understanding of the scope of its managerial rights; (5) full control of the process; and, (6) with the overall goal of drastically reducing avoidable implementation delays while ensuring promulgation of the most effective and impactful DGO policy language.*** To be blunt -- if the Commission does not at least articulate these as goals and begin the process to more fully examine the negative consequences and possibly flawed assumptions behind its current meet and confer practices, your USDOJ COPS reform process will continue to experience unreasonable delays and may squander whatever credibility with the public it has left.

Such an examination should include --

\*\*\* The distinction between mandatory subjects of bargaining (where an impasse could result in arbitration) and permissive (strictly voluntary) talks that either do not involve fundamental changes in working conditions or, if they do, they cover core policy topics that would be considered "managerial prerogatives" (as with the use of force policy in *SFPOA v. SF Police Commission* or, in my view, the Bias-Free Policing DGO). ***Is the Police Commission currently delaying implementation of any DGO -- regardless of subject matter -- anytime the POA requests meet and confer talks? If so, why is the Commission still giving the POA a legally unnecessary "blank check" to delay the process and opportunities to water down reforms?***

\*\*\* The difference between talks aimed at changing the DGO policy or wording choices the Commission has already made after a hearing (which the SFPOA can participate in on an equal basis with the public) and talks strictly limited to addressing -- not revisiting -- the working conditions ***impacts*** of those policy choices.

\*\*\* How and when the Commission should exercise its authority on an informed, ***case-by-case***, basis about which particular DGOs should be sent to meet and confer (under what target deadlines and with what strategic goals in mind) and when they should simply be implemented immediately after adoption.

\*\*\* When it is prudent to implement DGOs over POA objections (given the consequences of unreasonable delays) vs. when it might be prudent to continue talks... and for how long.

\*\*\* The difference between the legal need to sometimes "meet and confer" and the practical, legal reality that "meet and confer" does not require "meet and agree" given the likelihood that arbitrators will rule in the Commission's favor if it is seeking to implement policy changes recommended by USDOJ COPS, that are already in place in other jurisdictions, that are the productive of collaborative efforts that included opportunities for SFPOA participation and/or are in line with current best practices in law enforcement.

\*\*\* The Commission's ability and need to reasonably track DGOs while they are in meet and confer, to monitor whether its goals and directives are still being actively pursued as the talks continue, to establish reasonable target deadlines for how long the talks should take place (especially in light of the very slow progress on USDOJ COPS reforms) and how and when it can exercise its authority to break off talks and implement the DGO.

\*\*\* The role, if any, of current SFPOA contract provisions in contributing to the delays and

the Commission's need to proactively identify those (and other items) for sought-after revision in the upcoming contract talks. (For example, during the last set of contract talks in 2018, community pressure from the #NoJusticeNoDeal campaign eventually led the City to propose a provision that, in exchange for their hefty pay increases, the SFPOA would agree to short deadlines for claiming any right to meet and confer on USDOJ COPS reform-related policy changes. ( <https://www.sfchronicle.com/opinion/openforum/article/No-pay-raise-for-SFPD-without-reform-12753915.php> .) The SFPOA rejected that proposal and the arbitrator ruled in their favor on that point probably, in part, because it came up so late in the process. It would be far preferable for the Commission -- ideally after a public hearing -- to identify its reform and fiscal priorities for a new contract with the SFPOA well in advance. Has anyone solicited the Commission's input yet?)

\*\*\* The need to discuss *only* mandatory subjects of bargaining in closed session since the Brown Act requires open, public discussion of all other policy matters. Literally everything else is a permissive subject of talks with the SFPOA but the Police Commission cannot thwart its open meeting obligations by shielding from public view its discussion about policy choices with closed session "labor talks" on non-mandatory, permissive topics.

I recognize these may seem like legally complex topics but that is no reason to avoid publicly discussing and addressing them. ***To do otherwise is to perpetuate a core area of dysfunction and delay the USDOJ COPS report called on you to address. To do otherwise is to continue to act as though the POA has labor rights they quite plainly do not have (as shown in SFPOA vs. SF Police Commission)... is to perpetuate the myth that the Commission lacks policy-setting and implementation authority that it clearly does have... and to needlessly sacrifice the increasingly urgent imperative of swifter and stronger reform and the public's full right to participate on an equal basis in collaborative policy development to the SFPOA's on-going desire to stall, block or water down reforms in closed-door meet and confer sessions.***

Thank you.

John Crew  
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cc. SFPD Chief of Police William Scott  
DPA Director Paul Henderson

an action is "taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. here  
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