

Short Guide to the Negotiated Settlement Agreement (NSA)

Paula Hawthorn, PhD

Paula.hawthorn@gmail.com email for electronic version with live embedded references

History

On January 22, 2003, the United States District Court for the Northern District of California approved the settlement of a lawsuit between the City of Oakland and 119 plaintiffs who alleged that Oakland police officers had beaten, kidnapped and planted drugs on them in the summer of 2000. The plaintiffs, who were represented by attorneys Jim Chanin and John Burris, received a payout of \$11M, and the City agreed to reforms embodied in the Settlement Agreement, a list of 51 different tasks which OPD must come into compliance with, in the judgement of a court-appointed Monitor. A good explanation of the background is the Wikipedia article https://en.wikipedia.org/wiki/Allen_v._City_of_Oakland and a good explanation of all 51 tasks is in the first Monitor's report, <http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/dowd005015.pdf>

This is a Settlement Agreement that was agreed to by the plaintiffs and the City, and the compliance is overseen by a federal court judge. This is not the same as other Federal Oversight of police departments, for instance the one in Los Angeles, because it is not overseen by the US Justice Department. In Los Angeles the oversight had a defined 5-year period <https://www.pbs.org/wgbh/pages/frontline/shows/lapd/after/decreed.html> and it might be that because the US Justice Department was involved, more expertise was brought to the problems of oversight and reform. We do not know if that would have made a difference in Oakland.

Process for determining compliance

Compliance with each of the tasks is determined by the Independent Monitor. From 2003 – 2009 that was a team led by Division Chief Rachel Burgess (retired, LA County Sheriff's Office) and as they explained in their last report <http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/dowd006411.pdf> they found that although OPD had made substantial progress, there remained several tasks where OPD was not fully compliant. The initial monitoring team decided to not continue in that capacity, and a new team was chosen, led by Chief Robert Warshaw, former chief of the Rochester, NY, police department. As with the Monitoring Team led by Division Chief Burgess, the assessment of compliance is determined solely by the Monitoring team. The team writes a report (and they are all on line at <http://www2.oaklandnet.com/government/o/OPD/OAK059862#imt> for the older ones and <http://www2.oaklandnet.com/government/o/OPD/a/publicreports/DOWD004998> for the later ones), and gives it to the judge who then makes whatever orders he deems necessary.

Where are we now

The Wikipedia article cited above states: *[Due to lack of progress] On October 4, 2012, Plaintiffs' counsel filed a motion requesting that the Oakland Police Department be placed in receivership.^[1] The OPD requested more time to achieve compliance.*

Plaintiffs' motion ultimately led to a settlement by the parties, who agreed to the Court's appointment of a Compliance Director who would have broad ranging powers, including the power "to review, investigate and take correction action regarding Oakland Police Department policies, procedures, and practices that are related to the objectives of the Negotiated Settlement Agreement (NSA) and Amended Memorandum of Understanding (AMOU), even if such policies, procedures, or practices do not fall squarely within any specific NSA task."¹²

At this time, Chief Warshaw is the person appointed by the Judge to be both the Compliance Director and the Monitor. He continues to hold that the OPD is not in compliance with three of the original fifty-one tasks: Task 34, Vehicle Stops, Field Investigations and Detentions; Task 40, Personnel Assessment System and Task 41, Use of Personnel Assessment System. Task 34 is where the Monitor and the court lodge the complaint about racial profiling. Task 40, the creation of a computerized Personnel Assessment System to keep track of issues with officers and flag those who, for instance, have a large number of complaints against them, has indeed been completed, but the system does not work perfectly. Task 41, the application of the Personnel Assessment System, is to make sure that the officers who have been flagged by the Personnel Assessment System are properly disciplined, counseled, etc.

How much does it cost?

In 2015 Rashidah Grinage filed a Public Records Act request with the City of Oakland, asking for all data on the cost of the Negotiated Settlement Agreement. I analyzed that data, and found that as of that time the total spent was about \$30,000,000. But what was more interesting to me was the ongoing cost, so for the year 2014 the costs were:

- \$940,000 paid to Police Performance Solutions (Chief Warshaw's company) for Monitoring Services.
- \$263,000 paid to Warshaw Associates Inc for Compliance Director Services.
- \$172,000 paid to DLA Piper, legal fees for "Outside Counsel" no notation as to what they were needed for.
- \$88,000 paid to Elite Performance Assessment Consultants, for Audit Services. On their web site, <http://elitepacllc.com/> Elite Performance Assessment Consultants lists as among their expertise the auditing of police department policies to see if they conform to consent decrees.
- \$68,000 to James B Chanin ESQ by Court Order. Jim Chanin is one of the plaintiffs' attorneys. There is no notation as to what this is for.
- \$21,000 for Monitor Office Space
- \$2,500 to Stanford University for Subject Matter Expert. This was the beginning of the Eberhardt study, and those costs have gone up each subsequent year.

So, for 2014, the cost was about \$1,550,000. This amount will only have gone up in the intervening years. I encourage you to file your own requests for more current information.

Why is it taking so long?

There are three possible reasons that it is taking so long. **1) Greed:** Chief Warshaw's group makes at least a million dollars a year from this contract, and that money will stop if they find that OPD is in compliance, so they have no incentive to find the OPD in compliance, which leads to moving the goal posts, adding requirements for compliance that were never in the original NSA. An example is the

Monitor's adding Professor Eberhardt's "Fifty Recommendations to Mitigate Racial Disparities and Improve Police-Community Relations"

<http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/oak059292.pdf> and

demanding that all 50 be completed. **2) Incompetence:** it is obvious, given the wide powers that Chief Warshaw was given in 2012, that he could have ordered that, for instance, officers flagged by the PAS system be reassigned, etc. But he has not. Why not? His reports continue to complain about things that he has the power to change. For instance, in the latest report, he says the specifications for the changes to PRIME, the Personnel Assessment System, are "too vague", yet he has the power to direct that better specifications be done. Or **3). A very difficult goal.** At the latest case management conference with the judge in charge of the case, Judge Orrick, Chief Kirkpatrick stated in her presentation that Judge Orrick had come to the OPD & in his speech to the officers said that the NSA was "not about checking boxes, but about changing hearts" Actually, the NSA was about checking boxes, the original agreement was very clear about specific, measureable goals. Now that it is about changing hearts, how long does that take for any group of people?

What now?

Another interesting set of reports are the OPD internal Office of the Inspector General reports titled "OPD-NSA Related Reports":

<http://www2.oaklandnet.com/oakca1/groups/police/documents/webcontent/oak067719.pdf>

These reports are a model of what you would expect a Compliance Director's report to be like. Look at the section beginning page 31, *Internal Affairs: Process for Handling Citizens' Complaints Alleging Racial and/or Identity Profiling* and note the clear statement of the problem, and a recommended solution.

I believe that at least we should ask the judge to fire Warshaw and hire someone who can do a good job. And we should demand that the goals be stated, measurable and achievable. When asked what police department in the US can be used as a model for the OPD: what police department that is, in fact, not doing racial profiling, has a good computerized personnel assessment system (with embedded video from the personal recording devices), has a good process for disciplining officers flagged by the computerized personnel assessment system, Chief Warshaw said that there are none. He stated that the goal for OPD is to be the best in the nation. Professor Eberhardt, was asked for an example of any city at all that had implemented even 10 of her 50 recommendations, a city that had implemented even 10 who saw a drop in profiling statistics, and she could give no example except to say that New York City is "doing better", something that the family of Eric Garner ("I Can't breathe") would not agree with. This is a hard task. Maybe our \$1.5M a year is well spent, trying to get the best police department in the nation. Or maybe it could be better spent toward the same goal, if we had a better Monitor and/or a better process.

All opinions stated in this are mine, alone.

Paula Hawthorn 2/14/2018