

Sixth Progress Report of the Compliance Director for the Oakland Police Department

June 8, 2015

Introduction

This is the sixth progress report issued in my capacity as both Monitor and Compliance Director of the Negotiated Settlement Agreement (NSA) in the case of *Delphine Allen, et al., vs. City of Oakland, et al.*, in the United States District Court for the Northern District of California. In January 2010, under the direction of Judge Thelton E. Henderson, the Parties agreed to my appointment as Monitor of the Oakland Police Department (OPD). With the assistance of the Monitoring Team, I determine the status of OPD's compliance with the requirements of the 22 active NSA Tasks.

In December 2012, as a result of the City's slow progress with the NSA reforms, and following Court-ordered negotiations among the Parties, Judge Henderson established a Compliance Director for the Department. The Court's Order of December 12, 2012 outlined the Compliance Director's broad powers and responsibilities to "bring...[OPD] into sustainable compliance with the NSA and AMOU."¹ On February 12, 2014, Judge Henderson issued an Order finding it "appropriate and effective to now concentrate the powers of the Compliance Director and Monitor into one position."²

Wearing two hats – as Monitor and Compliance Director – is an extraordinary charge. It affords me many authorities: to determine whether the Department has achieved compliance with the NSA; and also to provide certain direction to the agency in its efforts to attain compliance.

As Monitor, I continue to oversee the Monitoring Team's work as we assess the Department's progress. The Monitoring Team makes quarterly visits to Oakland to meet with Department personnel; observe Departmental practices; review Department policies and procedures; collect and analyze data using appropriate sampling and analytic procedures; and inform the Parties – and, on a quarterly basis, the Court – with information about the status of OPD's compliance.³

¹ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012. The AMOU, or Amended Memorandum of Understanding Re: Post NSA Terms and Conditions Allowing For the Resolution of Plaintiffs' Claims for Injunctive Relief and For Dismissal of The Action, was approved by the Court on June 27, 2011.

² United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Modifying Compliance Oversight Model, dated February 12, 2014.

³ Per the Court's May 21, 2015 Order, beginning in July 2015, the Monitoring Team will alter the structure of our visits and replace the quarterly compliance reports with monthly progress reports.

As Compliance Director, I hold more direct authority over the Department's NSA-related decisions. With the assistance of a seasoned associate, I serve as an agent of the Court, and work closely with OPD on a sustained basis. My primary focus is for the Department to achieve and sustain compliance with the reforms outlined in the NSA. As directed by the Court, I "have the power to review, investigate, and take corrective action regarding OPD policies, procedures, and practices that are related to the objectives of the NSA...even if such policies, procedures, or practices do not fall squarely within any specific NSA task."⁴ I shall become involved in all matters that directly relate to the NSA – as well as issues in which there is a reasonable nexus to the NSA or those that concern civil rights, which I view as central to the NSA.

As of the last quarterly monitoring report (issued in April 2015), the Department was in full compliance with 19 of the 22 Tasks; and in partial compliance with Tasks 5, 34, and 45. In this report, per the recent Court Order modifying the monitoring plan (May 21, 2015), I discuss the status of the Tasks that remain out of compliance or have only recently come into compliance – and what the Department is doing currently to attain or sustain compliance with these requirements. I will also discuss the recently completed Court-ordered investigation on the discipline and arbitration process.

The May 21, 2015 Court Order Modifying the Monitoring Plan

The Court's Order of May 21, 2015 modified the monitoring plan that has been in place since the beginning of our tenure to make more efficient use of resources while focusing on the long-term sustainability of the reforms in the NSA.⁵ Several years ago, the Parties contemplated and agreed that once OPD achieved compliance with all of the NSA reforms, the Department would commence a sustainability period to demonstrate that the practices and reforms are fully sustainable. Per the Order, "It...remains unclear whether the City can sustain the reforms it has achieved thus far. Indeed, some of the NSA tasks have only been in compliance for a short time, and some have gone in and out of compliance over the past several years. As this Court has repeatedly stated, compliance must be sustainable before this case can end. This requires a one-year period of demonstrated substantial compliance, as agreed to by the parties in their MOU and AMOU, as well as evidence that reforms have become so institutionalized that the absence of oversight will not result in a return to practices that fail to protect constitutional rights."

⁴ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

⁵ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Modifying Monitoring Plan, dated May 21, 2015.

The Order requires that the Monitoring Team actively monitor only those Tasks (currently, seven) that have not been in compliance for at least one consecutive year.⁶ Beginning next month, my Team shall “provide more contemporaneous reporting” of the actively monitored Tasks via monthly progress reports. In addition, my Team and I shall provide increased technical assistance to the Department to help it to achieve compliance with all of the NSA Tasks; and to “address, in a sustainable manner, the strategies and benchmark areas included in the Court’s December 12, 2012 Order re: Compliance Director and the shortcomings identified in the Court Investigator’s April 16, 2015 report.”

The Order continues, “The Monitor will also help Defendants institutionalize an internal system of monitoring by the Office of Inspector General or other City or Department entity, along with internal mechanisms for corrective action.” More specifically, for the Department to achieve truly sustainable compliance, I shall require that OIG create additional full-time auditor positions and demonstrate its capacity to conduct comprehensive audits – as well as to appoint and train appropriate personnel throughout the Department to conduct mini-audits on NSA-related and other procedures. The Monitoring Team will continue to review, analyze, and discuss in our reports any NSA-related audits conducted by OIG. We will also determine how the Department responds to the recommendations outlined in these audits – and work with OIG to streamline its process for audit follow-up. Within the next several months, I shall begin to require the Department’s participation in the publication of monitoring status reports, with an eventual transition to a Department-issued status report.

News Since Fifth Progress Report

On August 14, 2014, the Court expressed its dismay with the recent reinstatement of an officer whom Chief Sean Whent had terminated, and with the City’s poor performance in other recent arbitrations – several of which also overturned terminations of officers who had been sustained for serious misconduct. The Court ordered an investigation on the City’s police discipline and arbitration process, commenting, “Failure to address the issues addressed in this order will prevent compliance, let alone sustainable compliance, with the Negotiated Settlement Agreement (‘NSA’). Defendants cannot be in compliance with Task 5 if the internal investigations leading to disciplinary decisions by Defendants are inadequate. Likewise, they cannot be in compliance with Task 45 if discipline is not consistently imposed. Because imposition of discipline is meaningless if it is not final, the Monitor and the Court must consider whether discipline is upheld at the highest level, most often arbitration...” At that time, the Court questioned, “whether Defendants are adequately preparing cases for arbitration such that consistency of discipline can be assured to the greatest extent possible.”

⁶ The Order adds, however, “To ensure continued compliance with all aspects of the NSA, the Monitor may choose to examine tasks that are no longer being actively monitored.”

The investigation was recently completed; and the Court-appointed investigator issued his report, concluding that Oakland's police discipline process is "broken" because, among other reasons, it fails "to deliver fair, consistent, and effective discipline."⁷ The report continues, "Time and again, when the Oakland Police Department...has attempted to impose significant discipline, its decisions have been reversed or gutted at the arbitration stage, causing the public to question whether the City handles disciplinary cases appropriately." The report discusses the lack of accountability among City officials for the serious failures of both OPD and the Office of the City Attorney (OCA) in police discipline cases. It also offers many concrete recommendations in the areas of investigation, discipline, preparation, arbitration, and sustainability.

Just a few days following the report's release, on April 21, 2015, the Court described the report's findings as "both disappointing and shocking."⁸ It continued, "[I]t is difficult to reach any conclusion other than that the City has been indifferent, at best, to whether its disciplinary decisions are upheld at arbitration." The Court ordered the City to "work to eliminate the problems identified" in the Court-appointed investigator's report, and to file a status report on or before September 1, 2015 to discuss its progress.

I discuss these issues further in the section on Tasks 5 and 45 below.

In addition, over the last few months, my associate and I observed several noteworthy developments in the Department, including:

- The City has received a great deal of attention during the last several weeks in response to OPD's changed tactics for facilitating nighttime marches. In the last year or so, the City has facilitated numerous large-scale events – and others and I have commended the Department for its more thoughtful and cautious approach to crowd control than in the past. Recently, however, the City has begun interpreting its crowd control policy more broadly and has appeared to restrict the routes of nighttime marches following several protests that involved looting and serious destruction of public property. I continue to facilitate discussions between the Department and local attorneys from the legal team in the case of *Spalding v. City of Oakland*, which required significant changes to the Department's crowd control policy. I also continue to closely monitor officers' uses of force and less lethal munitions; the Department's interactions with citizens; and any related complaints or investigations in all large-scale events.
- The City Attorney has become more engaged in matters relevant to the recent report about discipline and arbitration – as well as developments regarding the crowd control policy. Her participation in the dialogue has been a value-added and we look forward to a measure of collaboration with her and her office as we attempt to mutually identify problems and resolutions.

⁷ Report of the Court-Appointed Investigator in *Delphine Allen v. City of Oakland*, dated April 16, 2015.

⁸ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: [1054] Investigator's Report on Arbitrations, dated April 20, 2015.

- In striking contrast to past practice, when it was a much more insular agency, OPD now sends many top commanders to police schools and trainings around the country. In several cases, Department personnel have participated in panel discussions to discuss modern policing issues that OPD has been at the forefront of – including the use of and policies related to Portable Digital Recording Devices (PDRDs). In a recent biweekly report, Chief Sean Whent wrote, “OPD’s experience with a body worn camera program has made us an industry leader in this emerging policing issue, and I am happy to share our lessons learned with other agencies.”

As noted above, OPD is currently in compliance with 19 of the 22 active Tasks – the second consecutive reporting period with this compliance rate. This is the highest number of Tasks in compliance since the beginning of our tenure and in the history of the NSA. The Department must continue its steady progress with the reforms, and focus on making the reforms sustainable.

Discussion of Tasks

As described in the May 21, 2015 Court Order, the Monitoring Team’s assessments have shown that OPD has not achieved – or has only recently come into – compliance with the following seven Tasks:

- Task 5, *Complaint Procedures for IAD*; and Task 45, *Consistency of Discipline*
- Task 20, *Span of Control for Supervisors*
- Task 26, *Force Review Board (FRB)* and Task 30, *Executive Force Review Board (EFRB)*
- Task 34, *Vehicle Stops, Field Investigation, and Detentions*
- Task 41, *Use of Personnel Assessment System (PAS)*

Below I will discuss recent efforts by OPD to achieve or sustain compliance with these Tasks.

Task 5, Complaint Procedures for IAD; and Task 45, Consistency of Discipline

In our most recent quarterly status report, we found OPD in partial compliance with Tasks 5 and 45. As noted above, during the two prior reporting periods, we had deferred our assessments of these Tasks due to the then-ongoing Court-ordered investigation of the Department’s discipline and arbitration process.

A few days following the investigation report's release, on April 21, 2015, the Court ordered the City to "work to eliminate the problems identified" in the Court-appointed investigator's report, and to file a status report on or before September 1, 2015 to discuss its progress.

We have begun to see evidence of improvements in this area. By all accounts, the Department and the City Attorney's Office appear to be working together more closely. At a recent weekly meeting between the Chief and IAD, OCA personnel updated the Department on recent arbitrations and discussed observations the office had made of the related IAD investigations. According to OCA, in cases when the office determines that outside counsel is needed to handle arbitrations, it now assigns attorneys earlier in the process than in the past, allowing them more time to prepare and providing more resources to support their preparation.

We will continue to monitor these developments closely.

Task 20, Span of Control for Supervisors

In our most recent quarterly status report, for the third consecutive reporting period, we found OPD in compliance with Task 20. OPD had previously been in partial compliance with Task 20 due primarily to its non-compliance with the subtasks related to consistency of supervision (Task 20.2) and the actual ratio of supervisors to officers (Task 20.3). Last year, my associate and I worked with Department officials and the Plaintiffs' attorneys to revise the methodology for assessing these subtasks. This mutually agreeable approach allowed the Department to achieve compliance with Task 20 – but even more importantly, to develop Task 20-related practices that are sustainable in the long term.

Late in 2014, in anticipation of its annual "draw" – in which officers, based on seniority, select their assignments for the coming year – the Department reworked its relief supervision system so that it involves a smaller number of relief sergeant assignments. The Department also sought my permission to have considered in compliance sergeants who are covering for assigned supervisors who are on short-term leave. I provisionally authorized this altered model and methodology, promising to review the data for the first quarter of 2015 to determine compliance and assist with any necessary tweaks.

We met with OPD officials recently upon our review of the first quarter's data, and it appears that this new design and methodology allows the Department to sustain its compliance with these critical requirements. Department officials have assured us that this reworked system is designed in such a way that OPD plans to employ it in the long term.

In the next few months, we will continue to review data and confer with relevant Department personnel to sustain this new design. We will also interview patrol watch commanders to learn more about how they make staffing decisions, and review a sample of patrol squads' sergeants to understand better how patrol officers are supervised over time.

Task 26, Force Review Board (FRB); and Task 30, Executive Force Review Board (EFRB)

In our most recent quarterly status report, for the third consecutive reporting period, we found OPD in compliance with Tasks 26 and 30. Prior to that, OPD had been in partial compliance with these Tasks during many different reporting periods since the beginning of our tenure.

As noted previously, the Monitoring Team has observed significant improvements in board hearings since the adoption last year of revised Departmental General Order K-4.1, *Use of Force Boards* – which requires the board proceedings to be more formal, efficient, and analytical. Deputy Chiefs now regularly confer with presenters in advance of the hearings to communicate their expectations; presenters are far better prepared; the Department has reduced the number of participants who are required to attend hearings; and board members are provided reports and other evidence in advance of the hearing date.

Over the next few months, the Monitoring Team will continue to observe the board hearings.

Task 34, Vehicle Stops, Field Investigation, and Detentions

Task 34 is one of the NSA's most significant requirements – as it addresses the bias-based policing that was an original issue in this case. OPD has been in partial compliance with Task 34 since the fourth reporting period.

Professor Jennifer Eberhardt of Stanford University continues to assist the Department with its stop data analysis. Dr. Eberhardt expects to complete an examination of the first full year of available stop data in the next several months. At an all-Parties' meeting in April, Dr. Eberhardt and her team presented preliminary data analyzing officers' years of experience as a predictor for recovery rates or other data.

In the next few months, I will continue to work with OPD to explore ways in which the collected information and Dr. Eberhardt's analysis can serve as the basis for the development of training and other intervention activities to address the racial disproportionality. A recent Monitoring Team assessment concluded that of every four searches, one recovered contraband. The search recovery rates – sometimes referred to as "yield rates" – vary widely among different squads in the Department. We will explore with OPD officials ways in which the Department can learn more about what supervisors of squads with particularly high or low search recovery rates are doing or not doing.

Task 41, Use of Personnel Assessment System (PAS)

OPD achieved compliance with Task 41 in the twentieth reporting period.

As noted previously, as part of its risk management system, the Department constructs lists of the “Top 30” members and employees within several categories of risk-related activity. We are beginning work with the Department to focus on the individuals who are “repeaters” on these lists – that is, those who continue to meet system thresholds without changing their behavior.

Over the last few months, Microsoft has begun to fulfill different components of the new IPAS2 system. Independently, the City has retained a data scientist who is documenting the workflow of the PAS Administration Unit; eventually, this documentation will be used to test the new system’s viability. While IPAS2 is still under development, we have encouraged OPD to set up an IPAS2 use committee – made up of representatives of different ranks and sectors of the Department – to think and learn more about how the new system could be useful to different segments of the Department. The first meeting of this use committee will take place within a few weeks.

Whether the Department is still using the current system or once it has adopted the shinier new system, it is most critical that the Department use the system as a tool to identify risk and change problematic behavior.

In the next few months, we intend to observe the first meeting of the IPAS2 use committee and track Microsoft’s development progress closely. We also will continue to work with the Chief and his Executive Team to improve the inquiry and discussion in the Department’s Risk Management Meetings. These forums serve as an essential tool to identify and address issues related to officers who have performance or other problems, and I would like to see OPD do a better job examining patterns of behavior, instead of just explaining away some findings.

Discussion of Matters Outlined in December 12, 2012 Court Order

The Court’s Order of December 12, 2012 grants the Compliance Director the authority to assist OPD to “address, resolve, and reduce: (1) incidents involving the unjustified use of force, including those involving the drawing and pointing of a firearm at a person or an officer-involved shooting; (2) incidents of racial profiling and bias-based policing; (3) citizen complaints; and (4) high-speed pursuits.”⁹ The Order describes such matters as “key to driving the sustained cultural change envisioned by the parties when agreeing to the NSA and AMOU.” The Order also states that the Department should develop “a personnel assessment system (‘IPAS’) that provides a sustainable early-warning system that will mitigate risk by identifying problems and trends at an early stage.”

⁹ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

According to data provided by OPD, the Department continues to improve in all of these areas. While OPD tracks all of its uses of force, including those “involving the drawing and pointing of a firearm at a person,” and it examines the justification for all Level 1 and 2 uses of force as part of its review board process, the Department does not specifically track “unjustified” uses of force. OPD did not have any officer-involved shootings in 2014. To date in 2015, the Department has had three officer-involved shootings, two of which involved mentally disturbed suspects. In the first case, the officer’s two rounds missed the mentally disturbed subject, who retreated and surrendered; in the second case – which also involved a mentally disturbed suspect whose erratic behavior prompted calls to OPD – the officer’s round struck the subject, who is expected to survive. The third case, the first fatal officer-involved shooting in about two years, occurred just two days ago, and involved an interaction with an initially unresponsive man who had a loaded gun in his parked car on a freeway exit ramp. The Executive Force Review Board will hear the first of these three cases later this month; and, as always, we will closely monitor the Department’s investigations and board presentations of these incidents.

In the last year, the Department has demonstrated reductions in uses of force without reducing the number of arrests or showing any other indications of what is sometimes referred to as “depolicing.” We are especially encouraged by the significant reductions in Level 1, the most serious uses of force. As noted previously, OPD attributes the reductions to improved training and changes in policy that characterize uses of force differently; encouragingly, our reviews of the documentation to date have not uncovered anything that indicates otherwise.

Also, thus far in 2015, the Department has logged 21 pursuits; at the same time last year, it had also logged 21. As of the implementation of OPD’s revised pursuit policy (which took effect in January 2014), OPD now also tracks its “non-pursuits” – that is, situations in which officers do not elect to pursue but in the past, under the former policy, likely would have. Thus far in 2015, OPD has logged 83 non-pursuits. OPD continues to refine its policies on legitimate circumstances for pursuits.

In the area of “incidents of racial profiling and bias-based policing,” the available data raises many questions about what accounts for the varying search rates among different racial and ethnic groups – and it has not yet been determined whether there is a constitutionally valid basis for the disparity or there is a need for corrective intervention.

While OPD appears to be making progress – with the involvement of Dr. Eberhardt and the Department’s ongoing engagement with its publicly released stop data reports – this is an area that will be constantly scrutinized by us, the Court, the Plaintiffs’ attorneys, and the community. Notwithstanding some of the progress of the agency, and the value-added to its capacities with the access to Dr. Eberhardt, OPD must develop a greater sense of cultural comfort in its discourse on race. The Chief – who has set a good standard – must

be joined by others, throughout the ranks, so that they too can be at the forefront of a dialogue that is now a national one. As it is becoming increasingly clear that the most significant domestic story on the evening news is matters relevant to “race and the police,” the comfort to engage in a public dialogue is of paramount importance to the health of the City.

In the next few months, I will continue to engage City and Department officials regarding strategies to resolve the disparities suggested by the Department’s available stop data; as well as how best to measure OPD’s progress in all of the critical areas outlined in the Court Order of December 12, 2012. I will discuss these matters further in future progress reports.

Other Recent Activities of Compliance Director

Beyond what is noted above, my associate and I have been involved in many activities since I issued my last progress report as Compliance Director:

- Enhancing the Department’s capacities for community interaction and engagement – including opportunities to solicit public feedback on its programs and initiatives. Members of the Monitoring Team and I occasionally meet with community groups to learn more about their interactions with the Department and their observations of its progress with the reforms.
- Continuing to facilitate discussions between the Department and local attorneys from the legal team in the case of *Spalding v. City of Oakland*, which required significant changes to the Department’s crowd control policy.
- Providing guidance, mentoring, and technical assistance to Department officials in several other key areas – including recent personnel transfers and promotions, managing and training members and employees, new technological initiatives, policy revisions, and organizational changes.

In the next few months, beyond what I have listed above, my associate and I intend to work with the Department to:

- Continue to work closely with the Chief and his Executive Team to build capacity and foster leadership within the Department, especially in ways that focus on sustainability of the reforms in the NSA. We were encouraged to hear one OPD commander say recently, “If you’re a commander in this Department, you’re a risk manager.”
- Assist the Department to talk more openly about the compact it must have with the communities it serves and to talk about matters of race.
- Work with the Department to create succession and training plans to ensure that personnel in new assignments learn from their predecessors about the responsibilities of their new positions.

- Assist the Department to develop a training needs assessment. We will review the results of last year's survey conducted by the Training Section on the Department's current training offerings.
- Encourage the Department to examine the ways in which it trains officers to respond to subjects with mental health issues.
- Engage the Department, in conjunction with the Office of the City Attorney, to assess and possibly revamp OPD's fitness for duty evaluation.
- Revise critical Departmental policies.

Conclusion

Per the Court's May 21, 2015 Order, "The Monitor's most recent report – the twenty-first report by the second monitoring team – found the City in compliance with all but three of the fifty-one [original] NSA tasks. Despite such progress, however, fundamental issues remain. The Court Investigator's report concerning the discipline process provides the most recent and stark example. As the Court has already noted, the shortcomings identified by the Investigator severely undermine consistency of discipline and accountability, both of which are fundamental principles behind the NSA. Similarly, Defendants' efforts to curb bias-based policing, which gave rise to many of the original complaints in this case, continue to be a work in progress."



Chief (Ret.) Robert S. Warshaw