

Twenty-Fifth Report *of the Independent Monitor for the Oakland Police Department*

Introduction

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 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.¹ After 12 years of monitoring OPD's progress with the reforms, it is time for us to devote special attention to the most problematic component parts of the Tasks that are not yet in full compliance or have not been in compliance for at least one year.

To do this, per the Court Order, we are increasing the frequency of our compliance assessments and our reports detailing our findings and other monitoring activities. We also provide increased technical assistance – via monthly joint monitoring/technical assistance visits by designated Team members – in these areas. We also provide particular guidance and direction to the Department on the three Tasks (5, 34, and 45) that are currently in partial compliance. (As of our most recent quarterly report, OPD was in full compliance with all Tasks except for these three Tasks.) As we move forward, part of our assessment of compliance for Tasks 5 and 45 will take into account the degree to which the City is adopting the recommendations listed in the recent (April 16, 2015) report on police discipline by the Court-Appointed Investigator – and the City's own commitments. In addition, per the Court's Order, we will also continue to monitor closely the Department's progress with the December 12, 2012 Court Order as it relates to Task 34 and other critical issues.

In this report, we will describe our recent assessments of Tasks 20, 34, and 45 – and offer commentary on Tasks 26 and 30. As described previously, because we are now reporting on a monthly (as opposed to quarterly) basis, we do not assess and discuss each active or inactive Task in each report; however, for each report, we select several active and/or inactive requirements to examine, and discuss the most current information regarding the Department's progress with the NSA and its efforts at making the reforms sustainable.

Below is the current compliance status of the Tasks listed in the May 21, 2015 Court Order.

¹ 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.

Compliance Status of Tasks Listed in the May 21, 2015 Court Order		
Task	Description	Compliance Status
5	Complaint Procedures for IAD	As of the twenty-first reporting period (covering October through December 2014), in partial compliance. Not assessed in this report.
20	Span of Control	In compliance since the nineteenth reporting period (covering April through June 2014). Now considered inactive.
26	Force Review Board (FRB)	In compliance since the nineteenth reporting period (covering April through June 2014). Now considered inactive. Discussed but not assessed in this report.
30	Executive Force Review Board (EFRB)	In compliance since the nineteenth reporting period (covering April through June 2014). Now considered inactive. Discussed but not assessed in this report.
34	Vehicle Stops, Field Investigation, and Detentions	In partial compliance since the fourth reporting period (covering July through September 2010).
41	Use of Personnel Assessment System (PAS)	In compliance since the twentieth reporting period (covering July through September 2014). Not assessed in this report.
45	Consistency of Discipline Policy	As of the twenty-first reporting period (covering October through December 2014), in partial compliance.

Increasing Technical Assistance

Per the May 21, 2015 Court Order, “The Monitor will provide increased technical assistance to help Defendants achieve sustainable compliance with NSA tasks and 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.”

Accordingly, our Team has altered the nature of our monthly site visits so that they include both compliance assessments and technical assistance. As in the past, we continue to meet with Department and City officials; observe Department meetings and technical demonstrations; review Departmental policies; conduct interviews and make observations in the field; and analyze OPD documents and files, including misconduct investigations, use of force reports, crime and arrest reports, Stop Data Forms, and other documentation. We also provide technical assistance in additional areas, especially those that relate to the remaining non-compliant Tasks

or those areas identified by the Department. For instance, within the last few months, we have provided technical assistance to Department officials in the areas of Executive Force Review Board (Task 30); stop data (Task 34); risk management (Task 41); consistency of supervision (Task 20); and revisions to several Department policies and procedures.

Building Internal Capacity at OPD

Per the May 21, 2015 Court Order, “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.”

The Office of Inspector General (OIG) recently hired a new police auditor, and the hiring process for an additional police auditor is currently underway.

In the meantime, we continue to work closely with OIG’s lieutenant and his staff to identify areas that it should audit or review – and to help design approaches to these audits that are not cumbersome, so as to ensure sustainability. This week, OIG produced its second monthly progress report, which details the results of its most recent reviews. This progress report, like the first report OIG produced, is impressive and will be released publicly, via the Department’s website. This second report focused on five areas: (1) stop data analysis of search rates and search recovery rates; (2) the field complaint acceptance process; (3) the preliminary inquiry process; (4) personnel arrested, sued, and/or served with administrative process; and (5) promotional consideration procedure.

As with its first report, in each of the areas where OIG identified problems, the report included helpful recommendations to Department units to “close the loop” on outstanding or problematic issues. We look forward to reviewing future OIG progress reports, and also assisting OIG as it becomes a stronger unit and further develops its capacity to monitor the Department’s continued implementation of the NSA reforms.

Focused Task Assessments

Task 20: Span of Control for Supervisors

Requirements:

On or before August 14, 2003, OPD shall develop and implement a policy to ensure appropriate supervision of its Area Command Field Teams. The policy shall provide that:

1. *Under normal conditions, OPD shall assign one primary sergeant to each Area Command Field Team, and, in general, (with certain exceptions) that supervisor's span of control shall not exceed eight (8) members.*
2. *During day-to-day operations, in the absence of the primary supervisor (e.g., due to sickness, vacation, compensatory time off, schools, and other leaves), the appropriate Area Commander shall determine, based on Department policy and operational needs, whether or not to backfill for the absence of the sergeant on leave.*
3. *If a special operation, (e.g., Beat Feet, Special Traffic Offenders Program (STOP), etc.) requires more than eight (8) members, the appropriate Area Commander shall determine the reasonable span of control for the supervisor.*
4. *If long-term backfill requires the loan or transfer of a supervisor from another unit, the Chief of Police and/or the Deputy Chief of Police shall make that decision.*

(Negotiated Settlement Agreement IV. C.)

Relevant Policy:

Three Departmental policies incorporate the requirements of Task 20: Departmental General Order A-19, *Supervisory Span of Control*, issued on July 26, 2006; Departmental General Order D-13, *Assignment to Acting Higher Rank or Classification*, issued on June 17, 1999; and Departmental General Order D-13.1, *Assignment to Acting Sergeant of Police*, issued on May 14, 2014. (The publication of DGO D-13.1 cancelled Special Order 8435, which previously governed the selection process of acting sergeants.)

Commentary:

In January 2015, following discussions with our Team, the Department developed and implemented an alternate relief sergeant system. Although the new plan reduced the number of relief sergeants assigned to Patrol, OPD maintained that it would not affect compliance with the requirements related to consistency of supervision and span of control. We monitored these developments closely, keeping in close communication with appropriate Department officials on the changes; and we recently reviewed Task 20 with an altered methodology that appropriately accommodates these changes.

For our assessment, we reviewed spreadsheets prepared by the Department for the months of June, July, and August 2015 that, by date, note which type of sergeant supervised each applicable squad – a primary sergeant, relief sergeant, acting sergeant, other sergeant (one working overtime), or none. (The Department refers to unsupervised squads as “open.”) Using Telestaff, the Department’s electronic scheduling system, we also spot-checked this data to verify its accuracy. We calculated per squad the compliance percentages for this subtask during this reporting period. Each of the 45 applicable squads were in compliance – that is, all applicable squads during this reporting period were supervised by either a primary, relief, or other/overtime sergeant for at least 85% of their working shifts. We also found that none of the applicable squads exceeded the required 1:8 supervisor to officer ratio at least 90% of their working shifts.

As we have noted previously, we are encouraged that OPD continues to be in compliance with these important requirements. Even more importantly, the Department has institutionalized the sound practices of tracking how each squad is supervised each day; planning, when possible, for expected absences; and thoughtfully considering how to fill in for personnel who are absent unexpectedly.

Task 26: Force Review Board (FRB)

Requirements:

OPD shall develop and implement a policy concerning its FRB proceedings. The policy shall:

- 1. Set out procedures, membership and a timetable for FRB review of use of force investigations involving Level 2 incidents, as defined in Department General Order K-4, REPORTING AND INVESTIGATING THE USE OF FORCE;*
- 2. Require the FRB to review all use of force investigations;*
- 3. Require the FRB to make a recommendation as to whether the use of force was in policy or out of policy;*
- 4. Require the FRB to forward sustained policy violations to the Discipline Officer.*
- 5. Require the FRB not to review any use of force allegation until the internal investigations has been completed;*
- 6. Authorize the FRB to recommend to the Chief of Police additional use of force*

training or changes in policies or tactics, or additional standards, investigatory policies, or training for use of force investigations;

7. *Require the FRB to conduct an annual review of use of force cases examined, so as to identify any patterns of use of force practices that may have policy or training implications, and thereafter, issue a report to the Chief of Police;*
8. *Require that the FRB membership include, at a minimum, one member from the Training Division, one member from the Field Training Officer program, and either the Bureau of Field Operations Deputy Chief or his/her designee;*
9. *Minimally, that one member of the FRB shall be replaced at least annually.*

(Negotiated Settlement Agreement V. C.)

Relevant Policy:

Department General Order K-4.1, *Force Review Boards*, was published February 17, 2006 and most recently revised on October 16, 2014.

Commentary:

Force Review Boards are convened for the purpose of reviewing Level 2 use of force events.²

OPD is in compliance with this Task and it is therefore considered inactive; however, the importance of use of force reviews requires our continued assessment of FRB activities during our monthly site visits.

OPD did not convene any FRBs during the months of July, August, and September; accordingly, we are not including an assessment of this Task in this report. The absence of force events requiring FRB review is reflective of successful OPD efforts to reduce the frequency of use of force events; nevertheless, as further discussed in Task 30 commentary below, we have recommended the OPD further strengthen its FRB and EFRB processes.³

² Level 2 Use of Force includes, 1) Any strike to the head (except for an intentional strike with an impact weapon); 2) Carotid restraint is applied that does not result in the loss of consciousness; 3) Use of impact weapons, including specialty impact munitions or any other object, to strike a subject and contact is made, regardless of injury; 4) Any unintentional firearms discharge that does not result in injury; 5) A police canine bites the clothing or the skin of a subject, or otherwise injures a subject requiring emergency medical treatment (beyond first-aid) or hospital admittance; 6) Any use of force which results in injuries to the subject requiring emergency medical treatment (beyond first-aid) or hospital admittance; (NOTE: For the purposes of this order, an evaluation by a medical professional to assess a complaint of injury is not emergency treatment) 7) Any Level 3 use of force used on or applied to a restrained subject; 7.a) A restrained subject is a person who has been fully placed in a Department authorized restraint device such as both hands handcuffed, a WRAP or Rip Hobble; 7.b) A subject with only one handcuff on is not a restrained person.

³ Twenty-Second Report of the Independent Monitor for the Oakland Police Department, July 10, 2015.

Task 30: Executive Force Review Board (EFRB)

Requirements:

1. *An EFRB shall be convened to review the factual circumstances surrounding any Level 1 force, in-custody death, or vehicle pursuit-related death incidents. A firearm discharge at an animal shall be reviewed by the EFRB only at the direction of the Chief of Police. The Board shall have access to recordings and/or transcripts of interviews of all personnel on the scene, including witnesses, and shall be empowered to call any OPD personnel to provide testimony at the hearing.*
2. *OPD shall continue the policies and practices for the conduct of EFRB, in accordance with the provisions of DGO K-4.1, FORCE REVIEW BOARDS.*

(Negotiated Settlement Agreement V. G.)

Relevant Policy:

Department General Order K-4.1, *Force Review Boards*, was published February 17, 2006 and most recently revised on October 16, 2014.

Commentary:

Executive Force Review Boards (EFRBs) are convened for the purpose of reviewing Level 1 use of force events.⁴ The EFRB consists of three senior commanders as voting members. In addition, regular non-voting attendees include the Training Section Commander and a representative of the City Attorney's Office.⁵ A Level 1 use of force may include both criminal and administrative elements; accordingly, both the Criminal Investigation Division (CID) and IAD present the results of their respective investigations to an EFRB.⁶

⁴ Level I Use of Force events include: 1) Any use of force resulting in death; 2) Any intentional firearm discharge at a person, regardless of injury; 3) Any force which creates a substantial risk of causing death, (The use of a vehicle by a member to intentionally strike a suspect shall be considered deadly force, reported and investigated as a Level 1 UOF under this section. This includes at any vehicle speed, with or without injury, when the act was intentional, and contact was made); 4) Serious bodily injury, to include, (a) Any use of force resulting in the loss of consciousness; and (b) Protracted loss, impairment, serious disfigurement, or function of any bodily member or organ (includes paralysis); 5) Any unintentional firearms discharge, (a) If a person is injured as a result of the discharge; or (b) As directed by the CID Commander; 6) Any intentional impact weapon strike to the head; 7) Any use of force investigation that is elevated to a Level 1 approved by a Watch Commander.

⁵ This includes two follow-up EFRBs and one re-presentation.

⁶ CID staff present the criminal case investigation and recommendations. Following that, the IAD force investigator(s) present the administrative case in detail – including diagramming, audio and visual representations of the case, its findings and recommendations with regards to whether the force was reasonable, and whether the conduct of officers during the event was consistent with OPD policies and procedures.

Task 30 is currently inactive; however, we continue to attend and assess EBRB activities during our site visits.⁷ We observed the boards conducted in July and August.

The incident reviewed by the board in July involved a non-fatal firearm discharge by an officer during an encounter with a subject armed with a knife. After hearing the presentations, the board determined that there was a need for clarification on communication, tactical, and other issues. The board reconvened in August to receive and consider follow-up information that it found responsive to its inquiry. Following this final review, the board found the force used during this encounter appropriate and within policy. In addition, the board recognized notable performance during the encounter by one of the involved officers. We concur with these findings.

The incident reviewed by the board in August involved an individual reportedly off his medication and attempting to assault family members. Four officers responded and during the course of the encounter, pointed firearms, deployed Electronic Control Weapons (ECWs), and discharged a firearm (no strike). Board members discussed a broad range of issues during its reviews of this event and also assigned deliverables to appropriate personnel. The official report and the results of the assigned deliverables, have not yet been made available for our review; therefore, we defer our assessment until receipt of the report.

OPD did not conduct an EFRB in September.

While OPD has successfully reduced its uses of force overall, and up until this year, had a significant reduction in the number of Level 1 uses of force, the Department has experienced four fatal officer-involved shootings (OISs) this summer. Accordingly, we recommended that OPD strengthen its review process.

OPD Force Review Boards serve as the processes in which these most critical events are reviewed – but they also present opportunities for OPD to look beyond the customary questions of policy compliance and legal justification when these events occur. As we have recommended, OPD should include in its EFRB deliberations an examination of whether the use of deadly force may have been avoided; the identification of tactics, strategies, and opportunities as events unfolded that may have supported such an outcome; and the enumeration of other available options that *could* or *should* have been considered. Lessons learned and detailed examinations of the force events examined should be widely shared across OPD. Also, as previously recommended, the OPD should address the question of “whether the force, even though legally justified and within policy, was the only and/or best option.”

Finally, we also previously expressed interest in the Department conducting an analysis and issuing findings regarding whether the tactical direction provided by the on-scene supervisor led to or contributed to an *unnecessary* use of lethal force; the measure to which supervisors are held accountable for their tactical decisions leading to the use of lethal force; and the manner in which the involvement of a supervisor and/or officer in an unnecessary use of lethal force event will be recorded or in IPAS.

⁷ Compliance assessments include a review of the full case files and our regular observations of the boards.

Recognizing that police officers are clearly authorized to use force, including deadly force, to neutralize a threat of serious injury or death to themselves or others, we suggest the above enhancements to the review process will serve to solidify any justification for an officer's use of force when appropriately employed – and by extension, enhance the public's understanding of an officer-involved shooting.

During both our August and September site visits, we met with the Chief to discuss the way forward with the adoption of these recommendations. Given the significance of this matter, it is our expectation that OPD will imminently address this issue.

Task 34: Vehicle Stops, Field Investigation, and Detentions

Requirements:

1. *OPD shall require members to complete a basic report on every vehicle stop, field investigation and every detention. This report shall include, at a minimum:*
 - a. *Time, date and location;*
 - b. *Identification of the initiating member or employee commencing after the first year of data collection;*
 - c. *Reason for stop;*
 - d. *Apparent race or ethnicity, and gender of individual(s) stopped;*
 - e. *Outcome of stop (arrest, no arrest);*
 - f. *Whether a search was conducted, and outcome of search;*
 - g. *Offense categories (felony, misdemeanor or infraction).*
2. *This data shall be entered into a database that can be summarized, searched, queried and reported by personnel authorized by OPD.*
3. *The development of this policy shall not pre-empt any other pending or future policies and or policy development, including but not limited to "Promoting Cooperative Strategies to Prevent Racial Profiling."*

(Negotiated Settlement Agreement VI. B.)

Relevant Policy:

Department policies relevant to Task 34 include: General Order M-19, *Prohibitions Regarding Racial Profiling and Other Bias-Based Policing*; Report Writing Manual (RWM) Inserts R-2, N-1, and N-2; Special Order 9042, *New Procedures Regarding Stop Data Collection* (published June 2010); and Special Order 9101, *Revised Stop Data Collection Procedures* (published November 2012).

Commentary:

In our prior quarterly assessments of information and data to assess compliance with this Task, we reviewed Computer Aided Dispatch (CAD) entries, Field Contact Cards, traffic citations, and Stop Data Forms. We found that officers accurately and fully completed stop data forms as required.⁸ In addition, we carefully examined the *reason* for the stop – essentially the justification for the interaction between the officer and the person stopped – and found appropriate justification for >94% of all stops.

Our more recent monthly reviews have focused on analysis of officers' interaction with the public following the stop in order to identify possible indicators of racial disparity.

In order to facilitate these reviews, we attend and observe OPD's monthly Risk Management Meetings during our regular site visits.⁹ These meetings are designed to conduct in-depth reviews of Risk Management from one of the five OPD Areas on a rotating basis. In advance of the meetings, we receive data and related risk management information pertaining to the Area scheduled for review, which includes stop data for the full City as well as for the particular Area scheduled for examination.

The past several reviews have focused on analyses of the ratio of searches and/or the search recovery rates among the identified population groups. Search and search recovery data for the Area being examined, as well as for each of the squads within the Area is carefully reviewed. Focusing on squads with lower than average recovery rates, we have further examined and requested OPD to examine the specific stops in an attempt to identify the reason for the abnormality. Thus far, OPD has noted that these abnormalities appear to be related to either the experience level of the squad or the crime control strategy being employed within the Area. OPD is addressing these issues on a continuing basis.

As noted in our previous report, the data presented for the August review was particularly noteworthy: the search recovery rate of the Area being reviewed was the highest seen to date, at an average of 60% for vehicle stops and 49% for pedestrian stops. Although there were two squads with low vehicle recovery rates, the volume of searches negated the need for further review.

⁸ Required data includes 1) time; 2) date; 3) location; 4) identification of member making stop; 5) reason for stop; 6) apparent race/ethnicity of individual(s) stopped; 7) gender of individual(s) stopped; 8) outcome of stop (arrest or no arrest); 9) whether a search was conducted; 10) outcome of any search; and 11) offense category (felony, misdemeanor, or infraction).

⁹ Risk Management Meetings are conducted monthly for the purpose of reviewing various data (including stop data) to identify performance/risk indicators requiring intervention or worthy of commendation. Each month, data from one of the five districts is reviewed by OPD command staff with the Area Commander. Any identified issues are assigned the Area Commander for resolution in the form of deliverables.

Stops Made by the Area Under Review

During our September site visit, we again attended the Risk Management Meeting during which stop data for the selected Area was reviewed. OPD officers assigned to this Area under review made 2,928 vehicle stops and 417 pedestrian stops.¹⁰ Tables One and Two below illustrate the numbers and percentage of the above-enumerated stops resulting in searches and the searches that resulted in recoveries.

The variance in the **percentage of stops** among the various population groups is a continuing point of interest and concern, both overall and within the individual Areas. Within the Area under review for this report, the variance among the population groups for *vehicle stops* ranges from a high of 57% for African Americans to a low of 3% for Other.¹¹ Similarly, the breakdown for *pedestrian stops* ranges from a high of 64% for African American to a low of 2% for Other.

The variances in the **percentage of stops resulting in searches and the percentage of searches resulting in recoveries** among the various population groups are also of continuing interest. (See Tables One and Two.) Data for the Area reviewed for *this* report indicate that members of the African American population group are searched at the highest rate during vehicle stops (23%), and members of the Hispanic population group are searched at the highest rate during pedestrian stops (37%). The average search rates for vehicle and pedestrian stops are 17% and 35%, respectively. Search recoveries, however, are the highest among the Hispanic population group for vehicle stops (46%), and for the African American population group during pedestrian stops (32%). The average search recovery rates for vehicle and pedestrian stops are 33% and 25%, respectively.¹²

TABLE ONE - AREA VEHICLE STOPS/SEARCHES/RECOVERIES							
Race/ Ethnicity	Stops		Searches ¹³		Recoveries		
	Number	Percent	Number	Percent	Number	Percent	
African American	1,679	57%	356	23%	106	30%	
Asian	156	5%	5	3%	2	40%	
Hispanic	773	26%	102	14%	47	46%	
White	234	8%	12	5%	3	25%	
Other	86	3%	3	4%	0	0%	
	2,928	100%	478	17%	158	33%	

¹⁰ The dataset includes activity for the period January 17, to August 14, 2015.

¹¹ "Other" includes all individuals not identified as African-American, Asian, Hispanic, or white.

¹² We have disregarded one search and one recovery in the Other category as the high percentage.

¹³ Excludes searches incident to arrest.

TABLE TWO – AREA PEDESTRIAN STOPS/SEARCHES/RECOVERIES							
Race/ Ethnicity	Stops		Searches ¹⁴		Recoveries		
	Number	Percent	Number	Percent	Number	Percent	
African American	265	64%	71	35%	23	32%	
Asian	11	3%	2	22%	0	0%	
Hispanic	87	21%	25	37%	4	16%	
White	46	11%	14	36%	1	7%	
Other	8	2%	1	14%	0	0%	
	417	100%	158	35%	77	25%	

The search recovery rates at the squad level for vehicle searches ranged from 18% to 44%; and for pedestrian related searches, from 0% to 52%, with the averages at 33% and 25%, as indicated above. The squad with the 0% recovery involved seven searches during the period under review; therefore, it warranted no further examination. These results however, prompted OPD to initiate an in depth review of the search data for the two squads with recovery rates of 40% and 42%. This objective of this review is to determine whether there are practices and procedures that should be more widely adopted within OPD – and/or whether there are inconsistencies in the data documentation between the squads and more importantly the various Areas. We await the results. In addition, we have requested specific additional search recovery data for our review in order to gain a better understanding of the types and quantities of contraband being increasingly seized during these searches. That review is ongoing.

We again commend OPD for its increasingly fruitful searches across all race and ethnic population groups; however, we remain concerned with both the elevated number of stops and the percentage searches of individuals who identify as African American and Hispanic. Accordingly, we not only continually assess data for *results*; we periodically assess the documented basis for the searches to ensure that *sufficient justification was present* for the search. However, as previously reported, such assessments covering the past several reporting periods have consistently verified the presence of sufficient cause for the searches in a high percentage of cases (>94%).

As previously indicated, the overall search recovery rates for the Area squads under review are strong ranging for vehicle searches from 18% to 44% and for pedestrian related searches from 0% to 52%, with the averages at 33% and 25%, as illustrated above. This reflects positively on this Area and its personnel.

¹⁴ Excludes searches incident to arrest.

Comparative Citywide Stop Data

OPD provided us with comparative citywide stop data for the first six months of 2014 and 2015, which we presented in our last report.

To summarize, the data found an increase in both numbers and percentages for stops involving both African American and Hispanic population groups, but a decrease in both numbers and percentages of the remaining population groups.

The data also found an increase in the search recovery rates during the period; searches of African Americans decreased by 1%, while search recoveries increased by 14%; searches of Hispanics increased by 3% while the search recovery rate increased by 25%. Overall searches increased numerically by 285, or 2%; while search recoveries increased by 380, or 16%.

We anticipate that OPD will issue a comprehensive public report outlining the results of its analysis in the near future.

Additional Thoughts

Our concern with the Department's high number of probation/parole stops and searches continues. We have ongoing discussions with OPD regarding the development of strategies to address these concerns.

While recognizing the overall value of this legal procedure is important, as we have previously emphasized, so is the recognition of the negative impact the indiscriminate employment of this strategy may have on the community – and in particular, on the population groups affected. It is an area ripe for the employment of the tenets of procedural justice – i.e., the process of stopping and searching individuals on probation/parole is more than simply *legal*, but also viewed as *legitimate* in the eyes of those involved.

Yet despite these concerns, we continue to be encouraged by the progress made by OPD with the collection of stop data and look forward to the publication of its analysis and further progress.

Clearly, progress is being made and the continued engagement with Dr. Jennifer Eberhardt of Stanford University should bring further understanding of the issues related to bias in policing. This will not only be beneficial to OPD and the Oakland community, but to other police agencies and the communities they serve, as well. This is forward-thinking and a credit to OPD.

Task 45: Consistency of Discipline Policy

Requirements:

On or before October 6, 2003, OPD shall revise and update its disciplinary policy to ensure that discipline is imposed in a fair and consistent manner.

1. *The policy shall describe the circumstances in which disciplinary action is appropriate and those in which Division-level corrective action is appropriate.*
2. *The policy shall establish a centralized system for documenting and tracking all forms of discipline and corrective action, whether imposed centrally or at the Division level.*
3. *All internal investigations which result in a sustained finding shall be submitted to the Discipline Officer for a disciplinary recommendation. The Discipline Officer shall convene a meeting with the Deputy Chief or designee in the affected chain-of-command for a confidential discussion of the misconduct, including the mitigating and aggravating factors and the member/employee's overall performance.*
4. *The COP may direct the Discipline Officer to prepare a Discipline Recommendation without convening a Discipline Conference.*

(Negotiated Settlement Agreement X. B.)

Relevant Policy:

Five Departmental policies incorporate the requirements of Task 45: Departmental General Order M-03, *Complaints Against Department Personnel and Procedures* (published December 6, 2005 and revised most recently on August 24, 2013); Training Bulletin V-T.1 and V-T.2, *Internal Investigation Procedure Manual* (published July 17, 2008); Internal Affairs Policy and Procedure Manual (published December 6, 2005); and Training Bulletin V-T, *Departmental Discipline Policy* (published March 14, 2014). As the Department has trained at least 95% of relevant personnel on these policies, we find OPD in continued Phase 1 compliance with this Task.

Commentary:

In our four quarterly reports prior to the nineteenth reporting period, we found OPD in compliance with Task 45. During the nineteenth reporting period, however, we placed OPD in deferred compliance status with Task 45 due to two cases that had emerged from the disciplinary process that we found unacceptable. In one case, a senior officer struck a subject when he was lying on the ground after being shocked by a Taser. In this case, the then-City Administrator overruled the OPD discipline process, and reduced the discipline from a 10-day suspension to counseling. The second case involved an officer who threw a “flash bang” explosive device into a crowd of demonstrators during the Occupy Oakland-related protests of 2011. This officer’s termination was overruled by an arbitrator who ordered his reinstatement.

The NSA requires that OPD maintain a centralized system for documenting and tracking all OPD forms of discipline and corrective action, whether imposed centrally or at the Division level. To assess Phase 2 compliance with this subtask, we queried the IAD database to identify all of the cases with at least one sustained finding that were approved from August 1, through August 31, 2015. This query yielded seven cases, containing nine sustained findings. All (100%) of these cases and findings contained all of the necessary information available on the printout generated by IAD for our review. OPD is in compliance with the requirement that it maintain an adequate system for documenting and tracking discipline and corrective action.

The NSA also requires that discipline be imposed in a manner that is fair and consistent. To this end, the Department developed a Discipline Matrix, which was adopted on September 2, 2010 and in effect until a new Discipline Matrix was approved on March 14, 2014. This new matrix applies to violations after that date.

We reviewed all seven cases and nine sustained findings that were decided during the period of August 1, through August 31, 2015. In four of the cases, the discipline had not yet been determined at the time of our review. Two of these cases involved the care of civilian property. The other two involved violations of OPD’s pursuit policy. In three of the cases we reviewed, a penalty was determined, and the discipline imposed in each case fell within the discipline matrix that was in effect at the time of the action for which the discipline was imposed. In one of these cases, a demeanor allegation was sustained; and in the other two, the subject officers were involved in avoidable collisions.

During the period of August 1, through August 31, 2015, Skelly hearings were held for five IAD cases involving five employees with sustained findings in which discipline of a one-day suspension or greater was recommended. We reviewed each of the Skelly reports, and found that all had adequate justification for the results they documented. In two of the five cases, discipline was upheld. In another case, a proposed 10-day suspension was upheld, but five days were held in abeyance, barring similar conduct in the following 12 months. In another case, a suspension of two days was reduced to a written reprimand, but later elevated to a one-day suspension by the Chief of Police. In the remaining case, a proposed 10-day suspension was reduced to six days, with four days held in abeyance. The Chief of Police approved all penalties, and all fell within the guidelines of the current disciplinary matrix.

As described above, since our nineteenth quarterly report, we had deferred our assessment of Tasks 5 and 45 due to the then-ongoing Court-ordered investigation of the Department's discipline and arbitration process. On August 14, 2014, the Court expressed its dismay with the 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 Order reads, in part:

“This is not the first time an arbitrator has overturned an officer's termination by Defendants, and, indeed, this Court previously ordered the parties to discuss the reinstatement of [another officer] by arbitration at the September 22, 2011 status conference. The City's promises to correct deficiencies at that time have fallen short, and further intervention by this Court is now required.

“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...”

The Court-appointed investigator issued his report on April 16, 2015. The report concluded that Oakland's police discipline process is “broken” because, among other reasons, it fails “to deliver fair, consistent, and effective discipline.” It continued, “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 discussed the lack of accountability among City officials for the serious failures of both OPD and the Office of the City Attorney in police discipline cases. It also offered many concrete recommendations in the areas of investigation, discipline, preparation, arbitration, and sustainability.

Just a few days following the report's release, on April 20, 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. On September 1, 2015, the City filed its status report with the Court as required.

The topics covered – and the related recommendations – in the Court-appointed investigator's report were far-ranging and comprehensive. Likewise, so was the City's response. However, some recommendations have specific applicability to Task 45, and are discussed below.

In one of his recommendations, the Court-appointed investigator wrote, “The Department should revamp its Skelly hearing process. Skelly officers should receive training on conducting thorough IA investigations to ensure that their decisions cannot be effectively challenged at the arbitration stage for having been based on insufficient investigation. They should also be trained and given guidelines on writing detailed Skelly reports. The OCA should be made part of the process, particularly in the drafting of Letters of Intent to Discipline. And to improve consistency and predictability in the handling of serious disciplinary cases, the Department should assign all serious cases (those involving at least one Class I allegation) to a Deputy Chief, to the Assistant Chief, or to the Chief him- or herself.”¹⁵

In its response, the City indicated that it budgeted for an additional Deputy Chief position, and filled the position on August 15, 2015. One of this Deputy Chief’s duties will be to handle the majority of the Skelly hearings, including all cases in which suspension of five days or greater is the proposed penalty. The City contends that the Office of the City Attorney (OCA) has historically provided training to OPD’s Skelly officers. However, two of OCA’s Labor and Employment attorneys are currently putting together an updated curriculum for Skelly officer training, and they plan on delivering the training on or before December 1, 2015. We will comment on progress in future reports.

Additionally, the City Attorney issued an Administrative Instruction on August 28, 2015, which has the stated purpose of establishing “...procedures for the Internal Affairs Division (“IAD”) of the Oakland Police Department (“OPD”) and the City’s Employee Relations Department (“ER”) to notify the City Attorney’s Office (“OCA”) regarding important steps in the OPD discipline process.” The document outlines the required notifications that must take place between OPD and OCA, but is silent on the issue of OCA drafting Letters of Intent to Discipline.

The Court-appointed investigator also wrote, “The Pre-Discipline Report should be changed to avoid creating unnecessary obstacles in the arbitration process. We recommend that in the more serious (or Class I) cases, the Chief meet in-person with the supervisors of the subject officer to consult about the appropriate level of discipline, but that the Department continue to use the existing written Pre-Discipline Report in less serious cases.”¹⁶

The City indicated that policies have been amended to remove the requirement that the Pre-Discipline Report be filled out at each level of the subject officer’s chain of command, and instead require that the Division commander or manager consult with those supervisors in the chain of command and then prepare one report which reflects the Division Commander’s or the manager’s recommendations. These policy changes are subject to the meet and confer process with the affected collective bargaining units, and it is not expected that this process will be completed until after the first of the year.

OPD also advised that it is making changes to the Pre-Discipline Report. Currently, two versions are used – one for preventable vehicle collisions, and one for all other violations. The updated form will be used in all circumstances.

¹⁵ Report of the Court-Appointed Investigator in *Delphine Allen v. City of Oakland*, pp 41, 42.

¹⁶ Report of the Court-Appointed Investigator in *Delphine Allen v. City of Oakland*, p 41.

Consequently, until OPD and the City address the serious and systemic issues specifically outlined in the Court Order, we consider OPD to be in partial compliance with Task 45.

Conclusion

OIG is continuing to transform itself into a more sufficiently staffed unit that tackles issues that have impeded OPD's progress with the NSA reforms and other issues in the Department. We continue to be encouraged that OIG also appears to be collaborating well with IAD and other crucial Department units.

That said, we recommend that the Department strengthen its Executive Force Review Board deliberations to include an examination of whether any use of deadly force may have been avoided; the identification of tactics, strategies, and opportunities as events unfolded that may have supported such an outcome; and the enumeration of other available options that *could* or *should* have been considered.

Further, there remain significant unresolved issues relevant to Task 34, which we consider a centerpiece of the entire NSA. Currently, OPD collects and presents an array of data regarding stops, reasons for stops, searches, reasons for searches, arrests, and race/ethnicity of the individuals with whom it interacts during these stops. However, the Department should conduct more regular and targeted analyses, focused on any anomalies, and develop appropriate interventions.

Consistent with what we highlighted in our last report, the May 21, 2015 Court Order makes clear that this case will not end until OPD has been in full compliance for one year and there is "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."



Chief (Ret.) Robert S. Warshaw
Monitor