

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

August 25, 2014

Introduction

This is the third 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. Our quarterly assessments have found that while the Department has achieved compliance with several requirements, in other areas, progress has stagnated.

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.

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, undeniably, for the Department to achieve and sustain compliance with the reforms outlined in the NSA. As

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.

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.”³ 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 July 2014), the Department was in full compliance with 17 of the 22 Tasks, and in partial compliance with four additional Tasks. (We deferred our assessment of one Task.) This is the highest number of Tasks in compliance since the beginning of our tenure. In this report, I discuss the status of the five non-compliant Tasks – as well as the three that have recently come into compliance – and what the Department is doing currently to attain or sustain compliance with these requirements.

News Since Second Progress Report

Within the last two months, my associate and I have observed a few promising developments in the Department. For example:

- In July, OPD held a meeting with community stakeholders to discuss the Department’s recently released stop data report. Participants included clergy members and representatives from community organizations. Assistant Chief Figueroa told the group that the Department viewed this effort as the first step in an “ongoing collaboration,” and solicited feedback on the report and what information might be useful to include in the future. OPD is considering holding additional forums to receive public feedback on its Ceasefire program and other initiatives.
- The Department has been prudent in the selection of personnel for promotion – in that it has appropriately exercised its management options to choose or bypass candidates.
- The Department’s Office of Inspector General (OIG) is establishing two new useful practices. Following the release of an OIG audit, the applicable unit/persons at OPD are now required to develop and implement a plan in response to the report’s findings and recommendations. In addition, OIG is appointing and training appropriate personnel throughout the Department to conduct mini-audits on NSA-related and other procedures.
- OPD’s monthly Risk Management Meetings require that Area Captains respond in writing within two weeks on any outstanding issues. In one recent meeting, for instance, an Area Captain was tasked with analyzing one squad’s number of vehicle collisions, number of citizen complaints, and high percentage of uses of force per

³ 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.

arrest – all of which were high relative to other squads in the same district. In another recent meeting, an Area Captain was tasked with determining the cause for the relatively low productivity of one officer.

I commend the Department for its increasing openness to introspection and self-analysis – and for the steady progress that it has made toward achieving compliance with the NSA. Yet as I noted in my last report, the Department still has much work to do to *institutionalize* the critical reforms laid out in the NSA – and the Court will not likely vacate this process until there is demonstrated evidence of sustainable reform.

Just last week, in an Order of August 14, 2014, the Court expressed its indignation with the recent reinstatement of an officer whom the Chief had terminated, and with the City’s poor performance in other recent arbitrations – several of which also overturned terminations.⁴ The Order asserted that the Department is no longer in compliance with Tasks 5 (Complaint Procedures for IAD) and 45 (Consistency of Discipline), as it “question[ed] whether Defendants are adequately preparing cases for arbitration such that consistency of discipline can be assured to the greatest extent possible.” The Court ordered that I conduct a far-reaching investigation of the discipline and arbitration process and direct the Department and City “to take appropriate corrective action to ensure sustainable reforms, including, if necessary, immediate corrective action pending further investigation.” As my investigation has just begun, I will discuss this in more detail in future progress reports.

Discussion of Tasks

The Monitoring Team’s assessments have shown that OPD has not yet achieved – or has had difficulty maintaining – compliance with the following eight Tasks:⁵

- Task 20, *Span of Control for Supervisors*
- Task 26, *Force Review Board (FRB)* and Task 30, *Executive Force Review Board (EFRB)*
- Task 33, *Reporting Misconduct*
- Task 34, *Vehicle Stops, Field Investigation, and Detentions*
- Task 37, *Internal Investigations - Retaliation Against Witnesses*
- Task 40, *Personnel Assessment System (PAS) – Purpose* and Task 41, *Use of Personnel Assessment System (PAS)*

⁴ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Internal Affairs Investigations and Subsequent Proceedings, dated August 14, 2014.

⁵ The Monitoring Team found Tasks 33 and 37 in compliance in our seventeenth and eighteenth quarterly status reports, and found Task 40 in compliance in our eighteenth quarterly status report. We discuss these three Tasks in this report because the Department has struggled to maintain compliance with these Tasks during our tenure.

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

Task 20, *Span of Control for Supervisors*

Since the beginning of our tenure, OPD had 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). In our most recent quarterly status report, we deferred our assessment of Task 20, as the Parties were working on a new, mutually agreeable approach to these issues. Last month, my associate and I completed a series of discussions with Department officials and the Plaintiffs' attorneys to revise the methodology for assessing these subtasks. We believe that our new approach will allow the Department to achieve compliance with Task 20 – and even more importantly, to develop Task 20-related practices that are sustainable in the long term.

The Department is currently reworking the relief supervision system that has been in place for over one year. Chief Whent has expressed that while he believes that the relief system is a useful arrangement in the long term, its current formation – which comprises 23 relief sergeant assignments – is not sustainable. The Department plans to propose a slightly different model, involving 16 relief sergeant assignments, though it remains to be seen if this will allow the Department to achieve compliance with these requirements. The Department intends to implement this new system in 2015.

In a string of recent promotions, the Chief appears to be approaching his decisions thoughtfully, carefully reviewing candidates' work and disciplinary histories. The Chief and his Executive Team are informally courting viable candidates, as well, which is a good sign of leadership development in the Department.

In the next few weeks, my associate and I will further discuss with the Department its plans for a new relief sergeant system. We will also follow up with the Department's plans to enact these changes into policy, develop a long-term solution to the issue of relief sergeants for the two field-based units in the Criminal Investigation Division (CID), and improve its relief system for Watch Commanders.

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

OPD has been in partial compliance with Tasks 26 and 30 during many different reporting periods since the beginning of our tenure. In May, with the assistance of the Monitoring Team, the Department revised relevant policy Departmental General Order K-4.1, *Use of Force Boards*. This policy requires the board proceedings to be more formal, efficient, and analytical. Since the adoption of the new policy, the Monitoring Team has observed one force review board – for the use of a Taser during an arrest at the Oakland Coliseum. The Monitoring Team found that the board's proceedings included a thorough analysis of the

incident and the involved officers' tactics; and observed that the Deputy Chief who facilitated the discussion opened with clear ground rules for the proceedings.

During the last few weeks, my associate and I began to examine the significant reductions in uses of force in the Department within the last year. As noted previously, OPD attributes this drop largely to improved training and changes in policy that characterize uses of force differently. Yet even considering these advances, we have found that the low rates of some patrol squads' uses of force seem implausible. As a starting point for our analysis, we are reviewing recent citizen complaints of force and attempting to locate their associated use of force reports.

In the next few weeks, I will continue to review more closely the downward trends in uses of force, and discuss with the Department its training to reduce officers' use of boilerplate language when justifying encounters that ultimately involve a use of force.

Task 33, Reporting Misconduct

OPD regained compliance with Task 33 in the seventeenth reporting period after being in partial compliance with this Task for the prior four reporting periods due to the Department's failure of its officers to report misconduct during the Occupy Oakland events. The Department reports that it is increasingly holding individuals accountable for failing to report misconduct or activate their Personal Data Recording Devices (PDRDs) as required.

Over the last few weeks, we have focused our efforts on holding individuals accountable for failing to report misconduct on the Department's use of PDRDs. The Department currently has 10 spare PDRDs available if an officer's PDRD malfunctions; this is, encouragingly, unlike a few years ago when OPD did not have a sufficient inventory of PDRDs to equip each officer. We have begun talking with the Department about how – and how frequently – sergeants are reviewing their subordinates' PDRD footage; and also how the Department can improve its storage and tracking system of PDRD footage. Some sergeants report that the process of reviewing PDRD footage is overly time-consuming because the system is not user-friendly.

In the next few weeks, I plan to learn more about sergeants' reviews of their subordinates' PDRD footage; and to assist the Department to improve its storage and tracking system.

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.

As described above, in July, OPD held its first meeting for community stakeholders on stop data issues. Also within the last few months, Professor Jennifer Eberhardt of Stanford University began assisting the Department with its stop data analysis. We look forward to

reviewing the interactive maps Professor Eberhardt is creating of the race of citizens who are stopped, which citizens are searched, and what is recovered from those searches. The Department's preparation and public presentation of the stop data is a good start, but there remain many unanswered questions regarding the disparities among racial and ethnic groups.

In the next few weeks, I will engage the Department regarding its strategies to resolve the disparities discussed in its recently released stop data report, and continue to work with OPD to explore ways in which the collected information can serve as the basis for the development of training and other intervention activities.

Task 37, Internal Investigations – Retaliation Against Witnesses

OPD recently regained compliance with Task 37. OPD was in partial compliance with this Task for the prior two reporting periods, and not in compliance with this Task for the fourteenth reporting period, due to the Department's failure to respond fully to the most serious allegation of retaliation observed by the Monitoring Team. OPD reports that it aggressively scrutinizes and investigates any allegations of retaliation. The Department is providing improved training to new police officers and employees to, according to OPD, emphasize a culture of accountability and the importance of reporting misconduct.

In the next few weeks, I will continue to discuss and review OPD's training on these critical matters.

Task 40, Personnel Assessment System (PAS) – Purpose; and Task 41, Use of Personnel Assessment System (PAS)

OPD regained compliance with Task 40 in the eighteenth reporting period after completing the upgrade that allows arrest data from Alameda County to automatically populate the Records Management System (RMS) without requiring manual data entry. OPD remains out of compliance with Task 41.

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. Earlier this year, the Monitoring Team conducted a supplementary review of the Top 30 lists to learn more about how OPD uses these lists and develops interventions for the individuals who appear on them; the review found that several individuals appeared on multiple Top 30 lists, and several individuals appeared on these lists over several different reporting periods.

In the next few weeks, I will work with the Department to review its strategies for members and employees who are “repeaters” – that is, those who continue to meet system thresholds without changing their behavior. Also, I will make plans to review the IPAS2 system as Microsoft, the system’s developer, fulfills different components of the project in the coming year.

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.”⁶ 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.”

According to data provided by OPD, the Department has made improvements 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 has not had any officer-involved shootings in 2014.

Also, thus far in 2014, the Department has logged 25 pursuits; at the same time last year, it had logged 103. (OPD had a total of 148 pursuits for the full year of 2013.) 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 2014, OPD has logged 93 non-pursuits. OPD continues to refine its policies on legitimate circumstances for pursuits; command staff plan to visit patrol officer line-ups within the next few months to re-train personnel on the new policies.

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 retention of the services of Dr. Eberhardt and the Department’s ongoing engagement with its publicly released stop data report – this is an area that will be constantly scrutinized by us, the Court, the Plaintiffs’ attorneys, and the community.

⁶ 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.

In the next few weeks, 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 – including “unjustified” uses of force. 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 second progress report as Compliance Director:

- Continuing 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.
- Enhancing the Department's capacities for community interaction and engagement. 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. We recently met with a community coalition, and we intend to bring members of the Executive Team to our next meeting with this group.
- Working with the Department on revisions to several NSA-related policies. Most recently, these included those relating to Force Review Boards (Task 26), personnel assigned to specialized units (Task 39), and pursuit driving (Court's Order of December 12, 2012).
- Providing guidance, mentoring, and technical assistance to Department officials in several other key areas – including recent personnel transfers and promotions, managing members and employees, new technological initiatives, and organizational changes.

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

- Build teamwork among members of the Executive Team.
- Continue discussions with the Department regarding sustainability of the NSA reforms.
- Assist the Department to develop a training needs assessment. A few weeks ago, OPD's Training Section began to solicit feedback from officers on the Department's current training offerings. The Department is working to improve the way in which its training lesson plans refer to the relevant Department policies.
- 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

The recent fatal shooting of an unarmed African American teenager by a white Ferguson, Missouri police officer – and the subsequent community uproar and protests around the country – has stirred national interest in issues related to police use of force and a police department’s accountability to the community it serves. This should serve as a “call to action” for elected and appointed officials alike. Community peace is often fragile – and it can be mitigated by one incident. Here in Oakland, there has been a recent upsurge in political activity and protests – some connected to the events in Ferguson, some concerned with international issues, and others addressing more local matters. I continue to closely monitor OPD’s response to these activities, the Department’s interactions with citizens during such events, and any related complaints or investigations.

In recent conversations with the Chief and his Executive Team, I invited them to think about where they envision the Department in five, 10, 15 years down the line – and how to carve out their own legacy after OPD achieves compliance with the NSA. In July, Chief Whent participated in the Senior Management Institute for Police, hosted by the Police Executive Research Forum, in Boston. In a recent biweekly report, Chief Whent wrote, “It was encouraging to see that OPD is out in front of many current trends in the [law enforcement] industry.”



Chief (Ret.) Robert S. Warshaw