

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

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## 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.<sup>1</sup> 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 have increased 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 5, 30, 34, 41, and 45. 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.

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<sup>1</sup> 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.

<b>Compliance Status of Tasks Listed in the May 21, 2015 Court Order</b>		
<b>Task</b>	<b>Description</b>	<b>Compliance Status</b>
5	Complaint Procedures for IAD	As of the twenty-first reporting period (covering October through December 2014), in partial compliance.
20	Span of Control	In compliance since the nineteenth reporting period (covering April through June 2014). Now considered inactive. Not assessed in this report.
26	Force Review Board (FRB)	In compliance since the nineteenth reporting period (covering April through June 2014). Now considered inactive. 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.
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). Now considered inactive.
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 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. Within the last few months, we have provided technical assistance to OPD officials in the areas of Executive Force Review Board (Task 30); stop data (Task 34); risk management (Task 41); and several key 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.”

As reported previously, we continue to work closely with the Office of Inspector General’s (OIG) 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. Just recently, OIG hired two new police auditors, which significantly expanded the unit’s staffing and, more importantly, signaled a commitment by the Department to self-reflection and analysis.

Last week, OIG produced its fourth monthly progress report, which details the results of its and its external audit contractor’s most recent reviews. This progress report, like the others OIG produced, is impressive and will be released publicly, via the Department’s website. This most recent report focused on three areas: (1) review of use of force investigations (Levels 2, 3, and 4); (2) review of Annual Management and Departmental Reports; and (3) Personal Digital Recording Device (PDRD) inspection. As with its other reports, in each of the areas where OIG identified problems, the report included 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.

In our last monthly report, we discussed our observations of the Department’s Lexipol working group, which is reviewing and revising OPD policies and procedures to post them to Lexipol’s streamlined online platform. Lexipol, a vendor that has done this type of work with police departments across the county, states that policies relevant to police departments in all states have already been written and are available for customization by local departments such as OPD.

The Department must ensure that NSA-related policies are appropriately and sufficiently adopted as part of Lexipol. As we have shared with OPD, to ensure continuing compliance, the Monitoring Team and Plaintiffs’ attorneys will need to review and re-approve all policies related to the active and inactive Tasks of the NSA. When Team members are next onsite, we will observe another session of the working group.

## *Focused Task Assessments*

### Task 5: Complaint Procedures for IAD

#### Requirements:

1. *On or before December 1, 2003, OPD shall develop a policy so that, OPD personnel who become aware that a citizen wishes to file a complaint shall bring such citizen immediately, or as soon as circumstances permit, to a supervisor or IAD or summon a supervisor to the scene. If there is a delay of greater than three (3) hours, the reason for such delay shall be documented by the person receiving the complaint. In the event that such a complainant refuses to travel to a supervisor or to wait for one, the member/employee involved shall make all reasonable attempts to obtain identification, including address and phone number, as well as a description of the allegedly wrongful conduct and offending personnel, from the complainant and any witnesses. This information, as well as a description of the complaint, shall immediately, or as soon as circumstances permit, be documented on a Complaint Form and submitted to the immediate supervisor or, in his/her absence, the appropriate Area Commander, and shall be treated as a complaint. The supervisor or appropriate Area Commander notified of the complaint shall ensure the Communications Division is notified and forward any pertinent documents to the IAD.*
2. *An on-duty supervisor shall respond to take a complaint received from a jail inmate taken into custody by OPD, who wishes to make a complaint of Class I misconduct contemporaneous with the arrest. The supervisor shall ensure the Communications Division is notified and forward any pertinent documents to the IAD. All other misconduct complaints, by a jail inmate shall be handled in the same manner as other civilian complaints.*
3. *In each complaint investigation, OPD shall consider all relevant evidence, including circumstantial, direct and physical evidence, and make credibility determinations, if feasible. OPD shall make efforts to resolve, by reference to physical evidence, and/or use of follow-up interviews and other objective indicators, inconsistent statements among witnesses.*
4. *OPD shall develop provisions for the permanent retention of all notes, generated and/or received by OPD personnel in the case file.*
5. *OPD shall resolve each allegation in a complaint investigation using the “preponderance of the evidence” standard. Each allegation shall be resolved by making one of the following dispositions: Unfounded, Sustained, Exonerated, Not Sustained, or Administrative Closure. The Department shall use the following criteria for determining the appropriate disposition:*
  - a. *Unfounded: The investigation disclosed sufficient evidence to determine that the alleged conduct did not occur. This finding shall also apply when*

*individuals named in the complaint were not involved in the alleged act.*

- b. Sustained: The investigation disclosed sufficient evidence to determine that the alleged conduct did occur and was in violation of law and/or Oakland Police Department rules, regulations, or policies.*
  - c. Exonerated: The investigation disclosed sufficient evidence to determine that the alleged conduct did occur, but was in accord with law and with all Oakland Police Department rules, regulations, or policies.*
  - d. Not Sustained: The investigation did not disclose sufficient evidence to determine whether or not the alleged conduct occurred.*
  - e. Administrative Closure: The investigation indicates a service complaint, not involving an MOR violation, was resolved without conducting an internal investigation; OR*
  - f. To conclude an internal investigation when it has been determined that the investigation cannot proceed to a normal investigative conclusion due to circumstances to include but not limited to the following:
    - 1) Complainant wishes to withdraw the complaint and the IAD Commander has determined there is no further reason to continue the investigation and to ensure Departmental policy and procedure has been followed;*
    - 2) Complaint lacks specificity and complainant refuses or is unable to provide further clarification necessary to investigate the complaint;*
    - 3) Subject not employed by OPD at the time of the incident; or*
    - 4) If the subject is no longer employed by OPD, the IAD Commander shall determine whether an internal investigation shall be conducted.*
    - 5) Complainant fails to articulate an act or failure to act, that, if true, would be an MOR violation; or*
    - 6) Complaints limited to California Vehicle Code citations and resulting tows, where there is no allegation of misconduct, shall be referred to the appropriate competent authorities (i.e., Traffic Court and Tow Hearing Officer).**
  - g. Administrative Closures shall be approved by the IAD Commander and entered in the IAD Complaint Database.*
- 6. The disposition category of "Filed" is hereby redefined and shall be included under Administrative Dispositions as follows:*
- a. An investigation that cannot be presently completed. A filed investigation is not a final disposition, but an indication that a case is pending further developments that will allow completion of the investigation.*

- b. The IAD Commander shall review all filed cases quarterly to determine whether the conditions that prevented investigation and final disposition have changed and may direct the closure or continuation of the investigation.*
- 7. Any member or employee who is a subject of an internal investigation, as well as any other member or employee on the scene of an incident at which misconduct has been alleged by a complainant, shall be interviewed and a recorded statement taken. However, investigators, with the approval of an IAD Commander, are not required to interview and/or take a recorded statement from a member or employee who is the subject of a complaint or was on the scene of the incident when additional information, beyond that already provided by the existing set of facts and/or documentation, is not necessary to reach appropriate findings and conclusions.*

(Negotiated Settlement Agreement III. E.)

**Relevant Policy:**

There are six Departmental policies that incorporate the requirements of Task 5: Department General Order M-03, *Complaints Against Department Personnel and Procedures* (published December 6, 2005 and revised most recently on August 22, 2013); Communications Division Policy & Procedures C-02, *Receiving and Logging Complaints Against Personnel and Use of Force Incidents* (published April 6, 2007); Training Bulletin V-T.1, *Internal Investigation Procedure Manual* (published June 1, 2006); Special Order 8270, *Booking of Prisoners at the Glenn E. Dyer Detention Facility* (published June 24, 2005); Special Order 8565, *Complaints Against Department Personnel* (published May 11, 2007); and IAD Policy & Procedures 05-02, *IAD Investigation Process* (published December 6, 2005). In addition, NSA stipulations issued on December 12, 2005, and March 13, 2007, incorporate the requirements of this Task.

**Commentary:**

We found OPD in Phase 2 compliance with Task 5 from the fourteenth through the eighteenth reporting periods. (In each of the prior reporting periods, we had found the Department in partial compliance with Task 5.) During the nineteenth reporting period, we placed Task 5 in deferred compliance based on a then-ongoing Court-Ordered investigation of the City's discipline and arbitration process. In our twenty-first report, noting that the investigation had been completed, we placed Task 5 in partial compliance. Although we found the Task 5 cases we reviewed at that time to be in compliance, we noted then that the Court had ordered the City to "work to eliminate the problems identified" in the investigator's report.

Task 5 consists of several subtasks, briefly described below. Based on OPD's compliance history with many of the subtasks, not all are being actively monitored at this time.

**Task 5.1** requires that when a citizen wishes to file a complaint, the citizen is brought to a supervisor or IAD, or a supervisor is summoned to the scene. **Task 5.2** requires that if there is a

delay of greater than three hours in supervisory response, the reason for the delay must be documented. **Task 5.3** requires that where a complainant refuses to travel to a supervisor, or wait for one, personnel make all reasonable attempts to obtain specific information to assist in investigating the complaint. **Task 5.4** requires that specific information be documented on a complaint form and submitted to the immediate supervisor or, in his/her absence, the appropriate Area Commander. **Task 5.5** requires that the supervisor or Area Commander notify Communications and forward any pertinent documents to IAD.

To assess compliance with Task 5.1 through and including Task 5.5, we review the Daily Incident Logs (DILs) prepared by the Communications Division and forwarded to IAD each business day. The DIL form has been modified several times in recent years to elicit “forced responses” that gather all of the information required to evaluate compliance with these Tasks. These modifications have significantly enhanced OPD’s ability to document compliance by properly filling out and distributing the logs, and compliance rates with these subtasks have been near 100% for several years now. Consequently, we are no longer actively assessing OPD’s compliance with these Tasks, but we continue to receive daily both DILs and Daily Complaint Referral Logs (used to document when Information Business Cards (IBCs) are provided to citizens in lieu of a complaint forms). We spot-check these forms to verify that the quality of their completion has not diminished.

**Task 5.6** requires that an on-duty supervisor respond to take a complaint received from a jail inmate taken into custody by OPD, who wishes to make a complaint of Class I misconduct contemporaneous with the arrest of the inmate. To assess Task 5.6 in the past, we reviewed all complaints that appeared to have originated from North County Jail, Santa Rita Jail, Glenn E. Dyer Detention Facility, or Juvenile Hall during a given reporting period. We reviewed these complaints for two triggering events: an allegation of Class I misconduct; and the complaint lodged at the time of arrest. If both of these were not present, the case was deemed in compliance if it was “handled in the same manner as other civilian complaints.” OPD has been in compliance with Task 5.6 for several years, and we are no longer actively assessing compliance with this Task or Task 5.12 (see below). However, we do receive at least 15 completed IAD cases every month to assess compliance with other Tasks. If any of these cases are applicable to Task 5.6, we will review them for compliance with this Task’s requirements. We noted one case in our sample in which a sergeant responded to the North County Jail to take a complaint lodged in conjunction with an arrest. While the allegations were not of actions constituting Class I misconduct, we note that the supervisor responded properly and in a timely manner.

**Task 5.12** requires that the Watch Commander ensure that any complaints that are applicable to Task 5.6 are delivered to and logged with IAD. Under current policy, the Communications Division must record on the DILs complaints that are received and/or handled by on-duty supervisors, and the DILs is forwarded daily to IAD. As mentioned above, OPD now has a strong history of properly completing the DILs and routing them to IAD, which in turn ensures compliance with this Task.

**Task 5.15** through **Task 5.19**, and **Task 5.21**, collectively address the quality of completed IAD investigations, and therefore remain the subject of our focused Task assessments. To assess compliance with these Tasks, we reviewed 15 IAD cases that were approved in September 2015.

This sample included investigations completed by IAD and Division-level investigations (DLIs). It also included cases that were resolved via formal investigation and investigations that were resolved via summary finding.<sup>2</sup>

Together, **Tasks 5.15** and **Task 5.16** require that OPD: gathers all relevant evidence; conducts follow-up interviews where warranted; adequately considers the evidence gathered; makes credibility assessments where feasible; and resolves inconsistent statements.

In each of the cases we reviewed, we believe that OPD gathered all relevant evidence available. We note that OPD appropriately considered such evidence in making their determinations of findings in all cases except one. In this case, the complainant alleged that a Public Safety Dispatcher (PSD) made a rude comment and hung up the telephone on the complainant. The recording of the call revealed that the comment was never made, but the same recording also clearly indicated that the PSD hung up on the complainant. Only one finding of unfounded was reached, and no finding was attributed to the complaint of hanging up. That should have been sustained.

In the overwhelming number of cases, video and/or audio recordings proved to be a significant factor in reaching a proper conclusion. In one case, a follow-up interview of the complainant was conducted in an attempt to seek clarification or resolve inconsistencies. In another case, all of the involved officers were interviewed twice. The focus of the re-interviews was on the force allegedly used during the incident.

Credibility assessments were made in seven of the 15 cases. In five of the 15 cases, all of the allegations were resolved by administrative closure or informal complaint resolution, negating the need for credibility assessments. The remaining cases were approved for summary finding, and by policy, investigators are not required to assess credibility in these instances since a determination can be made without interviewing all involved. In three cases, complainants were deemed not credible. Two involved allegations of excessive force and one involved an allegation of inappropriate touching during a search incidental to an arrest. In all of these cases, the allegations were refuted by PDRD recordings, and in one case, an independent witness also indicated that the act complained of did not occur.

In nine of the cases we reviewed, OPD successfully resolved inconsistent statements. In eight of these cases, PDRD recordings were available and assisted in the determination. Five cases were resolved via administrative closure or informal complaint resolution, and so it was not necessary to identify or resolve inconsistent statements. In the case involving the PSD referenced above, we do not believe the investigation successfully resolved the allegation of hanging up on the complainant.

**Task 5.17** requires that OPD permanently retain all notes generated and/or received by OPD personnel in the case file. OPD personnel document that all investigative notes are contained within a particular file by completing IAD Form 11 (Investigative Notes Declaration). OPD has a sustained history of 100% compliance with this subtask. During this reporting period, the form was again properly completed in all 15 cases we reviewed.

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<sup>2</sup> Summary findings are investigations in which the Department believes a proper conclusion can be determined based on a review of existing documentation with limited or no additional interviews and follow-up.

**Task 5.18** requires that OPD resolve each allegation in a complaint investigation using the preponderance of the evidence standard. **Task 5.19** requires that each allegation of a complaint is identified and resolved with one of the following dispositions: unfounded; sustained; exonerated; not sustained; or administrative closure. Our sample of 15 cases contained 51 allegations that received dispositions as follows: 14 exonerated; 21 unfounded; 11 administratively closed; and four informally resolved. (None were sustained or not sustained.) In one case, the PSD case referenced above, the allegation of hanging up the phone on the complainant did not receive a finding. PDRD video continues to be an invaluable factor in arriving at definitive conclusions. In eight of the cases we reviewed, PDRD footage factored into the determination; and in another case, a recording of a telephone call was used.

We believe that OPD failed to use the preponderance of the evidence standard in one other case besides the PSD case we've already cited. In this case, the complainant alleged that officers failed to retrieve his medicine and a shirt for him before transporting him to jail. While the investigation clearly substantiated the allegation, the investigator – a patrol sergeant – reached a finding of unfounded in an incredible display of semantics gymnastics. The allegation was relatively minor – and would have appropriately been handled by counseling and training. The obvious reluctance to assign a sustained finding is concerning, all the more so because it was not caught during the review process in IAD.

**Task 5.20** requires that the IAD Commander review all “filed” cases quarterly to determine whether the conditions that prevented investigation and final disposition have changed. A filed case is defined as an investigation that cannot be presently completed and is pending further developments that will allow completion of the investigation; filed is not a final disposition. Traditionally, as part of our review of this Task, we also reviewed cases that are tolling. OPD defines a tolled case as an administrative investigation that has been held in abeyance in accordance with one of the provisions of Government Code Section 3304. While we are no longer actively assessing this subtask, we note that filed and tolling cases are reviewed with the Chief during his weekly IAD meetings and are listed by case number on the printed meeting agendas. We receive and review these agendas regularly.

**Task 5.21** requires that any member or employee who is a subject of an internal investigation, as well as any other member or employee on the scene of an incident at which misconduct has been alleged by a complainant, shall be interviewed and a recorded statement taken. However, with the approval of the IAD Commander or her designee, investigators are not required to interview and/or take a recorded statement in all cases. For example, interviews are not needed from a member or employee who is the subject of a complaint, or who was on the scene of the incident when additional information – beyond that already provided by the existing set of facts and/or documentation – is not necessary to reach appropriate findings and conclusions. Five of the 15 cases we reviewed were resolved via summary finding, and all were appropriately approved for such closure. In all but one of these cases, the availability of PDRD video was the primary reason interviews were unnecessary. In the other case, the complainant alleged that officers did not document her call for service. Documentation did, in fact, exist, negating the need for interviews.

We reviewed one case where a supervisor involved in the incident conducted the investigation, in violation of the NSA – specifically, inactive **Task 12**. Task 12.2 requires that: Where an

investigator believes that s/he cannot conduct a fair and impartial investigation, or that his/her involvement will compromise the investigative process, *or where the investigator was directly involved in the incident being investigated*, the investigator is removed from the investigation. In this case, involving an allegation that one of the responding officers was intoxicated, the responding supervisor was also the subject of the complaint. The complainant alleged that the sergeant inappropriately poked or patted him. While this allegation was appropriately administratively closed, and video evidence conclusively disproved the allegation, it cannot be disputed that the sergeant was “directly involved in the incident being investigated” and himself a subject of the complaint. His recusal form was improperly completed, and he should not have been allowed to investigate the complaint.

In summary, our review of these 15 cases revealed more issues than has been our experience in recent reviews. While the majority of the cases we reviewed comported with NSA requirements and OPD policy, the exceptions noted in our relatively small sample should serve as a caution against complacency.

As noted in our previous reports, OPD’s ultimate compliance with Task 5 hinges on how the City and the Department respond to the Court-ordered independent investigation of its discipline and arbitration process. The August 2014 Court Order requiring such an investigation reads in part:

“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 (OCA) 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 5, and are discussed below.

In one of his recommendations, the Court-appointed investigator wrote, “The Department should involve the OCA more deeply in the investigation process and with sufficient time for OCA to provide a helpful response. We recommend that the City station a Deputy City Attorney in the Department, specifically in IAD, at least on a part-time basis. The Deputy City Attorney can assist with training of IA investigators; planning and execution of IA investigations; identifying and correcting inconsistent rules or policies; making disciplinary decisions; drafting Letters of Intent to Discipline; advising Skelly hearing officers; and preparing in a timely and thorough manner to represent the City at arbitrations. This attorney should be someone who is familiar with the Department and with whom the Department has a good working relationship. This change will have several salutary effects, not the least of which would be improving trust and cooperation between the two offices.”<sup>3</sup>

The City advises that in August 2015, it hired a new attorney for Labor and Employment Unit. OPD has provided a dedicated workspace in IAD for this attorney, and she currently has office hours in IAD three days a week.

The Court-appointed investigator further recommended that, “With every serious complaint, the OCA should assign one attorney to assist OPD from the outset of the investigation of a complaint through the resolution of the case, including representing the City in that case at arbitration.”<sup>4</sup>

OCA advised in its last progress report that it has reestablished its Labor and Employment Unit and assigned a supervising attorney and four staff attorneys. This workgroup is responsible for handling arbitration cases or working alongside outside counsel who may be retained to handle such cases. Furthermore, in serious cases, OCA is assigning an attorney to work with OPD from the beginning of the investigation. In many cases, this role is filled by the attorney referenced above who actually works part-time in IAD.

In another recommendation, the Court appointed investigator wrote, “The Department should revise the investigation process to consider supervisory accountability more thoroughly and to ensure that potential mitigating or exculpatory evidence or witnesses are considered.”<sup>5</sup>

Task 16 of the NSA requires that “if an IAD investigation finds that a supervisor or manager should have reasonably determined that a member/employee committed or violated a Class I offense, the supervisor or manager is held accountable, through OPD’s administrative discipline process, for failure to supervise, failure to review, and/or failure to intervene.” OPD has included a member accountability assessment component into its complaint investigation process, and for all sustained allegations, the investigator must determine whether a peer or supervisor had any opportunity to prevent – or subsequently report – the act complained of. We have determined that OPD has consistently complied with this requirement and Task 16 is no longer actively monitored.

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<sup>3</sup> Report of the Court–Appointed Investigator in *Delphine Allen v. City of Oakland*, p 40.

<sup>4</sup> Report of the Court–Appointed Investigator in *Delphine Allen v. City of Oakland*, p 40.

<sup>5</sup> Report of the Court–Appointed Investigator in *Delphine Allen v. City of Oakland*, p 41.

The Court-appointed investigator also recommended that, “The Department should consider in all cases whether it needs interview civilian witnesses as part of its investigation, and it must be diligent in its efforts to locate and contact these witnesses. It should also work with OCA to develop a policy to determine when outside experts should be hired and who will pay for them.”<sup>6</sup>

The City advised in its September progress report that OPD and OCA are working together to develop a policy to help OPD determine when an investigation would benefit from highly specialized expertise, as well as how best to assess a potential expert’s skill and knowledge. This policy is slated for completion prior to the filing of the City’s next progress report. In addition, the City reports that OCA and IAD personnel currently evaluate whether civilian witnesses should be interviewed as part of their case evaluation process. OCA also has memorialized in policy the requirement to notify IAD of civilian witnesses in a civil lawsuit if there is a corresponding IAD investigation. We also review OPD’s efforts to locate and interview witnesses as part of our assessment of Task 5.15 and 5.16.

In the last recommendation pertaining to Task 5, the Court-appointed investigator suggested that, “The Department should reduce turnover in IA by including at least one civilian at a high level of authority within the division. The civilian member of IA, who would be answerable to the Chief, would remain in IA without needing to transfer to a different assignment and would thus be able to develop expertise in the division over time. The civilian should be someone who understands both community expectations and police procedure, who has investigative experience, and who has a commitment to collaborate with the OCA on the most serious cases.”<sup>7</sup>

In October, OPD hired an Internal Affairs Manager, who reports directly to the Captain in IAD. This individual previously served with the Chicago Independent Police Review Authority. During our most recent site visit, we were advised that he is currently serving as the Division-Level Investigation (DLI) Coordinator, and managing internal audits and controls, while he is immersing himself in learning all of the responsibilities of the IAD command staff.

OPD’s next progress report on its compliance with all of the recommendations of the Court-appointed investigator will be filed on or before December 31, 2015. OPD remains in partial compliance status with Task 5.

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<sup>6</sup> Report of the Court-Appointed Investigator in *Delphine Allen v. City of Oakland*, p 41.

<sup>7</sup> Report of the Court-Appointed Investigator in *Delphine Allen v. City of Oakland*, p 41.

## 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.<sup>8</sup>

OPD is in compliance with this Task and it is therefore considered inactive; however, due to the importance of force reviews, we continue to observe and assess FRB activities during our monthly site visits.

Since July, OPD conducted one FRB, which was conducted in October and we reported our concurrence with the FRB findings in our last report.

## 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.

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<sup>8</sup> 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.

### **Commentary:**

Executive Force Review Boards (EFRBs) are convened for the purpose of reviewing Level 1 use of force events.<sup>9</sup>

OPD is in compliance with this Task and it is therefore considered inactive; however, due to the seriousness of Level 1 force events and the importance of these reviews, we continue to observe and assess EFRB activities during our monthly site visits.<sup>10</sup>

Since July, OPD conducted three boards: one each in July; August; and more recently, in November. We previously reported our concurrence with the July and August EFRB findings.

Level 1 use of force events may include both criminal and administrative elements; accordingly, both the Criminal Investigation Division (CID) and the Internal Affairs Division Force Investigations Unit Review Unit (IAD) present the results of their respective investigations to an EFRB.<sup>11</sup>

The event reviewed by the EFRB in November commenced when two officers engaged occupants of a vehicle believed to have been associated with recent robberies. Officers determined via a file check that one of the subjects was on probation and wanted on a misdemeanor. As officers attempted to place the subject under arrest, he fled with officers in pursuit. Assistance was requested, a search team responded, and a perimeter was established. At one point, the subject approached the perimeter whereupon when seeing the officer, he fled back into the perimeter out of sight.

Search team officers were searching the area, including rooftops, when they located the subject below in a narrow space between buildings where he appeared to be hiding. Officers commanded the subject to “show his hands;” however, the subject did not comply. Upon further observation, officers noted that he appeared to be unconscious. They then approached the subject and were able to pull him from the narrow location whereupon they immediately commenced Cardio Pulmonary Resuscitation (CPR) and requested medical assistance. The subject was later pronounced deceased.

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<sup>9</sup> 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.

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

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

<sup>10</sup> Compliance assessments include a review of the full case files and our regular observations of the boards.

<sup>11</sup> 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.

The incident was captured on officers' PDRD.

Level 1 use of force events generally include both criminal and administrative elements; accordingly, both the Criminal Investigation Division (CID) and the Internal Affairs Division Force Investigations Unit (IAD) present the results of their respective investigations to an EFRB.<sup>12</sup>

Both the CID and IAD case presentations were professionally presented and demonstrative of skilled, thorough investigations. CID found that officers used no force on the subject and no basis for further action.

The IAD investigation, which explored administrative aspects in detail, included a review of its investigation of officers' conduct and their compliance with policies and training. The review addressed policy and training requirements relating to detention, vehicle stops, perimeter and containment procedures, foot pursuit, the use and alleged use of force and other requirements.

IAD also found that the involved officers used no force on the subject. Further, it was clear from both the CID and IAD investigations that officers had no direct physical contact with the subject from the time he fled until they pulled him from the described place of confinement for the purpose of providing medical care.

The board closely examined the officers' actions from the initial point of contact through and including the provision of medical attention, and found that the involved officers had no physical contact with the subject from the point where he fled until the rescue for the purpose of providing medical attention. We concur with the EFRB, and do not find it necessary to review the final EFRB report for this case.

In prior reports, we commented on and credited OPD with a marked reduction in its overall uses of force, including Level 1 uses of force. However, due to recent fatal officer-involved shootings, we recommended that OPD strengthen its EFRB process by including, for example, 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. In addition, we recommended that OPD address the question of "whether the force, even though legally justified and within policy, was the only and/or best option."

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<sup>12</sup> 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.

We first made note of these recommendations in our July 2015 monthly status report. Since August, we have been meeting with the Chief on a monthly basis to discuss the way forward with the adoption of these recommendations. The Chief met with the Oakland Police Officers Association (OPOA), consistent with the “meet and confer” requirements of its contract; however, they did not reach agreement on the suggested policy revisions. The Chief reworked some of the language in the policy, and we concurred with the new version, which the Chief was prepared to implement. However, he rescinded the implementation of the policy, after the OPOA asserted that the meet and confer process was still ongoing; at this point, after five months, this process is at a standstill.

Just a few days ago, on December 11, 2015, the Court issued an Order, which reads in part, “[T]he Court understands that the union and the City have had extensive exchanges on this issue, and even if the City was required to meet and confer, the union cannot unilaterally decide when the meet and confer process should be deemed complete. This process has gone on long enough, and IT IS HEREBY ORDERED that the City must complete any additional meeting and conferring it believes it must do with the union and reach a final determination on whether it will implement the revised policy on or before December 21, 2015.”

Implementation of these enhancements to the EFRB process will 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. After any loss of life, a police department should critically consider its own processes and search for ways to safely avoid the use of deadly force when possible.

The Court’s December 11, 2015 Order makes clear, “if the City does not implement the revised policy by the above deadline, then the Compliance Director shall invoke his authority to direct its implementation.”

## 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 prior reports, we reported that officers were accurately and fully completing the stop data forms as required.<sup>13</sup> We also noted that our assessment included careful examination of stop data documentation outlining the *reason* for the stop – essentially the justification for the interaction between the officer and the person stopped – and found justification appropriately documented and/or explained.<sup>14</sup>

The quality and ever-expanding size of the stop database has provided the basis for the review and assessment of several elements of officers’ encounters with members of the public to include, but are not limited to, reasons for the stops, searches, seizures, arrests, or actions taken among the differing population groups. We and OPD conduct these assessments on a monthly basis.

These assessments commence with a review of citywide and specified Area command stop data provided by OPD. In addition, we attend OPD’s monthly Risk Management Meetings, which occur during our regular site visits.<sup>15</sup> The past several reviews have focused on analyses of the ratio of searches and/or the search recovery rates among the identified population groups.<sup>16</sup> In

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<sup>13</sup> 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).

<sup>14</sup> Our findings were based on our review of Computer Aided Dispatch (CAD) entries, Field Contact Cards, traffic citations, Stop Data Forms and related reports.

<sup>15</sup> 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 Area commands 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.

<sup>16</sup> The term search recovery rate refers to the discovery of contraband or evidence of a crime discovered during a search.

particular, we identified squads within the Area being examined with lower than average recovery rates for further examination by OPD in an effort to identify reasons for the abnormalities. The OPD reported that its initial examinations to determine the reasons for the identified abnormalities appeared to be related to either the experience level of the squad being reviewed or the crime control strategy being employed within the Area. OPD addressed these issues with training and enhanced supervision.

In August, we noted a significant increase in the overall recovery rate of squads in the Area under review. This was repeated in September and October. These three successive strong recovery rate numbers were clearly positive; however, the data required further examination so as to assure accuracy. To do so, we and OPD began to expand our assessments to include not only squads with *low* recovery rates, but also squads with *high* recovery rates.

OIG approached this issue by conducting a detailed “Analysis of Search Rates and Search Recovery Rates” and found, similar to our prior findings, the searches to be lawful; and in addition, noted that the recovery rates appeared to “correlate with an officer’s Section or Area of assignment; higher recovery percentages were more likely to be articulated as being tied to intelligence led policing strategies or operations.”<sup>17</sup> We concurred with those findings.

OIG also made recommendations to address its findings, which included specified coaching, mentoring and/or training designed to improve the value of stops and searches. In addition, OIG identified a need to clarify and/or strengthen the policy definition and/or instruction on the process for documenting recoveries in varying circumstances, for example: 1) the recording of a recovery of an item found during a pat-down search that is temporarily held for officer safety purposes, but returned to the person; or 2) the recording of evidence and/or person from whom the evidence is recovered in cases of multiple person stops and/or vehicle searches with multiple occupants. The examination indicated some inconsistency with the recording of stop, search and recovery data relating to these types of encounters.

Our review of data relative to pat-down searches/recoveries verified the lack of clarity relating to the documentation of recoveries relating to pat-downs. For example, our review of 43 pat-down searches, all of which reportedly resulted in recoveries, found that 20 of these searches resulted in no permanent recovery/seizure of evidence or contraband.

The standard for conducting pat-down searches differs from the probable cause standard required for other searches, as does the expectation of evidence/contraband discovery; instead, these searches are primarily based on officer safety. Accordingly, the temporary seizure and holding of items that pose a threat to the officers’ safety is an acceptable practice, however the accurate documentation of these temporary seizures is important. Data provided for this report illustrated in Tables One and Two depict the extent to which improper recording of temporary recoveries can affect data analysis.

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<sup>17</sup> Monthly Progress Report of the Office of Inspector General, Oakland Police Department, October 2015, pp. 4-9.

<b>Table One</b>				
<b>Citywide</b>	<b>Pat-downs (frisks) Vehicle Stops</b>		<b>Pat-downs (frisks) Pedestrian Stops</b>	
	<b>Race</b>	<b>Searches</b>	<b>Recoveries</b>	<b>Searches</b>
African American	535	133/101	348	69/42
Asian	16	6/4	27	5/1
Hispanic	173	44/35	95	20/13
White	39	12/6	42	7/2
Other	10	4/3	4	2/2
<b>Total</b>	<b>773</b>	<b>199/149</b> (26%/19%) <sup>18</sup>	<b>516</b>	<b>103/60</b> (20%/12%) <sup>19</sup>

<b>Table Two</b>				
<b>Area</b>	<b>Pat-down (frisks) Vehicle Stops</b>		<b>Pat-downs (frisks) Pedestrian Stops</b>	
	<b>Race</b>	<b>Searches</b>	<b>Recoveries</b>	<b>Searches</b>
African American	54	16	73	20
Asian	2	1	2	0
Hispanic	11	3	12	2
White	3	0	8	1
Other	0	0	1	0
<b>Total</b>	<b>70</b>	<b>20 (29%)</b>	<b>96</b>	<b>23 (24%)</b>

OPD has initiated corrective action, including specific policy revisions and training enhancements, to address these issues of stop data collection definitions and consistency. In addition, OPD has also initiated the process to revise the stop data collection forms to permanently incorporate these changes.

<sup>18</sup> Includes the temporary recovery and holding of 55 items that, though not illegal or of evidentiary value, could pose a safety threat to officers.

<sup>19</sup> Includes the temporary recovery and holding of 45 items that, though not illegal or of evidentiary value, could pose a safety threat to officers.

MONTHLY REVIEW OF SELECTED AREA

During our November site visit, we again attended the Risk Management Meeting, during which stop data for the selected Area was reviewed.

*Vehicle and Pedestrian Stops*

OPD officers assigned to this Area under review made 3,146 vehicle stops and 833 pedestrian stops, as illustrated in Table Three.<sup>20</sup> The variance in the **percentage of stops** among the various population groups is of continued interest, both overall and within the individual Areas. As illustrated below, the variance among the population groups for *vehicle stops* within the Area under review for this report ranges from a high of 65% for African Americans to a low of 4% for Other. This compares with a citywide high of 58% for African Americans to a low of 3% for other. Similarly, the breakdown for *pedestrian stops* ranges from a high of 73% for African American to a low of 1% for Other.<sup>21</sup> This compared with a citywide high of 67% for African Americans to a low of 1% for Other.

Table Three				
Race/Ethnicity	Vehicle Stops		Pedestrian Stops	
	Number	Percent	Number	Percent
<b>African American</b>	2,036	65%	612	73%
<b>Asian</b>	181	6%	28	3%
<b>Hispanic</b>	353	11%	71	9%
<b>White</b>	464	15%	112	13%
<b>Other</b>	112	4%	10	1%
<b>Total</b>	<b>3,146</b>	<b>100%<sup>22</sup></b>	<b>833</b>	<b>100%</b>

*Searches-Recoveries*

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.

*Searches:* Data for the Area reviewed for this report indicate that members of the African American population group are searched at the highest rate during both vehicle stops (16%) and pedestrian stops (42%). The average search rates for vehicle and pedestrian stops are 11% and 35%, respectively (See Table Four).

(Citywide data not illustrated.)

<sup>20</sup> The dataset includes activity for the period January 17, to September 18, 2015.

<sup>21</sup> “Other” includes all individuals not identified as African American, Asian, Hispanic, or white.

<sup>22</sup> Percentages rounded.

<b>Race/Ethnicity</b>	<b>Vehicle Searches</b>		<b>Pedestrian Searches</b>	
	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>
<b>African American</b>	292	16%	172	42%
<b>Asian</b>	0	0%	1	6%
<b>Hispanic</b>	14	4%	17	35%
<b>White</b>	18	4%	18	21%
<b>Other</b>	2	2%	0	0%
<b>Total</b>	<b>326</b>	<b>11%<sup>24</sup></b>	<b>208</b>	<b>36%</b>

*Recoveries:* Data for the Area reviewed for this report indicate that search recoveries are high among the African American population group for both vehicle and pedestrian stops. The average search recovery rates for vehicle and pedestrian stops are 55% and 45%, respectively (See Table Five). Citywide vehicle stop search recovery rates range from 73% (Asian) to 44% (White), with an average of 50%. Citywide pedestrian stop recovery rates range from 57% (Other) to 42% (African American), with an average of 42%. (Citywide data not illustrated.)

<b>Race/Ethnicity</b>	<b>Motor Vehicle Recoveries</b>		<b>Pedestrian Recoveries</b>	
	<b>Number</b>	<b>Percent</b>	<b>Number</b>	<b>Percent</b>
<b>African American</b>	163	56%	76	44%
<b>Asian</b>	0	0%	1	100%
<b>Hispanic</b>	7	50%	8	47%
<b>White</b>	8	44%	9	50%
<b>Other</b>	2	100%	0	0%
<b>Total</b>	<b>180</b>	<b>55%<sup>25</sup></b>	<b>94</b>	<b>45%</b>

*Squad Level Search Recoveries:* The variances in the **percentage of stops resulting in searches and the percentage of searches resulting in recoveries** among the various population groups continue to be of interest, particularly at the *squad* level. It is at this and at the individual officer level, where unbiased, quality policing begins and ends. For the present Area, the search recovery rates at the squad level for vehicle searches ranged from 26% to 100% (average

<sup>23</sup> Incident to Arrest, Weapons (Pat-downs) and Inventory Searches Excluded.

<sup>24</sup> Percentages rounded.

<sup>25</sup> Percentages rounded.

recovery rate - 55%); and for pedestrian-related searches, from 13% to 75% (average recovery rate - 45%). This is remarkable by any accounts. Nevertheless, both the high and the low recovery rates require review to assure all is in order insofar as the presence of justification for the search is concerned and whether recoveries are properly documented and/or whether there appears to be any indications of racial bias warranting further review. Our reviews have consistently found OPD searches are meeting legal requirements; however, possible racial/ethnicity issues require more in-depth analysis and continued, ongoing review.

### *Additional Thoughts*

OPD has made significant progress with the collection, analysis and reporting of stop data in the last five years – and more particularly since 2013, when we first assessed the collected data as sufficiently accurate and reliable. During our site visit relating to this report, OPD rightly posed an inquiry regarding what remained for compliance with the requirements of this Task. We suggest that the remaining work includes, but is not necessarily limited to:

1. Assured resolution of issues, including revisions to stop data forms, relating to the definition and documentation of pat-down search recoveries of both seized evidence and the return of items temporarily retained for safety purposes.
2. Assured resolution of issues relating to search recoveries in cases of multiple person stops and/or vehicle searches with multiple occupants.
3. Analysis to include not only Area and overall squad activity, but activity of individual officers within squads.
4. The implementation of general and specific intervention strategies to address data indicators of abnormalities and/or possible bias at the Area, squad and individual officer levels.
5. Resolution of the sustainability question as to whether the present rotating review of stop data (once in five months) is sufficient to reliably identify possible bias and assure sustained intervention and/or prevention measures.
6. Receipt and implementation of Dr. Eberhardt's forthcoming report and recommendations.

In short, OPD must continue to do what it is doing while making adjustments to further strengthen and assure sustainability of its collection, analysis, reporting of stop data, and equally important, to strengthen intervention processes so as to address indicators of racial bias.

## Task 41: Use of Personnel Assessment System (PAS) and Risk Management

### **Requirements:**

*Within 375 days from the effective date of this Agreement, OPD shall develop a policy for use of the system, including supervision and audit of the performance of specific members, employees, supervisors, managers, and OPD units, as well as OPD as a whole. The policy shall include the following elements:*

- 1. The Chief of Police shall designate a PAS Administration Unit. The PAS Administration Unit shall be responsible for administering the PAS policy and, no less frequently than quarterly, shall notify, in writing, the appropriate Deputy Chief/Director and the responsible commander/manager of an identified member/employee who meets the PAS criteria. PAS is to be electronically maintained by the City Information Technology Department.*
- 2. The Department shall retain all PAS data for at least five (5) years.*
- 3. The Monitor, Inspector General and Compliance Coordinator shall have full access to PAS to the extent necessary for the performance of their duties under this Agreement and consistent with Section XIII, paragraph K, and Section XIV of this Agreement.*
- 4. PAS, the PAS data, and reports are confidential and not public information.*
- 5. On a quarterly basis, commanders/managers shall review and analyze all relevant PAS information concerning personnel under their command, to detect any pattern or series of incidents which may indicate that a member/employee, supervisor, or group of members/employees under his/her supervision may be engaging in at-risk behavior. The policy shall define specific criteria for determining when a member/employee or group of members/employees may be engaging in at-risk behavior.*
- 6. Notwithstanding any other provisions of the PAS policy to be developed, the Department shall develop policy defining peer group comparison and methodology in consultation with Plaintiffs' Counsel and the IMT. The policy shall include, at a minimum, a requirement that any member/employee who is identified using a peer group comparison methodology for complaints received during a 30-month period, or any member who is identified using a peer group comparison methodology for Penal Code §§69, 148 and 243(b)(c) arrests within a 30-month period, shall be identified as a subject for PAS intervention review. For the purposes of these two criteria, a single incident shall be counted as "one" even if there are multiple complaints arising from the incident or combined with an arrest for Penal Code §§69, 148 or 243(b)(c).*
- 7. When review and analysis of the PAS threshold report data indicate that a member/employee may be engaging in at-risk behavior, the member/employee's immediate supervisor shall conduct a more intensive review of the*

*member/employee's performance and personnel history and prepare a PAS Activity Review and Report. Members/employees recommended for intervention shall be required to attend a documented, non-disciplinary PAS intervention meeting with their designated commander/manager and supervisor. The purpose of this meeting shall be to review the member/employee's performance and discuss the issues and recommended intervention strategies. The member/employee shall be dismissed from the meeting, and the designated commander/manager and the member/employee's immediate supervisor shall remain and discuss the situation and the member/employee's response. The primary responsibility for any intervention strategies shall be placed upon the supervisor. Intervention strategies may include additional training, reassignment, additional supervision, coaching or personal counseling. The performance of members/ employees subject to PAS review shall be monitored by their designated commander/manager for the specified period of time following the initial meeting, unless released early or extended (as outlined in Section VII, paragraph B (8)).*

8. *Members/employees who meet the PAS threshold specified in Section VII, paragraph B (6) shall be subject to one of the following options: no action, supervisory monitoring, or PAS intervention. Each of these options shall be approved by the chain-of-command, up to the Deputy Chief/Director and/or the PAS Activity Review Panel.*

*Members/employees recommended for supervisory monitoring shall be monitored for a minimum of three (3) months and include two (2) documented, mandatory follow-up meetings with the member/employee's immediate supervisor. The first at the end of one (1) month and the second at the end of three (3) months.*

*Members/employees recommended for PAS intervention shall be monitored for a minimum of 12 months and include two (2) documented, mandatory follow-up meetings with the member/employee's immediate supervisor and designated commander/manager: The first at three (3) months and the second at one (1) year. Member/employees subject to PAS intervention for minor, easily correctable performance deficiencies may be dismissed from the jurisdiction of PAS upon the written approval of the member/employee's responsible Deputy Chief, following a recommendation in writing from the member/employee's immediate supervisor. This may occur at the three (3)-month follow-up meeting or at any time thereafter, as justified by reviews of the member/employee's performance. When a member/employee is not discharged from PAS jurisdiction at the one (1)-year follow-up meeting, PAS jurisdiction shall be extended, in writing, for a specific period in three (3)-month increments at the discretion of the member/employee's responsible Deputy Chief. When PAS jurisdiction is extended beyond the minimum one (1)-year review period, additional review meetings involving the member/employee, the member/ employee's designated commander/manager and immediate supervisor, shall take place no less frequently than every three (3) months.*

9. *On a quarterly basis, Division/appropriate Area Commanders and managers shall review and analyze relevant data in PAS about subordinate commanders and/or managers and supervisors regarding their ability to adhere to policy and address at-risk behavior. All Division/appropriate Area Commanders and managers shall conduct quarterly meetings with their supervisory staff for the purpose of assessing and sharing information about the state of the unit and identifying potential or actual performance problems within the unit. These meetings shall be scheduled to follow-up on supervisors' assessments of their subordinates' for PAS intervention. These meetings shall consider all relevant PAS data, potential patterns of at-risk behavior, and recommended intervention strategies since the last meeting. Also considered shall be patterns involving use of force, sick leave, line-of-duty injuries, narcotics-related possessory offenses, and vehicle collisions that are out of the norm among either personnel in the unit or among the unit's subunits. Division/appropriate Area Commanders and managers shall ensure that minutes of the meetings are taken and retained for a period of five (5) years. Commanders/managers shall take appropriate action on identified patterns of at-risk behavior and/or misconduct.*
10. *Division/appropriate Area Commanders and managers shall meet at least annually with his/her Deputy Chief/Director and the IAD Commander to discuss the state of their commands and any exceptional performance, potential or actual performance problems or other potential patterns of at-risk behavior within the unit. Division/appropriate Area Commanders and managers shall be responsible for developing and documenting plans to ensure the managerial and supervisory accountability of their units, and for addressing any real or potential problems that may be apparent.*
11. *PAS information shall be taken into account for a commendation or award recommendation; promotion, transfer, and special assignment, and in connection with annual performance appraisals. For this specific purpose, the only disciplinary information from PAS that shall be considered are sustained and not sustained complaints completed within the time limits imposed by Government Code Section 3304.*
12. *Intervention strategies implemented as a result of a PAS Activity Review and Report shall be documented in a timely manner.*
13. *Relevant and appropriate PAS information shall be taken into account in connection with determinations of appropriate discipline for sustained misconduct allegations. For this specific purpose, the only disciplinary information from PAS that shall be considered are sustained and not sustained complaints completed within the time limits imposed by Government Code Section 3304.*
14. *The member/employee's designated commander/manager shall schedule a PAS Activity Review meeting to be held no later than 20 days following notification to the Deputy Chief/Director that the member/employee has met a PAS threshold and when intervention is recommended.*

15. *The PAS policy to be developed shall include a provision that a member/employee making unsatisfactory progress during PAS intervention may be transferred and/or loaned to another supervisor, another assignment or another Division, at the discretion of the Bureau Chief/Director if the transfer is within his/her Bureau. Inter-Bureau transfers shall be approved by the Chief of Police. If a member/employee is transferred because of unsatisfactory progress, that transfer shall be to a position with little or no public contact when there is a nexus between the at-risk behavior and the “no public contact” restriction. Sustained complaints from incidents subsequent to a member/employee’s referral to PAS shall continue to result in corrective measures; however, such corrective measures shall not necessarily result in a member/employee’s exclusion from, or continued inclusion in, PAS. The member/employee’s exclusion or continued inclusion in PAS shall be at the discretion of the Chief of Police or his/her designee and shall be documented.*
16. *In parallel with the PAS program described above, the Department may wish to continue the Early Intervention Review Panel.*
17. *On a semi-annual basis, beginning within 90 days from the effective date of this Agreement, the Chief of Police, the PAS Activity Review Panel, PAS Oversight Committee, and the IAD Commander shall meet with the Monitor to review the operation and progress of the PAS. At these meetings, OPD administrators shall summarize, for the Monitor, the number of members/employees who have been identified for review, pursuant to the PAS policy, and the number of members/employees who have been identified for PAS intervention. The Department administrators shall also provide data summarizing the various intervention strategies that have been utilized as a result of all PAS Activity Review and Reports. The major objectives of each of these semi-annual meetings shall be consideration of whether the PAS policy is adequate with regard to detecting patterns of misconduct or poor performance issues as expeditiously as possible and if PAS reviews are achieving their goals.*
18. *Nothing in this Agreement, and more specifically, no provision of PAS, shall be construed as waiving, abrogating or in any way modifying the Department’s rights with regard to discipline of its members/employees. The Department may choose, at its discretion, to initiate the administrative discipline process, to initiate PAS review or to use both processes concurrently or consecutively.*

(Negotiated Settlement Agreement VII. B.)

**Relevant Policy:**

OPD revised and issued Departmental General Order D-17, *Personnel Assessment Program*, in November 2013.

### **Commentary:**

**Task 41** addresses the effectiveness of the use of PAS to manage risk in the Department. The processes involved in this Task include the assessment of officers regarding risk-related behavior; identification of officers surpassing thresholds; comprehensive reviews of those officers and; when appropriate, continued monitoring or intervention deemed with those officers. This multistep process also supports a broader approach to managing risk in which the Department continuously assesses activity and seeks to incorporate those assessments more generally into its activities. The potential contributions of this process can already be seen in the monthly Risk Management Meetings.

As of September 30, 2015, there were a total of 14 officers undergoing monitoring and seven who were in intervention based on their individualized risk assessments. This means that approximately 4% of all officers were under some form of risk management-related status. When the percentage uses patrol officers as its base, this figure raises to eight percent. While there is no set standard or expected levels for these figures, the current numbers remain approximately the same as those reported for the past year. Tracking the number of officers in monitoring and supervision provides an important check on the process to assure that appropriate standards are maintained.

As in the past, we have examined data on all stages of the risk management process using PAS. The overall review of officer behavior, identification of those surpassing thresholds, and the PAS unit's detailed review of those officers for consideration for monitoring and supervision continues, as expected under Departmental policy. We reviewed all PAS reports from the quarter ending September 30, 2015 to assess thoroughness of the written reviews and the review process. This reflected a substantial amount of activity including 15 reports completed during the quarter, and an additional 17 reports completed earlier but finalized and received by the PAS unit during the time period. This total is approximately half of the number reviewed during same period in the previous year. The reports all included a review of 20 performance dimensions and signoffs of supervisor, command staff, and the PAS review team. The initial reviews and the processes up the chain of command are all thorough and well documented.

The risk review process appears to be consistent with reduction in overall uses of force and complaints as noted in previous reports. In fact, the incorporation of review of other activity in the monthly risk management meetings, including arrests, accidents, and stop data, can suggest the further incorporation of risk concepts into Departmental management. The caveat, of course, is that high quality reviews of these areas remain essential to the effectiveness of the risk management system. Concerns over these reviews have been noted in previous reports. Maintaining high standards in this area is particularly important in light of the technological advancement associated with the development of the new risk management database. The quality and use of risk reviews, including the individual analyses completed by the PAS Unit and the incorporation of risk factors in monthly command meetings, will remain critically important regardless of technological progress.

As the existing risk management system continues to assess officers, review those passing thresholds and implement strategies to reduce risk, work is also continuing on the development of the new risk management system, which has been named PRIME for Performance, Reporting, Information and Metrics Environment. PRIME is now expected to be up and running by the end of the first quarter of 2016.

## 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 September 1, through October 31, 2015. This query yielded 11 cases, each containing one sustained finding. 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 11 cases with sustained findings that were decided during the period of September 1, through October 31, 2015. One case involved an allegation of improper demeanor. Another case involved the failure to file a use of force report. The remaining nine cases involved what OPD determined to be avoidable motor vehicle collisions. In all cases except the force reporting case, 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 the force reporting case, the officer was on probation and was released from the Department.

During the period of September 1, through October 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, the Chief of Police overruled the hearing officers. In one case, originally sustained for failing to accept a complaint – intentional, the Chief agreed with the hearing officer that the unintentional version of this MOR violation was more appropriate. However, he determined that a written reprimand was more appropriate than counseling recommended by the hearing officer. The other case involved allegations of improper detention and unjustified use of force. The hearing officer felt the force was justified, but upheld the sustained finding for the improper stop and recommended a written reprimand. The Chief overruled him and sustained both allegations and retained the originally recommended penalty of a one-day suspension.

In another case involving an avoidable collision resulting in a death, the Chief concurred with the hearing officer's recommended change in the applicable MOR violation to a Class II violation, but both the hearing officer and the Chief agreed that the proposed 20-day suspension should stand. While this is outside the guidelines of the Discipline Matrix, they determined that the aggravating factors, including the officer's driving history and the consequences of the collision, justified the discipline imposed.

OPD remains in partial compliance with Task 45.

## Conclusion

As described above, PRIME – or Performance, Reporting, Information and Metrics Environment, the new risk management system, is a complex technological undertaking that has required some change orders and resulted in some delay, but continues to move forward through its development phases. In fact, there is some reason for concern that its forward momentum has caused it to be somewhat detached from the current risk management processes under PAS. That is to say, the danger is that these two systems exist in silos where one is the working system developed over years, and the other is a technology project only loosely tied to the substantive issues of risk management. It is important now that these aspects of the project can now come together to define the Department's approach to risk management. The new technology can help the Department enhance its understanding and use of risk management. As an example, the system should be able to translate the experience underlying PAS into easily interpretable PRIME charts and graphs that supervisors and command staff can use to anticipate and identify problems and take remedial action.

Together PRIME and PAS can add to important transformations that are occurring in the Department. That will require that connections be made between approaches to risk that reflect both the department's experience and its new capabilities. The issues that can connect these silos deal with how risk management will be understood moving forward. Will it be a limited part of personnel management processes or a core concept driving a new approach to policing? The answers to this question may help form the foundation in a new era of policing in Oakland. The potential should not be underestimated.

We acknowledge that OPD has come a long way during our tenure in this project, but we encourage both the police and political leadership of the City to not minimize the importance of the remaining matters in this undertaking.



Chief (Ret.) Robert S. Warshaw  
*Monitor*