



Special Report *of the*
Independent Monitor *for the*
Oakland Police Department:
Officer-Involved Shootings

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Review of Oakland Police Department
Officer-Involved Shooting Investigations and Reviews

Introduction

On 31 May 2012, the Honorable Thelton E. Henderson issued an order in the case of Delphine Allen, et al. v. City of Oakland, et al., which read, in part:

The Monitor has recently raised with the Court questions about how Defendants investigate officer-involved shootings, up through and including the proceedings of the Executive Force Review Board and subsequent deliberations by the Chief of Police and the City officials who supervise him. This is of utmost concern, as uses of force and the manner in which they are investigated are among the most serious issues in this case, and officer-involved shootings, many of which result in death, are the gravest possible uses of force. The Court hereby directs the Monitor to identify any systemic problems that exist in the process by which Defendants evaluate such cases, as well as whether unique problems arose in any individual case, and recommend solutions to those problems. This analysis shall be included in the Monitor's next quarterly report. If the Monitor believes it is warranted, he shall also investigate, pursuant to the Court's January 27, 2012 order, whether sanctions are appropriate in any cases of individual misconduct he might uncover.

Pursuant to the Court's order, we requested completed investigations, including the findings of the associated Executive Force Review Boards (EFRBs), for the *nine most recent* Level 1 Uses of Force, eight of which involved Oakland Police Department (OPD) officers discharging firearms. We analyzed the cases according to multiple criteria, including but not limited to: demographic information of involved officers and subjects; initial reasons for the encounter; weapons for both officers and subjects; presence of an imminent threat; nature of injuries, if any, to both officers and subjects; quality of forensic evidence; statements in conflict with other statements and/or physical evidence; use of boilerplate language; use of the preponderance of the evidence standard; findings of the Internal Affairs Division (IAD); findings of the EFRBs; and

findings of the Chief of Police, who has the ultimate responsibility to make a determination in these cases.

In addition to the analysis of these completed investigations, we have had numerous conversations with OPD personnel on many of these specific cases, and on the topic of officer-involved shootings (OIS) in general. We are traditionally advised when an OIS occurs, and have for some of these cases followed the progress of their investigation during and in between site visits. It is also our practice to attend any Force Review Boards (FRBs) and EFRBs which coincide with our regular on-site team inspections.

In this report, we will provide an overall summary of the investigations reviewed; an overview of each specific case, including any perceived deficiencies or concerns; and a discussion of possible systemic issues we have identified from this review and our observations during the tenure of our engagement.

Summary of Investigations Reviewed

The nine investigations we reviewed fall into the following categories:

- Two (2) separate fatal OIS events resulting in a total of three deceased subjects.
- One (1) OIS event resulting in the subject receiving critical but not life threatening injuries.
- Four (4) OIS events resulting in no injuries to the subjects because the officers that discharged their firearms missed their intended targets.
- One (1) OIS event involving the use of shotgun-deployed less lethal munitions, consisting of drag stabilized rounds or what is commonly referred to as bean bag rounds, resulting in the subject receiving non-life threatening injuries.
- One (1) non-OIS event involving an ASP expandable baton strike to the head. It is unknown if this use of force resulted in injuries as the subject fled the scene.

Demographic Information of Involved Officers and Subjects

The involved officers¹ in the above describe events were:

- Four (4) Hispanic males
- Three (3) white males
- Two (2) black males
- One (1) white female

The involved subjects² in the above described events were:

- Seven (7) black males
- Three (3) white males
- One (1) male of unknown ethnicity, as he fled the scene.

Individual Event Summaries

What follows are summaries of the individual cases we reviewed, including, where applicable, issues and concerns we've identified with the particular cases.

[REDACTED THROUGH PAGE 12.]

¹ An event can have more than one involved officer.

² An event can have more than one involved subject.

Systemic Issues

As stated in the Introduction, this review was carried out pursuant to Court Order. We were directed “to identify any systemic problems that exist in the process by which Defendants evaluate such cases, as well as whether unique problems arose in any individual case, and recommend solutions to those problems.” We have discussed specific cases above. We will now outline what we perceive to be systemic issues based on our review of these cases, other cases, and our observations and discussions with OPD personnel during the course of our engagement.

These issues do not permeate all investigations. Not all of OPD’s “officer-involved-shootings” engender concern or warrant closer scrutiny. What is troubling, however, is that our greatest concerns are almost always in the cases that are not clearly justified; where the use of deadly physical force is questionable. These are the cases, above all others, that require objective, unbiased, probing investigations, and yet they appear to be cases that exhibit the most deficiencies and the least inquisitiveness.

Quality of Investigations

- **Failure to use the preponderance of the evidence standard.** The standard of proof in criminal prosecutions is “beyond a reasonable doubt”. The standard of proof in administrative investigations, particularly those conducted by IAD and extending to the reviews of the EFRB, is “preponderance of the evidence”. This standard has been described as “more likely than not”, or “a slight tipping of the scales”. We note instances where IAD and EFRBs will base their determinations on scenarios that may be *possible*, but if looked at objectively, do not appear likely. This should be a cause of concern for the Department and the community.
- **Lack of imminent threat.** A member of the police is justified in using deadly physical force only when he reasonably believes such force is necessary to defend the member of the police, or a third person, from the *imminent threat of death or serious bodily injury*.⁵ We concede that these situations are fluid, stressful, and dangerous. However, the justification for using deadly physical force must be based on the threat presented to the

⁵ Tennessee v. Garner, 471 U.S. 1, 85 (1985).

officer at the precise time force is used. In some cases, we do not believe the evidence supports the existence of an imminent threat at the time the trigger is pulled. Of particular concern are those cases in which a subject is shot in the back.

- **Lack of impartiality on the part of some investigators.** We have noted instances in which investigators display a distinct lack of impartiality in conducting investigations. This can range from failing to ask difficult questions and probe inconsistencies – to being report takers rather than investigators – to providing actual justification for an officer’s actions, as further outlined below:

- **Use of boilerplate language.** The use of boilerplate language in officer-involved shooting investigations continues to surface, where the investigator inserts language into the report to provide justification for missing details or to address conflicts with established facts. These include, but are not limited to:
 - “Diminished situational awareness”⁶
 - “Tunnel vision and distorted perceptions”
 - “I know from training and experience such incidents are stressful...”

The investigative reports do not indicate that these determinations are made by an expert who is qualified to render an opinion on human physiological response to the particular incident being investigated. Rather, they appear to be the opinions of investigators and not based on specific evidence developed or obtained during the investigation.

- **Statements in conflict with other statements and/or physical evidence go unaddressed.** The Level 1 use of force investigations have, on occasion, revealed conflicts with photographic/video evidence and officer statements that go unchallenged or addressed. Despite these unresolved conflicts, EFRB findings of “in compliance with policy” are made.
- **Lack of timely notification to Internal Affairs.** We note a lack of timely notification to IAD when an OIS occurs. In our review sample, the time of notification ranged from 20 minutes to 3 hours and 26 minutes after the incident, without articulation or identifiable cause for the delay.

⁶ After repeatedly seeing this term in IAD investigations, we requested that OPD provide an actual definition and a listing of their subject matter experts who are qualified to identify it. Neither could be provided.

- **Crime scene integrity and security.** During our assessment, we noted a significant number of OPD personnel – and on occasion, other agency personnel – entering the crime scenes. Crime scene security is paramount during the preliminary investigation of an OIS, to allow for the locating, photographing, and preserving of valuable physical evidence. This is important to reconstruct events as they occurred and to ensure a complete, thorough, and factual investigation of the scene, free of outside or unnecessary contamination. No explanation is provided for the large number of personnel allowed to enter the crime scenes of OPD officer-involved shootings. Our review noted ranges from a low of 44 to a high of 80. We understand that certain people may require entrance to a crime scene, including EMS personnel, the assigned investigator(s), coroner/medical examiner, the District Attorney, and evidence technician(s) to process the scene, but the numbers of persons allowed on a routine basis appears excessive.

Process Issues

- **Dissenting opinions are formally documented in IAD investigations, thereby giving them greater weight and credence.** In two separate OIS investigations in our review, the IAD investigators determined that the shootings were justified. The IAD commanding officer disagreed with those findings, but rather than send the investigation back to be changed, he merely wrote a memo indicating that he disagreed with the findings and why. Therefore, the findings not supported by the IAD commander were reviewed, along with his reasons for disagreement. We have counseled that the IAD commander is ultimately responsible for the investigations – and findings – emanating from IAD, and if he or she is not comfortable or in agreement with the findings submitted, they should be changed. This same dynamic would not be allowed in a criminal investigation, and it should not be tolerated in an administrative investigation.
- **Inordinate attention to extraneous details, with lack of critical focus on salient issues of justification.** We have seen many examples of endless debate on procedural issues which lead up to or were contemporaneous with a shooting, with little or no probing discussion involving the justification of the force itself. Often, the lethal force is

dismissed as justified, but issues such as proper radio procedure, tactical errors, where a car was parked, or the appropriateness of a foot chase consume in-depth discussions.

- **The EFRB Chair can be overruled by the vote of members of subordinate rank.** The EFRB makes its findings by majority vote. This allows for the possibility – observed in our sample – that Deputy Chiefs can disagree with the Assistant Chief and Board Chair, and have their findings be the exclusive official findings of the Board. During recent discussions on this topic, OPD was extremely reluctant to change the voting process. At a minimum, if an EFRB vote is not unanimous, we believe the dissenting opinion should be well documented in the Board’s report. The Chief of Police can – and on occasion has – overturned the findings of an EFRB. This authority is appropriate, as he has ultimate responsibility for the determination of fact in these cases. He should have the benefit of dissenting opinions in making his decisions.

Cultural Issues

Every police department, like any organization, can have a culture – a set of values or a general way of thinking and doing things that tend to define the agency. Having a department culture is not a negative thing. In fact, a police leader should intentionally try to foster an organizational culture based on honesty, integrity, respect for those served, and other positive attributes.

We have identified some issues which we believe contribute to a high incidence of officer-involved shootings and, on occasion, to flawed investigations and findings. We discuss them under the heading of cultural issues because they are not rooted in policy or process, but rather speak to the mindset of the Department.

- **Hypersensitivity to the dangers of police work.** We fully recognize that police work is inherently dangerous, and we in no way minimize the risks OPD officers face as they perform their duties. We do note, however, that the OPD Administration and OPD policies tend to inordinately overemphasize officer safety issues and repeatedly reinforce the dangers of police work, often several times in the same policy. We fully understand the importance of officer safety but cannot detach it from the safety of the public. This can create an environment in which officers are on a perpetual state of high alert, assuming that all citizen contacts have the potential to go badly, and reinforce a need to

be ready to defend themselves at all times against aggressive actions. We believe this contributes to the high number of Level 4 uses of force (pointing of a firearm) we have noted in several reports, and may contribute to officer-involved shootings where the justification is questionable.

- **A bias that an OIS is justified unless proven otherwise.** Each OIS must be investigated on its own merits in as objective a way as possible. We note, however, that in most cases, the investigator appears predisposed to the position that the shooting is justified, and then subtly or overtly sets out to prove that premise. Factors that tend to reinforce this bias are:
 - **The criminal history of the subject.** For example, every EFRB commences with a detailed history of subject's criminal record. This tends to reinforce that a "bad guy" was involved and that should be taken into account in determining justification.
 - **The presence of a firearm.** If a firearm is involved in the incident, we note the OIS will almost always be found to be justified, even if at the time of the actual use of force, the firearm was not being used as an imminent threat. During our conversations, one OPD command officer, showing great insight, wondered if it was possible for a suspect possessing a handgun to surrender without being shot, given that his every action would probably be construed as a furtive move.
- **Inordinate amount of concern is placed on whether a finding can be successfully defended in a disciplinary proceeding or appeal.** The administrative findings should be made on the preponderance of the evidence standard, with no regard for how it might culminate in the disciplinary process. Often during our discussions, OPD staff will speculate on the chances of defending a finding in these processes, expressing concern that they will be overturned. We assert that if findings are ultimately overturned, the administration can still lay claim that it made the right call. Further, arbitrators can be publicly called to task for reversing the disciplinary decisions of the Chief of Police.

Conclusion

Officer-involved shootings are emotional and trying events for both the police department and the community. It is critical that when they occur they are investigated in as thorough and

objective a manner as possible. Nothing will shake the community's confidence in its police department more than the perception that the agency cannot police itself in these matters of life and death.

When justified, police officers are authorized on behalf of society to use deadly physical force. With this authority comes tremendous responsibility – the responsibility to use this authority with the utmost discretion and in accordance with legal and moral standards; the responsibility to use deadly force only when necessary; and the responsibility, when such force is used, to determine whether it was legally justified and within policy. In some of the cases we have reviewed over our tenure, we do not believe OPD has fulfilled these responsibilities. Imperfect decision making by officers, investigators, review boards or the Chief of Police are not mere statistical outcomes. People die. Seeking perfection may be the goal that always outdistances the organization, but in the use of deadly force, it cannot be abandoned.

The Court's Order stated, "If the Monitor believes it is warranted, he shall also investigate, pursuant to the Court's January 27, 2012 order, whether sanctions are appropriate in any cases of individual misconduct he might uncover." It is our intention to discuss with the Court our concerns regarding the actions of individual officers who were involved in "OIS's" as well as the behaviors of those who have investigated or reviewed certain cases that have been of great concern to us.