

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

December 1, 2014

Introduction

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

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

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

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

As Compliance Director, I hold more direct authority over the Department's NSA-related decisions. With the assistance of a seasoned associate, I serve as an agent of the Court, and work closely with OPD on a sustained basis. My primary focus is, undeniably, for the Department to achieve and sustain compliance with the reforms outlined in the NSA. As

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

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

directed by the Court, I “have the power to review, investigate, and take corrective action regarding OPD policies, procedures, and practices that are related to the objectives of the NSA...even if such policies, procedures, or practices do not fall squarely within any specific NSA task.”³ I shall become involved in all matters that directly relate to the NSA – as well as issues in which there is a reasonable nexus to the NSA or those that concern civil rights, which I view as central to the NSA.

As of the last quarterly monitoring report (issued in October 2014), the Department was in full compliance with 18 of the 22 Tasks, and in partial compliance with two additional Tasks. (We deferred our assessment of Tasks 5 and 45.) This is the highest number of Tasks in compliance since the beginning of our tenure. In this report, I discuss the status of the Tasks that remain out of compliance or have recently come into compliance – and what the Department is doing currently to attain or sustain compliance with these requirements.

News Since Third Progress Report

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

- OPD has facilitated numerous protests and other events involving large crowds within the last year, and for the most part, these events have been peaceful. Yet the protests of the last week – in response to the St. Louis County, Missouri’s grand jury’s decision to not indict the white police officer who fatally shot an unarmed African American teenager – have an entirely different character. While the overwhelming majority of protesters have exercised their rights peacefully, the protests have also involved violence against police officers, looting, and destruction of public property. I continue to closely monitor OPD’s response to these activities, including officers’ uses of force and less lethal munitions; the Department’s interactions with citizens during such events; and any related complaints or investigations.
- Over the past few months, we have observed that discussions at the monthly Risk Management Meetings have declined in quality. While the Area Captains seem more comfortable and less defensive with the format of the meetings, which signals progress; commanders are not asking probing questions to consider the various identified risk factors. We intend to work with the Department on this issue.
- The Department is currently revising its policy on annual performance appraisals of its members and employees. We have observed that an inordinate number of members and employees are rated highly by their supervisors in the Department. While this phenomenon is not unique to OPD, it certainly devalues the assessments.

³ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

Upon our request, the Department provided the distribution of ratings for all members and employees over a 12-month period; we will review this data carefully and discuss it with the Department.

As noted above, the Department is currently in compliance with 18 of the 22 active Tasks – the highest number of Tasks in compliance since the beginning of our tenure. I commend the Department for its steady progress toward achieving compliance with the NSA. But the efforts must go on.

Discussion of Tasks

The Monitoring Team’s assessments have shown that OPD has not yet achieved – or has had difficulty maintaining – compliance with the following eight Tasks:⁴

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

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

Task 20, Span of Control for Supervisors

In our most recent quarterly status report, for the first reporting period since the beginning of our tenure, we found OPD in compliance with Task 20. OPD had been in partial compliance with Task 20 due primarily to its non-compliance with the subtasks related to consistency of supervision (Task 20.2) and the actual ratio of supervisors to officers (Task 20.3). Earlier this year, my associate and I completed a series of discussions with Department officials and the Plaintiffs’ attorneys to revise the methodology for assessing these subtasks. The new, mutually agreeable approach to these issues allowed the Department to achieve compliance with Task 20 – but even more importantly, to develop Task 20-related practices that are sustainable in the long term.

⁴ The Monitoring Team found Task 20 in compliance in our nineteenth quarterly status report; Tasks 33 and 37 in compliance in our seventeenth and eighteenth quarterly status reports; and Task 40 in compliance in our eighteenth quarterly status report. We discuss these Tasks in this report because the Department has struggled to maintain compliance with these Tasks during our tenure.

In anticipation of its annual “draw” – in which officers, based on seniority, select their assignments for the coming year – the Department has reworked the relief supervision system that has been in place for over one year. Chief Whent has expressed that while he believes that the relief system is a useful arrangement, its current formation – which comprises 23 relief sergeant assignments – is not sustainable. The Department’s slightly altered model involves 16 relief sergeant assignments. I have provisionally concurred with the Department’s proposal. It remains to be seen if this new plan will allow the Department to sustain its newly achieved compliance with these critical requirements.

My associate and I will review the available data every few weeks during the first quarter of 2015 to determine compliance under this altered model and assist the Department with any necessary tweaks.

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

OPD has been in partial compliance with Tasks 26 and 30 during many different reporting periods since the beginning of our tenure. In May, with the assistance of the Monitoring Team, the Department revised relevant policy Departmental General Order K-4.1, *Use of Force Boards*. This policy requires the board proceedings to be more formal, efficient, and analytical.

Since the adoption of the new policy, the Monitoring Team has observed several improvements in board hearings. Deputy Chiefs now confer with presenters in advance of the hearings to communicate their expectations; the Department has reduced the number of participants who are required to attend hearings; and board members are provided reports and other evidence in advance of the hearing date.

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

In the next few months, I will continue to review more closely the downward trends in uses of force. The Office of Inspector General (OIG) recently conducted a review of Level 4 incidents; we will follow up on this with the Department. I will also discuss with the Department its training to reduce officers’ use of boilerplate language when justifying encounters that ultimately involve a use of force.

Task 33, Reporting Misconduct

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

OIG recently conducted a review to determine if sergeants reviewed their subordinates' PDRD footage, as required by policy. Following its review, OIG issued an information bulletin to remind supervisors of this requirement. Yet while the current PDRD policy requires supervisors to audit their subordinates' PDRD footage, it does not set out *how* supervisors should do this, and we have observed that the quality – and therefore, utility – of these reviews is inconsistent. We will provide more direction to OPD in this area.

In the next few months, I plan to provide more direction to OPD in this area, and to follow up with the Department regarding its recent improvements to the PDRD storage and tracking system.

Task 34, Vehicle Stops, Field Investigation, and Detentions

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

For the last several months, Professor Jennifer Eberhardt of Stanford University has been assisting the Department with its stop data analysis. Dr. Eberhardt and her team are completing an examination of the first full year of available stop data (April 2013 through April 2014), and recently presented at an all-Parties meeting their preliminary findings. The presentation noted, for instance, that race plays a significant role in who officers stop, and why, and for how long.

In the next few months, I will continue to work with OPD to explore ways in which the collected information and Dr. Eberhardt's analysis can serve as the basis for the development of training and other intervention activities to address the racial disproportionality.

Task 37, Internal Investigations – Retaliation Against Witnesses

OPD regained compliance with Task 37 in the seventeenth reporting period, after one reporting period of non-compliance and two reporting periods of partial compliance as a result of the Department's failure to respond fully to the most serious allegation of retaliation observed by the Monitoring Team. OPD reports that it aggressively scrutinizes

and investigates any allegations of retaliation. The Department is providing improved training to new police officers and employees to, according to OPD, emphasize a culture of accountability and the importance of reporting misconduct.

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

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

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

Over the last few months, the Department has on occasion reported problems with recording accurate arrest counts or other data in the PAS system. Encouragingly, the PAS Unit staff discovered these problems as part of its daily reviews of arrest data; it appears that the unit's internal audit procedures are successful in identifying these data problems.

As noted previously, as part of its risk management system, the Department constructs lists of the "Top 30" members and employees within several categories of risk-related activity. Earlier this year, the Monitoring Team conducted a supplementary review of the Top 30 lists to learn more about how OPD uses these lists and develops interventions for the individuals who appear on them. We plan to conduct a similar analysis – with a particular focus on the individuals who have appeared on multiple Top 30 lists, or on these lists over several different reporting periods.

Following this analysis, I will work with the Department to assess its strategies for members and employees who are "repeaters" – that is, those who continue to meet system thresholds without changing their behavior. Also over the next few months, I will make plans to review the IPAS2 system as Microsoft, the system's developer, fulfills different components of the project in the coming year.

Discussion of Matters Outlined in December 12, 2012 Court Order

The Court's Order of December 12, 2012 grants the Compliance Director the authority to assist OPD to "address, resolve, and reduce: (1) incidents involving the unjustified use of force, including those involving the drawing and pointing of a firearm at a person or an officer-involved shooting; (2) incidents of racial profiling and bias-based policing; (3) citizen complaints; and (4) high-speed pursuits."⁵ The Order describes such matters as

⁵ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

“key to driving the sustained cultural change envisioned by the parties when agreeing to the NSA and AMOU.” The Order also states that the Department should develop “a personnel assessment system (‘IPAS’) that provides a sustainable early-warning system that will mitigate risk by identifying problems and trends at an early stage.”

According to data provided by OPD, the Department has made improvements in all of these areas. While OPD tracks all of its uses of force, including those “involving the drawing and pointing of a firearm at a person,” and it examines the justification for all Level 1 and 2 uses of force as part of its review board process, the Department does not specifically track “unjustified” uses of force. OPD has not had any officer-involved shootings in 2014.

Also, thus far in 2014, the Department has logged 34 pursuits; at the same time last year, it had logged 133. (OPD had a total of 148 pursuits for the full year of 2013.) As of the implementation of OPD’s revised pursuit policy (which took effect in January 2014), OPD now also tracks its “non-pursuits” – that is, situations in which officers do not elect to pursue but in the past, under the former policy, likely would have. Thus far in 2014, OPD has logged 147 non-pursuits. OPD continues to refine its policies on legitimate circumstances for pursuits.

In the area of “incidents of racial profiling and bias-based policing,” the available data raises many questions about what accounts for the varying search rates among different racial and ethnic groups – and it has not yet been determined whether there is a constitutionally valid basis for the disparity or there is a need for corrective intervention. While OPD appears to be making progress – with the retention of the services of Dr. Eberhardt and the Department’s ongoing engagement with its publicly released stop data report – this is an area that will be constantly scrutinized by us, the Court, the Plaintiffs’ attorneys, and the community. At the all-Parties meeting presentation by Dr. Eberhardt, discussed how OPD’s recovery rates compared to those of other departments – and what can be done to raise these rates.

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

Other Recent Activities of Compliance Director

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

- In an Order of August 14, 2014, the Court expressed its indignation with the recent reinstatement of an officer whom the Chief had terminated, and with the City’s poor performance in other recent arbitrations – several of which also overturned

terminations.⁶ The Order asserted that the Department is no longer in compliance with Tasks 5 (Complaint Procedures for IAD) and 45 (Consistency of Discipline), as it “question[ed] whether Defendants are adequately preparing cases for arbitration such that consistency of discipline can be assured to the greatest extent possible.” The Court ordered a far-reaching investigation of the discipline and arbitration process and directed the Department and City “to take appropriate corrective action to ensure sustainable reforms, including, if necessary, immediate corrective action pending further investigation.” As part of this investigation, which is currently underway, we are interviewing key players in the discipline and arbitration process – inside and outside of the City – and reviewing the files for arbitrations that occurred within the last five years.

- Facilitating discussions between the Department and local attorneys from the legal team in the case of *Spalding v. City of Oakland*, which required significant changes to the Department’s crowd control policy.
- Working with the Department on revisions to several NSA-related policies. Most recently, these included policies that govern Force Review Boards, the Department’s canine program, reporting and investigating force, and crowd control.
- Enhancing the Department’s capacities for community interaction and engagement. Members of the Monitoring Team and I occasionally meet with community groups to learn more about their interactions with the Department and their observations of its progress with the reforms. In January, we will facilitate a meeting between members of the Executive Team and a community coalition that is focused on policing issues. Also, in July, OPD held a meeting with community stakeholders to discuss the Department’s first public stop data report; OPD is considering hosting similar meetings in the future, and creating other opportunities to solicit public feedback on its Ceasefire program and other initiatives.
- Providing guidance, mentoring, and technical assistance to Department officials in several other key areas – including recent personnel transfers and promotions, managing and training members and employees, new technological initiatives, and organizational changes.

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

- Continue discussions with the Department regarding the sustainability of the NSA reforms.
- Learn more about the Department’s plans for a Tactical Team rotation policy.

⁶ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Internal Affairs Investigations and Subsequent Proceedings, dated August 14, 2014.

- Continue to work closely with the Chief and his Executive Team to build capacity and foster leadership within the Department, especially in ways that focus on sustainability of the reforms in the NSA.
- Engage the Chief and his Executive Team about the Risk Management Meetings to improve the inquiry and discussion in these forums.
- Assist the Department to develop a training needs assessment. We will review the results of the Training Section's recent survey of officers on the Department's current training offerings.
- Follow up with OIG on the Department's follow-up to its audits, and its plans to appoint and train appropriate personnel throughout the Department to conduct mini-audits on NSA-related and other procedures.
- Begin discussions with OPD on the importance of creating succession and training plans to ensure that personnel in new assignments learn from their predecessors about the responsibilities of their new positions. While OPD – like many law enforcement agencies – regularly transfers its members and employees to different assignments throughout the Department, it generally does a poor job in creating such plans.
- Engage the Department, in conjunction with the Office of the City Attorney, to assess and possibly revamp OPD's fitness for duty evaluation.
- Revise critical Departmental policies.

Conclusion

The Oakland Police Department has, in fact, made progress in its long involvement with the NSA. Throughout this period, a number of political changes have occurred regarding the executive leadership of the City. To its credit, and more recently, as a result of the leadership of Chief Sean Whent, the Department has been steady in its forward progress and did not become immersed in other developments in City government that could conceivably mitigated the road to compliance. Mayor Jean Quan, who shall soon be leaving office, has played an important leadership role. Incoming Mayor Libby Schaaf has pledged her support and commitment to the reform process, and we look forward to her active engagement in this most important of undertakings.



Chief (Ret.) Robert S. Warshaw