Report of the Court-Appointed Investigator in

Delphine Allen v. City of Oakland

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I. OVERVIEW

As the nation has focused on a string of recent high-profile cases involving police conduct – from Ferguson to Staten Island to North Charleston – the issue of police discipline has taken center stage. These incidents raise the vital question of whether police departments can be trusted to police themselves. If a police department's internal discipline system does not work, the entire department suffers. A broken discipline process means bad officers remain on the force – a clear threat to public safety. It also means good officers lose faith in the process. And it erodes the public's trust in local law enforcement.

For years, Oakland's police discipline process has failed to deliver fair, consistent, and effective discipline. Time and again, when the Oakland Police Department ("the Department," or "OPD") 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 result is that many, both inside and outside of the Department, have little faith in the integrity of the process.

There are many reasons the discipline system is broken, but they fall into four broad categories.

- **First, the Department has not done what it needs to do to ensure fair and consistent discipline.** Its internal investigations have often been inadequate, resulting in repeated reversals of discipline decisions in arbitration. Because internal investigations serve as the foundation for the Department's disciplinary decisions, mistakes or oversights in the investigation stage undermine the Department's efforts to impose lasting discipline. Further, OPD's polices are vague or inconsistent in ways that have repeatedly come under fire from arbitrators. And perhaps most alarming, while OPD's discipline decisions were repeatedly reversed, Department leadership did not publicly express indignation with any of the arbitrators' decisions, and it did not make it a priority to fix the discipline system.

- **Second, the Oakland City Attorney's Office ("OCA") demonstrated neglect and indifference in its handling of OPD disciplinary cases and arbitrations.** The City of Oakland has lost arbitrations time and again because the OCA has generally done a poor job of representing the City's interests. For years, the OCA handled disciplinary arbitrations haphazardly, often waiting until the last minute to prepare for hearings or to assign cases to outside counsel, and showing little regard for the importance of police arbitrations to the integrity of the entire police discipline process. While there have been notable improvements in the OCA's handling of arbitrations in recent months, there is little evidence the OCA was taking action to address its poor record in arbitrations before the Court ordered this investigation.

- **Third, the relationship between the Department and the OCA has been dysfunctional.** The two offices have viewed each other warily, and they have not consistently supported each other's needs in the discipline process. The tension in this relationship has only exacerbated problems with the discipline system.

- **Fourth, there has not been a culture of accountability regarding police discipline in Oakland.** The problems with police discipline are not just an OPD problem; they are a City of Oakland problem. A police discipline process that is not fair and consistent corrodes both the relationship between officers and their superiors and the relationship between citizens and their police department. But the Oakland City administration – the Mayor, the City Administrator, and the City Council – has not held anyone to account for these failures. The City administration has done nothing to demand or enforce an effective discipline system. Simply put, it should not have taken a court order to focus the City's attention on these problems.

Of course, even when the system is working well, not every disciplinary decision made by the Department is correct; such decisions are subject to human error and fundamental differences in opinion. But the problems the City of Oakland faces are not just the result of the challenges of arbitration or the possibility of error. They are the result of a broken and inadequate system that has evaded the public's scrutiny for too long.

The City can – and must – do better. There is no easy fix to this problem, but there are many straightforward and fairly simple steps that OPD and the City Attorney's Office can take to improve the current system. And these are steps the City has understood it should take for some time, as we heard them repeatedly from several witnesses we interviewed. This report recommends improvements in a number of areas, including the following:

- OPD should revise its investigation procedures and training so that the resulting investigations are more robust – and thus more resilient – at the arbitration stage.
- OPD should revamp its Skelly hearing process by retraining its hearing officers and by allowing only Deputy Chiefs or higher to hear serious cases.
- OPD should hire a civilian supervisor and professional investigators in IAD to ensure more continuity in the division.
- The OCA should station a Deputy City Attorney in OPD's Internal Affairs Division. This attorney would train IA investigators, help them work up cases, advise OPD in the discipline process, and prepare cases for arbitration.
- With every serious complaint, the OCA should assign one attorney to assist OPD from the outset of the investigation of the complaint through the resolution of the case, including representing the City in that case at arbitration.
- In hiring outside counsel, the OCA should prioritize expertise in police discipline cases and ensure that outside counsel receive the cases with more than just a few days or weeks to prepare.

- OPD and the OCA should use civilian and expert witnesses more effectively to investigate and support disciplinary findings.
- OPD and the OCA should implement procedures that enable them to learn from mistakes or shortcomings revealed in discipline cases and make necessary changes.
- The Mayor, the City Administrator, and the City Council should hold OPD and the OCA accountable for failings in the police disciplinary process by requiring both offices to provide regular updates on serious discipline cases and efforts to reform the discipline process.

There is no question that if OPD and the OCA implement these changes, the discipline system will be greatly improved. Investigations will be stronger. Internal discipline recommendations will be more consistent. And while the City will not win every police arbitration, it will prevail in more of the cases where OPD's disciplinary decisions were meritorious.

The benefits of an improved discipline system will be many. Officers who have done nothing wrong will be cleared earlier in the process. Officers who have engaged in misconduct will be appropriately disciplined; arbitration will no longer offer a get-out-of-discipline-free card. Perhaps most important, an effective discipline process will build public trust in the Department and promote public safety. If OPD has a discipline system that works, the citizens of Oakland will know that officers who engage in misconduct will not just be put back on the job over the Chief's and Department's objections. Then, and only then, will the Department and the City be able to say the police discipline system is fair and consistent – a significant step toward ending the need for judicial oversight.

II. FACTUAL BACKGROUND

A. The Oakland Police Department's Disciplinary Process.

When the Department receives a complaint, whether from the public or from an internal source, the Internal Affairs Division ("Internal Affairs," "IA," or "IAD") determines whether the complaint should be referred for investigation. Generally, Internal Affairs investigates more serious allegations (Class I allegations), while field supervisors resolve less serious charges (Class II allegations).[1] Under the Department's current protocol, if Internal Affairs conducts an investigation, it must complete the investigation within 180 days of receiving the complaint. This requires the investigator to determine whether each allegation

[1] OPD classifies misconduct as either "Class I" or "Class II." Per Department General Order M-03, Class I offenses "are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution." Class II offenses include "all minor misconduct offenses."

should be considered sustained, not sustained, unfounded, or exonerated, applying the preponderance of the evidence standard.[2] To conduct an investigation, the IA investigator reviews all relevant documentation and reports, including any available audio or video recordings. The investigator also interviews relevant witnesses, including the subject officer, to determine what occurred and whether it constitutes a violation of Department policy. Subject officers typically have their attorney present for their interview.

If the complaint involves a Level 1 or Level 2 use of force, Internal Affairs and the Criminal Investigations Division ("CID") conduct investigations concurrently.[3] Both divisions report their findings and conclusions to an Executive Force Review Board or EFRB (for Level 1 uses of force) or a Force Review Board or FRB (for Level 2 uses of force). The review board considers both the IAD and CID investigations and determines whether the use of force falls within Departmental policy.

Following all investigations, the Chief reviews the investigator's conclusions (as well as any conclusions by the EFRB or FRB) and determines whether to sustain the findings, reject them, or conduct further investigation. If the Chief agrees that a violation occurred, the Chief also receives and reviews a Pre-Discipline Report, which contains written discipline recommendations from the subject officer's chain of command.

The Chief may impose various levels of discipline, including counseling and training, written reprimand, suspension, fine, demotion, or termination. The Department's Discipline Matrix sets out guidelines for discipline based on the severity of the offense and how many prior offenses the subject officer has. Per policy, the Chief has discretion to impose a level of discipline outside the range called for by the matrix. Once the Chief has decided what discipline to impose, the Department issues a Letter of Intent to Discipline informing the subject officer that the Department has sustained a finding of misconduct, identifying the specific rules the

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[2] A finding of "sustained" means "[t]he 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." *See* NSA at 10. A finding of "not sustained" means "[t]he investigation did not disclose sufficient evidence to determine whether or not the alleged conduct occurred." *Id.* A finding of "unfounded" means "[t]he investigation disclosed sufficient evidence to determine that the alleged conduct did not occur." *Id.* It also applies to cases in which individuals named in the complaint "were not involved in the alleged act." *Id.* And a finding of "exonerated" means "[t]he 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." *Id.*

[3] Per Department General Order K-4, a Level 1 use of force is defined as any use of force resulting in death; any intentional firearm discharge at a person, regardless of injury; any force which creates a substantial risk of causing death; any use of force resulting in loss of consciousness; or any intentional impact weapon strike to the head. A Level 2 use of force is defined as any use of force involving an unintentional strike to the head; use of impact weapons, including specialty munitions, where contact is made with the subject; any unintentional firearm discharge that does not result in injury; a police canine bite to clothing or skin of a subject; or any use of force resulting in the subject requiring emergency medical treatment or hospital admittance.

Department believes the officer violated, and setting out the Chief's recommended level of discipline.

If the discipline involves a fine, demotion, suspension, or termination, the Department also notifies the subject officer of the date and time of the officer's Skelly hearing.[4] At the Skelly hearing, the subject officer and his or her legal representative may present defenses to the charges or evidence in mitigation of the discipline. At OPD, Deputy Chiefs and captains are eligible to serve as Skelly hearing officers, and the hearing officer is charged with making an independent assessment after reviewing the Department's findings in light of evidence or argument presented by the subject officer or the officer's attorney. Following this review, the Skelly hearing officer issues a memorandum recommending that the Chief uphold, reverse, or modify the proposed discipline. The Chief then makes a notation on the Skelly report indicating whether he fully accepts, partially accepts, or rejects the Skelly hearing officer's recommendation.

At that stage, if the case involves a demotion, termination, or suspension of five days or more, the Department must present it to the City Administrator to approve imposition of final discipline. If the City Administrator accepts the Department's proposed discipline, the City Administrator will send the subject officer a Notice of Discipline, triggering the officer's appeal and grievance rights under the City's Memorandum of Understanding ("MOU") with the Oakland Police Officers' Association ("the Union").[5] At that point, the subject officer may opt to move through several steps: he or she may submit a grievance to the City Office of Employee Relations; proceed to informal conflict resolution; and, ultimately, proceed to arbitration.

Under the current MOU, the officer may take to arbitration any discipline ranging from a written reprimand to a termination.[6] The MOU provides that the arbitrator's decision will be final and binding. Once the City Attorney's Office receives notification of an officer's grievance, it proceeds to represent the City's interests throughout the arbitration and post-hearing briefing.

[4] The Skelly hearing process takes its name from the case of *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, 539 P.2d 774. In that case, the California Supreme Court held that public employees have certain due process rights that the government must fulfill before imposing discipline against them. *Id.* at 215. These rights include "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing the discipline." *Id*.

[5] The Oakland Police Officers' Association is frequently referred to as "the OPOA" or "the Union," including by its own members. For ease of reference throughout, this report will refer to it as "the Union."

[6] In lieu of arbitration, the officer may choose to submit a grievance concerning a suspension, fine, demotion, or termination to the Civil Service Board. Officers almost unanimously opt for arbitration.

B. The Negotiated Settlement Agreement.

In January 2003, the City of Oakland entered into the Negotiated Settlement Agreement ("the NSA") with plaintiffs' counsel in *Delphine Allen, et al. v. City of Oakland, et al.*, consolidated case number C00-4599 TEH, otherwise known as the "Riders" case. The plaintiffs in the Riders case alleged that OPD had been deliberately indifferent to or encouraged an ongoing practice of misconduct to violate the plaintiffs' civil rights, including by failing to exercise appropriate hiring, training, supervision, and discipline of its officers. In the NSA, the City and OPD agreed to enact an extensive list of tasks and policy reforms to improve operation of the Department. The Court appointed a Monitor to ensure ongoing compliance with the NSA's provisions.

The NSA includes several reforms directed at improving the police discipline process. For example, **Task 5** focuses on the IAD complaint process and includes several subtasks, such as Tasks 5.15 and 5.16, which require the City to ensure OPD conducts reliable internal investigations by gathering all relevant evidence; conducting follow-up interviews as necessary; adequately considering the evidence gathered; making credibility assessments where feasible; and resolving inconsistent statements. **Task 16** requires the City to ensure that OPD holds supervisors and managers accountable in disciplinary matters where appropriate, including for failure to supervise subordinates who commit serious offenses. **Task 45** requires the City to ensure that OPD imposes discipline in a fair and consistent manner.

To strengthen the NSA and ensure meaningful compliance with its terms, the Court appointed a Compliance Director in March 2013 with broad authority to enforce the parties' agreement. *See* Dkt. Nos. 885, 911. As set forth in the Court's order, the Compliance Director oversees the City's compliance with all obligations under the NSA, including disciplinary matters. The Compliance Director "may, at his or her sole discretion, develop a corrective action plan for any task for which the Monitor finds Defendants to be out of compliance." Dkt. No. 885 at 6. The Compliance Director also has "the power to review, investigate, and take corrective action regarding OPD policies, procedures, and practices that are related to the NSA and MOU, even if such policies, procedures, or practices do not fall squarely within any specific NSA task." *Id.* The Court also provided the Compliance Director with "the authority to direct specific actions by the City or OPD to attain or improve compliance levels, or remedy compliance errors, regarding all portions of the NSA." *Id.* Pursuant to the Court's order dated February 2, 2014, the roles of the Compliance Director and the Monitor were concentrated into a single position. *See* Dkt. No. 973.

C. The Court's September 2011 Order Regarding Police Discipline Arbitrations.

In September 2011, the Court ordered the parties to appear at a status conference to address an arbitration decision reinstating Officer Hector Jimenez, whom OPD terminated after he shot and killed an unarmed civilian. *See* Dkt. No. 630. The Court expressed concern about the effect the failed arbitration could have on the Department's disciplinary process:

> While Defendants may be unable to overturn the arbitrator's decision that the shooting was justified and that the Department did not have just cause to terminate Jimenez's employment, Defendants shall address whether they have plans to return Officer Jimenez to patrol duty or some other assignment. If Defendants question the expertise of the arbitrator who decided this case, they shall also explain why this particular arbitrator was selected and what steps they are taking to ensure that future arbitrations are submitted to individuals whom they believe to be qualified to decide force-related issues.

See Dkt. No. 630-1 (redacted order requesting City to address the arbitration decision).

In response to the Court's order, the City informed the Court it would implement reforms directed at improving its representation and performance in arbitration proceedings. *See* Dkt. No. 633 (City's redacted response); Dkt. No. 637 (minutes of status conference); Dkt. No. 1015 (order referring to the City's "promises to correct deficiencies" following the reinstatement of Officer Jimenez).

D. <u>The Court's August 2014 Order Regarding Police Discipline Arbitrations.</u>

In July 2014, an arbitrator ordered the reinstatement of Officer Robert Roche, whom the Department had attempted to fire as a result of his alleged wrongful use of force during the Occupy Oakland events of October 2011. According to the Department, Roche had violated Department policies by throwing a CS blast dispersion grenade directly into a small crowd of people who were attempting to assist an injured protester. The protester, Scott Olsen, was lying on the ground, semi-conscious and bleeding after being shot in the head at close range with a beanbag round, when Roche's CS blast grenade detonated close to his head, potentially compounding Olsen's already serious injuries.

Following an investigation, the Department terminated Roche, and the City entered into a $4.5 million settlement with Olsen. However, the City failed to uphold the termination at arbitration. Instead, the arbitrator sustained Roche's grievance and ordered that he be reinstated to his previous position within the Department, with back pay for the time he spent away from work.

As has been widely reported, Roche and other officers made public social media posts about his case both before and after the arbitration hearing. For example, four days before the arbitration, Roche posted on Facebook a picture of himself with four other officers at a bar apparently about to take shots of liquor. The caption of the picture read: "Four more days until arbitration. It's about f**king time. Shooters ready, stand-by…." Several other users commented on the picture, expressing excitement to see Roche back at work soon. For example, one individual wrote: "If their arbitration record is any indicator they should start pressing your uniform now."

The Roche arbitration decision brought OPD's disciplinary process and the OCA's role in that process back to the Court's attention with added urgency. Shortly after the decision, the Court issued an order noting that the decision was "not the first time an arbitrator has overturned an officer's termination by [the City]." *See* Dkt. No. 1015 at 1. As the Court explained, the parties had previously been ordered "to discuss the reinstatement of Officer Jimenez by arbitration at the September 22, 2011 status conference." *Id.* The Court observed that "[t]he City's promises to correct deficiencies at that time have fallen short, and further intervention by [the] Court is now required." *Id.*

The Court identified a direct connection between the City's repeated failures to enforce discipline at arbitration and the City's obligations to comply with the NSA, remarking that "failure to address the issues [in police disciplinary arbitrations] will prevent compliance, let alone sustainable compliance, with the Negotiated Settlement Agreement." *Id.* For example, the Court held that the City cannot be in compliance with Task 5 if the internal investigations leading to the Department's disciplinary decisions are inadequate. Although noting it was reasonable to expect differences of opinion and some unfavorable arbitration decisions, the Court also stated that the City cannot demonstrate compliance with Task 45, requiring imposition of fair and consistent discipline, if the discipline is regularly overturned. As the Court explained, "imposition of discipline is meaningless if it is not final." *Id.* The Court questioned whether the City was "adequately preparing cases for arbitration such that consistency of discipline can be assured to the greatest extent possible." *Id.* at 2.

The Court found that the City's regular failure to enforce and uphold discipline at the arbitration stage "undermines the very objectives of the NSA: to promote police integrity … and to enhance the ability of the Oakland Police Department … [to] protect the lives, rights, dignity and property of the community it serves." *Id.* Accordingly, the Court directed the Compliance Director to investigate the entire police disciplinary process, including specific areas identified by the Court as potentially problematic. *Id.* The Court said that following the investigation, the Compliance Director should, where appropriate, direct the City to take "corrective action to ensure sustainable reforms, including, if necessary, immediate corrective action pending further investigation." *Id.* In a follow-up order dated August 20, 2014, the Court appointed me to serve as investigator and facilitate the Court-ordered investigation into the disciplinary process. *See* Dkt. No. 1017.

E. The Scope of the Investigation.

To conduct the Court-ordered investigation, my team and I reviewed documents, interviewed witnesses, and analyzed investigation and arbitration files. The following summary describes the scope of our investigative efforts.

To obtain relevant documents and correspondence, we issued document requests to both OPD and the City Attorney's Office. In response to our requests, we received and reviewed more than 7,500 pages of email correspondence. Pursuant to the Court's order

regarding discovery in this case, and over the OCA's objection, we were able to review correspondence between the OCA and OPD to which the City asserted privilege.

To assess the effectiveness of the City's representation in police arbitration proceedings, we reviewed arbitration files for the 26 arbitrations of sworn officers that took place over the last five years. For each, we examined the Department's complete disciplinary file leading up to the arbitration; all relevant correspondence with OCA, OPD, or outside counsel; the arbitration transcript; the parties' post-hearing briefing; and the arbitrator's decision. In total, we received and reviewed well over 10,000 pages of arbitration transcripts, briefings, and decisions.

To assess the effectiveness of OPD's internal disciplinary processes, we also reviewed OPD case files for more than 150 disciplinary cases that resulted in Skelly hearings over the last five years. As part of our review of each case file, we examined the Internal Affairs investigation and report, any Executive Force Review Board or Force Review Board findings, the Skelly hearing officer's report, any relevant email correspondence, and the Chief's final disciplinary decision. In total, we received and reviewed several thousand pages of OPD disciplinary files.

We also reviewed the City of Oakland's Joint Report on the Police Discipline Process, which was prepared during the course of our investigation and signed by City Attorney Barbara Parker, Police Chief Sean Whent, and former Interim City Administrator Henry Gardner. The City's Joint Report contains the City's analysis of the police disciplinary process and proposed recommendations for improving the outcomes of discipline cases. The City's Joint Report is attached as Exhibit A.

We also conducted witness interviews with representatives of OPD, the OCA, Oakland City government, other law enforcement personnel, and legal and subject matter experts in the field of police discipline. In total, we conducted more than 40 interviews. We also attended a training session with the City Office of Employee Relations in which OPD sergeants were trained on the application of discipline and its relation to the arbitration process.

Finally, we note that we received and appreciate the full cooperation of both the Department and the City Attorney's Office in seeking access to documents and witnesses. Both the Department and the City Attorney's Office provided us with relevant materials and made available to us all witnesses with whom we wished to speak. We also appreciate the time and thoughtfulness of many individuals outside of OPD and the OCA who generously agreed to speak with us and contribute their thoughts and experiences to our analysis.

III. FACTUAL FINDINGS

We make the following factual findings based on our interviews with witnesses, our review of correspondence and other relevant documents, and our consideration of the arbitration briefs, transcripts, and decisions. We will present our factual findings in the following format: ***First***, we will review the City's record at arbitration; ***second***, we will highlight

specific deficiencies within the disciplinary process that have contributed to the City's failure to impose consistent discipline; ***third***, we will address the relationship between OPD and the OCA; ***fourth***, we will address the lack of accountability that has allowed these failures in the disciplinary process to go uncorrected; and ***fifth***, we will review more closely a single case that demonstrates the effects of a dysfunctional discipline system.

A. Overview of the City's Arbitration Results.

As part of our investigation, we reviewed the last 26 OPD arbitrations that took place over the past five years.[7] For each arbitration, we considered the Department's Internal Affairs investigation; the findings of the EFRB/FRB, where applicable; the Skelly hearing officer's report; the Chief's imposition of discipline; all relevant correspondence produced by the OCA in response to our document requests; the transcripts from the arbitration hearing; the parties' post-hearing briefs; and the arbitrator's decision.

The arbitrator upheld the discipline imposed in only seven of 26 arbitrations. Of the seven cases in which discipline was upheld, four cases, which date from 2010, were related matters involving officers who had lied on search warrant affidavits. Of the 19 cases where the discipline was not upheld, arbitrators vacated the discipline entirely in 11 cases. In four of the remaining eight cases, the arbitrators reduced the discipline to a counseling memorandum or written reprimand. Thus, 15 of the 26 cases that went to arbitration in the past five years saw the discipline of suspension, demotion, or termination reduced to written reprimands or no discipline at all.

The City's success rate at arbitration is even lower if we look only at decisions during the tenure of the current City Attorney, who took office in July 2011. Thirteen arbitrations took place during that period. In only three of those cases did the arbitrator uphold the discipline; in four cases, the arbitrator reduced the discipline considerably (two resulted only in written reprimands); and in the remaining six cases (almost half), the arbitrator sustained the grievance, vacating the discipline entirely.

These results are cause for grave concern. What they suggest is that, in recent years, the odds have been very high that the City will lose at arbitration. To be clear, we are not saying that the City should always win. But the cases that make it to the arbitration step have undergone an exhaustive review process. OPD has supposedly thoroughly reviewed and investigated the allegations; the Skelly hearing officer has considered the officer's arguments in mitigation; the command structure at OPD has considered all of its available options in light of the findings; and the Chief has reached a discipline decision. The fact that the City can make

[7] For purposes of this analysis, we treat as separate arbitrations those cases in which two officers' grievances were grouped together into a single arbitration proceeding.

that decision stick in only a small number of these cases, even after such extensive investigation and review, indicates that there are fundamental problems in the discipline process.

The OCA claims that one explanation for the City's poor arbitration results is that arbitrators tend to want to "split the baby," imposing a level of discipline somewhere between upholding the Department's level of discipline and vacating it entirely. *See* City's Joint Report at 5. But that is not accurate. In fact, arbitrators appeared more likely to vacate the discipline entirely than to award something in the middle of the parties' respective positions.

The City takes a more favorable view of its win-loss record than we do.[8] *See* Joint Report at 5. For example, the City's report portrays several arbitration decisions reducing suspensions to mere written reprimands as cases in which the City "prevailed in its effort to impose discipline." *Id.* at 6. In our view, an arbitration where a suspension is reduced to a written reprimand is not evidence the City "prevailed" at arbitration.

A recent article in the *Wall Street Journal* examining the issue of police discipline stated that "[p]olice unions win reversals or modifications in more than 60% of disciplinary cases that go to arbitration nationwide."[9] In Oakland, the number of Union wins is far higher. During the current City Attorney's tenure, the Union has won reversals or modifications in more than 75% of disciplinary cases that went to arbitration. And prior to the Court's August 2014 order, the Union had won reversals or modifications of discipline in nine consecutive arbitrations. These statistics alone suggest that the disciplinary process requires scrutiny.

B. Shortcomings in the Disciplinary Process.

OPD's disciplinary proceedings have been plagued with both procedural and substantive problems. This section of the report will describe the shortcomings our investigation revealed, from OPD's rules and policies, through the investigation and discipline process, to post-arbitration follow-up.

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[8] We note some differences between the City's calculations and our own. First, the City considers as two separate arbitrations a case involving two officers and resulting in one officer's discipline being upheld and the other officer's discipline being reduced. *See* Report at 6. At the same time, it considers as a single decision a case in which two officers both had their demotions vacated. *Id.* For purposes of our analysis, we consistently treat cases involving two officers as two individual cases. The City also considered one case reducing a termination to a written reprimand as "reversed," although it considered other cases resulting in reductions to written reprimands as "Upheld/Modified." *Id.* For purposes of our analysis, even though the discrepancy between the discipline imposed by the Department (termination) and the final discipline (written reprimand) was great, we considered this case as one in which the arbitrator reduced the discipline but did not reverse it entirely.

[9] *See* Zusha Elinson, *Punishment of Police Under Scrutiny* (Wall Street Journal, Nov. 21, 2014) (available at http://www.wsj.com/articles/punishment-of-police-under-scrutiny-1416598682).

1. OPD Fails to Provide Clear Rules and Policies.

The purpose of an IA investigation is to determine whether there has been a violation of Department rules and policies. Clear internal rules and policies are essential to predictable and effective discipline. A consistent theme in the arbitrations we reviewed, however, has been the Department's failure to provide clear rules and policies that notify officers of (1) what conduct is prohibited, and (2) what the consequences are for a violation. Arbitrators regularly decline to uphold discipline if the rule or policy at issue is vague or unclear, especially where the Department failed to provide the officer with suitable training and guidance to understand the Department's expectations.

The following are examples of cases in which arbitrators found the Department's policies to be insufficiently clear to support discipline:[10]

Arbitration L: "There is a significant 'gap' in OPD's published policies… For purposes of this Decision, what is 'key' is that the language at issue was drafted by OPD, and therefore any ambiguity in the text properly is held against the Department."

Arbitration Q: "For an employee to be disciplined for violating a rule, the employee must receive notice of the existence of the rule as well as notice of the consequences for not following it… Although [the Department's representative] firmly believed the rules …. were 'black and white' with no room for discretion or flexibility, the City has not established that members, employees or supervisors received training or were alerted to this rigid view…."

Arbitration R: "The essential problem for the City … is that the policy they cite is not specific enough to become the basis of discipline in this case…. In our case, the City failed in its burden to show that a clear policy, or even training, existed to guide the Grievant in her decision…."

Arbitration T: "[T]he City had the obligation to make [the scope of the rule] clear…. It did not do so. Moreover, as both City witnesses indicated, it did not do so in training…. In short, whatever the merits of its view … the City did not clearly and unambiguously establish the scope of prohibited conduct."

[10] To preserve the confidentiality and privacy rights of subject officers, and for consistency and ease of reference, this Report will refer to the arbitrations individually as "Arbitration A," "Arbitration B," and so on. However, where the arbitration became a matter of public record due to extensive media coverage, comments by counsel, or prior court proceedings, we do reference the subject officers by name.

Arbitration U: "The Grievant had no advance notice and training in the specific procedures and techniques that the IA investigator and City officials would later expect him to have followed. He was also unaware he would be subject to disciplinary action if he failed to follow those unknown procedures."

Arbitration V: "[T]he problem with [the City's] argument is that neither the policy nor the training identifies what constitutes a [violation]."

For a disciplinary system to work, the rules must be clear. If the rules are unclear, the Department might enforce them unevenly, or at least that will be the perception. This severely limits the City's ability to comply with Task 45 of the NSA, which requires that discipline be imposed in a fair and consistent manner. And in the context of arbitrations, if the Department fails to implement clear rules and policies that communicate its expectations, the City will continue to see its discipline decisions undone by arbitrators who are troubled by vague rules or inadequate training.

2. Investigations Fail to Consider All Relevant Facts or Witnesses.

Since the signing of the NSA, the Internal Affairs Division has improved the quality of its investigations, work product, and investigator training. Nevertheless, the insufficiency of investigations remains a consistent theme in arbitrations and is frequently cited by arbitrators as a justification for reversing OPD's discipline.

One factor contributing to inconsistent Internal Affairs investigations is high turnover. Investigators in IAD are regularly transferred to other assignments, and in recent years there have been several different commanders of the division. There are certainly benefits to having officers move through IAD as part of their career path, since it means more officers will be familiar with the Department's internal discipline function and processes. And it is a positive development that in recent years the heads of IAD have been promoted to top management positions – including, of course, the current Chief, Assistant Chief, and three Deputy Chiefs – as it demonstrates that serving as IA commander is not an obstacle to advancement within the Department.

However, the high turnover rate in IAD also has a cost. New investigators must be trained. New commanders launch initiatives they are unable to complete before transferring to another position in OPD. In the words of more than one Department official, the constant cycling of officers and commanders has resulted in matters "falling through the cracks."

Whether because of the high turnover rate or because of more persistent cultural problems in the training and supervision of investigators, it is clear there continue to be deficiencies in IAD that contribute to poor arbitration results. We found several cases where IA investigators failed to interview or identify potentially critical fact witnesses or failed to consider all the evidence. In some cases, these failures gave arbitrators the impression,

whether accurate or not, that the investigation was directed at upholding a complaint rather than reaching an objective conclusion. These mistakes result in losses at arbitration.

Arbitration B: The arbitrator expressed discomfort with the "unrelenting manner in which evidence was gathered to support the charges without sufficient consideration of all the relevant facts and evidence." For example, the arbitrator noted the investigation had apparently disregarded the testimony of an independent witness who corroborated the subject officer's account of events. The arbitrator vacated the officer's termination and ordered that he be reinstated to his former position.

Arbitration D: This case involved an officer's allegedly false statements on search warrants. Testimony at arbitration revealed that the IA investigator had failed to interview the subject officer's partner who had potentially relevant, exculpatory information about the charges. The arbitrator found the investigator's oversight to be a persuasive point in favor of the grievant, explaining that "[i]it is a fundamental element of the MOU's just cause provision that the investigation must be thorough, fair, and comprehensive." Citing that failure and others, the arbitrator concluded that the Department had "arrived at its conclusion without interviewing individuals who may have had relevant or exculpatory information." The arbitrator vacated the officer's termination and ordered that he be reinstated to his former position with only a written reprimand.

Arbitration U: The investigator failed to interview several witnesses the subject officer had identified as having potentially exculpatory information. In part because of this failure, the arbitrator found the information in the IA report to be "incomplete, biased and directed at finding the [officer] responsible for intentionally violating his duties." The arbitrator thus ruled that IA's findings were "not fairly reached or supported by reliable, relevant, and truthful evidence." The arbitrator vacated the subject officer's suspension and ordered that the City pay up to $10,000 of the officer's attorney's fees for the City's "bad faith."

Because the above cases involved challenges to discipline at the arbitration stage, it is not surprising they focused on the investigator's failure to consider potentially *exculpatory* evidence. Our conclusion, however, is not that the Department's investigations are typically biased in favor of finding a violation. We have also seen instances in which investigations failed to include interviews with potentially *inculpatory* witnesses or where the investigator's conduct raised questions about whether the investigator might have been biased in favor of the subject officer.

For example, in connection with the Jimenez arbitration, the plaintiff's attorney in the decedent's wrongful death action against the City was able to locate a civilian who claimed to have witnessed the shooting. The attorney had the civilian eyewitness deposed in the civil proceedings, during which the civilian provided his account of the events, including that the decedent, "Jody" Mack Woodfox III, had been running *away* from officers when Jimenez shot him in the back and killed him. It appears from the available documentation that no IA investigator ever interviewed this individual, even though a member of the City Attorney's Office attended the deposition at which this testimony was provided.

Issues of possible investigator bias in favor of the subject officer also arose in Roche's case. As noted above, the Department's investigation into whether Roche's conduct during the Occupy Oakland protests constituted criminal behavior concluded that Roche had not committed any crime. After the arbitrator ordered Roche reinstated, however, one of the sergeants who had investigated the case changed her Facebook profile picture to an image of a saint with Roche's face. The investigator's profile picture included the words "Well Deserved Victory" and "Saint Rob."

For a discipline decision to be fair, it must be unbiased and based on full consideration of all relevant facts and thorough interviews with all relevant witnesses. The dangers of doing anything less are clear: officers who are disciplined may feel the result is not fair, because the discipline was based on an incomplete examination, and officers who legitimately should be disciplined may prevail at arbitration because the arbitrator finds that the investigation was incomplete. Both results are toxic to a functioning discipline system and diminish the public's faith in the process.

3. Investigations Do Not Adequately Consider the Possible Responsibility of Supervisors.

Under the just cause standard, employers must show they have imposed discipline in a fair and even-handed manner. In police arbitrations, this means the Department must have considered the culpability not just of the officer who is the subject of the complaint but also of supervisors and command-level representatives whose own failings in supervision, training or direction might have contributed to or facilitated the officer's misconduct. In several cases, arbitrators have concluded that the Department focused its discipline on lower-level officers to the exclusion of their peers or superiors. In these cases, the arbitrators found the Department appeared more intent on demonstrating that it took some action in response to misconduct than on seeking to identify how widespread the misconduct actually was or how high up in the Department it reached.

The following are some examples of cases in which arbitrators criticized the Department for failing to consider adequately the responsibility of supervisors:

Arbitration B: "At the heart of the City's argument is the contention that the Grievant acted outside the scope of what his commanders had approved. This

contention is unsupported by the evidence. [The grievant's lieutenant] unequivocally explained that the Grievant executed the plan which had been approved by his superiors at the command post…

"When it subsequently developed that the Grievant was being charged with a serious violation, [his lieutenant] was being charged with a less serious violation, and [the Deputy Chief] was not being charged with any violation, [the Grievant's lieutenant] was 'astonished'….

"Consistent with the arbitrator's determination, the Grievant was awarded a medal of commendation for the same events which are the subject of disciplinary action and none of his supervisors have been disciplined for their participation in the incident."

Arbitration L: "I find the Department acted improperly in singling out [the Grievant] for discipline, when others within OPD (including others senior in rank to [Grievant]) also were present and participating in decisionmaking (or, per OPD policies, should have been participating in decisionmaking), but were not similarly held accountable…

"If OPD is going to hold [Grievant] to a strict interpretation of the General Orders when justifying its decision to terminate him, then it is reasonable to question why other OPD personnel are not held to a similarly strict reading of the General Orders…

"In this Arbitrator's view … the City's decision to single out [Grievant] for discipline does not adequately recognize the responsibility of others – including their organizational peers, and also some of the senior management of the Department…. [T]he decision to discipline [Grievant] has the appearance of the Department needing to hold *someone* individually accountable … but not considering the possibility that senior-level management decisions also contributed to the chain of events."

Arbitration U: The Department alleged that an officer had intentionally failed to take reports of excessive force from several arrestees following a protest. The subject officer claimed he had simply been following instructions from several commanding officers who were present on the scene as he was compiling the reports. The IA investigator never interviewed two of the three supervisors whom the subject officer had identified as providing those instructions, and the Department made no effort to determine whether any of the supervisors bore culpability for the subject officer's alleged violation.

No disciplinary system can be effective if it is perceived as focusing on the culpability of lower-level officers without adequately considering the responsibility of supervisors, as required by Task 16 of the NSA. It could well be that the supervisors in the above cases and others did nothing wrong, but OPD's failure to conduct a thorough evaluation of their culpability has undermined discipline cases and contributed to reversals at arbitration.

4. OPD's Process for Determining Discipline Renders Those Decisions Vulnerable to Attack.

After the IA investigation concludes, the Department must decide whether to discipline the subject officer and, if so, what level of discipline to impose. There are several stages to this process, including the Pre-Discipline Report, the Chief's disciplinary decision, and the Skelly hearing. This process too often involves inconsistent, disjointed, and even contradictory recommendations and decisions.

a. Inconsistent Recommendations in the Pre-Discipline Report.

When IA determines that an allegation is sustained, all individuals in the subject officer's chain of command – including the sergeant, lieutenant, and captain – complete a written "Pre-Discipline Report" stating their recommended level of discipline for the offense. These recommendations are forwarded to the Chief, who makes the final decision on imposing discipline. We understand that the Pre-Discipline Report practice was designed to ensure that all individuals in an officer's chain of command take ownership of the disciplinary process through documenting their analysis and recommendations for appropriate discipline. For example, when a sergeant submits a signed disciplinary recommendation for an officer under the sergeant's command, that sergeant's participation helps to ensure that discipline remains a Department-wide responsibility and is not entrusted solely to the highest-ranking individuals.

However, numerous witnesses told us that the Pre-Discipline Report process makes it unnecessarily difficult for the Department to enforce discipline at arbitration because the report can create a disparate evidentiary record the Union could later use against the Department. For example, if one of the individuals in the chain of command recommends a level of discipline significantly lower than the discipline the Chief ultimately imposes, the Union might offer the Pre-Discipline Report in arbitration to suggest that the Chief's decision was overly harsh. While we understand and appreciate the benefits of this practice, we also recognize the hurdles it has posed to upholding discipline in some cases.

b. Lack of Evidence to Support the Chief's Disciplinary Decision.

In some cases we reviewed, it was unclear to arbitrators what basis the Chief had for selecting a particular level of discipline where there was significant contradictory evidence in the record. This lack of clarity undermined the discipline decision in some cases.

In **Arbitration U**, for example, the officers completing the Pre-Discipline Report unanimously recommended a five-day suspension with two days held in abeyance. However,

the then-Chief, without any explanation, and despite mitigating evidence, imposed five days' suspension with no days held in abeyance. It is unclear what basis the Chief had for departing upward from the unanimous recommendation in the Pre-Discipline Report. The arbitrator commented on this apparent confusion, noting that "it is unclear whether the Chief was aware that the reviewers had recommended that two of the suspension days be held in abeyance or, if he were so aware, why he disagreed with their recommendation." The Chief's failure to explain his decision created the impression that the Department did not pay sufficient attention to its own processes or recommendations, and it contributed to the arbitrator's decision to reduce the discipline imposed.

Similarly, in **Arbitration B**, the Department attempted to terminate an officer based in part on his alleged inappropriate response to a dangerous situation following the shooting of another officer. Shortly after the incident, the then-Chief had awarded the subject officer the Department's Medal of Merit in recognition of his performance. After a civil lawsuit was filed against the City, however, the Chief asked that the medal be withdrawn, and the Department attempted to terminate the officer based on the very same incident for which it had earlier awarded him one of its highest honors. In vacating the discipline and ordering that the officer be reinstated, the arbitrator also noted as persuasive that the officer "was awarded a medal of commendation for the same events which are the subject of disciplinary action." Again, the Chief's failure to explain the discrepancy was cited by the arbitrator as a reason to reduce the discipline.

c. Problems with Skelly Officer Selection and Performance.

Once the Chief has made an initial determination of the appropriate level of discipline to impose, the subject officer has the right to present mitigating or exculpatory evidence at a Skelly hearing. Upon receiving notice of an officer's request for a Skelly hearing, OPD administrative staff schedules the hearing date and assigns an available hearing officer who is not in the subject officer's direct chain of command. The Department's Deputy Chiefs and captains are all eligible to serve as hearing officers, with Deputy Chiefs being assigned to hear the most serious cases. From our interviews, it appears the Department assigns hearing officers to cases based primarily on which eligible Deputy Chief or captain is available to hear the case rather than on who is best qualified to consider the subject matter.

Several witnesses we interviewed expressed concerns that individual Skelly hearing officers apply inconsistent standards, and that an officer's chances of having discipline reduced or vacated at the Skelly stage depend in part on which hearing officer is assigned to the case. Several witnesses expressed concern that hearing officers may be conflicted in instances where they (as fellow officers of the Department) are represented by the same law firm – and, in some cases, even the very same attorney – that represents the subject officers appearing before them.

A biased or incorrect Skelly recommendation can have damaging effects on the discipline process. Although the Chief is free to disregard a Skelly officer's recommendation, in arbitration the Union often uses disagreement between the Chief and the Skelly officer to cast doubt on the final level of discipline, even going so far as to call the Skelly officer as a witness at arbitration to testify about the disagreement. From our review, that has been an effective tactic. In addition, the perception that the likely outcome of a Skelly hearing depends on which officer is assigned to hear the case undermines OPD's efforts to build confidence in its discipline.

To assess the performance of Skelly hearing officers, we reviewed all Internal Affairs cases that resulted in Skelly hearings over the last five years, regardless whether those cases proceeded to arbitration. For each Skelly hearing, we noted who served as the Skelly hearing officer, the level of discipline recommended before the hearing, the Skelly officer's finding and recommendation, the level of discipline following the hearing, and any other notable features of the case. In total, we compiled and reviewed statistics for 27 different Skelly hearing officers through approximately 200 Skelly hearings.

Because each case is different, it is difficult to know for certain whether hearing officers apply similar standards in deciding cases. However, from a review of all Skelly decisions over the past five years, it appears the outcome may be affected by which hearing officer gets the case. For example, one Skelly hearing officer we reviewed heard 28 cases and recommended sustaining the discipline in 18 cases, reducing the discipline in 6, and vacating the discipline in 4. Of the 18 cases where the hearing officer had recommended sustaining the discipline, though, 7 involved officers who either did not even show up to the Skelly hearing or showed up only to admit responsibility and accept the discipline.

By almost any measure, these numbers put this particular Skelly officer dramatically out of line with the decisions of other Skelly officers. For example, in the period we reviewed from 2009 to 2014, the Department held almost 200 Skelly hearings. In those cases, Skelly officers recommended vacating the discipline entirely in just 7 cases. This particular Skelly officer heard only about 15% of the total cases, but he was personally responsible for more than half of the recommendations to vacate the Chief's disciplinary decisions. Anecdotally, we also heard from several witnesses that this particular Skelly officer's decisions were more likely to be favorable to subject officers than were those of other Skelly officers.

Another problem we have noted is that Skelly officers sometimes do not leave a sufficient record of their investigation to protect their decision from attack at arbitration. Skelly hearing officers have the authority to request additional investigation into unresolved issues, including gathering additional evidence or further interviews of relevant witnesses. If a Skelly hearing officer, before issuing a decision, ensures that the investigation is complete by ordering more investigation if necessary, and if he or she makes a record of having reviewed all of the evidence, the Department should not have to struggle with allegations of an incomplete or biased investigation at the arbitration stage.

5. The OCA's Lack of Meaningful Participation in OPD Investigations or Disciplinary Decisions Undermines Discipline Cases.

In several cases, the OCA failed to provide OPD with the help it needed in its investigation or disciplinary decisions. It is true that the OCA has been affected by staff and budget cuts in recent years, but the absence of OCA attorneys from key stages of the investigation and imposition of discipline has harmed the entire discipline process. The City's case at arbitration is shaped largely by the Department's decisions and actions during the investigation and imposition of discipline. The cases suffer when the Department has to make those decisions without meaningful participation from counsel.[11]

One example of this involves the drafting of the Department's Letter of Intent to Discipline. The letter is provided to the subject officer after the Chief makes a final determination regarding discipline. It is a critically important document that sets the framework for any discipline imposed; if a particular basis for discipline is not included in the letter, it cannot be included as part of the City's case at arbitration. In effect, the letter serves as the charging document, and it should be reviewed by counsel. It appears OCA has traditionally played no role in reviewing or drafting this letter. In fact, it appears OPD has been using a form letter completed by administrative staff.

Arbitration V provides a vivid demonstration of the problem. Counsel for the City had argued that the officer's conduct violated the Department's crowd control policy. The arbitrator rejected the argument, explaining that the Department had not previously charged the officer with violating that policy. The OCA also argued the officer could be disciplined for misusing a weapon in attempting to control protesters. Although the arbitrator conceded that "it may be that such a use would be a violation," he noted the City had similarly failed to identify that policy as a violation in its notice to the employee. Thus, the City was precluded from raising either of the two policies as a basis for the discipline. These problems might have been avoided if counsel had been involved in drafting the notice.

The OCA's lack of involvement in the investigation and discipline process has other damaging consequences. For example, several witnesses shared with us that some investigators are inexperienced in interview techniques or unclear how an interview may be used at arbitration. OCA attorneys could train these investigators or participate in important interviews. They could also help to ensure that the investigators interview the right witnesses, ask the appropriate questions, and gather the necessary evidence. But for the most part, OCA has not done these things, often waiting until shortly before the arbitration hearing before becoming actively involved in the case.

[11] Of course, for the OCA to be involved in a meaningful way, the Department must give the OCA sufficient time to research the issues and provide competent advice. We observed several instances in which officers sent the OCA requests for legal advice only a day or two before they needed an answer.

Even when the OCA is involved in the process, however, its involvement has frequently been unproductive. The decision of whether and how to discipline an officer is a difficult one, and OPD should have the benefit of counsel's advice when it needs it. While the OCA has been involved in some of these decisions, numerous witnesses told us that OCA attorneys are often unwilling to provide clear advice to the Department and instead hedge their opinions in an effort to avoid taking a position that could later be proven wrong. And in some cases, the OCA took so long to respond that OPD had no choice but to proceed without legal advice.

6. The OCA's Delay in Preparing or Assigning Cases to Outside Counsel Undermines Discipline Cases.

When the City Attorney's Office receives notice that an officer has requested arbitration, the office opens a case file and requests the officer's personnel file. After that, though, the case has tended to languish for months, often until just a month or even a few weeks before the arbitration hearing, when the OCA finally begins to prepare for the hearing or assigns the case to outside counsel.

a. Failure to Prepare.

Arbitration U provides a compelling example of the effects of OCA's failing to prepare sufficiently for a disciplinary case. In February 2013, lawyers for the Union notified the City Attorney's Office that the subject officer was grieving his five-day suspension to arbitration. Upon receiving notice of the officer's arbitration request, a Deputy City Attorney requested that a case be opened for the matter and assigned to her, and that the officer's personnel and disciplinary files be transferred to her office.

In September 2013, seven months after the OCA received the case, the Union attorney and the Deputy City Attorney selected an arbitrator and agreed on a December date for the arbitration hearing. However, approximately two weeks before that hearing, the Deputy City Attorney contacted the arbitrator to request a continuance, citing a busy work schedule and insufficient time to prepare for the hearing. The arbitrator denied the request, noting that the same Deputy City Attorney had agreed to the December hearing date several months earlier.

On December 5, 2013, the day of the arbitration, the Deputy City Attorney arrived an hour late to the arbitration hearing. When the hearing began, the Union attorney stated on the record that she believed the Deputy City Attorney was so unprepared that the City was acting in bad faith by proceeding. For example, the Union attorney noted that the Deputy City Attorney had waited until the day before the arbitration hearing to provide the Union with a witness list, which contained the names of individuals the Union knew the Deputy City Attorney had not contacted and did not intend to call at the arbitration.

The arbitrator asked the Deputy City Attorney to respond to the allegations. On the record, the Deputy City Attorney explained that the case had been handed to her "at the last minute," even though she had received notice of the arbitration almost 10 months earlier. The

Deputy City Attorney also stated on the record that she had not begun preparing for the case until the day before the arbitration hearing. As the Deputy City Attorney stated: "The witness list that I produced was – I stated in my e-mail, which I cc'd the arbitrator on, that this was a tentative witness list as I was just now beginning to prepare for the case, and that was yesterday."

During opening statements, the Deputy City Attorney appeared confused about the facts of the case and the relevant stages of OPD's disciplinary process. After opening statements, she called only a single witness – the former Chief, whom the Union had brought to the hearing and had identified as supporting *its* case. It soon became clear that the Deputy City Attorney had done nothing to contact the witness prior to the hearing. Despite being called by the City, the former Chief testified *against* the City's case, disagreeing with the level of discipline and explaining that he now believed that the suspension should have been reduced to a written reprimand. The Deputy City Attorney appeared unaware that the former Chief's testimony would differ from his earlier decision on discipline.

Following this single witness's damaging testimony, the Deputy City Attorney rested and called no further witnesses – not the IA investigator; not any of the Department officials who had reviewed and approved the findings; and not the several civilians who allegedly had information that would be helpful to the City. As with all the arbitrations, the City, as employer, had the burden of establishing just cause to impose the discipline. In this instance, however, the only testimony the OCA presented in support of the discipline was that of a single witness who believed the City was wrong to impose the discipline. The Union then called two thoroughly prepared witnesses who both testified persuasively against the discipline.

In the arbitrator's written decision, the arbitrator referred to the case as "extraordinary" and held that the City had "committed an egregious violation of the parties' collective bargaining agreement" by disciplining the officer without any supporting evidence. With no witness testimony to support the City's position – and with considerable testimony and evidence in opposition – the arbitrator ruled that the City had failed to prove any element of just cause, much less all of them. The arbitrator also ruled that the City "failed to prove that it treated the Grievant fairly during the administrative IA investigation and subsequent review process, or that it seriously and fairly provided the Grievant the due process that is required by *Skelly* [] and the MOU's grievance procedure."

The arbitrator sustained the grievance, vacated the suspension, and ordered that the officer receive back pay with interest for the period he had been on suspension. The arbitrator also ruled that the City had acted "arbitrarily, capriciously, and … in bad faith" by imposing the discipline and proceeding to arbitration. Accordingly, in addition to awarding back pay with interest, the arbitrator also ordered that the City pay up to $10,000 of the officer's attorney's fees.

While this is admittedly an extreme example of lack of preparedness, it was far from the only one that we learned of in our investigation. Time and again, witnesses told us that the OCA had been contacted them at the last minute – frequently the week before the hearing – and prepared them for testimony in a cursory fashion. This was in marked contrast with the early, repeated, and comprehensive preparation that Union witnesses told us they underwent.

b. Delay in Assigning Cases to Outside Counsel.

In nearly all of the police arbitrations since 2011, the City Attorney's Office has engaged outside counsel from private law firms to represent the City. According to the OCA, it has hired outside counsel in these cases because several years of staff reductions and budget cuts have left it unable to handle the arbitrations internally. In several cases, however, the OCA waited so long to retain a private attorney – in one case, until just *one week* before the arbitration – that its delay virtually guaranteed failure.

There is no good reason for the OCA's delays in preparing cases or assigning them to outside counsel; in each case, the OCA received timely notice of the arbitration demand and had plenty of time to prepare for the hearing internally or to identify and engage outside counsel. The following are examples of police arbitrations that were not timely assigned to outside counsel:

Arbitration S: The OCA received notice of the arbitration by November 16, 2012 and scheduled the arbitration for September 16-17, 2013. However, it did not begin contacting outside counsel to handle the case until late August 2013 – almost 10 months after it received the case. The City Attorney selected an outside firm on August 29, 2013. Outside counsel received the case file and conducted an initial review on or about September 4, 2013, leaving counsel only 12 days to prepare for the arbitration. Ultimately, the arbitrator sustained the grievance in part, reducing the three-day suspension to a written reprimand.

Arbitration T: The OCA received notification of the arbitration request by November 15, 2012, when a Deputy City Attorney requested that the OCA open a case file on the matter and assign it to her. The OCA later selected an arbitrator and scheduled the arbitration hearing for October 18, 2013. The OCA assigned the matter to outside counsel on October 11, 2013 – one week before the arbitration hearing. The arbitrator sustained the grievance, vacating the officer's 10-day suspension.

Arbitration O: The OCA received notification of the officer's grievance by May 21, 2012. The parties later selected an arbitrator and scheduled the hearing for September 18, 2012. The OCA apparently did nothing to prepare or engage outside counsel until it was too late, however, because the OCA unilaterally cancelled the arbitration hearing. In assigning the case to

outside counsel on September 26 – more than a week after the initial hearing date – the Deputy City Attorney noted that both the arbitrator and the Union attorney were "not happy" with the OCA for cancelling the initial hearing date. The City went on to lose at arbitration, with the arbitrator vacating the officer's five-day suspension and awarding full back pay.

Arbitration R: The parties scheduled the arbitration hearing for September 9, 2013. However, the OCA did not select an outside firm until August 13, 2013 – less than a month before the hearing date. The OCA's records on this point are not clear, but it appears the firm began work on the case on or about August 20, 2013, leaving counsel only about 20 days to prepare for the arbitration. Following the arbitration proceedings, the arbitrator reduced the officer's 10-day suspension to a mere written reprimand.

Perhaps even more troubling than the OCA's handling of these cases is its unwillingness to concede its mistakes. For example, in response to an *East Bay Express* article that was highly critical of the OCA's handling of the Roche arbitration, including its decision to send the matter to outside counsel shortly before the hearing, City Attorney Barbara Parker herself wrote to defend her office's performance and demand that the *East Bay Express* issue a correction.[12] In her comment, the City Attorney made several claims about her office's handling of the case, including that "timing of the assignment was not a factor in the outcome of the case," and that the attorney who handled the case "actually was assigned in February, about a month and a half before the hearing."

The City Attorney's claim does not tell the whole story. Internal OCA records show that the office received formal notification of Roche's arbitration demand no later than November 12, 2013. During the three-and-a-half months the OCA had the case, it appears the OCA did no substantive work to prepare for the arbitration. The case was eventually assigned to an outside law firm on February 27, 2014. However, the attorney whom the OCA intended to handle the case was not available for an April 7 arbitration, so her colleague took over as counsel. Records show that the attorney who handled the arbitration hearing did not even conduct a "preliminary review" of the file until March 14 – only 24 days before the arbitration.

More to the point, it is alarming that the City Attorney believes that the timing of this assignment was not a factor in the outcome of the case. The Union had been working up the case for months, and it is clear from the record of the hearing that its attorneys spent long hours preparing witnesses and developing a strategy for the hearing. In contrast, the attorney representing the City was handed the case – which apparently had not been worked up in any

[12] *See* Ali Winston, *Why Can't Oakland Fire Bad Cops?* (East Bay Express, Sept. 17, 2014) (available at http://www.eastbayexpress.com/oakland/why-oakland-cant-fire-bad-cops/Content?oid=4074076).

way for arbitration – just over three weeks before the hearing. Having reviewed the transcript of the hearing and having spoken to many individuals involved in the case, we can say categorically that this mismatch in preparation of the two sides had an effect on the outcome.

It is not just the City Attorney who claims OCA's delay in choosing outside counsel had little effect on the outcome of arbitrations. This argument is also made in the City's Joint Report signed by the Chief of Police and the then-Interim City Administrator. The Report notes that,

> due to insufficient staffing and personnel issues, timing of assignment of arbitrations to counsel was not optimal in some cases. In all cases except possibly one, timing of the assignment does not appear to have been a factor in the outcome of the arbitration. In that non-termination case, which did not involve use of force by the officer, longer lead time would have allowed counsel more time to prepare. However, the arbitrator's decision noted that the parties were thoroughly and competently represented by their respective advocates throughout the hearing.

See Joint Report at 25.

This raises several concerns:

First, we are troubled that the Chief, the City Attorney, and the City Administrator have all attempted to downplay the negative effects of assigning cases to outside counsel shortly before the arbitration hearing. We question what gave these individuals confidence that handling cases in this haphazard manner, including, for example, by assigning outside counsel to an arbitration one week before the hearing, "does not appear to have been a factor in the outcome."

Second, assigning cases to outside counsel just days or weeks before arbitration *has* had an effect on the City's record at arbitration. Union attorneys often spend several months diligently preparing their case, identifying and working with their witnesses, closely analyzing the evidence, and perfecting their trial strategy. The City's outside counsel often receives the case file just weeks before the hearing, with little time to prepare a strategy for the hearing, much less to identify, locate, and prepare witnesses. We spoke with several OPD witnesses who said they had received notice of hearings from outside counsel just days before they had to testify, and who described preparation for testimony that was plainly inadequate. An attorney who has just weeks to prepare for a hearing is at an enormous disadvantage against an attorney who has prepared for months. Our review of the transcripts of these hearings bears this out: Union attorneys and witnesses are consistently better prepared.

Third, the OCA's inadequate staffing is not an excuse for failing to assign cases to outside counsel in a timely manner. Inadequate staffing may be a reason to hire outside counsel in the first place, but it does not justify waiting until the last minute to do so.

And ***fourth***, unlike the City, we do not take comfort in the fact that an arbitrator stated in a written decision that the parties were thoroughly and competently represented. Whatever the motivation for an arbitrator to make such a statement, the records of these arbitrations show that representation for the City in many instances was far from thorough. Indeed, in **Arbitration U**, in which the OCA failed to call a single favorable witness or submit any non-hearsay evidence in support of the discipline, the arbitrator noted that both parties had received effective representation – and then demanded the City pay up to $10,000 of the subject officer's attorney fees for proceeding in bad faith.

7. The OCA's Process for Selecting Outside Counsel Has Been Ineffective.

The City Attorney's Office established the current protocol for selecting outside counsel shortly after the current City Attorney took office in July 2011. The OCA purportedly enacted this change to increase transparency, improve the use of objective criteria in evaluating outside counsel, and broaden the pool of qualified law firms that could be considered for City contracts.[13] The current selection protocol includes a Request for Qualifications ("RFQ") by which private law firms may seek to be included in a list of firms approved for handling legal matters for the City. According to the OCA, "[s]election of outside counsel for all matters, including arbitrations, is based on expertise in the relevant practice areas, quality of work, commitment to controlling costs, adherence to budgets, the firm's diversity, and whether the firm is local (Oakland-based)." If the OCA determines a firm meets the qualifications for a particular type of legal assignment, that firm's name will be added to a list of firms eligible to receive work in that subject matter.

Under the current protocol, when the OCA determines that a matter should be assigned to outside counsel, the assigned Deputy City Attorney selects at least three firms from the list of qualified firms. The Deputy City Attorney contacts each firm to determine: (1) what rate the firm will charge; (2) the firm's proposed not-to-exceed amount; and (3) which attorney(s) at the firm will handle the matter. The Deputy City Attorney then forwards that information to the Chief Assistant City Attorney, noting whether the firms are diverse and/or based in Oakland, and making a recommendation of which firm should be retained. The Chief Assistant City Attorney sends a recommendation to the City Attorney, who has final decision-making authority and discretion to choose a different firm if necessary. If a particular matter is urgent, or if the list does not include sufficiently qualified firms, the City Attorney also has discretion to contact other firms not on the list.

Although the OCA's current selection protocol for outside counsel was apparently intended to increase transparency and objectivity, in practice it is not significantly different from the unstructured process it replaced, and it raises several concerns.

[13] Under the earlier selection protocol of the previous City Attorney, it appears the City Attorney's Office could select outside counsel without conducting any formal internal review.

a. The RFQ Process Fails to Result in Selection of the Most Appropriate Attorney for the Job.

Our most serious concern with the selection process is that it fails in its most important task: finding the right attorney for the job. The OCA has not preserved all relevant documents or communications related to this process, so the records we received were not complete on this point. Nevertheless, from the records the OCA did preserve, we saw discussions about hiring more small firms, or more local firms, or more firms that have not previously been hired. What we saw far too little of, however, were efforts to find experts in police disciplinary arbitrations. For example, in one case, an OCA memo recommended hiring a particular firm in a police disciplinary matter in part because the firm had handled several real estate matters for the City; the memo did not discuss what specific qualifications the attorney handling the matter would bring to a police arbitration case.

Representing a party in police discipline arbitrations calls for a particular skill set. As we heard from many witnesses, in order to prevail in these hearings, an attorney needs to be familiar with the culture of police departments, and of the specific department in question. The attorney needs to understand how the internal discipline process works, what standards the department uses in selecting discipline, and how the recommended sanction compares with sanctions handed down in other cases. And the attorney needs to appreciate the ways in which arbitrators treat sworn police officers differently than other public employees. These are all skills an attorney can learn, but it takes time and experience to learn them.

Some of the attorneys hired by the OCA appeared to have little or no prior experience in police discipline cases. For example, in **Arbitration P**, the outside attorney hired by the City seemed unfamiliar with issues that regularly arise in police disciplinary cases. For example, the City's outside counsel suggested the arbitrator had to determine whether the officer had "just cause" to fire his gun, rather than whether OPD had "just cause" to impose the discipline. The question before the arbitrator was, of course, the latter, and the arbitrator and the Union attorney easily agreed on that issue. Numerous witnesses told us that, although this attorney and others chosen by the OCA were competent, they had a crippling lack of knowledge about police discipline in general and the Department's disciplinary process in particular. And because the OCA tended to engage counsel late in the process, it often fell to OPD witnesses to try to educate outside counsel on not just the facts of the case but the disciplinary process in general.

On this point, we note that, of the several factors the OCA generally considered in assigning cases to outside counsel, two factors in particular were missing from the selections we reviewed: (1) a thoughtful consideration of the relevant experience of the specific attorney who would be handling the matter (the OCA often appeared to concentrate more on the firm that would handle a matter rather than the specific attorney who would represent the City); and (2) input from the Chief and feedback from Department witnesses who had to work with outside counsel. It is remarkable that in selecting attorneys to represent OPD's interests and

work with OPD witnesses in such important cases, the OCA almost never sought OPD's feedback on the OCA's selection process or outside counsel's performance. The OCA's practice of selecting outside counsel without seeking input from OPD demonstrates a lack of appreciation for the Department's efforts and the importance of an effective attorney-client relationship.

To be clear, while there may not be a surfeit of counsel experienced in police arbitrations, there are certainly attorneys in California who have made that their practice and are highly successful at it. We not only spoke with such attorneys in the course of our investigation, we also learned that other law enforcement departments have made it a practice to seek out and hire precisely those types of attorneys for the job. It is not impossible to find attorneys with expertise in this area if that is a priority.

b. OCA's Ineffective Selection Process Has Given Rise to Concerns About the Integrity of the Process.

Several witnesses expressed concerns that the OCA's process for selecting outside counsel may be based on a pay-to-play scheme, where firms that contributed to the City Attorney's political campaigns would be more likely to receive work.

From our review of the documents produced to us by the City Attorney's Office, we did not find that it hired outside counsel for police discipline cases based on pay-to-play. In the cases we reviewed, we saw some instances in which the OCA hired firms that had donated to the City Attorney's campaign, but we saw others where the office hired firms that (as far as we could determine) had never donated anything to advance the City Attorney's political interests. And while we saw some instances where contributing law firms were selected over non-contributing law firms, we did not see evidence that the selection was based on whether the firms had contributed to the City Attorney's campaigns. Frankly, given the City's incomplete records, it was often difficult to understand why any given firm had been selected.

However, it is not difficult to understand why outside observers have suspected a pay-to-play scheme. The City Attorney has not selected firms that appear to have substantial experience in and a reputation for handling police arbitration cases, and that begs the question of what is behind the choice of counsel. What we have seen is that the City Attorney's decisions have been based on matters unrelated to prior expertise in police arbitration, including considerations such as OCA's familiarity with a particular law firm, its desire to spread work around, its desire to work with a new firm, or on any number of factors other than who can best represent the City in a police arbitration case. The following cases demonstrate the problem:

Arbitration N: In this case, a representative of the OCA responsible for recommending outside counsel based his recommendation for a specific firm in part on the fact that it had "worked on some real estate matters that transferred there with another partner." The recommendation did not explain why

the firm's experience in real estate matters was relevant to its selection in a police disciplinary arbitration. The recommendation also did not explain in detail why the lawyer who would handle the matter was qualified, or even what type of issues the matter involved. (The arbitrator ultimately reduced the subject officer's 11-day suspension to a three-day suspension.)

Arbitration S: In a memo dated August 20, 2013, an OCA representative recommended hiring Firm A from a list of three firms, but did not explain the reasoning behind the recommendation or provide any details about the other two firms besides their location and minority-owned status (and the fact that one of the firms did not handle police disciplinary matters). The City Attorney requested additional information, including a description of the matter and the firms' hourly rates. The OCA representative responded by changing the recommendation to suggest instead that the OCA select Firm B from the list.

The City Attorney disagreed with the new recommendation and, without explanation, approved hiring Firm A. The Chief Assistant Attorney then wrote to explain that he preferred sending the matter to Firm B, as Firm A was already handling – and billing large amounts – on several matters for the City. The Chief Assistant Attorney stated that retaining Firm B would lead to a better distribution of the City's cases. The City Attorney noted the disagreement but declined to change her decision, offering no written explanation.

Noticeably absent throughout this exchange, however, was any discussion of which specific attorney would handle the matter from either firm, much less what relevant experience that attorney would bring to the matter. (Following the hearing, the arbitrator ruled against the City, reducing the officer's 10-day suspension to a mere written reprimand.)

From our review of the records, it is often impossible to tell why the City Attorney's Office selected an attorney to represent the City in any particular police arbitration. There is very little in the records we received from the OCA showing that its goal was to hire the best attorneys for the job. The apparent failure of the OCA to prioritize expertise in the field of police discipline when selecting counsel in these cases has created two problems. First, it has left many wondering what is behind the City Attorney's process for selecting outside counsel, since it does not appear to be subject-matter expertise. Second, and far more important, it has risked placing these extremely important cases, and to some extent the very integrity of the Department's discipline process, in the wrong hands.

8. The OCA Has Failed to Litigate as Aggressively and Effectively as it Should.

In many of these cases, there has been a noticeable lack of zealous, aggressive advocacy on behalf of the City. This is likely because the OCA or its outside counsel have in many cases started preparing too late in the process to make strategic litigation decisions for how to prepare and present the case. For example, engaging in pre-hearing litigation, including by making discovery requests, takes time, just as it takes time to locate and prepare civilian witnesses or consult with outside experts on forensic issues.

In several interviews, representatives of other law enforcement agencies confirmed that requesting pre-hearing discovery, using civilian witnesses, and consulting with outside experts in these arbitrations can be crucial. It is no surprise that in most of the cases we reviewed, the OCA failed to call civilian witnesses or outside experts, because counsel likely only had enough time to focus on doing the bare minimum necessary to present the case to the arbitrator. But such failures can be – and likely already have been – fatal to the City's arguments at arbitration.

a. Failure to Request Pre-Hearing Discovery.

OCA attorneys and outside counsel hired by the OCA generally fail to request pre-hearing discovery in arbitration cases. The OCA has explained that the City does not have a right to pre-hearing discovery in police arbitrations, and thus the OCA does not request it.

The City's failure to seek discovery has resulted in a one-sided pre-hearing discovery process. The City must provide the grievant with all of the evidence the City relied on in finding a violation and imposing discipline. The Union usually provides nothing in return. The City often does not learn about the Union's witnesses or experts until shortly before the hearing. As one attorney representing the City explained to us, learning about the OCA's case at arbitration is the "exciting" part of handling these cases. While such a surprise may be "exciting," the records of the arbitration hearings show it is also often hugely disadvantageous to the City. The City's attorneys have no rebuttal experts or rebuttal witnesses prepared, because until the hearing begins they have no sense of what they will need to rebut.

Even without an enforceable right to pre-hearing discovery, the City should still request it. In our discussions with representatives of other law enforcement agencies, we learned that counsel for those agencies seek pre-hearing discovery as a routine practice. In some cases the arbitrator will require limited discovery, in other cases more extensive discovery, and in others no discovery at all. But it is clear that if counsel for the City does not at least *ask* for pre-hearing discovery, they are unlikely to ever receive it.

b. Failure to Call Civilian Witnesses.

Civilian witnesses may offer helpful perspectives that are different from those of police officers. On occasion, civilian witnesses may also be able to contribute valuable eyewitness testimony or information that officers do not have. The City has done a poor job of using civilian witnesses in arbitrations.

For example, in **Arbitration U**, the Department had alleged that an officer failed to record complaints from arrestees that various officers had used excessive force against them during a protest. One of the arrestees had even made a documented complaint with the Department about the excessive force. Perhaps because the Deputy City Attorney did not begin preparing for the arbitration until the day before the hearing, however, she failed to call any of these critical civilian witnesses at the arbitration. The arbitrator commented on the noticeable absence of these witnesses, stating in her written decision that "none of the arrestees, on whose behalf [the IA investigator] alleged claims of excessive force … was called to testify before the arbitrator." The arbitrator ultimately described the case as "extraordinary," in part because of the City's "remarkable" failure to present any relevant witnesses, including the civilian eyewitnesses, in support of its case.

c. Failure to Use Outside Expert Witnesses.

As with civilian witnesses, outside expert witnesses can offer different perspectives from those of experts within the Department. On occasion, outside experts may also have a greater level of expertise in the subject matter. But in the cases we reviewed, the OCA had no established protocol for determining when to use an outside expert or how to select an appropriate expert witness. And, as with civilian witnesses, the OCA and its outside counsel often began preparing far too late in the process to use an outside expert effectively. For example, as discussed further below, in the Jimenez arbitration the City relied primarily on forensic evidence to establish that the subject officer had committed a serious violation. At arbitration, however, the Union offered testimony from an outside expert who cast doubt on the City's interpretation of the evidence. The OCA offered no rebuttal expert to support its case. As a result, the arbitrator gave considerable weight to the opinion of the Union's expert, describing his testimony as "extremely credible" and ruling that the City's theory of the case was incorrect.

It is impossible to know in retrospect in which cases the City could have obtained a more favorable outcome if it had worked with outside experts in preparing its case. But we can say with confidence that the City's failure to call an outside expert witness in several of the arbitrations we reviewed demonstrates a lack of planning and zealous advocacy in representing the City.

d. Failure to Track Data Essential to Success in Arbitration.

It is clear from our interviews that the Union's attorneys are assiduous in keeping track of data from previous cases. We understand they keep records of arbitrators' performance in previous cases so they know whom to strike and whom to try to keep when given a list of potential arbitrators. They also have access to a database of the discipline imposed by OPD in prior cases, a database they use to great effect in hearings when arguing that the recommended discipline in any given case is out of line with the Department's prior decisions.

The OCA appears to have neither of these resources. While there are individual attorneys in the OCA who have some institutional memory of individual arbitrators, there has not been any consistent, organizational effort to keep track of how the arbitrators have performed in previous cases. Indeed, when one arbitrator who had reversed OPD's discipline reappeared on the list of possible arbitrators for a later case, it appears no one was aware of the City's prior, negative experience with that arbitrator.

We also did not see evidence of any database maintained by the OCA to keep track of prior discipline. For this reason, the Union's arguments of disparate treatment were all the more effective, since the OCA had nothing at hand with which to rebut them. Notably, the OPD does have a system for tracking this information, but it is only recently that the two offices have begun coordinating on this issue.

9. OPD and the OCA Have No System to Identify Problems that are Learned Through the Discipline Process and to Make The Necessary Improvements.

One measure of an effective discipline program is that it is designed to identify internal problems and correct them. In our conversations with representatives from other law enforcement agencies, we learned that they had systems, both formal and informal, to learn from mistakes or deficiencies in their discipline programs and to make improvements based on what they learned. In some instances, the attorneys working on a discipline case will keep track of problems they identify and share those with the agency at the end of the process. Another approach is to convene a meeting of the attorneys and department representatives at the conclusion of a significant case to review lessons learned. Whatever the system, the purpose is the same: to identify what is wrong or what could be done better – and to fix it.

Every discipline case, and particularly every significant case that goes to arbitration, offers the OCA and OPD the opportunity to make the discipline process better. It is clear from our review of the arbitration files that cases in which the City has lost at arbitration are valuable sources of information about deficiencies in the investigation process; the imprecision of written policies; the failure of OPD to train on its policies; problems with Skelly hearings; and, above all, deficiencies in the way the OCA and its outside counsel represent the City in arbitrations.

Unfortunately, the OCA and OPD have done little to take advantage of these opportunities. In several cases, OCA attorneys or outside counsel have merely forwarded an unfavorable arbitration decision to OPD so it could make the necessary adjustments to the officer's personnel file. In a few cases, conscientious OCA attorneys or outside counsel have described the proceedings in detail and identified potential problems. Even in these cases, however, we saw no meaningful follow-up, and the same problems arose again and again – vague policies, incomplete investigations, unprepared attorneys – with nothing done to ensure that the problems were corrected before they arose again. The occasional email from a Deputy City Attorney offering a post-mortem is worthy of commendation, but it is far from the sort of

institutionalized process necessary to capture and learn from the valuable information offered by these cases.

C. The Relationship Between OPD and the OCA Has Been Dysfunctional.

Over time, the many failures in the disciplinary process have had a corrosive effect on the relationship between OPD and the OCA. Separate and apart from the internal problems plaguing each, the two offices have worked together so poorly that an already bad situation was made worse. We repeatedly heard from witnesses that rather than supporting each other in the discipline process, the OCA and OPD often viewed each other with mutual suspicion. The result has been a less-than-unified front on the City's side, and when the case goes poorly, a sense by each office that the other is to blame.

Regarding OPD's concerns, we heard and reviewed evidence showing the OCA has often been extremely slow to respond to OPD's requests for legal advice. Sometimes OPD could receive an answer only by asking the same question a number of times. OPD witnesses also reported that it was common for the OCA to take a vague or ambiguous position in response to a legal question, or to edit a document primarily with stylistic rather than substantive suggestions. This type of legal advice is at best unhelpful and at worst disrespectful of the Department's efforts to make informed decisions on discipline.

But OPD's most serious concerns about its relationship with the OCA have to do with arbitrations. Many within the highest ranks of the Department believe that despite its best efforts to impose discipline, the Department often loses at arbitration because the City Attorney's Office fails to do its job. The OCA has done many things to reinforce this perception, including assigning cases at the last minute without sufficient focus on the attorney's qualifications and without contacting relevant OPD witnesses until days before an arbitration hearing. By handling OPD disciplinary cases in this way, the OCA has sent the message that it does not appreciate how important these cases are to the Department's disciplinary process or how much work Department personnel have put into them.

The OCA has its own frustrations with OPD. Many at the City Attorney's Office believe that OPD's errors during the investigation or imposition of discipline make cases unnecessarily difficult to defend at arbitration. And, just as the OCA has failed to assign cases in a timely manner, OPD has also frequently waited until the last minute to seek feedback and legal advice from the OCA regarding investigations and other disciplinary decisions. In these cases, the OCA has not had sufficient time to provide a thorough answer to OPD's requests.

Arbitration U provides a good example of the breakdown in the relationship between the two offices. At the arbitration, the Deputy City Attorney was unprepared to handle the case and failed to call a single favorable witness or present any non-hearsay evidence in support of the Department's disciplinary decision. In the arbitrator's written decision, the arbitrator referred to the case as "extraordinary" and took the highly unusual step of sanctioning the City $10,000 for its bad faith. It appears the OCA did not tell OPD specifically

what happened in the arbitration, though, including about the OCA's failure to prepare sufficiently ahead of time or even present any evidence in support of the Department's efforts. At the same time, it appears OPD merely accepted that it had lost yet another arbitration, without attempting to find out what had happened or where the process had broken down.

Fundamentally, this has not been a functioning attorney-client relationship. The attorneys do not always respond promptly when the client seeks information, and some of them have performed in a manner that does not inspire trust. And the client, in turn, has often failed to involve the attorneys in essential steps of the process. As a result, the Union faces a poorly coordinated opponent, dramatically improving its chances to prevail at arbitration.

D. There has Been No Meaningful Accountability for the City's Failed Disciplinary System.

In our meetings with law enforcement, current and former city officials, and others, there was one concern we heard expressed more than any other: there is a critical lack of accountability for police discipline. Witnesses described failures at every stage of the disciplinary process, all exacerbated by a lack of accountability. When IA did not perform an adequate investigation and the case fell apart, no one was held to account. When case after case was lost in arbitration because OPD's policies were unclear, no one was held to account. When the OCA failed to have discipline upheld in the vast majority of cases – even in cases where the City had paid large sums as civil settlements for the same conduct – no one was held to account.

The failures described in this report were not hidden; they are evident to anyone who participates in the OPD disciplinary process. But had the Court not ordered an investigation, it is not clear that anyone would have been held accountable for this broken system, and many of these failures may never have been addressed. We have seen no evidence that, prior to the Court's order, there was sufficient alarm within either OPD or the OCA about the City's inability to uphold discipline. As far as we can tell, even after the Court expressed concern about the process in 2011, both offices continued business as usual – and with the usual unsatisfactory results. Indeed, leading up to the Court's 2014 order, the Union had succeeded in vacating or reducing the discipline in nine consecutive arbitrations.

Nor did the Oakland City administration take any steps to hold anyone to account. Time and again, the City wrote checks to settle civil lawsuits arising out of police misconduct, only to see the City Attorney's Office fail to uphold discipline for that very same misconduct. We have seen no evidence that the Mayor, or the City Administrator, or the City Council took steps to hold anyone accountable for these failures or improve the City's outcomes at arbitration.

E. A Closer Examination of One Arbitration Helps Demonstrate What Happens When the Discipline System is Dysfunctional.

To get a sense of what it means to have a dysfunctional disciplinary process, it is useful to look at a specific case. No one case contains all of the deficiencies we have discussed above,

but one case in particular illustrates what can happen when the discipline process does not work as it should. That case is the shooting and killing of "Jody" Mack Woodfox by Officer Hector Jimenez. As noted above, more than three years ago, the Court turned its focus the City's police disciplinary arbitrations in response to the reinstatement of Jimenez, whom the Department had attempted to terminate for shooting a civilian in the back after a traffic stop. *See* Dkt. No. 630-1. The arbitrator's decision was reported widely in the press, including articles that quoted directly from the arbitrator's written ruling.[14] Following the decision, Jimenez's attorney also commented extensively on the case, including by describing Jimenez's testimony at the arbitration, referring to the testimony of other arbitration witnesses, and providing a detailed discussion of the arbitrator's decision, including the specific reasons the arbitrator cited for reinstating Jimenez.[15] While we have treated other arbitration proceedings (except for public aspects of Roche's case) as confidential and have not discussed personally identifiable information, the extensive media coverage of this case, including articles quoting directly from the arbitration decision and public statements by Jimenez's own attorney describing the arbitration, as well as the civil case against the City, make this a matter of public record and concern.

Less than seven months later, in July 2008, Jimenez and his partner, who was driving their police vehicle, were patrolling in the early morning hours in East Oakland when they observed a speeding car traveling northbound on Fruitvale Avenue. Jimenez and his partner began pursuing the vehicle. At one point, the driver of the vehicle, "Jody" Mack Woodfox III, made a U-turn and proceeded to speed southbound on Fruitvale toward International Boulevard. Woodfox continued to attempt to evade Jimenez and his partner until he came to a sudden stop near the intersection of Fruitvale and East 17th. Although accounts of what happened next differ, no one disputes the end result: After Woodfox exited his vehicle, Jimenez killed him by shooting him multiple times in the back. According to the coroner's report, Woodfox suffered at least three gunshot wounds: one to his back left shoulder; one to his back left underarm; and one to his back lower torso, just above his left buttock. Woodfox was unarmed, and all of the gunshots entered his body from behind.

Jimenez and his partner claimed that Woodfox stopped his vehicle so abruptly they were unable to stop their police cruiser behind his, instead having to stop almost directly adjacent to Woodfox's vehicle. They claimed Woodfox left his car in gear, though, so it continued to roll slowly forward until it was almost in front of their patrol car. Jimenez claimed

[14] *See, e.g.*, Henry K. Lee, *Oakland must rehire cop who shot suspect in back* (San Francisco Chronicle, March 5, 2011) (available at http://www.sfgate.com/crime/article/Oakland-must-rehire-cop-who-shot-suspect-in-back-2528215.php) (including quotations taken directly from Arbitrator David Gaba's written decision).

[15] *See* Justin Buffington, *Oakland Police Officer Involved in Shooting Reinstated with Full Back-Pay and Benefits* (available at http://www.rlslawyers.com/oakland-police-officer-involved-in-shooting-reinstated-with-full-back-pay-and-benefits/).

that he got out of the patrol car; drew his gun; moved around his open passenger-side door to the passenger-side front wheel well; and shouted to Woodfox to put his hands up several times. According to Jimenez, Woodfox got out of the car and began running suddenly in a 45-degree angle toward the driver-side door of the patrol car, where Jimenez's partner was located. Jimenez said he thought he saw Woodfox reach for something in his waistband. Believing Woodfox was reaching for a gun, Jimenez fired several shots at Woodfox. After a very brief pause, when Woodfox continued to run, Jimenez fired a second volley of shots, after which Woodfox collapsed to the ground.

The Department conducted an investigation and made several relevant findings, including the discovery of a bullet strike mark in the back of Woodfox's trunk.[16] According to the Department, the angle of the bullet strike showed that Jimenez had likely fired at Woodfox while Woodfox was still in the "V" that his driver-side door made with his vehicle – in other words, almost immediately after Woodfox exited the car, and long before he would have had any opportunity to charge at Jimenez's partner. The Department also noted that Jimenez's partner was standing outside the patrol car with his gun drawn but did not fire at Woodfox.

The Department also interviewed several civilian witnesses that it identified in a broad canvass of the surrounding neighborhood. Because the incident took place in the early morning hours, most witnesses were woken by the sounds of the car chase or the gunshots but did not actually see what happened. However, there were some civilians who claimed to have witnessed the shooting, and they unanimously agreed on one point: Woodfox was running away from the police when he was killed. One witness (Witness 1) said she observed the incident from her bedroom window, which had a view of the intersection. After she heard screeching tires outside, she stood up on her bed and looked out her window. She saw Woodfox stop his car, get out, and start running across Fruitvale trying to escape. She said the police pulled up behind Woodfox's vehicle. She thought the driver of the police cruiser started firing on Woodfox as he was trying to run away. She said: "The guy from the car [Woodfox] never looked back. He never looked back. He was running. His hands were moving, he was running fast, he was trying to get away."

Two other civilian witnesses (Witnesses 2 and 3) also said they witnessed the car chase and the shooting. These witnesses were apparently drinking together at the time of the

[16] Given the intense public scrutiny on the Jimenez case, it is notable that the lead IA investigator assigned to the case had been in IA for only six days when he received the assignment, had not yet taken the Department's course on how to conduct IA investigations, and had never previously worked as a homicide investigator. It is clear the investigator tried to conduct a thorough investigation, but it is possible he lacked the relevant experience necessary to handle a case of this magnitude. For example, when the investigator was asked on cross-examination at arbitration whether there was a way to determine if the strike mark on Woodfox's trunk had been made by Jimenez's gun, the investigator stated he did not know if there was any way to determine that. The Union's expert witness did manage to make that very determination, however, simply by obtaining comparable trunk lids and firing different types of ammunition at them.

incident, and they were a significant distance from the scene, so their testimony could have been challenged on both grounds. But both witnesses stated Woodfox was running away from the police when he was shot. Witness 2 testified in her civil deposition that "[h]e [Woodfox] jumped out the car and started running. He jumped out first and then the police said halt…. I heard the word halt and then I heard 'pow, pow, pow, pow, pow'…. All I seen was him holding up his pants trying to run…. He wasn't trying to hear no police. He was trying to run….. He was scared."

These witness statements were all available to the City long before the arbitration hearing. Witnesses 1 and 2 gave recorded statements to the IA investigator, and those statements were included in the Skelly materials and provided to the OCA well in advance of the arbitration. Further, Witnesses 2 and 3 both gave depositions in the civil wrongful death case filed by Woodfox's heirs against the City.[17] A representative of the OCA was present for both of those depositions. And although plaintiffs' counsel was able to locate Witness 3 and take his civil deposition in the wrongful death case, it does not appear that the Department ever interviewed him, despite his professed willingness to cooperate with the investigation.

Both the bullet strike evidence and the witnesses' testimony would have contradicted Jimenez's version of the events, but the two were potentially inconsistent with each other. The civilians who claimed to have seen the shooting all stated that Woodfox had already been running away from the officers when Jimenez shot him in the back. In contrast, the bullet strike evidence suggested Jimenez had begun firing at Woodfox when Woodfox was still near the open driver-side door of his vehicle.[18] In deciding to terminate Jimenez, the Department apparently concluded that the bullet strike evidence was more compelling than the civilian testimony.

Thus, at arbitration, the City offered no civilian witness testimony, instead relying primarily on the bullet strike evidence and prior statements from both Jimenez and his partner, including statements that Woodfox had not looked at them as he ran. The Union called both Jimenez and his partner as witnesses, though, and they both told roughly the same story – that Woodfox had exited his vehicle and had begun running in the direction of Jimenez's partner.

The City argued that Woodfox was shot as he ran away, but it offered little evidence in support. The arbitrator did not hear from the multiple eyewitnesses who reportedly saw Woodfox running away from Jimenez and his partner when he was shot. In fact, the arbitrator referred briefly to the Department's efforts to interview civilian witnesses in his written decision, but he made no mention of the potential eyewitnesses' testimony, stating only that

[17] The City ultimately settled the wrongful death case with Mr. Woodfox's family for $650,000.

[18] As the IA investigator noted in the report: "[Witness 1] does not appear deceptive, however the evidence (Jimenez and [his partner's] statement, coupled with the bullet strike mark on the trunk of Woodfox's car) doesn't support her claim that the suspect had already run from the car prior to the police arriving."

the Department had interviewed "36 residents of the neighborhood … who gave statements saying they heard only gunshots [and 17] other residents [who] gave statements saying that they didn't see or hear the incident." The arbitrator appeared confused about the civilian witnesses' statements, and the City's failure to call civilian witnesses at the arbitration did nothing to help the matter. Thus, the only eyewitness testimony the arbitrator heard was from Jimenez and his partner, both of whom stated – without contradiction – that Woodfox ran in the direction of Jimenez's partner.

As noted, the City relied on bullet strike evidence instead of the civilian eyewitnesses. In response, the Union presented testimony from an expert witness who disputed the City's theory about the bullet strike forensic evidence. The Union's expert witness reportedly purchased two trunk lids similar to the one from Woodfox's car and fired different types of ammunition at them. The expert concluded based on his experiments that the bullet strike on Woodfox's trunk could not have been made by Jimenez's gun.

Despite the fact that the bullet strike evidence was a central part of the City's case, the City had no meaningful response to the Union's expert testimony. The City called no rebuttal expert. Indeed, it appears the City never contacted any outside expert to shore up its case or support its conclusion. As a result, the arbitrator had no basis for discrediting the Union's expert testimony. In his decision, the arbitrator referred to the expert's analysis as "extremely credible" and consistent with Jimenez's account of events. According to the arbitrator, the Union's expert made it "very clear that Officer Jimenez could not have created the strike mark at issue with his weapon." The arbitrator further stated, "once the 'fact' surrounding the strike-mark on the trunk has been removed from the equation, both [Jimenez's partner's] and Officer Jimenez's stories make sense." Thus, the arbitrator vacated the discipline and ordered Jimenez reinstated with full back pay and benefits for the time he had been away.

We cannot say what actually happened that tragic evening, just as we cannot say what result the arbitrator should have reached. What we can say, though, is the City did not put forward its best case, and the disciplinary process did not function as it should have. The arbitrator did not hear potentially relevant evidence, including testimony from civilian eyewitnesses to the shooting. In addition, the City may have relied on a faulty theory of the case, or, in the alternative, may have failed to obtain and present persuasive expert testimony to support its theory. Either way, the City did a poor job of presenting its case. Part of the fault for this failure lies with OPD, as it relied on forensic evidence without conducting a sufficient analysis to support its interpretation of that evidence. And part of the fault lies with the OCA, as it failed to present potentially critical eyewitness testimony or identify its lack of an expert witness as a possible weakness.

It is important that Oakland's police discipline process function in all cases, whether high-profile or not. But in those cases where an officer has shot and killed a civilian, it is essential that the discipline process works. There is nothing more destructive of the public's trust in its police department than knowing that an officer whom the Department thinks should

be terminated for having killed an unarmed man is back on the force. As one local media source stated at the time: "Jimenez's termination sent the right message, that police have the right to use deadly force to defend themselves only when their lives are at risk and that police officers will be held accountable for their actions. Jimenez's reinstatement sends the exact opposite message."[19] If an officer who shoots an unarmed civilian is put back on the force because the City has not done an adequate job in defending its decision to terminate, the public will certainly lose faith in the City's ability to discipline its own police force.

IV. RECOMMENDATIONS

Before discussing our recommendations, we first note that both OPD and the OCA have made significant and commendable improvements since the Court's August 2014 order. For example, since that time, the OCA has begun preparing for arbitrations much earlier in the process. According to OCA staff, the office has begun assigning cases to outside counsel with sufficient time to prepare for arbitrations, including assigning cases *before* selecting arbitration dates, ensuring that qualified outside counsel will be available. It appears the OCA has begun focusing on the qualifications of the individual attorney handling the arbitration rather than the characteristics of the attorney's law firm. We understand the OCA has been holding regular meetings with OPD representatives to attempt to improve the quality of the Department's investigations and decisions and to build trust and cooperation between the two offices.

These reforms are encouraging, and they have already resulted in better outcomes in arbitration. Indeed, since the Court's August 2014 order, the City has succeeded in fully upholding the discipline in two arbitrations, while the Union has succeeded in reducing the discipline in one case. These results speak for themselves. However, the catalyst for the improvements appears to have been the Court's August 2014 order. Very little was being done to improve the process before the Court issued that order, and that is not to the City's credit.

One other development worth noting is the City's own review of the police discipline process. The City's review resulted in the report that is attached as Exhibit A. We appreciate the City's efforts to identify some of the problems with the process and to suggest possible improvements. Throughout this process, both OPD and the OCA made several thoughtful and helpful recommendations for improving the current system, including certain recommendations set forth in the City's Joint Report. To the extent we agree with the City's suggestions, they are included in our recommendations below.

Turning to our recommendations, we note that nothing we are recommending should come as a surprise to the City. The recommendations all come from individuals who work for

[19] *See* Editorial, *Police officer's reinstatement sends wrong message* (Oakland Tribune, March 10, 2011) (available at http://www.contracostatimes.com/ci_17584439).

OPD, the OCA, and the City administration. The City understands what it needs to do to make police discipline work, but it has not previously demonstrated the will to do it.

The responsibility for these failures does not just lie with OPD and the OCA. The City's police disciplinary process is overseen by the City Administrator and the Mayor. With the extensive oversight these individuals and offices may provide, it should not have been necessary for a U.S. District Court to order an investigation and recommendations. More to the point, with the City under Court supervision, and with the Court having already alerted the City to problems with police arbitrations, it is an indictment of the City's lack of focus on this issue that the Court had to appoint an investigator to bring these problems to the fore.

The principal finding of our investigation is that the City has not shown a sense of urgency or concern about its handling of police discipline cases. The City handled these cases haphazardly, imposing discipline inconsistently, sometimes assigning cases to counsel at the last minute, and, predictably, losing at arbitration far too frequently. And despite the City's abysmal record, no one in the City – not in OPD, nor in the OCA, nor in the City administration – raised sufficient alarm. If the City does not make the police disciplinary process a priority, there is little hope the City's current improvements will last once the process is no longer under the spotlight of a Court-ordered investigation.

With those comments in mind, we offer our recommendations in the following general areas: **Investigation**, **Discipline**, **Preparation**, **Arbitration**, **Accountability** and **Sustainability**.

Investigation:

- 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.

- 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.

- 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.

- 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.

- 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.

Discipline:

- The Department has informed us it is addressing its outdated rules and policies by transitioning to a system developed in conjunction with Lexipol, a national leader in policy management resources for law enforcement organizations. We commend OPD for this decision. However, it may take years for the Department to complete the transition, and in the meantime, it must still work to ensure that its current rules and policies do not undermine the disciplinary process. The Department should coordinate with the OCA to address these issues proactively, making whatever policy changes are necessary while awaiting the transition to Lexipol. The City should also commit adequate resources to the transition to ensure it does not take longer than necessary.

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

- The Department should revamp its Skelly hearing process. Skelly officers should receive training on conducting thorough IA investigations to ensure that their decisions cannot be effectively challenged at the arbitration stage for having been based on insufficient investigation. They should also be trained and given guidelines on writing detailed Skelly reports. The OCA should be made part of the process, particularly in the drafting of Letters of Intent to Discipline. And to improve consistency and predictability in the

handling of serious disciplinary cases, the Department should assign all serious cases (those involving at least one Class I allegation) to a Deputy Chief, to the Assistant Chief, or to the Chief him- or herself.

- The Department and the Compliance Director should meet to discuss adopting a formal procedure for handling the reintegration of officers who have been off duty for an extended period of time due to pending disciplinary matters. Regardless of whether discipline is sustained, the absence of an officer from active duty for a period of time can have negative effects on that officer's performance.

Preparation:

- The OCA should put in place a formal process for selecting outside counsel sufficiently in advance of arbitration to allow for full and thorough preparation. The selection process should focus primarily on the qualifications of the individual attorney who will handle the arbitration, rather than on the qualities of the attorney's firm. The top priority should be ensuring that the attorneys the City is paying to represent it in police arbitrations are experienced and accomplished in police discipline arbitrations. And as OCA has begun to do in recent cases, it should select outside counsel before setting an arbitration date.

- The OCA should seek OPD's input on the selection and use of outside counsel. Following arbitration proceedings, the OCA should seek OPD's feedback on counsel's performance, level of preparation, and knowledge of police disciplinary matters. This will both improve the quality of the OCA's decisions and make better use of OPD's involvement in the arbitration process.

- OPD and the OCA should work together to create a shared database for tracking the status of disciplinary cases, perhaps by modifying the database IA currently has in place for this purpose. This will help to ensure that both offices are keeping track of the cases from beginning to end. The offices should also work together to have an effective system for comparing levels of discipline across similar cases.

Arbitration:

- The OCA should maintain a database to track the performance of arbitrators and to inform the City's decision in the selection of arbitrators. Ideally, the OCA could coordinate with other offices in the state to share information about arbitrators assigned to police discipline cases.

- The OCA or its outside counsel should request pre-hearing discovery in all significant arbitrations. In the meantime, the City should seek to amend the MOU to require pre-

hearing disclosure of evidence and expert witnesses. Such an amendment will help to ensure that arbitrations are decided on a full and fair consideration of all relevant facts, rather than one side's surprise or lack of preparation.

- In cases where the OCA uses outside counsel, it should have a Deputy City Attorney attend the arbitration to supervise the proceedings and monitor counsel's performance.

- The OCA or its outside counsel should litigate cases aggressively, including by using civilian and expert witnesses where appropriate, preparing witnesses thoroughly, concentrating additional resources on post-hearing briefing, and requesting to file reply briefs in serious cases.

- The OCA should require the attorney who handled the case, whether a Deputy City Attorney or outside counsel, to draft a post-hearing memo describing the proceedings and identifying potential areas of improvement for both the City Attorney and the Chief. Likewise, OPD should require the IA or Department representative at the arbitration to do the same. Finally, the two offices should establish a procedure to review arbitration proceedings and results together and jointly identify corrective actions to improve performance.

Accountability:

- For any reforms made in response to the Court's order to be lasting or meaningful, the City must take ownership of this issue. The City Administrator, the City Council, and the Mayor have all allowed a broken disciplinary system to continue unaddressed. These individuals and others must take a more active role in the process, requiring regular reports from OPD and the OCA into any potential shortcomings or obstacles in imposing meaningful discipline.

Sustainability:

- While we commend OPD and the OCA for the changes they have made in recent months, we note that none of these changes has been implemented in a sustainable way. There have been no changes in Department General Orders or other written policies. Practices have changed, but they could just as easily revert back when the Court is no longer supervising these matters. For the Court and the public to have confidence that OPD's discipline process has been changed in a sustainable and lasting fashion, OPD, the OCA, and the City administration should implement reforms that are incorporated into the policies that govern their actions.

If the City implements these or similar reforms and does so in a sustainable way, we are confident it will improve not only its performance in police disciplinary arbitrations, but also its relationship of trust and confidence with the community it serves.

EXHIBIT A

CITY OF OAKLAND

MEMORANDUM

TO: Ed Swanson, Esq.
Swanson & McNamara LLP

FROM: Barbara J. Parker, City Attorney
Henry Gardner, City Administrator
Sean Whent, Police Chief

DATE: January 19, 2015

RE: Allen vs. City of Oakland
Report on the Police Disciplinary Process

Attached is our formal input regarding the investigation.

Allen v. City of Oakland

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REPORT ON POLICE DISCIPLINARY PROCESS

I. PREFACE

This report is the joint effort of the City Attorney, City Administrator and Police Chief to (1) provide a frank review of the entire disciplinary process beginning with the Internal Affairs Division ("IAD") investigation up to and including arbitration hearings and awards; (2) identify and assess the shortcomings and issues in the process; (3) describe the changes that have been implemented to address the shortcomings and issues; and (4) recommend additional changes that we believe will improve the process and assure that the City takes all reasonably practicable steps to support consistent, fair and just discipline and accountability of police officers.

Our goal is to clearly describe the issues and to demonstrate our collective responsibility, understanding and commitment to work in a coordinated way to improve the disciplinary system.

Many of the issues and shortcomings are the result of insufficient staffing, staff turnover, inconsistent practices and the absence of or sporadic implementation of protocols and procedures. These can be addressed. Indeed the Office of the City Attorney ("OCA") has conducted its own review of the police disciplinary process, including the OCA's handling of police arbitrations during the last five years. Moreover, it is important to note that there are many sound practices and procedures in place, and that the City has taken affirmative steps – including before the Court issued its August 14, 2014 order – to improve the disciplinary process for police officers.

To address the reversals of discipline and modifications of the level of discipline by arbitrators requires that the City make changes at each level of the process, as opposed to focusing primarily on arbitration hearings. In arbitration, the City is bound by the record of evidence that it relied upon to impose discipline.

We remain committed to working with the Court to meet all the goals and benchmarks of the Negotiated Settlement Agreement ("NSA"), including ongoing and sustained implementation of consistent, fair and effective disciplinary procedures. Our goal is to provide Oakland citizens the most effective, professional and accountable police force in the country. It is in this spirit of cooperation and commitment to continuous improvement that we provide this report and recommended actions.

II. INTRODUCTION.

The issue of discipline for alleged police misconduct is a difficult subject that has been discussed extensively over the years, and more recently as a result of the nationwide protests following the recent deaths of African American men at the hands of police officers in Ferguson, Missouri and Staten Island, New York. No perfect system has been devised. The Memorandum of Understanding ("MOU") between the City of Oakland (the "City" or "Oakland") and the Oakland Police Officers' Association ("OPOA") requires that the City hold hearings before an arbitrator or Oakland's Civil Service Board to resolve grievances that are not settled.

In Oakland, the overwhelming majority (91%) of police disciplinary actions are not grieved, or the grievances are settled after the *Skelly* hearing by the Police Chief/City Administrator, the Employee Relations Department (Step 3 under the OPOA MOU), or the City Attorney's Office (Step 5 under the OPOA MOU). During the five-year period covered by this investigation (September 10, 2009 through September 9, 2014), there were 22 arbitration decisions; eleven (11) of those decisions reversed the City's discipline. During roughly that same period (July 1, 2009 through June 30, 2014), the City imposed discipline on officers in 254 instances. Thus, about nine percent (9%) of all discipline cases during the relevant time frame actually went to an arbitration hearing, and only about four percent (4%) were reversed.

Reversals of discipline in high profile matters can lead to questions about the efficacy of the system. Some observers and writers have even questioned the wisdom of using arbitrations

since arbitrators often adopt a "split the baby" approach and are reluctant to uphold career-ending terminations except in the most egregious of cases. The arbitration system is an element bargained for by the OPOA. It is reflected in the MOUs for all of the City's bargaining units and is a longstanding provision of City MOUs. That system appropriately places the burden on the City to prove the disciplinary action is supported by a preponderance of the evidence, as non-probationary officers have a property interest in their jobs and cannot be reprimanded, suspended or terminated without just cause. That system also gives the arbitrator authority to substitute his or her judgment regarding the level of discipline, even if the arbitrator determines that the City met the evidentiary standard, there was no disparate treatment, and the City's level of discipline is not unreasonable. In other words, even when arbitrators believe the level of discipline is within reason, they nevertheless are authorized to institute a lower level of discipline that they believe is more reasonable.

On August 14, 2014, the Court issued its Order Re: Internal Affairs Investigations and Subsequent Proceedings, which directed the Compliance Director to investigate Oakland's disciplinary decisions that have been overturned in arbitration and to determine such corrective actions as may be necessary. Given the scope of the investigation, the Court authorized the Compliance Director to request approval of additional staff. On August 20, 2014, the Court approved the engagement of Edward Swanson, Esq. of Swanson & McNamara LLP to assist the Compliance Director in the investigation.

In the Order, the Court identified a number of areas for investigation and observed that failure to address the enumerated issues would prevent compliance with the Negotiated Settlement Agreement ("NSA"), in particular Task 5 (Complaint Procedures for IAD) and Task 45 (Consistency-of-Discipline Policy).

The City Administrator, City Attorney and Police Chief have the same goals as the Court: to ensure that the City takes all reasonably practicable steps to impose and uphold effective, consistent and fair disciplinary actions. Accordingly, the City has cooperated fully with the investigation, providing complete responses to the investigator's document requests (to date

OCA has produced approximately 12,000 pages of documents) and facilitating candid and expeditious interviews with a great number of City officials and employees. Consistent with this spirit of cooperation, the City submits this report (1) to assist the Court, the Compliance Director and Mr. Swanson in the investigation and evaluation of the OPD disciplinary process beginning with the Internal Affairs Division's ("IAD") investigation and reports up to and including the arbitration hearing and award, (2) to apprise the investigator of changes that the City has already implemented to address issues and improve the process, and (3) to identify additional changes that the City believes will improve the process.

This report addresses the following subject areas:

(1) An overview of OPD disciplinary procedures;

(2) The impact of budget cuts and staff reductions on police disciplinary process and actions that have already been taken to help to reverse such effects;

(3) Outcome statistics for police discipline arbitrations;

(4) Leading articles regarding statistics on on police discipline arbitrations;

(5) Specific issues that have affected police disciplinary actions and outcomes, including the issues enumerated in the Court's August 14, 2014 Order; and

(6) Actions the City has already taken to address these issues and recommendations for future steps.

As we mentioned above, while arbitration of police discipline has been the subject of significant criticism, we believe that certain policies and procedures and improving coordination among City players will improve the process. In fact, we have already addressed some of them, including, for example, insufficient attorney staffing that required the Office of the Oakland City Attorney ("OCA") to appoint outside counsel to handle the lion's share of arbitrations in recent years and insufficient staffing in the Employee Relations Department and the Police Department. We believe the additional measures that we propose in this report will assist the City in

addressing the process issues and making a strong record to support the City's disciplinary action.

However, there is no silver bullet or panacea. As the Court acknowledged in its August 14, 2014 Order, "not every disciplinary decision will be upheld at arbitration . . . ." Order at 2. The arbitration system is designed to resolve doubts in the officers' favor. Moreover, arbitrators have an inherent economic interest in rendering decisions that will enhance their chances of being selected again to arbitrate police discipline grievances. It has been observed that arbitrators proceed with caution so as not to alienate the parties, particularly the police unions. The result is often "split the baby" decisions or even decisions that appear to be focused on protecting the subject officer. The reality is that the City will always face challenges in terminating police officers or severely disciplining them under the current system. In our view, the arbitration system, though not perfect, is a necessary procedure to balance protection of employees' rights and the City's interest in holding police officers accountable for misconduct. We recommend some changes that will provide a more efficient and fair process to balance those interests.

III. POLICE ARBITRATION CASES – FIVE YEAR TIMELINE AND OUTSIDE COUNSEL SELECTION PROCESS.

A. Police Arbitration Case History

On September 9, 2014, Mr. Swanson sent a *First Set of Document Requests* to the City Attorney's Office. The requests covered documents related to police arbitration decisions issued over the preceding five year time period, which included 22 arbitration decisions. We recently (December 30, 2014) received arbitration decisions in two subsequent arbitration cases and have added those cases to the time line below.

In all of those cases, the City asked the arbitrator to uphold discipline the City had imposed on the officer in question and the OPOA argued in each case that no discipline was warranted. In fifty-four percent (54%) of the cases (*i.e.*, 13 of the 24 cases), arbitrators upheld

the City's decision to impose discipline. In other words, the City's prevailed in its effort to impose discipline in more than half of all police arbitration cases in the last five years. The arbitrator modified the level of discipline in about half of the 13 cases where the arbitrator upheld the City's decision to impose discipline.

Documents and information pertaining to arbitrations typically are confidential because they deal with personnel matters and/or attorney-client communications. However, for reference purposes in this report, we provide the following public information about the 24 cases described below.

Arbitrations by Date	**Attorney for the City**	**Discipline**	**Outside Counsel Payment**
1. December 30, 2014	Deputy City Attorney	Upheld	N/A
2. December 30, 2014	Deputy City Attorney	Upheld/Modified	N/A
3. April 7, 2014	Nossaman LLP	Reversed	$84,567.08
4. December 5, 2013	Deputy City Attorney	Reversed	N/A
5. October 18, 2013	Foster Employment	Reversed	$24,720.50
6. September 16, 2013	Foster Employment	Upheld/Modified	$22,250
7. September 9, 2013	Ruiz & Sperow LLP	Upheld/Modified	$58,656.62
8. August 21, 2013	Nossaman LLP	Reversed	$31,962.42
9. December 11, 2012	Andrada & Associates	Reversed	$26,979.41
10. November 29, 2012	Andrada & Associates	Reversed	$15,775.65
11. November 27, 2012	Hanson Bridgett	Upheld/Modified	$47,948.39
12. June 25, 2012	Nossaman LLP	Upheld	$69,692.81
13. June 6, 2011	Bertrand Fox Elliot	Reversed	$24,923.20
14. May 12, 2011	Law Office of D. Bialosky	Reversed	$45,586.27
15. May 9, 2011	Deputy City Attorney	Upheld/Modified	N/A
16. December 8, 2010	Deputy City Attorney	Upheld	N/A
17. November 1, 2010	Deputy City Attorney	Reversed	N/A
18. June 22, 2010	Deputy City Attorney	Upheld/Modified	N/A
19. May 24, 2010	Renne Sloan	Upheld	Not Available
20. May 5, 2010	Deputy City Attorney	Upheld	N/A
21. March 29, 2010	Deputy City Attorney	Upheld	N/A
22. March 9, 2010	Deputy City Attorney	Reversed	N/A
23. January 27, 2010	Deputy City Attorney	Upheld/Modified	N/A
24. September 10, 2010	Deputy City Attorney	Reversed	N/A

B. Outside Counsel Selection Protocol

Like other cities and counties, Oakland hires outside counsel to handle legal work (1) when outside expertise is needed, (2) when the City, a City board or commission, an employee, the City Attorney or another City official has a conflict of interest, (3) when a particular matter requires dedication of resources that are not available in house, such as a major class action suit that demands full time work of one or more attorneys, or (4) when the Office lacks in-house capacity to handle the volume of legal work.

In FY 2011-12, the City Attorney established the first Request for Qualifications ("RFQ") process for outside counsel to make the hiring of outside counsel more competitive, open and transparent. Law firms and attorneys who are interested in working for the City submit a response to the RFQ, which can be found on the City Attorney's web site: http://www.oaklandcityattorney.org/.

All outside firms handling arbitrations have submitted responses to the City's RFQ and are highly qualified to work on labor and personnel matters.

The main purposes of the RFQ process are to increase transparency, save taxpayer dollars by increasing competition and open up the hiring process to a larger and more diverse pool of qualified firms and attorneys. The City Attorney's protocol is consistent with the City's policy to encourage and work with local and diverse businesses. A firm's diversity and whether it is local are factors weighed in selection of outside counsel.

IV. OVERVIEW OF DISCIPLINARY PROCEDURES.

The NSA and General Order ("GO") M-3 require that the Department investigate all misconduct complaints from any source, including complaints from OPD personnel. For complaints that are received in the field, a supervisor must conduct a Preliminary Inquiry and ensure that all relevant documentation is forwarded to the Internal Affairs Division ("IAD").

The IAD also may receive complaints directly, from members of the public, via lawsuits and the Citizens' Police Review Board ("CPRB").

The IAD Intake Section reviews each complaint and determines whether it can be resolved in Intake, whether it should be administratively closed (*e.g.*, service complaints, allegations that even if true would not violate a Departmental rule) or whether it should be referred for investigation. The IAD investigations section investigates Class I (more serious) offenses; Class II offenses are investigated or resolved at the division level unless otherwise directed by a specified Police Commander. *See* GO M-3 at 21.

Generally, the Department must complete the investigation and notify the subject officer of the proposed discipline within one year of the Department's discovery of the alleged misconduct "by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct." Gov. Code § 3304(d)(1). Otherwise, the City cannot discipline the employee. However, based on the requirements of the Monitor/Compliance Director, the City must complete its processes in a much shorter period, 180 days, unless the Chief approves an extension. *See* GO M-3.

Division-level and IAD investigators are required to make findings using the "preponderance of evidence" standard. *See* NSA § III(E)(5); Training Bulletin (TB) V-T. The lieutenant in charge of IAD investigations, the IAD captain, and sometimes the commander who oversees the IA division review the investigations before they are finalized. Currently, with one exception IAD has discretion to seek legal advice from OCA regarding investigations on a case-by-case basis before they are finalized. The Court requires that IAD forward retaliation cases for OCA review.

Once an investigation has been completed, the investigator makes the following findings regarding each charge: sustained, not sustained, unfounded or exonerated. The investigator then presents the case to the Chief of the Police Department (the "Chief") or his designee. The Chief or his designee determines whether to affirm the investigative conclusions. The Chief or his

designee also may send the case back to IAD if he or she determines that more investigation is needed.

Typically, the Chief considers discipline separately, after the investigation has concluded. In most cases, prior to imposing discipline, the Chief reviews a Pre-Discipline Report that the officer's chain of command prepares. The chain reviews the subject officer's five-year disciplinary history, the officer's two most recent performance evaluations, the Complaint Investigation Report and IAD's Report of Investigation for the current case. The supervisor, lieutenant, captain, and deputy chief, each prepare a written discipline recommendation. *See* TB V-T.

The types of discipline the Chief may propose are: counseling and training, written reprimand, suspension, fine, demotion and termination. The Discipline Matrix, contained in an appendix to TB V-T, sets out the ranges of discipline to be applied for first, second, and third violations (within five years) of each Departmental rule. The matrix was created to provide guidelines for discipline in response to the prior monitoring team's recommendations that the City have such standards. The Chief may propose discipline that falls above or below the matrix range, but he must clearly document his rationale. *See* TB V-T. The Chief also retains the discretion to waive the pre-discipline process and propose discipline without a Pre-Discipline Report. *See* TB V-T.

Once the Chief determines the appropriate level of discipline, the OPD issues a Notice of Proposed Discipline signed by the Chief or his designee. The notice advises the subject officer that he or she has been sustained for misconduct, lists the rule(s) violated, and specifies the discipline the Chief intends to impose or recommend to the City Administrator. For a suspension, fine, demotion or termination, the notice also advises that the subject officer will receive a subsequent letter notifying him or her of the date and time of his or her *Skelly* hearing. Currently, the Chief has authority to impose suspensions of four days or less, written reprimands, and counseling and training; the City Administrator must approve discipline exceeding a four-day suspension. The Court's order states that the Chief, City Administrator and all other city

officials must consult with and obtain the approval of the Compliance Director/Monitor on certain disciplinary cases. *See* July 22, 2014 order at 2; *see* also Dec. 12, 2012 order at 6.

In the case of suspensions, demotions or terminations, the Department is required by law to provide the subject officer the opportunity to participate in a *Skelly* due process hearing.[1] Prior to the hearing, the Department provides the subject officer a "*Skelly* packet" containing the materials the Department relied upon in sustaining the misconduct and recommending the discipline.

At the *Skelly* hearing, the officer may present any defenses and/or mitigating circumstances to the *Skelly* hearing officer; *Skelly* hearing officers may be captains or deputy chiefs. The *Skelly* hearing officer is required by law to independently review the matter; he/she is not acting as an agent of OPD in this capacity. The subject officers typically are represented by legal counsel provided by OPOA. Currently, the Department has discretion to invite and on a case-by-case basis invites the OCA to participate in *Skelly* hearings. There is no requirement that the OPD consult with the OCA regarding certain levels of discipline such as suspensions of 30 days or more, demotions, or terminations.

After the hearing, the *Skelly* hearing officer makes a written recommendation to the Police Chief regarding whether the sustained finding and discipline should be upheld. In some cases, the *Skelly* hearing officer asks for OCA advice regarding this determination. There are no standards or protocols regarding consultation with the OCA; and the OCA has no authority to direct the *Skelly* hearing officer regarding particular findings.

In some instances, the parties agree to settle the matter after the *Skelly* hearing. If the Chief authorizes settlement, the OCA seeks approval from the City Administrator as needed and negotiates and drafts the agreement. The OCA requires approval from the City Administrator on settlements compromising discipline exceeding a four-day suspension. The Court's July 22,

[1] A *Skelly* hearing is named after the case of *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which the California Supreme Court held that a terminated public employee has a due process right to pre-disciplinary discovery of all the "materials upon which the action is based . . . ." *Id.* at 215.

2014 order states that Compliance Director/Monitor must also approve certain discipline settlements.

For cases that are not settled after the *Skelly* hearing, the Chief reviews the *Skelly* hearing officer's recommendation and accepts, partially accepts, or rejects it. The Chief documents his decision on the *Skelly* report.

Currently, as we mentioned, OPD must present cases involving suspensions of five days or more, demotions, and terminations, to the City Administrator or his designee for approval. (Practice and policy in this respect have varied over the years depending upon the City Administrator.) If the City Administrator or his designee wishes to move forward with discipline, the City sends the subject officer a Notice of Discipline letter, signed by the City Administrator or his designee. After receiving a Notice of Discipline letter, the subject officer or the OPOA may contest the discipline through the grievance process. *See* MOU, Art. X. Several steps make up the grievance process. Step 1 provides for informal submission to the employee's supervisor and also formal submission to the Bureau Chief. In Step 2, the subject officer or the OPOA may submit the grievance in writing to the Chief. In Step 3, the employee or OPOA may submit the grievance to Employee Relations and Employee Relations may settle the grievance. Step 4 provides for conflict resolution if both parties agree. Step 5 provides for appeal to the Civil Service Board or arbitration. (The City Attorney may settle the case before the arbitration or Civil Service Board hearing.) The OPOA may submit to arbitration a grievance concerning anything from a written reprimand up to termination. The subject officer or the OPOA may elect to submit a grievance concerning a suspension, fine, demotion or discharge (but not a written reprimand) to the Civil Service Board in lieu of arbitration. The MOU provides time limits at each step of the process which may be extended by mutual agreement.

Arbitration is governed by the MOU which provides in relevant part:

> Should the grievance remain unresolved, either the City or the Association may, within fourteen (14) calendar days of the third step response, submit the grievance to an impartial arbitrator who shall be selected by mutual agreement or, if such agreement is not reached, by alternately striking names from a list of seven (7)

> arbitrators to be developed by the parties. In the absence of agreement on a list of arbitrators, the parties will request a list from the California State mediation[sic] and Conciliation Service.
>
> * * * *
>
> If arbitration is selected, it is agreed that the decision of the arbitrator shall be final and binding on all parties and that the arbitrator's fees shall be borne equally by the parties. It is expressly understood that the arbitrator shall have no power or authority to add to or subtract from the provisions of this Agreement or departmental rules or general orders; provided that, if any inconsistency between this Agreement and any of the foregoing rules or orders exists, this Agreement shall prevail.
>
> * * * *
>
> Unless otherwise agreed to by the employee, in writing, all meetings and hearings for any disciplinary mater shall be private and confidential, and shall include only the parties and exclusive representatives.

MOU, Art. X.5.C.

The City's arbitration agreement with the OPOA is typical of most labor arbitration processes in that it does not require discovery, nor does it require adherence to the rules of evidence. Not only are arbitrators therefore allowed to receive evidence that otherwise would be subject to exclusionary rules such as hearsay, some arbitrators, as a matter of policy, will receive virtually all evidence offered and will weigh it according to their judgment. *See* Kagel, *Practice and Procedure,* in The Common Law of The Workplace; The Views of Arbitrators 32 (2d ed. 2005); *Teamsters Local 251 v Narragansett Improvement Co.*, 503 F.2d 309, 87 LRRM 2279 (1st Cir. 1974). Since the MOU provides that an arbitrator's decision is final and binding, such decisions cannot be overturned except in extraordinary circumstances. The City may file a petition in civil court to vacate a disputed arbitration award, but would have the burden of proving the arbitrator exceeded his or her powers. Cal. Code Civ. Proc. § 1286.2(a)(4); *Paramount Unified Sch. Dist.. v. Teachers Ass'n of Paramount*, 26 Cal. App. 4th 1371, 1381 (1994). The Court hearing the petition can consider only whether the decision is "utterly irrational" and does not review the merits of the controversy or the weight of the evidence. *Id.*

V. THE IMPACT OF STAFF REDUCTIONS AND RESTRUCTURING TO REVERSE THOSE EFFECTS.

Staffing throughout the City has fluctuated over the years depending upon the City's financial status.

A. OCA

Major budget cuts to the OCA spanning a decade beginning in Fiscal Year[2] ("FY") 2002-2003 required that the OCA retain outside counsel to handle most arbitrations in recent years and greatly reduced the Office's staff to oversee outside counsel and in-house capacity to provide advice and counsel to OPD during the disciplinary process. While nearly all departments had cutbacks, the cuts disproportionately impacted the OCA because it has had few, if any, vacant positions. The budget cuts eliminated more than one-third of the OCA's staff: 19 attorneys and 14 support staff were laid off. The layoffs reduced the number of attorneys from approximately 50 in 2002 to approximately 30 by the end of FY 2012-2013.

To address the ongoing budget cuts, the OCA was reorganized on several occasions during this ten-year period to better serve clients and had to shift more work to outside counsel. For example, the Labor & Employment unit in the Litigation Division was eliminated and all labor and employment litigation was assigned to outside counsel. The Labor & Employment advice unit, which had four attorneys (one supervisor and three line attorneys) in 2002 before budget cuts began also was reorganized and then temporarily disbanded during the decade of budget cuts. Due to personnel issues, the unit lacked a supervisor and the OCA was unable to hire one for the period of mid-August 2011 to mid-February 2014, which led the unit to be temporarily disbanded. In the interim, one of the three line attorneys left the OCA for another position, another attorney was transferred to the Public Safety unit to advise the Police and Fire Departments, and the third line attorney was transferred to the Litigation Division to serve as the only in-house attorney handling arbitrations. At the same time, the Chief Assistant City Attorney overseeing the Litigation Division (including arbitrations at that time) was sporadically out of the

[2] The City's Fiscal Year begins on July 1 and ends on June 30.

office and on leave for significant periods of time and the attorney who was assigned to supervise arbitrations in the Litigation Division had a full case load and only two line attorneys to handle trials. These circumstances reduced the OCA's in-house capacity to handle arbitrations.

For years prior to and including the period covered by the investigation, the OCA repeatedly advised the City Council that budget cuts that eliminated attorney positions actually increased the deficit instead of saving the City dollars, because outside counsel are more expensive than in-house attorneys and less efficient given their lack of familiarity with City procedures and personnel policies[3].

In FY 2013-14, for the first time since budget cutting in this century began, the Council restored two attorneys and one support staff to OCA with the expectation that doing so would be more efficient and lower outside counsel costs. The two attorneys were assigned to the Litigation Division to handle civil jury trials and OCA was able to resume handling some labor and employment litigation in-house. Outside counsel costs dropped by almost $2.4 million in FY 2013-14, saving the City 3.6 times the total annual costs of the positions the Council added to OCA's budget that year.

This FY's budget (FY 2014-15) restored two more attorneys and one additional support staff. These attorneys joined the OCA in late October and early November of this year and were assigned to the Labor & Employment advice unit.

With the addition of the two attorneys in the Fall of 2014 and the hiring of a supervisor for the unit in February 2014, the OCA was able to re-establish the Labor & Employment advice unit. The unit now has the same number of attorneys that the City Council budgeted in 2002. These additional resources will increase the OCA's capacity to handle arbitrations in house. That said, the volume of labor and employment advice and the number of arbitrations have increased

[3] Budget cuts required the OCA to retain more outside counsel because the City Attorney has a Charter-mandated duty, among other things, to provide advice and counsel, to represent the City when it is sued, to review contracts and legislation and to represent the City in arbitrations. (*see* City Charter section 401(6).)

dramatically during the last decade. Since July 2014, the OCA has received 19 new police arbitration cases, which has continued to necessitate hiring outside counsel to handle many of these cases.

In sum, restoring staff and reconstituting the Labor & Employment advice unit are positive steps. Still, the OCA continues to be understaffed. The reconstituted Labor & Employment advice unit handles and supervises arbitrations, provides labor and employment advice to all City departments, including advice to *Skelly* hearing officers as requested by OPD, and participates in union negotiations. In light of the importance of having attorneys who handle arbitrations involved in providing advice throughout the disciplinary process (beginning at the IAD investigation stage), current staffing of the Labor & Employment advice unit remains insufficient to provide advice and counsel for all significant cases.

The Public Safety advice unit which provides the bulk of OPD's legal work including NSA compliance advice, force boards, review of OPD policies, contracts, and council reports and legislation also lost attorneys due to the budge cuts. The unit included six attorneys before budget cuts commenced and now includes a supervisor and two line attorneys who also provide advice and counsel to other clients such as the Public Ethics Commission.

B. Employee Relations Department and Police Department

The Employee Relations Department also experienced budget cuts. The director left the City and that post was vacant for nearly a year. In August 2014, the City Administrator hired a new director who has begun to hire staff. Due to the staffing issues, a number of police grievances were backlogged in the department and the OPOA has exercised its right under the MOU to bypass the department and move the grievances to arbitration. Hence, the OCA has received 19 new police arbitration cases since July 2014.

During the period covered by the investigation, the OPD received a large volume of complaints related to the Occupy Oakland protests. OPD lacked in house capacity to handle the

investigations in accord with its timelines. To comply with OPD's 180 day time line to complete investigations, OPD retained contractors to conduct a number of the investigations.

VI. REVIEW OF STATISTICS OF POLICE DISCIPLINE ARBITRATIONS.

Nationwide statistics for police arbitrations are not officially compiled. However, statistics are available from academic and news articles regarding police discipline arbitration outcomes, especially in major metropolitan areas such as Chicago, Philadelphia and Cincinnati. The City of Oakland's win-loss record for police termination arbitration over the five-year period the investigation covers are on par with or superior to the statistics reported by these sources for other cities.

In the City of Oakland, the results of the 22 police arbitration decisions covered by the investigation plus the two recent cases (December 30, 2014) are as follows: In 54% of the cases, the arbitrators upheld the City's decision to impose discipline for the violations in question and the arbitrators reversed discipline in 46% of the cases. In approximately half of the cases in which the arbitrator upheld the City's decision to discipline the officers, the arbitrator modified the level of discipline; in the other half of the cases in which the arbitrators upheld the City's decision to impose discipline, the arbitrators upheld the City's level of discipline. With respect to the ten police terminations during the period covered by the investigation, arbitrators upheld the terminations in 50% of the cases and reversed the terminations in 50% of the cases.

A seminal study of police disciplinary arbitration results in Chicago from 1990-1993 by Professor Mark Iris found that 60% of the arbitrations upheld the decision to impose discipline, 40% reversed it; of the 60% of cases that upheld the disciplinary decision, 41% upheld the level of discipline while 19% upheld the decision to discipline the employee and reduced the level of discipline.[4] In Philadelphia, an inquiry by the Police Advisory Commission in 2014 reportedly determined that in "26 cases of police officers fired between 2008 and last year for offenses

[4] Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. of Crim. L. and Criminology 215, 235 (1998).

ranging from domestic incidents and retail theft to excessive force and on-duty intoxication . . . 19 of the cops were reinstated by arbitrators," a rate of 73%. These decisions included the reinstatement of an officer "who was fired after he was captured on video striking a woman during a Puerto Rican Day Parade after-party . . . ."[5] The Pittsburgh Public Safety Director reportedly found that "in the cases where terminations were appealed by the police union through arbitration, officers got their jobs back close to 70 percent of the time . . . ."[6] A San Jose newspaper obtained 17 arbitration decisions from police misconduct cases in San Jose, Stockton, Richmond, Alameda, Sierra Madre, Oroville, Merced County and Oakland and found that "arbitrators reinstated the officer nine times, and reduced a suspension once – a reversal rate of about 59 percent."[7] An in-depth report by the *Cincinnati Enquirer* found that "[i]ndependent arbitrators ruled against the city and reinstated fired officers in 16 of the 18 cases they decided in the past 10 years."[8] In other words, Cincinnati lost 89% of arbitrations involving termination of a police officer. One of the re-hired officers in Cincinnati was subsequently involved in an incident where he used a Taser on a City Councilmember's daughter who was kneeling at the time with her hands up.[9]

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[5] Zalot, *Police Advisory Commission calls for review of arbitration process in cases of dismissed cops*, philly.com (Nov. 19, 2014), available at http://articles.philly.com/2014-11-19/news/56313268_1_police-advisory-commission-arbitration-process-kelvyn-anderson.

[6] Zimmerman, *In a Bind: Arbitration gives officers a method of fighting termination, but what recourse does the public have when they're rehired,* Pittsburgh City Paper (April 23, 2014) available at http://www.pghcitypaper.com/pittsburgh/in-a-bind-arbitration-gives-officers-a-method-of-fighting-termination-but-what-recourse-does-the-public-have-when-theyre-rehired/Content?oid=1746236&showFullText=true.

[7] Brundage, *The unfiring of a Menlo Park police officer*, Almanac (June 4, 2013) available at http://www.almanacnews.com/news/2013/06/04/the-unfiring-of-a-menlo-park-police-officer.

[8] Horn, *Fired to rehired, City's record poor when dismissals go to arbitration*, The Cincinnati Enquirer (June 29, 2008) available at http://www.cincinnati.com/apps/pbcs.dll/article?Dato=20080629&Kategori=NEWS01&Lopenr=108250002&Ref=AR.

[9] Editorial, *Re-examine police appeal system*, The Cincinnati Enquirer (Aug. 25, 2009) available at http://www.cincinnati.com/article/20090826/EDIT01/908260371/1192/EDIT/Re-examine+police+appeal+system.

In short, the City of Oakland's record on all police arbitrations over the period covered by the investigation is in line with the records described above. With respect to terminations specifically, the City of Oakland's record of 50/50 is significantly better than the average for the other large cities cited above. While there appear to be no studies by government, a commission or academic source regarding the rate of discipline reversal in police arbitrations nationwide, a recent article in *Wall Street Journal* reported:

> Police unions win reversals or modifications in more than 60% of disciplinary cases that go to arbitration nationwide, according to research by Will Aitchison, a lawyer who represents police unions and the director of Labor Relations Information System, a training firm that tracks labor trends.
>
> Mr. Aitchison said the rate is because unions go to arbitration only in rare cases, when an officer's punishment is seen as unfair. He said public pressure can cause a rush to judgment in some high-profile and controversial incidents, such as police shootings like the one in Ferguson.[10]

The article does not reveal the details of Mr. Aitchison's research, but his explanation for the high rate of reversal is not generally accepted, as discussed in the next section.

VII. ARTICLES ON POLICE DISCIPLINE ARBITRATION STATISTICS.

There appears to be general agreement in the literature on best practices in police discipline, including (1) progressive discipline using a discipline matrix, (2) department policies and procedures written in clear, understandable language, (3) consistent enforcement of policies and procedures, (4) effective supervision by front-line supervisors, and (5) effective citizen complaint reception and investigative procedures.[11]

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[10] Elinson, *Punishment of Police Under Scrutiny*, The Wall Street Journal (Nov. 21, 2014) available at http://online.wsj.com/articles/punishment-of-police-under-scrutiny-1416598682.

[11] *See, e.g., Employee Disciplinary Matrix: A Search for Fairness in the Disciplinary Process*, The Police Chief, Vol. 73, No. 10 (October 2006), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1024&issue_id=102006; D. Stephens, *Police Discipline: A Case for Change*, U.S. Department of Justice, National Institute of Justice (2011), available at https://www.google.com/?gws_rd=ssl#q=police+discipline+a+case+for+change.

Arbitration, on the other hand, is regarded as a challenge to effective and consistent discipline. The 1998 article, *Police Discipline in Chicago: Arbitration or Arbitrary, supra*, was one of the first studies to acknowledge the challenge by reviewing outcomes of the arbitration process in Chicago. The author found that "discipline imposed upon Chicago police officers is routinely cut in half by arbitrators." *Id.* at 216.[12] The author concluded that "[t]his extraordinary even-handedness of outcomes raises serious, basic questions about the propriety of the arbitration process." *Id.* In fact, the author cautioned "outside arbitration can negate the police disciplinary process . . . ." *Id.* at 222.

The article made a number of observations to explain this phenomenon in Chicago. One, however, stands out for all jurisdictions. *Id.* "[A]rbitrations center on the issue of whether or not the Department can meet its burden to convince the arbitrator that just cause did in fact exist for taking disciplinary action." *Id.* at 225. Therefore, the mindset of the arbitrator can be a predominant factor in arbitration outcomes. In other words, the obvious – albeit difficult to quantify – explanation is that the arbitrators account for these skewed results. *Id.* at 240-241. Specifically, it is in the arbitrators' self-interest to appear impartial in order to be selected to serve as arbitrators in the future. *Id.* As a result, the article reasoned, "[i]t may be that being perceived as even-handed in terms of the results of decisions takes precedence over impartiality in viewing the evidence in the various cases." *Id.* at 241. In short, the arbitrator will strive to be "fair" to both sides, which can translate to giving some relief to the officer regardless of what the evidence may show.

However, the author concluded that arbitration is not likely to be eliminated or supplanted by another process:

> Given the entrenched position binding arbitration now holds as the preferred means of resolving grievances under collective bargaining agreements, it is not clear what type of an alternative to arbitration could both feasibly be used to replace arbitration and

[12] The article described a study conducted in Houston for the period of 1985-1988 where, out of 155 arbitrations, arbitrators reversed 47 police disciplinary actions (30%), upheld 60 actions (38%) and modified 48 (31%). *Id.* at 243 & n.88.

> avoid the apparent tendency to split awards documented here. However, the current absence of viable option should not deter one from facing the very real prospect that the system now in place appears to have a very crucial drawback.

Id. at 243.

Subsequent articles appear to show a system not just geared to split decisions but one with a pronounced tendency to favor the officer over the department, particularly in cases of serious misconduct when the discipline is a lengthy suspension or termination. A 2011 article, which noted that "disciplinary decisions are frequently overturned or reduced by review boards and arbitrators, undermining the impact of discipline," quoted a study concluding that in Cincinnati "'when fired officers appeal to an outside arbitrator, they get their jobs back every time.'" Stephens, *supra*, p. 7.

A 2009 article published by the Cato Institute as part of its National Police Misconduct Reporting Project bears the title "Arbitrating Your Safety Away."[13] The article described multiple instances of serious misconduct where an arbitrator ordered the department to reinstate officers charged with, *inter alia*, pistol-whipping, brawling, punching a handcuffed suspect (on video), and threatening to arrest a woman if she did not consent to sex. *Id.*

The article also made a number of observations about the reasons that arbitration "tends to overturn decisions to fire most often and is least understood by the general public." *Id.* "The problem is that labor arbitrators have a single goal, being to find some way to resolve a labor dispute in a way that can satisfy both parties if at all possible." *Id.* "Mainly an arbitrator is concerned with whether or not the discipline was legal, whether it compares with the disciplinary history of that department for similar offenses, and whether there is any way to salvage the law enforcement officer's job with that department." *Id.* "This set of guidelines biases labor arbitrators in favor of law enforcement officers as the arbitrator is essentially looking for any reason whatsoever to overturn a disciplinary action and will only sustain it if no possible reason to overturn it exists." *Id.*

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[13] D. Packman, *Arbitrating Your Safety Away*, Cato Institute (Sept. 21, 2009), available at http://www.policemisconduct.net/arbitrating-your-safety-away/.

Nonetheless, the author of the Cato Institute article concluded, "it's nearly impossible for a local government to take the right to arbitration away from a law enforcement union under contract because the alteration of the disciplinary process must be agreed to by the union, and once they have the ability to appeal firings through arbitration in addition to other options, they never let it go and local governments cannot force them to do so." *Id.*

In 2013, Professor Iris, the author of the 1998 article on police discipline arbitrations in Chicago, returned to the subject in *Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception,* 1 Va. J. Crim. L. 540 (2013). In this article, Professor Iris argued for a public policy exception to deferential judicial review of arbitration decisions when it comes to cases involving police discipline. However, first, he assessed the present state of police disciplinary arbitrations in practice. After noting his own studies that produced "[e]mpirical findings [that] confirm the reality that from a police chief's perspective, the results of the arbitration process are not pretty" (*id.* at 543), the author singled out

> perhaps the best--or worst, depending on one's perspective--example is that of the Cincinnati, Ohio, Police Department, where outside arbitrators, over a period of several years, handed down fourteen consecutive decisions reinstating officers previously ordered discharged. It appears that in Cincinnati, the only way a discharge stayed in place was if the officer had also been convicted of a felony in criminal court proceedings.

Id. at 544 (footnotes omitted).

Moreover, Professor Iris wrote that "[a]necdotal evidence can easily be generated from many other jurisdictions to illustrate the fact that disciplinary actions, grounded in conduct which chiefs of police and presumably the public at large would find simply unacceptable, are often overturned by arbitrators." As examples, Professor Iris cited an arbitrator's decision to compel the Philadelphia Police Department to reinstate two officers who were discharged after their use of excessive force in beating three suspects was captured on video taken from a news helicopter and widely publicized. Three other officers involved in that same incident had their suspensions reduced to reprimands and a sergeant's demotion to police officer was reversed. Two San Jose

police officers were fired for failing to properly investigate an auto accident, thus covering up the intoxication of the driver, an off-duty district attorney's investigator whose husband was a San Jose police sergeant and father-in law a former police lieutenant. The officers contested the discipline, and an arbitrator concluded the penalties were too severe and reinstated the officers, reducing the penalty to a lengthy suspension. *Id.* at 544-545. Professor Iris observed that "such arbitration decisions are heartily disliked by police chiefs. They are widely perceived as undermining, compromising the chief's ability to manage the agency and ensure proper discipline." *Id.* at 546.

Articles continue to appear regularly suggesting that police officers use arbitration to avoid discipline to the detriment of public safety. On December 2, 2014, the Atlantic magazine published an article entitled "How Police Unions and Arbitrators Keep Abusive Cops on the Street," providing numerous examples, including the arbitrations in Oakland of police officers Hector Jimenez and Robert Roche fired by the Oakland Police Department both ordered reinstated by an outside arbitrator.[14] This article advocated abandonment of arbitration of police discipline altogether:

> Because good police officers and bad police officers pay the same union dues and are equally entitled to labor representation, police unions have pushed for arbitration procedures that skew in the opposite direction. Why have we let them? If at-will employment, the standard that would best protect the public, is not currently possible, arbitration proceedings should at a minimum be transparent and fully reviewable so that miscarriages of justice are known when they happen. With full facts, the public would favor at-will employment eventually.

Id.

In the same vein, on November 28, 2014, a contributing author to Forbes magazine wrote:

> What can be done about excessive police power? I'd propose a few reforms. First, remove collective bargaining for police officers

[14] C. Freidersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street,* The Atlantic (Dec. 2, 2014) available at http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/?single_page=true.

> entirely. They should be employed at will, and should be able to be fired without any arbitration whatsoever. Workplace protections can be good for workers, but retaining the public's trust in the police is far more important than making police officer be a nice job for someone.[15]

Nonetheless, there is no basis to expect that studies and articles severely critical of arbitration of police discipline will realistically lead to any change in its prevalence. Indeed, Professor Iris's 2013 attempt to find a public policy exception to deferential review of police arbitration outcomes demonstrates acceptance that the arbitration process is here to stay. Given these circumstances it is incumbent on the City of Oakland to make every effort to level the playing field and ensure the best possible results from police arbitration proceedings.

VIII. ISSUES IN POLICE DISCIPLINE ARBITRATIONS.

Arbitration is a negotiated term of the MOU between the City and the OPOA, and officers must and should be afforded this process before the City terminates, suspends or demotes them. However, based on review of police discipline arbitrations for the period covered by the investigation, there are a number of issues that have negatively impacted the City's ability to obtain arbitration outcomes upholding police discipline and that should be addressed. We y identify such issues in this section and in the next section recommend measures that should help ameliorate them.

A. Internal Affairs Investigations Provide the Record for OPD to Utilize in Arbitration Hearings to Establish Just Cause for Discipline.

The record utilized by the attorneys for the City of Oakland in arbitrations is limited to the evidence developed by the OPD as set forth in IAD's report of the investigation ("ROI"). As a matter of due process, all facts and evidence relied on by the official imposing discipline must be provided to the officer in the *Skelly* letter giving the officer notice of the proposed disciplinary action and at the *Skelly* hearing that follows the imposition of discipline. The practical

[15] A. Ozimek, *Making The Police Less Powerful*, Forbes (Nov. 28, 2014) available at http://www.forbes.com/sites/modeledbehavior/2014/11/28/making-the-police-less-powerful/.

consequence of this principle is that the City cannot use any evidence obtained after the *Skelly* hearing to support cause for discipline. If the City uncovers "new" evidence, it must re-*Skelly* the officer, and begin the process anew. Although state law requires that the City complete the investigation and notify the officer of the disciplinary decision within one year of the Department's discovery of the misconduct[16], the policies OPD adopted based on the NSA require that the Department complete its processes in half that time, namely, 180 days.

Some of the arbitration decisions covered by this investigation have noted deficiencies in IAD investigations and reports. IAD investigators are sergeants in the OPD who are assigned to this unit as a detail following which they return to the general duty population. Although the assignment to IAD can be for up to six years, assignments generally last two to three years. IAD investigators initially may face a learning curve to develop the expertise to conduct investigations of alleged police misconduct, collect and document all relevant evidence, and prepare an authoritative written report. Accordingly, IAD investigators sometimes may not "lock down" a witness's testimony with a sufficiently comprehensive examination, including follow-up questions, to make it more difficult for the witness to change his/her testimony at the arbitration hearing.

Due to staff reductions in the OPD and the OCA and the 180-day timeline to complete investigations, it has been challenging to coordinate schedules to allow for completion of the draft ROI and review by the OCA. Consequently, OCA provides advice and reviews ROIs upon OPD's request, on a case-by-case basis. Tightly crafted ROIs are important because ROIs are an important building block of evidence to support the discipline in arbitrations. Additionally, IAD utilizes ROIs to make presentations to the Executive Force Review Board ("EFRB"), and may utilize the ROIs in presentations before the Force Review Board ("FRB") depending on the seriousness of a use of force incident. FRB and EFRB, among other things, make determinations

[16] Government Code section 3304(d)(1) prohibits discipline of a police officer if the investigation of alleged misconduct is not completed within one year of discovery by the person authorized to initiate the investigation. However, the City requires that the investigation be complete within 180 days.

whether the use of force complied with OPD policy, and these findings may be presented in arbitration proceedings.

Additionally, as we stated earlier, the OCA remains understaffed. As it stands, even if the OPD provides all draft reports to the OCA regarding significant alleged misconduct, the OCA currently lacks capacity to timely review all such draft reports and also lacks capacity to have the Labor & Employment advice attorney who would handle potential arbitration review the ROI and consult with OPD from the outset of the IAD process.

B. OCA Attorneys Are Not Consistently Involved Early and at All Critical Phases of the Disciplinary Process.

When IAD initiates an investigation of an officer, OPOA provides an attorney who represents and advises the officer during interviews and during the *Skelly* hearing. By contrast, because of staffing levels, OCA attorneys in consultation with the Police Chief agreed to attend *Skelly* hearings only for priority cases and other cases as requested by the Chief.

The OPOA conducts a thorough investigation and continues to investigate on the officer's behalf after the ROI issues and the *Skelly* hearing is conducted, right up until the arbitration hearing. This asymmetry affords the OPOA the opportunity to exploit any ambiguity or other issues in the evidence collected by the IAD investigator and/or any issues in the report. For example, in a number of arbitrations, OPOA has presented witnesses who were able to credibly change the version of the events they communicated to an IAD investigator, because the interview had not sufficiently pinned down the witness's recollections and statement.

C. Timelines for Assignment of Arbitrations to Counsel.

Based on City Attorney's internal review, due to insufficient staffing and personnel issues, timing of assignment of arbitrations to counsel was not optimal in some cases. In all cases except possibly one, timing of the assignment does not appear to have been a factor in the outcome of the arbitration. In that non-termination case, which did not involve use of force by the officer, longer lead time would have allowed counsel more time to prepare. However, the arbitrator's decision noted that the parties were thoroughly and competently represented by their respective advocates throughout the hearing.

As we discussed earlier in this report, the insufficient staffing issues have been partially addressed by hiring a supervisor for the Labor & Employment advice unit and two line attorneys. The supervision issues have been addressed by hiring a new Litigation Division Chief Assistant City Attorney who oversees arbitrations and by hiring a new supervisor for the Labor & Employment advice unit who supervises arbitrations. The individuals who were in charge of overseeing and supervising arbitrations during the period under investigation no longer are involved.

Outside counsel need more time to prepare than in-house attorneys, because outside counsel are less familiar with OPD policies, procedures and personnel and with City government generally. In fact, there often is a loss of efficiency in assigning arbitrations to outside counsel, because they rely heavily on supervision by OCA attorneys for information and support during the preparation process and the hearings.

D. The OPOA Has No Obligation to Disclose Witnesses and Evidence Prior to the Arbitration Hearing.

Thorough preparation for arbitration hearings is critical because the pre-trial discovery and disclosure available in ordinary civil litigation are not required in arbitration under the MOU with the OPOA. The OPOA is not obligated to disclose witnesses, including expert witnesses, or the exhibits that it intends to present at the arbitration hearing. On the other hand, the City has a legal duty to disclose all evidence, including any expert witness reports, that it relied upon to make its disciplinary recommendation, prior to the *Skelly* hearing[17]. The absence of a pre-hearing disclosure and discovery requirement amounts to one-sided discovery in favor of the disciplined officer and the OPOA, because the City cannot supplement evidence after the *Skelly* hearing. Since this limitation does not apply to the subject officer and the OPOA, the City must conjecture which witnesses or other evidence will be presented by OPOA and may face a surprise witness or other evidence at the arbitration hearing, while the sum total of the City's evidence has long been disclosed. Notwithstanding thorough preparation, the OPD and OCA

[17] At the hearing, the City can present expert testimony to corroborate/bolster its position or rebut OPD's evidence/testimony.

too often are speculating and developing a hypothesis regarding some of the testimony and witnesses OPOA will present.

E. The Arbitration Selection Process May Lead to Selection of Arbitrators Unknown to the OCA Who Are Unfamiliar with Police Discipline Cases.

The arbitration selection process set forth in the MOU may lead to designation of arbitrators who are *not* familiar with police discipline. Under the MOU, the OCA and OPOA obtain seven names of labor arbitrators from the California State Mediation and Conciliation Service.[18] Each side strikes one name after another in turn, which can lead to the least known arbitrator being selected. Prior to the striking process, the OCA exercises due diligence to learn the arbitrators' history but may not be able ascertain how or if the arbitrator has handled cases involving police discipline.

F. Arbitrators Often Are Reluctant to Impose Severe Discipline.

There is a systemic bias "toward the middle" in labor arbitration. Neutrals are dependent on future selection by the parties (as opposed to the lifetime appointment of federal judges or 12-year terms of state court judges). Arbitrators who are perceived as leaning to one side or the other will likely be stricken by the side that perceives a philosophical bias. Arbitrators can be effectively "blackballed" in areas of the law when the same parties and the same law firms appear repeatedly. On that score, the law firm of Rains Lucia Stern has represented the disciplined officer in every arbitration with the City of Oakland referenced in this report, from 2010 to the present. In fact, the firm states that it "represents several thousand peace officers throughout California as members of law enforcement labor associations . . . ."[19] Thus, Rains

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[18] The California State Mediation and Conciliation Service ("CSMCS") is a service of the California Public Employee Relations Board. According to its website, "[t]he service maintains a list of qualified private arbitrators and handles requests from labor and management parties for arbitration lists. Upon mutual request by labor and management, for a nominal fee, the Service provides a list of arbitrators with experience in labor relations." *See* http://www.perb.ca.gov/csmcs/smcsoffices.aspx. Very few of the decisions of arbitrators on the SMCS list have been published. *See* http://www.perb.ca.gov/csmcs/arb/arblistweb.aspx. As set forth above, the MOU requires arbitration proceedings to be confidential.

[19] *See http://www.rlslawyers.com/practice-areas/peace-officers/#.*

Lucia Stern is in a position to ensure that arbitrators perceived to be unfavorable to officers are not selected throughout the state.

In addition, commentators have observed that arbitrators in general seek to appear as neutral as possible as a point of professionalism, as well as to encourage parties to retain them. These tendencies lead to "split the baby" outcomes. In particular, arbitrators are reluctant to uphold termination of a police officer, recognizing that this outcome ends the officer's career. Generally speaking, the arbitration system is designed to resolve any questions or doubts in favor of the employee who has a property interest in his or her job. Arbitrators therefore typically feel an obligation to preserve an officer's job if at all possible and therefore uphold termination or significant discipline only in egregious cases.

G. Arbitrators May Use the Wrong Standard of Proof.

The NSA prescribes a "preponderance of the evidence" standard for police discipline following a citizen complaint. NSA, Section III, Task 5. Yet, in some decisions, arbitrators have ignored the NSA and applied a "clear and convincing evidence" standard on the ground that this standard is customary in labor arbitrations when the discipline is severe (*see* Footnote 21.) or that the NSA standard of proof is limited to cases involving citizen complaints. (*see* Footnote 21.)

H. The City May Have Difficulty Demonstrating That the Discipline Imposed Is Consistent with Discipline Imposed Previously in Similar Situations.

Consistency of discipline is a significant factor in arbitration outcomes. Consistency is required by the NSA (*see* Section X, Task 45) and is a principle of basic fairness in police discipline. *See Employee Discipline Matrix: A Search for Fairness in the Disciplinary Process*, *supra* ("like penalties for like offenses in like circumstances"). However, City does not have a fully effective method to demonstrate that discipline imposed in a particular case is consistent with discipline imposed in similar cases. The OPD uses a discipline matrix which is an accepted mechanism to establish consistency of discipline. *Id.* The matrix sets forth a range of discipline based on the class of offense and repeated instances of the same class of offense. However, the

range of discipline is quite broad, especially for more serious offenses. For example, in an excessive use of force case, the prescribed discipline may be anything from counseling to termination.

In addition, due to frequent changes in City Administration (Employee Relations, City Administrator, Police Chiefs and other staff) as well as understaffing due to budget cuts, the City sometimes has not taken into account historical records of discipline in determining levels of discipline and has not developed a strategy to address disparate treatment claims based on such historical records of discipline. This makes the City vulnerable to disparate treatment claims by the OPOA, as occurred in one of the arbitration decisions covered by the investigation[20]. In that case, the City was not able to refute testimony that no other officer had been terminated for the violation in question or persuasively demonstrate the rationale for the higher level of discipline.

Another disparate treatment issue that can derail discipline is the claim that an officer was singled out because the City did not investigate other officers for similar conduct or because the City imposed discipline only on low level officers as opposed to supervisors and commanders.

I. The Pre-Discipline Report Is Used to Demonstrate Inconsistency.

The record often provides the basis for the arbitrator to "split the baby" or reverse discipline because of inconsistency in the disciplinary recommendations by supervisors and others in the chain of command up to and including the police chief. The *Skelly* officer may disagree with the proposed discipline altogether – as occurred in one of the decisions covered by the investigation – or may recommend a different level of discipline as set forth in the *Skelly* letter. The *Skelly* officer's role is to provide an independent review of the proposed discipline, not to support the OPD's position.

This issue is particularly acute with respect to the Pre-Discipline Report, which calls for an investigated officer's supervisor, lieutenant, captain and the Chief to recommend discipline in writing for officer misconduct. The report was designed to hold officers in the chain of

[20] We provide a separate confidential letter regarding the cases in point due to the confidentiality of these personnel decisions.

command accountable, but it has become a vehicle for OPOA to demonstrate inconsistency in discipline, providing a basis to reduce the level of discipline or to reverse it. Typically, the supervisor recommends the lowest level of discipline and the Chief recommends the highest. However, the immediate supervisor is less likely than higher level officers to appreciate the consequences of inadequate discipline with respect to civil suits, compliance with the NSA, and/or public trust. The Pre-Discipline Report can become a featured arbitration exhibit for the OPOA to highlight that officers in the chain of command did not agree with the level of discipline the Chief recommended. The OCA advised against instituting this practice before it began. In general, there are too many layers of written review in OPD disciplinary procedure, which creates an opportunity for inconsistencies.

J. Some OPD Policies and Work Rules Are Not Sufficiently Clear, Comprehensive and Consistent.

The OPD is rule driven. There are many policies, procedures and general orders governing nearly every aspect of the Department's activities. The OPOA sometimes argues that the absence of a specific policy is a basis to reverse discipline. Claims of inadequate notice of or training on policies and procedures also can be a stumbling block. For example, in one of the cases covered by the investigation, testimony revealed that officers had not been provided training regarding standards and procedures.

Given the many policies, rules and general orders, there are arguments that some OPD policies and rules are ambiguous, incomplete or inconsistent with other policies, and that some policies are outdated and should be repealed. This makes the City vulnerable to findings by the arbitrator that the officer did not have adequate notice of the rule that was violated or training. The OCA and OPD have worked together to prioritize review and revision of a number of policies, particularly those that have been scrutinized under the NSA and those that have proved to be problematic in upholding discipline. However, the OPD has myriad policies and the OPD and OCA lack sufficient staff to review, update, amend, and repeal them as appropriate and provide officers training regarding the myriad policies.

K. Sometimes Levels Of Discipline Are Imposed That Are Unlikely to Be Upheld in Arbitration.

OPD has been subject to criticism by the Compliance Director/Monitor that historically the level of discipline imposed has been too lenient. The NSA requires that the City consult with the Compliance Director before imposing certain discipline and before settling the OPD civilian and sworn officer grievances of discipline. An assessment of the likelihood that the City will prevail in an arbitration based on the state of the evidence should be a major factor in the imposition of discipline and the decision whether to settle a case. Of course, the OPD should impose strict penalties in areas when it believes it has been too lenient in the past, including with regard to settlement. However, to provide the best record, testimony and arguments to sustain changes in historical levels of discipline for particular violation, OPD, OCA and ER and the City Administrator need to routinely coordinate this process and with an eye toward the posture in arbitration. The City's objective of effective and consistent discipline is not served if arbitrators reverse discipline; such reversals may become setbacks in terms of both efficacy and consistency and encourage the OPOA to take more matters to arbitration.

IX. RECOMMENDATIONS FOR FUTURE INVESTIGATIONS AND ARBITRATIONS.

While the challenges outlined in the previous section are significant, the City believes the following ameliorative measures are indicated and will help to address the shortcomings and imbalances in the current process that may affect arbitration outcomes. This is not to say that these recommended measures will dramatically change future outcomes or necessarily would have changed the results of recent arbitrations. In particular, we discuss in our confidential letter regarding the decisions covered by the investigation, how the arbitrator's decision in the Roche case which triggered the investigation was not based on an unreasonable evaluation of the key evidence before him. However, we offer the following recommendations to solve particular challenges that arise in the disciplinary process beginning with IAD and up to and including the

arbitration hearings of police officer grievances of disciplinary determinations. If implemented, we believe the recommendations will improve the win-loss record in future arbitrations while preserving due process for officers.

A. The IAD Should Have a Civilian Commander and Some Permanent Civilian Investigators.

As we discussed, currently IAD is a temporary assignment; most officers and commanders of the IAD rotate out of IAD after two to three years even though OPD policy allows them to remain in IAD for up to six years. Ideally, IAD should be a six-year assignment so that officers do not rotate out of IAD around the time they have finely honed their skills. To provide incentives for officers to rotate into IAD for six years, they should be provided with opportunities for advancement and enhanced compensation. In other words, IAD would function as a specialized, elite unit. This unit also would benefit from assignment of a civilian commander with arbitration experience who could provide direction, training and guidance regarding employment investigations that feed into arbitration proceedings[21]. The unit also would benefit from including some civilian investigators who are permanently assigned to IAD. Implementation of this recommendation would increase investigators' level of expertise and skill and experience and reduce the turnover that currently impacts the effectiveness of the process. Having a civilian commander also would help to address the issues flowing from turnover by providing long term consistency and continuity of leadership of IAD.

B. OCA Attorneys Should Provide Guidance in All Significant IAD Investigations and *Skelly* Hearings.

Ideally, the OCA should have sufficient in-house staff so that it can be involved in the IA process from the beginning, just as OPOA is on its side for the officer. This is particularly important for significant discipline and high profile cases when there is a potential for termination after a first offense under the Disciplinary Matrix. The OCA should provide guidance in the investigation, review the report before it is finalized, and represent the City at the

[21] Pursuant to the City Charter, any civilian commander who is also an attorney would not and could not serve as an attorney. The OCA provides legal counsel to commanders and the Department.

Skelly hearing and the arbitration. Ideally, the same OCA attorney should be involved in a particular IA case from inception through the conclusion of the arbitration. Attorneys who handle the arbitrations will be more likely to spot and follow up to address deficiencies in the record as they will always have their mind's eye on the potential hearing. This practice also would familiarize attorneys with the cases from inception as opposed to when they are presented to OCA for arbitration; this will help to put the OCA's attorneys on an equal footing with the OPOA's attorneys when arbitration occurs.

This level of involvement is not possible with current OCA staffing levels. To properly review a pending investigation, a staff attorney needs to spend a number of hours reviewing evidence and interviews for the case, additional hours communicating with the investigator, and more hours following up. Due to the attorney's resulting familiarity with the case, there would be time savings at the back end if the case goes to arbitration. However, there would still be a substantial increase in the overall time the OCA spends on OPD matters. For the Labor & Employment advice unit to undertake this role, at least four additional OCA attorneys would be required. Under the current staffing, the Public Safety advice unit, which does not represent the City in arbitrations, handles advice and review of IAD investigations with one supervisor and two line attorneys. This staffing is insufficient to allow handling of all significant IAD cases.

In the meantime, to use OCA attorneys' time efficiently, a protocol should guide how the case is presented to the attorney. For example, IAD's interviews of subject officers and witnesses should be transcribed to enable efficient and effective OCA review. The protocol should be clear regarding the types of IAD cases that require OCA review, the point in time when the OCA becomes involved, and the amount of time necessary to allow for OCA review.

C. IAD Investigators Should Receive Increased Training.

IAD investigators could benefit from more training in interviewing techniques that enable an investigator to "lock" the subject into his or her story and create a solid record, in a process very similar to taking a deposition. Interviews are in fact the closest thing to depositions in

arbitration proceedings. Some of this training will happen automatically if the OCA takes a larger role in the investigative process generally and starts working directly on certain investigations, particularly if the recommendations we made regarding the IAD are implemented (*see* Section IX(A)). However, foundational and periodic training will still be necessary.

D. When a Force Review Board Is Involved, IAD Should Make Only Factual Findings

In several cases, the arbitrator noted that IAD found no violation, while the Force Review Board found a violation. Similarly, in several cases the arbitrator noted that the chain of command could not agree on the level of discipline. Such internal disagreements on the record make arbitrations more difficult and are simply unnecessary. For use of force cases when a force review board is involved, IAD should make factual findings only and should not opine on whether the facts amount to a violation.

E. Additional In-House Attorneys and Employee Relations Department Staff Should Be Hired to Handle Disciplinary Cases and Handle Arbitrations.

The OCA has already taken steps in this direction by reestablishing the Labor & Employment advice unit, which was disbanded during staff reductions, and is now staffed with a supervising attorney and three line attorneys. As a result, more arbitrations will be handled in-house. However, to handle virtually all police arbitrations in-house with adequate time to prepare for each arbitration would realistically require hiring four additional Labor & Employment advice attorneys. This higher staffing level is necessary because the Labor & Employment unit provides labor and employment advice to each of the City's departments, participates in labor negotiations, and handles arbitrations related to the City's other bargaining units. In addition, the number of grievances has skyrocketed as evidenced by the 19 arbitration cases that OCA received since July 2014.

The OCA has already established a practice of designating an attorney to prepare for arbitration no later than two to three months before the scheduled arbitration, given that attorneys have many cases to coordinate and given the logistics of OPD witness availability.

The Employee Relations Department lacked a director for many months due to personnel issues that resulted in the position being vacated. Additionally, the department lacked sufficient staff to closely oversee and review grievances, assist the OPD and other departments and the OCA by providing historical statistics regarding discipline, and oversee bargaining and MOU negotiations. The City has already begun to address this issue. In August 2014, the City Administrator hired a new director and that director has begun to fill vacancies in the department. Additional staff will be necessary to enable the department to track all significant discipline, handle negotiations and bargaining and other duties.

F. The City Should Establish a Protocol to Track Status of Cases.

The OCA and other City departments involved should implement a tracking system enabling the OPD and OCA to ascertain the status of any case after an investigation has been commenced and to follow up as required.

G. *Skelly* Officers Should Receive Increased Training.

Skelly officers, whose function is to independently review the record, would benefit from more guidance and regular training regarding their responsibilities to ensure that their recommendations are invariably sound and well-reasoned. A contrary conclusion by an OPD *Skelly* officer significantly decreases the likelihood that discipline will be upheld in arbitration.

H. The Arbitrator Selection Process Should Be Amended.

In the upcoming MOU negotiations, the City should seek agreement to a settled list of arbitrators who will hear and decide cases by rotation. In the 1990s the OPOA MOU included a list of agreed upon arbitrators as did the firefighters MOU. The MOU for sworn fire personnel continues to have such a list of agreed upon arbitrators. Arbitrators selected by this process are more likely to build a base of knowledge about police discipline and will be less timid in their rulings. This modified arbitrator selection process will not entirely eliminate the arbitrator's incentive to make "split the baby" decisions in order to be included in the next MOU, but an agreed upon list could mitigate this issue.

I. The Arbitration Guidelines in the MOU Should Be Amended.

The City should seek an amendment of the MOU that would require the arbitrator to sustain the discipline the City imposed if the facts and law support the discipline and the discipline is consistent and reasonable. Such provisions would lessen the ability of an arbitrator to come to any decision that he or she deems suitable, including a "split the baby" decision. In other words, this provision would require that the arbitrator uphold the level of discipline the City imposed if the City satisfies the preponderance of the evidence standard, there is no evidence of disparate treatment, and the City's level of discipline is reasonable and consistent with progressive discipline.

J. The MOU Should Be Amended to Entitle Both the City and the OPOA to Witness Lists and Exhibits and to Provide a Preponderance of the Evidence Standard of Review

The MOU should be amended to provide that *both* sides are entitled to receive, upon request, the other side's witness list, including experts and exhibits, to mitigate the evidentiary advantage currently afforded OPOA; and the MOU should be amended to explicitly state that the preponderance of the evidence is the standard of review.

K. The Court Might Issue An Order Requiring "Preponderance of the Evidence" Standard of Proof.

The Court should consider issuing a supplemental order to the NSA that specifically states that the "preponderance of the evidence" standard of proof applies to discipline in all arbitration proceedings, including termination cases. This would clarify that the "preponderance of the evidence" standard is not limited to citizen complaints and is not overridden by any policy or practice in other labor arbitrations.

L. The City Should Routinely Compare Proposed Discipline to Past Cases

In imposing discipline, as a matter of routine, OPD, ER and the City Administrator should review similar cases from the last three to five years to make sure that the discipline is similar to cases with similar facts and similar levels of aggravation and mitigation. The OCA

should be aware of this information when it provides advice during the disciplinary process and the City should coordinate and develop testimony to address this issue. OPD also should review its practices in terms of providing notice and training in the subject area. And OPD should consider whether the City is vulnerable to a disparate treatment claim on the ground that City did not investigate or discipline other officers who committed the same or similar acts, or on the ground that the City imposed discipline only on low level officers as opposed to managers and commanders. These are issues that OPOA has raised in arbitration and at *Skelly* hearings.

Of course, the City is not bound forever to its past practices or policies. But, the City must be aware of and take into account its history, in order to present to the arbitrator a convincing basis for changing its policy or practice and to demonstrate that officers have been given notice of the new standard and provided appropriate training.

M. The City Should Improve Its Discipline Tracking System.

The discipline tracking system should be reviewed so that it is more useable by ER, OPD and attorneys conducting arbitrations. One option to improve the tracking system would be for Employee Relations to maintain a searchable database that records all instances when discipline was imposed and sustained, whether or not the matter went to arbitration.

N. The OPD Should Discontinue Use of the Pre-Discipline Report and Instead High Level Commanders Should Make Disciplinary Recommendations.

The OPD should eliminate use of the Pre-Discipline Report. Instead the OPD should adopt a model under which high level commanders serve as the "discipline officers," i.e., make disciplinary recommendations. The high level commanders would obtain appropriate feedback on discipline from the subject's chain of command and then make a recommendation directly to the Chief after considering those opinions and historical levels of discipline.

O. The OCA Should Review Significant New OPD Work Rules before Implementation.

The City should adopt a protocol that requires that the OCA review, comment and potentially revise significant new OPD rules such as the pursuit policy or crowd control policy, before they are implemented. The City also is considering retaining Lexipol, which provides customizable model police policies based on federal and state statutes, case law, regulations, and best practices. To provide sufficient in-house support to review these work rules and policies and procedures, the Public Safety advice unit would need one to two additional attorneys.

P. The Employee Relations Department Should Review Proposed Discipline at Step 3.

Ideally, the City's Employee Relations Department ("ER") should provide detailed review of discipline at Step 3. ER also is best positioned to make a record of discipline in similar situations. However, increased involvement by ER would require additional staffing in that department. As it stands, ER does not have enough analysts to conduct such a review of police discipline matters along with all the department's other work.

Q. Settlement Decisions Should Be Made by City Officials

The City should have the freedom to settle cases when it is in the best interest of the City to do so, notwithstanding the recommendation of the Compliance Director/Monitor against settlement. In other words, the City should return to its former practice of settling cases when there is a significant probability that discipline will be reversed in arbitration in whole or in part. If necessary, the matter should be taken up with the Court under the dispute resolution procedure, so that City has the opportunity to present to the Court the rationale and evidence.

X. CONCLUSION.

Reviewing police discipline arbitration statistics and the many articles pointing out the puzzling outcomes in some arbitrations, it may seem that the City like so many other municipalities is stuck with a broken system. The City does not share this view. With the

improvements that we recommend regarding the City's internal procedures and the changes to the MOU that we propose, we are confident that the City will have an arbitration process that is fair and acceptable to OPD officers and employees, the OPOA, the City and the people of Oakland. As we observed, binding arbitration has been a longstanding component of the police disciplinary process for most municipalities. This is as it should be given the importance of protecting public employees' jobs unless the City demonstrates by a preponderance of the evidence that disciplinary action is warranted. Likewise, the employees, unions , the City and the people of Oakland have a clear and grave interest in holding officers accountable for misconduct to protect the citizens they are sworn to protect and serve. The City Administrator, the OCA and the Police Chief are pleased to submit this report as an important beginning step towards that objective.

Dated: January 19, 2015

Barbara J. Parker
City Attorney

Dated: January 19, 2015

Henry Gardner
City Administrator

Dated: January 20, 2015

Sean Whent
Police Chief