Second Report of the Court-Appointed Investigator in

Delphine Allen v. City of Oakland

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March 21, 2016

I. EXECUTIVE SUMMARY

Much has changed in the year since my team and I filed our first report on police discipline in Oakland. For the most part, the developments are encouraging, although the City needs to make additional changes to improve its police discipline process. But most importantly, the City must take substantial steps to ensure its positive progress is sustained after the conclusion of this litigation.

The good news is that the Oakland Police Department ("OPD" or "the Department") and the Oakland City Attorney's Office ("OCA") have begun to work as a team on police discipline cases, rather than pointing the finger at each other for breakdowns in the discipline process. Attorneys from the Labor and Employment Unit of OCA are now involved in discipline cases from their initiation to their conclusion, providing the Department with support and guidance throughout. OPD has established procedures to ensure that Skelly hearings are more consistent and that hearing officers are better trained. The problems with Oakland's hiring of outside counsel to represent the Department in arbitration – including OCA hiring outside attorneys too late in the process and hiring attorneys with little or no prior experience in police discipline arbitrations – have not recurred in the year since our first report. Both OCA and outside counsel have done a better job representing the City in arbitrations, although two of the more serious cases have resulted in losses. And OPD is putting in place a much more robust and responsive system to update and continuously improve the internal policies that govern the conduct of its officers.

However, work remains to be done to implement the recommendations from the first report. Specifically:

- The Department needs to consider thoroughly whether supervisors, and not just officers, should be disciplined when something goes wrong.

- OPD and OCA need to encourage investigators, supervisors, attorneys and others to recommend improvements to OPD policies, procedures, and training, and to track and implement recommendations that raise legitimate concerns.

- OPD's discipline decisions remain vulnerable to attack at arbitration when OPD cannot prove that officers have been trained on the conduct that is the subject of the discipline. This can be improved with better tracking of which officers have been trained and of the content of that training.

- OPD's discipline decisions also remain vulnerable in response to allegations that the Department did not adequately consider punishment in similar prior cases before imposing discipline on a given officer. The City must be prepared to demonstrate at arbitration that the Department considered comparable discipline in appropriate cases in order to rebut charges that discipline is arbitrary or disproportionate.

- While OPD employed a civilian supervisor in the Internal Affairs Division ("IAD") as was recommended in the first report, it is not clear that position is being used for its stated purpose: to support continuity in IAD. If the Department continues its practice of rotating the sworn commander of IAD on a regular basis, it needs to take steps either through the civilian supervisor or through other means to ensure that the high turnover in that position does not result in a loss of institutional memory.

- OCA and the City need to continue to press for improvements in the police arbitration process. Both the City and the Oakland Police Officer's Association ("OPOA"), which represents officers, would benefit from sharing discovery and witness lists before arbitration. They would also be better off with a fixed panel of arbitrators rather than receiving lists generated with each new arbitration that need to be winnowed down to the few arbitrators that both sides feel are sufficiently experienced and balanced.

- Finally, while OCA has made significant strides in improving the way it supports OPD in the investigation and prosecution of specific discipline cases, it remains deficient in its overall support of the Department. OCA has not properly fulfilled its role as "general counsel" to the Department. The Department often feels it gets little guidance from OCA on policy matters, and that guidance frequently is of limited value or comes too late to be of use. Our review of communications between OPD and OCA bears this out. OCA should continue to support OPD on discipline investigations and arbitrations, but OPD should have its own internal counsel who reports to the Chief and advises on policy, training and other matters.

Once these outstanding issues are addressed, the City of Oakland will have a much stronger police discipline system. The question then becomes what can be done to ensure it stays that way.

Time and again it has taken the Court's intervention to get the City to take necessary steps to improve police discipline. Before the Court ordered the first investigation, little was being done by the City administration, OPD or OCA to fix the City's broken police discipline system. After the Court issued its order, the City took steps to improve its discipline process.

The same is true with sustainability. Before the Court ordered the second investigation, the City's leadership had done little to ensure that changes to the discipline process would last. After the Court issued its order, the Mayor, the City Administrator, and City Council all took some action to require greater accountability by OPD and OCA regarding police discipline.

While it is heartening that the City responded to the Court's orders about police discipline, it is not encouraging that it takes Court orders to trigger the necessary changes. Given that pattern, the question is how the Court can have confidence that the City will carry on the hard work of maintaining an effective police discipline process when the Court is no longer supervising the City and OPD.

To support the City's efforts to make the changes sustainable, we offer the following recommendations:

- The City should commit to fund two crucial attorney positions within OCA that currently support OPD in its discipline investigations and arbitrations. One of these is the position of the Deputy City Attorney assigned to provide OPD advice in its discipline investigations and assistance or representation in arbitrations. The other is the Deputy City Attorney who oversees the Labor and Employment Unit and who is most directly responsible for supervising OCA's support to OPD on police discipline issues.

- The Mayor, City Administrator and City Council should require regular reporting by OPD and OCA on key issues involving police discipline, including reports about how OCA is supporting OPD in discipline matters, how the City is faring in police discipline arbitrations, and what other important issues are arising in the discipline process.

- The Mayor should disseminate information on police discipline on a regular basis to inform the public about the City's efforts to enforce discipline in a fair and effective manner.

- In its regular audits of OPD policies and practices, OPD's Office of Inspector General ("OIG") should include some key metrics to ensure the Department is upholding high standards for discipline.

The City, through its administration, the Department, or OCA may have additional proposals for how to make the improvements to police discipline sustainable. We urge the City to take whatever steps it believes are necessary to ensure that all of the hard work it has done to strengthen its system of police discipline will outlast the Court's supervision.

II. BACKGROUND

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*., C00-4599 TEH. In the NSA, the City and OPD agreed to enact an extensive list of tasks and policy reforms to improve operation of the Department, including several tasks directed at improving the police discipline process. The Court appointed a Monitor to ensure ongoing compliance with the NSA's provisions.

On August 14, 2014, the Court ordered an investigation regarding police discipline in Oakland. Dkt. No. 1015. On August 20, 2014, the Court appointed me to serve as investigator for that purpose. Dkt. No. 1017. On April 16, 2015, I filed my report (the "First Report"), which included factual findings and recommendations regarding police discipline in Oakland. Dkt. No. 1054. The report included 19 recommendations that OPD, OCA, and elected officials in Oakland could implement to improve police discipline and sustain the City's progress.

Following my report, the Court ordered the City to file a report by September 1, 2015, and subsequently ordered the City to file quarterly reports discussing the City's progress on improving its disciplinary system. Dkt. Nos. 1055, 1071. The City complied, filing progress reports on September 1, 2015 and December 22, 2015. Dkt. Nos. 1066, 1078. The progress reports stated that every recommendation from the First Report was either implemented or scheduled for implementation.

However, on January 26, 2016, the Court found that "the descriptions of the steps the City has taken do not reflect full and sustainable implementation." Dkt. No. 1082 at 1. In particular, the Court expressed concern that the City had not yet taken steps "sufficient to satisfy the recommendation that the City establish sustainable accountability procedures that will outlive this litigation." *Id.* at 1-2. Given this, the Court re-engaged me as Court Investigator "to examine whether the City has implemented and is making sustainable progress on the recommendations in the Court Investigator's April 16, 2015 report." *Id.* at 3.

As with the first investigation, to conduct the second investigation my team and I reviewed correspondence, interviewed witnesses, and analyzed investigation and arbitration files. We reviewed over 2,500 documents and conducted more than 25 interviews. We met with members of OPD, OCA, elected officials, Plaintiffs' counsel and outside experts on police discipline.

Once again, we received and appreciate the full cooperation of both the Department and the City Attorney's Office. Both the Department and the City Attorney's Office provided documents and made witnesses available promptly, for which we are grateful. We also appreciate the time of many individuals outside of OPD and OCA, whose thoughtful participation contributed to our analysis.

III. FACTUAL FINDINGS

We make the following factual findings based on our review of relevant documents and our many interviews with witnesses. First, we discuss developments since the First Report in Oakland's police discipline process. Second, we examine areas where there is room for improvement. Third, we discuss the need for OPD to have its own general counsel. Fourth, we assess what efforts have and must be made to ensure a system of fair police discipline is sustainable after the close of this litigation.

A. OPD and OCA Have Made Improvements to the Police Discipline Process

1. The Relationship Between OCA and OPD in the Disciplinary Process Has Improved

By far the most positive change we observed in the course of this investigation is the improved relationship between OPD and the Labor and Employment Unit of OCA in the disciplinary process. The two offices appear to be working together in a much more

collaborative and productive fashion in the investigation and prosecution of discipline cases. This is due in large part to the OCA staffing a highly capable Deputy City Attorney within IAD. Every OPD witness we spoke with told us the presence and hard work of this Deputy City Attorney had significantly improved the Department's ability to carry out its discipline process. The documents and correspondence we reviewed reinforced this conclusion, showing that the Deputy City Attorney assigned to IAD has been involved at every phase of discipline, has responded to OPD needs promptly, and has been a source of guidance and advice for IAD.

2. OCA Has Been Involved Earlier in Investigations

In addition to improving the relationship between OPD and OCA, the assignment of a dedicated attorney to IAD has enabled OCA to get involved in supporting the Department from the outset of IAD investigations. OPD and OCA witnesses confirmed that IAD investigators have benefited from this early involvement as a result of receiving attorney input on investigation strategy, witness interview questions, and report drafting. From our review of the files, we find the overall quality of IAD investigations has improved as a result of the involvement of OCA. Those improved investigations will stand up better to scrutiny at arbitration.

3. OCA and OPD Have Collaborated to Improve Skelly Process and Training

Since the First Report, the Department has instituted the practice of assigning all cases involving recommendations of five days suspension or more to one deputy chief. This change is a positive one, as it creates greater consistency of discipline.

This Skelly officer and all other officers who could be assigned a Skelly hearing received training, developed in collaboration between OPD and OCA, on how to conduct the Skelly process. Our review of the training materials confirms that the training was thorough and included both practical and legal considerations. Attendance records demonstrate that all but a handful of potential Skelly officers attended the training, and there are plans to train those who were not able to attend.

4. OCA Has Selected Outside Counsel Earlier and Based on Expertise with Police Discipline Matters

Email correspondence and outside counsel billing records demonstrate that since the First Report, OCA has assigned arbitrations to outside counsel much earlier in the process. As a result, outside counsel has had more time to craft an arbitration strategy, collect documents and other factual evidence, and interview Department and civilian witnesses.

Additionally, in contrast to past practice, OCA has made it a priority to hire outside counsel for police discipline arbitration based on the outside counsel's experience with police discipline matters and on the strength of prior performance. Some outside counsel have now handled multiple police discipline arbitrations, allowing them to build familiarity with the operations and stakeholders in the Department.

Finally, OCA included a requirement in the Arbitration Protocol, which OCA adopted after the First Report, that OCA solicit feedback on the performance of outside counsel from OPD following arbitrations. After recent arbitrations, OCA has consulted members of OPD about their experiences with outside counsel. OCA has indicated that it will use that feedback in future hiring decisions.

5. OCA is Better Prepared for Arbitration

OCA and its outside counsel have been better prepared to defend police discipline in recent arbitrations. Time logs for attorneys demonstrate extensive preparation for arbitrations, including time spent gathering and reviewing documents, identifying and preparing witnesses, and crafting and executing litigation strategy.

To be sure, OCA has experienced some tough losses since the First Report, including two cases in which terminations were reduced to suspensions. In the first case, the Department terminated an officer who allegedly engaged in inappropriate activity with a prostitute. IAD conducted an investigation that, while not perfect, was thorough and fair. OCA, with the assistance of experienced outside counsel, put in significant time preparing for the arbitration, including flying out of state to interview the key witness. At arbitration, counsel employed a solid strategy and advocated vigorously. Despite these efforts, the arbitrator overturned the suspension. In a roughly two-page analysis of an arbitration that lasted two full days, the arbitrator found that the alleged victim was not credible. The arbitrator also appears to have applied an incorrect legal standard, requiring a level of proof higher than by a preponderance of the evidence.

In the second case in which the Department's termination decision was reversed, the Department terminated an officer who allegedly used excessive force. In this instance, there were problems with IAD's investigation that contributed to the arbitrator's unfavorable decision. Those problems, in our view, arose from OPD making decisions during the investigation process without the benefit of advice from OCA. While it is not possible to know whether a different approach to the investigation would have prevented the reversal of discipline at arbitration, the lack of legal advice made the case more complicated. This again points to the need for continued close cooperation between OCA and OPD.

Whereas several arbitration losses examined in the First Report stemmed, at least in part, from the lack of preparation on the part of OCA, after a close review of the two aforementioned cases, we find that these recent arbitration losses occurred despite substantial preparation and advocacy by the Labor and Employment Unit and its outside counsel. No city attorney's office, no matter how well prepared, can expect to win every arbitration. Indeed, a perfect win record might suggest that the Department was intentionally handing out weak discipline or avoiding tough cases in order to have the discipline upheld at arbitration. The City can only ensure that it has investigated, prepared, and presented its cases thoroughly. It

cannot control the uncertainties of arbitration, though as discussed below, it can advocate for measures that reduce that uncertainty.

6. Lexipol May Improve Police Policy Management

The Department, led by the Research and Planning Unit, is transitioning its policies to the Lexipol system, a web-based policy management resource for law enforcement organizations. OPD, in coordination with OCA, will use the transition to Lexipol as an opportunity to review and consolidate all OPD policies for clarity and effectiveness. Assuming the adoption of Lexipol goes as planned, the Department will reap the benefits of having its policies in one central location accessible to officers and will receive updates on developments in law and best practices. The Department expects to adopt Lexipol by the end of 2016.

B. <u>There Remains Room for Improvement</u>

Despite the improvement made before and after the First Report, there are still significant issues that OPD and OCA need to address to strengthen the police discipline process.

1. Supervisor Accountability

In the First Report, we recommended that OPD "revise the investigation process to consider supervisory accountability more thoroughly and to ensure that potential mitigating or exculpatory evidence or witnesses are considered." Dkt. No. 1054 at 44. In its September 1, 2015 progress report, the City responded that "[s]upervisor accountability assessments have been a required component of OPD investigations for several years." Dkt. No. 1066 at 7. In other words, it appears that OPD does not believe new policies or procedures are necessary to adequately assess supervisor accountability. We strongly disagree.

While supervisor accountability is considered in IAD investigations, it appears IAD, and possibly the Department as a whole, has an unnecessarily narrow definition of what supervisor accountability means. IAD reports of investigation include a section called "Member/Employee Accountability." However, with rare exceptions, that discussion is limited to whether a supervisor witnessed, knew of, or should have known of the misconduct in the investigation but failed to report that misconduct. This is an important consideration, but it is not the only way that supervisors should be held accountable.

At least two other forms of supervisor accountability should be considered as a regular part of an IAD investigation: (1) whether a supervisor ordered or otherwise caused the misconduct; and (2) whether the supervisor failed to sufficiently supervise the officer accused of misconduct.

Members of IAD said that if a supervisor is suspected of misconduct, the supervisor is brought into the investigation as a separate subject. From our review, that happens on some occasions and not others.

For example, in one investigation that eventually resulted in arbitration, an OPD-generated complaint led to the investigation of an acting sergeant for failure to supervise. During the course of the investigation, IAD added the lieutenant tasked with supervising the acting sergeant for his failure to supervise the supervisor. The investigation resulted in sustained violations for both supervisors.

But in another case, the supervising officer was not brought in as a separate subject for failure to supervise where the investigator found the subject officer had four prior Supervisory Note Files[1] ("SNF") for the same misconduct as that alleged in the investigation, all within a short time period. The report noted that the supervisor of the subject officer "should reasonably consider different methods (other than multiple SNF entries) to improve performance in this area." In such circumstances, IAD should at least discuss whether the supervisor should be held accountable for a failure to supervise, when his reporting officer committed a fifth violation of the same policy in a short period.

Unfortunately, in most reports of investigation, there is no documentation indicating whether IAD considered the accountability of supervisors at all, beyond whether the supervisor witnessed misconduct and failed to report it. It is typically impossible to determine from the file whether IAD conducted such a review but found no wrongdoing on the part of the supervisor, or if IAD did not consider the supervisor's responsibility at all. And disciplined officers often attack this absence in the record of any consideration of supervisor responsibility as evidence they are being scapegoated while their bosses get off scot-free.

Documenting the analysis and determination as to supervisor accountability, as more broadly defined, has the benefit of ensuring investigators give the issue fair consideration. It also provides proof of how IAD reached its conclusion on supervisor accountability, should the case later be arbitrated. Perhaps most important, investigating and documenting supervisor accountability will provide a powerful incentive to supervisors throughout the chain of command to make sure they are supervising and, as necessary, disciplining the officers below them.

2. Policy and Training Feedback Loop

In the First Report, we recommended that the Department "work to ensure that its current rules and policies do not undermine the disciplinary process" and that it should "coordinate with the OCA to address these issues proactively, making whatever policy changes are necessary while awaiting transition to Lexipol." Dkt. No. 1054 at 44. In response, the City

[1] A Supervisory Note File is an electronic collection of supervisor's notes stored in the Personnel Assessment System. The notes may include documentation that the supervisor warned an officer to change his or her conduct, or documentation that the supervisor trained the officer or requested the officer receive training from the Training Section.

indicated that "OCA and OPD are reviewing the rules and policies that were at issue in the arbitrations covered by the investigation, as well as arbitration decisions that have been issued subsequently. OPD is prioritizing use of force and related policies." Dkt. No. 1066 at 9. While reviewing these specific policies is a start, the City still needs a reliable system for identifying and correcting unclear policies or training in the future.

In several instances we observed IAD investigators making thoughtful suggestions regarding policy or training changes that would benefit future discipline. For example, in one report of investigation, an investigator suggested changes to the PDRD (portable digital recording device) policy and changes to PDRD training. In another report, an investigator recommended changes to an internal administrative procedure.

These and other recommendations demonstrate that IAD personnel are on the lookout for weak spots in Department policy or training, which is a positive development. But several witnesses we spoke with were not sure what happened to these recommendations, whether they were considered or implemented, and who was responsible for that process. And it was often difficult for us to tell if recommendations had been passed on to the appropriate decision-maker and been acted upon.

Furthermore, it is not just IAD investigators who can serve as sources of recommendations for improvements in the discipline process. Skelly officers, Force Review Boards/Executive Force Review Boards, front-line supervisors, Subject Matter Experts who advise and testify in support of IAD investigations, and attorneys working on arbitrations all may identify ways, at various stages of the disciplinary process, that OPD's policies or trainings could be improved and its discipline process could be strengthened. However, OPD noticeably lacks a system to collect such recommendations and ensure they are routed to the proper decision-maker. In order to reap the benefits of committed staff at OPD and OCA who identify problems and possible solutions, OPD needs to establish procedures to collect the recommendations, get them in the right hands, make sure they are acted upon, and confirm that the person making the recommendation is told what happened to their recommendation.

3. Training Records and Testimony

During the arbitration process, OCA often must prove that the subject officer acted in violation of policy or training. In order to demonstrate that an officer acted in contradiction to his or her training, OCA must present evidence as to what training the officer received. And frequently, the disciplined officer will claim that he or she did not receive training on the conduct for which they are being disciplined.

This argument recurs in arbitration after arbitration. In some instances, OPD is able to present evidence that the officer received training that covered the conduct in question. But frequently OPD appears to be scrambling to find evidence of what classes the officer took and what the content of those classes was. When OPD cannot adequately rebut an officer's claim

that he or she never received training on the conduct for which they are being disciplined, arbitrators frequently reject or reduce the Department's discipline decision.

OPD must find better ways to track the training that officers receive, both in formal classes and in less formal refresher sessions. It also should maintain more comprehensive databases of the subject matter and content of trainings and make those databases available to counsel representing the Department, so those attorneys can more effectively rebut claims of inadequate officer training.

Additionally, our review of arbitration records and our discussions with witnesses indicate that Subject Matter Experts ("SMEs") are often, but not always, willing to testify at arbitration regarding the substance of their trainings. When SMEs are not useful witnesses because they testify in intentionally vague or contradictory ways about the training they provided to an officer, it creates a serious weakness in the City's case at arbitration. SMEs in the Department should be instructed that testifying at arbitration about the training they administer is a job requirement of an SME. SME's who do not accurately testify about trainings they performed should be replaced.

4. Comparable Discipline

In the First Report, we recommended that OPD and OCA "work together to have an effective system for comparing levels of discipline across similar cases." Dkt. No. 1054 at 45. In the City's September 1, 2015 Progress Report, the City responded that IAD had shared its internal database with OCA, "allow[ing] OCA and IAD to jointly evaluate and compare levels of discipline across cases." Dkt. No. 1066 at 12. While this sharing of information is an improvement, it does not go far enough.

We made the initial recommendation because we found arbitrators frequently reduced discipline due to a lack of evidence that the Department had adequately considered whether the recommended discipline was in line with previous sanctions. In more recent arbitrations, OCA has presented to arbitrators a thorough explanation of the Chief's reasoning behind his discipline determination, primarily through the Chief's own testimony. That reasoning has discussed the range of discipline allowed by the Discipline Matrix, as well as the mitigating and enhancing circumstances of the individual officer. This more robust discussion of the justification for level of discipline has strengthened the City's position at arbitration.

However, the City's position could be further strengthened if OCA demonstrated at arbitration that the Department had taken into account other discipline cases when deciding how much discipline to impose. This is particularly true for those violations that are subject to a wide range of discipline on the Matrix (for example, violations that could result in anything from a written reprimand through termination depending on the circumstances). In at least one recent arbitration, an arbitrator reduced discipline where "the City [did] not provide[] any evidence of discipline that has been imposed in similar situations, leaving the matter to the undersigned."

The Department should continue to consider comparable discipline in all cases, and the Department should consider whether it would be beneficial to specifically document that analysis in cases that involve misconduct with a wide range of discipline on the Matrix. Regardless of whether the Department's assessment is documented, OCA must present evidence at arbitration demonstrating that this analysis occurs. If the evidence at arbitration shows that the City considered other comparable cases in reaching its decision, the arbitrator will better understand the City's decision and will be less likely to reject the discipline as arbitrary.

Additionally, should an officer grieve his or her discipline to Step 3, Employee Relations ("ER") should conduct its own analysis of whether the imposed discipline is consistent with past discipline in similar cases, and include that determination in its Step 3 response. ER should work with IAD to obtain the information it needs to conduct this analysis. This process will serve both to ensure due process for officers, and to provide additional evidence of consistent discipline where ER agrees that the Department's discipline was in line with comparable cases.

5. Civilian IAD Position

In the First Report, we recommended that "[t]he Department should reduce turnover in IAD by including at least one civilian at a high level of authority within the division." The Department has hired a civilian who has served in IAD for the last several months. The role of this civilian IAD manager is still being defined, which is understandable and expected. Whatever form this position ultimately takes, part of the job requirement should be to establish more institutional memory within IAD, given the frequent turnover in leadership in that division. This can be done in a number of ways. The civilian manager over time can serve as a trusted resident expert on IAD procedures, but in the meantime, the civilian manager can work to develop materials, in cooperation with OCA and the IAD Commander, that would assist personnel at all levels of IAD with understanding best practices and how the Division operates.

6. OCA Should Continue to Bargain for an Arbitrator List and Exchange of Discovery

In the most recent round of bargaining with the OPOA, we understand OCA and the Department made concerted efforts to improve police discipline arbitrations. While the Department was successful in winning an exchange of expert witness lists prior to arbitration, it appears from the current MOU that it was not able to secure a list of agreed upon arbitrators or an exchange of non-expert witnesses and discovery.

The Department should continue to negotiate for these changes, as they would help the process of fair and efficient discipline in general. A list of a fixed number of arbitrators would provide some clearly defined benefits. Most immediately, it would reduce the time, money, and resources the City and the OPOA spend in each case winnowing down arbitrator lists that are derived from the panel at large. And in the long term, it might create a panel of arbitrators

who serve for a fixed term and become more familiar with the specific practices and customs of OPD. Similarly, an exchange of witnesses and discovery ahead of arbitration would allow both the OPOA and the City to be better informed before arbitration, make better decisions about which cases should be arbitrated, and allow cases to proceed based on the facts, not on surprise.

C. OPD Needs More Consistent and Reliable Legal Support

Although the relationship between OPD and OCA as it relates to assisting with police discipline cases has greatly improved since the First Report, our second investigation raised renewed concerns that OPD still lacks critical support from OCA when it comes to matters outside of IAD investigations and arbitrations. In order to effectively discipline, OPD must be able to rely on OCA for counsel regarding policy and training changes, developments in police practices, and general advice. The Office of the City Attorney falls short in this respect.

Currently, the Labor and Employment Unit of OCA advises OPD on IAD investigations and handles arbitrations. The Public Safety Unit of OCA advises the Chief and the Department on policy, training, contracts, and other general matters. While the former unit, as noted above, has worked hard to strengthen the relationship between the two offices, the latter unit of OCA is impeding that progress.

The Public Safety Unit, particularly through its more junior Deputy City Attorneys, has made some improvements in providing OPD with timely and specific legal advice. But we reviewed and heard evidence that since the First Report, OPD's main point of contact in OCA was simply not providing the support that a client should expect of an attorney. The OCA legal staff (1) failed to keep promises to draft or edit documents; (2) pushed responsibility onto OPD for matters OCA should have handled itself; (3) asked OPD to review documents in an unreasonably short time due to OCA's own mismanagement of time; (4) demonstrated a lack of basic understanding of many OPD policies and practices, as well as OPD organizational structure; and (5) generally exhibited an attitude of annoyance towards its client rather than one of thoughtful service. As a result, many in the Department expressed reluctance to turn to OCA in the types of situations one would expect a client to seek advice from its lawyer.

These shortcomings have a direct impact on police discipline. When the Department leadership believes it cannot turn to its attorney for fast and reliable advice, or fears its requests will be met with avoidance or annoyance, OPD makes decisions without the benefit of the advice of counsel. Indeed, we are aware of recent instances where the Department acted without getting legal advice, in part due to the strained relationship between attorney and client, and where the Department suffered as a result. For a police department, the stakes are simply too high to take action without the benefit of legal counsel.

OCA informed us that it intends to shift the coordination of and responsibility for OPD policy and training advice from the head of the Public Safety Unit to the head of the Labor and Employment Unit, with Deputy City Attorneys within the Public Safety Unit still working on

these issues. While the Labor and Employment Unit has demonstrated commitment to serving OPD in discipline investigations and arbitrations, shifting additional advisory responsibility away from Public Safety and to Labor and Employment is an inadequate solution. OPD needs its own full-time internal counsel that is hired by OPD, not OCA, for advice on policy, training, and other issues.

We understand that currently, the needs of the Department take 25-50% of OCA's resources. This is not surprising, because our review of records and interviews demonstrate that advising the OPD in a timely fashion is a full-time job. While OCA could attempt to shift additional resources towards the Department, there are other important reasons for the Department to have its own attorney who reports directly to the Chief, and not OCA.

The Oakland Police Department is a 24-hour-a-day operation. It often requires legal advice on an emergent basis. In the past many years, OPD has not had consistent access to timely and effective legal support from OCA, which has harmed the Department's ability to improve its policies, trainings, and discipline process. OPD has had little recourse to address OCA's deficiency. The most certain way to ensure this problem does not recur is for OPD to have its own in-house attorney. Certainly, OPD would benefit from continued legal support from OCA, not just in investigations and litigation but in all aspects of its work. The in-house counsel could supplement rather than replace that support. We understand this is a common arrangement in many cities comparable in size to Oakland.

D. <u>Sustainability</u>

OPD and OCA have made changes to the police discipline process and can make additional changes to further strengthen fair police discipline. But ultimately, all this effort is for naught if the City's progress is not sustained after this litigation is concluded and the Court is no longer watching.

The City administration's commitment to sustainability has been, frankly, underwhelming. Again, while there have been some moves toward implementing long-lasting change, those have often been only in response to the Court's orders. In the First Report, we found that in order to ensure OPD and OCA are held accountable for a functioning police discipline system in the future, "the City must take ownership of this issue" and that the Mayor, City Administrator, and City Council "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." Dkt. No. 1054 at 46. In response, the City noted that "the Fiscal Year 2015-17 budget proposed by the Mayor and approved by the City Council created new positions to help implement the recommendations and institutionalize a better system of accountability for police" and that "[s]ince the beginning of their terms, the Mayor and City Administrator have attended every all parties meeting on the Delphine Allen case." Dkt. No. 1066 at 15. The City also said that "[t]he Delphine Allen case is a standing item on the Council's closed session agenda and OPD and OCA regularly report regarding compliance issues pertaining to the Court's orders." *Id.*

The budgetary changes the City made to create positions to support police accountability are certainly a step toward sustainability. But efforts to hold OPD and OCA accountable for police discipline are lacking so far. While the City pointed to the attendance of the Mayor and City Administrator at all-parties meetings as a key indicator of sustainability, unofficial attendance records and witness recollections indicate that the Mayor has *not* attended every all-parties meeting since starting her term, though the City Administrator did. Even if they had perfect attendance, the fact is that police discipline was almost never a topic of conversation at all-parties meetings or as part of briefing on the *Delphine Allen* case before City Council. And even if police discipline *were* on the agenda, attendance at a meeting to discuss this litigation, or briefing City Council about the litigation, does not demonstrate how City officials will monitor police discipline *after* the litigation is over.

We also note that after the Court issued the order expressing concern about the lack of evidence of sustainability, the City administration undertook a series of steps to demonstrate greater supervision of police discipline. Within weeks of the Court's order, a City Council member made a rules request to require OCA and OPD to report to City Council regarding police discipline, and the Mayor and City Administrator called for regular meetings with IAD regarding police discipline. All of these are positive steps toward demonstrating a commitment to sustainability, but none of them happened until the Court criticized the City for not showing such a commitment.

We do find that many of the key stakeholders are committed to making the police discipline system work in the long term. In the course of our investigation, we observed that members of the current OPD command staff have prioritized fair police discipline, not just because of the NSA and this investigation, but because they believe that fair police discipline makes for a stronger police force and City. Attorneys in OCA are also committed to making sure that their hard work to improve police discipline results in long-lasting change. And City leaders have also expressed their interest in seeing a robust and effective police discipline system, regardless of whether the Court is still monitoring the City. The question, then, is how to make sure that when the Court and the key individuals in the City working on discipline have moved on, the discipline system will not revert to its former, ineffectual state.

We welcome any suggestions the City has to demonstrate sustainability in this area, and after discussions with many of the stakeholders, we offer some recommendations of our own.

First, as discussed above, the dedication of the staff in the Labor and Employment Unit of OCA has significantly improved both the relationship between OPD and OCA and the quality of IAD investigations and arbitration proceedings. In order to maintain this level of dedication to police discipline matters in the future, the City should take steps to make permanent the positions held by the Deputy City Attorney assigned to IAD and the supervising attorney in charge of Labor and Employment. The supervising attorney position for Labor and Employment should be reclassified to require any future attorney in the role to have expertise in labor and employment matters and to specify that the attorney is responsible for overseeing OCA's work

on police discipline investigations and arbitrations. This position should also be made at-will to provide added measure of accountability. We understand that one mechanism for making this change would be to reclassify the position as an at-will Special Counsel for Labor and Employment, and that such an adjustment would require a meet and confer with the OPOA, as well as approval of the Civil Service Board. We are told that OCA is open to undergoing that process.

Second, OPD should investigate ways that its Office of Inspector General could audit OPD's performance in police discipline, both now and after the conclusion of the litigation. OIG could measure performance at various points in the process of discipline, from intake to investigation to Skelly to arbitration. OIG could also review whether OPD is receiving the support that it needs to carry out fair discipline.

Third, OPD and OCA should separately report to the City Council regarding police discipline. Shortly after the Court's order requiring this report, a member of City Council made a request that OCA and OPD report monthly to the Public Safety Committee of the City Council on many of the issues raised in the First Report. We understand that, in response, OCA has proposed quarterly reports to City Council on topics similar to those requested by the Council member. We recommend that OCA report to City Council quarterly on (1) recent arbitration decisions, (2) its efforts to support the police discipline process, and (3) recent developments in police discipline. OPD should simultaneously provide a separate quarterly report to the City Council regarding (1) IAD investigations, (2) police personnel trainings, (3) updates to police policy, and (4) recent developments in police discipline. Both OPD and OCA should simultaneously provide their reports to the Mayor and City Administrator. This reporting will ensure that city administration is kept informed of the functioning of police discipline, so that they may attempt to intervene should OCA or OPD performance deteriorate.

In addition to the reporting requirement to City Council, OPD and OCA should meet regularly with the City Administrator to report not only on pending investigations and arbitrations, but on changes to OPD trainings and policies, and the working relationship between OPD and OCA generally.

The City Council, City Administrator, and Mayor should stand ready to control the budget in a corrective manner should the relationship between OCA and OPD be dysfunctional. But ultimately, because the City Attorney is an elected position rather than one under the control of the City administration, the City Attorney answers only to the voters. In order for the people to be informed on the performance of OPD and OCA regarding police discipline, the Office of the Mayor should work to disseminate key information on police discipline to the public in an easily accessible format. These levels of budgetary and reporting safeguards are necessary because of the structure of government established in the Oakland City Charter.

IV. RECOMMENDATIONS

Discipline Process

1. Wherever appropriate in the police discipline process, OPD should examine not only whether a supervisor knew of misconduct that he or she did not report, but also (1) whether a supervisor ordered or otherwise caused the misconduct; and (2) whether the supervisor failed to sufficiently supervise the officer accused of misconduct. OPD should consider supervisor responsibility up the chain of command as necessary. The analysis of these issues should be documented in reports of investigation and force review board reports.

2. The Department should establish a process to seek from IAD, Skelly officers, supervisors, attorneys, or others recommendations to improve Department policies, trainings, and police discipline process. One possibility is to assign a coordinator, possibly within OIG, to serve as a clearinghouse for these recommendations. Whatever process is established for responding to these recommendations, it should result in (a) recommendations being routed to the appropriate personnel for response and, if appropriate, implementation of necessary changes; (b) a response to the party making the recommendation; and (c) documentation of the process.

3. The Department should instruct SMEs that testifying as to the substance of training they administer is required to serve as an SME. OPD should also ensure that its databases track all forms of officer training, whether as a result of academy, supervisor request, or discipline, in a centralized and easily searchable location. To the extent possible, the records should identify the topics of each training. OPD should also make every effort to ensure materials for related trainings are easily identified and accessible. And the Training Section should provide records and materials to attorneys preparing for arbitration in an efficient manner.

4. The Department should consider comparable discipline in all cases, should document that process where appropriate, and should be prepared to present evidence at arbitration regarding its consideration of comparable discipline. Additionally, should an officer grieve his or her discipline to Step 3, Employee Relations ("ER") should conduct its own analysis of whether the imposed discipline is consistent with past discipline in similar cases, and include that determination in its Step 3 response.

5. The Civilian Manager within IAD should be responsible for developing institutional memory within IA, potentially through the development of an IAD manual.

6. OCA and OPD should continue to work together to update Skelly hearing officer training and refresh Skelly officers on at least an annual basis.

7. OCA and the City should continue to press for improvements in the police arbitration process, including sharing discovery and witness lists before arbitration and agreeing to a fixed panel of arbitrators.

OPD/OCA Relationship

8. The current relationship between OPD and OCA for services beyond discipline investigations and arbitrations is inadequate and puts the Department's discipline process at risk. OPD should hire its own internal general counsel, who reports directly to the Chief. The City should provide the necessary funding to the Department for this position.

Sustainability

9. In order to maintain the position of the Deputy City Attorney currently assigned to IAD, future Oakland City budgets should include a full-time-equivalent attorney that is specifically charged with providing legal services to OPD related to IAD investigations, police arbitrations, and other police discipline matters. Should OCA fail to provide OPD with the services of that attorney, or should that attorney fail to provide the level of service required by OPD, the Mayor and City Administrator should send a budget amendment to City Council to reduce the City Attorney's departmental budget allocation in an amount equivalent to the Deputy City Attorney's salary.

10. The current Deputy City Attorney overseeing the Labor and Employment Unit should be reclassified as "Special Counsel – Labor and Employment." The position should require expertise in labor and employment matters, and should hold responsibility for overseeing OCA's work related to police discipline investigations and arbitrations. This will be an at-will classification, as the at-will status will help ensure that the person in this position continues to be held responsible for his or her efforts to oversee labor and employment matters, including police discipline investigations, grievances, and arbitrations.

11. OCA should report to City Council quarterly on recent arbitration decisions, its efforts to support the police discipline process, and recent developments in police discipline. OPD should simultaneously provide a separate quarterly report to the City Council regarding IAD investigations, police personnel trainings, updates to police policy, and recent developments in police discipline. Both OPD and OCA should simultaneously provide their reports to the Mayor and City Administrator.

12. Both OCA and OPD should meet with the City Administrator monthly to report on pending investigations and arbitrations, changes to OPD trainings and policies, and the working relationship between OPD and OCA.

13. The Mayor should disseminate easily accessible information to the public, on at least an annual basis, regarding police discipline in Oakland.

14. OIG should develop a plan to measure the performance of OPD at various points in the process of police discipline, including intake, investigation, Skelly hearings, and arbitration. OIG should also measure whether OPD is receiving the support that it needs to carry out fair discipline. The Mayor and City Administrator should present a budget that provides OIG with the resources it needs, including accredited auditors, to perform this additional function.

V. CONCLUSION

What is clear one year after our first report is that the problems with Oakland's police discipline process can be fixed, and although there is still work that must be done to implement the recommendations of our First Report, progress has been made. That progress is largely the result of some dedicated individuals in the Oakland Police Department and some hard-working attorneys in the City Attorney's Office. With sufficient support and resources, OPD and OCA can deliver police discipline that is fair and effective. What is not clear is whether the people responsible for the progress will continue to get the support they need once the Court is no longer supervising the police discipline system. The progress that has been made is to the credit of the City, OPD, and OCA, but it happened only in response to Court orders. And those orders came only after it was clear to all that the Oakland police discipline system had not been working for some time. The City must demonstrate that, whether the Court is supervising it or not, Oakland will continue to pay attention to, and provide necessary resources and personnel for, its police discipline system.