



# **INDEPENDENT POLICE AUDITOR'S FIRST REPORT - 2016**

**Presented to the Honorable City Council  
City of Palo Alto**

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## I. Introduction

This report addresses materials received by the Independent Police Auditor (“IPA”) for review from the first half of 2016. Per an oversight protocol established by the City of Palo Alto in 2006, the Palo Alto Police Department (“PAPD”) sends completed cases to us from within three categories: complaint investigations, internally generated misconduct investigations, and reviews of Taser deployments. We then evaluate those cases for both the effectiveness of the process and the legitimacy of the results; where applicable, we also offer recommendations to the Department regarding best practices and systemic reforms.

In May of 2016, the Santa Clara County District Attorney’s Office completed its independent review of the Department’s first officer-involved shooting incident in several years. The fatal shooting by officers of a man holding a knife had occurred late in 2015. The investigation and assessment was in keeping with established protocols, and was conducted to evaluate the legality of officers’ use of deadly force. In this case, the D.A.’s office was able to rely on video recordings and other evidence in making its determination; it found the officers’ actions to be justified as a matter of self-defense.

From there, the shooting case went to the Department for it to initiate its own administrative review. This process overlaps in some respects with the D.A. inquiry, but goes beyond the “bottom line” question of legal justification. Instead, it looks at a wider range of policy and performance questions and includes issues of both individual accountability and systemic reform. That internal review is still pending; when it is done, the IPA will have the opportunity to evaluate the Department’s response for its thoroughness and effectiveness, and will provide a public summary in our next Report.

As for this version of our semi-annual audit, it features our smallest number of new cases in several years. There are two administrative misconduct investigations – both generated internally by PAPD executives and both resulting in “sustained” findings of policy violations. In fact, there were zero citizen complaints that rose to the level of requiring formal investigation. The Report also discusses two Taser deployments, both of which were found to be “in policy”.

## II. Case Reviews

### Case # 1

#### *Factual Overview:*

This case began when a supervisor woke up not feeling well and decided to take the day off. He sent text messages to colleagues in an effort to provide notification and arrange for coverage; however, problems arose because of the *type* of official leave he attempted to take pursuant to the Department’s employee absence policies. Additionally, by recruiting his own

replacement informally, the supervisor also deviated from the established protocols for fair distribution of overtime among available and interested personnel.

### *Outcome and Analysis*

The Department determined that the subject had violated policy with regard to technical timekeeping procedures – both in this instance and in prior absences that were reviewed as part of the case investigation. He was also found to be in violation of the specific policy governing the distribution of overtime. However, the more serious allegations, which involved intentionally misleading behavior and willful defiance of direct supervisory instructions, were not sustained. It is also important to note that, although the different types of designated absences had different approval requirements, the investigation determined there was no *financial* advantage associated with choosing one instead of another, and no reason to believe that the supervisor’s actions were intended to acquire something to which he wasn’t entitled.<sup>1</sup>

We concur with these findings.

As with examples from our previous Report, the case involves conduct by a supervisor. This has significance in a couple of directions. On the one hand, it continues to be concerning that supervisors seem disproportionately represented in recent misconduct allegations; one would obviously prefer to see that individuals entrusted with higher levels of responsibility are “leading by example” in better ways. At the same time, the willingness of Department management to address these issues belies the common belief that supervisors are more likely to remain exempt from accountability than rank and file officers.

Apart from the rank of the involved party, this case was primarily notable for the thorough and thoughtful quality of the investigation and assessment. The issues had the potential to be extremely convoluted. This was because of the arcane nature of the timekeeping procedures, the circumstantial significance of a discussion between the subject employee and his own supervisor that had occurred weeks earlier, and the potential for ambiguity in the interpretation of text messages that comprised important evidence. The investigation separated and pursued the various issues with clarity and completeness, and the accompanying analysis of the different categories of evidence within the case file was consistently sophisticated and persuasive.

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<sup>1</sup> His informal recruitment of his replacement for an overtime position, on the other hand, did have the effect (if not the intention) of providing someone with an unfair “inside track” to a money-making opportunity, the prevention of which is part of the reason why the policy exists.

Case # 2:

*Factual Overview:*

This case originated from the internal assessment of a pedestrian stop involving an intoxicated juvenile. In the course of reviewing other potential concerns about the incident, it came to the attention of Department management that one of the responding officers had not activated his in-car “Mobile Audio Video” (“MAV”) system to record the encounter as required by policy. This prompted the Department to initiate an administrative investigation into that officer’s pattern of behavior.

*Outcome and Analysis:*

Based on a review of various recordings and shift records, the Department determined that – on multiple occasions in recent weeks leading up to the pedestrian stop – the officer had failed to test his recording equipment at the start of his shift, and/or failed to activate the system during relevant enforcement actions. The allegations were accordingly “sustained.”

We concur with this result. We also commend the Department for its swift and efficient resolution of this straightforward matter; the investigation appears to have been completed and submitted for review within three weeks of the precipitating incident.

In our experience across a range of agencies, the failure to activate recording equipment or personal microphones is a widespread issue. We should also note, in fairness to officers, that individual instances are often benign in their impact, and are frequently a function of mechanical problems or simple negligence rather than an intentional effort to evade the camera’s eye. Many agencies accordingly take a graduated approach to addressing the issue, especially when technology – such as the body cameras that PAPD has yet to adopt – is new. Here, though, the MAV system is of long standing. More importantly, the Department had already done a lower level intervention with the same officer for the same problem in 2015.

Recordings are becoming increasingly prevalent in law enforcement, and increasingly connected to public expectations regarding the legitimacy of police accountability. Therefore, it makes sense for the Department to pay special attention to this type of lapse when it occurs.

**IV. Taser Case**

Incident # 1:

*Factual Overview:*

This incident commenced when an officer observed a vehicle traveling at an excessive rate of speed and pulled him over. The officer suspected that the driver was under the influence and requested backup. A supervisor responded to the location and the officer performed field

tests on the driver. The officer searched the vehicle and observed what appeared to be drug paraphernalia in the front passenger seat area. The officer then decided to arrest the driver and requested him to place his hands behind his back.

After one handcuff was placed on the driver, he began to struggle with the officers, who repeatedly asked him to relax and stop resisting. As a result of his continuing to struggle, the driver was eventually taken to the ground by the two officers. The struggle continued on the ground resulting in the driver striking the supervisor in the head with his foot; the supervisor then used his Taser on the individual. At that time, the struggle subsided, an additional PAPD officer arrived on scene and the driver was handcuffed without further incident.

The driver and involved officers suffered abrasions as a result of the struggle. The driver was escorted to the hospital for treatment prior to being booked; while there he spoke with an uninvolved supervisor who had responded to the location to conduct the force investigation.

*Outcome and Analysis:*

Based on the force investigation, PAPD determined that the force used, including the use of the Taser, was within policy.<sup>2</sup> We agree with the Department's conclusion regarding the use of force.

The mobile-activated video system on the patrol car captured the incident as well as the verbal exchange between the driver and the two officers. As the driver began to struggle, the officer told him that he was about to "smash" his head into the ground. To the Department's credit, they identified this comment as inappropriate and provided verbal counseling to the officer regarding the remark.

While the use of force in this case was reasonable and PAPD addressed the inappropriate comment, our review revealed several issues regarding the force investigation itself:

*The Investigator Interviewed the Civilian Witnesses Together.* Two civilian eyewitnesses to the force were identified and then interviewed by the investigator together. Standard investigations protocols recognize the importance of interviewing witnesses separately so that their respective versions are not influenced by the account or recollections of others. However, in this case, for no explained reason, the investigator chose to interview the two witnesses together. And, unsurprisingly, since the two witnesses knew each other, when the male witness was being interviewed, the female witness actually supplied answers to questions directed to

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<sup>2</sup> The supervisor reported that after he deployed the Taser, he received a shock to his hand, causing him to drop the device. It would have been beneficial for PAPD to have further explored this issue with its Taser defensive tactics expert to determine whether the shock to the officer occurred as a result of an equipment malfunction or as a result of how the Taser was deployed (or some other reason) so that it could avoid this undesirable result in the future.

him. By the time the PAPD investigator directed the interview to the female, she essentially was only asked whether she agreed with what the male had said.

*Officer Who Used Force Was Present When Arrestee Interviewed About the Force Incident.* To his credit, the investigator travelled to the hospital to interview the arrestee. During the recorded interview, the officer who used force was present in the hospital room. In our prior experience, we have found that the presence of a directly involved officer during such an interview can have a chilling effect on the arrestee. The dynamic lessens the likelihood of a full and candid description of his perspective, and therefore impedes the fact-gathering process.<sup>3</sup> It would have been preferable, then, for the interview of the arrestee to have occurred outside the presence of the force-using officer.

*Interview of Arrestee Ended with Leading Questions.* The recorded interview<sup>4</sup> of the arrestee is brief and began with the investigator appropriately asking the arrestee what happened. However, at the conclusion of the interview, the investigator wrapped up the interview with the following questions:

“Is that why you resisted arrest today?”

“When told you were under arrest, you decided to resist?”

“You still resisted, correct?”

Fact-gathering interviews are intended to be open-ended and should not suggest the answers to the questions as the investigator did here. “Leading” questions are especially problematic when the implied answers are so obviously favorable to the Department, thereby undercutting the objectivity of the process. The impression from this interview is that the investigator’s intent was to obtain a recorded statement in which the arrestee admitted resisting arrest, rather than simply obtaining his version of the events.

*Report Summary Relies on Information Not Contained in the Investigative Material.* In the investigator’s use of force analysis, he concluded that his opinion that the force used was within policy was based in part on speaking with the supervisor at the scene. However, there is

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<sup>3</sup> We recognize that sometimes it is necessary to have an officer present for security purposes; if that was the case, and no practical alternatives were available, it would be useful to at least document those circumstances in the report.

<sup>4</sup> PAPD has recently equipped its officers with body worn cameras that have the ability to video and audio record events. When the investigator interviewed both the civilian witnesses and the arrestee, he apparently used his body worn camera to do so, but did not direct the lens at the individuals he was interviewing. The video of the arrestee’s interview in particular could have provided helpful additional evidence as it would have better captured his affect and the injuries he suffered to his facial area. We have commented on this failure to take advantage of the video capabilities of the body worn camera during interviews in one of our earlier reports.

no documentation of what the supervisor said about the incident in the investigative package. Investigative principles dictate that information that is relied upon to render a determination should be included in the investigative material. That principle was not followed in this case.

PAPD has established expectations that when one of its officers uses force, even if it appears on its face as straightforward, the matter is investigated consistent with basic fact-gathering principles. As detailed above, in this case, that expectation was not met in a number of ways. Moreover, PAPD's internal review mechanisms for force investigations did not identify these issues when the report was submitted for review and approval.

***Recommendation: PAPD should find means to reinforce basic investigative principles with its supervisors, and should enhance its force review protocols to ensure quality control and – where necessary – appropriate remediation.***

Incident # 2:

*Factual Overview:*

This incident began with a witness reporting the presence of a male subject that had apparently “passed out” in some bushes in the downtown area. The subject was contacted by two PAPD officers, and proved to be unwilling or unable to secure a ride for himself in lieu of being arrested for public intoxication. When officers finally decided to take him into custody, he was uncooperative and then resistive.

At that point, seconds into a struggle with the increasingly defiant subject, one officer gave warnings and then deployed his Taser for one short cycle. The probes contacted the subject, who stumbled over a trash can and fell to the ground, where he was handcuffed without further incident.

The man was treated at the scene by paramedics and then transported to the hospital, where he was eventually cleared for booking.

*Outcome and Analysis:*

The Department followed its usual protocol in reviewing the TASER deployment, and determined that the use of force was “in policy.” We concur.

In reaching its conclusion, the Department was able to rely on the officers' reports, as well as independent witness statements and a MAV recording of the incident. The radio car was parked at some distance from the incident, and the video is therefore remote and slightly obscured. However, the audio recordings are clear and helpful, and the video does show a physical struggle that is consistent with the various accounts.

The totality of the evidence establishes that the subject was uncooperative and that his level of physical resistance met the threshold for the Taser's appropriate use. The officer who

deployed it gives clear warnings – and in fact evokes a response from the subject that “You can Tase me all you f\*\*\*ing want.” All the relevant after-incident protocols appear to have been followed appropriately as well.

That said, we make two small criticisms about the Department’s response. First, the supervisor’s written report on the incident describes the key moments in terms that seem slightly overheated. The struggle is described as “obviously worsening” and “very dangerous” for the officers. These terms are both subjective and relative, of course, but the recording shows a skirmish with an unarmed and drunk individual that seemed short in duration and mild in intensity. In fact, the involved officers – to their credit – appear to maintain considerable steadiness and aplomb in their competent and efficient resolution of the problem.

We mention this not to quibble, and certainly not to question the legitimacy of the Taser deployment, which was “text book” in many respects. Instead, the concern is that if descriptions are exaggerated, it suggests an effort to give a rhetorical boost to the justification for force, rather than providing an objective analysis. To preserve the credibility and legitimacy of its final decisions, it is important for the Department to refrain from any appearance of putting its thumb on the scale as it evaluates force incidents.

***Recommendation: The Department should be careful to maintain objectivity and accuracy in its descriptions of force incidents, so as not to leave the impression that it is editorializing or otherwise influencing the outcome.***

Secondly, we had similarly minor but noteworthy concerns about the interview with the subject at the hospital, which was recorded by the handling supervisor. In our view, this is an important part of the force review process from both an investigative and risk management perspective. But it is also one where objectivity and proper regard for the rights of the subject are critical features.

In this case, the interview appeared to lack focus, and there seemed to be a lack of communication with the subject (who was at the hospital awaiting treatment at the time of the interview, and still presumably intoxicated to some extent) about the goal of the questioning. This is significant to the extent that purely administrative questions about force are legally and substantively distinct from a criminal interview for which the Miranda warnings would apply. Ideally, these differences should be made clear from the outset.

To his credit, the supervisor did do a fine job of defining and addressing the medical issues arising from the incident. However, the subject was reticent about describing his recollections of what had happened. The reasons – whether a lack of memory or unwillingness to cooperate – were ambiguous, and the supervisor’s line of questioning did not pin it down as effectively as it might have. What should have been a straightforward exercise was not, and the dialogue, which had been largely benign if ineffective, seemed to deteriorate in tone toward the end.

*Recommendation: The Department should consider the advisability of briefing or training to supervisors that reinforces the goals and techniques of an effective subject interview in a use of force case.*

**V. Conclusion**

Thank you for the continued opportunity to monitor PAPD on behalf of the community it serves. Please feel free to contact us at your convenience with questions or other feedback.