

INDEPENDENT POLICE AUDITOR'S REPORT

Presented to the Honorable City Council

City of Palo Alto

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for the City of Palo Alto



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Introduction

This report addresses materials received by the Independent Police Auditor (“IPA”) for review from the first half of 2018. In keeping with the protocol that we have followed in the past for these semi-annual releases, it covers investigations by the Palo Alto Police Department (“PAPD”) that fall within the scope of our auditing responsibilities and that were completed by the end of the relevant time frame. This time, there are two reviews of Taser deployments (both of which were deemed “in policy” by Department management) and two investigations into alleged officer misconduct – one of which involved a “reserve” employee of the Department.

Update: IPA’s Scope

Over the past year, we have received numerous inquiries about the status of our outstanding report. In September of 2018, we learned from an outside source about an investigation that involved allegations of racially inappropriate language by a supervisor, stemming from an incident that had occurred a few years in the past but that had come to light again in 2017. It was not an incident we knew anything about. Accordingly, we made inquiries and learned about the path that the case had taken at both the time of the incident and subsequently. We were advised by PAPD that because the matter had been treated as a Human Resources issue and was investigated under the auspices of that City department, it was originally viewed as falling outside the parameters of our auditing responsibilities. Accordingly, we had not been alerted to the case or provided an opportunity to review it.

In the aftermath of the September 2018 outreach, we were asked by PAPD’s Chief of Police to review the matter in question – as well as three additional HR initiated investigations that had been completed in 2017, prior to the audit period. We then received summary HR investigative reports from the City to assess per our usual protocol. In April 2019, we prepared a draft semi-annual report which incorporated our relevant findings and recommendations from those cases as well as our usual PAPD investigations.

Upon receipt of our draft report, different City officials revisited the question of whether PAPD personnel issues investigated through HR were – and/or should be – included as part of our standard review protocols. Per the request of those City officials, we held our draft report in abeyance pending further direction on this matter and received no additional direction in the months preceding the October 2019 expiration of our current contract. In December 2019, the City approved a three-year contract extension which was modified to expressly indicate that complaints and investigations of internal personnel or human resources matters¹ were not within

¹The City in interpreting the contract defines “personnel or human resources matters” to be investigations of sworn officers relating to assignments, evaluations, promotions, demotions and similar issues, and allegations of harassment, discrimination, and retaliation

our scope of review. With an extant contract and clear direction, we then finalized this Report in conjunction with those parameters.

As the issue of IPA's scope was being re-examined, the Chief has continued to emphasize his continued commitment to oversight and transparency and has encouraged his team to interface with us in real time as cases are being investigated and disciplinary determinations are made. The Chief's guidance to command staff will necessarily result in the City's oversight entity being more impactful with influence in real time rather than after the fact evaluation.

Taser Cases

Incident 1

Factual Overview:

On the date of the incident, in the early morning hours, the initial officer and a backup officer contacted two individuals inside a car in a shopping center parking lot. The individual seated in the driver's seat displayed objective symptoms of alcohol intoxication. During the encounter, the man was run for warrants and the officer was informed by the individual that he was a former but not current parolee. The warrant check for the man was negative; however, the female with him in the car had two outstanding misdemeanor warrants. During this process and while the officers were back at the patrol car, the man exited the vehicle. The officers quickly responded to the man, handcuffed him and patted him down for weapons.

When they walked the man to the patrol car, he refused to get in the backseat. The two officers had to physically push the man into the car. Once seated in the back seat, the man resisted the backup officer's attempts to lift his legs into the car by straightening out his body while keeping his feet outside the car.

The female companion then exited the vehicle and walked toward the backup officer. The female officer directed her to get back in the car, but she did not comply. The man used profanity and told the backup officer to "chill out". The female officer repositioned herself on the driver side of the car and tried to pull the man in with her arms but was unable to do so. The backup officer was able to get both of the man's legs in the vehicle, but the man placed his foot against the door, locked his knee, and prevented the officer from closing the door. The backup officer tried to push the man's foot down using his own foot but was unable to do so. The backup officer then tried to bend the man's knee with his hands but was not successful. The female officer continued to give the man commands to get in the car, but he refused.

The female officer then removed her Taser from her holster and told the backup officer of that fact. She then placed her Taser against the man's back and warned him he was going to get Tased. The man still did not comply and then forcefully kicked the door with his left leg and yelled out, "Tase me, bitch." The officer then moved the Taser away from the man's back and activated the Taser. The man screamed in pain, sat up from the back seat, and fell forward out of the vehicle and onto the ground. The backup officer guided him to the ground by placing his left hand on his back.

The man then intentionally struck the right side of his face against the ground approximately five times. A responding officer placed his foot underneath the man's head to prevent him from hitting his face any further. A padded helmet was placed on the man's head. Paramedics arrived and the man again struck the right side of his head multiple times. A hobble device was then applied to the man's legs, and officers and medics lifted the man onto a gurney, where he was restrained at four points. The man was transported to the hospital, and he was found to have a small brain bleed. The man was then released.

Outcome and Analysis:

In assessing the use of force, the handling field sergeant considered PAPD's Taser policy, which has several components relevant to the facts of this incident. First, the policy requires an examination of the immediacy and severity of the threat to officers and others and the conduct of the subject.

The field sergeant reviewed the officer's use of the Taser and found the following:

- The man was extremely intoxicated and did not comply with the backup officer's commands to get back into the vehicle;
- The female companion presented an additional complication as she eventually exited the vehicle and walked behind the back-up officer, having not been searched and with two outstanding warrants;
- The man physically resisted the officers' efforts to place him in the backseat of the patrol vehicle, and was agitated and verbally confrontational;
- During the initial contact, the female had said there was a third subject who was not accounted for; and
- Once the man started kicking the door, there was an immediate need to bring the situation under control.

The Taser policy also requires an examination of the size of the officer, the size and nature of the subject, and the potential for injury to officer, subjects and others. Here, the field sergeant's analysis included the following components:

- The man was approximately six inches taller than the female officer and approximately seventy pounds heavier;
- The man was a convicted felon and previously on parole;
- The backup officer was of equal size to the man.

Additionally, evaluation under the Taser policy requires a review of the availability of other options. The field sergeant found that the female officer had been limited in her force options. She lacked sufficient space to deploy her baton, and the use of OC spray would have negatively affected both her and the backup officer.

The policy authorizes Taser use when the subject is violent, physically resisting, or has demonstrated by words or action and intention to be violent and to physically resist, and

reasonably appears to present the potential to harm officers, him/herself or others. In assessing this incident, the field sergeant found several factors to support the deployment:

- The man physically resisted the officers' attempt to place him in the back seat of a patrol vehicle by pushing back against them;
- Once partially seated inside the vehicle, he made his body rigid by straightening out his back and legs and prevented the backup officer from closing the door;
- He repeatedly yelled profanities at the officers;
- He gave the reasonable appearance of a potential to harm officers by kicking the door near where the backup officer was standing.

Finally, the policy notes that the use of the Taser should generally be avoided on individuals who, like the subject in this case, are handcuffed. There is, however, an exception: when the totality of the circumstances indicates that other available options reasonably appear ineffective or would present a greater danger, and the officer reasonably believes the need to control the individual outweighs the risk of Taser deployment. The field sergeant considered the following evidence in this regard:

- The man was extremely intoxicated, verbally confrontational, physically resisted officers, and became violent by kicking the door;
- The officers had two or possibly three subjects at the scene;
- The female officer was not able to physically control the man because of his size and the backup officer was not in a position to control his legs;
- The situation was rapidly evolving and the man was becoming increasingly agitated.

In all, the field sergeant noted that the subject was handcuffed and partially seated in the backseat of a patrol car – facts that tend to militate against Taser use. However, because the man was physically resisting, violent, and increasingly agitated, and because there were multiple suspects on scene and a potential for officers getting injured, he ultimately concluded that the Taser use was within Departmental policy.

The reviewing lieutenant concurred that the Taser use was within policy. He opined, however, that there were some “officer safety” considerations that merited further review of possible training with the involved officers. These included:

- Considerations and actions when interacting with former parolees;
- Inquiring about weapon possession during contacts with suspicious persons;
- Consideration of vehicle searches during contacts with suspicious occupants; and
- Consideration of alternative detention methods for handcuffed prisoners.

The Captain concurred with the force determination and the recommendation for additional training by the Department's Defensive Tactics Team. The Assistant Chief concurred and assigned a lieutenant to review and coordinate a debrief and training for the involved officers.

OIR Group Assessment of Factors

As noted above, the field sergeant concluded that the factors present during this incident justified the deployment of the Taser. We do not necessarily disagree with this “bottom line” determination. However, we note several factors – which were not addressed in the field sergeant’s evaluation – that complicate our own analysis of these facts and our ability to endorse the officers’ decision-making and performance.

A review of the video/audio footage of the incident suggests that any threat posed to the responding officers was mitigated by the fact that the officers were not dealing with subjects currently suspected of serious criminal activity. The male subject had no warrants or wants and admitted to being on parole but was no longer so. The female had misdemeanor warrants that were eventually handled at the end of the incident through issuance of citations. Even after the force incident in which the subject’s actions against the officers were characterized as violent, he was neither arrested nor charged and released after receiving medical treatment.

When the male subject got out of the car, he did so non-aggressively and with his hands raised. The backup officer escalated the matter by immediately yelling at the man: “get your ass in the car.” The response by the man was to apologize repeatedly to the officers for his actions. A review of the video shows that there was really no time for the man to comply with the order, as the officers swiftly walked up to the man and grabbed him. The officers did not return the man to the car – which is what they had ordered him to do – but instead patted him down, handcuffed him, and walked him back to the radio car.

The possibility of a third subject was not seriously considered by the responding officers in real time. The female officer had indicated to the backup officer that she was skeptical since there was no room in the car for a third subject. If the officers had been concerned about the possibility of being potentially outnumbered on the vehicle stop, they could have called for additional backup; in the moment, they chose not to.

As for the female companion, she did not appear to be unduly intrusive regarding the officers’ efforts to bring the man into custody. While she approached the officers, which is always a cause for concern, there is no evidence that she did anything to physically interfere with their actions. The fact that neither she or the vehicle had yet to be searched had more to do the officers’ choices than with any danger she posed; they could have ordered her out of the car and patted her down for weapons if they had genuine concern about the possibility that she might be armed.

A review of the video shows that when the man kicked the inside door of the patrol car, it was not directed at the backup officer. Moreover, there was no apparent exigency to bring the man into custody: at the time the decision to use the Taser was made, the man was sitting in the back of the car and had made no effort to escape or fight with the officers. Simply holding the scene static until backup officers arrived could well have obviated the need for a Taser deployment.

When considering other force options, the field sergeant only considered the baton or OC spray. He did not consider the option of using control holds to maintain the subject in the back of the

car until additional officers arrived. If the officers had simply contained the subject in the back seat of their patrol car, they could have used those additional officers to safely pull the subject from the car and place a hobble on his feet if necessary, thereby avoiding the need to deploy a Taser.

The field sergeant similarly failed to consider whether de-escalation techniques could have resulted in a different outcome.² As noted above, once the man exited the car with hands raised, he was extremely apologetic to the officers. Instead of de-escalating the situation and returning the man to the driver's seat, the officers escalated the situation, effectuated an arrest and handcuffed the man. As the man was led to the patrol car, the female officer told him he was being an "idiot", while the man is asking "what did I do?" and "why are you doing this to me sir?" to which the backup officer responded: "get in the goddamned [patrol] car." When later interviewed by the field sergeant, the man talked about how the officers had not treated him with respect. In short, the way in which the officers escalated the event ended up raising the agitation level of the man who had up to then not expressed any hostility whatsoever to the officers.

The field sergeant's analysis also fails to consider the effectiveness of the Taser deployment. Instead of allowing the officers to bring the man under control safely within the patrol car, the Taser use did just the opposite, causing the man to lurch entirely out of the car and onto the ground, where he began to hurt himself. Fortunately, other officers soon arrived who were able to quickly stabilize the situation.

We agree with the Department that the initial officers did not perform consistent with principles of officer safety when they left two subjects in the car without searching them or the vehicle. Nor did the two involved officers ever ask either of the occupants whether they possessed any weapons.

But another officer safety issue that was not addressed by the field sergeant was the fact that the female officer told the man he was being detained and then left him to go back to her car to talk to dispatch. Officers are taught that before a person is informed he is to be detained, he is ordered out of the car, patted down, and handcuffed rather than being left in the driver's seat of the vehicle, where he could drive away, produce a weapon, or create additional safety issues for the responding officers.

In short, the analysis in this case by the field sergeant lacks rigor and omits discussion of the officers' questionable decision-making. Instead it focuses almost exclusively on those factors that support a conclusion that the Taser was the best weapons choice. Facts that are not helpful to support that conclusion, and that we point out here, are ignored by the PAPD analysis to a disappointing extent. For the reasons articulated above, we are not persuaded that the officers had no other options to resolve the situation.

Even if ultimately the decision is that the Taser use was within policy, PAPD should evaluate whether other strategies existed to address the challenges faced by the involved officers. In other

² The current PAPD Taser policy expressly instructs the Personnel and Training Lieutenant to ensure that all Taser training includes de-escalation techniques.

words, even though the Taser could have been used in this case, PAPD should examine and address whether there were other ways to safely bring the individual into custody. This analysis was presumably undertaken but not documented by the reviewing lieutenant when he recommended training for the involved officers regarding their decision making, including consideration of alternative detention methods for handcuffed prisoners than use of the Taser. While PAPD should be commended for recognizing that this incident presented learning opportunities for the involved officers to improve their decision-making, it would be helpful for the Department to document the rationale for the training action plan in the use of force review package.

Recommendation # 1: When reviewing force incidents, all the facts that are available to be reviewed should be included in the analysis.

Recommendation # 2: A force analysis should not be reluctant to provide constructive criticism of officer actions.

Recommendation # 3: A force analysis should expressly discuss whether there were opportunities for the involved officers to deploy de-escalation techniques.

Incident 2

Factual Overview

A PAPD officer attempted to stop a female when the license plate of the car she was driving showed a warrant. When he tried to effectuate a traffic stop, she initially stopped and began to comply by getting out of the vehicle but then re-entered her car and sped away, leading officers on a 5 ½ mile vehicle pursuit. At the end of the pursuit, the female did not comply with instructions to separate from her vehicle. As the initial officer, a K9 officer, went to retrieve his dog to assist with the detention, the woman ran into the passenger side of the officer's patrol car. The officer deployed the dog which caused the woman to leave the patrol car, shut the dog into the car, and attempt to jump on the hood of the car. The K9 officer grabbed the woman as other officers arrived on scene. The woman continued to attempt to escape by kicking the police dog and striking out at the officer with her arms and feet, causing the dog to disengage.

The woman then ran in the direction of two other officers. One of the officers deployed his Taser but only one probe made contact, so it proved ineffectual. The police dog was re-deployed and bit the woman, and officers were then able to successfully bring her into custody. The woman received several wounds to her head, legs, and torso from being bitten by the police dog, but none required sutures. The K9 handler complained of pain from being kicked in the knee by the woman in her effort to elude being taken into custody. The police dog received a large scratch to his eye, suffered when he was struck by the female.

Outcome and Analysis:

The field sergeant who conducted the force review determined that the use of the dog was consistent with PAPD policy, which authorizes use under the following conditions: when there is a reasonable belief that the individual poses an imminent threat of violence or serious harm to

the public, any officer, or the handler, and the individual is physically resisting or threatening to resist arrest, and the use of a canine reasonably appears to be necessary to overcome such resistance.

The field sergeant also found the Taser use to be within Department policy based on the officer's observation of the female's uncooperative actions at the initial traffic stop scene, her entering into a police vehicle, and her assault of the police dog and a fellow officer.

A different field sergeant reviewed the vehicle pursuit and found it to be within Departmental policy. The sergeant noted that areas for improvement were identified, such as providing more information about the pursuit by the pursuing officers. The sergeant noted that a debriefing was held with all involved officers to discuss areas for improvement.

The reviewing lieutenant agreed with the sergeants' determination that the uses of force and vehicle pursuit were within policy. He identified the following issues:

- Mobile Activated Video (MAV) use violations.
 - The K9 handler did not have a MAV microphone during his encounters with the female. He was instructed to store his microphone in his vehicle so that it is accessible and functioning upon a moment's notice.
 - The officer who deployed the Taser did not have an operable MAV microphone because he was charging it at the time of the incident. The officer was instructed to obtain an additional microphone or charge his properly at the end of his previous shift.

The lieutenant wrote that he was not aware of any previous MAV policy violations on the part of these officers.

- Supervisory control. The lieutenant noted that during the initial traffic stop, supervisors did not assign roles to on-scene officers.
- Use of the Taser with the K9. The lieutenant noted that the use of a Taser in conjunction with a possible K9 deployment is heavily discouraged, because a dog who is inadvertently Tased may refuse to perform in the future. The lieutenant wrote that he had a discussion with the officer, who indicated that he would consider all available force options when confronted with a similar scenario in the future.
- The lieutenant noted that team and individual officer training will be conducted on an ongoing basis with the handler and K9 so that officers will become more accustomed to working alongside a K9 team.
- The lieutenant noted that the officer who deployed the Taser was heard telling the female: "take your f*cking hands out of your pants". The lieutenant reported that he spoke to the officer about the use of profanity and the need to avoid using it in the future.

In contrast with the narrow focus in the previous Taser incident discussed above, the reviewing sergeants and lieutenant in this case made a commendable effort to identify and document performance issues that could have been improved. In particular, the documented listing of actions taken by the lieutenant to remediate identified issues is impressive.

In our review, we identified the following additional issues:

No report from Stanford Department of Public Safety (SDPS) deputy

The investigation notes that a SDPS deputy was involved in the vehicle pursuit of the woman. However, there was apparently no request made of the deputy to prepare a report of his actions or observations. When a police response involves multiple agencies, all involved should be asked to prepare a written report so that a comprehensive account can be obtained.

No analysis of how the woman was able to successfully access the inside of a patrol car or training to prevent future occurrences

The investigation notes that while the K9 handler was dealing with his dog at the end of the pursuit, the woman was able to successfully enter his patrol car. As the report notes, a suspect's access to a radio car exponentially increases the risk to responding officers. A different tactical approach as officers arrived at the pursuit terminus could have ensured that the subject not be able to access any patrol cars. Yet this potential tactical misstep was not identified or addressed as an action item.³

No warning before Taser deployed and no documentation explaining why no warning given

PAPD policy instructs officers to provide a Taser warning when feasible, and to document the reason in cases where it is deemed not feasible. In this case, the officer who deployed the Taser did not provide a warning to the woman before discharging his Taser. Moreover, and inconsistent with policy, the officer did not document in his report why no warning was given.

Decision to deploy Taser

As noted above, the lieutenant noted that Taser use is heavily discouraged when K9s are part of the tactical response. There were additional circumstances that also indicate that the Taser deployment in this case was not the best weapons option:

- The fact that the woman was running made it very difficult to ensure that both probes would effectively strike her, create a circuit and render the Taser use effective. In this case, that proved true since only one of the probes struck her.
- The fact that the woman was wearing loose bulky clothing made it less likely either probe would successfully imbed into her skin, as required for an effective deployment.
- At the same time, a successful deployment would have created its own concerns: the resulting muscular incapacitation of a running individual may have caused her to fall in such a way as to sustain serious injury, including a head impact.

³ PAPD's review could have well concluded that no other viable options existed to prevent the woman from accessing the patrol car; our larger point is that during the after-action review, the decision-making that caused this to occur was not fully evaluated.

Recommendation # 4: When other agencies are involved in similar joint operations, field supervisors should request that their personnel prepare a report documenting actions and observations.

Recommendation # 5: When a suspect successfully makes entry into a patrol car, the incident should be debriefed to reduce the likelihood of similar occurrences.

Recommendation # 6: Supervisors should be reminded of the Taser policy requirement that when warnings are not given prior to deployment of a Taser, the officer needs to document the reason for why no warnings were provided.

Recommendation # 7: PAPD may wish to further discuss with the involved officer why the Taser deployment was not the best weapons choice in this case.

Misconduct Investigations

Case 1

Factual Overview:

An adult woman complainant made several allegations relating to being detained and searched after a PAPD supervisor observed her during routine early morning patrol. At the time of the incident, she had been seated in her vehicle in the parking lot of a closed public building. After some initial inquiries, the supervisor determined that the woman was on probation for a prior conviction and decided to call for backup in order to conduct an investigatory search. The woman alleged that the supervisor, and the backup officer who eventually responded, had directed a female Explorer⁴ (who was riding along with the backup officer) to search her in a way that had involved inappropriate physical touching.

Additionally, she alleged a previous encounter with the same supervisor that had supposedly occurred several months earlier, in the parking lot of a drugstore and also in the early morning hours: she claimed that the officer, in uniform and driving a marked vehicle, had complimented her inappropriately and persistently, to the point where she was uncomfortable and concerned about his ability to access her personal information. Later, she also expressed dissatisfaction with the Department employee who had originally taken her complaint; the investigation also encompassed the propriety of that supervisor's interactions with her.

Outcome and Analysis:

The investigation was conducted by a retired PAPD manager whom the Department has utilized on several occasions. We have reviewed several cases in recent years that were handled by this

⁴ PAPD's Explorer program, which we have written about in the recent past, is intended to introduce interested local juveniles and young adults to the Department through education and participation in a variety of agency activities. Many police departments throughout the country offer some version of this idea. It is widely recognized as an enhancement to community relations and a vehicle for positive youth development; at the same time, the variety of attendant risks means that clear policy and effective supervision are critical.

individual, and our general impression is that his work is thorough and effective. Here, he was able to rely on in-car camera recordings and audio as a foundation for his evidence gathering. He also supplemented the complainant's detailed initial written statement, and her recorded "intake" interview with the PAPD sergeant, by speaking with her himself at some length. He also interviewed the various Department members who were involved in the stop and spoke with the sergeant who is currently in charge of the agency's Explorer program to gain his perspective on what had occurred.

Based on this body of evidence, he submitted findings and conclusions that, for the first time in our experience of reviewing his completed work, deviated in part from the final result reached by Department executives. We discuss these differences and our own assessment below.

With regard to the complainants' assertions that she had been inappropriately "fondled and molested" at the direction of the sergeant, the investigation established that the pat-down search was legally justified and reasonable in its nature and duration. An in-car camera recording documented the event in a way that belied several of the particulars in the woman's complaint and showed that the officers' behavior was not disrespectful or malicious toward her. The search lasted approximately a minute. While she may well have been bothered in the ways she later asserted, this was not outwardly reflected by her actions in the moment; on the contrary, she comes across as very cooperative and conversational throughout the recording and during the search itself. She even complimented the Explorer on having met the Department's entry requirements. Nor was there evidentiary support to that the other cited aspects of the sergeant's performance during the stop amounted to misconduct or were otherwise problematic or improper.

The investigation also did not support the allegation that, some seven months earlier, the same sergeant had flirted with her and made her uncomfortable with his persistence when encountering her in the parking lot of a drug store while on duty. She did not provide a specific date; however, the investigation showed that, during a three-month window that matched her approximation, the sergeant was working a shift that clashed with her recollection of a nighttime encounter. Moreover, he did not appear to have worked any relevant overtime assignments during that period.

These two key findings were affirmed by Department management during its review of the case, and we concur.

Where the investigator took a different position than the Department was with regard to the use of the Explorer for conducting the search. The concern was not that the Explorer had mistreated the complainant in any way. Instead, the investigator took the position that it was inherently misguided – and a conflict with policy – to put the Explorer in that situation, for which she lacked the training, experience, and authority. Though nothing went wrong, the potential for the Explorer's safety to have been compromised, and the extent to which the Explorer's involvement went beyond established parameters for the program, rose to the level of a policy violation in his mind. He believed the sergeant should receive discipline for his role in directing this procedure to occur.

The Department's decision-makers disagreed. This was based in part on their perception that some of the responsibility for what had transpired fell on the shoulders of another supervisor who had briefly visited the scene. This supervisor, who had authority over the sergeant that night spoke with the sergeant, learned of the basic situation, and then drove away after learning that backup – including the Explorer – was on its way and seeing it arriving.

The circumstances for searching the female subject were less than optimal in one of two ways. Either the search would be conducted by a male officer (in tension with the Department's policy that calls for "same sex" searches when possible) or by the female Explorer (in what was arguably an inappropriate delegation of responsibility). This created a dilemma, albeit a readily surmountable one.

The Department ultimately took the position that the higher-ranking officer who showed up at the sergeant's call could and should have recognized the pitfalls of the situation and done more to intervene before simply leaving. Because of this, the reasoning went, and because of asserted ambiguities within the relevant Explorer policies, the Department believed that the sergeant should not be held formally accountable for his actions.

This analysis, while plausible, also prompted questions as to whether the "buck stopped" with the other supervisor, and whether discipline for that employee was therefore appropriate. As it weighed its options in this regard, the Department took the step of consulting with us – one of the rare occasions in which it sought our perspective prior to making its final decision.

We welcomed the opportunity to hear about the situation at this earlier stage; presumably, the outreach reflected a new approach on the part of the new Chief, as well as the ambivalence that executives felt about going against the investigator's original conclusions. Our own initial reaction – with the caveat of not having reviewed the case file itself – was to suggest further investigation into whether the supervisory lapses rose to the level of misconduct. The Department considered our input and ultimately demurred. Instead, the thought was that a fairer – and ultimately more constructive – resolution would entail training for the involved personnel and a revision/clarification of the relevant policies.⁵ Along with a Department-wide reiteration of the relevant same-sex search protocols, PAPD revised its Explorer policy to include a series of new "directives" – including one that prohibits their being used to conduct person searches of criminal suspects in the absence of exigent circumstances. This, of course, establishes a clear rule that would have been applicable to the incident in question.

We consider the final outcomes to have been both reasonable and consistent with many of the goals of effective administrative discipline. It is important to note that the friction points in the decision-making process related to matters peripheral to the serious original allegations, which the investigation convincingly established as unfounded.

⁵ This was based in part on the fact that the other supervisor had already been interviewed as a witness in the case, and that the investigator had not flagged potential culpability issues.

As for the questions of a.) whether the handling sergeant's choice to have the Explorer do the search; and b.) whether the other supervisor's lack of engagement with the question of the female detainee and the Explorer's involvement amounted to misconduct, we acknowledge the validity of the factors that guided the Department's ultimate course of action. Importantly, the decision to "stand down" on formal discipline was accompanied by the alternative and useful interventions that did occur.

At the same time, and respectfully, we still think we were correct in pushing at least for further formal investigation; i.e., a subject interview of the second supervisor. We consider supervisory performance – including judgment, engagement, leadership, and decision-making – to be as critical as any single factor in the effectiveness of a law enforcement agency. High standards and accountability are accordingly at a premium for these members of any department.

Here, the performance of both officers merited rigorous scrutiny. In fact, as strong an argument could be made that both should be accountable, rather than neither.⁶ To have their mutual (if only partial) shortcomings in issue-spotting and risk management effectively cancel each other out seems like a precedent to be leery of.

Recommendation # 8: The Department should pursue formal investigation protocols to ensure that supervisory-level performance issues are addressed and documented as effectively as possible.

As for the supplemental issue of dissatisfaction with her intake interview that the complainant later submitted by email, this was identified by the investigator but then not overtly addressed in the findings and conclusions. He did describe/summarize the interview in question at some length, based on his review of the audio and video recording of it. The implication seemed to be that the complainant had ample opportunity to express her concerns, and that her allegations about skeptical or otherwise deterring behavior were not substantiated. But the relevant supervisor was not interviewed, and the allegations were not formally addressed.

We reviewed the same recording and compared it to the complainant's characterization of it when she sent her email some three months later. As a substantive matter, we concur with the finding (expressed in the file by omission) that the supervisor behaved professionally – and even quite patiently – in making sure that the complainant had every opportunity to share her concerns. The meeting lasted well over an hour and included lengthy, uninterrupted stretches of explanation and detail from the woman. Though the supervisor did ask questions and offered occasional explanations (which she later portrayed as defensiveness), these moments seemed to arise naturally from the conversation. Not only did they seem objectively neutral, but there was also nothing apparently inhibitory in their effect.

⁶ Another factor in our assessment is that the Explorer's "same-sex" status in relation to the subject, which was perhaps the strongest argument in favor of stretching the bounds of normal Explorer involvement, did not seem to be a motivating factor in the sergeant's choice. Instead, it appeared that he simply saw the search as an opportunity to enhance the young woman's training in the context of a low-key, seemingly safe encounter.

The even-handed receptivity of supervisors when handling the intake of complaints is an important building block to an agency's internal review system. We have raised issues about this in the past with regard to Palo Alto, and we take note when questions about intake become part of the complainant's stated concerns. Here, the supervisor appears to have done a very appropriate job of facilitating the initial fact-gathering and allowing the complainant a genuine chance to be heard.

Our only quibble, then, is with the missing procedural step of analysis and resolution for this aspect of the allegations. We encourage the Department to address such issues overtly where relevant and include them in the findings and conclusions of the case.

Recommendation # 9: When challenges to the objectivity or thoroughness of an investigation become part of a complaint, the case file should reflect the assessment and resolution of those allegations as part of the formal summary.

Case 2

Factual Overview:

This administrative review pertained to an off-duty criminal violation for drunk driving that occurred on a freeway outside of Palo Alto and had been handled by the CHP. It involved one of the Department's "reserve" officers, who was seen weaving erratically after midnight on a weekend morning while driving his own car.

After being pulled over, the reserve went through various tests for impairment that established his intoxication, and he was arrested without incident. He later pled "No Contest" to a misdemeanor DUI charge; as a first-time offender, he received a sentence that combined community service obligations with fines, mandatory treatment, and temporary limitations on his driving privileges.

PAPD placed him on leave from performing any law enforcement duties during the pendency of the criminal case. As with any criminal charge, this incident also had implications for the officer in connection with Department policy.

Outcome and Analysis:

Months after his arrest, and as the resolution of the court proceedings began to take shape, the officer approached the Department to propose a settlement of the administrative charges against him. This entailed acknowledging wrongdoing and taking responsibility for his actions without going through a formal interview.

The Department eventually reached an agreement along these lines. It took into account the officer's lengthy history of "exemplary" service in deciding to retain him under the relevant terms and conditions – even though, as a reserve, the officer was technically an "at-will" employee who could be discharged at any time and for any reason. With some reservations, we concur with this result.

Beyond its relatively straightforward facts, the case is noteworthy for a couple of reasons. One is the notion of the “pre-investigation” settlement that was reached by the parties. And the other – not un-related – is the discipline process as it relates to the unique category of reserve personnel in a law enforcement agency.

Similar in superficial ways to a plea bargain in criminal court, a negotiated settlement such as the one in this case arises from the officer’s interest in moving forward after a lapse, and the resulting willingness to forgo the various investigative processes and appellate rights to which peace officers are entitled. We consider this an appropriate tool for addressing a range of allegations. In exchange for acceptance of responsibility, the officer gets a straightforward – and often mitigated – consequence for his or her wrongdoing. And the agency is able to address the relevant misconduct with minimal resources and in a relatively non-adversarial manner. Such settlements thereby achieve the corrective goals of the discipline process in an efficient, constructive fashion.

In our experience, though, the approach is best suited to cases involving relatively low-level misconduct, and for which there is no real point to additional investigation. Examples such as an unintentional discharge of a weapon with no harm done, or involvement in a minor but preventable traffic collision, lend themselves to the benefits of this format without the agency needing to worry it is missing something factual or underreacting to a serious issue.

Here, some of the relevant conditions pertained. The officer was not only willing to participate but took the initiative, and a significant body of evidence was in hand due to the criminal proceedings. But the misconduct at issue was also significant – particularly given the findings as to the officer’s high blood alcohol content. Moreover, there were other aspects of the incident that fell outside the scope of the Vehicle Code violation and merited additional scrutiny in our view. These included the allegation that the officer had shouted “I’m one of you,” to the CHP when he was pulled over (and then immediately showed the handling officer his Department identification), and his reported misrepresentations as to the number of drinks he had consumed.

These facts reflected poorly on him in ways that both aggravated the misconduct and potentially implicated his suitability as a peace officer. While there are legitimate reasons to alert responding officers to one’s own policing responsibilities (especially, for example, if a weapon is within reach), it can also be perceived as an improper effort to curry favor. Moreover, the intentional if ineffective attempt to deny excessive drinking clashed with expectations for dealing with law enforcement in a respectful, truthful manner.

Even more significant was the involved officer’s unique status with the Department. As a “reserve,” he was essentially serving as a volunteer who had gone through extensive training and was eligible to exercise law-enforcement powers. Many agencies have such affiliated individuals (some of whom are retired regular officers); they offer valuable service, generally on a part-time basis, for a nominal few dollars per year.

Reserves serve on an “at-will” basis. This means they fall outside the normal employment rights and protections that apply to peace officers. It also means that an agency’s options are limited when it comes to corrective action: because the officers are not paid a normal salary, they do not

receive “suspension days.” Consequently, and for all intents and purposes, an agency’s formal disciplinary options in the aftermath of proven misconduct are limited to either a written reprimand or else separation from the agency.

There were seemingly reasonable arguments for both consequences in this case. The officer’s long and apparently distinguished service to the Department merited consideration, and perhaps even outweighed the severity of the misdemeanor. At the very least, though, making that decision in this case merited careful scrutiny and a full accounting of the officer’s mindset – as a formal interview would have achieved.

Additionally, we encourage the Department to be vigilant in general when it comes to its reserve personnel. This is our first case involving one of these individuals in more than 10 years of serving as Palo Alto’s Independent Police Auditor. According to the Department, it has five trained reserves who are currently serving in this capacity.

We have seen examples from other jurisdictions in which standards for reserve officers, not only for accountability but also for matters such as training and certification requirements, are less robust than they should be. The leniency arises in understandable ways: the aforementioned limited choices is one big reason, and gratitude for dedicated volunteer service is another. (We have been told by the Department that the reserve in question is particularly noteworthy in this regard; his experience in helping to staff and organize various special event security teams is particularly beneficial.) Moreover, these individuals are often prominent supporters of law enforcement in their personal lives and chosen fields.

Our sense is that the Department did deliberate carefully with regard to the outcome of this case; we are also told that the relevant individual has been exemplary in addressing wellness issues and in his willingness to share his experiences constructively within the organization. These are both positive developments that have affirmed the Department’s judgment. But it is nonetheless important for agencies to maintain rigor in these arenas as a matter of both operational effectiveness and risk management.

Recommendation # 10: The Department should regularly evaluate the certification status and performance of its reserve personnel.

Recommendation # 11: The Department should ensure that any proven misconduct involving reserve personnel is met with a consequence that adequately reflects the standards and risk management concerns of the agency.