



Fifth OIR Group Report re Monitoring of  
Burbank Police Department

February 2018

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## **I. Introduction**

Pursuant to the Independent Monitor agreement with the City of Burbank, this constitutes OIR Group's fifth report on internal investigations and administrative reviews conducted by the Burbank Police Department ("BPD"). It covers completed cases regarding incidents that occurred in 2016 (though some of the review process extended into this year). We focus on a sampling of Internal Affairs investigations into allegations of misconduct, and a similar range of "use of force" packages. We also assess all of the year's vehicle pursuits (there were 6 in 2016). Finally, we evaluated the Department's administrative response to a pair of officer-involved shooting incidents – one in which the subject sustained only a minor injury, and the other in which the subject died of a self-inflicted wound after an exchange with several officers. In both cases, the Department found that the officers' actions were justified and in-policy.

In addition to the categories listed above, we continue this year with our audit of BPD email communications, which is designed to ensure that users of the system comply with policy. This process has two components. The first is an assessment of BPD management's internal audit of officers below the rank of captain, as well as civilian personnel. The second, which we performed in 2016 for the first time, involves our own scrutiny of a month's worth of email activity by the six members of the Department's executive command: the Chief, Deputy Chief, three captains, and the senior civilian administrator. As discussed below, both parts of the audit showed improvement over prior results – which had created some negative attention for the Department in 2016. With exceptions so minor as to be negligible, the electronic communications reflected a high level of professionalism.

The encouraging outcome of the email audit matches our larger impressions of the Department and its current direction: namely, that it continues to evolve in the sophistication and effectiveness of its various internal review mechanisms. Its protocol for investigating and evaluating uses of force, for example, is both well-constructed and thoughtfully executed at all levels of supervision. The various "checks and balances" help promote not only accountability for the exercise of police power but also opportunities for the identification of potential improvements – a significant benefit that many agencies fail to pursue.

As for the misconduct investigations, they are largely effective in their thoroughness and appropriate in their results. Importantly, the Department also makes the discipline process a core responsibility for all managers, in terms of both investigations and outcomes. This promotes the notion that upholding standards and appropriately responding to problems is a shared and worthy goal – not secretive work to be performed exclusively by Internal Affairs.

One significant blemish in an overall positive report was the managerial failure by a BPD command staff member that allowed twelve internal affairs investigations to go un-reviewed for months and sometimes years. This failure allowed the one year statute of limitations to lapse for these cases, which made it not possible to discipline any subject officers who had founded policy

violations. While it appears that only one officer escaped formal accountability as a result of the lapse, the relatively minor consequence to accountability is only part of the damage that such a failure had on BPD's internal investigative system. We were also disappointed that BPD's internal controls did not effectively identify that twelve cases had gone significantly delinquent and was not able to rectify the issue before it was too late. As detailed below, BPD has made a number of systems changes to prevent a similar occurrence and we have some additional recommendations to ensure that future misconduct cases do not fall through the cracks.

In keeping with the theme of continued progress, the Department recently added an impressive new feature to its efforts at self-scrutiny. For the first time, it conducted a "data mining" audit to identify officers who were "high frequency" participants in uses of force and other risk-associated incidents during a 12-month period.<sup>1</sup> It then pulled relevant documents and recorded materials from the incidents in question, in an effort to determine whether patterns or common characteristics existed that might warrant further attention from the Department.

The point of the exercise was not punitive, and each individual event had already been the subject of supervisory review. Instead, the goal was to pro-actively – and constructively – ensure that potentially beneficial adjustments to officer performance were not being missed. The audit ended up focusing on several officers who had been involved in multiple force incidents over the one year's time. The in-depth, collective analysis of those encounters was thorough and ultimately reassuring: the review largely affirmed that these "high activity" officers were doing legitimate and solid work. And the supervisor who did the lion's share of the audit (investing some 125 hours into evaluation of the relevant incidents) also offered some useful recommendations to benefit the Department as a whole, based on her findings.<sup>2</sup>

All of these review mechanisms are distinct from actual officer performance in the field – but they influence that performance in significant ways. We noted a reduction in racial profiling<sup>3</sup>

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<sup>1</sup> Here the Department was taking creative advantage of technological/software capabilities it had recently acquired, which gave it the opportunity to assess collective information in efficient ways.

<sup>2</sup> These included additional training for dealing with individuals in crisis (which characterized several of the force incidents) and reinforcement by supervisors as to the importance of professional language (another common lapse that we agree merits attention).

<sup>3</sup> We discussed this category of complaint – which is particularly sensitive for several reasons – in detail in our previous report. It should be noted that there have been no sustained profiling allegations in our experience with BPD. At the same time, though, the complainants are often sincere in their perceptions and concerns, and law enforcement agencies do well to recognize this dynamic and seek to work through it with effective communication and other approaches. The decrease that we note above is a positive development, and one we will continue to monitor.

and discourtesy allegations, for example, and a pattern of controlled and thoughtful approaches to the use of force among BPD officers.

Naturally, among all the materials we reviewed there were times when officers fell short of the ideal – or even the expected baseline standard – in the context of their general performance or individual incidents. Two officers left the Department in the aftermath of serious and troubling allegations of sexual misconduct. Less momentously, there were lapses in execution or adherence to training, and occasional lapses in professionalism or knowing misconduct on a smaller scale. Moreover, in the context of vehicle pursuits, ironing out the balance between effective enforcement and risk management continues to be a challenge for BPD officers and management alike.

As in the past, we identified individual shortcomings and more general opportunities for improvement among the many cases we evaluated. Our goal in sharing these critiques is not to nitpick or play “gotcha” with the Department, but instead to take advantage of our access and outside perspective to enhance the good work that BPD is already doing. We make recommendations accordingly throughout the report. And we are gratified to have seen concrete ways in which prior recommendations were reflected in the contents of this year’s case materials. The Department has consistently chosen to treat our audit process as an opportunity to improve. Its willingness to have a dialogue and to be receptive to new ideas is commendable and much appreciated.

Earlier this year, we also had the opportunity to meet with the leadership of the officers’ labor association. We had a candid discussion that involved some clarification about our role, and some shared insights into the perspective and concerns of the rank and file. It was helpful to us, and we hope it marks the beginning of a dialogue that will continue.

## II. **Officer-Involved Shootings**

The two cases summarized below were the first shooting incidents that BPD had experienced in several years. Nonetheless, BPD’s internal protocols seem to have been well situated to deal with them in effective and constructive ways that addressed both accountability and other potential areas for improvement.

### A. OIS # 1, Subject Deceased

#### *Factual Synopsis*

This incident began when officers were dispatched in the early morning hours to a fast food restaurant regarding a subject who refused to leave when he was informed the restaurant was closing. The subject indicated that he had a gun and that others outside the restaurant intended to harm him.

BPD officers responded to the location and confirmed that all employees were out of the restaurant and that the subject was the only individual who remained inside. Officers contacted the subject and instructed him to leave but he refused. During the next half hour, the subject moved to various positions within the restaurant and officers observed him holding a handgun and, at times, pointing it at officers. Once the existence of a firearm was confirmed, on-scene sergeants redeployed officers to positions of greater safety and the Department's armored vehicle was summoned.

The subject fired a round from his handgun into the ceiling inside the restaurant. Moments later, he pointed his handgun in the direction of officers positioned outside and fired, shattering the glass. The subject then leaped through the broken window, continuing to hold his handgun. The subject pointed his gun at officers, fired at and shattered the McDonald's window, and then proceeded to jump through the now broken window as three BPD officers fired seven, three, and one rounds respectively in response to these actions. The subject sustained gunshot wounds to his thigh and arm as a result of BPD's use of deadly force. The subject then placed his handgun to his head and fired.

BPD officers used an armored vehicle and ballistic shield to approach the subject, handcuffed him and then called paramedics, who had been staged nearby, to provide him medical attention. The subject was transported to a nearby hospital but died from his injuries. The autopsy report found the cause of death to be suicide, based on forensic evidence that the head wound had been self-inflicted.<sup>4</sup>

#### *BPD's Criminal Review of the Incident*

Under its established protocol, BPD personnel handled the criminal investigation into the incident. This is not unusual among law enforcement agencies that have the resources and expertise to undertake such a task.<sup>5</sup> The District Attorney sends a representative to the scene, monitors the subsequent investigation for thoroughness, reviews the completed case file, and makes the ultimate decision as to the legality of the officers' actions.<sup>6</sup>

We found the investigation to be generally thorough and objective – with one significant exception. Instead of interviewing the on-scene officer witnesses to the use of deadly force, BPD chose to rely on their observations as set out in police reports. While these reports were generally detailed, they naturally lacked the depth of information gained by a comprehensive

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<sup>4</sup> The thigh wound was characterized as also contributing to the death.

<sup>5</sup> While preferring to take the lead in its own investigations, BPD does utilize Los Angeles County Sheriff's Department crime scene technicians for assistance with photographs, diagrams, and other forensic details.

<sup>6</sup> The District Attorney issued its declination letter in January of 2018.

interview. This investigative technique was especially important in this case, since the three officers who used deadly force declined to provide voluntary statements<sup>7</sup>, and their observations were accordingly not available for purposes of the criminal review. While there were a number of BPD witnesses on scene, interviewing each of them would have provided greater insight to the event.

***Recommendation 1: BPD should refine its officer-involved shooting protocols so that all police witnesses to the use of deadly force are interviewed as part of the criminal investigation.***

We note one other aspect of the criminal investigation. After the shooting, BPD conducted a witness canvass of the location. During that canvass, several witnesses indicated that they had photographed or videoed part of the incident with their cell phones. The report indicates that interviewing officers requested those witnesses to email the video/photos to them at a later time.

While those witnesses apparently followed the officers' instructions, the casualness with which this potentially critical evidence was obtained seemed noteworthy. While we do not advocate for confiscation of every witness' cell phone, a better way to ensure that BPD obtains a copy of the evidence would have been for the officers to ask that the transmittal of the evidence be undertaken in their presence. That way, if there had been a refusal, more stringent efforts could have helped ensure that the Department was able to retrieve the evidence.

***Recommendation 2: BPD should consider the optimal way for officers to ensure collection of cell phone video and photographic evidence in a critical incident.***

*BPD's Administrative Review of the Incident:*

Along with the criminal investigation discussed above, BPD promptly initiated its administrative review of what had occurred. Internal Affairs personnel responded to the scene, and soon took an active role: because of the officers' decision not to provide voluntary statements to the criminal case, the Department ordered them to participate in an administrative interview as to their actions. Such an obligation is recognized under the law as a way to balance the officers' rights with the agency's need to have a detailed understanding of officer actions and decision-making. The resultant "compelled" testimony can then only be used for internal purposes.

Significantly, BPD not only conducted these interviews, but did so on the date of the incident. The fact that IA sought, and successfully obtained, an account from the involved officers before they ended their shift is a testament to BPD's recognition of the evidentiary importance of a relatively contemporaneous statement. BPD's position on this issue is consistent

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<sup>7</sup> The choice by officers to exercise their rights in this fashion after a shooting is legally valid. It is also a common – though by no means universal – practice.

with best investigative practices – and not universally followed in law enforcement. It is an approach that other agencies would do well to emulate.

To BPD's further credit, it did not show the available restaurant video of the subject's actions prior to interviewing the involved officers. As a result, consistent with our view of best investigative practices, BPD was able to obtain a pure statement of the officers' actions and state of mind. This "statement first" approach is another way in which the Department differs from other agencies. It is an issue that has become a source of some contention in this age of commonplace video evidence, and we agree with BPD that conducting the interview prior to an exposure to recordings is the better practice. It avoids the potential problem of the video's influence – however innocent – on officer recollection and perception of events, and also preempts the challenges from those who argue that showing the video allows officers to "get their story straight."

Within a week of the incident, the Department's administrative response continued with the convening of a comprehensive tactical debriefing. The debriefing session included involved BPD personnel, officers from the Burbank Airport Police who had assisted with the operation, and the Pasadena Air Support Unit that had also been deployed. The debriefing session identified training and equipment needs that included in part:

- Optics for the patrol rifles
- Access to the armored vehicle keys by all personnel
- Enhanced spotlights on the armored vehicle
- Shotgun load out protocols
- Tactical medic bags for all Department vehicles
- Training related to officer-down rescue tactics
- Storage and removal of patrol rifles and shotguns from police vehicles.

This discussion was procedurally noteworthy, insofar as it ensured a timely evaluation and response to identified issues. While recognizing the importance of the formal criminal investigation, we endorse the Department's recognition of the incident as something that merited scrutiny beyond the specific questions of deadly force and officer accountability. The effort to glean useful information, and take corrective action as soon as is practicable, is especially important for these major events.

While we applaud the Department for conducting the session, no contemporaneous document was prepared that set out its findings and recommended action items. Months later during the Critical Incident Review Board ("CIRB") review, the findings were alluded to, but even that document did not include the reason for the equipment and training recommendations that emanated from the session. In our work with other agencies, we have seen good intentions and thoughtful insights "slip through the cracks" of follow-up and remediation unless they are memorialized and closed out within the file itself.

***Recommendation 3: BPD should continue to convene tactical debriefs after critical incidents but should ensure that any findings and recommendations are documented.***

Seven months after the incident, the Department convened its Critical Incident Review Board to further evaluate the case. This Board is the cornerstone of BPD's administrative process for evaluating uses of force. It is comprised of command staff members and other knowledgeable parties, and is discussed in more detail below at page 21. The CIRB concluded that the use of deadly force by all three officers was in policy, given that each of them had sufficient justification in light of the subject's actions.

The CIRB also found that the restaurant video of the incident showed that another responding BPD officer (who had not used deadly force) had taken actions inconsistent with principles of officer safety by exposing himself to a potential threat. The CIRB Board recommended that the officer's commanding officer meet with him to review and discuss his tactics during the incident.

The CIRB determined that all but two of the equipment and training issues identified by the earlier debrief had been addressed. The CIRB reported that with regard to the two outstanding issues, the Department had purchased rifle optics and tactical medic bags for all vehicles with an expected full deployment of the equipment within two months.<sup>8</sup>

The CIRB discussed the value and importance of an in-car video system and noted that had the officers' vehicles been so equipped, much of the incident would have been captured and memorialized on that system. The CIRB report stated that the significance of an in-car video camera system cannot be overstated for officer safety, in addition to investigative and risk management considerations. CIRB recommended that the Department continue to seek resources to acquire an in-car video system for the patrol fleet.<sup>9</sup>

The Chief approved all of the CIRB recommended findings.

We have repeatedly written about how impressed we are with the Department's commitment to critically examining critical incidents and uses of force, and the value of the CIRB process in accomplishing those goals. Here, for example, the analysis extended beyond the shooting officers' actions, and noted that one officer deployed at the location in a way that

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<sup>8</sup> Since the CIRB report, the medic bags have been fully deployed and officers have been trained on their use. The new rifles and optics have yet to be fully deployed, but an upcoming firearms training session specific to the new rifles and optics is due shortly at which point the optics will become fully deployed.

<sup>9</sup> Depending on the incident, in-car videos can capture dynamic events more effectively than a body-worn camera; the reverse is also true. For an agency interested in comprehensive coverage, having both video systems operational is ideal.

put his safety at risk. The officer's supervisor was ordered to conduct a debriefing outlining the tactical deficiencies identified.

While this insight and corrective response are commendable and representative of the CIRB's work, we do have a suggestion. For purposes of completeness and to gain further insight into how the debriefing was received by the officer, it would be helpful for the CIRB process to request that the supervisor document the debriefing described above and include in the CIRB administrative file.

One aspect of the incident that was not included in the CIRB memorandum was the performance of the on-scene sergeants. The investigative reports repeatedly illuminated the effectiveness of the decision-making of the sergeants as they coordinated the positioning of the on-scene officers. For example, once it was confirmed that the subject had a gun, sergeants then re-positioned officers a greater distance from the restaurant and ensured that they had sufficient cover. A request was made for retrieval of the Department's armored vehicle, which proved useful in the eventual tactical response and the securing of the subject. The sergeants coordinated an evacuation of the restaurant parking lot and several vehicles which were still occupied by patrons. Finally, the sergeants requested a SWAT rollout<sup>10</sup> and ordered all officers to don ballistic helmets.

While we assume that these examples of sound tactics and strong supervision were discussed by the CIRB participants, it would have been helpful to have highlighted this in the CIRB memorandum. Moreover, in the same way that sub-optimal performance was addressed through a briefing, it is important to reinforce decision making that is consistent with Departmental expectations. For that reason, it would have been helpful for a command staff member to meet with the involved officers and the on-scene sergeants to discuss the findings of the CIRB meeting.

***Recommendation 4: When a supervisor is requested to conduct a tactical debrief with an officer as a result of identified sub-optimal performance, the CIRB process should request that the briefing be documented.***

***Recommendation 5: When sergeants are on-scene for a critical incident, the CIRB process should review their decision-making and document any observations and assessments. The CIRB process should then assign a command staff member to convene a meeting to discuss those findings with the on-scene sergeants.***

***Recommendation 6: The CIRB process should ensure that after an officer-involved shooting is reviewed, meetings are held with the involved officers to discuss the CIRB findings.***

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<sup>10</sup> The actions of the subject required a tactical response by the on-scene officers before the Burbank SWAT team was able to deploy.

## B. OIS # 2, Subject Injured

### *Factual Synopsis:*

This case involved a BPD officer firing three shots at a subject who was driving his truck in reverse in the direction of the officer and his partner, who had just pulled the subject over in their radio car. The subject's injury was minor: he sustained a bruise that was apparently the result of a bullet going through his seat but not breaking his skin. Backup officers arrived soon after the shooting, and he was taken into custody without further incident.

The incident began when a woman went into a convenience store in the early morning hours to request help; she said she had just left a white pickup truck where a man had been transporting her against her will. The store clerk called 911 on her behalf, and responding officers saw a truck in that area that met the description. They then pursued the vehicle for a short time before it stopped in apparent response to their efforts.

However, as the officers were getting out of their vehicle to approach the man, he suddenly put his truck into reverse and drove at the car, closing the distance rapidly and eventually grazing its front bumper. The driver officer later said he thought about backing up himself, but felt that it was too late because his partner had already begun to emerge from the vehicle. It was the passenger officer who fired three times in response to the threat he perceived from the subject's driving behavior and the oncoming vehicle. The subject effectively surrendered at that point.

### *BPD's Criminal Review of the Incident*

As discussed above, BPD did conduct a criminal investigation into the shooting as a component of its response. (The subject was ultimately charged with assault with a deadly weapon against the officers.) The District Attorney's Office also responded, in spite of the ambiguous nature of the subject's injuries.<sup>11</sup>

The driver officer in the case did give a witness statement to criminal investigators, while the shooting officer declined to do so in keeping with his rights. (This dynamic is discussed above, in the context of the previous case.) The driver officer's account supported the sense of threat perceived by his partner, who was first to leave the car and therefore more vulnerable.<sup>12</sup>

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<sup>11</sup> The District Attorney issued a letter of opinion in September of this year, concluding that the officer's use of deadly force had been legally justified.

<sup>12</sup> The subject also gave a voluntary statement about his actions, which he described as an attempt to reposition his vehicle after having originally stopped in a place he thought was not legal.

While the circumstances leading up to the shooting (including the woman's involvement) were somewhat unusual, the deadly force itself was relatively straightforward. The investigation was thorough and addressed the key questions.

*BPD's Administrative Review of the Incident*

The Department's Internal Affairs unit rolled out to the scene and subsequently conducted a thorough use of force investigation that included a re-interview of the witness officer and a compelled statement from the shooter officer. This interview took place the following day. While we describe above our preference for "same day" statements in this important context, this was still relatively timely. Our understanding is that the decision was driven in part by the timing of the incident (which was already late in the officers' shift). This is understandable, but we reiterate our recommendation that the Department strive for obtaining the statement of involved officers as soon as is practicable.

***Recommendation 7: In the aftermath of an officer-involved shooting, BPD should continue to prioritize the prompt interview of involved personnel, and should conduct it before the end of the officers' shift in the absence of compelling reasons to wait.***

The rest of the Internal Affairs review was thorough and thoughtful, and provided the foundation for a Critical Incident Review Board evaluation. Beyond the use of deadly force, which the Board determined had been justified and in policy, another key question related to the "shooting at vehicles" dimension of the incident. This practice has become generally disfavored in recent years, primarily because it is understood to be ineffective in stopping the vehicle, potentially dangerous in the event of an incapacitated driver, and a worse option for threatened officers than simply getting out of the way if possible. In fact, BPD has joined other progressive agencies in adopting a policy that discourages the tactic except in the absence of other viable options.

Here, the Department evaluated the incident and found that the officer's actions had fallen within the exception. The abrupt and startling maneuver by the subject had occurred before the officer could successfully clear the radio car; it was also noteworthy that that officer had restricted his shots to three in a show of controlled reaction.

In keeping with the holistic evaluation that is a characteristic strength of the CIRB process, the Department evaluated other elements of the incidents as well, including the following:

- A questionable performance from the 911 operator who handled the initial call from the convenience store; her conduct (including somewhat terse interactions with the "good Samaritan" reporting party and a failure to solicit additional details) became the subject of a separate administrative investigation.

- The incomplete “public safety” statement that the first supervisor on scene obtained from the involved officers in the aftermath of the incident. (These are specific topics that relate to those circumstances of a shooting that may require immediate intervention, and which are accordingly recognized as a supervisor’s obligation to address.) The Department addressed this through preparation of a series of questions that became part of the field supervisors’ standard notebook.
- The officers’ conduct during the short vehicle pursuit – and specifically their failure to put out radio traffic relating to the status. (This was explained to the satisfaction of reviewers by the officers, who cited the limited duration and their focus on ascertaining the subject’s intentions.)
- The deviation from proper protocol that resulted in both officers being transported from the scene in the same car, rather than separately in keeping with best investigative practice. This was addressed through a supervisory briefing.

## **II. BPD Emails**

### **A. Introduction**

Last year, our report featured sections on BPD electronic communications for the first time. This was in response to a controversy that developed in the spring of 2016, when the media learned of several inappropriate emails (mostly revolving around racial or ethnic “humor”) that had been passed along by a former command staff member. The insensitive tone of the emails, and the adequacy of the Department’s original response, generated criticism and concern.

The City asked us to expand our existing audit functions in three ways. One was to unspool what had happened a couple of years earlier, when the problematic emails had first come to the attention of the Chief and other City officials, and to evaluate the adequacy of that initial response. The second was to monitor the Department’s internal audit process, which was revived last year after having been dormant for a brief period. And the third was to conduct our own independent direct review of a sampling of emails from command staff members – who had been exempted from the existing BPD protocol, and therefore were not subject to standardized scrutiny.

We accomplished these goals and shared our findings in a public report last December. Among our recommendations were some adjustments to the BPD internal audit process that were designed to make it more consistent and effective, and a larger suggestion to the City that it amend the language of its broader policy. This latter change allowed for “de minimis” use of work email for generic non-work purposes, in recognition of the benign nature of those communications and the reality of technology as utilized in everyday life. Those recommendations were adopted, and provided the backdrop for our review this year.

## B. BPD Internal Audit: Results

The Department audit encompassed 29 employees and looked at each person's email accounts for a selected month. While the audit drew from a range of classifications, including civilian employees, the individual employees were chosen at random.<sup>13</sup> A separate audit was conducted by a Department captain for a sampling of supervisors at the sergeant and lieutenant levels.

In all, some 9600 emails were collected and reviewed for the audit, and the results showed overwhelming compliance with City and Department policy in this arena. The audit noted individual instances of non-work-related correspondence, but, cumulatively, these were very small in number and unremarkable in their content – well within the parameters of accepted use under the new policy.

An even smaller number of emails emerged that were of questionable propriety for the workplace, either because of content, tone, or mild profanity. The Department determined that none of these was egregious enough to constitute a formal policy violation, and we concur.

However, we also agreed with Department executives in thinking that a counseling session – for purposes of discussing the specific instances and offering a reminder about expectations – was warranted for each of the relevant employees. Department leadership assured us that the conversations occurred, but they were unable to locate relevant documentation. Nor did the Department-wide bulletin that was circulated in the aftermath, or the correspondence to all the parties who had been selected for the audit, make any reference to these “borderline” entries.<sup>14</sup>

We hesitate to make too much of this, and emphasize that, on the whole, compliance levels were extremely high. At the same time, we encourage the Department to “show its work” in the audit context through documentation, even when the only necessary interventions are minor and informal in nature. Doing so helps reinforce the standards and ensures the kind of

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<sup>13</sup>We had recommended that the Department adjust its audit protocol to ensure the repeat inclusion of any individuals who were found to have violated policy in a prior review. This would provide additional incentive for these employees, and a means for the Department to ensure that behavior had been corrected. The Department accepted the suggestion and agreed to add relevant personnel for a period of two years after the violation. However, no employees were out of policy during the last review cycle.

<sup>14</sup>In addition to the email audit and use of force audit discussed in this report, BPD regularly conducts audits of other critical operations; an impressive feat considering the size of the Department and other responsibilities. In the spirit of transparency and to better inform its public about its progressive auditing work, BPD should consider posting on its website a description and summary results of these audits when they occur.

follow-through on good intentions that is sometimes lost in the flow of management's responsibilities.

***Recommendation 8: BPD's final audit report should document any after action remediation, including counseling sessions to employees who performed below Departmental expectations.***

***Recommendation 9: BPD's Department-wide bulletin setting out the results of the audit should indicate if it discovered emails of questionable propriety.***

### C. OIR Group Audit of Executive Team

For the second year, the City's information technology group provided us with a copy of a month's worth of activity for the Department's upper management, so as to ensure the inclusion and accountability of these six individuals. This included both received and sent items.

We surveyed the entire listing of emails for each person, and opened numerous individual examples. The vast majority were straightforward examples of Department business, often received by multiple members of the command staff and therefore reflected in multiple accounts. A special emphasis went to "Sent" emails, due to the greater control and responsibility that senders possess when it comes to their email communications.

The audit revealed no violations of policy. A tiny percentage of "Received" emails related to commercial correspondence seemingly unrelated to the workplace (such as notices from realtors, a stock market service, and landscaping company). These were otherwise innocuous and scattered among the audited individuals. Additionally, a couple of emails that we reviewed – and that came from individuals outside the Department – featured political commentary that was "humorous" in questionable ways, but that did not involve action by the BPD recipient.

As for the "Sent" emails from each account, none of them included problematic content or deviated from policy. The small handful that were arguably personal in nature fell well within the acceptable range in terms of both their substance and volume.

In short, the Department's top officials matched or exceeded the appropriate performance that characterized the audit results for BPD personnel at all ranks. This outcome helps to illustrate that the lessons of last year's controversy have continued to resonate. The Department deserves credit for this outcome, and for the effort it invests in promoting it through inspection.

### **III. Review of Misconduct Investigations**

OIR Group evaluated a total of 29 Internal Affairs cases for this year's report. Approximately half of them originated as citizen complaints of misconduct, while the remainder were initiated internally based on supervisory concerns about employee performance. Two of the cases ended in the employee's resignation, but most involved lesser allegations, and in

several instances the weight of evidence exonerated the officer. Our focus, as always, is on the quality of process itself – its thoroughness, objectivity, and effectiveness – as opposed to individual cases or outcomes. That said, we found ourselves largely in agreement with the results BPD reached, as well as the methods by which it reached them.

As has been the case in the last couple of reports, we remain impressed with the quality of the investigations themselves. The thorough and methodical approach to evidence collection and analysis was most evident in cases involving serious allegations and handled by the specialists at Internal Affairs (“IA”). By and large, though, it was also reflected in the work product of more “minor” misconduct cases, as performed by supervisors from throughout BPD’s units of assignment.

The Department has committed to spreading the responsibility for the discipline process throughout its supervisory ranks, rather than isolating it within IA. Some of this is a function of necessity: the IA unit is small and its cases tend to be labor intensive. But its advantages go beyond mere practicality. It reflects a philosophy that “discipline is everybody’s business” and not the secretive, mysterious domain of IA alone. Importantly, though, the Department takes pains to monitor its less experienced supervisors as they conduct investigations. Management also vets completed cases through several layers of scrutiny before a final outcome is reached, in an effort to ensure the legitimacy and accuracy of the result. This makes for a “best of both worlds” dynamic, in which the involvement and contributions of a range of supervisors is supplemented by the expertise of IA and the careful attention of decision-makers.

BPD investigations make effective use of relevant recorded materials, which are in turn provided for our review process as an additional tool. These can include video (especially in the jail context, with its controlled environment and range of surveillance cameras), but almost always involve audio recordings from the individual devices that each patrol officer wears per policy. These recordings are often quite useful and occasionally dispositive in the weighing of specific allegations. Importantly, officers seem aware of and compliant with the expectation as to their deployment – it was rare to see instances of key encounters not being captured.

BPD has also improved in the comprehensive way it gathers and evaluates other evidence, including relevant reports and accounts from available witnesses.<sup>15</sup> As a rule, the investigation summaries show a connection of the evidentiary “dots” that is clear, easy to follow, and convincing as a basis for the final outcomes.

The timeliness with which investigations are completed is another area in which BPD’s performance is solid and often impressive; this is another advantage to the distribution of cases

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<sup>15</sup> One commendable example involved a case in which investigators reached out to the defense attorney of an important civilian witness in an effort to seek his version of what had occurred; the attorney agreed to facilitate the interview.

among supervisors from throughout the Department. There are exceptions to this – in one relatively straightforward case involving the performance of a dispatcher in a significant call, it took several months for an interview with the subject employee to occur. While this is never ideal, the Department seems conscious of the ways in which efficiency and promptness can benefit both the agency and the involved employees. And it should be noted that no cases ran beyond the statute of limitations period that would have precluded disciplinary action.<sup>16</sup>

As usual, the individual cases offered specific examples of strengths and occasional weaknesses. We highlight some of these here to the extent they have broader applicability that we hope the Department will bear in mind going forward:

A. Notification Letters

In prior reports, we have complimented the Department for its thoughtful approach to communicating outcomes to complainants. Notifications at the end of an investigative process are required under California law, but individual agencies have responded to this obligation with varying degrees of detail and candor. This is latitude that the statute allows – its mandated content is quite limited, and competing provisions that are designed to protect officer privacy often lead law enforcement to err on the side of minimalism and form letters.

The cases we reviewed this year continued BPD's recent tradition of providing individualized responses that include supporting details and explanation for the outcomes, all while preserving officer rights. This often includes a description of the investigative steps that were taken: a concrete way of illustrating that the Department did indeed take the allegations seriously and had a basis for evaluating their veracity.

As we have said before, the willingness to personalize and explain is constructive in ways that transcend individual case outcomes. Even a person who feels disappointment over an outcome can potentially take solace in the notion that he or she was taken seriously and given a fair hearing – an impression that is much stronger when specific facts and pieces of evidence are included in the Department's response. In one case in which a father had alleged physical mistreatment of his mentally ill son by arresting officers, for example, the Department added language that explained some of the training that each patrol officer receives in addressing mental health symptomology.

The caveat, of course, is that the information should be accurate. We noted at least one instance in which the notification letter described an investigative step that had not, in fact,

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<sup>16</sup> This is in contrast to the twelve internal investigations that we discuss below that were timely investigated but went beyond the statute as a result of a command staff member's inattention.

occurred.<sup>17</sup> While we agreed with the final outcome of the case (and the Department's finding of no misconduct), and assume that the mistake was as innocent as it was motive-less, it is a reminder that the Department's complete control over the process, and the importance of the communication itself, enhances the responsibility to get things right.

#### B. Holistic Approach to Review

An area of considerable improvement in recent years is the Department's willingness to view citizen complaints and misconduct investigations not just as an obligation but as an opportunity to improve. We saw multiple instances in which the Department went beyond the initiating allegations to address conduct or systemic issues in a broader way.

In some cases, this pertained to additional misconduct that was not included in the initial allegations but that emerged during the attendant investigative process. For instance, a supervisor was found to have violated policy in two ways during his response to an arrest that prompted a complaint about excessive force. Though neither issue (discourtesy, and a procedural flaw in orchestrating the arrest) was featured in the original complaint, the Department nonetheless took appropriate action in pursuing these aspects of the case.<sup>18</sup>

Other cases presented an opportunity for the Department to reconsider policy or offer briefing training based on facts that emerged from the investigation. In one, the review of an attempted suicide in the jail revealed that neither the on-duty jailer nor an officer who was working there had conducted the required "secondary search" of the newly booked inmate who later tried to hang himself.<sup>19</sup> The Department ultimately determined that the responsibility for ensuring the search rested with the jailer, and held him accountable. However, it also recognized that all officers who end up working in the jail on a temporary or overtime basis needed to be familiar with those procedures unique to the jail assignment. In an effort to improve efficiency and safety, it created relevant training to meet that objective.

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<sup>17</sup> This was a further interview of one of the involved parties, which supervisors had reasonably determined was not necessary given the weight of the evidence.

<sup>18</sup> In another case, though, we found the Department's approach to be narrower than we might have preferred. It involved an allegation of racial discrimination and an improper vehicle impound. As we reviewed the audio recordings from the lengthy detention at issue, we found passages in which the officer's tone, demeanor, and word choice seemed to antagonize the complainant unduly if not unprofessionally. While the more serious allegations were properly unfounded, it would have been beneficial to at least bring some of these exchanges to the subject officer's attention during the review process.

<sup>19</sup> The man's method – twisting his own tank top into a makeshift noose – turned out to be irrelevant to any performance failure by BPD employees; the clothing item would not have been confiscated anyway.

The booking process and subsequent detention of an intoxicated female created another learning opportunity amidst the accountability for several instances of deviation from policy. Here, Department executives became belatedly aware of issues with the intake of the woman, who was uncooperative and belligerent with the officers and bit one of them during the process. Though a significant struggle was involved in searching her, and in removing her bra as a precaution, the involved employees kept their documentation of the event to a minimum, and failed to follow the protocols for dealing with female arrestees, reporting force, and other issues related to supervisory initiative and effective risk management.

Though none of the actions or omissions at issue proved to be malicious (and in fact were often mitigated by plausible explanations), it seemed clear that remedial measures were appropriate. As summarized in a thoughtful series of recommendations at the end of the investigative summary, the Department addressed definitional ambiguities about when a physical struggle constitutes reportable “force” within the meaning of the policy. It also developed relevant training and adjusted certain protocols in the jails in an effort to increase vigilance and proactivity in dealing with problematic or “high risk” inmates.

Finally, the arrest of a man for trespassing in front of a department store (in an effort to solicit customers for his charity) prompted the Department to revisit this potentially confusing area of the law. The man’s complaint was not sustained, but the legal nuances of soliciting rights cases prompted the Department to seek training materials from the City Attorney’s Office, and to provide “roll call training” as a reminder to patrol officers about how to proceed. This type of issue-spotting – and collaboration with City partners – is a positive development.<sup>20</sup>

### C. Sexual Misconduct Investigations

This year’s audit included two cases that resulted in the ultimate resignation of subject officers in connection with serious and multi-faceted misconduct investigations. The cases were distinct from each other, but shared some common traits: the conduct extended over a course of years and revolved around sexual contacts, many of them in an on-duty context and/or relating to individuals whom the subject officers met in the context of their work responsibilities.

Both cases were initiated by complaints from women who had been in relationships with the officers and were now bothered by ongoing and unwanted attention. One of these complainants also alleged sexual assault, which prompted the Department to appropriately reach

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<sup>20</sup> Interestingly, the officers in the original case had taken action in partial reliance on a restraining order against the man that technically did not apply to the location at issue. The officers’ confusion was understandable, and they had an independent and sufficient basis for taking the complainant into custody. Still, the pitfalls exemplified by the mistake reinforce the value of the training that the Department later offered.

out to another law enforcement agency for a criminal investigation.<sup>21</sup> In both cases, misuse of Department resources and episodes of poor judgment were collateral problems that arose from pursuing relationships that were inappropriate and exploitative at best.

The Department's administrative investigations into these major matters were methodical and comprehensive. In that respect, they echoed some of the very strong and similarly large-scale cases we have reviewed in the last few years, the thoroughness and organization of which match or exceed anything we encounter in our work as monitors for agencies throughout California. These efforts often involved going back in time to piece together evidence and find corroborating witnesses. BPD Internal Affairs uses data such as phone records and service logs in effective ways – paying attention to seemingly mundane details in order to establish leads, develop a more complete picture of officer behavior, and to provide a context for evaluating the veracity of sensitive accounts by witnesses and subject officers alike. Against the backdrop of this persuasive material, it is unsurprising when officers end up acknowledging significant facts that provide a basis for substantial discipline – or even termination.

We add two points for further consideration. One is that these two cases are not the first we have seen in recent memory with a nexus to repeated episodes of on-duty sexual activity. We reiterate our impression that the Department's response has been conclusive and effective. And we recognize that the behavior at issue is so plainly wrong and unacceptable that it is hard to prevent or deter through pro-active interventions. Still, we encourage the Department's leadership to grapple with the issue, assess whether a sub-culture of pursuit of inappropriate on-duty relationships might exist, and consider steps that might heighten awareness and deter problematic inclinations from blossoming into a serious problem.

***Recommendation 10: BPD should consider whether briefing training on relevant policy, and/or relevant audits, could better reinforce agency expectations relating to on-duty conduct and personal relationships stemming from police contacts.***

Secondly, we note that one of the officers remained on duty for several weeks as the Department's investigation unfolded, prior to being put on "administrative leave." This was in contrast to the other officer, who was facing a criminal allegation and who was put on leave almost immediately. The timing decision can be a challenging one for law enforcement agencies – it obviously is a significant step to remove someone from duty on the basis of allegations (while continuing to pay that person's full salary). There are practical and morale reasons for a careful and discriminating approach, especially since investigations can take weeks or months before they are finalized.

It is true that the allegations against the one officer did not include assault or other illegal conduct. They were quite sensitive nonetheless, including from a risk management perspective. In our view, the scope of them was sufficiently grave, and the proof sufficiently persuasive, that

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<sup>21</sup> The final outcome of that criminal review is pending.

it warranted intervention at an earlier point in the timeline than when BPD executives acted. This is a judgment call, and we acknowledge that the facts as we know them do not suggest that any delay brought a negative consequence. However, on those rare occasions when potential termination seems likely, we encourage the Department to err on the side of caution.

***Recommendation 11: BPD should develop and follow standard criteria for evaluating whether officers should be placed on administrative leave, or otherwise restricted from public contact, while serious allegations of misconduct are pending.***

#### D. A Lapse in BPD's Accountability System

In 2015, pursuant to an audit of BPD's internal investigative files, it was learned that a command staff member had failed to process twelve completed cases, including both citizen complaints and internal personnel inquiries, that had been investigated and submitted for his review. Upon this discovery, BPD requested an outside entity to conduct an investigation into the command staff member's handling of the matters.

The investigation confirmed that, in failing to appropriately process the files, the command staff member had violated the City's policy relating to "incompetency or inefficiency in the performance of required duties." The affected cases covered a five-year period. The investigation further revealed that three of the cases involved sustained violations of BPD policy, one of which would have resulted in discipline that the Department was precluded from imposing due to the failure to meet the statutory deadline.

Prior to the completion of the outside investigation, the command staff member composed a memorandum acknowledging the administrative failure and accepting full responsibility for the transgression. BPD ultimately disciplined the command staff member at the conclusion of its review

Though the involved twelve cases were not of grave significance, they nonetheless constitute a disappointing systemic deficiency – one that reflects poorly on the Department's ability to meet a fundamental duty. The timely completion of cases speaks both to public confidence and internal order in questions of accountability. Certainly, any of the private persons who filed a complaint against BPD had the right to expect a timely and appropriate investigation and resolution. To the extent this did not happen – and complainants in these cases waited literally for years before receiving notification – it not only does a disservice to those individuals, but also reinforces public skepticism about law enforcement's willingness and suitability to "police itself" with rigor.

A further question that the investigation had difficulty answering is why it took so long for BPD to effectively address the lapse by the command staff member. Department audits as early as 2012 identified delinquent internal cases, but BPD was slow to react to the audits with appropriate corrective actions. These, of course, would have included identifying the bottleneck,

fixing it, completing the cases, and taking disciplinary action as warranted. Instead, as noted above, things did not begin changing in earnest until a change at the executive level in 2015.

In light of the progress we have observed and remarked upon in previous reports, we were disappointed to learn about this substantial shortcoming. It is worth noting, however, that the investigation found no apparent “ulterior motive” for the mishandling of these matters, which is some consolation. And significant mitigation comes from the relevant command staff member’s unqualified acceptance of responsibility for the negligent performance.

In the end, the Department determined to “remediate” the conduct of the individual employee through traditional discipline. If we had been consulted about options for remedial action, we would have advocated for an approach that would have more effectively benefited the Department. For example, if the command staff member had addressed all BPD supervisors to discuss and acknowledge this major lapse in his own performance, it would have ensured a stronger level of atonement, sent a powerful deterrent message, and emphasized to supervisors the importance of this aspect of internal accountability. As we have advocated before, alternatives to traditional discipline can provide an opportunity for a meaningful teaching moment. This can be especially true at the command level, where, for example, the candid acknowledgement of shortcomings to subordinates sends a powerful message of accountability and leadership.

As for our concern that such a lapse not recur, we are encouraged by new monitoring systems designed to prevent a comparable backlog from arising in the future. Taking advantage of recently acquired databases that track internal investigations, BPD command staff at the highest level has taken personal responsibility for ensuring that the internal investigation and review process is timely completed. We have seen exemplars of spread sheets that are produced on a monthly basis to ensure that “older” cases are flagged and addressed. We expect that the lessons learned from this alarming occurrence have resulted in recognition of the importance of tracking the status of internal investigations in real time and responding pro-actively to lags in the process. And so far, the increased vigilance has been demonstrated by the fact that there have been no similar missteps since July of 2015.

As an additional safeguard to BPD’s internal tracking system, and as part of routine communications with BPD executives, we would welcome the chance to receive this status report on a monthly basis. In our experience with other outside agencies, this additional layer of scrutiny can serve as an instrument of both quality control and internal motivation. And such access would help us more effectively report to the Burbank community how the Department is doing on this critical facet of internal accountability. However, the ultimate responsibility for administrative accountability rests with the Department, and we are hopeful that the new monitoring systems constructed will prove to be fail safe.

***Recommendation 12: When there is a violation of policy, BPD should consider devising alternative methods of remediation outside the traditional disciplinary structure such as briefings, including when the subject is a supervisor.***

***Recommendation 13: The City and BPD should consider devising protocols whereby the Independent Auditor is regularly provided a real-time report or briefing on the status and age of internal investigations.***

### **III. Review of Force Incidents**

#### **A. Overview**

Last year, BPD officers were involved in seventy documented force incidents. Of these, OIR Group reviewed twenty-two, a number which includes two K-9 bites as well as the two officer-involved shooting incidents we discussed in a separate section above. The cases we assessed, like the overall total for the year, ranged in severity and in the types of force that were used.

The Department's review process continues to evolve, adjusting to experience and circumstances in an effort to balance efficiency with the kind of comprehensive and holistic review we have commended in the past. Our overall impression is that it remains impressively thorough. It is characterized by several layers of formal scrutiny that culminate in the Critical Incident Review Board process.

After review and fact-gathering at the sergeant and lieutenant level, the case materials go to the CIRB panel, which periodically brings together top Department executives along with representatives from training and other potentially relevant subject matter experts. The last year has brought a noteworthy innovation to the roster of attendees: two "peer" participants. These are line-level officers who were selected with input from the BPD labor association. They add an important perspective to the discussion, and their inclusion also has the potential to demystify the process and increase trust among their fellow officers. It is a reflection of BPD's commitment to making its scrutiny of force cases a constructive and useful exercise.

The process has numerous elements. There is responsibility and accountability at every level, beginning with the involved officers themselves and continuing through the different stages of evidence-gathering and assessment. A new checklist helps ensure that sergeants and lieutenants have covered the requisite tasks in investigating the force; these include assembling photographs and other potential audio or video recordings<sup>22</sup>, reviewing the officers reports for

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<sup>22</sup> The Department has distinguished itself in recent years with its thorough approach to searching for relevant surveillance video or other sources of evidence. After subduing a drug-impaired subject on a busy street, for example, investigators found a witness who had watched the encounter from a nearby motel and filmed a portion of it on her cellphone. Though it was not conclusive, they nonetheless secured a copy of the clip and included it in the file.

thoroughness, consistency and accuracy, and conducting interviews with witnesses and the subject officer him or herself.<sup>23</sup> An evaluation of other potential force options is included in the process as a matter of routine. And the initial evaluations by these supervisors often include thoughtful discussions about things that could have been done differently or better.<sup>24</sup>

Finally, the CIRB panel acts as an important safeguard against errors that may have slipped through at the lower levels.<sup>25</sup> There were several instances in the cases we reviewed where the CIRB panel flagged issues (from specific factual mistakes to larger analytical flaws) that had been missed at the sergeant/lieutenant level.

#### B. Holistic Approach to Review

One of the best features of the review process as it has evolved in recent years is the way it moves beyond the significant but narrow “bottom line” question of whether the force was consistent with Department policy. Overwhelmingly in 2016, the Department found that the force was in fact appropriate – there was discipline connected to the force in only two of the 70 cases. We did not see reason to dispute the legitimacy of this result. At the same time, however, and as we have noted before, the most constructive review processes go beyond the main issues of legality and reasonableness. Many if not most force events offer occasion to consider alternatives, spot questionable tactics or other performance issues, and identify things that the involved personnel – or the Department as a whole – could learn from for future reference. This has a range of positive potential implications for operational effectiveness and safety.

Most of the CIRB summaries did feature one or more of these substantive or procedural “learning opportunities.” These are some examples:

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<sup>23</sup> These statements can obviously be quite significant, either in corroborating officer accounts or in raising specific challenges to the legitimacy of officer actions. They also help ensure that proper medical attention occurs, and protect the City from liability by committing the subject to a voluntary and “real time” version of events. The BPD practice involves separate efforts by both the sergeant and the lieutenant to speak to the subject (who has been afforded the Miranda rights advisement) and ask questions pertaining both to the incident and his or her physical condition and needs.

<sup>24</sup> One notable example came in the aftermath of the arrest and intermittent struggles with a belligerent and intoxicated juvenile who had been wandering in traffic. The lieutenant who was the Watch Commander critiqued his own performance, arguing in retrospect that he should have directed the use of leg restraints at an earlier point in the detention.

<sup>25</sup> The CIRB panel reviews reports in anticipation of their periodic meetings – and does so with a careful eye. On multiple occasions in the cases we reviewed, they noted inconsistencies or points requiring clarification in the initial paperwork and returned them for further analysis.

- In a case involving the tackling/takedown of a fleeing subject – with no injuries – the force was relatively routine and in policy. Nonetheless, the CIRB process flagged the poor quality of the investigative photos, the potential culpability of the handling officer for allowing his ride-along (an officer from an outside agency) to get involved, and the failure to automatically and immediately get a medical clearance for the subject.
- In evaluating the relatively routine “takedown” of an individual who was in a park after hours, the panel formally affirmed the pro-active enforcement efforts of officers who were taking initiative in a problem area, but raised tactical questions about the delay in handcuffing and neutralizing the subject in a car.
- A Taser deployment was found to be in policy, but the CIRB process produced a “corrective action” for Department Communications staff, which had provided an inadequate description of the subject at the outset of the call. The review also noted that the documentation failed to include a reference – required by policy – as to whether a warning was given (or an explanation as to why it was not) prior to the Taser deployment.

This kind of effort – and attention to peripheral detail – is obviously labor intensive, and the Department periodically and understandably looks for ways to streamline its process. In some of the later cases in the cycle, for instance, we noted a marked shift toward concision in the final memo produced by the CIRB board – to the point where none of the “discussion points” or analysis was being described.

Importantly, we have been assured that the substantive dialogue remains robust. While that is the important thing, we hope the Department will look for ways to balance its interest in efficiency with full record-keeping that helps preserve and reinforce relevant ideas. Moreover, as auditors who are generally not present at the CIRB meetings,<sup>26</sup> we appreciate being able to track and verify the issues that were identified and discussed.

***Recommendation 14: The Department should take advantage of its existing forms, and/or a “bullet point” format, to ensure that the key discussion points from the CIRB process are reflected in the final force package for individual cases.***

#### C. K-9 cases

We looked at two bite cases from last year, both of which resulted in minor injuries to the subject and were found to be in policy. These were the first of their kind in our recent reviews of BPD, and we were largely impressed with the thorough and constructive assessments that

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<sup>26</sup> During this audit period, we were invited and did attend a CIRB session, which we found beneficial.

occurred. The Department seems to recognize that K-9 programs, while an effective aid to apprehension and an enhancement to officer safety, are also inherently a source of risk and liability, and require strict policy and rigorous training standards.

One of the cases raised collateral issues about the initial deployment, which had been a “mutual aid” situation involving a request from a neighboring agency. Adherence to established criteria for use of a police dog in search and apprehension is obviously an important feature of a sound K-9 program, and the Department rightly recognized that work in outside jurisdiction can complicate that process. Accordingly, the Department worked to update its policy to clarify the needed authorizations and lines of responsibility in a deployment scenario. This struck us an appropriate and useful response, and a good example of how individual cases can provide an impetus for beneficial adjustments.

#### D. Supervisor Interviews

As noted above, the arrestee in a BPD use of force is routinely interviewed, depending on circumstances, at least once and often twice by supervisors. The purpose is administrative – to ensure that any medical needs are being addressed and to learn the arrestee’s perspective on the force and its legitimacy. On rare occasions, the arrestees do not wish to give a statement or cooperate with the inquiry, and this is appropriately respected.

The Department’s diligence and thoroughness in this arena is praiseworthy, given the importance of the arrestee’s version as an element of accountability. In one case, for example, the arrestee asserted that a loosened tooth was a function of officers hitting him. This prompted significant investigative efforts in an effort to corroborate or refute the arrestee’s claim, which did not match the officers’ initial version and was ultimately not supported by the evidence.

A common pitfall, though, is to turn the interview into a type of “cross-examination” in which statements by the arrestees are challenged or debated by the supervisor. This tendency is understandable: the supervisor often has knowledge that directly clashes with the arrestee’s assertions (which can, of course, be self-serving and biased at times), and wishes to clarify the points in the name of both truth and efficiency. But it comes at a cost to the perceived – if not the actual – objectivity of the process. We saw instances of this in the cases we reviewed in this audit, at both the sergeant and lieutenant level.

Interestingly, among the case files we evaluated were two in which the same lieutenant chose different approaches with subjects who were offering questionable versions of events. One involved some level of challenge and dispute; in the other, the lieutenant allowed the plainly implausible statements to unspool, effectively letting them speak for themselves. Circumstances differ from case to case, of course, but in our view, the latter practice is the more effective.

The idea of law enforcement “policing itself” meets with skepticism from some quarters for obvious structural reasons. We have never taken the position that the potential conflict of

interest is fatal to the legitimacy of an internal review process – but it is something that agencies should recognize and guard against. While misrepresentations or false accusations from complainants can be frustrating, the role of an initial interview should simply be to get the most complete and detailed statement possible. Assessment of the other available evidence is the best means of addressing claims that appear to be – or are – inaccurate, and supervisors should take pains to avoid “putting a thumb on the scale” by adopting a contentious tone or line of questions.

***Recommendation 15: Supervisors should maintain their objectivity during subject interviews after a use of force, focusing on obtaining a detailed statement and avoiding a dynamic in which they are outwardly contesting or rejecting information being shared.***

E. Evolutions in the Force Review Process

Appropriately, BPD engages in an ongoing effort to evaluate its practices and determine whether adjustments are needed (or at least potentially beneficial). This is true in the force review arena as well, where the thoroughness of the Department’s multi-faceted review process comes at a price: namely, the considerable time and effort involved in providing this level of scrutiny, evaluation, and response.

In the interest of striking the right balance, and recognizing that some of the fundamental precepts of the command staff’s review priorities have become more familiar over time, BPD executives recently adopted a new approach to lower-level incidents. It involves documenting and accounting for these kinds of events (which are physical in nature, but only involve “de minimis” force with no injury or other complications) without subjecting them to the full supervisory review process and CIRB assessment. We spoke with BPD’s leadership during the development of this new protocol, and received assurances that the scope of relevant cases was limited, and that safeguards continued to be in place so as to preserve the strengths of the prior system. We look forward to reviewing the accumulated records in connection with our next audit, with an eye toward evaluating whether the “de minimis” cases are still receiving appropriate scrutiny.

**III. Review of Vehicle Pursuits**

A. Introduction

In 2013, the Department implemented a new policy governing the way vehicle pursuits are conducted. This policy was comprehensive, detailed and clear. The major guidelines addressed, among other things, these components of officer decision-making in a pursuit:

- Basis for initiation of the pursuit
- Communication with supervisors and dispatch during the pursuit
- Tactics during the pursuit
- Command and control of vehicle pursuits by supervisors

- Reasons to terminate a pursuit including suspect driving, behavior and other new information

The underlying idea is that vehicle pursuits are a high-risk activity for officers, uninvolved motorists and pedestrians in the area and should be undertaken only when a suspect's current criminal activity or reckless driving pattern outweighs the inherent danger to the community.

Since implementation, the number of pursuits initiated by BPD officers has decreased, falling to six or less for each of the last three years. However, the pattern of pursuit policy violations throughout the department has remained similar over those years, with a majority of pursuits ultimately deemed in violation of BPD policy. We have chalked this up in the past to the challenges of introducing a new policy in an important area of police work – and one that, fortunately, the Department does not have frequent opportunity to test and refine in its daily work. To an extent, this is still true, and we balance our criticisms below against our awareness of BPD assiduous review efforts. Still, the high percentage of “out of policy” events makes clear that further work is needed.

The Department continues to document its evaluation procedures well and to strive to apply its standards consistently. Once a violation is identified, the Department's remedial efforts focus on training to bring the skills and knowledge of officers up to a high standard of compliance with policy. Shortly after any vehicle pursuit, usually a sergeant from the involved shift completes a pursuit critique, which is reviewed by the watch commander and the captain of Patrol who approve a Vehicle Pursuit Review memo that is reviewed by the Critical Incident Review Board (CIRB), which evaluates the pursuit for compliance with Department policy.

In 2016, there were six vehicle pursuits. Of these, four were found out of compliance with some aspect of the pursuit policy by the Department's Critical Incident Review Board (CIRB). These numbers show that strict adherence to policy continues to be unreliable. Interestingly, most of these violations are centered on one topic – suspicion of an insufficient level of crime to justify a vehicle pursuit.

The policy states that an officer may initiate a pursuit of someone suspected of committing a serious or violent felony. This does not include commercial burglary. Officers may also pursue a driver suspected of being under the influence, but only if the suspicion is reasonable and the subject's driving is “so flagrantly reckless that the driving presents a clear and present danger to other users of the highway....” (Policy 314.3.1)

In spite of this guidance, the officers in one of last year's pursuits initiated the pursuit because they suspected the driver might be involved in a commercial burglary, then decided he might be driving under the influence. The officers' observations fell short of the pursuit threshold on both counts: the commercial burglary was not an appropriate basis for pursuit, and the possible DUI lacked objective indicators and flagrantly reckless driving. The other three

pursuits that fell short also did so because the patrol officers started to pursue the subject when they either suspected that the driver was under the influence or that the suspect car was a possible (but unconfirmed) stolen vehicle, a property crime that does not reach the policy threshold for a pursuit.

Similarly, the 2015 pursuit policy violations were also largely based on insufficient justification to initiate the pursuit. This trend has an arguable “bright side,” to the extent it reflects well on adherence to standards once a given pursuit is underway. Indeed, we did not see evidence of dangerous driving by officers or failure to follow the protocols that are intended to regulate and control pursuits as they unfold. We do, however, encourage the Department to remain active in reinforcing the policy’s core principles as they pertain to initiation.

B. Untimely Feedback

Notable among this past year’s vehicle pursuits is the fact that, of the eight officers actively involved in a pursuit, three of them were also involved in a second pursuit within the year. Each of those three were found in violation of pursuit policies. The last two pursuits of the year came five weeks apart and involved the same two officers and the same type of policy violation: namely that the suspected crime was insufficiently serious to justify a vehicle pursuit under BPD policy. In both cases, the CIRB prescribed remedial training for the officers.

This recommendation, and the training that would follow, however, came too late following the first of the two pursuits. The CIRB convened and reached its findings 126 days after the first of these pursuits, but the second pursuit happened only 37 days after the first. We recognize that some lag time is unavoidable, and that the close succession of the two pursuits was unusual. Still, this happenstance is a good reminder of why minimizing the gap between event and subsequent administrative response should be a priority – an approach not always reflected in the statistics from last year.

A brief look at the other 2016 pursuits demonstrates that the time period between the pursuit and its CIRB finding is quite variable. The number of days for this period is 18, 94, 65, 81, 126 and 117, respectively for each of the six pursuits. Importantly, there is sometimes another significant delay before official findings are conveyed to the involved officers. After the fourth vehicle pursuit, for instance, the officers were not officially notified of the CIRB’s findings until almost six more months had passed. There should be no logistical hurdle in providing more timely feedback to the involved officers. Given the demonstrated problem of repeating the same mistakes prior to correction, the Department should consider reducing and standardizing the period of delay between the pursuit and the CIRB evaluation and the notification to officers.

Fortunately, other forms of constructive feedback for officers who have been or may be involved in vehicle pursuits can and do occur quickly after the incident. After one pursuit that ended after the suspect vehicle struck a signpost, a curb and a fence, the lieutenant who had

monitored the pursuit from the station, concluded after considering the pursuit review completed by his sergeant, that the involved officers had likely violated the BPD policy that prohibits initiating a vehicle pursuit based only on the unconfirmed suspicion of a stolen vehicle. Within a week of the incident, the lieutenant debriefed the incident with the entire shift of patrol officers at roll call and addressed both good and bad aspects of the decision-making. In another instance, the lieutenant debriefed the pursuit incident at roll call the next day. This willingness to engage line officers in constructive dialogue about challenges they all may face is a positive aspect of the vehicle pursuit review procedures instituted by the Department and a feature of a progressive organization.

### C. Challenges to Objectivity

Immediately after each vehicle pursuit, a sergeant collects incident reports, tapes, photos and other documentation and completes a detailed review of the circumstances and tactics of the pursuit. The resulting memo, labeled a review or a critique, includes the “Watch Commander’s Insight,” where the Lieutenant who acted as watch commander, monitoring the pursuit as it occurred, applies BPD policies to the facts of the pursuit and makes a recommendation to the CIRB as to whether the pursuit complied with those policies or not. The Pursuit memos we reviewed from 2016 were generally admirable documents that followed the Department’s thorough format devised for vehicle pursuit reviews. They detailed the relevant facts and explained the Watch Commander’s rationale for his or her recommendation. Five out of six of them, however, suffered the same drawback. They were written by field sergeants who either actively participated in the management of the pursuit, arrived immediately at the termination of the pursuit or, in one case, was an actual participant in the pursuit itself.

The role of the field sergeant during a pursuit involves monitoring, managing – including the option to call off the pursuit – and assisting, if time permits. This is well articulated in BPD policy. The subsequent role of this sergeant as the framer of the basic document that will provide the basis for the CIRB’s evaluation of the pursuit is, in our view, a flawed approach. It is one in which the benefits of the sergeant’s direct familiarity are outweighed by the potential for a conflict of interest: the sergeant must either evaluate his or her own performance or avoid that aspect of the pursuit altogether. While the review memos we examined appear to be thorough and professional, this practice places a strain on the sergeant’s objectivity.

We broached this topic once before in our July 2015 report, but this year we see a concrete example of the viability of assigning the initial pursuit critique to an uninvolved sergeant. One of the six pursuit review memos from 2016 was indeed prepared by an uninvolved sergeant. Drawing on the ample documentation of the pursuit, that review also appears to be thorough and perceptive in providing the CIRB with a full perspective of the incident, despite the fact that the sergeant “was not there.”

A similar argument can, of course, be made regarding the “Watch Commander’s Insight” that occurs at the lieutenant level. However, as to this potential structural problem, we acknowledge the much smaller population of lieutenants to perform this task and the fundamentally more detached role played by the watch commander regarding a pursuit. We suggest, however that the Department evaluate this area of potential conflict of interest and consider modifying the watch commander’s role in the evaluation of the pursuit.

It might also enhance the constructive impact of CIRB proceedings if the actions and judgments of sergeants and lieutenants were more explicitly taken up by the review board and documented accordingly. If CIRB does indeed deliberate on the actions of the chain of command in a pursuit, it rarely shows up in the CIRB reports. During one pursuit, the Watch Commander learned that the officers had decided to initiate the pursuit because they reasonably suspected that the vehicle they were following might be stolen, though it had not been reported stolen. The Watch Commander concluded that this was an insufficient basis to pursue but decided to allow the pursuit to proceed for one more minute until the police helicopter arrived to take over. A few days after the incident, the Watch Commander explained his conclusions to the two officers about their deviation from policy and his own rationale for allowing the pursuit to continue. He told them that his own actions and judgments as well as theirs would be reviewed by command. Based on the record related to the pursuit, however, it is unclear whether the lieutenant’s decisions were ever considered by the CIRB. The CIRB memorandum addresses only the shortcomings of the two patrol officers. If the decisions of sergeants and lieutenants related to pursuits are not explicitly considered and documented as part of the CIRB process, it may tend to undermine the confidence that field officers have in the fairness and accuracy of the policy review process.

#### D. Conclusions/Recommendations

The raft of policies and procedures concerning vehicle pursuits that BPD instituted a few years ago has produced a robust but intricate policy and an effective, multi-layered evaluation process focused on remediation and education. We commend this alignment of values and make the following recommendations aimed at preserving the strengths of both the policy and the review process.

***Recommendation 16: The CIRB process should set time expectations on when notification of the results of the CIRB review to officers is to occur.***

***Recommendation 17: BPD should assign the initial pursuit review/critique to a sergeant who was not involved with the incident.***

***Recommendation 18: BPD should include the actions and decisions of sergeants and lieutenants among the standard evaluations made by the CIRB about every pursuit.***

## **List of Recommendations**

***Recommendation 1: BPD should refine its officer-involved shooting protocols so that all police witnesses to the use of deadly force are interviewed as part of the criminal investigation.***

***Recommendation 2: BPD should consider the optimal way for officers to ensure collection of cell phone video and photographic evidence in a critical incident.***

***Recommendation 3: BPD should continue to convene tactical debriefs after critical incidents but should ensure that any findings and recommendations are documented.***

***Recommendation 4: When a supervisor is requested to conduct a tactical debrief with an officer as a result of identified sub-optimal performance, the CIRB process should request that the briefing be documented.***

***Recommendation 5: When sergeants are on-scene for a critical incident, the CIRB process should review their decision-making and document any observations and assessments. The CIRB process should then assign a command staff member to convene a meeting to discuss those findings with the on-scene sergeants.***

***Recommendation 6: The CIRB process should ensure that after an officer-involved shooting is reviewed, meetings are held with the involved officers to discuss the CIRB findings.***

***Recommendation 7: In the aftermath of an officer-involved shooting, BPD should continue to prioritize the prompt interview of involved personnel, and should conduct it before the end of the officers' shift in the absence of compelling reasons to wait.***

***Recommendation 8: BPD's final audit report should document any after action remediation, including counseling sessions to employees who performed below Departmental expectations.***

***Recommendation 9: BPD's Department-wide bulletin setting out the results of the audit should indicate if it discovered emails of questionable propriety.***

***Recommendation 10: BPD should consider whether briefing training on relevant policy, and/or relevant audits, could better reinforce agency expectations relating to on-duty conduct and personal relationships stemming from police contacts.***

***Recommendation 11: BPD should develop and follow standard criteria for evaluating whether officers should be placed on administrative leave, or otherwise restricted from public contact, while serious allegations of misconduct are pending.***

***Recommendation 12: When there is a violation of policy, BPD should consider devising alternative methods of remediation outside the traditional disciplinary structure such as briefings, including when the subject is a supervisor.***

***Recommendation 13: The City and BPD should consider devising protocols whereby the Independent Auditor is regularly provided a real-time report or briefing on the status and age of internal investigations.***

***Recommendation 14: The Department should take advantage of its existing forms, and/or a “bullet point” format, to ensure that the key discussion points from the CIRB process are reflected in the final force package for individual cases.***

***Recommendation 15: Supervisors should maintain their objectivity during subject interviews after a use of force, focusing on obtaining a detailed statement and avoiding a dynamic in which they are outwardly contesting or rejecting information being shared.***

***Recommendation 16: The CIRB process should set time expectations on when notification of the results of the CIRB review to officers is to occur.***

***Recommendation 17: BPD should assign the initial pursuit review/critique to a sergeant who was not involved with the incident.***

***Recommendation 18: BPD should include the actions and decisions of sergeants and lieutenants among the standard evaluations made by the CIRB about every pursuit.***