

SKELLY RECOMMENDATION

Oakland Police Department

April 2020

SUBJECTS:

Lieutenant Alan Yu
Sergeant Francisco Negrete
Officer William Berger
Officer Craig Tanaka
Officer Brandon Hraiz
Officer Josef Phillips

Michael Gennaco
Skelly Officer



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SKELLY RESPONSE:

Pursuant to the California Constitution and the Manual of Rules (“MOR”) of the Oakland Police Department (“OPD”), Department personnel are provided an opportunity to respond to notices of an intent to discipline prior to formal imposition of that discipline. Commonly known as a Skelly hearing (after a California Supreme Court ruling), this opportunity for further consideration from an impartial reviewer can occur in-person and/or by written response to the Notice of Intent to Discipline.

In this case, as further delineated below, the subject OPD officers who received Intent Notices, opted via their counsel to forego an in-person hearing and exercise their due process rights through written submissions. This document addresses the issues raised within those written responses and covers the Skelly officer’s related findings. It also discusses the Skelly officer’s independent review of the investigative and related materials, and any separate findings that resulted from that process.

SKELLY OFFICER

Per contractual arrangement with the City of Oakland, this writer, Michael J. Gennaco, was assigned the role of Skelly officer for this matter. Until receiving this assignment, I was not involved in the investigation or review of the incident that resulted in the Notices of Intent to Discipline.

SUBJECTS

Alan Yu, Lieutenant
Francisco Negrete, Sergeant
Craig Tanaka, Officer
Brandon Hraiz, Officer
William Berger, Officer
Josef Phillips, Officer

REPRESENTATIVES

Lieutenant Yu’s representative is Stephen N. Welch, Esq.
Sergeant Negrete and Officers Tanaka, Hraiz, Berger and Phillips are represented by Zachery A. Lopes, Esq.

ALLEGATIONS

OPD Lieutenant Alan Yu failed to properly perform his duties as the Incident Commander.

OPD Sergeant Francisco Negrete failed to properly perform his duties as the DAT supervisor and improperly used lethal force in the fatal shooting of Mr. Joshua Pawlik.

OPD Officer Craig Tanaka improperly used lethal force in the fatal shooting of Mr. Joshua Pawlik. Officer Tanaka failed to advise the Communications Division of his rifle deployment.

OPD Officer Brandon Hraiz improperly used lethal force in the fatal shooting of Mr. Joshua Pawlik.

OPD Officer William Berger improperly used lethal force in the fatal shooting of Mr. Joshua Pawlik.

OPD Officer Josef Phillips improperly used force when he used less lethal force on Mr. Joshua Pawlik.

MOR VIOLATIONS (as set out in the Notice of Intent to Discipline)

For Lieutenant Yu:

MOR 234.00-2 Command Officers – Authority and Responsibilities, Class II

For Sergeant Negrete:

MOR 285.00 – Supervisors – Authority and Responsibilities, Class I
MOR 370.27 – 1f Use of Physical Force – Level 1

For Officers Hraiz and Berger:

MOR 370.27-1f, Use of Physical Force – Level 1

For Officer Tanaka:

MOR 370.27-1f, Use of Physical Force – Level 1
MOR 314.39-2, Performance of Duty - General

For Officer Josef Phillips

MOR 370.27-1f, Use of Physical Force – Level 2

DOCUMENTS REVIEWED

I reviewed the entire Skelly file, including but not limited to all investigative reports, the relevant MOR provisions, and the various findings made with respect to the incident, as well as all documents and research materials referenced in the two written Skelly responses received. In furtherance of evaluating the proposed discipline, I reviewed the subject officers' performance and training history as contained in the Skelly file.

ANALYSIS/ASSESSMENT

The findings and disciplinary determinations in this matter stemmed from the use of deadly force against Joshua Pawlik on March 11, 2018 by Sergeant Negrete and Officers Hraiz, Berger, and Tanaka, and the use of less lethal force against Mr. Pawlik by Officer Phillips. The findings and disciplinary determinations also found fault with Sergeant Negrete for his failure to perform his responsibilities as the leader of the "designated arrest team" ("DAT") and with Lieutenant Yu for his failure to perform his supervisory responsibilities as the incident commander.

Per OPD protocols, this incident was initially criminally investigated by OPD, and the results of the investigation were presented to the Alameda County District Attorney for criminal review. A subsequent administrative investigation was presented to the Department's Executive Force Review Board ("EFRB"). The EFRB found that all the officers' uses of force complied with policy. The EFRB found that Lieutenant Yu did not properly command the scene and was culpable of Class II misconduct. The EFRB further found that Sergeant Negrete's supervision of the arrest team was so grossly derelict that he was culpable of Class I misconduct. Finally, the EFRB found that Officer Tanaka improperly deployed his patrol rifle without notifying Communications Division as directed by policy, an instance of Class II misconduct.

The Chief of Police reviewed the findings of the EFRB and concurred with its findings as to the uses of force. However, the Chief found that the notification issue with Officer Tanaka's rifle deployment should result in a not sustained finding. The Chief agreed that a Class II violation of command responsibilities by Lieutenant Yu should be sustained. Finally, the Chief found that Sergeant Negrete's supervision failings did constitute a sustained policy violation, but only as Class II misconduct.

The City of Oakland Community Police Review Agency ("CPRA") conducted its own investigation regarding this matter and found that Sergeant Negrete and the other officers who used deadly force should be exonerated as to their uses of force. The CPRA also found that Officer Phillips' use of force should result in an exonerated

finding. The CPRA sustained a finding against Sergeant Negrete and Lieutenant Yu for a Class II failure to supervise and found demotion as the appropriate level of discipline for both. Finally, the CPRA reached a not sustained finding with regard to the allegation that Officer Tanaka failed to advise Communications Division of his rifle deployment.

The Compliance Director for the City of Oakland found that Sergeant Negrete and Officers Berger, Hraiz, and Tanaka violated the Department's Use of Deadly Force Policy and that Officer Phillips violated the Department's Use of Force Policy and found termination as the appropriate discipline for each violation. The Compliance Director further found that Sergeant Negrete failed to supervise the event to the degree it merited a Class I violation and found that termination was the appropriate discipline. The Compliance Director found that Lieutenant Yu failed to fulfill his command responsibilities, a Class II violation of policy, and that a five-day suspension was the appropriate level of discipline. The Compliance Director found that Officer Tanaka failed to advise the Communication's Division of his rifle deployment in violation of OPD's Performance of Duty policy. Finally, the Compliance Director found that Officer Tanaka did not violate the Performance of Duty policy for self-deploying as lethal cover.

The Discipline Committee of the Oakland Police Commission noted the contrary findings of the CPRA and the Compliance Director and found that Sergeant Negrete's use of deadly force was out of compliance with OPD policy and sustained the allegation that he violated MOR 370.27 – 1f Use of Physical Force – Level 1. The Discipline Committee further found that Sergeant Negrete failed in his supervision of other officers in violation of MOR 285.00-1 Supervisors – Authority and Responsibilities, and that his conduct rose to the level of a sustained Class I violation. The Discipline Committee concluded that termination was the appropriate discipline for each of Sergeant Negrete's two policy violations.

The Discipline Committee found that Officers Tanaka, Hraiz, and Berger's use of deadly force was out of compliance with OPD policy, and that the allegation that they violated MOR 370.27 – 1f Use of Physical Force – Level 1 was sustained. The Discipline Committee found that termination was the appropriate discipline for the policy violations.

The Discipline Committee found that Officer Phillips' use of force by discharging a bean bag gun was out of compliance with OPD policy, and that the allegation that he violated MOR 370.27 – 1h Use of Physical Force – Level 2 was sustained. For that policy violation, the Discipline Committee found that termination was the appropriate discipline.

The Discipline Committee further noted that both the CPRA and the Compliance Director found that the allegation that Lieutenant Yu failed to properly perform his duties

as the Incident Commander in violation of MOR 234.00.2 Command Officers- Authority and Responsibilities, Class II was sustained. The Discipline Committee determined that demotion was the appropriate discipline.

Even though there were contrary findings issued by the Compliance Director and the CPRA that Officer Tanaka violated OPD's Performance of Duty policy by failing to advise the Communications Division of his rifle deployment, the Discipline Committee did not issue findings.

DISCUSSION OF SUSTAINED USE OF FORCE FINDINGS (SERGEANT NEGRETE, OFFICER HRAIZ, OFFICER BERGER, OFFICER TANAKA, OFFICER PHILLIPS)

The officers involved in the use of force in the Pawlik matter all make identical arguments in responding to the investigative and review proceedings as to their use of force. For purposes of brevity and to the degree that their arguments are the same, they will be referred to collectively in this Report as the "involved officers" or "officers". Those findings that relate solely to Sergeant Negrete in his role as a supervisor, and the arguments he raises in his defense, are designated below as applying only to him.

Arguments Raised in Skelly Proceedings

1. *Right to Pre-deprivation Hearing*

The involved officers first maintain correctly that they have a property right to continued employment, protected by the due process clauses of both the United States and California Constitutions. The officers also are correct that the City and Commission must comply with pre-deprivation procedural requirements before they may impose punitive action of the type contemplated against them.

Further, the involved officers contend correctly that prior to imposition of discipline, at a minimum, pre-removal safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

In this case, pursuant to Skelly requirements, the City and Commission did provide the involved officers notice of the proposed action, the reasons supporting the actions, a copy of the charges, and the complete investigative files upon which the actions were based. Further, as evidenced by the written response received from the involved

officers, the City and Commission have provided them the right to respond to the authority initially determining discipline.¹

2. Burden of Proof

The involved officers correctly contend that the City has the burden of proof in sustaining an allegation of misconduct and that any disciplinary action for these officers be for “cause”. For the City of Oakland, that burden is set out in the Negotiated Settlement Agreement struck to resolve complaints by private plaintiffs and which terms have governed many of the policies and procedures of OPD since its entry in 2003:

III.E.5. 5. OPD shall resolve each allegation in a complaint investigation using the “preponderance of the evidence” standard.

Negotiated Settlement Agreement, *Allen v. City of Oakland*, (3:00-cv-04599)

Moreover, *Skelly v. State Personnel Bd.*, (1975) 15 Cal.App.3d 332, itself indicated that the proper standard of proof at the administrative level should be a preponderance of the evidence. The involved officers argue that the appropriate standard should be “clear and convincing” and cites *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853 for that proposition. However, as the *Ettinger* court itself made clear, that case was dealing with a revocation of a physician’s license and the court accordingly found the higher “clear and convincing” standard to be applicable. The *Ettinger* court expressly distinguished its case from a “mere termination of state employment” for which the lesser standard had been found applicable. In this case, the proper standard of proof is preponderance of the evidence.

¹ Counsel for Sergeant Negrete and Officers Berger, Hraiz, Tanaka, and Phillips forwarded to this Skelly officer a supplemental written response on March 27, 2020. The response contains additional discussion about one of the video analyses provided to counsel by the City but did not cause this Skelly officer’s substantive analysis and findings to change as set out in this Report. The response also reasserts that information not provided to the involved officers amounts to a Skelly violation, but the additional arguments did not change the analysis contained below. Finally, the response discusses and includes media reports about recent events surrounding the termination of the Chief. The additional information provided about the Chief does not impact whether the involved officers violated policy on March 11, 2018, nor does it impact the investigation, proceedings, analysis, and findings, all of which predate the City’s decision to terminate the Chief.

3. Prior Reports and Analyses

The involved officers contend that the “vast majority” of facts leading up to the officers’ use of force are not in serious dispute. The officers cite selected prose from the prior investigations and reviews to support their contention that the uses of force were within policy. Sergeant Negrete also cites to prior reviews to maintain that his supervision of the incident was also within policy. However, Sergeant Negrete fails to note that *all* of the prior reviews had determined that there was sufficient evidence to find that he had failed to properly supervise the DAT.

With regard to the use of force, the involved officers cite from the District Attorney report, the EFRB report, the Chief’s Addendum, and the CPRA report that found their actions reasonable. Again, however, these assertions of reasonableness must be considered in light of the larger context of analysis – much of which is contrary or less favorable.

It must also be noted that the District Attorney finding expressly noted that the its review focuses:

exclusively on the question of whether there is sufficient evidence to prove beyond a reasonable doubt that a law enforcement official committed a crime in connection with the shooting death. The OIS Team does not examine collateral issues such as whether law enforcement officials complied with internal policies, used appropriate tactics, or any issues that may give rise to civil liability. This report should not be interpreted as expressing any opinions on non-criminal matters.

District Attorney Letter at p.2

This language is clearly meant to forestall the approach that the officers take here: namely, reliance on the District Attorney’s expressly limited findings for the separate purpose of asserting their compliance with OPD internal policy.

Moreover, during the involved officers’ extensive citations to OPD’s and CPRA’s findings that their use of force was within policy, they neglect to address the contrary findings reached by the Compliance Director. In the Discipline Committee’s report, it expressly noted that it had reviewed the EFRB, CPRA, the Chief’s Addendum, and the *Compliance Director’s Memorandum and Addendum* in reaching its own decision as the ultimate authority in the process.

Under Oakland’s Charter, the Discipline Committee is empowered to decide any dispute between CPRA and OPD (as represented by the Compliance Director) regarding the proposed findings and level of discipline. In fact, the Discipline Committee has no

substantive function *unless* there is a dispute in findings or discipline between the two entities. Accordingly, while the officers' preference for the CPRA's relevant findings is understandable, it does not nullify the Compliance Director's findings or the Discipline Committee's later endorsement of them.

4. Challenges to the Discipline Committee's Report

The involved officers maintain that the Discipline Committee's statement that officers tried to rouse Mr. Pawlik with verbal commands is "undisputedly factually inaccurate" since he was already awake and moving. The factual record is clear that when officers first came upon Pawlik, he was not awake and not moving. The record further suggests that Pawlik awakened either as a result of the noise from the Bearcat armored vehicle arriving, because of some other stimuli, or on his own. What is also not in dispute is that on-scene officers did give numerous commands to Pawlik shortly after the time they observed him rouse. Even if the contested sentence in the Discipline Committee's factual narrative is not precisely accurate, the discrepancy is inconsequential in its influence on the determination as to the propriety of the officers' eventual use of force.

The involved officers also note that the Discipline Committee's report stated that the video of the incident was the most essential piece of evidence and focus on the Committee's finding that the video confirmed "that at no time did Mr. Pawlik raise the handgun toward the officers or otherwise in a threatening manner toward the officers". Given the video's acknowledged significance, the officers fault the Discipline Committee for failing to discuss the findings of "various experts" that the video either supported the officers' perceptions that Pawlik pointed the pistol at them or did not contradict those perceptions.

Legal precepts have long recognized that while experts may offer the factfinder assistance as a result of their special expertise, the weighing of that assistance remains a matter of the factfinder's discretion. Accordingly, it was not requisite for the Discipline Committee to expressly accept or discard – or even consider – the "video expert" opinions in reaching its findings. In fact, the Committee's report itself suggests that it was able to make an assessment without reliance on outside impressions: "The Committee also finds that the PDRD video speaks for itself." *Discipline Committee Report at p. 5.*

The involved officers also fail to note that the Compliance Director's report did discuss some of the expert video analysis – and pointed out the shortcomings therein. Similarly, the officers do not address the Compliance Director's findings that "[Pawlik's]

movements, as seen on the video, do not coincide with the movements to which the officers claim they reacted.” See *Compliance Director’s report at p. 2*.

The involved officers also noted that the Discipline Committee report deviated from the prior review bodies by failing to identify, discuss or analyze the Department’s policies at issue. However, the officers fail to note that the Discipline Committee had access to and reviewed each of those prior analyses, and that there was no requirement to set out another rendition of the policies at issue or an analysis thereof.

5. Jurisdiction of the Discipline Committee to Impose Discipline

The involved officers maintain that because the Chief of OPD and the CPRA agreed that the use of force was within policy, the Discipline Committee lacked jurisdiction to consider those decisions. Sergeant Negrete similarly argues that because the Chief and the CPRA agreed that he did not violate his supervisory authority with gross dereliction, the Discipline Committee lacked jurisdiction to consider that decision. The officers focus on the City of Oakland Charter amendments that limit the involvement of the Discipline Committee to situations in which the Chief and CPRA disagree on findings.²

The involved officers’ argument fails to consider the impact of the federal court’s extant Order in *Delphine Allen, et al, v. City of Oakland, et al.*, Case 3:00-cv-04599-TEH, “Order Re: Compliance Director”, filed on December 12, 2012. In that Order, pursuant to agreement by the parties, the Court outlined the duties of the Compliance Director, which was intended to assist the City in achieving compliance with the Negotiated Settlement Agreement. As part of those duties, the Court’s Order noted that the Compliance Director had the authority to:

direct specific actions by the City or OPD [...] including [...] personnel decisions, including [...] findings and disciplinary actions in misconduct cases and use-of-force reviews.

A fair reading of the Order is that the Compliance Director has the authority to overrule any disciplinary findings by the Chief of Police, which is what occurred in this case. Accordingly, it is the Compliance Director’s findings that are binding as to any potential overlap or conflict with the CPRA. To the degree that those findings did in fact conflict with those reached by CPRA, the Charter delegates the Disciplinary Committee to

² The involved officers further advise that they have sought judicial relief relative to this jurisdictional issue in federal court which is currently pending. *Negrete, et al. v City of Oakland, et al.* Case No. 19-cv-05742-WHO.

determine the final outcome. This Skelly officer finds that the involved officers' assertion that the Committee lacked jurisdiction is without merit.

6. Allegation of Skelly Violations

The involved officers correctly state that the *Skelly* decision requires the City to produce copies of all materials upon which the decision-maker relied to render a determination. This Skelly officer initially received thousands of pages of material in binders provided by OPD and was informed that the same materials had been provided to representatives for the involved officers.

The involved officers maintain that they did not receive an unredacted Chronological Log of the investigation, the CPRA Investigative Report, CPRA Director Mike Nispero's communications to the Disciplinary Committee, and transcripts of the involved officer's interviews.

The Chronological Log is an account of the investigative activities presented in time-line fashion. The multiple page log of activity provided to the disciplined officers contains eight "one-line" redactions. The Skelly officer reviewed an unredacted copy of the Chronological Log and found, as represented by OPD representatives to the officers' counsel, that the references related to legal interactions. The redacted information does not contain any substantive information about the facts of the investigation or the review process itself. The inconsequential redactions made by the City to eliminate references in the logs to interactions with counsel could not result in any real prejudice to the involved officers.

The involved officers concede in their papers that they received the CPRA report from other sources. The fact that the involved officers heavily referenced the report in their Skelly response established that there was no prejudice to the initial omission of the CPRA report from the Skelly materials provided.

The involved officers maintain that the account between CPRA Interim Director Mike Nisperos referenced in the Disciplinary Committee's report should have been provided. The Skelly officer has been informed by the City that no such document or other recordation referencing that exchange exists, and that counsel for the officers was so advised. The Skelly officer received no written materials about the exchange between the Disciplinary Committee and Interim Director Nisperos. If no material exists to provide, then none can be provided.

Finally, the involved officers maintain that transcripts of officers' interviews were not initially provided. The Skelly officer has been informed that, in response to this registered concern, transcripts of the officers' interviews were provided. Likewise, the Skelly officer received transcripts of the officers' interviews from the City. As a result, the eventual providing of transcripts to the officers' satisfactorily resolved the concerns initially raised.

For the reasons stated above, the Skelly officer finds that none of the cited issues amounted to an actionable "discovery violation," and no violation of the officers' Skelly rights occurred.

7. "Just Cause" to Proceed Against Officers

The involved officers maintain that the Disciplinary Committee neither applied the appropriate standard in finding the use of force out of policy nor articulated with specificity how they had violated that policy. In essence, the involved officers fault the Committee for not setting out in writing the Fourth Amendment "objective reasonableness" test and weighing the appropriate factors.

While the Committee's Report does not include an extensive written analysis of the sort undertaken by the Compliance Director, the CPRA, and the EFRB, the Committee considered those prior analyses as part of its own review process. Nor was it necessary for the Committee to produce another detailed written analysis as part of its charge. Rather, its assignment was to determine whether, based on the evidence derived from the various investigations, the involved officers violated OPD policy when they used force.

OPD's use of force policy expressly notes that a key factor in determining the reasonableness of the force is "whether the suspect poses an immediate threat to the safety of law enforcement officers or others" (G.O. K-3, IIA, 1b). Significantly, with regard to the use of a firearm at a person, it holds as follows:

The discharge of a firearm at a person constitutes lethal force and is authorized only when there is reasonable cause to believe there is an immediate threat of death or serious bodily harm. (G.O. K-3, 4D)

The Disciplinary Committee report noted that the "PDRD video clearly shows Mr. Pawlik did not lift, move or point the handgun in a threatening manner toward the Officers." Committee Report at pp. 5-6. The Committee additionally wrote that it did not "find persuasive Officer testimony that Mr. Pawlik lifted, moved or pointed the handgun in a threatening manner toward Officers." *Id.* at p. 5.

A key issue in this case with regard to the use of force was whether Mr. Pawlik, by his actions after rousing, posed an immediate threat of death or serious bodily harm to the officers. The Discipline Committee, as set out in its report, considered the video evidence and statements of the officers in conjunction with all the additional investigative material and prior analyses. It concluded that Pawlik's actions upon awakening did not meet the threshold of an immediate threat to the involved officers. Nothing more is required of the Committee than to make this factual determination.

The involved officers maintain that the Committee's misinterpretation of Officer Berger's statement to Officer Phillips ("If that gun moves... bag him") shows that the Committee improperly considered the use of force under a subjective standard and demonstrated the Committee's "basic incompetence". However, a reading of the Committee report indicates that it considered that statement as evidence to show that Officer Berger ordered Officer Phillips to use less lethal force based on any movement by Mr. Pawlik, even movements that would not constitute a threat. The Committee apparently concluded that the statement showed a predisposition by at least Officer Berger to use force on Mr. Pawlik regardless of how he responded when he roused, in contravention of OPD policy.

The involved officers argue that the Committee failed to consider that the decision by the officers to use deadly force was a "split-second decision." However, while the decision to use deadly force was fairly rapid after Mr. Pawlik made a move (for reasons about which the reviewing bodies clearly diverged), the responding officers, led by Sergeant Negrete, had a significant amount of time to develop a plan to safely take Pawlik into custody. While the CPRA report makes much of the officers' ultimate need for rapid decision-making, the Committee had the CPRA analysis as a resource for its own review. As indicated in its report and consistent with the conclusion of the Compliance Director, it nonetheless found that Mr. Pawlik's movements were not threatening and should not have resulted in a use of deadly force.

8. *Substantial Evidence of Unreasonable Force*

The involved officers maintain that the Committee's significant reliance on the video to establish that Mr. Pawlik did not make a threatening movement prior to the use of force demonstrates that its findings were not backed by substantial evidence. The involved officers note the prior analyses by video experts that found either that the video evidence supported the officers' statements that Mr. Pawlik pointed his weapon at them or at least did not contradict them.

As stated above, and as with any fact finder, the Committee is not bound by opinions of experts. Moreover, as set out in the Compliance Director's report, concerns had been raised by the Chief about the usefulness of OPD's internal video analysis ("substandard" and "embarrassing"), yet it was cited approvingly in the CPRA analysis upon which the officers rely. And, like the Committee, the Compliance Director had made similar findings about the import of the video:

Mr. Pawlik roused to consciousness, and the video shows his actions to be consistent with someone who was waking up and attempting to orient himself. He was moving minimally. He was a live human being – and any reasonable officer should not have expected him to remain perfectly still. His movements, as seen on the video, do not coincide with the movements to which the officers claim they reacted. Mr. Pawlik's slight movements did not constitute intent and a reasonable officer should not have concluded such.

Compliance Director Addendum to OPD EFRB Report at p. 2.

In addition to concluding that the video evidence did not support the involved officers' version of events, the Compliance Director's report further identified significant discrepancies and inconsistencies between what the involved officers reported in their interviews and the video evidence. Similarly, as detailed above, the Discipline Committee found that the involved officers' statements were not "persuasive" in light of the video evidence.

9. The Finding that Sergeant Negrete's supervisory actions violated OPD policy

As explained above, the EFRB and the Compliance Director found that Sergeant Negrete's actions as a supervisor violated MOR 370.27-1, Supervisor- Authority and Responsibilities, Class I. The CPRA and the Chief of Police agreed that Sergeant Negrete violated the Manual of Rules but found his misconduct constituted a Class II violation. In recommending a violation of policy, the EFRB noted the following most significant shortcomings in Sergeant Negrete's performance:

- Sergeant Negrete deploying his own rifle as part of the DAT, even though he had two officers already with rifles as primary cover officers;
- Sergeant Negrete taking the role of both team leader and talker/cuffer, which split his attention and did not allow him to effectively supervise the team; and

- Sergeant Negrete's failure to plan for a foreseeable exigency – Pawlik awakening and refusing commands.

The CPRA report similarly found fault with several aspects of Sergeant Negrete's decision-making:

- Sergeant Negrete did not have a clear and comprehensive plan.
- Sergeant Negrete's plan was missing critical contingencies and steps.
- Sergeant Negrete's plan did not take into account the actual facts of the situation before him.
- Sergeant Negrete failed to remain in a supervisor role and properly supervise those under his command.
- Sergeant Negrete failed to assist in the sequestration of officers post-shooting, and in not discussing the incident following an OIS.

The Sergeant's challenges to these findings include the following:

a. Whether Sergeant Negrete Was Acting in a Supervisory Capacity

Sergeant Negrete maintains that he should not be found to have violated the supervisory General Order because Lieutenant Yu was in charge of the scene. He also argues that four additional and more senior sergeants were on scene and only he was singled out for discipline.

In fact, as noted above, both OPD and CPRA found that Lieutenant Yu failed in his responsibilities as incident commander in violation of the General Orders, in part as a result of his failure to adequately supervise Sergeant Negrete. At the time of the incident, Lieutenant Yu was positioned across the street and not geographically able to closely supervise the designated arrest team ("DAT") officers as they were tactically deployed.

While there were other sergeants on scene, Sergeant Negrete was expressly designated by Lieutenant Yu as the DAT supervisor. Both Lieutenant Yu and Sergeant Negrete himself related this fact when they were interviewed, and there is PDRD evidence confirming this assignment. Sergeant Negrete's argument on this point is belied by the evidence to the contrary.

b. Whether Sergeant Negrete Had Sufficient Notice

Sergeant Negrete maintains that the Manual of Rules setting out what is expected of supervisors do not provide sufficient specificity to hold him accountable. He cites to the specific sub-categories set out in MOR 285.00 and asserts that none of those specified responsibilities apply to the decision-making he undertook in OPD's response to the Pawlik call. Sergeant Negrete concludes in his papers that he had no notice through OPD policy about what he needed to do or not do in assuming command of the DAT relating to Mr. Pawlik.

In first response to Sergeant Negrete's arguments, MOR 285.00 does speak to basic responsibilities that supervisors of OPD have such as SUPERVISION (285.14), LEADERSHIP (285.28) and DIRECTION (285.42). As noted above, both reviewing bodies found that Sergeant Negrete failed in these basic responsibilities as a result of his defective plan and by assuming the role of an actor instead of a leader.

More significantly, during both the investigative and review process, OPD subject matter experts on standards and training of supervisors related in detail what was expected of supervisors of a DAT team and how those expectations were conveyed to sergeants. Both OPD and CPRA decisionmakers had the benefit of these insights as to how Sergeant Negrete's performance during the Pawlik response fell short of those expectations.

The fact that OPD does not have a MOR that specifically sets out the responsibilities of a supervisor of a DAT does not mean that a sergeant who has been provided training cannot be held accountable for significant deviation from that training. As detailed above, in this case, all prior decision-making bodies found that Sergeant Negrete significantly deviated from training and Department standards and accordingly violated policy. Through that training preceding the event, Sergeant Negrete was sufficiently placed on notice of his supervisory responsibilities as a DAT leader.

c. Whether Sergeant Negrete Actions Were Consistent with Department Training and Policy

Sergeant Negrete maintains that all of his decision-making as the DAT leader was consistent with OPD training and policy. However, evaluation of the most significantly defective supervisory decision-making identified by the prior deliberative bodies belies Sergeant Negrete's assertions.

As set out by both OPD and CPRA, while Sergeant Negrete assumed the role of DAT leader, he also assigned himself a lethal role, a handcuffing role, and a role as the person designated to communicate with the subject. Sergeant Negrete decided to deploy his own rifle instead of relying on the designation of Officers Berger and Hraiz as lethal covers. This decision meant that at the time that Mr. Pawlik roused, Sergeant Negrete was “supervising” the team and giving Pawlik instructions, all while peering down the scope of his rifle. By assigning himself multiple tactical responsibilities, Sergeant Negrete seriously limited his opportunity to fulfill his primary duty, which was supervising the team.

Sergeant Negrete maintains that, because his choice to play a tactical role is a common practice that is consistent with training, it cannot be used as a basis to find that he violated policy. Sergeant Negrete notes that because OPD’s subject matter experts only talked in terms of “encouraging” team leaders, said that it was “better” that one officer is not responsible for multiple roles, and opined that “ideally” the team leader would be able to take a step back and see what both the suspect and the DAT are doing, he cannot be held accountable for allegedly violating such a nebulous standard.

While Sergeant Negrete accurately quotes from the narrative of the subject matter experts, he fails to fully set out the concerns and criticism regarding when a DAT leader assumes active roles. For example, Sergeant Toribio stated the following:

The fourth role is that of team leader. This would be the ‘quarterback’ of the team. Ideally, they would be able to take a step back and see what both the suspect and the DAT are doing. This allows the team leader to effectively manage the DAT.

[...]

Toribio was asked if team leaders should take on other roles within the DAT. He said that in an ideal situation, it is best for the team leader to step back and remove themselves from other roles. The team leader would just coordinate the other roles within the DAT. It becomes difficult to run the team if the team leader is invested in other functions. This makes it difficult for the team leader to think and plan, or to ensure that the other members of the DAT are fulfilling their duties. Removing the team leader from the other roles reduces his/her stress level and allows them to think more clearly about the situation.

[...]

Toribio was asked if he would have any points of concern if the team leader was looking through the scope of his/her rifle while also giving verbal commands. Toribio said that he would assume the team leader would only do this only if the other members of the DAT did not pick up on the threat. If that was the case, it would be appropriate for the team leader to do this. If the roles were appropriately being fulfilled by other members of the DAT, you would not want the team leader to be doing these things as well.

Toribio was asked if the team leader can properly supervise the DAT if his/her attention is focused on these other tasks (talking to the suspect, pointing his/her rifle at the suspect, etc.). Toribio said that the team leader would not be able to fully supervise the DAT under these circumstances. A lot can change out of the view of the area that the team leader is focused.

EFRB Additional Analysis Document, January 8, 2019, pp. 2-5.

A fair reading of Sergeant Toribio's statement is that every scenario is different depending on the number of resources available and the situation presented. Sergeant Toribio's use of the word "ideally" in the context of his statement is that some of the precepts are dependent on whether there is time and sufficient personnel to assign individual tasks to the team. And Sergeant Toribio's statement that there are no "hard and fast" rules suggest that every situation is different and written policies cannot be devised to cover every variable.

Sergeant Toribio's qualifiers do not preclude OPD and CPRA for finding fault with Sergeant Negrete's decision to take on tactical roles while also serving as DAT leader. As Sergeant Toribio set out above, in situations such as the Pawlik incident where a DAT leader has sufficient resources and time to assign roles, it is counterproductive for the leader to assume other roles. And, as set out above, when a leader is trying to fulfill that role while looking through a scope of a rifle and giving commands, it inhibits the ability to "fully supervise" the team. Given the circumstances presented to Sergeant Negrete, the failure to maintain a role as team leader and delegate other responsibilities so deviates from training precepts and expectations that both agencies could reasonably find a violation of OPD supervisory policies.³

³ Sergeant Negrete's argument that some SWAT operations assign a team leader to tactical tasks is also inapposite here as it is clear that this response was not a SWAT operation but a DAT response with different objectives, training and expectations.

The EFRB and CPRA also faulted Sergeant Negrete for not planning for the contingency that actually occurred: Mr. Pawlik awakening and failing to follow commands. Sergeant Negrete responds to this criticism by maintaining that he did have a plan for this contingency: namely, to use bean bag rounds on Mr. Pawlik. Sergeant Negrete further maintains that he did not need to articulate any contingency plan since all officers would be trained on how to respond when Mr. Pawlik presented a deadly threat.

However, Sergeant Negrete did not advise Officer Phillips to deploy the less lethal rounds should Mr. Pawlik awaken and not follow commands. Instead, it was actually Officer Berger who advised his fellow officer to deploy should Pawlik move. And according to Officer Phillips, he was advised initially that the less lethal would be used to rouse Mr. Pawlik should commands and sirens be unsuccessful. As the subject matter experts for OPD explained, the need to articulate a plan is essential so that everyone will be on the same page as the operation proceeds.

Sergeant Negrete argues that when Mr. Pawlik sat up and pointed a firearm at the officers, Pawlik dictated their response. Sergeant Negrete misconstrues the whole point of planning, delegation, and articulation, which is to ensure that the subject is not able to dictate the response of law enforcement. A plan with contingencies on how to respond allows officers to dictate the outcome of the event. Because Sergeant Negrete's plan was defective in considering likely contingencies, there is sufficient evidence to support the finding made by both OPD and CPRA that he fell short of his supervisory responsibilities.

Finally, Sergeant Negrete's response did not address other on-scene supervisory actions that also formed a basis for the sustained charge. For example, both OPD and CPRA noted that Sergeant Negrete made comments about what had occurred to other involved officers in the aftermath, such as advising them that Pawlik pointed his firearm "directly" at them and that they had "no choice" but to use force. Assertion of these views in that context was a highly inappropriate transgression for an on-scene supervisor to make.

Sergeant Negrete's response fails to convincingly rebut the findings made by both OPD and CPRA that his on-scene decision-making violated his responsibilities as the DAT leader.

This Skelly officer independently finds a series of mistakes by Sergeant Negrete as team leader as aptly set out by the EFRB and CPRA reports that had significant

implications for how the incident ended. As detailed below, many of those mistakes resulted in greatly increasing the likelihood that force, including deadly force, would be used. Even though no policy specifically sets out the “dos” and “don’ts” of a DAT leader, Sergeant Negrete’s actions can fairly be characterized as falling below the standard general expectations for supervisory performance. His failure to plan readily foreseeable contingencies and his self-assignment of tactical responsibilities, even when he had ample time to perform these tasks in the specific context of this incident, left him and his team poorly prepared to address the situation presented. Sergeant Negrete’s failures as DAT leader violated MOR 285.00, and the allegation should be sustained.

10. The Finding That Sergeant Negrete’s Failures as the DAT Leader Amounted to Gross Dereliction of Duty.

Initially EFRB found that Sergeant Negrete’s failures as the DAT leader rose to the level of gross dereliction of duty, resulting in a more serious “Class I” violation. The Chief modified that determination to a Class II violation but was overruled by the Compliance Director, who agreed with the EFRB’s “Class I” finding. The Disciplinary Committee also found that the supervisory violation constituted a “Class I” violation.

In maintaining that his supervisory shortcomings should not constitute a Class I violation, Sergeant Negrete presents no new arguments other than urging that the analysis set out by CPRA is the most logical. And while he cites approvingly to language in the EFRB report, Sergeant Negrete fails to acknowledge that the Board found that his supervisory failures did amount to a Class I violation.

This Skelly officer finds the analysis of the EFRB sound. Most compelling in support of a finding of gross negligence and dereliction of duty was the articulation of the series of supervisory mistakes by Sergeant Negrete that left him and his team poorly prepared to address the challenges presented – and the consequential loss of life that emanated from those poor decisions. Moreover, by his unprompted statements to team members immediately after the incident (that the subject pointed a gun at them and that they had to use deadly force), Sergeant Negrete corrupted the investigative process before it could even begin by undermining the ability of each involved officer to relate their observations and actions free from outside influence.⁴

⁴ Sergeant Negrete’s almost immediate statements to other involved officers seriously calls into question whether those officers’ subsequent recitations were based solely on their own observations and not influenced by their team leader’s assertions.

Accordingly, this Skelly officer finds that the allegation of a “Class I” violation should be sustained.

SKELLY OFFICER’S FINDINGS AND ANALYSIS ON USE OF FORCE

In addition to reviewing the analysis put forth by the various administrative bodies that considered this matter, as discussed above, this Skelly officer also reviewed the evidence independently to determine whether that evidence provided sufficient bases to find the involved officers’ use of force was in contravention of OPD policy.⁵ For this reviewer, the critical question was not limited to the “split second” decision the officers made about whether to discharge their weapons when they perceived what they claimed was an immediate threat to them and others.⁶ Instead, the analysis also encompassed whether the involved officers performed reasonably after responding to the call and observing an individual apparently not conscious with a gun in his hand. This wider lens of review is supported by case law in California. In *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013), the California Supreme Court held as follows:

Law enforcement personnel’s tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise

⁵ The involved officers correctly assert that OPD’s use of force considerations incorporate the factors set out in *Graham v. Connor*, 490 U.S. 386, 396 (1989). Those factors include “[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* Based on the facts of this case, the justification relied on by the officers for their use of force is that Mr. Pawlik posed an immediate threat to the safety of them and others.

⁶ In its analysis, the EFRB found that while officers had restricted the public’s access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm’s way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik’s pointing of the firearm in a residential area posed an immediate threat to the public.

This Skelly officer disagrees that Pawlik’s potential ability to shoot at a residence constituted an “immediate threat to the public”. No member of the public was discernable at the time of the incident. According to the officers, Pawlik pointed his weapon at them, not at a nearby structure. Therefore, the possibility of harm to the public too speculative to constitute an immediate threat under the scenario presented and does not constitute an additional justification for the application of deadly force.

to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable.

In determining the “totality of the circumstances” in considering the reasonableness of any use of force, the tactical conduct and decisions preceding the use of deadly force are relevant considerations. And as discussed above, the substandard pre-event decision-making by Lieutenant Yu (in part) and Sergeant Negrete (in significantly larger part) should be considered in evaluating the reasonableness of the force.⁷

As indicated above, in the discussion of Sergeant Negrete’s violation for a Class I violation of his responsibilities, a number of Negrete’s decisions left the DAT poorly prepared to deal with the eventuality of Mr. Pawlik rousing and beginning to move. Because Sergeant Negrete had provided the team insufficient direction on how to respond should Pawlik awaken on his own, they were left to improvise in the moment on how to proceed.⁸ The self-delegation by Sergeant Negrete of responsibility for a lethal force option, giving commands⁹, and handcuffing left him unable to successfully lead the team as the scenario progressed. Instead of stepping back and coordinating the response, Sergeant Negrete was trying to manage the team as Pawlik roused while simultaneously looking through the scope of his rifle and preparing to deliver deadly force rounds himself.

One particularly concerning aspect of this operation is that, unlike many tactical challenges confronted by police, the responding officers and DAT leader had resources and time to devise a coordinated response. In fact, responding officers had close to an

⁷ Sergeant Negrete is heard on his PDRD saying to Lieutenant Yu, “if he wakes up now, we’ll deal with him.” But how the team would deal with him was never articulated, nor was a plan devised.

⁸ Sergeant Negrete told IAD investigators: “[Pawlik] was not obeying my commands. At this point, I’m thinking of other options for less lethal, but it evolved so quickly that that didn’t happen.” Sergeant Negrete failed to adequately explain why those other options had not been considered or discussed earlier in the incident response, when there was ample time to do so.

⁹Sergeant Negrete initially called out to the team that if the subject “goes alert” that he would be talking. But later Sergeant Negrete told Sergeant Webber to make the announcements if the subject awoke. And then once Pawlik awoke, Sergeant Negrete started giving commands. The plan was suspect in both its creation and in its implementation. Moreover, even though it would have been important to communicate to Lieutenant Yu the various team assignments, Sergeant Negrete never advised the Lieutenant that he was going to assume the role as “talker”.

hour to prepare to take Mr. Pawlik into custody before he began to rouse, and Sergeant Negrete, the designated team leader was on scene for approximately 30 minutes prior to the shooting. Numerous officers, including supervisors, responded during that time, and Sergeant Negrete was even able to have the Bearcat armored vehicle summoned and deployed before Pawlik began to awaken.

Despite having an armored vehicle on scene that was specifically designed to provide the greatest protection for officers from firearm rounds, the team chose to use the equipment as only partial cover. Specifically for reasons of tactical superiority and safety, the Bearcat is outfitted with ports and a turret from which officers, fully protected by the armored walls of the vehicle, could deploy their firearms. The Bearcat is one of the few devices where a safely positioned law enforcement officer could virtually negate the threat of a an armed subject – and even receive a firearm round – before needing to respond with deadly force. Yet the responding officers chose to forego this option and continue to place themselves in positions of vulnerability.

Had the armored vehicle been used to its fullest advantage, officers could have been placed inside of the Bearcat, other officers could have been moved out of Pawlik's line of sight but ready to engage in case he decided to flee, and the tactical officers would have had more time to determine whether Pawlik was aggressing with his firearm or simply stirring in a natural way as he woke. And while it is almost never fair or appropriate to expect an officer to wait until being fired upon before deploying deadly force, the unique safety advantages of the armored vehicle are distinctive in this respect. Nonetheless, the benefits of the Bearcat were largely disregarded, to the tactical vulnerability of the officers when Pawlik began to rouse.

This Skelly officer finds unpersuasive the rejoinder from the OPD subject matter expert that the ports on the armored vehicle do not provide a conventional shooting position and do not provide an ideal platform for rifle use. Even assuming the concerns raised by the subject matter experts are true, the ports are specially designed so that firearms can be shot from inside the vehicle. And even if that requires an unconventional shooting position and the use of a sidearm instead of a rifle, the benefit of full and complete cover and reduction of risk to the officer should have outweighed any concerns posed by these limitations.¹⁰

¹⁰ See, "How to Master Armed Vehicle Response", June 19, 2018, Police One, where a training describes teaching officers to shoot from inside the turrets and ports of an armored vehicle.

Sergeant Negrete also failed to follow his own designation of Officer Berger and Hraiz to be the “lethal operators” for the team. Instead, he decided to also designate himself as a lethal team member, to the detriment of his ability to command the team. Moreover, without any apparent discussion or agreement, Officer Tanaka decided to also deploy as lethal cover.¹¹ The result was four officers deployed as lethal cover instead of the standard two. There was nothing particularly complicated in the geometry of the scenario: Mr. Pawlik was in a relatively confined space, had few avenues of egress and the two lethal operators had an adequate sight picture of him throughout the relatively static event. The more officers designated as lethal, the greater likelihood that lethality will be deployed; there was no rationale offered for why four rifle operators were deemed necessary by the involved to address the situation in this scenario.

After Mr. Pawlik began to awaken, the on-scene officers gave contradictory commands to him. One officer shouted “Don’t move!” and another almost simultaneously yelled “Get your hands up!” and “Get your hands off the gun!” This pattern of conflicting commands being given to Mr. Pawlik happened at least one additional time. Instead of one officer assigned to give clear cogent instructions to Pawlik so that he and all officers understood the expectation, the confusing and contradictory commands may well have contributed to confusion from Pawlik as he was rousing. The conflicting commands are indicative of a poorly coordinated and planned response to Mr. Pawlik’s foreseeable manner of rousing, thus adding to the avoidable disadvantages created by the officers’ poor preparation.

The team members did not coordinate their response through their team leader. Initially Sergeant Negrete said that he advised Officer Phillips in the presence of Officer Berger to use the bean bag rifle on the subject if he did not respond to announcements and/or sirens.¹² However, prior to the application of force and before Mr. Pawlik began to rouse, Officer Berger is heard advising Officer Phillips to “bag” Mr. Pawlik if the gun moves.¹³ This instruction from Officer Berger is contrary to the apparent understanding

¹¹ At no time did Sergeant Negrete advise Officer Tanaka of his assigned DAT role, thereby creating a vacuum of sorts that the officer chose to fill in problematic fashion.

¹² Yet Sergeant Negrete is heard on his PDRD instructing the initial less lethal officer that “once this is all set up, you are going to thump him.” It is unclear what Sergeant Negrete meant by “once this is all set up.” Moreover, this instruction is inconsistent with Sergeant Negrete’s plan for verbal challenges and sirens to try to rouse Pawlik.

¹³ The Compliance Director’s Supplemental Report suggests that Officer Berger’s comment could also reveal Berger’s own state of mind, that if the gun moved, Berger would fire. The Discipline Committee stated that Officer Berger’s statement shows “at worst, Officer Berger’s desire to shoot a rifle round at Mr. Pawlik, killing him.” This

Officer Phillips had that less lethal would be used to rouse Pawlik, as opposed to striking him defensively if the gun moved. For this reason, Officer Berger's conflicting and seemingly improvised instruction should have gone through Sergeant Negrete – either to be clarified or to at least ensure that all DAT members remained on the same page.

Sergeant Negrete also chose not to request assistance from a crisis intervention officer, a tactical operations officer, or a Spanish speaking officer despite an expressed observation by Officer Phillips that the subject might be Latino. Because these additional resources were not called, it is not possible to know whether their presence and advisements might have altered the outcome of this event.

The CPRA report cogently discussed an additional shortcoming of the DAT response:

It is recognized that those in charge of the incident, Sgt. Negrete and Incident Commander Lt. Yu, basically set up an extremely limited response scenario for Mr. Pawlik to escape deadly force: wake up, understand what was going on, release the weapon, and through it all, don't move the gun in any significant way that could be interpreted as more of a threat than it already is. The mood of so many officers facing Mr. Pawlik with his gun in hand, waiting to see him move it, contributed to setting the response that took place. An alternate plan or any restraint was never discussed with the officers on scene who were facing Mr. Pawlik with their rifles despite the precariousness of the situation. Mr. Pawlike sitting up with the gun still in his hand was a very real possibility. Yet what would happen when he did was never discussed. Certainly, the plan choices made here by those in charge for OPD were not the only choices that could have been made.

CPRA Report at p. 23.

However, then the CPRA Report cites a Seventh Circuit opinion for the proposition that there is no requirement that law enforcement officers use all feasible alternatives to avoid a situation where deadly force was used. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994). As noted above, the *Hayes* case, decided after *Plakas*, states that, at least in California, pre-event tactical decision making is relevant to whether officers behaved negligently in using force. While law arising from civil disputes is not necessarily

reviewer does not subscribe to either of these possible interpretations of Officer Berger's statement, but instead believes he was simply advising Officer Phillips to use the less lethal device if Phillips observed Pawlik's gun move.

controlling to assessing standards of conduct expected of law enforcement agencies, OPD's use of force policy expressly notes that the propriety of any force is to be adjudged on the "totality of the circumstances". The officers' response in this case provided few opportunities for Mr. Pawlik to escape the application of deadly force and that response can be relevant –and in this reviewer's view is highly relevant – to whether the use of force was reasonable in keeping with the dictates of Department policy.

The responsibility for the plan's defects rests largely with Sergeant Negrete as DAT leader. However, as defective as the plan was, the other involved officers cannot and should not escape culpability on the grounds that they were merely following orders. To the degree the plan was defective or if they did not clearly understand their roles, it was incumbent upon each team member to advise Sergeant Negrete of any confusion. The responding officers should have asked Sergeant Negrete how they should proceed if the subject roused but failed to follow commands.

Moreover, the involved officers engaged in a substandard execution of the plan when they gave conflicting commands to Mr. Pawlik, when Officer Berger advised Officer Phillips to change the plan for use of the less lethal shotgun, and when Officer Tanaka self-deployed as lethal cover without any instruction from the team leader.

Each member of the team who used force had an individualized responsibility to ensure that the plan and deployment of DAT was sound and to question aspects of the plan that were defective or confusing, so as to avoid using force that could and should have been obviated. There was no evidence that any involved officer did so.

Each member of the team who used force had an individualized responsibility to ensure that their own use of force was reasonable. Because each member allowed a flawed deployment to move forward, offering little opportunity for Mr. Pawlik to surrender without incident, each should be held accountable for the unreasonable use of force that resulted. For those reasons, in conjunction with the arguments put forward by the Compliance Director and the Discipline Committee¹⁴, this reviewer finds that Sergeant Negrete and the officers who also used force on Mr. Pawlik violated OPD's use of force policy.

¹⁴ Because the "plan" was so ineffective in its design and implementation, it makes less pivotal whether the officers thought they saw Pawlik point the gun at them, the plan was so poorly designed that an innocuous movement could equally have been interpreted as a threat.

SKELLY OFFICER'S FINDINGS ON LEVEL OF DISCIPLINE (SERGEANT NEGRETE, OFFICERS BERGER, HRAIZ, TANAKA, AND PHILLIPS)

Use of Force Policy

As detailed above, Sergeant Negrete and Officers Berger, Hraiz, Tanaka and Phillips all maintain that the use of force allegations against them should not be sustained. They do not argue, however, that if the force allegations are sustained, the proposed termination findings are inappropriate and excessive. They do not offer any information in mitigation of the use of force findings, should there be sustained findings.

The range of outcomes within OPD's Disciplinary Matrix for violations of the Department's use of force policy is a wide one: Counseling to Termination. Because this Skelly officer finds the use of force allegations to be sustained, and with the resultant death of the involved individual as the key aggravating factor, this Skelly officer also finds that the discipline finding of termination is appropriate.

Violation of Supervisor Policy (Sergeant Negrete)

As noted above, the Compliance Director found that Sergeant Negrete's violation of the supervisor policy amounted to a Class I violation, and that termination was the appropriate level of discipline for the offense. The CPRA found the supervisory failures to be a Class II violation, but recommended, without analysis, demotion as the appropriate discipline.¹⁵ The Discipline Committee found that Sergeant Negrete's failures as supervisor rose to the level of a Class I violation, and that termination was the appropriate disciplinary outcome.

Sergeant Negrete maintains that because any violation of policy he committed as a supervisor did not rise to a Class I violation, the proposed discipline of termination is excessive. As explained above, this Skelly officer finds that his supervisory failures amounted to a gross dereliction of duties and that they constituted a Class I violation.

OPD's Disciplinary Matrix provides for a discipline range of 5-day suspension to termination. Sergeant Negrete offers no factors in mitigation to consider should there be a finding of a Class I violation. In this case, Sergeant Negrete's cascade of poor decisions had an instrumental impact on the tragic outcome in this case. With the degree and consequences of Sergeant Negrete's supervisory failures as the key

¹⁵ This recommendation clashed with the relevant Discipline Matrix range for a Class II violation: Counseling to a 5-day suspension.

aggravating factor in this case, this Skelly officer finds that termination for this offense is the appropriate outcome.

DISCUSSION OF SUSTAINED FINDINGS (LIEUTENANT YU):

Arguments Raised in Skelly Proceedings

1. Statute of Limitations Challenge

Lieutenant Yu maintains that the statutory period during which discipline may be imposed has lapsed. Pursuant to Cal. Penal Code Section 3300 et seq, peace officers must be advised of any intent to discipline them within one year of the date of discovery of the misconduct. Lieutenant Yu acknowledges that Section 3304, subsection (d)(2)(A) provides that “[i]f the act, omission or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period” and that there was some time in which the Pawlik shooting was the subject of a criminal investigation.

However, Lieutenant Yu calculates the criminal investigation as not commencing until November 7, 2018 and concluding on March 6, 2019. It is clear that the criminal investigation commenced on the date of the incident, March 11, 2018, when OPD’s Criminal Investigation Division team rolled out to the scene and began its investigation. Moreover, as stated in *Parra v. City and County of San Francisco (2006) 144 Cal.App.4th 977, 994*, a case cited by Lieutenant Yu in his papers, the tolling provision applies: “[i]f the act, omission or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution.”

Accordingly, Lieutenant Yu’s notice of intent to discipline him was timely.

2. Whether a violation of MOR 234.00-2 Was Proven as to Lieutenant Yu

OPD’s EFRB unanimously found that in this incident the three main responsibilities of a DAT (arrest subject, prevent flight, react to contingencies) were lacking and that Lieutenant Yu failed to rectify these shortcomings. EFRB also expressed as “troubling” the fact that Sergeant Pierce, who was on scene and in charge of the rear perimeter, was not aware of who the incident commander was. One Board member said this spoke to a larger theme that there was a lack of firm communication from the incident commander to all involved members as to exactly what the plan was.

A Board member also specifically remarked that there were also failures after the use of deadly force, such as the issues with officer sequestration, which were the fault of Lieutenant Yu. The Board member also remarked that Lieutenant Yu should have seen Sergeant Negrete carrying a rifle and told him to store the rifle and concentrate on leading the DAT.

While the Chief found that while Lieutenant Yu took many appropriate actions expected of an incident commander, she agreed that Yu deferred to Sergeant Negrete too much and should have had more firm control of the management of the scene as articulated by the EFRB. The Chief also agreed that after Lieutenant Yu was briefed by Sergeant Negrete, he should have recognized that the sergeant had failed to plan for one of the three basic contingencies all DAT leaders must consider – i.e., how to react to foreseeable exigencies created by the suspect. Accordingly, she agreed with a sustained finding for a Class II violation of command responsibilities.

As to Lieutenant Yu, the Compliance Director apparently adopted the analysis of the EFRB and Chief and also sustained a finding for the same violation.

In his Skelly response, Lieutenant Yu maintains that he could not have ordered the on-scene officers not to use deadly force if there was a reasonable threat presented to them, or directed the officers to approach an armed and unconscious Mr. Pawlik. However, the basis for the sustained charges does not suggest that Lieutenant Yu should have undertaken such instruction as incident commander.

Lieutenant Yu maintains that he did not need to discuss with Sergeant Negrete what to do if Mr. Pawlik awakened and pointed a gun at officers, since all officers on scene would know what to do, i.e., use deadly force. However, Lieutenant Yu misconstrues the thrust of the criticism, which is that all foreseeable contingencies were neither considered by Sergeant Negrete nor recognized and addressed through appropriate intervention by the lieutenant during the planning phase.

Moreover, Lieutenant Yu fails to address the other identified shortcomings that formed the basis of the sustained charge, such as the failure to advise all supervisors that he was the incident commander, the failure to recognize that Sergeant Negrete was deploying his rifle while serving as DAT leader, and the failure to effectively sequester the involved officers post-incident. Accordingly, this Skelly officer recommends that as to Lieutenant Yu, there be a sustained finding for a Class II violation of command responsibilities.

Level of Discipline (Lieutenant Yu):

The Compliance Director, in sustaining a finding for a Class II violation of command responsibilities (MOR 234.00-2), determined that a suspension of five days was warranted:

Given the severity of the violation and the resultant consequences, coupled with my review of the range for this violation listed in the Discipline Matrix, I have determined that a suspension of five (5) days is warranted in this case.

Apparently, in sustaining for the same charge (MOR 234.00-2, Class II violation), the CPRA determined, without analysis, that demotion was the appropriate discipline. The Discipline Committee similarly found a violation of MOR 234.00-2, Class II violation. The Discipline Committee found, without analysis, that demotion was the appropriate discipline.

The OPD Discipline Matrix lists the following violations and penalties for first offenses:

234.00-1 COMMANDING OFFICERS – AUTHORITY AND RESPONSIBILITIES 5-day suspension to termination
(Gross dereliction of duty)
234.00-2 COMMANDING OFFICERS – AUTHORITY AND RESPONSIBILITIES Counseling to 5-day suspension

As to Lieutenant Yu, no decision-making body found the requisite “gross dereliction of duty” requirement to move the violation into the Class I category. While OPD’s discipline policy is clear that the Discipline Matrix provides discipline “guidelines,” and that a Chief of Police as decision-maker (and presumably the CPRA, Compliance Director, and Discipline Committee as well) can impose any discipline believed appropriate, the Matrix is intended to guide the decision-maker to consistent and principled disciplinary outcomes.

The Skelly officer may have been persuaded by the demotion determination of CPRA and the Discipline Committee had there been explanation of any aggravating factors that may have warranted such a significant upward departure. And while it is true that Lieutenant Yu made a series of mistakes as set out in the EFRB, Chief of Police and CPRA analyses, no decision-maker found those mistakes so egregious as to constitute a gross dereliction of duty Class I violation. On the other hand, as the key aggravating factor, Lieutenant Yu’s failure as incident commander to perform consistent with OPD expectations and training impacted the quality of the involved officers’ tactical response. Accordingly, this Skelly officer finds and recommends, consistent with the Discipline

Matrix, that Lieutenant Yu receive a 5-day suspension for the MOR 234.00-2, Class II violation, the top of the discipline range for this type of offense.

DISCUSSION OF ALLEGATION (OFFICER TANAKA, FAILURE TO ADVISE COMMUNICATIONS DIVISION OF HIS RIFLE DEPLOYMENT)

As noted above, the Compliance Director sustained a Performance of Duty finding against Officer Tanaka for his failure to advise the Communications Division of his rifle deployment. The CPRA reached a “not sustained” finding on this allegation. The divergent results on this allegation should have been resolved by the Discipline Committee. However, the Committee incorrectly reported that the Compliance Director had made a “not sustained” finding and therefore did not recognize its jurisdiction to resolve contrary findings between the Compliance Director and the CPRA. Per the City’s Municipal Code, the Discipline Committee should have issued a determination on this allegation. I recommend that the Discipline Committee, per the City’s Code, consider this allegation and make a finding.

SKELLY OFFICER'S FINAL CONCLUSION AND RECOMMENDATIONS

For the reasons articulated above, I recommend that the use of force violations as to each employee be SUSTAINED. I also concur with the Discipline Committee's findings regarding levels of discipline except for the level of discipline for Lieutenant Yu. I recommend a discipline level of 5-day suspension for his violation of supervisory policy. Because the Discipline Committee failed to resolve the contrary findings between CPRA and OPD on the Performance of Duty allegation stemming from Officer Tanaka's alleged failure to notify the Communications Division of his rifle deployment, I recommend that the Discipline Committee make a finding as to this allegation.

Michael Gennaco
Skelly Officer