

1 JOHN L. BURRIS, STATE BAR NO. 69888
2 Law Offices of John L. Burris
3 Airport Corporate Centre
4 7677 Oakport Road, Suite 1120
5 Oakland, California 94621
6 Telephone: 510.839.5200
7 Facsimile: 510.839.3882
8 Attorneys for Plaintiffs

9 JAMES B. CHANIN, STATE BAR NO. 76043
10 JULIE M. HOUK, STATE BAR NO. 114968
11 Law Offices of James B. Chanin
12 3050 Shattuck Avenue
13 Berkeley, California 94705
14 Telephone: 510.848.4752
15 Facsimile: 510.848.5819
16 Attorneys for Plaintiffs

17 *(Additional Counsel on Next Page)*

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 DELPHINE ALLEN; et al;

21 Pl aintiff,
22 vs.

23 CITY OF OAKLAND, et al.,

24 Defendant.

25 **MASTER CASE NO. C-00-4599 TEH**

26 **JOINT STATUS CONFERENCE**
27 **STATEMENT RE NON-MONETARY**
28 **SETTLEMENT ISSUES**

Date: September 22, 2011
Time: 11:00 a.m.
Courtroom 2, 17TH FLOOR

Honorable Thelton E. Henderson

1 Barbara J. Parker, City Attorney, State Bar No. 69722
Randolph W. Hall, Chief Assistant. City Attorney, State Bar No. 080142
2 Rocio V. Fierro, Senior Deputy City Attorney, State Bar No. 139565
rvfierro@oaklandcityattorney.org OFFICE OF THE CITY ATTORNEY
3 CITY OF OAKLAND
One Frank H. Ogawa Plaza, Sixth Floor
4 Oakland, California 94612
Telephone: 510.238.3601
5 Facsimile: 510.238.6500
Attorneys for Defendant CITY OF OAKLAND

6 GREGORY M. FOX, STATE BAR NO. 070876
Bertrand, Fox & Elliot
7 The Waterfront Building - 2749 Hyde Street
8 San Francisco, California 94109
Telephone: 415.353.0999
9 Facsimile: 415.353.0990
Attorneys for Defendant CITY OF OAKLAND

10 ROCKNE A. LUCIA, STATE BAR NO. 109349
11 Rains Lucia Stern, PC
Attorneys & Counselors at Law
12 2300 Contra Costa Boulevard, Suite 230
13 Pleasant Hill, CA 94523
Tel: 925-609-1699
14 Fax: 925-609-1690
Attorneys for OAKLAND POLICE OFFICERS ASSOCIATION

INTRODUCTION

This status conference is to discuss the City's compliance with the Negotiated Settlement Agreement ("NSA") and to respond to the Court's sealed order dated August 25, 2011 that the parties additionally address five specific matters at the status conference, including how confidential information should be handled in the proceedings.

In their joint response filed on September 2, 2011, the parties responded to the confidentiality issues by agreeing that information pertaining to personnel matters including internal affairs and force review investigations will be filed under seal, except as ruled by the court in its subsequent order. The parties now submit this bifurcated joint status statement in which the confidential version is filed under seal and the public version is filed in the public record. The parties understand that at the hearing, the public discussion will occur first in the open courtroom followed by the private discussion of the confidential matters in the sealed courtroom in which only persons authorized by the parties and/or the court shall attend.

PLAINTIFFS' CURRENT POSITION

This is a further status conference concerning the progress of the non-monetary settlement in the "the "Riders Litigation" which was approved by the Court on January 22, 2003.

Introduction and Sixth Quarterly Report of the Independent Monitor for the Oakland Police Department

An analysis of the Sixth Quarterly Report of the Independent Monitor for the Oakland Police Department demonstrates that the OPD has made little progress towards achieving Practice Compliance with the NSA/MOU. An analysis of the issues raised by the court in its August 25, 2011 order also demonstrates that the Oakland Police Department has not put critical portions of the NSA/MOU into actual practice, and in some cases, has treated this process with contempt. The only logical conclusion from these developments is that the Oakland Police Department has not made significant progress towards compliance and many of its members do not take this process seriously.

The Sixth Report of the Independent Monitor states that the OPD is in practice compliance with 13 of the remaining 22 Tasks—the same number as the reported in their last report. The IMT concluded that "this is disappointing, as it was our expectation that the Department would advance in

the aggregate.” Specifically, Task 3 (IAD Integrity Tests) and Task 25 (Use of Force Investigations and Report Responsibility) went from partial compliance to in compliance while Task 6 (Refusal to Accept or Refer Citizen Complaints) went from in compliance to not in compliance, and Task 30 (Firearms Discharge Board of Review) went from in compliance to partial compliance.

OPD’s achieving compliance in Task 3 was impressive since there were many problems with their efforts to perform Integrity Tests in the years leading up to 2010. However, the Department’s success in Task 3 only reinforces that the OPD could attain compliance if ALL of its members were motivated to do it. Sadly, while many of the OPD members who appear in court are highly motivated to attain compliance, the overall record of the entire Department suggests that these individuals are not representative of others who regard the agreement with contempt or simply do not care at all about the NSA/MOU and its provisions.

Pursuant to the Court’s Orders of August 25 and September 8, 2011, Plaintiffs respond to the issues set forth therein:

1. Reinstatement of Officer Hector Jimenez.

REDACTED

2. “Operation Summer Tune-Up”

The OPD needs to specifically identify why they used the term “Operation Summer Tune-Up” to characterize a law enforcement operation in the City of Oakland. However, whatever the reason, it is hoped that the OPD will agree that the use of this term is unfortunate no matter what the intent.

Plaintiffs’ counsel share the Court’s concern regarding the use of the phrase “tune-up” in the context of an initiative to “clean up the streets.” A brief internet search reveals that the phrase “tune-up” is a common colloquialism for “to beat-up” and/or “to assault.” For example, A Dictionary of Slang and Colloquial English by John Stephen Farmer and William Ernest Henley defines “to tune up” as “to beat.” This definition is incorporated herein as Exhibit 9. The Online Slang Dictionary of American, English, and Urban Slang defines “tune up” as “a beating” and “to beat” when used, respectively, as a noun and a verb.

The OPD either knew, or should have known, the message that was conveyed by naming their initiative “Operation Summer Tune-Up.” It therefore baffles Plaintiffs’ counsel that the City of

Oakland would use this code-name. Indeed, it seems unlikely that this phrase, rather than any other word or phrase in the English language, was arrived at randomly.

Plaintiffs' counsel further concur with the Court that the Department's use of the term "tune-up" suggests that the internal culture of the Department has not meaningfully progressed since the police beatings that precipitated this legal action over a decade ago. A significant number of the individual plaintiffs whose constitutional rights were violated in the Allen case were parolees and probationers who were beaten and assaulted by members of the Oakland Police Department.

Plaintiffs' counsel request that the Court investigate how and why the phrase "tune-up" was chosen for the above-described project targeting probationers and parolees, and who proposed and/or approved the name "Operation Summer Tune Up". We would also request that the OPD provide the process that is used to choose operation code-names, and which supervisors approve the naming of an operation such as "Operation Summer Tune Up". Finally, if this term was used with knowledge of its meaning, we believe that the person or persons involved should be investigated and appropriate training and discipline should be administered.

3. Smith v. City of Oakland Verdict and the "Unfounded" Determination of the Same Case by the OPD Internal Affairs Division

REDACTED

4. Level 4/Pointing of a Firearm

Plaintiffs' attorneys have read the IMT's findings on this issue as stated in their Sixth Quarterly Report and elsewhere. We have also talked to members of the OPD about their concerns for Officer Safety that resulted in their drawing a firearm in certain circumstances.

There is no doubt that this is a difficult issue in some respects. Officer safety is an important issue that must be taken into account in every policy and practice of the Oakland Police Department. On the other hand, a person, who has a gun pointed at them when they have not committed a crime and does not pose a danger to a police officer, will likely become alienated from law enforcement, jeopardizing both police-community relations and crime fighting techniques that must be relied on in getting information from the community that the police serve. Pointing of a firearm can also limit the options for an officer and can possibly result in a situation where there are unnecessary police

1 shootings.

2 It is imperative that the OPD and IMT reach an understanding as to whether they agree or
3 disagree with the IMT's findings, and if they disagree, identification of the areas of disagreement and
4 what they propose to do about them. This may well involve a case by case analysis of the incidents
5 reviewed by the IMT which led to their findings. This can be accomplished through technical
6 assistance or by some other means. Hopefully, by reviewing these incidents, the OPD and IMT can
7 identify areas of agreement where the incidents of pointing a firearm will be reduced. If not, the
8 OPD should inform the court and plaintiffs' counsel of their exact concerns.

9 Plaintiffs' attorneys are ready to accommodate any process which results in the OPD feeling
10 they are protected and the IMT believing that the problem they identified is being addressed. This
11 problem cannot be "swept under the rug". If there is disagreement between the parties, it must be
12 identified and specified so it can be addressed by the court or resolved through further training and/or
13 other appropriate action.

14 **5. Independent Reviews where it is Determined a Conflict of Interest Exists**

15 Plaintiffs' attorneys are not privy to the process by which independent reviews are sought
16 where it is determined that a conflict of interest exists. We would request that the Defendants
17 provide us and the court with all relevant information which would allow us to determine how this
18 process is conducted.

19 Plaintiffs' attorneys are also not aware of the details of the January 26, 2011 shooting and do
20 not know how it was decided that a conflict of interest occurred in that situation.

21 It is obvious that it is difficult for police officers, or anyone else, to judge their colleagues.
22 Furthermore, there may be personal relationships that preclude objectivity by some police officers
23 when they are asked to judge another police officer's performance. On the other hand, the finances
24 of the City are such that independent panels cannot be formed just because a police officer has to
25 make a hard decision about a colleague. That happens every day in Internal Affairs Departments
26 throughout the United States.

27 At its best, using outside persons where conflicts exist shows that the OPD wishes to have a
28 full and fair investigation. At its worst, the use of outside reviews allows the Department to avoid

1 making tough decisions which it must make and encourages a culture where officers (particularly
 2 supervisors) do not have to be responsible for accounting for other members' misconduct. As we all
 3 know, the NSA came about because officers could not and/or would not report and discipline police
 4 misconduct.

5 While it is difficult to imagine that every member has a conflict which necessitates an outside
 6 review of an officer involved shooting, Plaintiffs' attorneys are open to hearing the OPD account as
 7 to why this is necessary in this and other cases.

8 If the court wishes to further examine this matter, plaintiffs' attorneys request (1) that the
 9 OPD produce its written conflict of interest policy on these matters; (2) that the OPD state how often
 10 such consultants are hired and under what circumstances; and (3) if such consultants are widely used,
 11 that the OPD explain how this process does not compromise the necessity for supervisorial
 12 accountability, the lack of which was at the heart of the Riders case and other class actions filed since
 13 that time.

14 **Conclusion**

15 The lack of progress evidenced by the IMT in its Sixth Quarterly Report is disturbing. Even
 16 worse, the available evidence concerning the issues in the Court's Order, raises serious doubts
 17 whether the OPD will ever change its culture or comply with the NSA/MOU. Based on the evidence
 18 available to the Plaintiffs, the apparent failure to investigate the disturbing allegations in the *Woodfox*
 19 shooting appears to be completely indefensible. The naming of a law enforcement operation
 20 "Operation Summer Tune-Up" is grossly negligent at best, and is probably indicative of contempt for
 21 the community and the civil rights of Oakland citizens. The apparent actions of the OPD in the *Smith*
 22 case are indicative of deep seated failures in the Internal Affairs Division and demonstrate that
 23 members of the OPD had no plans to comply with the Stop Data Tasks in the NSA many years after
 24 the agreement was signed.

25 This agreement has lasted nearly nine years. Compliance should have been attained long ago
 26 yet there is no substantial compliance and no meaningful progress towards attaining it. The culture of
 27 the OPD may have partially changed, but such change cannot be called a success if the OPD engages
 28 in unacceptable behavior on a protracted basis. In the presence of such outrageous behavior and in the

1 absence of meaningful compliance, plaintiffs' attorneys recommend that the court set compliance
 2 deadlines. If these compliance deadlines are not met, control of the OPD ought to be given to
 3 someone who is capable of meeting them. Moreover, further outrageous behavior needs to be called
 4 what it is, an indication that too many members of the OPD have contempt for the NSA/MOU as well
 5 as the community they serve.

6 **DEFENDANT CITY OF OAKLAND'S POSITION**

7 City believes that it is important to maintain our focus that the objective of this injunctive
 8 relief proceeding is to implement the administrative reforms that the parties agreed to and which the
 9 Court approved in the NSA. Attainment of this objective means that fundamental changes must occur
 10 in the City's police department. These changes are structural, normative and evaluative. These
 11 changes, by their nature, demand a change in attitudes of many members of the police department
 12 and may mean a change in the manner in which at least some members see themselves and see their
 13 roles as police officers, supervisors and commanders. Change is difficult for many, if not most
 14 people. Institutional change is even more difficult to attain, even under the most favorable
 15 circumstances. It is human nature to resist change, particularly change that may involve fundamental
 16 realignment of sense of self and purpose.

17 The City recognizes that even the most dedicated commanders and supervisors need
 18 additional support if they are to effectively implement sustainable institutional change. This is what
 19 the City is attempting to accomplish with its Action Plan¹ that details the process by which the City is
 20 moving toward this change. The Action Plan is intended to be flexible and can be modified, refined,
 21 enhanced or otherwise altered as needed to assist City to comply with the NSA. The City is also
 22 considering other means to assist its police department in attaining compliance.

23 City believes that the tone and content of plaintiffs' statements concerning the Jimenez
 24 reinstatement, the City's use of "Tune-Up" and the Smith punitive damages decision do not advance
 25 the purposes of this status conference. The tone and content is adversarial, inflammatory and
 26 somewhat demagogic in that it raises issues that cannot fully be addressed without conducting a full

27 _____
 28 ¹ City's Action Plan is attached as Ex. 12

1 hearing at the status conference. The manner in which plaintiffs raise these issues will lead to
 2 collateral issues, such as second guessing or substituting plaintiffs' discretion for the discretion of the
 3 attorneys who attended and prepared the Jimenez arbitration. It will lead to what is essentially an
 4 evidentiary hearing on why city choose the term "tune-up". It will lead to introduction of evidence as
 5 to why City determined if the accusation against a former Officer was unfounded. These issues will
 6 move the focus of the status conference away from what is being done to implement institutional
 7 reform. The focus will be more on accusation and confrontation instead on working constructively to
 8 achieve the goal of institutional reform.

9 City does not object to responding to each of these issues, but as it stands, plaintiffs'
 10 inferences are of wrongdoing, unaccountability and incompetency. City believes that basic principles
 11 of due process entitle it to respond comprehensively to the accusations. A complete response during
 12 the September 22, status conference would necessarily lead to so many collateral issues as to totally
 13 obfuscate the purpose of the status conference. To this extent, City respectfully asks the Court to
 14 schedule a future hearing that will allow City to fully respond to statements and inferences raised by
 15 plaintiffs' counsel.

16 Notwithstanding City's above stated concerns, City provides a limited response Court's
 17 August 25 Order and again requests that the Court schedule a future hearing to allow full discussion
 18 of the issues raised in the August 25 Order.

19 Turning to the purpose of this report, the City informs the Court about the City's compliance
 20 work since the last CMC hearing. The City also answers the Court's questions regarding the City's
 21 response to (1) the reinstatement of Officer Jimenez, (2) the inappropriate use of the term "tune up"
 22 in connection with a 2011 violence suppression operation, (3) the IA investigation of a former
 23 Officer following the court verdict in the Smith case, (4) the concerns about the pointing of firearms
 24 by sworn personnel, and (5) the use of outside boards to hear police force incidents.

25 **Compliance Status**

26 Since the last CMC status conference, the City made organizational changes aimed at
 27 validating high professional policing standards, building leadership capacity within the department,
 28

1 and strengthening the department's management accountability measures. Under Chief Batts'
2 direction, the following was accomplished,

3 a. Accountability

4 The Court ordered that the department emphasize accountability at all levels of the
5 organization and the department responded. Over all there is greater emphasis by commanders and
6 supervisors to hold members accountable for their performance. Accountability is being metered out
7 fairly, with minor or first time deficiencies addressed through counseling and training, and the more
8 serious violations addressed at the appropriate level of discipline.

9 For example, in the last three months between June 15 and September 15, the Chief, police
10 executives, commanders, managers and supervisors addressed the department addressed employee
11 performance deficiencies and failures by imposing the following accountability measures:

- 12 ○ Entering 37 supervisory note file entries for commanders, managers, and supervisors
- 13 for performance related deficiencies
- 14 ○ A commander was placed on supervisory monitoring for command-related
- 15 performance issues
- 16 ○ Two commanders and a supervisor were sustained in separate IAD cases for
- 17 misconduct and disciplined
- 18 ○ Chief Batts terminated a commander as a result of a sustained IAD case for
- 19 truthfulness and other misconduct
- 20 ○ Assistant Chief Jordan initiated an IAD case on a supervisor for failing to thoroughly
- 21 investigate an allegation of misconduct
- 22 ○ The Assistant Chief has held nine accountability meetings involving 15 executive,
- 23 command, managerial, and supervisory staff to address performance related
- 24 deficiencies, accountability, the importance of attention to detail, policy compliance,
- 25 and leadership
- 26

27 The work of police officers is difficult, stressful and often dangerous. And the field of
28 policing attracts litigation and claims, which can result in significant losses for the City and liability

1 exposure for the officers themselves. Therefore, police departments must strive to track employee
 2 performance to be able to evaluate it and detect behavioral trends, predispositions, or other at-risk
 3 behavior which might threaten the safety of the officers or the public. The department does this
 4 through its Personnel Assessment System ("PAS"). Although the department must still improve the
 5 utilization of PAS as mentioned by the monitor, overall the department is showing improved use of
 6 the PAS system. For instance, the department consistently tracks the number of IA complaints, uses
 7 of force, and other performance factors to assess the need for early intervention and support services
 8 for officers. Equally important, the department uses PAS information and information from other
 9 data sources to review unfavorable trends in an officer's work so that they can be addressed through
 10 additional supervision or monitoring, thereby reducing the number of complaints and helping officers
 11 protect their careers.

12 Some examples include:

- 13 ○ The Department has provided training to commanders, managers, and supervisors on how to
 14 complete thorough, accurate, and complete PAS Reviews. This includes comprehensive
 15 analysis on determining if formal monitoring or intervention is needed.
- 16 ○ All PAS Reviews are inspected for quality, completeness, analysis, and documentation.
- 17 ○ PAS Reviews have incorporated elements noted by the Monitor as "productive additions,"
 18 including more details of uses of force and complaints and the summarization of these events
 19 using percentages.
- 20 ○ The Department is currently providing training to officers at Continued Professional Training
 21 regarding the purpose of PAS to demystify the process and increase understanding and
 22 support of the system.
- 23 ○ The Department identifies officers who most frequently use force and are the subject of
 24 misconduct complaints (Top 30 lists). These officer's records are then reviewed and
 25 discussed to determine if they are on Supervisory Monitoring or Intervention, and if the
 26 strategies implemented have been successful in addressing at-risk behaviors. If the officer has
 27 not been previously identified for Supervisory Monitoring or Intervention, or if strategies
 28

1 have not been effective, next steps are discussed to determine what the Department will do to
2 correct the identified behaviors.

- 3 ○ The Department has adjusted threshold levels to increase the number of officers selected for
4 PAS Reviews.
- 5 ○ In the 6th Quarterly Report, the Monitor recognized progress made the by Department and
6 moved the compliance status of this task (Task 41 – Use of PAS) from Not in-Compliance to
7 Partial Compliance.
- 8 ○ Chief Batts directed the implementation of the Risk Management and Policy Compliance
9 Meeting. This meeting utilizes PAS information and other data sources to hold captains
10 accountable for identifying and correcting at-risk behavior and ensuring their subordinate
11 commanders and supervisors are doing the same.

12
13 By reviewing employees' work and holding them accountable, the department is showing that
14 it values accountability; and that good performance is rewarded, deficient performance is expected to
15 improve, and poor performance amounting to misconduct is treated with discipline.

16 b. Using the Action Plan to Emphasize Accountability and Compliance

17 As a way to measure progress with NSA/MOU compliance, and hold members accountable
18 for compliance deficiencies, the City developed an Action Plan. The Action Plan is reviewed in set
19 intervals with the monitors and the parties during regular intervals when the monitors are in Oakland.
20 Specifically, the Action Plan is discussed during the parties' Working Group meetings which are
21 attended by the monitors, the attorneys for all the parties, the union president or vice-president, and
22 representatives from the Mayor's office, the City Administrator, the Chief and OPD Commanders,
23 and the City Attorney's Office. See Compliance Action Plan, attached as Ex. 12.

24 The Action Plan is updated regularly to reflect the goals that were achieved, new directives
25 from the monitors, concerns raised by the parties, and deliverables that must be tracked. In essence
26 the Action Plan has become the City's road map for achieving compliance.

27 City's implementation of the Working Group and the Action Plan have proven highly
28 successful in enabling all the stakeholders to discuss compliance challenges, obtain the Monitor's

1 direction and recommendations, reach consensus when possible, and successfully track the City's
 2 compliance efforts. The Working Group consists of Monitor Warshaw and deputy Monitor
 3 Reynolds, City Administrator Deanna Santana or her representative, Senior Advisor to the Mayor
 4 Reygan Harmon, Police Chief Batts, Assistant Chief Howard Jordan, Captain Anthony Toribio, and
 5 the attorneys for the City, the plaintiffs and the OPOA.

6 c. Accountability and Compliance Enhanced Through Field Supervision

7 On July 9, 2011, the City installed procedures to strengthen field supervision of officers and
 8 to strengthen commander accountability – two critical NSA components. Specifically, the Bureau of
 9 Field Operations was divided into two geographic areas, each under the command of a Deputy Chief.
 10 This smaller span of control helps the Deputy Chiefs monitor the work of commanders who are
 11 responsible for overseeing that appropriate levels of field supervision are maintained at all times. The
 12 reorganization also helped the City launch the 2-tier field supervision model that was discussed with
 13 the Monitor. The Department added relief sergeant positions to the Patrol Division to relieve regular
 14 sergeants from administrative duties. This 2-tier approach to field supervision will allow regular
 15 sergeants to spend more time supervising officers while also allowing the administrative sergeants to
 16 supervise officers during fill in assignments. The Department continues to find ways to increase field
 17 supervision and be responsive to the concerns of the community and the Court.

18 d. Designation of a Top Ranking Commander as the Inspector General Emphasizes the
 19 Importance of Compliance and Accountability

20 Chief Batts' designation of Assistant Chief Howard Jordan as the Inspector General for the
 21 Department has elevated the importance of the Inspector General's position and the compliance
 22 work. Assistant Chief Jordan's new role empowered him to begin accountability meetings with
 23 commanders and supervisors who fell short in their compliance responsibilities. About nine
 24 accountability meetings were held involving fifteen executives, commanders, managers and
 25 supervisors. These meetings have shown success. Participating commanders are improving their
 26 performance, and those who don't will face monitoring or discipline.

27 e. The Commanders' Risk Management and Policy Compliance Program Addresses
 28 Compliance and Accountability for the Police Executives, Managers and Supervisors

1 Early on, Monitor Warshaw noted that the City lacked a strong police risk management
 2 system. Monitor Warshaw recommended that the City review the Detroit risk management model and
 3 develop its own, to address liability and risks inherent in police operations. Following the City's visit
 4 with the Detroit Police Department, the Oakland Police Department began to design its program. The
 5 Department's program is showing promise. The program requires commanders to attend high-level
 6 executive meetings and address risk issues involving their bureaus/units, such as the use of force, foot
 7 and vehicle pursuits, and also concerns with employee absenteeism. This is a new program for the
 8 Department and the City looks forward to recommendations from the Monitor and the parties.

9 f. Integrity Testing Supports a Culture of Accountability

10 The Monitor's 6th Quarterly Report covered the Department's compliance efforts from
 11 January through March 2011, and reported generally the same number of compliant tasks reported in
 12 the previous quarter, with slight variations. Although disappointing, the City remains optimistic that
 13 its hard work will increase compliance levels.

14 Noted in the Monitor's report was the Department's successful compliance with Task 3 -
 15 Integrity Testing. The Department worked diligently to improve its work in this area and consulted
 16 with the Monitor on ways to improve. The results are that the Department significantly increased the
 17 number of tests conducted by the Integrity Unit and was able to conduct additional tests at the bureau
 18 level. The tests focused on employees with repeated allegations of misconduct and those identified by
 19 the Department as having with the most misconduct complaints.

20 Also noted by the Monitor are overall improvements in the quality of the City's force
 21 investigations which were found to be compliant; and the monitoring team also noted improvements
 22 in the quality of IAD investigations. Chief Batts directed that the Department conduct more "front
 23 end" reviews of IA investigations, and required commanders to meet with supervisors to provide
 24 them feedback. The Department states that supervisors are now using less mitigating factors to
 25 influence their findings and are focusing on conducting an objective analysis of the facts in IA
 26 investigations. Also, credibility assessments overall continue to improve. These improvements are
 27 credited to the excellent work of the Department's commanders and supervisors and that of the OIG
 28

1 and IAD staff who provide training, critical report review, and are holding accountable those
2 entrusted with completing these important investigations.

3 Also noted by the Monitor are overall improvements in the quality of the City's force
4 investigations. This is partly due to OIG's "front end" review of IAD and use of force investigations.
5 The OIG staff meets with commanders and supervisors to provide them feedback. The Department
6 states that supervisors are now using less mitigating factors to influence their findings and are
7 focusing more on conducting an objective analysis of the record. Also, credibility assessments overall
8 continue to improve. These improvements are credited to the excellent work of the Department's
9 commanders and supervisors and of the OIG staff who provide training, support members' efforts,
10 and continue to emphasize the value of accountability at all levels of the organization.

11 **1. Reinstatement of Officer Hector Jimenez**

12 **REDACTED**

13 **2. Operation "Summer Tune-Up"**

14 The City takes responsibility for this situation and regrets that the Department's use of the
15 name "Summer Tune-Up" referring to its Summer 2011 Probation Violence Suppression Operation,
16 gave the appearance to this Court that the City does not value high standards in professional policing,
17 or condones the mistreatment of citizens. The Department respectfully informs the Court how this
18 term was chosen for this operation.

19 As more fully described in the City's Memorandum attached as Ex. 14, this was a joint
20 operation between the Department and the Alameda County Probation Department. The operation
21 was conducted over four days in July of 2011 and involved probation compliance checks on
22 probationers with weapons or violent offenses. The goal of both agencies was to reduce the dramatic
23 increase in homicides during the summer of 2011, by focusing limited resources on overseeing
24 probationers who are most likely to use weapons and become the perpetrators of homicides, or the
25 victims. The operation resulted in 28 probationers found in violation of their probation, 17 were
26 arrested, and 7 guns were recovered along with cocaine, methamphetamine, heroin, and marijuana.

27 The Department indicates that it often uses "catchy" and informal names for crime reduction
28 or other special operations, and that these names generally refer to or incorporate information about

the identification of the suspects, [for example, persons associated with gang activity in a particular location of Oakland have adopted the street name the “Ghost Town Gang”], the location, the season of the year, or the objectives of the operation. The Department indicates that a commander who has worked in the Traffic Enforcement Division identified the name “Summer Tune Up” for the operation because (1) it reflected the season of the year when it was being conducted, (2) it related to the summer season when in the Lieutenant’s experience many people fix their cars to travel, and (3) it captured the need for both participating agencies to “tune up” or improve their work relative to overseeing violent probationers so that violent crime can be reduced.

The City has reviewed the various definitions given to the term “tune up” and understands that, as a slang term, it can imply a police beating. Its more formal definition, however, as contained in the Macmillian Dictionary, is simply “to make plans or arrangements.” Examples given in the context of its formal definition are:

- plan: to think carefully about a series of actions that you need to take in order to achieve something
- arrange: to make plans for something to happen, for example by agreeing a time and place
- organize: to prepare or arrange an activity or event
- draw up: to prepare and write something such as a document or plan
- map out: to plan in detail how something will happen
- think ahead: to make plans about things that will or may happen in the future, so that you will be prepared for them
- fix: to arrange for something to happen
- finalize: to make the final decisions or arrangements concerning something
- orchestrate: to plan and organize a complicated event or course of action, especially without being noticed, so that it achieves the result you want

City understands that the Department did not use this term to imply or suggest an improper police purpose. More importantly, the Department respectfully informs the Court that this program was implemented consistent with the Department’s policies and in a professional manner. The records show that the Department was thoughtful, thorough, trained officers on the legal standards and provided a high level of supervision and oversight of the police searches of the properties of probationers and parolees. These searches were conducted jointly by the Oakland Police Department and the Alameda County Probation Department to reduce the number of illegal weapons in the City

and prevent shootings and deaths. The Department's operation plans, training materials and evaluations show the detailed planning of the operation, the focus on meeting legal standards, the goal of preventing force incidents and citizens' complaints and the overall successful implementation of the operation. The records show the planning process, implementation and evaluation of the program, all of which reflect the Department's professional approach to this operation.

3. Internal Affairs Investigation and the Court Verdict in Smith v. City of Oakland

REDACTED

4. Force Involving the Pointing of Firearms

The Monitor's Supplemental Report of August 2, 2011 states that Oakland Police Officers are in some instances unnecessarily pointing their firearms at individuals, and not explaining their decisions in their reports. In response, the Department immediately began to address these concerns.

Department representatives met with line officers, supervisors and commanders to discuss this issue. Department representatives also discussed these concerns at line ups, in trainings and during meetings with OPD members. The City's attorneys provided guidance to the Department regarding the law, and discussed specific case summaries with Department representatives which illustrated the proper use of force in pointing firearms. The City's attorneys affirmed with the Department that officers have a legal right to point their firearms when they objectively and reasonably believe that a person or a situation present a serious threat to the officers' safety or the safety of others. In making this decision during highly charged situations, the City advised the Department that case law allows officers to consider the totality of circumstances, the nature of the crime involved, the ratio of the number of officers versus the suspects and other factors in deciding to draw and point a weapon. The City also advised the Department that officers have a duty to deescalate the force once the serious threat has ended, and that supervisors and commanders have a duty to ensure that officers are well and able to articulate in their reports why they drew and pointed their firearms. The Department issued an Informational Bulletin and has scheduled formal training on this issue in the near future. The Informational Bulletin is attached hereto as Ex. 16.

5. Empanelment of Outside Board to Review Use of Force Incidents

Occasionally a situation arises in which voting board members may not be qualified for

1 deciding a use of force incident. They may become involved officers or witnesses in the force
 2 incident, or other circumstances may render them unsuitable to decide the case. The City therefore
 3 must act to protect the integrity of the investigation, the rights of the subject officers and the rights of
 4 the complainants.

5 The Department considers several factors to determine when it is appropriate to retain an
 6 outside board to hear a Use of Force incident. The goal in selecting an outside board is to ensure the
 7 integrity of the Department's internal review process by removing any conflict, bias or the
 8 appearance of bias in internal force determinations.

9 The Department's K-4 and K-4.1 policies which were approved by the former Monitors and
 10 previously filed with this Court, govern the Department's force board proceedings and designate as
 11 voting members of the Executive Force of Review Board, Assistant Chief Howard Jordan, Deputy
 12 Chief Eric Breshears and Deputy Chief Jeffrey Israel. The Department's Training Bulletin V-T.1
 13 Part III, Internal Investigation Procedure Manual, effective July 17, 2008, require that the Department
 14 address an investigator's bias and conflicts concerns. This policy requires that investigators sign a
 15 "no conflict" statement and recuse themselves if they have a relationship, association or other interest
 16 which makes them unsuitable to review or decide an investigation of an OPD member. This policy
 17 states in part:

18 E. Recusal Process

- 19 1. The investigator shall review the investigative file after assignment.
- 20 2. Prior to the start of an internal investigation:
 - 21 a) The investigator shall disclose any relationship where it is clear that the nature of the relationship
 22 could be perceived to compromise the investigative process.
 - 23 1) If yes, the assigned investigator shall recuse him/herself from the investigation and document
 24 the circumstances on the Recusal Form (IAD Form - 13).
 - 25 2) If no, the assigned investigator(s) shall document this fact on the Recusal Form.
 - 26 b) Upon completion of the Recusal Form, the appropriate first-level superior shall meet with the
 27 investigator to jointly review the Recusal Form.
 - 28 c) The first-level superior shall determine whether it is clear that the nature of the relationship could be
 perceived to compromise the investigative process.
 - 1) If yes, the first-level superior shall approve reassignment of the investigation and document
 the decision on the Recusal Form.

An investigation may be reassigned if any of the following conditions exist, such as:

- (a) Family relationship;
- (b) Outside business relationship;

- (c) Romantic relationship;
- (d) Personal friendship;
- (e) Close work relationship (to be determined on a case-by-case basis); or
- (f) Directly involved in the incident, as defined in DGO M-3.

- 2) If no, the first-level superior shall approve the assignment and document the decision on the Recusal Form.
- 3) The investigator's first level superior shall ensure the Recusal Form is completed and signed and forwarded to the IAD prior to the start of the investigation.
- 4) The IAD shall retain the Form in the Control File.

In selecting an outside panel to conduct an internal force review, the Department ensures that the substantive provisions of these policies are complied with.

Only once in the recent history of the Department has an outside review panel been used to hear a force incident. The incident was March 21, 2009 shooting death of Oakland Police Officers Ervin Romans, Daniel Sakai, Mark Dunakin and John Hege. In that case, the Department consulted with the City Administrator and informed the former monitoring team. The Department decided to use an outside panel to conduct the City's force review work to ensure that the investigation was conducted properly. The Department was concerned that it would be unable to complete an internal force board review due to the gravity of the incident, the loss of life, the emotional state of Department personnel, and the fact that the Department's voting members responded to the scene and witnessed aspects of the police response. The outside force panel competently assessed the conduct of the involved commanders and officers and issued appropriate findings holding OPD members accountable for policy violations. The IMT attended the force board proceedings, the process worked, and the City was able to complete this important work under difficult circumstances and with the assistance of outside professional police executives.

In its Order the Court references a shooting incident that occurred on January 26, 2011 and in which the Court believes that the Department is assembling an outside review panel. The City has informed the Court that this incident was already heard and did not involve an outside panel. The City believes that the Court may be referring to the shooting incident of May 18, 2011 in which the Department is considering an outside review board to hear the case. This case is currently under investigation. Attached hereto as Ex. 17 is a Confidential Memorandum to the Court which explains the reasons why the City is considering using an outside board to review this case.

POSITION OF INTERVENOR: OAKLAND POLICE OFFICERS ASSOCIATION**1. Reinstatement of Officer Jimenez****REDACTED****2. Operation Summer “Tune-Up”**

The OPOA asserts that OPD may discuss in public why the term “Tune-Up” was given to this crime suppression operation. Similarly, the purpose of the operation and the City’s partnership with the Alameda County Probation Department can be discussed in public. However, specific information pertaining to implementation strategies, tactical considerations, and other matters that relate to the identification of probationers, police intelligence, and the safety of officers and the public are confidential and privileged and should be discussed in chambers.

3. Internal Affairs Investigation and the Court Verdict in Smith v. City of Oakland**REDACTED****4. Level 4 Uses of Force Involving Pointing of Firearms**

The OPOA agrees that oral and written responses to the Court’s questions are not confidential or privileged. However, the OPOA asserts that the filings and discussions on the Level 4 use of force issue should not include a disclosure of individual officers and their respective involvement in use of force. In addition, the OPOA is working directly with the Oakland PD to address various ways in which this issue can be appropriately addressed. (See Exhibit 19.)

5. Empanelment of Outside Board to Review Use of Force Incidents

The OPOA asserts that the process the City uses to decide whether to retain an outside board to hear a Use of Force incident is public information. However, discussions about the City’s selection of an outside board and the qualifications of its members as they relate to a pending Use of Force investigation are confidential and should be sealed to protect personnel matters and avoid compromising open investigations. The OPOA also requests that names of any individual officers that may be relevant to the discussion be maintained as confidential.

Dated: September 15, 2011

/s/
JOHN L. BURRIS
Attorney for Plaintiffs

1
2 Dated: September 15, 2011

3 _____
4 /s/
5 JAMES B. CHANIN
6 Attorney for Plaintiffs

7
8 Dated: September 15, 2011

9 _____
10 /s/
11 GREGORY M. FOX
12 Attorney for the Defendant

13
14 Dated: September 15, 2011

15 _____
16 /s/
17 ROCIO V. FIERRO
18 Attorney for the Defendant

19
20 Dated: September 15, 2011

21 _____
22 /s/
23 ROCKNE A. LUCIA JR.
24 Attorney for the OPOA
25 ATTORNEY ATTESTATION

26
27 *I hereby attest that I have received telephonic or email authorization for any signatures*
28 *indicated by a "conformed" signature (/s/) within this E-filed document.*

Dated: September 15, 2011

/s/
GREGORY M. FOX

EXHIBIT 1

REDACTED

EXHIBIT 2

REDACTED

EXHIBIT 3

REDACTED

EXHIBIT 4

REDACTED

EXHIBIT 5

REDACTED

EXHIBIT 6

REDACTED

EXHIBIT 7

REDACTED

EXHIBIT 8

APPEARANCES:

On behalf of the Union:

Justin E. Buffington
Rains Lucia Stern, PC
2300 Contra Costa Blvd.
Suite 500
Pleasant Hill, CA 94523

On behalf of the City:

Jennifer A. Chin
Deputy City Attorney
City of Oakland
One Frank H. Ogawa Plaza
6th Floor
Oakland, CA 94612

ISSUE

The parties stipulated to the following issue: Did the City of Oakland have just cause to terminate Officer Hector Jimenez's employment? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The relevant sections of the parties' Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association effective July 1, 2006, through June 30, 2013, read in part:

ARTICLE II MANAGEMENT RIGHTS

A. General

The City retains and reserves all the rights, power, authority, duty, responsibility, and obligations conferred on and vested in it by its Charter and by the laws and Constitutions of the State of California and the United States of America.

The City reserves its right to determine matters outside the scope of representation.

The City reserves its right to propose changes in wages, hours, and other terms and conditions of employment not covered by this Agreement, in accordance with the provisions of Charter Section 910 and this Agreement.

Except as limited by Charter Section 910 and by the specific provisions of this Agreement, the City retains all rights, powers, and authority granted to it by law or the Charter, including, but not limited to, the exclusive right to determine the merits, necessity, and organization of any service or activity the City may now or hereafter provide; to determine the City's mission and the mission of the Police Department and its employees, and to assign work to, direct, and schedule employees; to set standards of service; to determine the methods, means, and personnel by which the City will conduct its operations; to finance City operations and to determine financing methods; to establish and enforce reasonable dress and grooming standards and to determine the style or type of City-issued apparel, equipment, and technology; and to take all actions necessary to carry out its mission and these reserved rights.

Except as expressly provided in this Agreement, neither the City nor the Union concede or relinquish its rights under Charter Section 910.

ARTICLE X GRIEVANCE PROCEDURE

A. Definition

A grievance is hereby defined as any dispute which involves the interpretation or application of this Agreement; or disciplinary action taken against an employee, or controversy concerning the application of Departmental rules or general orders which are within the scope of bargaining.

It is the expressed intent of the parties that employees shall receive fair treatment and shall be disciplined only for just cause. Grievances shall be resolved expeditiously and at the lowest possible administrative level. No grievance filed by an employee, pursuant to the provisions of this Article, may be resolved inconsistent with the terms of this Agreement.

C. Procedure

1. Step 1 Initial Procedure

a. Informal Discussion

The employee or the Association representative may present the grievance orally to the immediate supervisor within seven (7) calendar days from such time as the employee or Association should reasonably have been aware of the occurrence of the incident giving rise to the grievance. The supervisor shall provide his/her response within seven (7) calendar days following the informal discussion.

b. Formal Submission

Should the grievance remain unresolved, the employee or Association representative may submit the grievance, in writing and on a form provided for that purpose, to the employee's Bureau Chief. The formal submission shall be made within seven (7) calendar days of the supervisor's response to the informal presentation of the grievance, or, if no response is received, at the conclusion of the seven (7) day period provided for informal discussion. The grievance shall state the specific section of the Memorandum of Understanding, the Personnel Rules, or departmental rules or orders alleged to be violated, or the disciplinary action taken, and the proposed solution. The Bureau Chief shall render a decision in writing to the employee and/or Association within seven (7) calendar days of receipt of the formal submission of the grievance. Copies of all written grievances filed by employees shall be provided to the Association within a period not to exceed five (5) calendar days. Copies of responses thereto shall also be provided to the Association.

2. Step 2 Appeal to Department Head

Should the grievance remain unresolved, the employee or Association representative may, within seven (7) calendar days of receipt of the Bureau Chief's decision, submit the grievance in writing to the Chief of Police. The Chief, or his/her designated representative, shall respond to the grievance in writing within seven (7) calendar days after receipt of the grievance. It is understood that nothing shall preclude the Association from presenting a grievance to the Chief of Police if it is deemed that such action is warranted by the nature or circumstances of the grievance.

3. Step 3 Employee Relations Officer – Association Representative

Should the grievance remain unresolved, the employee or Association representative may, within seven (7) calendar days after receipt of the department head response, submit the

grievance in writing to the Employee Relations Officer. The Employee Relations Officer, or a designated representative shall contact the employee or representative within seven (7) calendar days of receipt of the grievance to schedule a meeting to attempt to resolve the dispute.

The Employee Relations Officer or designee shall respond in writing to the grievance within thirty (30) days after the third step hearing. If the Employee Relations Officer fails to respond within the thirty (30) days, the Association may move the grievance to the next step.

4. Step 4 Conflict Resolution Process

The City and the Association encourage grievant(s) to attempt to resolve grievances through informal means. Either party to the grievance may request an informal resolution conference. The conference shall be attended by the individual grievant(s), a representative from the OPOA and the Director of Personnel or his/her designee. Said conference shall be convened within ten (10) working days of the request initiated by either party. Participation in, or refusal by either the grievant(s), the, OPOA or the City to participate in the conference, as well as any evidence, discussions, documents, statement, findings, recommendations, awards, orders, or any other record of the conference, shall not be presented as evidence, nor referred to any appeal or hearing by the grievant(s), Association or the City. In the event that all parties agree, they may request the assignment of a mediator from the State Mediation and Conciliation Service to assist in the informal resolution process.

No documentation regarding the Step Four (4) process shall be placed in any personnel file or other official file maintained for the purpose of making personnel decisions.

While the parties are utilizing the conflict resolution process set forth in Step Four (4), the parties may agree to extend the time limits described in Section D of this Article by no more than forty-five (45) days.

5. Step 5 Civil Service Board/Arbitration

Should the grievance remain unresolved, either the City or the Association may, within fourteen (14) calendar days of the third step response, submit the grievance to an impartial arbitrator who shall be selected by mutual agreement or, if such agreement is not reached, by alternately striking names from a list of seven (7) arbitrators to be developed by the parties. In the absence of agreement on a list of arbitrators, the parties will request a list from the California State mediation and Conciliation Service.

In accordance with Civil Service Rules, the employee or Association may elect to submit a grievance concerning a suspension, fine, demotion or discharge to the Civil Service Board in lieu of arbitration. Such election is irrevocable.

If the Civil Service Board is selected, appeals shall be handled in accordance with the procedures established in the Personnel Ordinance and as modified by Appendix C of this Memorandum of Understanding.

If arbitration is selected, it is agreed that the decision of the arbitrator shall be final and binding on all parties and that the arbitrator's fees shall be borne equally by the parties. It is expressly understood that the arbitrator shall have no power or authority to add to or subtract from the provisions of this Agreement or departmental rules or general orders; provided that, if any inconsistency between this Agreement and any of the foregoing rules or orders exists, this Agreement shall prevail.

Notwithstanding the above, the option of arbitration may not be elected in grievances filed by probationary employees in entry level positions whose basis is failure to successfully complete the probationary period, or Police Officer Trainees who are removed from employment for failure to successfully complete the Recruit School.

Unless otherwise agreed to by the employee, in writing, all meetings and hearings for any disciplinary matter shall be private and confidential, and shall include only the parties and exclusive representatives.

D. Time Limits

Time limits prescribed in Section C above may be modified by mutual agreement of the City and Association. Failure by the employee or Union to follow time limits, unless so extended, shall nullify the grievance. Failure by the City to follow the limits, unless so modified, shall cause the grievance to advance to the next step.

Steps One (1) and Two (2) may be waived by mutual agreement between the Association and the Department.

E. Immediate Dispute Resolution

1. In the event there is a dispute regarding the interpretation or application of this Agreement that imminently affects the City's interests, the Association, or a substantial number of members represented by the Association, either the City or the Association may upon written notice request suspension of the grievance process as described in Section (c) of this Article and proceed to immediate resolution discussions with the Chief of Police, the Employee Relations Officer, and an Association Representative. Such informal labor-management discussions shall be concluded within thirty (30) days of the date of the initial request for same.
2. Should the dispute still not be resolved within the thirty (30) day period, the parties have an additional fifteen (15) days to select an arbitrator from the panel of four (4) professional neutral arbitrators to be identified by the parties. The arbitrator assigned to hear the merits of the case will hold a hearing that is no longer than one (1) day and issue a decision within forty-five (45) calendar days of the selection of the arbitrator. The timelines or length of hearing may be shortened or extended by mutual agreement or upon an arbitrator's ruling on a request for an order shortening or extending time.

3. The arbitrator shall have no power to add to or to subtract from the provisions of this Agreement, the Personnel Rules, or departmental rules or orders in rendering his/her award.
4. The informal labor-management discussions will not automatically stay the City's action. However, the Association may demand a cease and desist order at any time upon invocation of the IDR process. If the Association makes such a demand, the first arbitrator from the list of four (4) professional neutral arbitrators, selected at random, that is available within a forty-eight (48) hour period shall hear the request for a temporary cease and desist order. The arbitrator shall have the authority to issue a temporary cease and desist order to stay, the implementation of the proposed change upon a proper showing of irreparable harm and inadequacy of normal grievance procedure remedies.
5. It is expressly understood and agreed that the provisions of this Section shall not be invoked for actions involving employee disciplinary actions or individual grievances.

H. Grievances that Involve Appeal of Discipline

Appeals of written reprimands shall be initiated at Step One (1). Appeals of fines, demotions, suspensions and termination may be initiated at Step Three (3), following completion of the Skelly process.

Other pertinent authority includes the Oakland Police Department General Rules, which include in part the following:

OAKLAND POLICE DEPARTMENT GENERAL ORDER K-3 USE OF FORCE

The purpose of this order is to set forth Departmental policy and procedures for the use of force by Department personnel.

The Oakland Police Department values the protection and sanctity of human life. This policy prohibits personnel from using unreasonable force. It also prohibits personnel from using force as a means of interrogation or punishment. This policy requires personnel to intervene in situations where they reasonably believe, based on the totality of the circumstances, that other personnel are subjecting a person to unreasonable force. This policy is more restrictive than state or federal laws that govern the use of force, and members are required to accomplish the police mission by adhering to this policy.

Personnel who use unreasonable force are subject to discipline for violating Departmental policy. Federal and state laws also provide for civil liability and possible criminal sanctions against personnel who use unreasonable force.

....

Definitions

D. Imminent Threat

"Imminent threat" refers to an impending threat or resistance that a member or employee reasonably believes will occur, based on the totality of circumstances. Imminent is not limited to "immediate" or "instantaneous." A person may pose an imminent threat even if that person is not pointing a weapon at the member or employee. A person is an imminent threat if the person is reasonably perceived by a member or employee to have the present **intent, means, opportunity, and ability** to complete the threat, regardless of whether the threatened action has been initiated.

1. Intent: The subject's apparent desire, which can be indicated by words, body language, or actions.
2. Means: The instrument, mechanical or physical, that may be used to cause injury.
3. Opportunity: The time and/or place which allowed the subject to use the means to cause injury.
4. Ability: The subject has the capability to carry out the action or threat.

....

K. Reasonable Force

Force that is objectively reasonable based upon the totality of the circumstances.

The standard used to determine objectively reasonable force is articulated in the United States Supreme Court decision, *Graham v. Conner*, 490 U.S. 386 (1989). The *Graham* decision holds that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, without regard to the officer's underlying intent or motivation. The determination of the reasonableness must be based on the totality of circumstances and must include a consideration that police officers are often forced to make split second decisions in circumstances which are tense, uncertain, and rapidly evolving. The determination of reasonableness is not based on the 20/20 vision of hindsight.

Personnel are not required to use the least assertive option and shall consider the following criteria when determining which level of force to use:

1. The objectively reasonable perception of a threat to the member, employee or third party.
2. Imminence of the threat to the member, employee, or third party;
3. Physical differences (e.g., age, size, relative strength, skill level, injuries, exhaustion, number of members/employees versus subjects);
4. Influence of drugs or alcohol on the subject;
5. Proximity of weapons to the subject;
6. Availability of other options;

7. Seriousness of suspected offense(s);
8. Training and experience level of the member or employee;
9. Potential for injury to member, employee, third party, or the subject;
10. Risk of escape; and
11. Other exigent circumstances.

....

II. Use of Force Policy

Departmental policy requires personnel to use only a force option that is objectively reasonable based on the totality of circumstances confronting them.

A. Lethal Force

1. Lethal Force is authorized to defend the member or a third person from what the member reasonably believes is an imminent threat of lethal force or force likely to cause serious bodily injury...
2. Lethal Force is prohibited when its sole purpose is to prevent a subject from escaping and the subject does not present an imminent danger of death or serious bodily injury.

The parties' Training Bulletin, Index Number III-B-2 dated September 18, 2001, reads in part:

High Risk Vehicle Stops

Definition: A high risk vehicle stop is a vehicle stop of a person or persons suspected of having committed a serious crime.

A high risk vehicle stop is unpredictable; it is never routine. Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise.

When a suspect in a high risk vehicle stop resists arrest, an officer may resort to reasonable physical force in compliance with General Orders K-3 and K-4.

....

During this movement, look for any bulges or areas where a weapon could be concealed. Pay particular attention to the suspect's waistband.

FACTS

Parties

The City of Oakland is the eighth-largest city in the State of California. The Mission of the Department is to provide the people of Oakland an environment where they can live, work, play, and thrive free from crime and the fear of crime. The City currently employs approximately 650 full-time police officers.

This case involves a 24-year-old police officer, Hector Jimenez, who was employed by the Department as a sworn peace officer. Officer Jimenez began his career with the Oakland Police Department as a police cadet in 2007. As both a cadet and police officer, Officer Jimenez underwent significant training. At the time of his termination on or about June 4, 2009, Officer Jimenez had been employed as a police officer for approximately two years. Officer Jimenez's performance evaluations during the two years prior to his termination found that he demonstrated good work habits, was very competent and hard working, and that he had received three captain's commendations.

Background

Officer Jimenez received training at the police academy on various subject matters including vehicle pull-over techniques, stops, the use of lethal force, and policy regarding high-risk car stops. Officers are taught that car stops are the second most dangerous activity a police officer can engage in. Officer Jimenez, through the Department's high-risk car stop policy, was taught that he is to assume that suspects in high-risk car stops are armed until he can personally assure himself otherwise.

The Incident

The following facts are not in dispute. On July 25, 2008, Officer Jimenez was working patrol with his regular partner, Officer Joel Aylworth. Officers Jimenez and Aylworth were working a 12-hour shift from 5 p.m. to 5 a.m. During their shift, and prior to the incident that is the subject of this arbitration, Officers Jimenez and Aylworth assisted with the investigation of two armed robberies by canvassing for suspects and witnesses. The suspects in those robberies were three African-American males and a Laotian male. None of the robbery suspects had yet been apprehended. In addition to the robberies, two homicides were reported that night in East Oakland.

At approximately 3:30 a.m. on July 25, 2008, Officer Jimenez was riding in patrol car 1706 with Officer Aylworth, who was driving. As they traveled south on Fruitvale Avenue, near Glendale Avenue, they observed a red Buick traveling north on Fruitvale Avenue in excess of the speed limit. When Officer Jimenez saw the Buick speeding, he conferred with Officer Aylworth who agreed that the Buick appeared to be speeding.

Officer Aylworth and Officer Jimenez decided that they would pull the vehicle over for the traffic violation. Officer Aylworth made a U-turn so that they could get behind the vehicle to pull it over. A van was between their patrol car and the Buick, but Officer Aylworth shifted the patrol car in their lane so that Officer Jimenez could maintain sight of the Buick and observe its driving pattern. Officer Jimenez saw that the Buick was weaving within its lane, straddling the lane markers, and was speeding up and slowing down. Officer Jimenez, based on his training and experience, concluded that the driver was under the influence of alcohol or drugs due to his driving pattern.

Once the van pulled to the side, Officer Aylworth pulled his patrol car directly behind the Buick and the patrol car's emergency lights were activated in an effort to get the Buick to yield to the right. The Buick slowed and pulled to the right as if it were going to stop for the officers; the Buick then abruptly made a U-turn and sped off on southbound Fruitvale Avenue at a high rate of speed. When the Buick drove past the patrol car, Officer Jimenez observed the driver to be an African-American male who was sweating. Officer Jimenez thought that was unusual as it was 3:30 a.m., the temperature was cool, and the driver's window was down. Officer Jimenez believed that the driver's sweating on a cool early morning was further indication that he was under the influence of alcohol or drugs. Tests later showed that the driver, Mr. Jody Mack Woodfox, was under the influence of a number of drugs including, but not limited to, cocaine, ecstasy, and alcohol.¹

When the Buick began evading the officers, Officer Jimenez became concerned because he had been trained that suspects who flee the police in vehicles could be armed or could have committed a crime more serious than a traffic violation. After the Buick made its U-turn and sped off, Officer Aylworth began following the Buick. As the officers gave chase, Officer Jimenez observed the Buick weave into the opposite lane of traffic, increase its speed to approximately 60 miles per hour, and run red lights at East 27th Street and Fruitvale Avenue and Foothill Boulevard and Fruitvale Avenue. The Buick then appeared to make a left-hand turn

¹ The Drug Screen administered by the coroner found: "Ethyl Alcohol, Cocaine and MDMA detected.

Blood Ethyl Alcohol	= 0.14 grams%	Urine Ethyl Alcohol = 0.207 grams%
Cocaine	= 0.49 mg/L	*MDMA = 0.36 mg/L
Benzoylcegonine	= 1.22 mg/L	**MDA = 0.05 mg/L
***Cocaethylene	= Present in blood"	

*MDMA (Methylenedioxymethamphetamine); colloquially known as ecstasy.

**MDA (Methylenedioxyamphetamine); also known as tenamfetamine (INN). MDA is a psychedelic, stimulant, and empathogen-entactogen of the phenethylamine and amphetamine chemical classes. It is mainly used as a recreational drug, and is known as "Sass", "Pink", or "Yop."

***Cocaethylene (ethylbenzoylcegonine) is the ethyl ester of benzoylcegonine. It is structurally similar to cocaine, which is the methyl ester of benzoylcegonine. Cocaethylene is formed in vivo when cocaine and ethyl alcohol have been ingested simultaneously.

onto the eastern portion of the staggered intersection of East 17th Street and Fruitvale Avenue, then swerved to the right, coming to an abrupt stop at the western corner of the staggered intersection of East 17th Street and Fruitvale Avenue.

The Buick's evasive course of action elevated the type of stop from a traffic enforcement stop to a high-risk car stop. When the Buick stopped, Officer Aylworth was unable to maneuver the patrol car into proper high-risk car stop position, instead stopping directly parallel and very close to the suspect vehicle and putting Officer Jimenez in a position for which he was not trained as part of his high-risk car stop training. The patrol car was so close to the Buick that Officer Jimenez was unable to open the door to exit the car. As the patrol car came to rest parallel to the suspect vehicle, Officer Jimenez looked directly to his right and made eye contact with Mr. Woodfox, who was sitting in the driver's seat of the suspect vehicle. The suspect vehicle began to slowly roll forward and Officer Jimenez, whose door was no longer obstructed by the suspect vehicle, exited the patrol car at his first opportunity.

What happened next is in dispute and occurred in a matter of seconds. The moment Officer Jimenez exited the patrol car, he began issuing commands to Mr. Woodfox to show his hands. As Officer Jimenez exited the patrol car, he drew his service weapon, per his training, and prepared for a foot chase by going around the door of the patrol car and positioning himself between the crease of the passenger-side door and the passenger-side wheel well, close enough to reach out and touch the patrol car.

The City argues that "Woodfox got out of the car and ran toward the opposite side of the street." However, a totality of the evidence indicates that Mr. Woodfox ran northeast toward Officer Aylworth. Specifically, Mr. Woodfox exited the suspect vehicle, took two to three steps in a northeasterly direction toward the driver's side of the patrol car, looked over his left

shoulder toward the area where Officer Jimenez was positioned, and placed his right hand into his waistband area. During this time, Officer Aylworth had some difficulty exiting the patrol car (Officer Jimenez does not wear a seatbelt while on patrol, while Officer Aylworth does). Officer Jimenez believed that Mr. Woodfox was advancing on his partner's position and accessing a firearm from his waistband to shoot one of the officers. Likewise, a reasonable officer standing in Officer Jimenez's position would have believed that the suspect was advancing on his partner's position and may have been accessing a firearm from his waistband to shoot his partner or himself. Officer Aylworth was either getting out of the police car or had just exited. In his initial Recorded Statement, Officer Aylworth stated that: "Woodfox took two steps eastbound and slightly toward the north and immediately made a motion with both hands to his waistband," and he was "concerned that the suspect was running in his direction."

In response to what he perceived as a deadly threat, Officer Jimenez discharged his firearm four to five times at Mr. Woodfox in an attempt to stop him. Prior to discharging his weapon, Officer Jimenez issued two to four sets of commands for Mr. Woodfox to show his hands. When Officer Jimenez discharged the first four to five rounds, he remained close enough to reach out and touch the patrol car, between the crease in front of the passenger-side door of the patrol vehicle and the passenger-side wheel well.

When Officer Jimenez discharged the initial volley from his firearm, Mr. Woodfox was four to five feet from the passenger-side headlamp of the patrol car and moving closer to Officer Aylworth's position. As Mr. Woodfox advanced, his right hand was in his waistband area and the left side of Mr. Woodfox's body was exposed to Officer Jimenez. Mr. Woodfox's position prevented Officer Jimenez from being able to see the right side of Mr. Woodfox's body and his right hand.

Officer Aylworth, who was at a different vantage point on the driver's side of the patrol car looking at Mr. Woodfox head-on, did not discharge his weapon. Officer Aylworth reported that from where he was, he was able to see Mr. Woodfox's hands after he saw what he believed to be Mr. Woodfox reacting from being struck by bullets. Officer Aylworth was located behind the driver's-side door of the patrol car, behind the patrol car's emergency lighting system.

Officer Jimenez had not expected that Mr. Woodfox would run in the direction of his partner as Mr. Woodfox had other open avenues of escape, such as south on Fruitvale Avenue or east across the street. In Officer Jimenez's experience, suspects who are attempting to flee typically run in the opposite direction of the police. Likewise, a reasonable officer would believe that a suspect attempting to flee would run in the opposite direction of the police. After Officer Jimenez discharged the first round of shots, Mr. Woodfox did not put his hands up in surrender nor did Mr. Woodfox go to the ground to take cover. Mr. Woodfox was parallel with the driver's-side bumper of the patrol car, with the right side of his body still not visible, and close enough to touch the patrol car when Officer Jimenez discharged his second volley of shots. Mr. Woodfox then fell to the ground. A search of Mr. Woodfox's body produced no weapon and he was later pronounced dead at the scene.

Officer Jimenez estimated that two seconds elapsed between the time Mr. Woodfox set foot on the pavement after exiting his vehicle and when he fell to the ground. The totality of the facts show that no more than three seconds elapsed from the time Mr. Woodfox exited the Buick until he collapsed after being shot by Officer Jimenez (it is more likely than not that approximately 2.6 seconds elapsed from the time Mr. Woodfox exited the car until he collapsed after being shot by Officer Jimenez). Minutes after the shooting, Officer Jimenez and Officer Aylworth were separated and each told their supervisor, Sergeant Paul Balzouman, what had

transpired. Officer Jimenez then told Sergeant Balzouman that Mr. Woodfox turned his body and head to the left, and put his hands in his waistband area as Officer Jimenez was issuing commands, whereupon, Officer Jimenez, believing Mr. Woodfox was retrieving a weapon, began discharging his firearm at Mr. Woodfox. Sergeant Balzouman authored a supplemental report in which he included the description of the events provided by Officer Aylworth and Officer Jimenez.

The Investigation

Sergeant Henderson Jordan and Sergeant Tom Schaffer of Internal Affairs were assigned to investigate the shooting. They reported to the scene and met with the homicide investigators, Sergeant Tony Jones and his partner Sergeant Derwin Longmire, as well as the patrol captain, Captain Carlo Orozco, and were provided with a synopsis of the incident that occurred.

As part of the investigation, Sergeant Jordan reported that both Officer Aylworth and Officer Jimenez were interviewed, as well as thirty-six (36) residents of the neighborhood who were contacted during a police canvass and who gave statements saying they heard only gunshots. Seventeen (17) other residents contacted during the canvass gave statements saying that they didn't hear or see the incident. On August 15, 2008, Sergeant Jordan conducted a supplemental canvass of the subject neighborhood attempting to contact residents who were not interviewed during the initial canvass.

There is no question that Officer Jimenez subjectively thought Mr. Woodfox posed a danger to Officer Aylworth. At the hearing, Sergeant Jordan testified:

115

- 4 Q. And it appears from Officer Jimenez's
- 5 perspective that Mr. Woodfox is running in a
- 6 northeasterly direction towards the general direction
- 7 of where his partner would be located in the police
- 8 vehicle, correct?

9 A. Yes, sir.

125

24 Q. Can you see how a police officer faced with
25 a split-second decision might interpret the suspect's

126

1 path as being towards the driver's side of the vehicle?

2 A. Yes.

3 Q. Because he doesn't have much time to make
4 the decision, does he?

5 A. No.

6 Q. And in his mind it was a life and death
7 decision, wasn't it, in Officer Jimenez's mind?

8 A. According to his testimony, yes -- or his
9 statement, yes.

10 Q. Do you have any reason to disbelieve that he
11 believed it was a life and death situation?

12 A. No.

Sergeant Jordon's December 12, 2008, Investigative Report Memorandum to the Executive Force Review Board (EFRB) addressed the issue of whether Officers Aylworth and Jimenez had a legal right to detain Mr. Woodfox. Sergeant Jordan stated:

Reasonable suspicion (a crime had occurred, was occurring, or was about to occur) had been met. Woodfox committed a vehicle code violation and failed to pull over as directed by Aylworth and Jimenez's emergency lights and siren. Woodfox fled from a lawful vehicle enforcement stop. Woodfox was required to identify himself to Aylworth and Jimenez but instead chose to flee. Woodfox's flight constituted a violation of PC 148(a) - Resist/Delay/Obstruct a Peace Officer and CVC 2800.1 - Evading a peace officer. Accordingly, the officers had a legal right to detain Woodfox.

Sergeant Jordan concluded in the Investigative Report Memorandum that:

Based on the statements taken, and the known actions of Woodfox, it is reasonable to conclude Jimenez is being truthful regarding his perception of the events. However, based on all of the evidence it is reasonable to conclude Jimenez's decision to shoot was not reasonable without more articulated facts. Jimenez's actions were not reasonable and did not comply with Departmental policy.

Sergeant Jordon's Investigative Report was extremely well done and the quality of his prose was excellent. However, Sergeant Jordon had to rely on the investigations and reports of others to compile his report.

The Executive Force Review Board met on January 6, 2009. In a report dated January 26, 2009, the EFRB found:

The members of the Board determined that the statements of the officers, witnesses, materials presented, and information provided by the Internal Affairs investigator were sufficient to render a finding.

The Board voted that the initial rounds fired by Jimenez were "**Not Compliant with Policy**" in accordance with the provisions of Departmental General Order K-3 (Use of Force). (Kozicki/Israel- Not in Compliance, Loman - In Compliance)

The Board voted unanimously that the second series of rounds fired by Jimenez were "**Not Compliant with Policy**" in accordance with the provisions of Departmental General Order K-3 (Use of Force)."

In a letter from Chief of Police Wayne G. Tucker to Officer Jimenez dated February 13, 2009, Chief Tucker stated that it was his intent to recommend to the City Administrator that Officer Jimenez be terminated from his position as a police officer with the Oakland Police Department as a result of the Internal Affairs Division investigation, which revealed "that you used excessive force when you shot and killed a person on July 25, 2008." Mr. Tucker stated that these actions violated Section 370.27-1, Use of Physical Force-Level 1 Lethal Firearm Discharge. Mr. Tucker further stated that Officer Jimenez had the right to respond orally or in writing to the facts on or before March 25, 2009.

Officer Jimenez was terminated on June 4, 2009. The parties subsequently proceeded to arbitration.

Facts at Issue**Which Way Did Mr. Woodfox Run?**

In its brief, the City posits that: "Woodfox got out of the car and ran toward the opposite side of the street." The City further posits that "Woodfox did not retrieve a weapon from his waistband and continued to run away from Aylworth." If either of the preceding statements were true, then either Mr. Woodfox would be alive today, or in the alternative, Officer Jimenez should be discharged from his employment.

The problem with the City's "facts" is simply that the evidence does not support them. In looking at the totality of the evidence, I have discounted the testimony of Officer Jimenez due to his obvious interest in the outcome of this matter. However, Officer Aylworth was clear in his sworn deposition testimony that Mr. Woodfox was running towards him at the time he was shot. As stated by Officer Aylworth:

90

9 MR. CHANIN: Q. So with that - - thank you. With
10 that I'd like you to turn page OAK749.
11 We're on there. Okay.
12 And the first thing that it says is - there is
13 three kind of bullet points here, "Woodfox was running
14 away from the police car and did not turn in the
15 direction of Aylworth."
16 Is that correct?
17 A. No, that's not correct.
18 Q. Okay. What is not correct about it?
19 A. He was running towards my direction.

93

3 Q. And I'd like to go back to number 749, same
4 exhibit that we've been working with, which is
5 Exhibit 6.
6 A. Six.
7 Q. Okay. There is - - the third little point they're
8 making here is, "The distance between Aylworth and
9 Woodfox was increasing as he ran away."
10 Is that a correct statement?

11 A. No, it's not correct.
12 Q. What's not correct about it?
13 A. Woodfox was getting closer to me.
14 Q. Okay. When?
15 A. During this course of flight.
16 Q. Okay. At any time before the second -- there
17 were two volleys of shots.
18 Is that correct?
19 A. Correct.
20 Q. At any time before the second volley of shots was
21 fired, was the distance between you and Mr. Woodfox
22 increasing?
23 A. Woodfox was getting closer to me.
24 Q. At the time the second shots were fired, he was
25 getting closer to you?

94

1 A. Correct.
2 Q. So there was no time between the -- strike that.
3 There was no time prior to any shots being fired
4 where Mr. Woodfox was running away from you?
5 A. Correct.

Officer Aylworth's testimony was corroborated by the statements of both himself and Officer Jimenez shortly after the incident, as well as the majority of forensic evidence at the scene.

DECISION

I. Burden of Proof

It is axiomatic in disciplinary administrative proceedings that the burden of proving the charges rests upon the party making the charges.² The obligation of a party to sustain the burden of proof requires the production of credible evidence for that purpose and an employer does not meet that burden by simply placing charges before the fact finder and claiming that it established a "prima facie" case.³

² *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 113 (1981).

³ *Id.*; see also *Los Angeles Police Protective League v. City of Los Angeles*, 102 Cal.App.4th 85 (Cal. App. 2 Dist. 2002).

The burden is not on the employee to refute the charges made.⁴ An independent decision maker must make factual findings subject to judicial review. Rather, the independent fact finding implicit in the concept of an administrative appeal requires, at a minimum, that the hearing be treated as a de novo proceeding at which no facts are taken as established and the proponent of any given fact bears the burden of establishing it.⁵

The law requires that the appointing power bears the burden of proof by a preponderance of evidence that the employee engaged in the conduct on which the disciplinary charge is based and that such conduct constitutes a cause of discipline under the applicable statutes.⁶ In addition to the burden of proof being placed on the appointing or charging party, the employee may further avoid the adverse action by establishing that the conduct was justified or not inappropriate.⁷ In the matter at hand, it is the Department's burden of proving, by a preponderance of the credible and admissible evidence, each separate charge against Officer Jimenez.

II. Did Officer Jimenez Violate OPD General Order K-3, Use of Force When he Shot Mr. Woodfox?

General Order K-3, *Use of Force* explains the Department's policy regarding Lethal Force as follows:

1. Lethal force is authorized to defend the members or a third person from what the member reasonably believes is an imminent threat of lethal force or force likely to cause serious bodily injury; or
2. To apprehend or arrest a person whom the member reasonably believes has committed or is committing a violent felony which involves the

⁴ *Steen v. Bd. of Civil Serv. Comm'rs*, 26 Cal.2d 716 (1945); *Fukuda v. City of Angels*, 20 Cal.4th 805 (Cal. 1999) (public agency must produce evidence of misconduct by the employee; the employee has no burden to produce evidence that no misconduct occurred).

⁵ *Caloca v. City of San Diego*, 102 Cal.App.4th 433 (2002).

⁶ *Steen v. City of Cathedral City*, 31 Cal.2d 542, 547 (1948); *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 113 (1981).

⁷ See *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 204, n.19 (1975); *Calif. Correctional Peace Officers Ass'n. v. State Personnel Bd.*, 10 Cal.4th 1133 (1995).

use, or threatened use coupled with the apparent ability to carry out the use of lethal force or force likely to cause serious bodily injury; and

- a. The person indicates by his or her conduct or by any other means that he or she presents an imminent danger of death or serious bodily injury to the member or a third person if not immediately apprehended, and
- b. All other reasonably available means of apprehending the person have failed, are inadequate, or are immediately unavailable.

The policy defines an “imminent threat” as someone who is “reasonably perceived by a member or employee to have the present intent, means, opportunity, and ability to complete the threat.” As Mr. Woodfox was not committing a violent felony, Officer Jimenez could only use lethal force to “defend the members or a third person from what the member reasonably believes is an imminent threat of lethal force...”

The Department’s use of force policy, with regard to lethal force, is extremely well written and consistent with the tenets set forth in the leading use of force decision, *Graham v. Connor*.⁸

Graham instructs that a use of force by a police officer is analyzed under the Fourth Amendment’s objective reasonableness standard.⁹ An objective reasonableness inquiry takes into account the totality of the circumstances known to the officer at the time the use of force was exacted, regardless of the officer’s underlying intent or motivation.¹⁰ A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. *Bryan v. MacPherson*, 608 F.3d 614, 618 (9th Cir. 2010).

⁸ *Graham v. Connor*, 490 U.S. 386, (1989).

⁹ *Id.* at 395.

¹⁰ *Id.* at 396-397.

A. Was it Reasonable to Perceive Mr. Woodfox as Having the Intent to Threaten Officer Aylworth?

The City defines “intent” as: “The subject’s apparent desire, which can be indicated by words, body language, or actions.” In the instant case, the perceived “intent” of Mr. Woodfox would be very different depending on when or where he was shot.

Sergeant Jordan in his report found:

Woodfox’s car had what appeared to be a fresh bullet strike mark on the trunk lid above the bumper. The angle of the strike mark appears to indicate that Jimenez fired at least one round in the direction of the “V” of the driver’s side door of Woodfox’s car.

In its brief, the City argues:

The physical evidence at the scene confirms that Jimenez started shooting at Woodfox soon after Woodfox got out of his car. A bullet strike mark on the trunk of Woodfox’s car is consistent with Aylworth’s perception that Jimenez began shooting at Woodfox while Woodfox was still in the “V” of his car door.

The City’s legal theories are excellent and well articulated. However, the facts in this case are disputed and ultimately this decision rests on the facts rather than the City’s meritorious legal argument.

If the bullet strike on the trunk of the car was created by Officer Jimenez’s service weapon, the City would be correct to discharge him as his entire story must be false. For the bullet strike to belong to Officer Jimenez’s weapon, Officer Jimenez would have had to jump out of his patrol car, pull his service weapon, run west to the right rear corner of Mr. Woodfox’s car, and attempt to shoot Mr. Woodfox as he exited his car. If this is what happened, Officer Jimenez should be discharged as Mr. Woodfox – at that time – could not have been reasonably perceived to be threatening Officer Aylworth.¹¹

¹¹ Officer Jimenez should also have been disciplined for poor marksmanship, not being able to shoot a stationary suspect at that range.

However, that is simply not what happened. Sergeant Jordan relied on others to provide him with this information, and Sergeant Jordan was simply given bad information by others. First, this forensic finding would require Officer Jimenez to engage in actions that can only be described as bizarre as he would have had to move west, away from Mr. Woodfox. Second, this action is directly contradicted by the testimony of Officers Aylworth and Jimenez. Critically, I don't have to reconcile the strange nature of this occurrence as the Union's expert witness was extremely credible in describing the impact marks. As stated by Mr. Alexander Jason, a certified senior crime scene analyst specializing in the reconstruction and analysis of shooting incidents:

592

- 7 Q. Do you have any further slides?
 8 A. My conclusion on this was that the impact on
 9 the trunk lid is not consistent with a .40 caliber
 10 bullet. A .40 caliber bullet will make a long surface
 11 graze mark or it will perforate the steel. It will not
 12 produce a defect like you see in the right there in
 13 AJ18, and I think the impact on the trunk lid is
 14 consistent with a low-energy bullet, that is lower
 15 energy than a .40 caliber. So something like a .32
 16 maybe a -3 would produce that, but a .40 caliber cannot
 17 produce that.

Officer Jimenez's service weapon was a .40 caliber Glock, and Mr. Jason makes it very clear that Officer Jimenez could not have created the strike mark at issue with his weapon. Mr. Jason's conclusions are further supported by the fact that Mr. Woodfox's car also had shotgun pellet strikes; clearly the Buick in question had been exposed to more than one exchange of gunfire. Unfortunately, this erroneous "fact" may have led some of the decision-makers in this matter (and Sergeant Jordan) to an erroneous conclusion. Once the "fact" surrounding the strike-mark on the trunk has been removed from the equation, both Officer Aylworth's and Officer Jimenez's stories make sense.

As noted above, another “fact” at issue is where Mr. Woodfox was trying to run. A number of witnesses, and common sense, dictate that suspects seeking to flee run away from the police while those seeking to harm officers run toward the police. The City, in its Memorandum to the EFRB, specifically found that:

Woodfox’s direction of flight increased the distance between Woodfox and Aylworth providing Jimenez more time to assess Woodfox’s actions.

In his deposition, Officer Aylworth was asked about the conclusions Sergeant Jordan drew in the PowerPoint he presented to the EFRB. Specifically, the attorney for Mr. Woodfox’s estate asked Officer Aylworth whether Sergeant Jordan’s conclusion in his EFRB PowerPoint, that “Woodfox was running away from the police car and did not turn in the direction of Aylworth” was in fact correct. Officer Aylworth testified under oath that Mr. Woodfox was in fact *not* running away from the patrol car when Officer Jimenez discharged his duty weapon.

Officer Aylworth was then asked whether Sergeant Jordan was correct in his conclusion that “the distance between Aylworth and Woodfox was increasing as he ran away.” Officer Aylworth testified under oath that “Woodfox was getting closer to [him].” Officer Aylworth was then asked if the distance between him and Mr. Woodfox was increasing at any time prior to the second volley of shots. Officer Aylworth testified that “Woodfox was getting closer to [him].” A totality of the evidence indicates that Mr. Woodfox was not in fact “running away from the police car” as stated in the Memorandum to the EFRB.

This disputed fact was clearly used by the EFRB in making its decision. As stated by Deputy Chief Jeffrey Israel:

250

17 Q. How did you vote as to the second series of
18 shots?

19 A. Also out of compliance.

20 Q. Why?

21 A. Same reason. Woodfox was moving away from
 22 Joel, and it just didn't appear to me that there was
 23 any imminent danger that was articulated. Aylworth
 24 said he was moving away. Aylworth could see both
 25 hands. Grant it that Hector said he could not see both

251

1 hands. Someone running away even if he has his hands
 2 in his waistband would not be enough to use deadly
 3 force, so I didn't think it was imminent danger of
 4 either officer being in danger of lethal force, and so
 5 there would be no reason to fire on him.

263

24 Q. So he's running northeast?

25 A. Northeast from his car door, which at the

264

1 very beginning puts him obviously running toward -- in
 2 the general direction of the police car, but within
 3 seconds he is past the police car and running clearly
 4 -- I mean, clearly he's trying to get away and not
 5 running towards.

Deputy Chief Israel was an extremely impressive witness, however, the conclusion he and the other members of the EFRB drew appears to be based on the information they were presented with. Again, Mr. Woodfox was entitled to run away from the police without being shot; however, if Mr. Woodfox was running in the direction of Officer Aylworth, a reasonable officer would perceive a threat to Officer Aylworth. Based on the information presented in the Powerpoint, Deputy Chief Israel was absolutely correct to find the shooting non-justified; however, the members of the EFRB were simply provided with erroneous information and hence drew erroneous conclusions.

Also critical to the evaluation of Officer Jimenez's conduct is the fact that, when Mr. Woodfox chose the path he took, he passed up other open avenues of escape that would be much more consistent with flight. Mr. Woodfox could have easily (instead of running toward the driver's side of the patrol car) taken a southerly path on Fruitvale Avenue away from Officer

Jimenez and his partner. Sergeant Jordan testified that Mr. Woodfox could have run south on Fruitvale Avenue and into Sanborn Park to get away, or into various alleyways and parking lots depicted on the aerial map.¹² Sergeant Jordan admitted that it could be reasonable for a police officer to conclude that a suspect who passed up other open avenues of escape and, instead ran in the direction of the police, was acting in a challenging manner. Sergeant Jordan was a credible witness and I believe him to be a reasonable officer. Sergeant Jordan stated at the hearing:

97

25 Q. Have you ever had suspects flee from you

98

1 during your career?

2 A. Yes.

3 Q. And when people are trying to flee they're
4 generally trying to get away from the police; would
5 that be accurate?

6 A. Right.

7 Q. Would it be fair to say that in most
8 cases -- would it be fair to say that Officer Wood --
9 that Officer Jimenez and Officer Aylworth perceived Mr.
10 Woodfox as running towards them?

11 A. Yes. In their general direction, yes.

12 Q. Would it be fair to say that if somebody is
13 trying to get away one would think that they run away
14 from them?

15 A. One would think.

107

23 Q. Can you see how an officer might think that
24 somebody who has passed up other open avenues of escape
25 and run in the general direction of the police might

108

1 think that that's a challenging act? Is that
2 reasonable to conclude?

3 A. That his direction of flight is a
4 challenging act?

5 Q. Yeah, when you're passing up other avenues
6 of escape.

7 A. I guess it could be reasonable to conclude
8 that.

¹² Grievant's Exhibit 3.

For whatever reason, Mr. Woodfox made a decision to run in the general direction of Officer Aylworth. While this decision is irrational, the decision could have been the product of the cocktail of ecstasy, alcohol, and cocaine that Mr. Woodfox had imbibed. Citizens under the influence of ecstasy, alcohol, and cocaine have a right not to be shot by the police; however, behaviors fueled by these drugs may inadvertently cause behaviors that make reasonable police officers fear for their partner's safety.¹³

In the instant case, Mr. Woodfox:

- Led Officer Aylworth and Officer Jimenez on a high speed car chase,
- Ignored repeated instructions from officers,
- Attempted to evade arrest,
- Ran towards Officer Aylworth, and,
- Jammed his hand in his waistband.

¹³ Mr. Woodfox was also a rather experienced criminal who had been previously arrested for:

DUI Alcohol/Drugs	23152(a) VC	Arrested Feb 08
Spousal Battery	273.5 PC	Convicted Apr 07
DUI Alcohol/Drugs	23152(A) VC	Arrested Oct 06
DUI Alcohol	23152(B) VC	Arrested Oct 06
Att. Murder	664/187 PC	Arrested May 04
Carjacking	215 PC	Arrested May 04
Assault with a Deadly Weapon	245(A) (1) PC	Arrested May 04
Parole Violation	3056 PC	Arrested May 04
Petty Theft	484(a) PC	Convicted Dec 04
Burglary	460(B) PC	Convicted Dec 04
Transport/Sell Narcotics	11352(A) HS	Arrested Mar 03
Possession of Narcotics	11350(A) HS	Arrested Jan 02
Carjacking	215(A) PC	Arrested Jan 02
Auto Theft	10851(A) VC	Convicted Feb 02
Parole Violation	3056 PC	Arrested Dec 01
False ID to Police	148.9(A) PC	Arrested Sep 01
Transport/Sell Narcotics	11352(A) HS	Arrested Aug 00
Possession of Marijuana for Sale	11359 HS	Convicted Apr 00
Sell Furnish Marijuana	11360 HS	Arrested Mar 00
Possess Marijuana for Sale	11359 HS	Arrested Mar 00

While criminals such as Mr. Woodfox have the same right not to be shot as any other citizen, Mr. Woodfox of all people should have known to run away from the police. While Mr. Woodfox's lengthy criminal history is irrelevant to the objective standard applied in this case, it does show the irrationality of Mr. Woodfox's actions.

Nearly every witness who testified, including Sergeant Jordan, Deputy Chief Breshears, and Captain Fairrow, stated that the waistband is a common area for suspects to hide weapons such as firearms. Officer Jimenez was trained, and his experience dictated, that the waistband is a common receptacle for firearms and other deadly weapons. The deposition testimony of Officer Aylworth and the arbitration testimony of Officer Jimenez support the fact that Mr. Woodfox was shot while his hands were at his waistband. The totality of evidence supports a finding that Officer Jimenez did not discharge his weapon until Mr. Woodfox's hands went to his waistband.

The City argues in its brief that:

However, during his homicide interview, which occurred shortly after the shooting, Jimenez could not say definitively whether Woodfox had just reached toward his waistband, or whether his right hand actually reached into his waistband.

Sgt. Longmire: All right. Did it look as though his hands were actually in his waistband or at his waistband?

Officer Jimenez: I think they were in his waist band.

Sgt Longmire: They were in it. And if you can't say definitively, it's okay.

Officer Jimenez: ...yeah, *I can't say definitively, sir.*
(emphasis in the original)

This argument lacks merit. Officer Jimenez appears to be simply trying to be truthful and is willing to admit that anything is possible. Officer Jimenez "thought" Mr. Woodfox's hands were in his waistband, and no questions were asked about whether it was more likely than not that Mr. Woodfox's hands were in his waistband. The totality of the evidence indicates that Mr. Woodfox's hands went to his waistband; whether they were "in" his waistband or "at" his waistband does not change the analysis as to how a reasonable officer would perceive Mr. Woodfox's intent.

In short, Mr. Woodfox, through his words (none as he ran toward Officer Aylworth ignoring commands to show his hands), body language (running toward an officer while trying to evade arrest), or actions (placing his hands on or at his waistband), indicated an apparent desire to harm Officer Aylworth. With perfect hindsight, we can see that Mr. Woodfox's actions were the product of intoxication, impaired judgment, and incredibly loose-fitting baggy pants.¹⁴ However, as stated in *Graham*, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁵ A reasonable officer standing where Officer Jimenez was standing on the night in question would have believed that Mr. Woodfox had the intent to harm Officer Aylworth.

B. Was it Reasonable to Perceive Mr. Woodfox as Having the Means to Threaten Officer Aylworth?

The Department's Training Bulletin dated September 18, 2001, defines high-risk vehicle stops as:

A high risk vehicle stop is a vehicle stop of a person or persons suspected of having committed a serious crime.

A high risk vehicle stop is unpredictable; it is never routine. *Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise.* (emphasis added)

The City has the ability to set reasonable rules for their employees to follow and to expect that their employees will do as they are trained. In the instant case, the City has chosen to direct their officers to "consider any high risk suspect to be armed until they have personally assured themselves otherwise." Mr. Woodfox was a high-risk suspect, *ergo*; Officer Jimenez had no choice but to consider him to be "armed." Ironically, Officer Jimenez could have been

¹⁴ The above does not even consider the additional factors that the shooting took place at approximately 3:30 a.m. in a section of Oakland that is considered 'high crime' and where calls for narcotics, firearms, assault, and domestic violence are regularly reported.

¹⁵ *Graham*, 490 U.S. at 396.

disciplined for disregarding his employer's instructions if he had failed to assume that a high-risk suspect such as Mr. Woodfox was armed. Simply put; "if an employee is permitted to willfully disregard a direct order, it would result in chaos in the work place. When an employee refuses to perform the work ordered by his/her supervisor, it is recognized as insubordination by the great majority of arbitrators."¹⁶ Officer Jimenez works for a paramilitary organization and is trained to follow orders; it is well established that "refusing a direct order from a supervisor is an action that is so clearly wrong that specific reference is not necessary."¹⁷

Choosing to disregard his training is not a decision Officer Jimenez can make on his own. In the less than three seconds that elapsed from Mr. Woodfox leaving his car until he collapsed, Officer Jimenez had little, if any, time to think. Instead of thinking and rationalizing, Officer Jimenez simply relied on what he had been taught and how he had been trained; he had been taught and trained to "consider any high risk suspect to be armed."

It is inherently reasonable for a police officer to rely upon his training and his employer's directives. Sergeant Jordan agreed that officers are trained to assume that suspects in high-risk stops are armed and stated:

94

2 Q. Fair enough. I'm going to jump around
3 again, and I apologize. Back to the high-risk car
4 stops.

5 Are you familiar with a portion of the
6 high-risk car stop policy that says that officers are
7 to assume that suspects in high-risk car stops are
8 armed until they personally assure themselves
9 otherwise?

10 A. Yes.

11 Q. And you acknowledge that's part of the
12 training that officers receive, correct?

13 A. Yes. Yes, sir.

¹⁶ *U.S. Dep't of the Army*, 125 LA 1287 (2008).

¹⁷ *U.S. Dep't of the Army*, 125 LA 1287 (2008).

The City now argues, "It was also unreasonable for Jimenez to assume that Woodfox had a weapon in his waistband because he did not have a clear view of Woodfox's waistband."

Even assuming that Woodfox reached *into* his waistband, it was not reasonable for Jimenez to assume that Woodfox was reaching for a gun with the intent to inflict serious harm. Suspects might reach for their waistband for any number of reasons. They could be reaching for another type of weapon. (Tr. at 316:22-23.) The suspect could be reaching for a weapon with the *intent to discard it*. (*Id.*, at 255:4-17.) Jimenez himself testified about a prior incident in which a known gang member reached into his waistband, pulled out a gun, and eventually discarded the weapon as he fled from the police. Jimenez did not shoot this individual. Thus, Jimenez had *personal experience* of a suspect reaching for his waistband and pulling out a gun without the intent to use it to harm officers.

The City fails to mention that in Officer Jimenez's previous encounter with an armed suspect, the suspect had been running away from him. The analysis in this case is identical; if Mr. Woodfox had been running away from the officers, rather than at Officer Aylworth, Officer Jimenez would have had no reason to discharge his duty weapon. Further, the City is correct that it was possible that Mr. Woodfox could have been reaching for a weapon other than a gun when Officer Jimenez made the decision to discharge his weapon. However, it makes no difference as to whether Mr. Woodfox would have been reaching for a knife, shurikens, or a blow gun with curare-tipped darts. All are weapons, and all would have made it reasonable for Officer Jimenez to perceive Mr. Woodfox as having the means to threaten Officer Aylworth.

The City is correct that: "Even if a suspect is running toward an officer and reaching for the waistband area, this is not enough to infer an imminent threat sufficient to justify the use of lethal force." However, if that individual is disobeying an officer's commands during a high-risk car stop, officers should consider the suspect to have the means to create an imminent threat as "officers are cautioned, taught, and trained to consider a high risk suspect to be armed until they have personally assured themselves otherwise."

C. Was it Reasonable to Perceive Mr. Woodfox as Having the Opportunity to Threaten Officer Aylworth?

The City defines “opportunity” as: “The time and/or place which allowed the subject to use the means to cause injury.” Sergeant Jordan testified:

45

20 A. Because as to use -- to use lethal force you
21 are required to -- to have the intent, the ability, the
22 means and the opportunity to complete that threat. And
23 in this situation we had the opportunity. The officers
24 were present. The suspect was present. The ability,
25 there's no testimony that Mr. Woodfox was injured or

46

1 disabled at the beginning of this incident, so the
2 ability was there.

...
17 point. And, again, we would have the opportunity. All
18 the officers are there, Mr. Woodfox is there. The
19 ability, he's -- per Officer Aylworth's testimony he
20 appeared to be -- had appeared to be shot, his motions
21 were slowed, but if he still had a firearm he could
22 possibly still shoot it, so the ability was there.

Clearly, the opportunity prong of the imminent threat analysis is not at issue in this case due to the close proximity between Mr. Woodfox and Officer Aylworth.

D. Was it Reasonable to Perceive Mr. Woodfox as Having the Ability to Threaten Officer Aylworth?

As stated by Sergeant Jordan at the hearing; “The ability, there's no testimony that Mr. Woodfox was injured or disabled at the beginning of this incident, so the ability was there.” Based on the photographs of Mr. Woodfox, he appeared to be young, fit, and in shape; in short, the type of individual who could move quickly and have the ability to harm Officer Aylworth.

III. Issues Surrounding the Community's Trust in the Department.

In its brief, the City makes several arguments that relate to the public perception of the Oakland Police Department by the community. Arguments made by the City include:

Finally, the Department continues to struggle to regain, and maintain, the community's trust after facing allegations in the *Riders* class action lawsuit that officers arrested citizens using excessive force and other questionable police tactics.... However, segments of the community remain wary of OPD officers. The Oakland community is also still haunted by the memory of BART police officer Johannes Mehserle's shooting of Oscar Grant.... Reinstating an officer who shoots an unarmed man in the back would only add to the community's apprehension about the police officers in Oakland.

I agree that it is unfortunate that some members of the public in Oakland distrust the Department and I have great sympathy for the family of Oscar Grant.¹⁸ However, sacrificing Officer Jimenez on the altar of public opinion will not bring back Mr. Grant, Mr. Woodfox, or the trust of the people of Oakland.

IV. The Penalty – Was Termination Justified?

In the instant case, the City has chosen to terminate Officer Jimenez. As stated in *Paperworkers v. Misco*:

Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*"¹⁹

As traditionally applied in labor arbitrations, the "just cause" standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. "An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action."²⁰

¹⁸ I also grieve for the family of Mr. Woodfox and regret his untimely death.

¹⁹ *Paperworkers v. Misco*, 484 U.S. 29, 41 (1987) (quoting *United Enterprise Workers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (emphasis added by the *Paperworkers* Court). *Paperworkers* was also quoted by this arbitrator in *County of Monterey*, 127 LA 207 (2009), in which the termination of a deputy sheriff was upheld.

²⁰ *Rabanco Recycling*, 118 LA 1411 (2003).

Again, in this case, the City provided an excellent brief and was correct as to all of its legal theories. However, the facts posited by the City are not supported by a preponderance of the evidence. As Officer Jimenez has not violated the City's Use of Force Policy, his termination must be rescinded and he should be returned to duty as soon as practical. A police officer challenging his wrongful dismissal is entitled to back pay,²¹ and Officer Jimenez is to be made whole for his losses.

CONCLUSION

In short, the City bore the burden to show, by at least a preponderance of the evidence, that Officer Jimenez violated the Memorandum of Understanding or an appropriate City rule. In the instant case, despite the excellent lawyering of the City's attorney, I have found that a preponderance of the evidence supports a finding that Officer Jimenez complied with the City's policies. If the totality of evidence would have indicated that Mr. Woodfox was running away from Officer Aylworth, this decision would have been different. If Officer Jimenez had not been trained that "Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise," this decision might have been different.

I commend the City of Oakland for the hard work of their employees in this matter. Sergeant Jordan and Deputy Chief Israel were both impressive witnesses who made correct decisions based on the information they were given. I also commend the Oakland Police Officers' Association for the effort and expense of using this process to clear Officer Jimenez who had to make a number of difficult decisions, under difficult circumstances, in less than three seconds.

²¹ *Parker v. City of Fountain Valley* 127 Cal.App.3d 99 (1981). See also, e.g., *Davis v. Civil Service Comm'n.*, 93 Cal.App.3d 417 (1979) (affirming the trial court's issuance of writ of mandate ordering back pay benefits for the period between employee's discharge and the due process hearing which upheld the discharge); *Fugitt v. City of Placentia*, 70 Cal.App.3d 868, 876 (1977) ("Mandamus is proper to compel the payment of back salary to a (public) employee for the period during which he was wrongfully discharged.")

AWARD

The grievance is sustained. The Employer will rescind the Grievant's discharge and he shall be reinstated within fourteen days of this decision and be made whole for any loss of pay or benefits from his time of discharge until February 6, 2011.²² This award is final on all issues other than back pay or other damages. The make-whole remedy is provisional and becomes final forty-five days from today's date in order to allow the parties to address any issues involving implementation or calculation of the award.

All fees and expenses charged by the Arbitrator shall be divided equally between the parties, as provided in Article X, Section C.5. of the parties' Memorandum of Understanding.

/s/ David Gaba

David Gaba, Arbitrator

March 2, 2011

Seattle, Washington

²² The February 6, 2011, date arises as a result of the Union agreeing to toll back-pay in exchange for an extension in the briefing schedule.

EXHIBIT 9

A dictionary of slang and colloquial English

John Stephen
Farmer, William
Ernest Henley

Digitized by Google

Tumbler.

to set to vigorously: also see verb; to take a tumble to oneself, to take oneself to task; to kick oneself (q.v.); to tumble to the racket (Am. pol.), see Racket; to tumble on one's feet, to escape without injury, to come out on top (q.v.).

Tumbler. In various colloquial or semi-colloquial usages denoting instability or eccentric movement. Thus (1) a glass rounded or pointed at the bottom, so that it could not be set down except when empty—a silent reminder of no heeltaps! and to pass the bottle: orig. a low Silver Cup to Drink out of (B. E.): nowadays applied to any glass that is cylindrical in shape, without a stem; (2) a variety of pigeon: in flight the bird often drops without wing-play; (3) a dog used in coursing rabbits, a Coney Dog (B. E.): it tumbles about in a careless fashion until, within reach of its prey, it seizes it with a sudden spring; (4) a porpoise; (5) a variety of printing machine: from the rocking or tumbling movement of the cylinder towards the impressive surface; (6) a cart: properly tumbrel; whence to nap the flog at (or to shove) the tumbler, to be whipped at the cart's-tail (B. E.) (1721); (7) A sharper employed to draw in pigeons to game (B. E.); (8) a worthless horse; a screw (q.v.); (9) a German Baptist or Dunker: the sect was founded by Alexander Mack about A.D. 1708. Persecution drove them in 1723 to the United States, where they founded a church at a German town in Pennsylvania: they separate the sexes in worship, are vegetarians, and are called Tumblers from their mode of baptism, which is by putting the person, whilst kneeling, head first under water; (10) a street rowdy: early part of the eighteenth century.

Tumble-down. Dilapidated, ruinous, rattletrap (q.v.) (1839).

Tummy. The stomach: also *tumtum*.

Tump. To pull, to draw.

Tumptsner. A settler: e.g. That'll be a *tumptsner* for the old gentleman.

Tum-tum. A dog-cart. See *Tummy*.

Tun. 1. A tippler: see Lushing-ton. 2. At Pembroke (Oxford) a small silver cup containing half a pint; sometimes with a whistle handle,

Turk.

which cannot be blown until the cup is empty.

Tun-belly. A fat, round-bellied man, a pot-belly, a corporation (q.v.); hence *tun-bellied*, paunchy, very corpulent, bellied like a tun: cf. *tun-great*, with a circumference of the size of a tun.

Tund (Winchester). To thrash, *tunding*, a thrashing.

Tune. To beat: also to *tune up*: e.g. The old man *tuned him up* delightfully. He got a good thrashing: of. I'll make you sing another tune, a threat of corporal punishment (Grose). *The tune the cow (or old cow) died of*, (1) a grotesque or unpleasant noise; (2) a homily instead of an alma. [From an old ballad.] Colloquialisms: *To the tune of*, to the sum, amount, or measure of [a stated figure, etc.]; *to change one's tune (or note)*, to alter one's way of talking, manner, or demand; to change from laughter to tears; *to sing another tune* (see Sing); *to tune up*, to commence (1578).

Tunker. A street-preacher. [?Dunker.]

Tunnel. A nostril (1596).

Tunnel-grunter. Usually in pl., potatoes.

Tup. To salute in drinking.

Tuppence (or Tuppenny). See Twopenny.

Tup-running. A rural sport practised at wakes and fairs in Derbyshire; a ram whose tail is well soaped and greased, is turned out to the multitude; any one that can take him by the tail, and hold him fast, is to have him for his own (Grose).

Turf. 1. (Winchester). The pitch: at cricket, the field being long grass. 2. (Folsted School). the cricket field: always with the definite article. As verb, (Derby School) (1) to send to bed at bedtime; (2) (Marlborough School), to chastise.

Turk. 1. A sword: cf. Andrew, Fox, Toledo (1638). 2. A savage fellow; a cruel hard-hearted man (B. E.); a Tartar (q.v.). Also to *turn Turk*, to turn renegade, to change for the worse, to go off (q.v.). *To Turkise*, to play the Turk; *Turkish treatment*, barbarous usage, very sharp or ill dealing in business (B. E.); *Turkish shore*, Lambeth, Southwark, and Rotherhithe sides of the Thames (Grose); *Turk-a-tence*, a term of

EXHIBIT 10

Volume II

Pages 283 - 557

United States District Court

Northern District of California

Before The Honorable Marilyn Hall Patel

John Smith,

Plaintiff,

vs.

City of Oakland, et al.,

Defendant.

No. C07-6298 MHP

Bench Trial

San Francisco, California

Wednesday, March 10, 2010

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff:

Law Offices of John L. Burris
Airport Corporate Center
7677 Oakport Street, Suite 1120
Oakland, California 94612

By: John L. Burris, Esquire
Ben Nisenbaum, Esquire

Haddad & Sherwin
505 Seventeenth Street
Oakland, California 94612

By: Michael J. Haddad, Esquire
Julia Sherwin, Esquire

(Appearances continued on next page.)

Reported By:

Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

1 Q. Now I'd like to ask you to please look at Exhibit 16, which
2 is in the blue book now.

3 Okay, Officer, have you seen Exhibit 16 before?

4 A. Yes, sir.

5 Q. What is that?

6 A. It is the special order in relation to our stop data form.

7 Q. This is an Oakland Police Department special order, which
8 is a policy, right?

9 A. Yes, sir.

10 Q. And because it's a policy, you are required to know it and
11 follow it at all times, correct?

12 A. Correct.

13 Q. And this was in effect in December of 2005, wasn't it?

14 A. Yes, sir.

15 Q. And what did this policy require you to do?

16 A. To fill out a stop data form.

17 Q. Under what circumstances?

18 A. Any type of vehicle or pedestrian stop at the time.

19 Q. For any kind of stop that you might do on a person, whether
20 it be in a vehicle or on foot, you were required to fill out a
21 stop data form at the time of the incident with Lucas and
22 Bradshaw, weren't you?

23 A. Yes, sir.

24 Q. Could you take a look at the last page of Exhibit 16. Is
25 that one example of one of the stop data forms that the Oakland

*Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060*

Exhibit 10

1 Police Department requires?

2 A. Yes, sir.

3 Q. Did you fill out a stop data form for this incident?

4 A. Yes, sir.

5 Q. Where is it?

6 A. I turned it in, sir.

7 Q. Do you have any explanation for why it's never been
8 produced for the plaintiffs in this case?

9 MR. BOLEY: Objection. Calls for speculation, and
10 lack of foundation.

11 THE COURT: The question is if he has any knowledge.
12 So you may answer the question.

13 THE WITNESS: I do not, sir.

14 BY MR. HADDAD:

15 Q. Doesn't a stop data form require you to give the reason for
16 any stop?

17 A. That is correct, sir.

18 Q. Do you think that if you had identified any traffic
19 violation at the time that it would have been documented on a
20 stop data form?

21 A. Yes, sir.

22 Q. Have you ever given -- given that you can't remember why
23 you pulled over Mr. Lucas, have you ever gone to try to see
24 what you wrote down on the stop data form?

25 A. I was unable to locate it because, trust me, I tried to

1 find it myself.

2 Q. You say you have been unable to locate it?

3 A. I have not.

4 Q. You have not been able to locate it?

5 A. I have not.

6 Q. Have you looked for it?

7 A. Yes, sir.

8 Q. How can you be sure that you filled it out?

9 A. Because I recall filling it out.

10 Q. Has -- to your knowledge, has the Oakland Police Department
11 had a problem with maintaining records such as data collection
12 forms?

13 A. I'm not qualified to answer that, sir.

14 Q. Have you heard of problems?

15 A. As far as stop data forms?

16 Q. Yeah.

17 A. I don't know.

18 Q. Who have you talked to in the department to try to find the
19 form for this incident?

20 A. I was in Records, we went through an IA case regarding this
21 case, so multiple people.

22 MR. HADDAD: I would move to admit the policy and
23 form included as Plaintiff's Exhibit 16.

24 THE COURT: Any objection?

25 MR. BOLEY: No objection.

1 **THE COURT:** Exhibit 16 is admitted.

2 (Plaintiff's Exhibit 16 was received in
3 evidence.)

4 **BY MR. HADDAD:**

5 Q. All right, so I apologize for asking you to shift back one
6 more time to this orange book. And I think it's the last
7 exhibit I'm going to ask you to look at.

8 **THE COURT:** Well, while you are doing that, this
9 policy indicates also that the supervisor, or the officer, I
10 guess, handing in the form, looks like, is to review these
11 forms and so indicate as well; who would that have been at the
12 time that --

13 **THE WITNESS:** Would have been our sergeant. And
14 they are reviewing it to make sure that it's complete, meaning
15 he didn't miss any bubbles or --

16 **THE COURT:** Who would that have been?

17 **THE WITNESS:** At the time it was -- we were rotating
18 through sergeants, so I think it was Sergeant Cunningham would
19 have been the supervisor at the time.

20 **THE COURT:** What's his first name?

21 **THE WITNESS:** Oliver.

22 **BY MR. HADDAD:**

23 Q. Did you say that you spoke with the Internal Affairs
24 investigator for this incident to see if he had ever seen the
25 stop data form for this incident?

1 A. I know it was a question that came up during the Internal
2 Affairs, yes, sir.

3 Q. Now, your Internal Affairs interview was tape-recorded, we
4 have all had a chance to listen to it; I don't recall hearing
5 any discussion of the stop data form. Did you have discussions
6 with the Internal Affairs investigator that were not
7 tape-recorded?

8 MR. BOLEY: Objection. Move to strike the comment
9 leading up to the question.

10 THE COURT: Yes, it's stricken. And so just answer
11 the question.

12 Do you want the question read back?

13 MR. HADDAD: I can say it again.

14 THE COURT: Okay.

15 BY MR. HADDAD:

16 Q. Did you have discussions with the Internal Affairs
17 investigator in the course of his investigation of this
18 incident that were not tape-recorded?

19 A. Yes, sir.

20 Q. What else did you talk about with the Internal Affairs
21 investigator pertaining to this incident that was not
22 tape-recorded?

23 A. It was just questioning about what the case was about and
24 what documentation I would need during the case.

25 Q. Okay.

1 So was it -- did you have a discussion with the IA
2 investigator about the fact that nobody could locate your stop
3 data form for this incident?

4 (Extended pause in the proceedings.)

5 **BY MR. HADDAD:**

6 **Q.** Did you -- I said, did you have a discussion with the IA
7 investigator about the fact that nobody could find your stop
8 data form for this incident?

9 **A.** No, we just talked about it being one of the documents that
10 I should probably try to find before the IA interview.

11 **Q.** All right.

12 Now, I'd like to ask you about some of the dispatch
13 information that your department collected pertaining to this
14 incident. So if you wouldn't mind turning to Plaintiff's
15 Exhibit 1, now in the orange book.

16 And the first page I want to ask you about has the
17 Bates Number 7923 at the bottom. It's about 30 pages into this
18 exhibit.

19 **MR. BOLEY:** What was that number, again?

20 **MR. HADDAD:** 7923.

21 **BY MR. HADDAD:**

22 **Q.** I'll help you find it, if you don't mind.

23 One last question about stop data forms: Did you
24 check with your supervisor to see whether he knew where the
25 stop data form was for this incident?

1 A. He would not have known after I turned it in.

2 Q. Okay.

3 Now, on the page I just identified, which is Bates
4 No. 7923 of Exhibit 1, what is this?

5 A. It's a radio purge.

6 Q. And this pertains to the -- to any radio traffic involving
7 you and your partner on the day of the incident; isn't that
8 right?

9 MR. BOLEY: Objection. Lack of foundation.

10 THE COURT: Objection is overruled.

11 You may testify, if you know, of your own personal
12 knowledge.

13 THE WITNESS: It pertains to some of our activities,
14 yes, sir.

15 BY MR. HADDAD:

16 Q. All right.

17 Now, you've seen this type of document before in the
18 course of your work, haven't you?

19 A. I have.

20 Q. See in the upper right it says, "requested by Christopher
21 Shannon"?

22 A. Correct.

23 Q. He is the Internal Affairs investigator for this incident,
24 isn't he?

25 A. He is one of them, yes.

CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Tuesday, March 23, 2010

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXHIBIT 11

Volume III

Pages 558 - 815

United States District Court
Northern District of California

Before The Honorable Marilyn Hall Patel

John Smith,)
)
Plaintiff,)
)
vs.)
)
City of Oakland, et al.,)
)
Defendant.)

No. C07-6298 MHP

Bench Trial

San Francisco, California
Thursday, March 11, 2010

Reporter's Transcript Of Proceedings

Appearances:

For Plaintiff: Law Offices of John L. Burris
Airport Corporate Center
7677 Oakport Street, Suite 1120
Oakland, California 94612
By: John L. Burris, Esquire
Ben Nisenbaum, Esquire

Haddad & Sherwin
505 Seventeenth Street
Oakland, California 94612
By: Michael J. Haddad, Esquire
Julia Sherwin, Esquire

(Appearances continued on next page.)

Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Exhibit 11

Downum - Cross / Haddad

765

1 A. And that's all I needed.
 2 Q. Now, you have explained that you and Officer Vass did not
 3 want to find any drugs or contraband on the men involved in
 4 this stop; is that right?
 5 A. That's correct, sir.
 6 Q. Including Michael Holmes, right?
 7 A. Yes, sir.
 8 Q. So there would have been no legitimate lawful reason for
 9 Officer Vass to search Mr. Holmes inside of his pants; isn't
 10 that true?
 11 A. It didn't happen.
 12 Q. That's not the question, though.
 13 There would have been no legitimate law enforcement
 14 reason to search Mr. Holmes inside of his pants during this
 15 traffic stop, correct?
 16 A. In theory, everyone in that car was arrestable for 11352 of
 17 the California Health and Safety Code, the sale and
 18 transportation of narcotics. And under those circumstances,
 19 given additional information and other things, it is possible.
 20 Q. Was -- was any narcotic or contraband observed or recovered
 21 from Michael Holmes in this stop?
 22 A. No, sir.
 23 Q. Was any narcotic or other contraband observed or recovered
 24 from any occupants in the car during that stop?
 25 A. No, sir.

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

766

1 Q. You had no probable cause to arrest Michael Holmes at that
 2 stop, did you?
 3 A. Yes, I did.
 4 Q. What was that?
 5 A. 11352 of the Health and Safety Code.
 6 Q. And what is that?
 7 A. He was in the vehicle with Mr. Salvador Ortega and Daniel
 8 Garibay when they delivered a quantity of heroin that was
 9 ultimately sold to Mr. Mays at 103rd and East 14th Street.
 10 Q. But you testified a few minutes ago that you weren't able
 11 to tell whether any transaction took place between Mr. Ortega
 12 and Mr. Mays when they talked to each other; isn't that right?
 13 A. I wasn't there for that, my undercover personnel was.
 14 Q. And you testified that you had no information that any
 15 transaction took place between Ortega and Mays, correct?
 16 A. Other than the wiretap information and my undercover
 17 officers' observations and the quantity of heroin recovered off
 18 of Mr. Mays, yes, there was.
 19 Q. How do you know whether Mr. Mays already had an ounce of
 20 heroin on him from someone else?
 21 A. Because of the phone conversations that the DEA office
 22 relayed to us saying that Mr. Ortega was going to deliver an
 23 ounce of heroin to Mr. Mays.
 24 Q. So you heard phone conversations that there was a plan to
 25 do it?

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

767

1 A. No, I did not, but I received it from the DEA office.
 2 Q. But you had no information that the transaction actually
 3 took place when you saw them talking, did you?
 4 A. What I said is I didn't recall because I cannot testify for
 5 my undercover officers, who are not here today.
 6 Q. All right.
 7 And in any event, the only person who talked to
 8 Mr. Mays at that time was Mr. Ortega, correct?
 9 A. I don't know.
 10 Q. That was what you just said a minute ago; did you know that
 11 or not when you said it this morning?
 12 MR. BOLEY: Objection. Argumentative, Your Honor.
 13 THE COURT: Objection overruled.
 14 You may answer.
 15 THE WITNESS: I said Mr. Ortega because that's one
 16 of the phones that was being listened to, or tapped, or
 17 whatever. But, Mr. Holmes and Garibay were in the car with
 18 them from the time the undercover picked -- picked the Yukon
 19 up until it arrived to Mr. Mays' location.
 20 BY MR. HADDAD:
 21 Q. Um-hmm.
 22 Sergeant, based on your vast experience in narcotics
 23 and as a sergeant with the OPD, 22 years with the OPD, right?
 24 A. Yes, sir.
 25 Q. Do you think that if there are several people present in a

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

768

1 car and one person in the car commits a drug transaction with
 2 somebody outside of the car you have probable cause to arrest
 3 every member of the car?
 4 A. Yes.
 5 (Extended pause.)
 6 THE WITNESS: Probable cause to arrest, not convict.
 7 BY MR. HADDAD:
 8 Q. Now, about those stop data forms.
 9 A. Yes, sir.
 10 Q. It was your responsibility, as the sergeant, under the
 11 written policy at the time, to make sure that stop data forms
 12 were being completed for every vehicle and pedestrian stop,
 13 correct?
 14 A. No, that's not what I said.
 15 Q. I would like to direct your attention to Exhibit 16. And
 16 I'll bring the book up to you.
 17 Do you have a monitor right there?
 18 A. Yes, sir.
 19 Q. I'll just put it on the monitor so you can see it.
 20 A. Okay.
 21 Q. You've seen this before, Sergeant?
 22 A. Yes, sir.
 23 Q. This is your department's stop data policy, correct?
 24 A. Yes, sir.
 25 Q. In effect since April 1, 2003, right?

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

769

1 A. Yes, sir.
 2 Q. Still in effect, correct?
 3 A. As far as I'm aware, sir.
 4 Q. Under section 2, where it says, "Responsibilities," it
 5 describes what members, meaning police officers and people
 6 involved in stops, are supposed to do, correct?
 7 A. I'm sorry, I was reading.
 8 Q. All right.
 9 Under section 2A?
 10 A. Yes, sir.
 11 Q. Subsection 1, you see that?
 12 A. Yes, sir.
 13 Q. That's where it describes that a stop data form must be
 14 filled out for every vehicle, walking or bicycle stop
 15 conducted, correct?
 16 A. Yes, sir.
 17 Q. Are there any exceptions?
 18 A. According to this, no.
 19 Q. Now, below that it talks about supervisory and command
 20 responsibilities; do you see that?
 21 A. Yes, sir.
 22 Q. That pertains to you as a sergeant, right?
 23 A. Yes, sir.
 24 Q. And this says, "Sergeants shall review all forms submitted
 25 by members to ensure the forms are completed in accordance with

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

770

1 this order. The approving supervisor shall write his or her
 2 name and serial number in the supervisor box signifying the
 3 form has been reviewed and approved."
 4 Did I read that correctly?
 5 A. Yes, sir.
 6 Q. That applied to you?
 7 A. Yeah.
 8 Q. Were there any exceptions?
 9 A. Didn't appear to be.
 10 Q. You were required to obey this policy, weren't you?
 11 A. Sure.
 12 Q. Going on to the next page, this describes more supervisor
 13 duties. It says under subsection 2, "The approving supervisor
 14 or watch commander shall return the form to the appropriate
 15 member after their review or deposit the form in the report
 16 writing receptacle"; is that right?
 17 A. Yes, sir.
 18 Q. And you understood that was the policy, right?
 19 A. That's not the direction I received from my boss.
 20 Q. Are you obligated to follow the policies of your
 21 department?
 22 A. And those of my boss, yes.
 23 Q. And what did your boss tell you to do that was different
 24 from the policy?
 25 A. Give them to him.

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

771

1 Q. Who was the boss?
 2 A. Lieutenant Doug Anderson.
 3 Q. Is he still with the department?
 4 A. No, sir.
 5 Q. What happened to him?
 6 A. He retired.
 7 Q. So you understood that Lieutenant Doug Anderson kept a
 8 report writing receptacle for these stop data reports, right?
 9 A. I believe the report writing receptacle that's being
 10 referred to in this order is not the same as Lieutenant
 11 Anderson used to use, no.
 12 Q. So what was Lieutenant Anderson using as a receptacle?
 13 A. A cardboard box.
 14 Q. Okay.
 15 Was it basically garbage?
 16 A. That was the feeling that I got.
 17 Q. You got the feeling that your commanding officer was
 18 treating these stop data forms as garbage?
 19 A. I believe that he just didn't know what to do with them.
 20 Q. Did you understand that these stop data forms were required
 21 by the United States District Court?
 22 A. Yes.
 23 Q. When you believed that your supervising officer was
 24 treating these forms as garbage --
 25 A. I didn't say that.

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

772

1 Q. Did you inform anybody in Internal Affairs or above your
 2 supervisor of that belief?
 3 A. No, sir. Actually, I sought counsel with another
 4 lieutenant, who helped me correct the problem.
 5 Q. Who was that?
 6 A. Lieutenant Garrahan (phonetic).
 7 Q. Who?
 8 A. Garrahan.
 9 Q. And how did Lieutenant Garrahan help you correct the
 10 problem?
 11 A. I started turning them in to the report receptacle myself.
 12 Q. What was the date that you started turning them in to the
 13 report receptacle yourself?
 14 A. It was in '06.
 15 Q. What month?
 16 A. I don't know, sir. I don't recall exactly, sir.
 17 Q. All right.
 18 Now, given that you had a responsibility to make
 19 sure that these stop data forms were being properly filled out
 20 and maintained, why didn't you make a note of the date that you
 21 corrected the problem to make sure that they are going to be
 22 properly maintained?
 23 A. Because I felt that it was taken care of, and I didn't
 24 initially know that's what Lieutenant Anderson was doing with
 25 them, I didn't know that. So it took me some time.

Sahar McVickar, C.S.R. No. 12963, RPR
 Official Court Reporter, U.S. District Court
 (415) 626-6060

Downum - Cross / Haddad

773

1 After I figured it out, I talked to Lieutenant
2 Garrahan, and then I just took care of it all myself and just
3 put them in the report writing box, where they are supposed to
4 go.
5 Q. All right.
6 Now, this stop that we are talking about involving
7 Mr. Ortega happened on February 20th, 2007?
8 A. Yes, sir.
9 Q. And that was after 2006, when you corrected the problem
10 with the maintenance of the stop data forms, right?
11 A. Yes, sir.
12 Q. Where is the stop data form?
13 A. Where is it?
14 Q. Yeah, where is the one for this stop?
15 A. I don't know.
16 MR. BOLEY: Lack of foundation, Your Honor.
17 THE COURT: You may testify, if you know.
18 THE WITNESS: I don't know.
19 BY MR. HADDAD:
20 Q. Have you looked for it?
21 A. No.
22 Q. Now, I want to ask you a hypothetical question because you
23 were asked what you would have done if you had seen Officer
24 Vass do a strip search on that day, and I want to ask you a
25 different one.

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

774

1 If Officer Vass has testified in this case that he
2 did not handcuff Michael Holmes during that February 20th, 2007
3 stop and he's the one who searched him, would you have any
4 reason to disagree with that?
5 A. Only that I recall --
6 MR. BOLEY: Objection, Your Honor. That calls for
7 speculation and misstates the testimony.
8 THE COURT: Objection is overruled.
9 You may answer.
10 THE WITNESS: I know for a fact that I pat-searched
11 Mr. Holmes on the sidewalk in the 9400 block of East 14th
12 Street, I know that I did. I am unsure if Officer Vass
13 pat-searched him or not, but I am absolutely certain that
14 Officer Vass did not reach in the man's pants, or any of that.
15 BY MR. HADDAD:
16 Q. And it's a matter of faith on your part that he didn't
17 reach into Mr. Holmes' pants; isn't that right?
18 MR. BOLEY: Objection. Argumentative.
19 THE COURT: The objection is overruled.
20 You may answer.
21 THE WITNESS: Can you repeat your question, please.
22 BY MR. HADDAD:
23 Q. It's a matter of -- strike that.
24 It's an assumption on your part when you say Officer
25 Vass did not reach into Michael Holmes' pants on that occasion;

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

775

1 isn't that right?
2 A. No, sir.
3 Q. You didn't see him do the search, did you?
4 A. I didn't see him do anything to that man.
5 Q. Now, going to the January '07 Orozco incident, this is the
6 high-speed chase that you talked about.
7 A. Yes, sir.
8 Q. Have you reviewed any reports in connection with that chase
9 to refresh your memory before today?
10 A. No, sir.
11 Q. So everything you've testified to today about what Officer
12 Vass and Officer Mork did in connection with that incident and
13 the aftermath, back on January 2007 is based on your memory; is
14 that right?
15 A. Solely.
16 Q. And you said that you assigned Officer Vass and Officer
17 Mork to assist with some search warrants with County Task
18 Force?
19 A. Yes, sir?
20 Q. When were those served, do you know?
21 A. Right after the end of the car chase -- let me fix that:
22 Within an hour after the end of the car chase.
23 Q. Where were they served?
24 A. I'm sorry? One was in the area of 96 and Cherry. And I
25 think there is one or two more in that same general area, but I

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

776

1 don't recall the exact locations.
2 Q. And how long did it take to serve those warrants?
3 A. I can only speculate.
4 Q. Okay, then we don't want you to speculate.
5 You don't know how long it took to serve them, do
6 you?
7 A. Not precisely, no.
8 Q. Okay.
9 And how far is that Cherry Street area where the
10 warrants were served from D Street and Elmhurst?
11 A. Ten, 15 blocks, maybe.
12 Q. And D Street and Elmhurst is squarely within the area that
13 Officer Vass and Officer Mork were assigned to; is that right?
14 The area of the City that Team 6 was working, right?
15 A. Oh, yes, yes.
16 Q. You testified that you believe Officer Vass and Officer
17 Mork were working in connection with the aftermath of this
18 police chase for the rest of their shift; is that right?
19 A. Yes, I needed the help.
20 Q. All day, and even overtime; is that right?
21 A. Yes, sir.
22 Q. And have you reviewed any records to see if that's true?
23 A. No, I have not.
24 Q. Okay.
25 Now, if they were serving warrants, that's

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

785

1 Q. By cell phone, it wouldn't, right?

2 A. Not on a CAD log, no.

3 Q. In fact, would there be any record of communication between

4 you and Officer Vass that happened on a cell phone?

5 A. Yes.

6 Q. What?

7 A. Cell phone records.

8 Q. How long does the department maintain those?

9 A. I don't know how long they maintain them, but I know they

10 do keep them for a period of time.

11 Q. Now, other than describing the numbers called and the time

12 of day that the call took place, cell phone records wouldn't

13 describe the nature of the call, would it?

14 A. No, it would not.

15 Q. Whereas the police radio CAD logs would describe something

16 about the nature of the call, correct?

17 A. Yes.

18 Q. Have you been trained about the Code of Silence?

19 A. Pertaining to what?

20 Q. Police work.

21 A. No.

22 Q. Have you ever heard of that term before?

23 A. On TV, yeah.

24 Q. You have never heard about it from the Oakland Police

25 Department?

Sahar McVicker, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

786

1 A. No.

2 Q. Do you have an understanding of what the term Code of

3 Silence refers to when it's discussed in connection with law

4 enforcement?

5 A. I find it to be inappropriate and silly to even discuss it.

6 Q. Why?

7 A. Because if someone needs to get fired, they generally do,

8 and I don't -- especially if somebody needs to get fired, I

9 will assist in getting rid of them.

10 Q. Um-hmm.

11 What about that supervisor of yours that was

12 trash-canning stop data reports; did he ever get fired?

13 A. I never said he was trash-canning anything.

14 Q. Didn't you believe he was treating them like trash?

15 A. That is what you said.

16 Q. Didn't you tell another lieutenant that you were concerned

17 that he was treating them like trash?

18 A. No, I did not, you did.

19 Q. You were concerned he wasn't maintaining them, as the

20 department required him to do, right?

21 A. I later learned that, yes.

22 Q. Because he was putting them in a box under his desk?

23 A. Yes.

24 Q. And you knew that wasn't the proper receptacle for those

25 things?

Sahar McVicker, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

787

1 A. That is why I corrected that activity.

2 Q. Did he get fired?

3 A. He opted to retire.

4 Q. In your 22 years on the police force, have you ever

5 reported another officer to Internal Affairs?

6 A. Yes.

7 Q. How many times?

8 A. Several.

9 Q. Have you ever observed any officer conduct a strip search

10 of anybody in the field?

11 A. Not in the last fifteen years, or so.

12 Q. Going back fifteen years, do you recall observing strip

13 searches in the field then?

14 MR. BOLEY: Relevance, Your Honor.

15 THE COURT: Objection sustained.

16 BY MR. HADDAD:

17 Q. Now, as a sergeant, is one of your responsibilities to make

18 sure that officers you supervise do not have a conflict of

19 interest in any of the work that they are doing?

20 MR. BOLEY: Objection. Vague as to the term

21 "conflict of interest." And relevance.

22 THE COURT: Objection overruled.

23 You may answer.

24 THE WITNESS: I'm not sure what specifically you are

25 referring to.

Sahar McVicker, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

Downum - Cross / Haddad

788

1 BY MR. HADDAD:

2 Q. If a member of the community was going to be the subject of

3 Oakland Police Department surveillance, would it be appropriate

4 to assign an officer to do that surveillance to a member of the

5 officer's family?

6 A. Oh, no.

7 Q. Would it be appropriate to assign an officer to do that

8 surveillance against a person that you knew the officer had a

9 grudge against?

10 A. It shouldn't be done.

11 Q. Would it be appropriate to allow an officer to conduct

12 surveillance on someone that was involved in litigation with

13 that officer?

14 A. It would be inappropriate to directly assign him with that

15 knowledge.

16 Q. And it would be inappropriate to allow it to happen if you

17 were aware it was happening, right?

18 A. If you were aware.

19 Q. Now, were you aware that the lawsuit filed by Michael

20 Holmes, Mark Ingram, and Richard Rix against Officer Vass was

21 filed on August 15, 2007?

22 A. No, sir, I had no -- no idea.

23 Q. Do you try to keep yourself apprised of when your officers'

24 conduct makes the newspaper?

25 A. We all make the newspaper one time or another.

Sahar McVicker, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

805

1 THE WITNESS: For both. He had the narcotics in the
2 car, transported it over to Mr. Mays, and then apparently sold
3 it to Mr. Mays. Given the information provided, you know,
4 through the wire and the undercover officers and the arrest
5 team officers, all of that coupled together --
6 THE COURT: How about you just have reasonable
7 suspicion to stop and find out what's going on?
8 THE WITNESS: No, I don't think so. I think we had
9 enough to arrest everybody.
10 THE COURT: With regard to the stop data forms,
11 once, you know, you took over or had responsibility for them,
12 changed how they were being handled, what, in fact, did happen
13 with them?
14 THE WITNESS: Oh, I would review them, and I would
15 take them, physically, and put them in the report box where
16 they are supposed to go.
17 THE COURT: And what happened with them after that,
18 do you know?
19 THE WITNESS: After that, I had no idea, ma'am.
20 There was a lady in our crime analysis section named Marie
21 Mason, that if you needed one for like an Internal Affairs
22 investigation, or something, you could give her a call, and I
23 guess she may or may not be able to locate them.
24 I have never had an occasion to actually have to
25 locate one, so I'm really unsure how to go about it other than

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

806

1 to call Marie.
2 THE COURT: Were they filed and maintained in some
3 location?
4 THE WITNESS: I know that now they have hired a
5 company to actually do it. They scan them, put them in a
6 computer, and all that kind of stuff. But as of a couple years
7 ago, it was inconsistent, I would say.
8 THE COURT: When you received them, did you ever
9 take them and compare them with any other, you know, arrest
10 reports or other reports that -- incident reports that may have
11 been filed?
12 THE WITNESS: Yes, ma'am. If, you know, we had an
13 arrest or a field contact, or anything of that nature, you
14 know, I would ensure that the correct number of stop data forms
15 were consistent with the other report forms and activity that
16 either were written on paper or that I overheard on the radio
17 or I was personally there for.
18 THE COURT: And did, though, those stop data forms,
19 when you looked at them and compared them with other activity
20 reports -- that may be the wrong term -- arrest reports or
21 field reports -- if you saw inconsistencies did you do anything
22 about that?
23 THE WITNESS: Oh, yeah, I talked to the guys once in
24 a while about it; either you need to do more of them or where
25 is the one for this, and that kind of stuff, and have them do

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

807

1 it. That would occur very seldom, every once in a while, but
2 not very often, you know, hey, where is the one for this, or
3 whatever, and kind of ensure that it was done.
4 THE COURT: Is it the practice that, if, in fact,
5 you are doing work, say with DEA or FBI or some other -- BNE or
6 whenever --
7 THE WITNESS: Un-hmm.
8 THE COURT: -- that if you write up a report in
9 connection with that, that the Oakland Police Department
10 doesn't retain a copy of that?
11 THE WITNESS: On occasion, yes. For wall-stop type
12 situations, we basically will write a copy and give it directly
13 to the DEA on occasion. Sometimes if it's a wall stop and we
14 are looking for state charging, then, yes, we will. It kind of
15 depends on the one need of the outside agency specifically
16 working with, you know, the DEA. Because some of our reports
17 were documented and put to our records division, just like
18 normal.
19 Other -- other reports, you know, pertaining to the
20 surveillance of a certain location or, you know, phone
21 information or things like that would be written and just be
22 directly given to them. I mean, I have written three or four
23 that personally that I know just went directly to the DEA
24 office here.
25 THE COURT: And if there is a stop but no arrest is

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

808

1 made, what record is made of that in terms of any kind of
2 written report?
3 THE WITNESS: Well, it should be that any stop that
4 you make should -- something should be written, either a field
5 contact card, a citation, a stop data form, and at least
6 something ought to be written.
7 As far as a report writing manual is concerned,
8 something needs to be done. You just can't stop a guy for
9 jaywalking and then, okay, see you, have a nice day, after you
10 find out he doesn't have any warrants or anything like that.
11 You still need to do something. You have to make note of the
12 stop.
13 I can -- I would understand, like, we all -- I
14 worked in Oakland for 20-some years, and I just know people.
15 So, you know, sometimes I'll just stop, hey, how you doing,
16 just kind of BS with them on the corner, or wherever they
17 happen to be. Or some of my old community member people I run
18 into, I sit and talk to them, or whatever. But it's more of a
19 social thing, kind of sort of. I mean, it's not really I'm not
20 looking to arrest anybody or write anybody a ticket or anything
21 like that, I'm just being social. And with that, you know, I
22 guess, to the letter of the law, I would be in violation of the
23 policy.
24 THE COURT: And if someone is stopped and is
25 searched but no arrest is made, what kind of a report is the

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

809

1 officer supposed to make of that?

2 THE WITNESS: Well, there should be, at minimum, a

3 field contact card, a, you know, stop data form, things of that

4 nature.

5 THE COURT: And should that card, reflect, then,

6 that a search was done and the type of search that was done?

7 THE WITNESS: I've never had it put to me that way

8 before. It seems to be proper, or would be okay.

9 THE COURT: Well, if you stopped the person and you

10 are searching the person, it's a little bit more than, you

11 know, have a nice day, right?

12 THE WITNESS: Yes, but I mean, you know, I was -- I

13 was employed here at the Oakland Police Department well before

14 the negotiated settlement agreement came, and, you know, we

15 stopped people all day long and said hi, and this and that,

16 whatever, searched them, okay, have a nice day, take it easy,

17 that kind of thing, and we didn't do anything. But, you know,

18 now we have different rules, and stuff like that to play by.

19 THE COURT: What happens now?

20 THE WITNESS: What happens now? You should write it

21 down.

22 THE COURT: How about in the period 2005 to 2008?

23 THE WITNESS: It's consistent with that. Some of

24 our forms have changed, but still you need to write something

25 down.

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

810

1 THE COURT: You were supposed to have been doing it,

2 then?

3 THE WITNESS: Yes.

4 THE COURT: Are there times when an officer who

5 comes off duty and doesn't look as if he's done much of

6 anything if you look at what's been written up, and you inquire

7 what were you doing, didn't you make any stop, didn't you do

8 this didn't you do that --

9 THE WITNESS: I work Highway Patrol squad right now,

10 and I have guys that do absolutely almost nothing, yeah. So

11 yes, it does occur. And I talk to them, and it generally

12 reflects in their yearly evaluation, and things like that. You

13 know, they -- I deny them things like schools or other fun

14 stuff to do.

15 THE COURT: Well, do they have a certain number of

16 stops they are supposed to make?

17 THE WITNESS: No, there is no quota or anything like

18 that. No.

19 THE COURT: And with respect -- going back to this

20 Ortega matter, as I understand it, Officer Vass was instructed,

21 or someone was instructed to then ID the people in the vehicle?

22 THE WITNESS: Yes, ma'am.

23 THE COURT: Is that correct?

24 THE WITNESS: Yes.

25 THE COURT: And what is the basis for doing that?

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

EXAMINATION BY THE COURT

811

1 THE WITNESS: To confirm the identity of the folks

2 in the car.

3 THE COURT: Yes, but what -- maybe that's the wrong

4 question.

5 What is the authority for doing that?

6 THE WITNESS: I don't --

7 THE COURT: Can't just stop a car.

8 THE WITNESS: A vehicle code violation.

9 THE COURT: What was the vehicle code violation?

10 THE WITNESS: 22108.

11 THE COURT: Which is?

12 THE WITNESS: Failure to turn your blinker on.

13 THE COURT: Was that what was going on here?

14 THE WITNESS: Yes, ma'am. For the stop of

15 Mr. Ortega, yes.

16 THE COURT: Yes.

17 And did the gentleman who was driving get a ticket

18 for that?

19 THE WITNESS: No, ma'am.

20 THE COURT: Was that written up anywhere in a

21 report, that they were stopped for --

22 THE WITNESS: It's on Officer Vass' field contact

23 card.

24 THE COURT: Okay, we'll take a look and see, okay.

25 Anything further?

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

812

1 May this witness be excused?

2 MR. BOLEY: Oh, no, Your Honor, I do have a couple

3 of questions.

4 THE COURT: Shouldn't have asked because that was

5 the end. Forget that. No, no, no. This is the end of the

6 tennis match. He's tired, anyway.

7 You may step down. You don't get the extra

8 questions just because I asked him a few questions.

9 You may not discuss your testimony, however, with

10 any other witnesses or persons until the trial is over.

11 You probably want to go home, anyway.

12 What time is it?

13 Your next witness is?

14 MR. BOLEY: Officer Vass.

15 THE COURT: Oh, Officer Vass?

16 MR. BOLEY: Yes.

17 THE COURT: How long are you going to be with him?

18 A while, I'm sure.

19 MR. BOLEY: You know, I think that my examination

20 will be about as long as Sergeant Downum.

21 THE COURT: Why don't we just take about ten

22 minutes, then, right now.

23 (Recess taken at 10:58 a.m.)

24 (Proceedings resumed at 11:26 a.m.)

25 THE COURT: You are still under oath. The oath will

Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060

CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Tuesday, March 23, 2010

*Sahar McVickar, C.S.R. No. 12963, RPR
Official Court Reporter, U.S. District Court
(415) 626-6060*

EXHIBIT 12

OPD - Action Plan Tracking

11 Aug 11

Task 3 – OPD to conduct integrity tests of subjects of repeated allegations of misconduct

Action Step	Responsible	Due Date	Status
Increase staffing of ITU	Capt. Figueroa	N/A	Completed
New ITU policy for units outside IAD on conducting integrity tests	Capt. Figueroa	N/A	Completed
Bureau level integrity tests	Bureau Chiefs	N/A	On-going
Focus on repeat offenders as integrity testing subjects	Capt. Whent	N/A	On-going
Focus on “in-moment” misconduct	Capt. Whent	N/A	On-going
Consult with Monitor during integrity test process to ensure compliance	Capt. Whent	N/A	On-going
Since 07 Apr, ITU has conducted seven field tests and one selective test on members of repeated allegations of misconduct and four planned tests. BFO has conducted two tests and BOI has met with ITU and will begin to conduct integrity tests.	Capt. Figueroa	N/A	On-going as of 26 May 11.
ACOP endorsed confirmation letters to 65 officers who passed IT tests.	ACOP Jordan	N/A	Completed 15 Jun 11.

Since 26 May, ITU has conducted four planned tests and four field tests. All have been on subjects of repeated complaints.	Capt. Whent	N/A	On going as of 16 Jun 11.
Completed three integrity tests involving surveillance of members identified through repeated allegations. Two of the tests failed and investigations have been initiated.	Capt. Whent	N/A	Tests completed as of 30 Jun and investigations are pending as of 5 Jul 11.
Transfer of personnel: replaced officer with one with more experience with surveillance operations to enhance efficiency and quality of tests.	Capt. Whent	N/A	Completed 09 Jul 11.
Changed language to letter to officers who have passed integrity tests.	Capt. Toribio	N/A	Completed 08 Jul 11.
Monitor's 6 th Quarterly Report found task in compliance			02 Aug. 11. In-compliance.
Integrity Tests to also focus on PAS Top 30 UOF and Complaints; tests relevant to allegations on Top 30.	Capt. Figueroa	N/A	In-progress
Conduct tests on possible abuse of sick/injury leave.	Capt. Figueroa	26 Aug 11	Pending follow up with City Attorney's Office.

Task 5.5 – Commander is notified when complaint is made

Action Step	Responsible	Due Date	Status
Provide refresher training to Communication's personnel reinforcing the importance of completing the DIL properly	Act. Lieut. Gonzalez	N/A	Completed
Weekly/Monthly compliance reviews by designated compliance auditors/assessors	OIG/IAD/Comm Section	N/A	On-going Recent weekly audits show 100% compliance
The ACOP and OIG met with Bureau of Services Commander and the Communications Center Acting Lieutenant to discuss daily auditing process and what is being done to ensure the DIL is completed thoroughly. Recent OIG audit discovered a DIL missing box indicating the name of the commander notified. ACOP advised this failure was unacceptable and disciplinary action would be taken if this happened again. An action plan was developed to prevent future occurrences. SNF entries made for the commanders and supervisors involved.	AC Jordan	N/A	Completed 21 Apr 11.
IAD Intake Section Commander issued directive to Intake Staff to audit the DIL on a daily basis. Per IAD Commander, an annuitant is conducting a weekly	Capt. Figueroa	N/A	Completed 21 Apr 11. Audit on-going.

audit on this subtask.			
DIL revised to include field for 2 nd reviewer at the Communications Center.	BOS	N/A	Completed 11 May 11.
Met with BOS and Communications Center Commanders to discuss deficient DIL from 11 May 11. BOS Commander was issued a Written Reprimand.	AC Jordan	N/A	Completed 27 May 11.
Monitor's 6 th Quarterly Report found task in compliance.			02 Aug 11. In-compliance.

Tasks 5.15, 5.16, and 5.18 – Quality of IAD investigations

Action Step	Responsible		Status
Creation of quality control team to review all IAD cases before finalization	Capt. Toribio	N/A	Annuitant started 18 Apr 11. Reviewing all DLI and IAD investigations.
Change review process to require Captains to review investigations	AC Jordan	N/A	Completed 09 Jul 11.
Executive Staff to hold investigators and Reviewers accountable for failing to complete quality investigations	AC Jordan	N/A	On-going
Additional training for IAD investigators and Department commanders/managers on conducting quality investigations	AC Jordan	31 Jul 11	Training started 03 May 11. Completed 27 May 11. Seventeen sessions total. 14 Jun 11: Added additional training classes through 28 Jun 11. Will now assign remaining supervisors to a training session with completion by the end of July.
Implement recommendations by outside auditor regarding qualitative assessment of IAD	Capt. Toribio	15 Aug 11	Audit to be completed by end of April 2011. Exit interview held 21 Jun 11. Final report completed 05 Jul 11. OIG and IAD have

investigations			begun implementing recommendations.
Weekly compliance reviews and audits by designated compliance assessors (OIG and IAD)	Capt. Toribio	N/A	On-going
IAD providing bimonthly training to staff re. investigations. OIG to participate.	Capt. Whent	N/A	Started 12 May 11. On-going.
Checklists of policy requirements for investigators and reviewers revised and created to enhance quality of investigations.	Capt. Figueroa	N/A	Completed 22 Apr 11.
COP to be briefed weekly on deficiencies in IAD cases: significant problems and repeat offenders.	Capt. Whent	N/A	On-going
Standardized investigative template sent to all commanders and supervisors including Summary Finding.	Capt. Whent	N/A	Sent 09 Jun 11.
Revised investigative template to enhance credibility assessment examples.	Capt. Figueroa		Completed 03 Aug 11.

Task 6 (Refusal to Accept or Refer Citizen Complaints)
Fell from Compliance to Not In Compliance for 6th Quarterly Report
Phase One

Action Step	Responsible	Due Date	Status
Allegations to remain as MOR violations and not training issues.	ACOP	N/A	Completed 03 Aug 11.

**Task 20.2 – Consistency of supervision
Phase One**

Action Step	Responsible	Due Date	Status
Reduce Sergeant and Lieutenant leave time (Vacation and Training)	DC Breshears	N/A	On-going Relief schedule for lieutenants has been implemented to fill patrol lieutenant absences.
Reduce use of patrol sergeants as instructors	AC Jordan	N/A	On-going
Identify sergeant positions outside of patrol that can be replaced by officers. Replace at a rate commensurate with overall staffing levels	AC Jordan	N/A	On-going
Replace sergeants assigned to Homicide Unit as investigators with officers. Two in 2011 and at least two 2012.	AC Jordan	Oct 11	
Identify sergeant positions outside of patrol that can be replaced by other staff or eliminated, if work can be parsed to other staff. Move sergeants within one year.	AC Jordan	Jan 2012	Pending IAD use of annuitants and civilianization of IAD.
Fill long-term lieutenant patrol vacancies to reduce need for acting lieutenants	AC Jordan	N/A	Promotions held 10 Jun 11. On-going.
Promote vacant sergeant, lieutenant and Captain ranks to reduce backfill by lower ranks	AC Jordan	N/A	On-going Five sergeants promoted to lieutenant of police. Four assigned to patrol. Completed 10 Jun 11. Eight sergeants promoted on 08 Jul 11: five assigned to Patrol. City authorized promotion of one additional lieutenant and three sergeants. Pending promotion 26 Aug 11.
Amend 85% compliance			

standard: • Sick/injury time and FML does not count towards compliance • Back filling by a relief sergeant within the team counts towards compliance			
---	--	--	--

Phase Two

Action Step	Responsible	Due Date	Status
Reorganize Patrol for team supervision: • 12 admin/relief/training sergeants • Patrol has 1 relief sgt per same 4 patrol squads and PSO Unit has 1 relief sgt per Area • Flex schedule for Admin sgts assigned to Patrol (OPOA negotiations pending)	AC Jordan	N/A	Reorganization completed 09 Jul 11. Pending flex schedule for admin/relief sergeants & negotiation with OPOA and creation of Corporal position.
Reassignment of squads to increase sergeants in patrol: • Eliminate Traffic Squad	DC Breshears	N/A	Elimination of Abandoned Auto Unit rescinded. Completed 09 Jul 11.
Civilianization of IAD: • Reduce sgts from 13 to 3 by replacing with civilian staff	AC Jordan	Jan 2012	Pending

Task 24 (UOF Reporting Policy)
Moved to Partial Compliance in 6th Quarterly Report due to Level 4 (Pointing of Firearm) analysis which questioned if force was necessary and appropriate

Action Step	Responsible	Due Date	Status
Front end review to identify and address problems.	Capt. Toribio	N/A	On-going as of 06 Jun 11.
OIG UOF Audit	Capt. Toribio	30 Sep 11	To include subtasks of Tasks 24.
Outside auditor to conduct qualitative analysis of Level 4 (Pointing of Firearm) including hand strikes, TASER, impact weapons.	Capt. Toribio	15 Oct 11.	Pending
Identify modifications to training and/or policy re. pointing of firearm.	ACOP Jordan	01 Oct 11	Pending
Review of Patrol Rifle Policy & Deployment	Capt. Toribio	01 Sep 11	Pending

Task 25 (UOF Investigations and Report Responsibilities)
Fell out of compliance in 5th Quarterly Report and in compliance for the 6th.

Action Step	Responsible	Due Date	Status
Front end review to identify and address problems.	Capt. Toribio	N/A	On-going as of 06 Jun 11.
Reminder to Commanders regarding deadlines: Division Commander authorization; reason for extension; who approved, new date; document in chronological log; BFO Admin to advise of new due date.	DC Breshears	N/A	Email sent 18 Apr 11. On-going.
DC Breshears reviewing all			

UOF extensions. Capt. Allison revising chronological log to calculate due dates.			
Level One timelines: review to reduce need for extensions, improve expediency.	Capt. Figueroa/ Capt. Toribio	25 Jul 11	Completed 16 May 11. Per Capt. Figueroa all Level One UOF to receive high priority. Assigned investigator to have other cases reassigned to help ensure Level One case is completed in a timelier manner. OIG researching other agencies to identify ways to improve Level One timeliness. 25 Jul 11: The following has been implemented to complete Level One UOF in a timelier manner: 1. Annuitant assigned to assist investigators on Level One UOF. A second annuitant started on 10 Aug 11 specifically for this purpose. 2. 30 day review with ACOP, OIG, Homicide, and City Attorney to identify work needing completion, areas of concern, additional resources. 3. Reduced status report case review and deadlines from ten to five work days.
Information Bulletin on boilerplate language in crime reports to be issued.	Capt. Toribio	N/A	Pending. PowerPoint and IB under final review. Completed 08 Jun 11.
Issued Level Four common mistakes report for BFO commanders and supervisors handout.	DC Breshears	N/A	Completed 17 Jun 11.
OIG UOF Audit.	Capt. Toribio	30 Sep 11	To include subtasks of Tasks 24 and 25.
Identify periodic refresher training to underscore to supervisors importance of conducting timely, thorough,	ACOP Jordan	31 Aug 11	Pending identification of training points for lineup training.

complete, and impartial UOF investigations.			
Monitor's 6 th Quarterly Report found task in compliance.			02 Aug 11 – In compliance.

Task 30 (EFRB)**Found in Partial Compliance for 6th Quarterly Report**

Action Step	Responsible	Due Date	Status – Due Date
Ensure subject officer's commander attends EFRB.	DC Breshears	11 Aug 11	Completed. Force Board Coordinator to ensure commander is invited. For excused absence a commander in subject officer's chain-of-command must attend.
Schedule EFRB during site visit for proper assessment.	DC Breshears	11 Aug 11	Completed. Timelines may require coordination with Monitoring team or alternative arrangements be made.

Tasks 33.1 and 33.2 – Reporting Misconduct

Action Step	Responsible	Due Date	Status – Due Date
Revise investigator template to include a section for analysis by investigator, on sustained cases, for any member/employee who knew of misconduct, but failed to report it	Capt. Figueroa	N/A	Completed 18 Jan 11.
Monitor's 5 th Quarterly Report found subtasks in compliance.			22 Apr 11 – In compliance.

Task 34 – Stop Data

Action Step	Responsible	Due Date	Status
Conduct audits of FI reports to determine if identifiable basis and/or authority for stop have	DC Israel	N/A	On-going

been documented			
Re-train members on how to 1) properly complete a FI report and 2) how to properly articulate the reason and legitimacy of the stops and pat-searches. Provide refresher training on stops based on reasonable suspicion or probable cause.	DC Israel	07 Jul 11	Expected completion 27 May 11 – pending review of training rosters.
Merge the FI report and stop data report in FBR so the documented reasons and/or legitimacy of stops for each stop data form are easily accessible	DC Israel	N/A	Completed 13 May 11.
Conduct analysis of stop data and issue report	Capt. Rachal	N/A	Began weekly reporting the COP 20 May 11. Next draft report due 17 Aug 11. Focus is on stops resulting in searches by race.
Secondary review of data to ensure accuracy for Monitoring audit.	Capt. Toribio	N/A	Completed.

Task 40/41 – Personnel Assessment System

Action Step	Responsible	Due Date	Status
OPD providing training to supervisors and commanders on PAS reviews	DC Israel	N/A	Completed
All PAS reviews inspected for quality, completeness, analysis, and documentation	DC Israel	N/A	On-going
OPD to increase PAS Unit staffing	DC Israel	N/A	Added one additional staff member on 19 Mar 11.

Development of a more reliable and sustainable PAS system, including sufficient IT support	City	June 2012	In-progress
Custodian of records program provides weekly report identifying status of data entry for their particular database, identification of problems and data entry delays	DC Israel	N/A	On-going
Daily audits for data accuracy	DC Israel		On-going
Outside audit to review PAS data and quality of PAS and provide recommendations for improvement	Capt. Toribio	31 Jul 11	Final Report completed 04 May 11. OPD reviewing and to begin implementing recommendations.
Updated PAS so identification of outliers is automated in the system. Undergoing beta testing for use in threshold reports. The reports calculate outliers using a three standard deviation from the mean formula for an 18 month period from date report is generated.	DC Israel	30 Sep 11	Pending. Beta testing as of 04 May 11. DIT unable to correct all problems with this automated process. DIT needs to rehire outside consultant to make corrections.
Case Evaluations and Report Review Notice data separated in IPAS.	DC Israel	N/A	Completed 28 Mar 11.
Monitor's 5 th Quarterly Report found Task 40 In Compliance			22 Apr 11
PAS Training for officers: purpose and responsibilities	DC Israel	15 Mar 12	On-going. Began 31 May 11.
Sergeants required to review all	DC Israel	N/A	Completed 13 May 11.

Field interview cards			
Task 41 Audit	Capt. Toribio	15 Sep 11	14 Jul: Preliminary audit results indicate follow up meetings are being conducted late—not within five calendar day timeline for follow up meetings. OIG met with ACOP and Research and Planning Division Commander to discuss corrective measures. R & P Commander to issue biweekly status reports to Deputy Chiefs and Captains. Commanders who miss timelines shall report to ACOP for corrective action.

Task 43 Academy and In-Service Training
Task in Compliance

Action Step	Responsible	Due Date	Status
Training Needs Assessment	ACOP Jordan	On-going	Training Section has completed Training Needs Assessment for Youth and Family Services Section (18 Feb 11). Training Section (29 Apr 11). and Animal Services Section (15 Jul 11). Special Operations Division assessment pending; Patrol Division to follow. Communications Section & Evidence Technician Unit due 31 Aug 11.
Evidence Technician Training	ACOP Jordan	31 Aug 11	Training needs assessment to be completed by Evidence Technician Unit, Crime Lab to coordinate with Training Section to set up training session for technicians, schedule technicians into relevant CPT courses.

Task 45.1 – Central system for documenting and tracking discipline and corrective action

Action Step	Responsible	Due Date	Status
Date added upon Chief making disciplinary finding	Capt. Whent	N/A	On-going
Weekly/Monthly compliance reviews by designated compliance auditors/assessors	OIG	N/A	On-going
Modified database to add “Discipline Pending” and “Skelly Pending.” to cover period between sustained finding and disciplinary finding. Policy dictates a 30 day period for discipline to be imposed after sustained finding.	Capt. Figueroa	N/A	Completed 26 Apr 11.
Database modification to include “No Discipline Imposed” Field.	Capt. Figueroa	10 Aug 11	Completed.

EXHIBIT 13

REDACTED

EXHIBIT 14

REDACTED

EXHIBIT 15

REDACTED

EXHIBIT 16



INFORMATION BULLETIN

OAKLAND POLICE DEPARTMENT

Date: 13 Sep 11

"Information Bulletins shall be used to set forth information, notices, or announcements regarding topics of general interest. Such bulletins shall not constitute official policy. Information Bulletins expire two years from the date of publication unless revised, canceled, or superseded sooner. Members shall retain them until expiration."

Level 4 – Pointing of Firearm

Legislative Considerations and Documentation/Articulation Reminders

The purpose of this bulletin is to remind officers that the pointing of a firearm constitutes a use of force and is therefore subject to the Fourth Amendment. The objectively reasonable standard of the Fourth Amendment used to evaluate any use of force, including the pointing of a firearm, is set forth in United States Supreme Court decisions, i.e. *Graham v. Connor* and *Tennessee v. Garner*. In both cases, the United States Supreme Court gave attention to the following facts and circumstances in determining whether any force, including pointing a firearm, is appropriate:

1. The severity of the crime at issue;
2. Whether the suspect poses an immediate threat to the safety of the officer or others; and
3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Documentation and Articulation

In determining the need and appropriate level of force, officers should evaluate each situation in light of the facts and circumstances known to the officer at the time. It is imperative that officers clearly articulate those circumstances in their report. It is equally important for supervisors and commanders, when critically reviewing use of force reports, to make certain that the circumstances prompting the force are adequately articulated.

Factors to consider and articulate when using force include, but are not limited to, the following:

- The seriousness of the crime or suspected offense
- The level of the threat the suspect poses to the officers or others
- Whether the suspect is actively resisting arrest or attempting to flee from officers
- The conduct of the subject being confronted as reasonably perceived by the officer at the time
- The proximity or access of weapons to the subject
- The availability of other resources
- The training and experience of the officer
- The ratio of the number of officers to number of suspects
- Officer versus suspect factors such as age, size, relative strength, skill level, injury, exhaustion
- The environmental factors and/or others exigent circumstances
- Whether the suspect is sober or under the influence of drugs or alcohol
- The age of the suspect

DGO K-4 requires the following documentation when reporting a Level 4 UOF incident;

- The member or employee who uses force shall include the following minimum information regarding the use of force incident in their Offense, Supplemental, or Use of Force Report:
 - The original reason for police presence on the scene;
 - The circumstances that resulted in the use of force; and
 - A detailed description of the force used.

Officers should additionally document, if applicable, why force was escalated and whether the force used could have been deescalated.

Case Law Examples

The following are case law examples of force that the courts determined to be justifiable based on the totality of the circumstances.

Ward v. Gates (2002) 52 Fed Appx. 341

The 9th Circuit held that officers did not use excessive force in pointing a weapon and detaining persons they found in a bank when responding to a bank robbery. The court stated that while it was later discovered that there was no need to use any force, as the two detainees were not criminals and had no intention in harming the officers, the question is not how much force was actually needed but how much force a reasonable officer would perceive needing. The officer conduct need not be the least intrusive means available. The court stated that officers were justified in using the force given the totality of the circumstances and the facts as they thought them to be, i.e. that they were responding to a report of a serious felony, that they were unaware that anyone had permission to be in the bank, and that they were unaware upon arrival that the Plaintiff was unarmed.

Lee v. City of Novato (2004) WL 1971089

The District court ruled against Plaintiff and held that the officer did not use excessive force when pointing his firearm at Plaintiff. At 2:00 a.m., four officers responded to a report of a gang fight at an apartment complex. The area was a high crime area and officers had responded to this complex on prior occasions for weapon and drug offenses, burglaries in progress, and domestic violence incidents. The officers witnessed three women in a car backing up rapidly from the complex parking lot. Officers ordered them out of the car. Two of the vehicle occupants immediately exited the vehicle; the Plaintiff took longer to exit the vehicle. Officers then ordered all three to get on the ground and the Plaintiff refused to comply. One officer then pointed his gun at Plaintiff as he walked toward her. The officer testified that he could not see Plaintiff's hands and did not know if she had a weapon. When he was close enough to determine that she was not armed he holstered the weapon. The district court granted summary judgment to the officer. The court stated that the officer acted reasonably, using the necessary level of force to ensure his own safety and the safety of fellow officers, and decreasing the level of force when appropriate.

Mejia v. City of Sacramento (Unpub. 9th Cir. 2006) 177 Fed Appx. 661

The 9th Circuit held that officers' pointing of weapons and handcuffing of Plaintiff during a search was objectively reasonable in light of the fact that (1) Plaintiff was present in the home of a known felon and probationer who had owned firearms in the past, (2) officers were uncertain about plaintiff's relationship to probationer, and (3) the danger to officers entering a home for a search. Officers had probable cause to believe that home belonged to probationer and that probationer was home at the time.

Deskins v. City of Bremerton (9th Circuit 2010) 388 Fed. Appx 750

Court held that officer's actions were reasonable where she pointed her gun at a deaf man during a traffic stop. The court reasoned that (1) the officer did not know the man was deaf and why he was refusing to obey commands, (2) she was on a dark highway with no other cars, (3) there was only one officer to one suspect, (4) the suspect was much larger than officer, and (5) she did not know whether he was armed or not. The court also held that even if the officer's conduct was unconstitutional the law was not clearly established that drawing a weapon in the particular circumstances amounted to excessive force so therefore she was entitled to qualified immunity.

Information Bulletin

Level 4 – Pointing of Firearm

Legislative Considerations and Documentation/Articulation Reminders

13 Sep 11

The following are case law examples of force that the courts determined to be non-justifiable based on the totality of the circumstances.

***Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007**

The 9th Circuit found excessive force where two officers pointed their firearms at Plaintiff's head. The court considered (1) that the crime under investigation was a misdemeanor (the call was for a man carrying a shotgun that had just shot two dogs), (2) the suspect appeared unarmed and was approaching officers in a peaceful manner, (3) there were no dangerous or exigent circumstances, and (4) the officers outnumbered the Plaintiff. Plaintiff had been armed earlier with a shotgun which he used to shoot two dogs on his property, but he was clearly not armed at the time of the detention. The court concluded that the use of a weapon that Plaintiff clearly no longer carried is insufficient to justify the intrusion on Plaintiff's personal security. Further, the court noted that officer never searched Plaintiff during the entire encounter, which supports the proposition that officers did not believe Plaintiff was armed. *Robinson* overruled the previous leading case, *Fuller v. Vines*. In *Fuller*, the issue was not whether there was excessive force but whether there was a seizure. The court held that an officer's actions in pointing his gun at Plaintiff did not indicate that Plaintiff was not free to leave and therefore was not a seizure. The pointing of the firearm was only a restraint on the person such that he could not attack the officers. The court held that while Plaintiff may have a state law tort action there was not a Fourth Amendment Constitutional violation. The *Robinson* court stated that to the extent that *Fuller* is read to suggest that the conduct of officers in pointing a gun at a suspect during an actual seizure can never be excessive force, it is overruled.

***Motely v. Parks* (9th Cir. 2005) 432 F.3d 1072**

Officer was found liable where he pointed his gun at an infant during a parole search of a residence. The court stated that while an officer helping to conduct a parole search of a gang member parolee's house may have been objectively reasonable to have drawn his gun during the initial sweep of the parolee's home, the officer's act of keeping his gun trained on a 5 week old infant while the officer searched a particular room was not objectively reasonable. The court reinforced that an officer's show of force is subject to the reasonableness standard even where no actual force is applied and that the use of force against a person who is helpless or subdued is constitutionally prohibited.

EXHIBIT 17

REDACTED

EXHIBIT 18

REDACTED

EXHIBIT 19

Rocky Lucia

From: Oakland Police Officers' Association [darotzarena7824@aol.com]
Sent: Tuesday, September 13, 2011 3:01 PM
To: Rocky Lucia
Subject: Message from the President

Having trouble viewing this email? [Click here](#)



September 2011

Member Alert

Dear Rocky,

In the Sixth Quarterly Report of the Independent Monitor, a section entitled "Supplemental Assessment: Officers Pointing Firearms" indicated that the Independent Monitor is "troubled by the high number of instances where the officers' pointing of a firearm was not necessary or appropriate, given the documentation we reviewed." The OPOA believes that the documentation of these incidents (primarily K4, Level 4 reports) is in most cases adequate and meets Departmental standards, yet some reports are lacking sufficient detail to fully document the legitimate actions taken by our members. The manner of review by the Department also needs to be fine-tuned to catch some of the reports that are not as detailed as they need to be. The OPOA believes that these two issues have significantly contributed to the Monitor's conclusions. We believe that the Monitors are not issuing a blanket criticism of the incidents themselves nor the actions of our members.

Every day our members put their lives at risk to protect the members of our community. Since 2000, the City of Oakland averaged 6,238 reported violent crimes and 104 murders per year.[1] By all accounts the level of violence in Oakland is such that our members must always expect the unexpected and that means officers may frequently have to unholster their firearm at a moment's notice given the level of criminal activity there is in Oakland.

While pointing our firearms is at times necessary to protect yourself and the community, fully documenting that event is also a must. The OPOA strongly recommends that members take as much time as necessary to review their K4 level 4 uses of force reports before submission. Be sure that when completing such a report it is clearly documented why the event occurred and there is no ambiguity. We are confident that fully documenting our actions will necessarily eliminate statistics showing "inappropriate" incidents. Should you have any questions about what to write in your K4 report, make sure you check with supervisor, or check our policies and Report Writing Manual.

Our number one goal is officer safety and protecting our community.

Dom Arotzarena
President, OPOA

[1] According to the Department of Justice Uniformed Crime Reporting Statistics (UCR)

Oakland Police Officers' Association
OPOA
Oakland, California 94607
510-834-9670

These emails are for OPOA members only. You are receiving this email because you have signed up for them. The OPOA will not sell your email address. The OPOA reserves the right to remove email address from this service. Go to opoamembers@gmail.com to sign up. You must show you are a current member of the OPOA. Don't forget to add donelan@opoa.org and opoamembers@gmail.com to your address book so we'll be sure to land in your inbox!

You may [unsubscribe](#) if you no longer wish to receive our emails.

 **SafeUnsubscribe**



Try it FREE today.

This email was sent to rlucia@rlslawyers.com by darotzarena7824@aol.com |
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).
Oakland Police Officers' Association | OPOA | 555 5th Street | Oakland | CA | 94607