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May 17, 2016

HONORABLE CITY COUNCIL
Oakland, California

**Re: First Quarterly Report from the City Attorney Regarding
Recent Arbitration Decisions, Efforts to Support the Police
Discipline Process, and Recent Developments in Police
Discipline.**

Dear President Gibson McElhaney and Members of the Oakland City Council:

I. INTRODUCTION

This is the City Attorney's First Quarterly Report to the Council in open session regarding the referenced subject matters. We anticipate providing quarterly reports to the Council at its regular meetings on the third Tuesdays of January, April, July, and October.

This report provides information on arbitration results and other developments related to police accountability. While future reports will provide this information on a quarterly basis, we believe it is important that this initial report cover a longer period. This will provide the Council with important context and a broader view of the reforms that the City has made. Accordingly, this report contains information regarding all the police-arbitration decisions that were issued after the 2014 arbitration decision involving Robert Roche, and the major improvements the Office of the City Attorney ("OCA") and the Oakland Police Department ("OPD") have made since they initiated reforms to the discipline process that same year.

The City has made significant improvements in the area of police accountability. Since the Roche decision, arbitrators have fully upheld police discipline 53% of the time. This is more than double the City's previous win rate, and exceeds the national average for police cases. These improvements are largely due to: 1) the Mayor's proposed budget for Fiscal Year ("FY") 2015-2017 and the Council's approved budget for FY2015-2017 which added a Deputy City Attorney to help support OPD's discipline process, specifically the investigative process; 2) an increase in collaboration between OCA and OPD; and 3) the City Attorney's implementation of protocols which ensure that attorneys timely and thoroughly prepare for arbitrations.

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II. RECENT ARBITRATION DECISIONS

	GRIEVANT & VIOLATION	CITY'S DISCIPLINE	ARBITRATOR'S DECISION	OUTCOME	DECISION DATE
1	Officer A Use of Force (Baton strikes)	15 Days	Upheld City's discipline.	15 Days	12-30-2014
2	Officer B Use of Force (Baton strikes)	15 Days	Reduced City's discipline.	1 Day	12-30-2014
3	Officer C Use of Force (TASER deployment)	1 Day	Upheld City's discipline.	1 Day	4-6-2015
4	Officer D Use of Force (Baton strikes)	5 Days	Upheld City's discipline.	5 Days	5-15-2015
5	Officer E Use of Force (TASER deployment)	15 Days	Reduced City's discipline.	5 Days	6-21-2015
6	Officer F Use of Force (Pushing a protestor)	1 Day	Upheld City's discipline.	1 Day	6-30-2015
7	Sergeant G Use of Force (Baton strikes)	30 Days	Reversed City's discipline.	0 Days	8-14-2015
8	Officer H Performance of Duty (PDRD) ¹	1 Day	Reduced City's discipline.	Written Reprimand	8-27-2015
9	Officer I Use of Force (TASER deployment)	10 Days	Upheld City's discipline.	10 Days	9-2-2015
10	Officer J Use of Force (TASER deployment)	10 Days	Upheld City's discipline.	10 Days	10-28-2015
11	Sergeant K Truthfulness and Harassment	Termination	Overtured City's termination and reduced discipline.	30 Days	10-29-2015
12	Officer L	5 Days	Upheld City's discipline.	5 Days	11-23-2015

¹ PDRD refers to a portable digital recording device, commonly referred to as a body camera.

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	GRIEVANT & VIOLATION	CITY'S DISCIPLINE	ARBITRATOR'S DECISION	OUTCOME	DECISION DATE
	Retaliation				
13	Officer M Failure to Supervise	5 Days	Reduced City's discipline.	Written Reprimand	12-7-2015
14	Officer N Use of Force and Reports / Bookings	Termination	Overtured City's termination and reduced discipline.	15 Days	3-1-16
15	Officer O Performance of Duty and Conduct Toward Others	12 Days	Reduced City's discipline.	10 Days	3-12-16

There have been 15 arbitration decisions since the Roche decision. In 8 cases (or 53%), the City's discipline was fully upheld. In 6 cases (or 40%), the discipline was reduced, and in 1 case (or 7%) the discipline was overturned. To put this in perspective, a November 21, 2014 article in the Wall Street Journal reported that police unions win reversals or modifications in more than 60% of disciplinary cases that go to arbitration nationwide.² In other words, police discipline nationwide is fully upheld at arbitration *less than* 40% of the time.³ During the five years prior the April 2015 report of Court-appointed investigator Ed Swanson, arbitrators fully upheld the City's discipline in 7 of 26 cases (or 27%).⁴ Having been fully upheld in 53% of recent cases, the City has nearly doubled its success rate at arbitration and has outperformed the national average in the process.

An examination of several subsets of cases shows where City has made the biggest gains and where there remains the most room for improvement. With respect to cases that involved uses of force, OCA and OPD have done particularly well; discipline has been fully upheld in 7 of the 10 cases (i.e., 70%). On the other hand, arbitrators fully upheld 3 of the 7 cases (i.e., 42%) that involved suspensions of 10 days or longer. This rate is consistent with the national average reported in the Wall Street Journal. It is nevertheless notable because it indicates that arbitrators have been more likely to modify or reverse longer suspensions than shorter ones. Similarly, arbitrators reinstated with suspensions both of the officers whose termination cases were decided

² Elinson, *Punishment of Police Under Scrutiny*, The Wall Street Journal (Nov. 21, 2014) available at <http://online.wsj.com/articles/punishment-of-police-under-scrutiny-1416598682>.

³ A seminal study of police disciplinary arbitrations in Chicago from 1990-1993 by Professor Mark Iris found strikingly similar results. In those outcomes, 41% upheld the level of discipline, 19% reduced it, and 40% reversed it. Iris, *Police Discipline in Chicago: Arbitration or Arbitrary*, 89 J. of Crim. L. and Criminology 215, 235 (1998).

⁴ During that five-year period, the overwhelming majority of Oakland officers who were disciplined (91%) did not appeal their discipline all the way to arbitration. The result was that the City arbitrated an average of 5.2 police cases per year for those five years. From December 2014 to the present, however, the City arbitrated an average of 10 police cases per year, meaning the rate nearly doubled. Future reports will examine whether the rate increases, remains steady, or decreases.

since September 2014. Termination cases obviously differ from suspension cases in that anything short of a complete victory by the City results in the reinstatement of an officer who OPD had deemed unfit to serve.

As Mr. Swanson found in his March 2016 report, the City's discipline was reduced or overturned in a number of high-stakes cases despite the City's substantial preparation and advocacy. There are several factors that help to explain the adverse outcomes. First, although these cases came to their final resolutions quite recently, the investigations and reviews leading up to those arbitration hearings predated many of the recent reforms OPD and OCA implemented. In other words, the records the City relied on in those cases did not benefit from the City's current, more rigorous investigative and review processes, which are discussed below. Second, high-stakes cases in general tend to be more difficult to win because they tend to be the most hard-fought by the officers and their union, and understandably so. Accordingly, even as the City continues to improve its processes, high-stakes cases will continue to be among the most difficult cases for the City to win outright with no reductions in discipline. Nevertheless, OCA and OPD are encouraged by the gains they have made, and continue to work on improving the outcomes for all cases.

III. OCA'S EFFORTS TO SUPPORT THE POLICE DISCIPLINE PROCESS

Arbitration Protocol

In July 2014, the City Attorney memorialized a protocol to ensure that OCA staff prepare for arbitrations in a timely and thorough manner (Attachment A). For cases that are assigned to outside counsel, the protocol requires that OCA assign the case early in the process, that counsel have expertise in police discipline, and that an OCA staff attorney provide close coordination and support throughout the process.

IAD Attorney

With the addition of a Deputy City Attorney in the City's most recent budget, OCA was able to assign a Deputy City Attorney as OCA's liaison and principal advisor to OPD's Internal Affairs Division ("IAD") and station the attorney at IAD on a part time basis. As Mr. Swanson acknowledged in his March 2016 report, this attorney's involvement at every phase of discipline has been instrumental in making the relationship between OPD and OCA more collaborative and productive.

Skelly Training

In 2015, OCA developed training for the Deputy Chief who handles the OPD *Skelly* hearings involving discipline exceeding five days.⁵ OCA held two training sessions in November 2015 for a total of 3 hours. OCA and the Deputy Chief jointly administered the training to the rest of OPD's *Skelly* officers in January 2016. OCA and OPD will continue to update the training and administer it on at least an annual basis.

⁵ *Skelly* hearings are a due process right, prescribed by the California Supreme Court, which allow officers to review and respond to the materials their employers rely on in reaching disciplinary decisions.

Policy Review

As OPD discusses in greater detail in the report it is submitting concurrently herewith, OPD is in the process of updating its policy manual and migrating it to the Lexipol system. OCA has supported OPD in its development of a protocol for the migration, and is providing legal review and analysis of key polices as they move through the review and approval process. Three attorneys are dedicating significant time to providing support for this process.

IV. RECENT DEVELOPMENTS IN POLICE DISCIPLINE

Effective August 28, 2015, the City Administrator adopted a new Administrative Instruction, which specifies how information on police investigations and discipline is to flow to OCA from OPD and Employee Relations. (Attachment B) The Administrative Instruction is designed to make OCA a part of the entire disciplinary process. In addition, during bargaining with the police officers' union in 2015, the City proposed that the new MOU include a requirement that both sides exchange witness lists and exhibits. The union agreed and the requirement has been incorporated into the new MOU.

V. CONCLUSION

We ask that the City Council accept this informational report.

Respectfully submitted,



BARBARA J. PARKER
City Attorney

Assigned Attorneys:
Ryan Richardson
Veronica Harris

Attachments:

Attachment A (OCA Arbitration Protocol)

Attachment B (Administrative Instruction 550)

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
Memorandum

TO: Labor and Employment Unit Supervisor and Staff

FROM: City Attorney Barbara J. Parker

DATE: July 10, 2015

RE: **ARBITRATION PROTOCOL**

This protocol shall be followed for all arbitrations. With the exception of section C, these procedures are not new, but instead memorialize practices already in place.

A. Staffing

The supervisor shall assess each case and current staff workload to determine whether the case will be handled by a staff attorney or assigned to outside counsel. The supervisor shall assign cases to staff attorneys or outside counsel as early as possible to maximize the attorney's preparation time and shall make every effort to assign each case prior to the scheduling of the arbitration hearing. If a hearing date has been scheduled or in the judgment of the supervisor needs to be scheduled before an attorney has been assigned to handle an arbitration, the supervisor will immediately advise the Chief Assistant City Attorneys and the City Attorney.

In selecting outside counsel, the expertise of the individual attorney who would be assigned to the case is the most important factor in selecting outside counsel. After confirming that the individual attorneys who are being considered for the assignment have the expertise to handle the assignment, the OCA will consider other factors such as cost, strategy, diversity, and whether the firm is local. Regardless of whether the case is assigned to a staff attorney or outside counsel, a staff attorney will be assigned as co-counsel to each case. Co-counsel will provide support during case preparation, attend the hearing, and assist in the preparation of the closing arbitration brief.

B. Initial Case Assignment

Within two weeks after assignment, the attorney will be expected to conduct a preliminary review of the case. Outside counsel will promptly report the assessment to staff co-counsel, who will provide any needed support or assistance in obtaining further information and/or contacting witnesses. For OPOA discipline cases, the initial assessment will include a review of the IAD Report of Investigation, any findings by the EFRB/FRB, *Skelly* recommendation, the imposition of discipline, Step 3 letter, and audio and video evidence. The initial case review must be sufficient to make an initial identification of necessary information and witnesses. In addition, the attorney shall

evaluate whether the case potentially requires consultation with and/or the testimony of an outside expert witness as part of the initial assessment

Upon completing an initial review, the attorney will determine whether settlement should be recommended. If the attorney believes settlement may be prudent, he or she shall inform the supervisor of the recommended settlement offer and the basis for it. If the supervisor agrees that settlement is advisable, the staff attorney will pursue that avenue with input and guidance from the supervisor.

Within two weeks after completing the initial case review, the attorney will be expected to begin requesting information from the client and contacting potential witnesses to advise them of the engagement, the case and the hearing date and plan of action. The attorney should follow up if he or she does not receive prompt responses. Outside counsel shall regularly update staff co-counsel of progress on the case, including scheduled witness interviews and receipt of any additional information or documents.

Even when a hearing is several or more months away, and even when the attorney has more immediate deadlines, he or she will be expected to perform the initial case review and begin requesting information and advising client and witnesses of the engagement and hearing date. These steps are necessary in every case. Taking these steps promptly will allow attorneys to work efficiently, maintain the office's client relations, and limit the overall stress associated with arbitration hearings.

C. Request for Witness and Exhibit Lists from OPOA for OPD Discipline Arbitrations

The assigned attorney shall confer with the staff attorney or supervisor, as the case may be, regarding the potential witnesses and exhibits that the attorney anticipates OPOA will utilize. Promptly after the initial case review, the attorney shall contact OPOA's attorney to request a list of the witnesses, including experts, and a list of the documents that OPOA will present at the hearing. The request must be documented in writing. If OPOA agrees to provide the list, the attorney will confirm that in writing including the date such list will be provided. If OPOA declines to provide the list, the attorney will memorialize this in writing.

The attorney is not required to request an exchange of witness or exhibit lists if, upon consultation with the staff attorney or supervisor, an exchange likely would not be to the City's strategic advantage. If such a determination is made, the attorney will memorialize it in writing and include the rationale for the decision.

D. Pre-Hearing Preparation

Well in advance of the hearing, the attorney will contact potential witnesses to discuss the case. When prudent, the attorney will contact potential witnesses who are not City employees, including percipient witnesses and expert witnesses. The attorney

will assess their role in the case and determine whether they should be prepared to testify. For all witnesses who will be asked to testify, the attorney shall schedule preparation time with the witness well in advance of the hearing.

The attorney will be expected to prepare examination outlines for both direct and cross examinations. The attorney further will be expected to identify the order of witnesses, prepare the witness list, and identify and prepare the City's exhibits. If it is determined that it is strategically advantageous to do so, the attorney may contact opposing counsel and offer to exchange witness lists (including the identities of any expert witnesses) and exhibit lists.

E. Post-Hearing De-brief and Feedback

The attorneys are expected to meet with the supervisor and the Department representative shortly after the hearing to discuss the effectiveness of the case, including any mistakes or "lessons learned." The staff attorney shall then prepare a written summary for the City Attorney and the client(s) regarding the arbitration proceedings, and providing analysis and feedback as needed. After the City receives a decision from the arbitrator, the assigned attorney will prepare an updated assessment of the case, including performance of witnesses, the arbitrator, the attorneys and an assessment of the IAD report, *Skelly* and other aspects of the case. This writing will be circulated to the City Attorney, Chief Assistant City Attorneys and the Department and a "post mortem" meeting or conference call will be scheduled to discuss the assessment and lessons learned and future strategies.

Staff attorneys are expected to solicit feedback from clients regarding perceived competence and effectiveness of outside counsel. The supervisor is expected to solicit feedback from clients regarding competence and effectiveness of in house counsel.

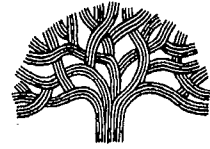
Very truly yours,



BARBARA J. PARKER
City Attorney

cc: Otis McGee, Chief Assistant City Attorney
Doryanna Moreno, Chief Assistant City Attorney

CITY OF OAKLAND



ADMINISTRATIVE INSTRUCTION

SUBJECT	Oakland Police Department Internal Investigations and Discipline Process	NUMBER	550
REFERENCE	AI 523	EFFECTIVE	8/28/15
SUPERSEDES			

I. PURPOSE

The purpose of this Administrative Instruction is to establish procedures for the Internal Affairs Division (“IAD”) of the Oakland Police Department (“OPD”) and the City’s Employee Relations Department (“ER”) to notify the City Attorney’s Office (“OCA”) regarding important steps in the OPD discipline process.

II. POLICY

As set forth below, this Administrative Instruction provides for the notification of the OCA of the following steps in the OPD discipline process: (1) the commencement of investigations within the IAD Investigative Section; (2) *Skelly* hearings related to internal investigations resulting in sustained findings; and (3) grievances submitted to ER related to the same.

All written communications under this policy should reference the corresponding IAD internal investigation number(s) in the subject line of the communication.

III. DEFINITIONS

Term	Definition
Step 3	In accordance with the operative memoranda of understanding between the City and various bargaining units, members/employees or their representatives may submit unresolved grievances in writing to ER within a prescribed timeframe to attempt to resolve the dispute.

IV. PROCEDURES

A. IAD Investigations

Responsible Party

IAD Investigative Section
Commander

Action

1. The IAD Investigative Section Commander shall, upon assigning an internal investigation to an investigator within the IAD Investigative Section, notify the OCA of the investigation by e-mail. The e-mail shall be sent to the Supervisor of the Labor and Employment Unit of the OCA, with copies to the Chief Assistant City Attorneys and the City Attorney, and shall reference the IAD internal investigation number in the subject line.
2. Upon request and within a reasonable period of time, the Investigative Section Commander shall have transcripts of any audio or video recordings, including subject and/or witness interviews, contained in a case file, the IAD will have such transcripts prepared by a certified court reporter. The foregoing shall be delivered to the OCA in a timely fashion, i.e., a time frame will allow the OCA reasonable time to review the foregoing and provide advice.

B. Skelly Hearings

Responsible Party

IAD Commander
(or equivalent)

Action

1. Upon provisional approval of discipline resulting from a sustained finding in any internal investigation, the IAD Commander shall ensure that the OCA is notified promptly of the date and time of all scheduled *Skelly* hearings and the identity of the *Skelly* officer.
2. In addition, if a *Skelly* hearing is scheduled related to a sustained finding for which the proposed discipline is termination, demotion, or a suspension of greater than ten (10) days, the date of the hearing shall be coordinated with the OCA so that the OCA can send a representative if the OCA deems it appropriate to do so.

C. Step 3

Responsible Party

Employee Relations

Action

In the event that an employee or union representative elects to submit to ER officer a written grievance related to the discipline of a sworn or non-sworn employee of the OPD, ER officer shall promptly consult with the OCA prior to issuing the Step 3 response. ER shall provide the OCA sufficient notice so that the OCA has a reasonable time to provide advice and consultation.

V. ADDITIONAL INFORMATION

Please direct any questions regarding this A.I. to IAD at extension 3161.



Sabrina Landreth
City Administrator

