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CITY OF OAKLAND



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Office of the City Attorney
Barbara J. Parker
City Attorney

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November 15, 2016

Public Safety Committee
HONORABLE CITY COUNCIL
Oakland, California

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

Dear Chairperson Brooks and Members of the Public Safety Committee:

I. INTRODUCTION

This is the City Attorney's Second Report regarding the referenced subject matters. Our first report was presented to the City Council's Public Safety Committee on July 12, 2016 (Attachment A). That report was not forwarded by the committee to the full the Council. This report provides information on arbitration results and other developments related to police accountability during the months of April through September of 2016.

II. RECENT ARBITRATION DECISIONS

One police-related arbitration decision has been issued since we filed the last report.

	GRIEVANT & VIOLATION	CITY'S DISCIPLINE	ARBITRATOR'S DECISION	OUTCOME	DECISION DATE
1	Officer A Miranda Violation	2-Day Suspension	Upheld City's discipline.	2-Day Suspension	6-27-2016

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

OPD Departmental Counsel

In April 2014, OCA assigned, on an interim basis, an experienced supervising attorney to serve as OPD's Departmental Counsel. In addition, OCA assigned a senior staff attorney to support OPD's Departmental Counsel. Previously, the supervising attorney assigned to OPD simultaneously advised multiple departments and bodies, such as the Fire Department, Office of Emergency Services, the Public Ethics Commission and staff, and the Council's Public Safety Committee. The provision of a dedicated Departmental Counsel to OPD represents a significant increase in legal support services for OPD. OPD has provided positive feedback to the City Attorney and the City Administrator about the new arrangement.

OCA has begun the process of recruiting and interviewing applicants to permanently fill the Departmental Counsel position. Once the City Attorney identifies the finalists, OCA will work closely with OPD and the City Administrator to fill the position, taking into account the Department's hiring preference. The City Attorney and the City Administrator have memorialized their process for recruiting, hiring, evaluating and reassigning Departmental Counsel (Attachments B and C).

Internal Affairs Division Training

OCA provided IAD Investigator training in September 2016. The training was provided in two sessions and totaled six hours. OCA created the training to provide in depth and interactive instruction on important aspects of the investigation process. The trainees included the current internal affairs investigators and IAD command staff. Topics included:

- Managing investigations
- Identifying Manual of Rules violations
- IAD interviews
- Credibility assessments
- Analysis of allegations

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IV. CONCLUSION

We ask that the City Council accept this informational report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barbara J. Parker". The signature is fluid and cursive, with the first name "Barbara" and last name "Parker" clearly distinguishable.

BARBARA J. PARKER
City Attorney

Assigned Attorneys:
Ryan Richardson
Veronica Harris

Attachments:

- Attachment A** First Progress Report Regarding Recent Arbitration Decisions, Efforts to Support the Police Discipline Process, and Recent Developments in Police Discipline dated May 17, 2016
- Attachment B** OCA Process for Hiring and Evaluating OPD Departmental Counsel dated June 23, 2016
- Attachment C** CAO Process for Hiring and Evaluating OPD Departmental Counsel dated June 24, 2016

FILED
OFFICE OF THE CITY CLERK
OAKLAND

CITY OF OAKLAND



2016 MAY -5 PM 2:31

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Office of the City Attorney
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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.

HONORABLE CITY COUNCIL

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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	Overtaken 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	Overtaken 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.

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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.

CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

To: Sabrina Landreth
City Administrator

From: Barbara J. Parker
City Attorney

Date: June 23, 2016

Re: **Interdepartmental Cooperative Process for Recruiting, Hiring,
Evaluating and Reassigning Departmental Counsel to the Oakland
Police Department (OPD)**

The City Attorney recognizes the value of and commits to a cooperative approach in the hiring process for Departmental General Counsel (GC) to the Police Department (OPD). This memorandum outlines the responsibilities of the Office of the City Attorney (OCA) in this cooperative process.

OCA will work with the Chief of Police (Chief) to shape the job announcement to attract applicants with the strengths and expertise that are important to both offices. OCA will closely review and evaluate all applications, conduct interviews of qualified eligible candidates for the position, and determine who the finalists should be. After this, OCA will present a list of no fewer than two finalists to the Chief.

OCA will provide the Chief with a reasonable time frame in which to interview the finalists if the Chief so chooses. OCA will discuss its assessments of the finalists with the Chief and will listen to the Chief's views regarding the finalists. The City Attorney will not unreasonably refuse to hire and assign the attorney who receives the Chief's endorsement.

The topic of legal services for OPD will be a standing item on the agenda for the City Attorney's monthly meetings with the City Administrator and Chief. During each of these meetings, OCA will discuss any issues the Chief and/or City Administrator may raise concerning the quality and/or quantity of legal services the Departmental Counsel (or other OCA attorneys) provide to OPD. The City Attorney will follow up on any such

Memo to Sabrina Landreth

June 23, 2016

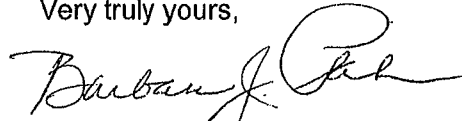
Re: Interdepartmental Cooperative Process for Recruiting, Hiring, Evaluating and Reassigning Departmental Counsel to the Oakland Police Department (OPD)

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issues and will take corrective action as appropriate.¹ The City Attorney will carefully consider requests by the City Administrator and/or Chief for a Departmental Counsel reassignment and will not unreasonably deny such requests.

The City Attorney will attempt to resolve any concerns the Mayor, City Administrator and/or Chief may raise at the end of each fiscal year regarding the legal services OCA provided to OPD during the year. OCA understands that if OCA, the Mayor and the City Administrator do not reach a resolution that addresses the Mayor's and City Administrator's concerns, the Mayor and City Administrator may provide a proposal to the City Council to adjust OCA's budget.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Barbara J. Parker', with a large, stylized initial 'P'.

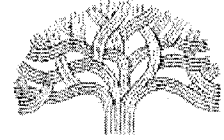
BARBARA J. PARKER
City Attorney

cc: Chief of Police

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¹ Additionally, if OPD believes advice it receives from its Departmental Counsel is incorrect, the Chief may request a second opinion and OCA, in accordance with its longstanding practice, will secure such opinion from outside counsel. OCA also secures outside conflict counsel when she or he has a conflict of interest regarding a particular matter.

CITY OF OAKLAND



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Office of the City Administrator
 Sabrina B. Landreth
 City Administrator

(510) 238-3302
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MEMORANDUM

To: City Attorney and Chief of Police
 From: Sabrina Landreth, City Administrator *SBL*
 Date: June 24, 2016
 Re: **Interdepartmental Cooperative Process for Recruiting, Hiring, Evaluating and Reassigning Departmental Counsel to the Oakland Police Department (OPD)**

The City Administrator recognizes the importance of allowing the Chief of Police (Chief) to have the opportunity to provide input into the hiring of the Departmental General Counsel (GC) to the Police Department (OPD) and commits to participation in a cooperative approach for doing so. This memorandum outlines the responsibilities of the City Administrator's Office and Chief in this cooperative process.

The Chief is hereby instructed to work with the City Attorney to shape the job announcement to attract applicants with the strengths and expertise that are important to both offices. The Chief will review the finalists for the job that OCA recommends. The Chief may elect to conduct interviews. The Chief will discuss assessment of the finalists with OCA and will listen to OCA's analysis regarding the potential effectiveness of each finalist. The Chief will then endorse one of the finalists. The City Administrator and Chief expect that OCA will not unreasonably refuse to hire and assign the attorney who receives the Chief's endorsement.

The City Administrator will ensure that the topic of legal services for OPD will be a standing item on the agenda for the City Administrator's and Chief's monthly meetings with the City Attorney. The City Administrator and/or Chief shall raise any issues they may have concerning the quality and/or quantity of legal services OPD receives from the Departmental Counsel (or other OCA attorneys) during each of these meetings. The City Administrator and Chief will seek to identify potential problems early so that the City Attorney may intervene and take corrective action where appropriate. Where corrective action proves unsuccessful, the City Administrator and/or Chief will advise the City Attorney in the event they believe the City Attorney should assign a new GC to OPD. The City Administrator understands that the City Attorney will not unreasonably deny such requests.

At the end of every fiscal year, as part of the annual Budget process, the City Administrator, Chief and the Mayor will conduct a performance review of the level of service OCA provided to OPD that year. If the review finds OCA has provided inadequate legal services, the Mayor and City Administrator will discuss their findings with the City Attorney. If the Mayor, City Administrator, and City Attorney do not reach a resolution that addresses the Mayor's and City Administrator's concerns, the Mayor and City Administrator may provide a budget amendment to the City Council to adjust the City Attorney's budget.