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November 29, 2016

HONORABLE CITY COUNCIL  
Oakland, California

**Re: Supplement to City Attorney's Second Report Regarding Recent Arbitration Decisions, Efforts to Support the Police Discipline Process, and Recent Developments in Police Discipline. (Forwarded by Public Safety Committee on November 15, 2016 – PSC Agenda Item 4 "Police Training, Policy and Accountability")**

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

## **I. INTRODUCTION**

At the Public Safety Committee's July 12, 2016 meeting, under Item 7, this Office presented our first report regarding recent arbitration decisions, efforts to support police discipline process and recent developments in police discipline. At the Committee's November 15, 2016 meeting, under Item 4, we presented our second report. Our second report attached our first report and was forwarded to the Council's November 29, 2016 meeting. This report supplements our first and second reports.

Our first report covered general developments in police discipline dating back to 2014, which is when the Office of the City Attorney ("OCA") and the Oakland Police Department ("OPD") began major reforms to the discipline process. Our first report also covered specific arbitration decisions as far back as December 2014. We chose this cut-off for arbitration decisions for two reasons. First, it captures the very first arbitration hearings that benefitted from the City's major reforms. Second, an analysis of cases prior to December 2014 would have been redundant. Both the City Attorney's office and a Court-appointed, independent investigator previously issued separate, detailed reports on the five-year period preceding December 2014.

Nevertheless, when we presented our reports to the Public Safety Committee, there was some concern about the cut-off date we chose for arbitration results. Specifically, there was concern that we had included too many arbitration results, thereby making it difficult to identify shorter-term trends. To address that concern, we submit this supplement, which analyzes case outcomes over time.

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**II. RECENT ARBITRATION DECISIONS <sup>1</sup>**

|          | <b>GRIEVANT &amp; VIOLATION</b>                         | <b>CITY'S DISCIPLINE</b> | <b>ARBITRATOR'S DECISION</b> | <b>OUTCOME</b>    | <b>DECISION DATE</b> |
|----------|---|--------------------------|------------------------------|-------------------|----------------------|
| <b>1</b> | Officer A<br>Use of Force<br>(Baton strikes)            | 15 Days                  | Upheld City's discipline     | 15 Days           | 12-30-2014           |
| <b>2</b> | Officer B<br>Use of Force<br>(Baton strikes)            | 15 Days                  | Reduced City's discipline    | 1 Day             | 12-30-2014           |
| <b>3</b> | Officer C<br>Use of Force<br>(TASER deployment)         | 1 Day                    | Upheld City's discipline     | 1 Day             | 4-6-2015             |
| <b>4</b> | Officer D<br>Use of Force<br>(Baton strikes)            | 5 Days                   | Upheld City's discipline     | 5 Days            | 5-15-2015            |
| <b>5</b> | Officer E<br>Use of Force<br>(TASER deployment)         | 15 Days                  | Reduced City's discipline    | 5 Days            | 6-21-2015            |
| <b>6</b> | Officer F<br>Use of Force<br>(Pushing a protestor)      | 1 Day                    | Upheld City's discipline     | 1 Day             | 6-30-2015            |
| <b>7</b> | Sergeant G<br>Use of Force<br>(Baton strikes)           | 30 Days                  | Reversed City's discipline   | 0 Days            | 8-14-2015            |
| <b>8</b> | Officer H<br>Performance of Duty<br>(PDRD) <sup>2</sup> | 1 Day                    | Reduced City's discipline    | Written Reprimand | 8-27-2015            |
| <b>9</b> | Officer I<br>Use of Force<br>(TASER deployment)         | 10 Days                  | Upheld City's discipline     | 10 Days           | 9-2-2015             |

<sup>1</sup> In addition to the sixteen (16) arbitration decisions from our first and second reports, this chart includes the City's most recent decision.

<sup>2</sup> PDRD refers to a portable digital recording device, commonly referred to as a body camera.

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|           | <b>GRIEVANT &amp; VIOLATION</b>                            | <b>CITY'S DISCIPLINE</b> | <b>ARBITRATOR'S DECISION</b>                          | <b>OUTCOME</b>    | <b>DECISION DATE</b> |
|-----------|--|--------------------------|---|-------------------|----------------------|
| <b>10</b> | Officer J<br>Use of Force<br>(TASER deployment)            | 10 Days                  | Upheld City's discipline                              | 10 Days           | 10-28-2015           |
| <b>11</b> | Sergeant K<br>Truthfulness and Harassment                  | Termination              | Reduced City's discipline<br>(overturned termination) | 30 Days           | 10-29-2015           |
| <b>12</b> | Officer L<br>Retaliation                                   | 5 Days                   | Upheld City's discipline                              | 5 Days            | 11-23-2015           |
| <b>13</b> | Officer M<br>Failure to Supervise                          | 5 Days                   | Reduced City's discipline                             | Written Reprimand | 12-7-2015            |
| <b>14</b> | Officer N<br>Use of Force and Reports / Bookings           | Termination              | Reduced City's discipline<br>(overturned termination) | 15 Days           | 3-1-2016             |
| <b>15</b> | Officer O<br>Performance of Duty and Conduct Toward Others | 12 Days                  | Reduced City's discipline                             | 10 Days           | 3-12-2016            |
| <b>16</b> | Officer P<br>Miranda Violation                             | 2 Days                   | Upheld City's discipline                              | 2 Days            | 6-27-2016            |
| <b>17</b> | Officer Q<br>Conduct Toward Others                         | 3 Days                   | Reduced City's discipline                             | 2 Days            | 9-30-2016            |

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### III. CASE OUTCOMES BY YEAR

#### A. All Cases

|                 | 2014    | 2015    | 2016    | All Years |
|-----------------|---------|---------|---------|-----------|
| <b>Upheld</b>   | 1 (50%) | 6 (54%) | 1 (25%) | 8 (47%)   |
| <b>Reduced</b>  | 1 (50%) | 4 (36%) | 3 (75%) | 8 (47%)   |
| <b>Reversed</b> | 0 (0%)  | 1 (9%)  | 0 (0%)  | 1 (6%)    |
| <b>Total</b>    | 2       | 11      | 4       | 17        |

#### B. Use of Force Cases

|                 | 2014    | 2015    | 2016     | All Years |
|-----------------|---------|---------|----------|-----------|
| <b>Upheld</b>   | 1 (50%) | 5 (56%) | 0 (0%)   | 6 (60%)   |
| <b>Reduced</b>  | 1 (50%) | 1 (33%) | 1 (100%) | 3 (30%)   |
| <b>Reversed</b> | 0 (0%)  | 1 (11%) | 0 (0%)   | 1 (10%)   |
| <b>Total</b>    | 2       | 7       | 1        | 10        |

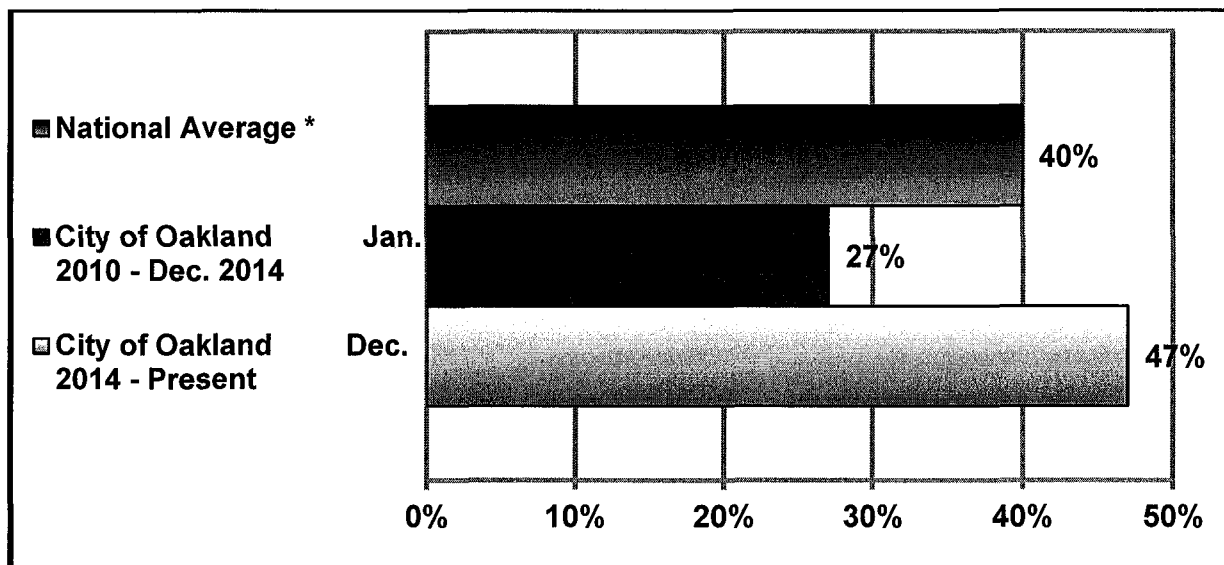
#### C. Cases Involving Suspension of 10 Days or More

|                 | 2014    | 2015    | 2016     | All Years |
|-----------------|---------|---------|----------|-----------|
| <b>Upheld</b>   | 1 (50%) | 2 (50%) | 0 (0%)   | 3 (43%)   |
| <b>Reduced</b>  | 1 (50%) | 1 (25%) | 1 (100%) | 3 (43%)   |
| <b>Reversed</b> | 0 (0%)  | 1 (25%) | 0 (0%)   | 1 (14%)   |
| <b>Total</b>    | 2       | 4       | 1        | 7         |

#### D. Termination Cases

|                 | 2014 | 2015     | 2016     | All Years |
|-----------------|------|----------|----------|-----------|
| <b>Upheld</b>   | 0    | 0 (0%)   | 0 (0%)   | 0 (0%)    |
| <b>Reduced</b>  | 0    | 1 (100%) | 1 (100%) | 2 (100%)  |
| <b>Reversed</b> | 0    | 0 (0%)   | 0 (0%)   | 0 (0%)    |
| <b>Total</b>    | 0    | 1        | 1        | 2         |

### **E. Percentage of Police-Discipline Cases Fully Upheld at Arbitration**



\* Source: 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>.

## **IV. DISCUSSION**

As we previously reported, an examination of several subsets of cases shows where City has made gains and where there remains the most room for improvement. For example, discipline in cases that involved uses of force has been fully upheld 60% of the time. This rate is significantly higher than the City's overall rate of 47%.

On the other hand, arbitrators have been less likely to uphold terminations and longer suspensions than to uphold shorter suspensions. Arbitrators fully upheld 3 of the 7 cases that involved suspensions of 10 days or longer. While the sample size is small, this rate of 43% is lower than the City's overall rate of 47%. Similarly, arbitrators overturned both terminations. That both these arbitrators still imposed suspensions is of limited significance since the end result was the reinstatement of two officers who the City previously deemed unfit to serve.

The fact remains that terminations and long suspensions are particularly difficult for public employers to defend at arbitration. With the exception of the three most recent cases, each of the cases reported above was reviewed by the Court's independent investigator.<sup>3</sup> Notably, in his latest report, the independent investigator found that arbitrators reduced the City's discipline in multiple recent cases despite the

<sup>3</sup> Mr. Swanson issued two separate reports on the City's discipline process and arbitration results. The first report was issued in April 2015 and covered approximately 5-years, from January 2010 through December 2014. His second report was issued 11 months later, in March 2016, and covered subsequent cases, up to and including the "Officer N" decision listed above.

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City's substantial preparation and advocacy. When employees stand to lose significant income or lose their livelihood altogether, their unions tend to expend more resources and fight harder, and some arbitrators tend to be more sympathetic. In our experience, this is true for both sworn and non-sworn employees. Nevertheless, OCA and OPD are encouraged by our gains and we endeavor to continue improving.

**V. CONCLUSION**

We ask that the City Council accept this supplemental, 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:  
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