

Fifth Progress Report of the Compliance Director for the Oakland Police Department

March 6, 2015

Introduction

This is the fifth progress report issued in my capacity as both Monitor and Compliance Director of the Negotiated Settlement Agreement (NSA) in the case of *Delphine Allen, et al., vs. City of Oakland, et al.*, in the United States District Court for the Northern District of California. In January 2010, under the direction of Judge Thelton E. Henderson, the Parties agreed to my appointment as Monitor of the Oakland Police Department (OPD). With the assistance of the Monitoring Team, I determine the status of OPD's compliance with the requirements of the 22 active NSA Tasks.

In December 2012, as a result of the City's slow progress with the NSA reforms, and following Court-ordered negotiations among the Parties, Judge Henderson established a Compliance Director for the Department. The Court's Order of December 12, 2012 outlined the Compliance Director's broad powers and responsibilities to "bring...[OPD] into sustainable compliance with the NSA and AMOU."¹ On February 12, 2014, Judge Henderson issued an Order finding it "appropriate and effective to now concentrate the powers of the Compliance Director and Monitor into one position."²

Wearing two hats – as Monitor and Compliance Director – is an extraordinary charge. It affords me many authorities: to determine whether the Department has achieved compliance with the NSA; and also to provide certain direction to the agency in its efforts to attain compliance.

As Monitor, I continue to oversee the Monitoring Team's work as we assess the Department's progress. The Monitoring Team makes quarterly visits to Oakland to meet with Department personnel; observe Departmental practices; review Department policies and procedures; collect and analyze data using appropriate sampling and analytic procedures; and inform the Parties – and, on a quarterly basis, the Court – with information about the status of OPD's compliance.

As Compliance Director, I hold more direct authority over the Department's NSA-related decisions. With the assistance of a seasoned associate, I serve as an agent of the Court, and work closely with OPD on a sustained basis. My primary focus is for the Department to achieve and sustain compliance with the reforms outlined in the NSA. As directed by the Court, I "have the power to review, investigate, and take corrective action regarding OPD policies, procedures, and practices that are related to the objectives of the

¹ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012. The AMOU, or Amended Memorandum of Understanding Re: Post NSA Terms and Conditions Allowing For the Resolution of Plaintiffs' Claims for Injunctive Relief and For Dismissal of The Action, was approved by the Court on June 27, 2011.

² United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Modifying Compliance Oversight Model, dated February 12, 2014.

NSA...even if such policies, procedures, or practices do not fall squarely within any specific NSA task.”³ I shall become involved in all matters that directly relate to the NSA – as well as issues in which there is a reasonable nexus to the NSA or those that concern civil rights, which I view as central to the NSA.

As of the last quarterly monitoring report (issued in January 2015), the Department was in full compliance with 19 of the 22 Tasks, and in partial compliance with one Task. (We also deferred our assessment of Tasks 5 and 45.) This is the highest number of Tasks in compliance since the beginning of our tenure – and in the history of the NSA. In this report, I discuss the status of the Tasks that remain out of compliance or have only recently come into compliance – and what the Department is doing currently to attain or sustain compliance with these requirements. I will also discuss my thoughts on the Reform Sustainability Phase, a process that can only be implemented until after a Court determination is made that “monitoring,” as we have known it, has been modified or suspended.

News Since Fourth Progress Report

Over the last few months, my associate and I observed several noteworthy developments in the Department, including:

- OPD has facilitated numerous protests, marches, and other events involving large crowds; and for the most part, these events have been peaceful. I continue to closely monitor officers’ uses of force and less lethal munitions; the Department’s interactions with citizens; and any related complaints or investigations in such events – and overall, I have been encouraged by OPD’s response to these activities in recent months. According to OPD, in the last quarter of 2014 (October 1, through December 31), the Department facilitated 31 protests and marches of approximately 10,000 protestors. While several of these events involved acts of violence against police officers, looting, and destruction of public property, OPD reported a total of 22 uses of force, one deployment of chemical munitions, and nine complaints. These numbers show that the Department is taking a more thoughtful and cautious approach to crowd control.
- We have observed that discussions at the monthly Risk Management Meetings have begun to improve in quality; Deputy Chief David Downing, who recently began facilitating the meetings, is noticeably prepared and comfortable with the data. Overall, this has improved the quality of the discussions. I would like to see the Department do a better job examining patterns of behavior, instead of just explaining away some findings. Risk Management Meetings serve as an essential

³ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

- tool in identifying and addressing the issues related to officers who have performance or other problems, and we will continue to engage Chief Sean Whent and his Executive Team to improve the inquiry in these forums.
- The Department is currently revising its policy on annual performance appraisals of its members and employees. As noted previously, we have observed that many members and employees are rated highly by their supervisors in the Department. While this phenomenon is not unique to OPD, given the significant number of years under which the organization has been monitored, we find this disappointing as it certainly devalues the assessments. We will continue to work on this issue with the Department.

As noted above, OPD is currently in compliance with 19 of the 22 active Tasks – the highest number of Tasks in compliance since the beginning of our tenure and in the history of the NSA. The Department must continue its steady progress with the reforms, and focus on making the reforms sustainable.

Discussion of Tasks

The Monitoring Team’s assessments have shown that OPD has not yet achieved – or has had difficulty maintaining – compliance with the following eight Tasks:⁴

- Task 20, *Span of Control for Supervisors*
- Task 26, *Force Review Board (FRB)* and Task 30, *Executive Force Review Board (EFRB)*
- Task 33, *Reporting Misconduct*
- Task 34, *Vehicle Stops, Field Investigation, and Detentions*
- Task 37, *Internal Investigations - Retaliation Against Witnesses*
- Task 40, *Personnel Assessment System (PAS) – Purpose* and Task 41, *Use of Personnel Assessment System (PAS)*

Below I will discuss recent efforts by OPD to achieve or sustain compliance with these Tasks.

⁴ The Monitoring Team found Task 20 in compliance in our nineteenth quarterly status report; Tasks 33 and 37 in compliance in our seventeenth and eighteenth quarterly status reports; Task 40 in compliance in our eighteenth quarterly status report; and Task 41 in compliance in our twentieth quarterly status report. We discuss these Tasks in this report because the Department has struggled to maintain compliance with these Tasks during our tenure.

Task 20, Span of Control for Supervisors

In our most recent quarterly status report, for the second consecutive reporting period, we found OPD in compliance with Task 20. OPD had previously been in partial compliance with Task 20 due primarily to its non-compliance with the subtasks related to consistency of supervision (Task 20.2) and the actual ratio of supervisors to officers (Task 20.3). Last year, my associate and I worked with Department officials and the Plaintiffs' attorneys to revise the methodology for assessing these subtasks. This mutually agreeable approach allowed the Department to achieve compliance with Task 20 – but even more importantly, to develop Task 20-related practices that are sustainable in the long term.

Late in 2014, in anticipation of its annual “draw” – in which officers, based on seniority, select their assignments for the coming year – the Department reworked its relief supervision system so that it includes 16, instead of 23, relief sergeant assignments.

It remains to be seen if this new design will allow the Department to sustain its newly achieved compliance with these critical requirements. My associate and I will soon review the data for the first quarter of 2015 to determine compliance under this altered model and assist the Department with any necessary tweaks.

Task 26, Force Review Board (FRB); and Task 30, Executive Force Review Board (EFRB)

In our most recent quarterly status report, for the second consecutive reporting period, we found OPD in compliance with Tasks 26 and 30. Prior to that, OPD had been in partial compliance with these Tasks during many different reporting periods since the beginning of our tenure.

Since the adoption of revised Departmental General Order K-4.1, *Use of Force Boards* – which requires the board proceedings to be more formal, efficient, and analytical – the Monitoring Team has continued to observe improvements in board hearings. For instance, Deputy Chiefs now regularly confer with presenters in advance of the hearings to communicate their expectations; the Department has reduced the number of participants who are required to attend hearings; and board members are provided reports and other evidence in advance of the hearing date.

In the next few months, I will continue to review more closely the downward trends in uses of force. As noted previously, OPD attributes the drops to improved training and changes in policy that characterize uses of force differently; encouragingly, our reviews of the documentation to date have not uncovered anything that indicates otherwise.

Task 33, Reporting Misconduct

OPD regained compliance with Task 33 in the seventeenth reporting period after being in partial compliance with this Task for four reporting periods due to the Department's failure of its officers to report misconduct during the Occupy Oakland events. The Department continues to report that it is increasingly holding individuals accountable for failing to report misconduct or activate their Personal Data Recording Devices (PDRDs) as required.

OIG recently conducted a review to determine if sergeants reviewed their subordinates' PDRD footage, as required by policy. Following its review, OIG issued an information bulletin to remind supervisors of this requirement. Yet while the current PDRD policy requires supervisors to audit their subordinates' PDRD footage, it does not set out *how* supervisors should do this, and the quality – and therefore, utility – of these reviews is inconsistent.

In the next few months, I plan to provide more direction to OPD to standardize the supervisory review of PDRD videos.

Task 34, Vehicle Stops, Field Investigation, and Detentions

Task 34 is one of the NSA's most significant requirements – as it addresses the bias-based policing that was an original issue in this case. OPD has been in partial compliance with Task 34 since the fourth reporting period.

Professor Jennifer Eberhardt of Stanford University continues to assist the Department with its stop data analysis. Dr. Eberhardt and her team expect to complete an examination of the first full year of available stop data in the next several months.

In the next few months, I will continue to work with OPD to explore ways in which the collected information and Dr. Eberhardt's analysis can serve as the basis for the development of training and other intervention activities to address the racial disproportionality. A recent Monitoring Team assessment concluded that of every four searches, one recovered contraband. The search recovery rates – sometimes referred to as “yield rates” – vary widely among different squads in the Department. We will explore with OPD officials ways in which the Department can learn more about what supervisors of squads with particularly high or low search recovery rates are doing or not doing.

Task 37, Internal Investigations – Retaliation Against Witnesses

OPD regained compliance with Task 37 in the seventeenth reporting period, after one reporting period of non-compliance and two reporting periods of partial compliance as a result of the Department's failure to respond fully to the most serious allegation of retaliation observed by the Monitoring Team. OPD reports that it aggressively scrutinizes

and investigates any allegations of retaliation. The Department is providing improved training to new police officers and employees to, according to OPD, emphasize a culture of accountability and the importance of reporting misconduct.

In the next few months, I will continue to discuss and review OPD's training on these critical matters.

Task 40, Personnel Assessment System (PAS) – Purpose; and Task 41, Use of Personnel Assessment System (PAS)

OPD regained compliance with Task 40 in the eighteenth reporting period after completing the upgrade that allows arrest data from Alameda County to automatically populate the Records Management System (RMS) without requiring manual data entry. OPD achieved compliance with Task 41 in the twentieth reporting period.

The Department, on occasion, reports problems with recording accurate arrest counts or other data in the PAS system. Encouragingly, the PAS Unit staff discovers these problems as part of its daily reviews of arrest data; it appears that the unit's internal audit procedures are successful in identifying these data problems.

As noted previously, as part of its risk management system, the Department constructs lists of the "Top 30" members and employees within several categories of risk-related activity. We are beginning work with the Department to focus on the individuals who are "repeaters" on these lists – that is, those who continue to meet system thresholds without changing their behavior.

Also over the next few months, I will review the IPAS2 system as Microsoft, the system's developer, fulfills different components of the project. In the meantime, as this new system is in development, we have encouraged OPD to set up an IPAS2 use committee – made up of representatives of different ranks and sectors of the Department – to think and learn more about how the system could be useful to different segments of the Department.

Discussion of Matters Outlined in December 12, 2012 Court Order

The Court's Order of December 12, 2012 grants the Compliance Director the authority to assist OPD to "address, resolve, and reduce: (1) incidents involving the unjustified use of force, including those involving the drawing and pointing of a firearm at a person or an officer-involved shooting; (2) incidents of racial profiling and bias-based policing; (3) citizen complaints; and (4) high-speed pursuits."⁵ The Order describes such matters as "key to driving the sustained cultural change envisioned by the parties when agreeing to

⁵ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Compliance Director, dated December 12, 2012.

the NSA and AMOU.” The Order also states that the Department should develop “a personnel assessment system (‘IPAS’) that provides a sustainable early-warning system that will mitigate risk by identifying problems and trends at an early stage.”

According to data provided by OPD, the Department has continued to make improvements in all of these areas. While OPD tracks all of its uses of force, including those “involving the drawing and pointing of a firearm at a person,” and it examines the justification for all Level 1 and 2 uses of force as part of its review board process, the Department does not specifically track “unjustified” uses of force. OPD did not have any officer-involved shootings in 2014. To date in 2015, the Department had two officer-involved shootings, both of which involved mentally disturbed suspects whose erratic behavior prompted calls to OPD. In one case, the officer’s two rounds missed the subject, who retreated and surrendered; in the other, the officer’s round struck the subject, who is expected to survive. We will closely monitor the ongoing investigations of these incidents. I also encourage the Department to examine the ways in which it trains officers to respond to subjects with mental health issues.

Also, thus far in 2015, the Department has logged six pursuits; at the same time last year, it had logged 12. As of the implementation of OPD’s revised pursuit policy (which took effect in January 2014), OPD now also tracks its “non-pursuits” – that is, situations in which officers do not elect to pursue but in the past, under the former policy, likely would have. Thus far in 2015, OPD has logged 38 non-pursuits. OPD continues to refine its policies on legitimate circumstances for pursuits.

In the area of “incidents of racial profiling and bias-based policing,” the available data raises many questions about what accounts for the varying search rates among different racial and ethnic groups – and it has not yet been determined whether there is a constitutionally valid basis for the disparity or there is a need for corrective intervention.

While OPD appears to be making progress – with the involvement of Dr. Eberhardt and the Department’s ongoing engagement with its publicly released stop data reports – this is an area that will be constantly scrutinized by us, the Court, the Plaintiffs’ attorneys, and the community. Notwithstanding some of the progress of the agency, and the value-added to its capacities with the access to Dr. Eberhardt, OPD must develop a greater sense of cultural comfort in its discourse on race. The Chief – who has set a good standard – must be joined by others, throughout the ranks, so that they too can be at the forefront of a dialogue that is now a national one.

In the next few months, I will continue to engage City and Department officials regarding strategies to resolve the disparities suggested by the Department’s available stop data; as well as how best to measure OPD’s progress in all of the critical areas outlined in the Court Order of December 12, 2012. I will discuss these matters further in future progress reports.

Other Recent Activities of Compliance Director

Beyond what is noted above, my associate and I have been involved in many activities since I issued my last progress report as Compliance Director:

- In an Order of August 14, 2014, the Court expressed its indignation with the recent reinstatement of an officer whom the Chief had terminated, and with the City's poor performance in other recent arbitrations – several of which also overturned terminations.⁶ The Order asserted that the Department is no longer in compliance with Tasks 5 (Complaint Procedures for IAD) and 45 (Consistency of Discipline), as it “question[ed] whether Defendants are adequately preparing cases for arbitration such that consistency of discipline can be assured to the greatest extent possible.” The Court ordered a far-reaching investigation of the discipline and arbitration process and directed the Department and City “to take appropriate corrective action to ensure sustainable reforms, including, if necessary, immediate corrective action pending further investigation.” As part of this investigation, which is currently wrapping up, we interviewed many key players in the discipline and arbitration process – inside and outside of the City – and are reviewing the last five years' worth of arbitrations files.
- Facilitating discussions between the Department and local attorneys from the legal team in the case of *Spalding v. City of Oakland*, which required significant changes to the Department's crowd control policy.
- Enhancing the Department's capacities for community interaction and engagement – including opportunities to solicit public feedback on its programs and initiatives. Members of the Monitoring Team and I occasionally meet with community groups to learn more about their interactions with the Department and their observations of its progress with the reforms. In January, for example, we facilitated a discussion between members of the Executive Team and a community coalition that is focused on policing issues.
- Providing guidance, mentoring, and technical assistance to Department officials in several other key areas – including recent personnel transfers and promotions, managing and training members and employees, new technological initiatives, policy revisions, and organizational changes.

Thoughts on the Reform Sustainability Phase

Several years ago, the Parties contemplated and agreed that once OPD achieved compliance with all of the NSA reforms, the Department would commence a sustainability period to demonstrate that the practices and reforms are fully sustainable. With NSA compliance at its highest level in the history of this process, I will soon be discussing with

⁶ United States District Court for the Northern District of California, Master Case File No. C00-4599 TEH, Order Re: Internal Affairs Investigations and Subsequent Proceedings, dated August 14, 2014.

the Court my recommendations on how to modify the current monitoring plan to make more efficient use of resources while focusing on the long-term sustainability of the reforms in the NSA.

I will also continue to work closely with the Chief and his Executive Team to build capacity and foster leadership within the Department, especially in ways that focus on sustainability of the reforms in the NSA. As one example, I will be working with the Department to create succession and training plans to ensure that personnel in new assignments learn from their predecessors about the responsibilities of their new positions.

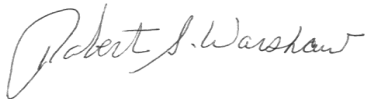
Finally, to build capacity within OPD:

- I shall require that OPD significantly bolster its internal audit function (OIG, by adding three or four additional full-time auditors) and demonstrate its capacity to conduct comprehensive audits – as well as to appoint and train appropriate personnel throughout the Department to conduct mini-audits on NSA-related and other procedures.
- The Monitoring Team will continue to review, analyze, and discuss in our quarterly status reports any NSA-related audits conducted by OIG and/or its external consultant.
- We will determine how the Department responds to the recommendations outlined in these audits – and if they help to improve the performance of the Department in different areas – and work with OIG to streamline its process for audit follow-up.
- I shall require the Department’s participation in the publication of quarterly monitoring status reports, with an eventual transition to a Department-issued status report.

Conclusion

The Oakland Police Department is now at its highest rate of compliance in the 12-year history of the NSA. Yet while significant progress has been made, there are some core matters – issues at the *heart* of this case – that have not yet been fully realized. The ongoing investigation of the disciplinary process points to some institutional failures and systemic deficiencies that may mitigate what is otherwise forward progress by the Department. Also, while OPD now has substantial data on who is stopped and searched by police officers, the Department still appears hesitant to *use* this information to learn more about the nature and outcomes of stops and searches – and to draw conclusions or address what it finds.

The City has a new Mayor who has appointed a new City Administrator. I have every reason to believe that the Mayor and her team are committed to the betterment of the agency's service deliveries and its compact with the community. That said, the Police Department, if it is to have sustainable reform, cannot do so in a vacuum. The City's leaders must demonstrate that the culture of accountability – so essential to what has been accomplished to date – extends to those elected and appointed leaders whose statutory and ethical obligations to this effort, cannot be allowed to waver.

A handwritten signature in cursive script that reads "Robert S. Warshaw". The signature is written in black ink and is positioned above the typed name.

Chief (Ret.) Robert S. Warshaw