Seattle Police Department
Office of Professional Accountability
Report of the Civilian Auditor
April-September 2008

STATUS OF CIVILIAN OVERSIGHT: Recommendations and Implementation of Changes

The three-part system for civilian oversight of the Police Department has undergone re-examination and adjustment in the past year. Two "blue ribbon" panels of prominent volunteers met extensively and received testimony. On January 29, 2008, the Police Accountability Review Panel [hereinafter the Mayor's Panel] released a report with 29 suggested changes in civilian oversight of the police, which the Mayor accepted. On June 12, 2008, the Seattle City Council Police Accountability Panel [hereinafter the Council's Panel] released a report supporting those recommendations and suggesting others intended to "complement and extend them." Both panels recommended that sworn personnel should continue to investigate allegations of misconduct by police employees under the leadership of a civilian Office of Professional Accountability [OPA] Director, who would continue to sit on the Command Staff. Both recommended expanding the role of an independent OPA Auditor and the membership of the OPA Review Board.

Combined with these suggested changes, the present Auditor is operating under a revised contract; the City signed a contract, with addenda and MOA's, with the Seattle Police Officers' Guild [hereinafter the Guild;] and the City Council passed a modifying Ordinance. Below is a summary of the major recommended changes in roles, reporting obligations, and procedures, with implementations to date.

Roles

<u>The OPA-IS and Civilian Director</u>

Both reports recommended that sworn personnel, under the leadership of a civilian Director, continue to provide initial classification and investigate allegations of misconduct by Department employees. The panels chose this mode over an outside investigative body: a choice in favor of effectiveness and credibility within the Department. The Director continues to sit on the

Command Staff and to recommend policy changes at that level. The Mayor's Panel recommended that the Director should attend "disciplinary" or so-called *Loudermill* "due process hearings," which are meetings of the employee with the Chief when a sustained finding and discipline are proposed. This change has been implemented by the new Ordinance and in practice. The Panel also recommended that the Director have control of the OPA budget. Under the new Ordinance, the Director makes recommendations regarding the OPA budget directly to the Mayor and the Council. It was also recommended that the Director have authority, in consultation with the Chief, to select and transfer OPA staff. This was the practice prior to the Panel's recommendation and continues.

There were two negative precautions: the Director should not have worked for the City in the preceding ten years and should not become a member of the Firearms Review Board. So far these recommended prohibitions have not been an issue.

The Director was advised to document all correspondence and substantive interactions with the Auditor and Review Board relating to the disciplinary process. This was and is the practice.

The Mayor's Panel suggested that the Chief appoint a high-ranking ethics officer who can provide advice and guidance to employees on issues of professional conduct. The Chief appointed a "Captain of Ethics and Professional Responsibility," in April 2008. The initial and primary focus is on ethical decision-making and the exercise of discretion "… in dealing with arrest, search, and seizure." The Captain is to serve as a Department resource for best practices on issues such as "…immigration policy; race and social justice; and racial profiling…."

The Council Panel recommended that "at least one third of the officers assigned to work at OPA should be detectives." All but one of the investigators of OPA-IS are detective sergeants, meaning they have passed qualifications for detective.

Role of the Auditor

In contrast to the last "blue ribbon panel" five years ago, which advised the City to abolish the Auditor position, both the Mayor's and Council's Panels recommended expansion of the role, continued as a civilian outside the

Department, doing real-time review of investigations. The Mayor's Panel opined that the Auditor's responsibilities "…should be increased beyond its current part-time independent contractor status." The commentaries regarding this new role and a recommended report on the Department's relationship with communities of color suggested that the Auditor review substantive policies and procedures beyond the OPA, to include the Firearms Review Board, the Police Intelligence Auditor, and "…issues of training, allocation of resources among precincts or squads, deployment and use of lethal and less-lethal weapons, policing approaches and enforcement policies." While the Mayor adopted and the Guild agreed generally to an expanded Auditor role, the job crafted so far has a more narrow focus -- on the OPA and on policies and procedures that relate to investigation of alleged misconduct. The term of this Auditor has been extended, subject to Council confirmation, until April 10, 2009. A modified contract explicitly authorizes critical review of outcomes; requires reporting on implementation of recommended changes in oversight, provides for quarterly meetings with the Director and Review Board, and coordination of in-depth reviews of "substantive policies, procedures and/or training that impact police accountability and/or the disciplinary system."

Although not endorsing a Department-wide inspector, the Mayor approved a larger role in review of policy and practice by requesting the Auditor to examine obstruction arrests where no further charges resulted. The Auditor reviewed 76 such cases from the past two and a half years and published a report in early October.

The City Council passed an Ordinance that also expands the powers of the Auditor, by giving him/her the authority to order rather than merely suggest additional investigation and assuring that all OPA records will be available.

Role of the OPA Review Board

The same Ordinance expanded the membership of the volunteer civilian Review Board to seven members of diverse backgrounds, tasked to review the complaint handling process as a whole, particularly its fairness, thoroughness and timeliness; advise the City and Department on policies and practices related to accountability and professional conduct; and organize and conduct public outreach focused on the complaint handling process and the professional conduct of police officers. The Mayor's Panel recommended the Board conduct at least four public hearings and/or community "listening sessions" each year. As well as being the primary link with the public, the Board is asked

to report on national trends and best practices in police oversight. The Ordinance and an MOA with the Guild provide that the Board not seek to influence or comment on the outcome of any particular case. The Board may continue to request and review randomly selected closed, redacted case files.

The Council's Panel also recommended the City indemnify the Review Board members and provide unredacted case files to them. The issue of unredacted files is pending in litigation.

The seven new Board members took office in September 2008. The Board has conducted a half-day training session attended by the Auditor and Director, who served as instructors for part of the session. The Board has set a regular schedule for its meetings. Various new members are learning about the system by attending the National Association for Police Oversight of Law Enforcement [NACOLE] conference, the Police Academy, going on ride-alongs, and sitting in on internal training sessions, as well as meeting informally with police and community groups.

Reports

The Review Board is tasked by the Ordinance to recommend topics for the Auditor's review of Department policies and practices related to accountability. The Board itself is to submit semiannual reports to the Council, Mayor, Chief, City Attorney and Clerk. The Auditor is also to prepare semiannual reports, as has been the practice. The Director is to compile and report on statistics concerning OPA case processing, which can be reviewed by the Board and Auditor, and make policy recommendations. This has also been the practice to date.

The Mayor's Panel suggested the reports of the OPA Auditor, Director and Review Board should be independently prepared, but jointly presented. The Auditor's contract specifies the Auditor, Director and Review Board should combine semi-annual reports into a single document. At this point, the Review Board is not yet in a position to report. This Auditor's Report includes commentary by the Director, as was done in the Spring 2008 Report, particularly where there were different views of cases or policy. The Chair of the Review Board has reviewed a draft and offered suggestions for this Report.

In keeping with the recommendations of both Panels, the Auditor's present contract and the Ordinance provide for consultation among the Review Board,

Director and Auditor on subjects for enhanced review by the Auditor. The Obstruction Report was such a subject, agreed to by the former Review Board and contributed to by the Director and Associate Director of OPA, as well as two designated members of the new Review Board and its Adviser.

The Panels recommended an in-depth look at the Department's relationship with diverse communities. The OPA Director and Auditor have begun by assessing the Department's own outreach to communities of color and diversity. The Review Board has designated liaisons for immediate cooperation with the Auditor and Director, and will address its public outreach role in the coming year.

The Council Panel recommended an annual Auditor report analyzing the "level of discipline imposed for various types of police misconduct." This has not been done to date. This Panel also recommended the Auditor annually report on OPA's response to "possible police misconduct as reported by Risk Management." While a specific report has not been done on this issue, the interaction of Risk Management and OPA was addressed in the Obstruction Report.

Procedures

The Panels and the new Ordinance foresaw greater cooperation among the three oversight entities, and it is fair to say that recommendation is being followed to the extent practicable. A Review Board training participated in by the Auditor and Director occurred on November 15th and was the second joint meeting; a joint report on diverse communities is anticipated; and the Auditor's reports include the Director's perspective on issues and cases.

Other recommendations for process changes are somewhat more difficult. The Mayor's Panel's third recommendation, for instance, was that:

> [t]here should be a separation between OPA investigations and any related criminal or civil proceedings. OPA investigators should not be involved as investigators in any related civil or criminal matter. Pending civil or criminal matters should not delay OPA investigations.

The commentary following this section is somewhat at odds with the last sentence, suggesting that the OPA extend its investigation time to accommodate

the unavailability of an employee or witness due to pending criminal charges. The Council's Panel made a similar suggestion. The Guild agreed to the separation of criminal and administrative investigations, but continues to control the timing of internal investigations. Its contract provides that an officer must be advised of potential discipline within 180 days of when the OPA or a sworn supervisor is notified of the alleged misconduct. That time may be extended if the officer is unavailable, but only with Guild approval for the unavailability of a witness or subject.

The OPA does complete its investigations (by and large) within the 180-day period even if a witness or complainant chooses not to cooperate. It generally awaits the outcome in misdemeanor criminal cases against the officer. The Department's former practice of discharging any employee facing a felony was invalidated by the Public Safety Civil Service Commission recently, so administrative discipline will now likely await the outcome of felony charges as well. The Auditor is regularly made aware of pending criminal cases against officers, without the names. The OPA monitors the status of pending criminal investigations through regular meetings with the Chief. In sum, then the separation of criminal and civil investigations has been accomplished, with some consequences not anticipated by the Panels, discussed under "Policy Issues" at the conclusion of this Report.

The Mayor's Panel also suggested that the OPA should identify serious cases of misconduct and focus investigative resources thereon as soon as possible. This is and has been the practice, including review of OPA's classifications by the Auditor. The Panel went on to recommend that the OPA should encourage mediation of less serious charges. Both parties must agree to mediate a complaint, and the Director reviews all cases and refers those that seem suitable for this face-to-face disposition. Following mediator training in August, OPA coordinated with the Guild to approve an expanded list of available mediators. The Council's Panel suggested in addition that there be written guidelines for mediation cases, which would exclude serious cases, cases where the officer has a history of complaints, or where individuals have in the past failed to participate in good faith. Since these guidelines are adhered to in practice, the Director does not feel it necessary to set any hard and fast rules.

The Council's Panel also recommended the OPA be explicitly authorized to investigate misconduct that may come to light through a lawsuit or claim filed against the City, or a criminal case. It is presently so authorized. The Auditor has similarly recommended that OPA review all claims when received by Risk

Management. Presently, all settlements are reviewed for potential investigation by OPA-IS. Though OPA is thus involved with reviewing potential misconduct that comes through Risk Management, earlier attention to a case risks starting the 180-day clock before a complainant is prepared to cooperate with an investigation. This is one of a number of repercussions of the 180-day contract rule discussed in the Policy section at the end of this Report.

The Council's Panel made several suggestions to increase the autonomy of the OPA: It recommended that the OPA should not consult with police officials outside OPA regarding classification or recommended findings of fact. This has not been adopted, as often there are discussions about case facts, for instance, in deciding whether to put an accused officer on administrative leave pending investigation. In a similar vein, the Council's Panel suggested that the Director should make a final dispositional recommendation in writing before a case is referred to the Chief. The Director has not accepted this requirement and City Council did not adopt it in the new Ordinance. Though she advocates her position on each specific case in which OPA-IS recommends a Sustained finding, the Director believes there is merit to engaging in discussion with the Chief and others about police practices or disposition in past cases, before making her own final decision.

The same Panel made two recommendations about how the OPA relates to complainants: that OPA-IS should re-interview them when necessary to assess new information and that the explanation of the finding sent to them should be specific enough that they can ask for reconsideration or identify any omissions. These are related but separable issues. The Director comments that OPA does consider new information when it comes to light and pointed out to this Auditor a number of cases in which re-interviews have happened. The OPA has also, in the past several years, changed its format for closure letters, intended to give complainants clear and specific reasons for the findings in their individual cases. The Auditor has proposed to review these letters and follow-up investigation conducted when new information is received. There are obvious issues where the 180-day time limit is near expiration.

The Mayor's Panel made suggestions about what happens when a discipline case goes to the Chief for final disposition by the Department: If new facts are disclosed at the discipline [*Loudermill* or "due process"] hearing, the case should be sent back to OPA for further investigation. This is being done. The Guild contract, however, provides that the 180-day clock for completion of the investigation is again running during that additional investigation.

If the Chief changes a finding recommended by the OPA, he is now required to state his reasons in writing and a summary of these decisions is available to the Mayor and City Council upon request. The Ordinance also requires the Director to summarize these explanations and also to keep track of cases where the 180-day time limit was exceeded, if discipline was contemplated. The Auditor has requested regular review of both of these records.

The Mayor's Panel asked that the Chief report within 60 days on implementation or not of policy recommendations made in the semiannual reports of Director, Auditor, and Review Board. The Director does keep track of OPA's recommendations, and includes them in her reports.
The Panels made several miscellaneous recommendations about the process, some of which have been adopted: a review of the City's policy pursuant to *Garrity v. New Jersey* (discussed between Auditor and Director and under review by the Director); specialized training for OPA-IS investigators (begun with a two day interviewing course); availability of civilian advocates for complainants from the Seattle Office for Civil Rights (the Director trained SOCR staff in how to assist citizens, civilian advocates from SOCR are welcome to accompany a complainant, and SOCR and OPA websites were changed accordingly); a policy prohibiting retaliatory contact with complainants (drafted by OPA and accepted by the Chief); training and policies to improve cultural competence (training begun with "Perspectives in Profiling," part of the "Tools for Tolerance" program); presumptive firing for dishonesty in the course of official duties (in place); suspensions to be in working days, not leave time (adopted); document release under the standards of the Public Records Act (police reports and videos already available on request from the Department; sustained cases made public).

As the above summary reflects, there have been structural and procedural changes in civilian oversight of the Seattle Police Department in response to the recommendations of the Mayor's and the Council's Panels.

AUDITOR ACTIVITIES

The scope of the contract for this Auditor changed in 2008, as noted above. I am tasked to coordinate with the Review Board and the Director to "identify substantive and procedural areas" for enhanced review. The Director and I have been working on the first stage of a report on the Department's relationship with diverse communities, focusing on the Department's own

initiatives. The new Review Board will be primarily responsible to solicit input from community members. We expect the second phase to be a coordinated effort among the Auditor, Director and Board to assess the success of departmental efforts and to suggest future directions.

I issued a report on obstruction arrests, available at www.Seattle.gov/police/opa. I examined OPA files where available, and court and police records for all cases where obstruction was the only resulting charge and either an OPA complaint was filed or the officer had made three or more such arrests over the past two and a half years, 76 cases in all. This intensive review of recent obstruction arrests revealed no pattern of abuse or misuse of the obstruction ordinance, but did point out oft-repeated situations that suggested policy and training changes – specifically support for the new bystander policy and for further training on the standards for "reasonable suspicion" detentions on the street.

I attended four days of the annual conference of the National Association for the Civilian Oversight of Law Enforcement, which included sessions on international oversight initiatives, crime reduction strategies, Taser use and guidelines, discriminatory policing, and assessment of the different modalities of oversight.

The Director brought in outside experts for a two-day training session on interview techniques for OPA-IS and County personnel, which I attended. It was highly successful in presenting innovative interview techniques for civilian witnesses. The OPA-IS sergeants pointed out that, at least in some cases, interviewing police officers requires some different techniques and the Director and I are looking forward to another session focusing on interviewing sworn personnel.

I testified before and conferred with members of the Mayor's and Council's Panels and spoke before the Civil Rights Commission as well as a Washington State Bar Association CLE.

I have continued to review OPA-IS investigations on a real time basis and sometimes suggested further avenues to explore. In this six-month period I reviewed 66 completed OPA-IS investigations. The number of full investigation cases is consistent with the average for other six-month periods I have reviewed. In nine of these, I asked for further investigation or had comments about the investigation conducted. In each case, further investigation was

conducted, I was convinced in consultation that it was unnecessary, or it was too late to be practical to conduct. There were no cases where I was dissatisfied with the OPA's response about further investigation.

I also audited OPA-IS investigations with a "critical review of outcomes," as mandated by my new contract. I disagreed with the disposition in seven of the 66 completed cases, not counting my general concern about the frequent use of Supervisory Intervention. While dispositions were generally not changed, there were full and useful discussions with the Director and OPA-IS staff, and the Director articulated clear reasons for her decisions. In my opinion, this is how our coordinated oversight functions are meant to operate: while the OPA Director and Auditor might not always agree, accountability is served by a frank and thorough discussion of different perspectives, and disclosure to the public in cooperative reports such as this one and the Auditor's Report of last Spring.

I reviewed 14 Line Investigations before they were referred out and had questions about the classification of two of these. I reviewed eight completed Line Investigations and disagreed with the outcome in one. The Director and I agreed that one line investigation should be promoted for a full OPA-IS investigation that in turn resulted in discipline.

I reviewed 22 Supervisory Referrals [SR's], down from the 56 reviewed last period. I disagreed with the classification of two. I reviewed 140 Preliminary Investigation Reports [PIR's], in keeping with numbers in previous six-month periods. In four of these I disagreed or had comments about the classification.

I reviewed 400 contact logs, which include a wide variety of calls to OPA-IS, the majority of which do not fall within the purview of the office. Many were referred on, or the screening sergeant attempted or accomplished the requested customer service. A few were converted to PIR's.

AUDITOR AND DIRECTOR COMMENTS ON SPECIFIC CASES

OPA-IS Cases

For the most part, I found the OPA-IS investigations to be complete and well reasoned in outcome. I commented on or asked for further information in nine out of 66 cases reviewed this period. Examples of simple follow-up I requested: I wanted an officer to listen to the in-car video and explain the time

variance with his recollection about an event that happened over a year earlier; asked to learn the result of criminal charges in one case; suggested OPA-IS attempt to help with the release of property in another; asked that employee records be reviewed for an employee's time taken off in various categories where fraud was suggested; and asked for detectives' justification for seizing victims' clothes at the hospital during investigation of a shooting. I have suggested more than once that back-up officers who are particularly vague in their interviews need to be pressed by OPA-IS investigators.

I criticized the outcome of approximately seven of the 66 cases I reviewed, not counting my general criticism of what I consider an overuse of the "Supervisory Intervention" disposition, discussed in a separate section *infra*. I focus here on those cases where I was critical, but recognize the vast majority were handled well and appropriately resolved.

In one case, I disagreed with "Administrative Exoneration" in a claim of excessive force made by an individual in jail. He claimed officers had struck him with their hands around his face and head, causing injury to his left eye, dizziness, a sense of fear and bad dreams and to hear voices. He was apparently refused admission to the jail and taken to Harborview for medical treatment. When released, he was unaware there was an outstanding arrest warrant for him until he was arrested three months later.

His taped statement from the jail at that time was interrupted by a fellow detainee trying to help him understand, and an operator who cut him off. The intake sergeant tracked down the original arrest and ordered the documents. Interestingly, the Use of Force report was "not yet available" three months after the incident. After the case was assigned for follow-up, another sergeant spoke again to the complainant and made an appointment to visit the person in six days. Meanwhile his public defender called and said he didn't want the complainant to phone OPA anymore. Twelve days later an envelope addressed to the complainant was returned.

The investigating sergeant recommended Administrative Exoneration because: the Use of Force packet was complete and thorough, and the force described was similar to that described by the complainant, and the photos of injuries were also consistent.

In my view, often repeated, when complainants call from the jail, even about incidents happening some time earlier, OPA-IS should make every effort to

physically visit, get an in-person statement, and get releases signed as soon as possible. This is particularly true when dealing with someone for whom English is a second language. Where injuries are serious enough to require in-patient treatment at Harborview Hospital, the justification and the extent should be explored. The fact that a Use of Force form is complete and accurately describes those injuries should be one of the first steps in investigation, but not the last. Of course there was very little remedy at the time I received the summary of investigation, because of the time elapsed and the objection of the defense attorney.

The Director agrees that more effort could have been made by OPA-IS at the outset, particularly with someone with limited English speaking abilities. However, the "justification and extent" of the complainant's injuries could not be explored because he and his attorney failed to provide a medical release.

The Director and I have also had discussions about the Use of Force Policy, specifically what qualifies as an "injury" resulting from "physical force." SPD Policies and Procedures Section 6.240 I.E. defines "physical force" to include "Any force… which causes an injury, could reasonably be expected to cause an injury, or results in a complaint of injury." Section 6.240I.E.1.c. defines "bodily or physical injury" to be "significant physical pain, illness, or impairment of physical condition."

Our discussion was in the context of a case that reflected the difficult decisions officers must make on the street as to whether they have sufficient, objective facts to justify a temporary detention, also called a "*Terry* stop," named after a Supreme Court case. In this case the officers wanted to talk to an individual in a high drug/prostitution area at 4:30 in the morning. The individual took off running and the officers chased him down, grabbed him by the arms and shoved him forcibly to the ground. He went immediately to a pay phone after this encounter and called the police to say: "I am not hurt but want to file a complaint." A sergeant responded to the scene and observed a minor cut lip, scuffed wrist, scraped knee and eye glasses from which the lens had been popped out. The subject also complained that he was punched and kicked, but the sergeant could not see any injuries consistent with that. This is an example of a case in which notification of a supervisor (the sergeant) was deemed by the Guild to start the investigative clock running. The complainant was unavailable for later follow-up.

The original OPA-IS and Director's recommendation was a finding of Sustained as to the officers' lack of reasonable suspicion to detain the man, which the Chief determined should be a Supervisory Intervention. OPA-IS and the Director resolved the force allegation as a Supervisory Intervention, and the Chief agreed. I disagreed with both resolutions, particularly in light of the officers' statement that they stop anyone in that area at that hour and that "stopping" apparently included the discretionary use of force.

The Director and I have suggested in a number of cases further training of SPD personnel to help them appreciate the sometimes difficult distinction between "social contacts" and legitimate *Terry* stops. Though the Director agreed with the Auditor that the facts of this particular case did not support reasonable suspicion justifying detention, the Chief preferred to emphasize the need for training through a Supervisory Intervention finding.

Because of the definitional issues, the Director has asked for a thorough review of the current Use of Force Policy. The OPA, Ethics Captain, and Audits unit are involved in considering force policies from other jurisdictions and ways the Department's can be clarified and improved.

In another case I agreed with a Sustained finding for excessive force where the back-up officer's in-car video had recorded the interaction. The officer had been jumped on from the rear as he took control of the subject's jay-walking friend. When the attacking young man was down and under control, the officer continued to use punches and knee strikes, which he claimed were necessary to control resistance. In the majority of cases, the in-car videos I have seen support the officers. In this case, however, the video was at 180-degree variance with the officer's perceptions or recollections and a Sustained finding was recommended by OPA and confirmed by the Chief.

I was troubled by a case with very similar circumstances three months later, involving the same officer, same kind of strikes delivered, same justification claimed, and same words spoken; but where no in-car recording was available. In that case a person with a felony warrant fled from the officers, was tackled, and was delivered knee strikes in the mid-section during handcuffing. Since the officers' testimony was consistent and supportive of each other, the result was a finding of Exonerated. The Director and I agreed that, despite some similarities, there was no evidence available to sustain an allegation of excessive force against the employee.

I was critical of the response of officers investigating a sleeping truck driver parked in a private parking lot, and of the OPA's conclusions about that encounter, which eventually led to his being Tased twice. The case involved a situation where an African American's non-cooperation was apparently based on fear or negative past encounters with police and the officer perceived that non-cooperation as highly suspicious of criminal conduct. The Director concurred with the OPA-IS Captain's recommendation of exoneration in this case, as there were *Terry* stop indicators in the hour and circumstances and the driver's non-cooperation in her opinion justified forceful removal from the truck, followed by warnings and handcuffing with the aid of the Taser.

Line Investigations

I questioned the classification of several line investigations, but was satisfied with the responses of OPA. One case was reclassified as a full OPA-IS investigation that resulted in discipline. Another was a *Terry* stop case that I thought required considerable legal sophistication to analyze, and was satisfied that the lieutenants who would be in charge of the investigation were up to date on the law. In another case, I thought the LI should be downgraded to a PIR, but was convinced by OPA-IS that there were several issues that needed to be explored to determine whether an officer was qualified to work off-duty. In a fourth, the Director downgraded the complaint to an SR so that compromise of damages could be accomplished, but asked the Ethics Captain, Law Department and Audits/Accreditation Department to look generally into situations where officers attempt to resolve disputes between neighbors by "brokering restitution." The case exemplified the neighborhood conflicts that can follow such a well-intentioned attempt at community problem solving.

I registered disagreement with one outcome of Supervisory Intervention. I suspect one reason for that outcome was that the event occurred in 2006. On the other hand, the officer's failure to write a collision report was a clear violation of policy, as there was extensive, obvious vehicle damage and some of those involved were treated by the Fire Department medics and transported to a local hospital. In my view, the passage of time, the drivers' exchange of information, and the fact that the officer had already been counseled should mitigate any punishment, after a Sustained finding for policy violation. Police reports can become vitally important to citizens as insurance companies sort out compensation for their damages.

The Director concurred with the OPA-IS Captain in the recommended finding of Supervisory Intervention because the named employee did not believe that a collision report was required and because he turned his attention to clearing the scene after the drivers exchanged information. Furthermore, because the complainant did not file her complaint until 16 months after the incident, some details were difficult to assess. The LI concluded with a recommendation for discussion and training with the officer.

Most Line Investigations are being completed on time. The Chief has continued to oversee the 60-day limit by reviewing all pending LI's every two weeks and personally contacting supervisors where appropriate. I did criticize the delay in one investigation. A complainant alleged that he was stopped without cause and called a "nigger" by the officer. The incident occurred on January 31; it was referred as an LI on February 7; an extension was requested on May 6, which apparently was the first follow-up at the precinct. The precinct investigator thereafter was unable to contact the complainant or witness. The officers vehemently denied ever using that language and described the stop as friendly and minimally intrusive. I recommended that in future all requests for extensions be accompanied by stated reasons for the need for more time and a statement of the investigation conducted by that time.

Supervisory Referrals

I registered a difference of opinion about one Supervisory Referral. The complainant alleged that the named officer, while investigating a property damage/anti-harassment situation, entered the woman's home without invitation, aggressively lectured her and "took sides." It appeared to be an ongoing conflict between neighbors, but was treated as a domestic violence complaint, which I did not understand. I thought the complaint was serious enough to warrant either a Line Investigation or an investigation by OPA-IS, primarily because of the three different interactions with police who insisted on entering the complainant's home.

The Director indicated that her decision to keep the case classified as a Supervisory Referral was based on previous contacts by the Department with the parties involved, and her assessment that the allegations could best be addressed by a supervisor and Precinct Commander.

In several cases classified as SR's, I have been unclear what exactly OPA was asking the supervisors to do. In the PIR cases, there are often explicit directions

as to how to resolve the case to the greater satisfaction of the complainant or subject and to suggest another way for the officer to handle a similar situation in the future. With the SR cases, deemed to be more serious, there is an expectation that the supervisor will assess the situation, do some further inquiry, handle it as he/she sees fit, including by informal mediation, and report back to OPA.

Since the referral out is by form letter, I intend to make a review of the returns of SR's for my Spring 2009 report in order better to audit these cases.

Preliminary Investigation Reports

PIR's are often good resolutions of complaints that are not serious, but that can negatively affect the Department's relationship with the public if not attended to. One complaint demonstrating the benefit of the PIR designation, for instance, was that officers did not explain well why an individual, who matched the description of a suspect with a gun, was "singled out" and removed from a Metro bus to be detained and searched. The complainant discussed this with the patrol sergeant and the OPA-IS intake sergeant and was satisfied that his concerns would be shared with the officers' chain of command.

Approximately six PIR's were upgraded to SR's during this six-month period, which often happens at the suggestion or with the concurrence of both Director and Auditor. One which I suggested upgrading was a complaint that the officer was rude and had violated traffic laws himself, causing unnecessary danger by driving backwards in the wrong lane. The original PIR directed the supervisor to discuss this with the officer and remind him of the impression he may be making on the public. The complaint was upgraded to an SR so that the supervisor would make contact with the complainant and hear her out and "help her more fully understand the officer's conduct." The Director also determined this might be a good case for mediation.

Two related PIR's alleged that protection orders had been dropped off at the precinct, but never served. On callback to the precinct, they were told no record of the orders could be found. The cases were sent to the precinct as PIR's with a request that the precinct procedure for handling protection orders be reviewed to assure proper tracking and accounting for such documents. I asked that there be follow up to see if the respondent in these cases actually showed up for the scheduled hearing, which would indicate she was in fact served. Given the

importance of service of domestic violence protection orders, both the Director and I thought it was important to assure prompt handling of such orders.

I initially disagreed with the classification and handling of a complaint by a public housing resident who claimed the police had come into her apartment at night three or four times without leaving any paperwork. OPA-IS classified it as a PIR and asked a supervisor from the named employee's chain of command to contact the "complainant to address her concerns and discuss her rights/responsibilities as the resident of a SHA housing unit." I felt the allegations merited a more serious response, given the nighttime entries and demand for identification from all people present. The Director declined to reclassify because the complainant had not been cooperative to date in responding and providing more information, despite efforts by OPA-IS to contact her. The Director also pointed out that a major problem for SHA is dealing with nonresident guests who become unauthorized permanent residents. Finally, the PIR classification anticipated follow-up and feedback from the supervisor. I was satisfied with the Director's resolution of the case.

I suggested an impound situation be upgraded from a PIR to an SR. In the OPA-IS Lieutenant's analysis, the "documents provided by the intake sergeant clearly are a guide for using discretion and suggest impoundment in this situation was not reasonable. However, without being there and without hearing for [*sic*] the employee, OPA-IIS is not in a position to judge the named employee…. No misconduct is identified." I failed to follow this reasoning and opined that if a complaint appeared to demonstrate a violation of policy, the case should be classified at least as an SR or a Line Investigation. The Director upgraded the case to an SR.

POLICY ISSUES

Increased Use of Supervisory Interventions

A "Supervisory Intervention" means "while there may have been a violation of policy, it was not a willful violation, and/or the violation did not amount to misconduct. The employee's chain of command is to provide appropriate training, counseling and/or review of deficient policies or inadequate training."

Supervisory Intervention is easily confused with "Supervisory Referral," which is an initial classification for what may be a minimal violation, requiring the

supervisor to investigate, contact the complainant, mediate and/or counsel the employee. At the very least, the similar wording and outcomes are confusing.

Supervisory Intervention is a disposition added in 2005, one of eight possible dispositions for administrative cases. In my opinion, that is too many; it is confusing to the public and to employees. The Director has stated publicly on a number of occasions that allowing for so many findings does not serve the goal of transparency. She is looking into the possibility of changing the number and definition of possible outcomes.

There has been a trend to use Supervisory Intervention more frequently in the years since its adoption. It is an outcome that, along with every disposition other than Sustained and Mediated, goes on an employee's "card," a record of the current year plus three more. (By contrast, a summary of the findings in a Sustained case is also posted in the employee's permanent personnel file.) Like the other dispositions short of Sustained, the Director has the final authority to impose it and the Chief does not review it unless flagged by the Director as a case of significance. The Chief has the final departmental decision where OPA recommends a Sustained finding and can downgrade it to Supervisory Intervention, and has done so on occasion.

The Sustained rate has remained at approximately the same level, so the Director believes that the increase in Supervisory Intervention findings primarily reflects a move towards requiring training and counseling in cases that before would have resulted in a Not Sustained or Exonerated finding. The Director further points out that she is obligated to use the findings as defined by the Department. Because the definition of "Supervisory Intervention" provides for a result for non-willful policy violations, she believes it must be considered in appropriate cases. By extension, she states that consideration of intent may impact whether a finding should be Sustained or treated as a Supervisory Intervention. The Director agrees that it is timely to consider the full panoply of findings, including Supervisory Intervention, with consideration given to the role of intent or willfulness when assessing police conduct. The OPA Director has initiated a review of the Department's overall approach to discipline and is considering research in the field and best practices from other jurisdictions. She anticipates reporting on her findings and making recommended changes in 2009.

Whether as a result of Sustained findings or of Supervisory Interventions, the Director strongly believes that the Department's discipline system should

provide for training and counseling in appropriate situations. The Department should consider whether punishing misconduct is as effective as other approaches to changing behavior. While certain violations should and will result in discipline up through termination, other misconduct can more appropriately be addressed through a wide range of training options.

My major disagreement with the widespread use of Supervisory Interventions is that it undercuts the duty of officers to be aware of Department policies and adds an implied requirement of intent to the finding of Sustained.
A Sustained outcome is defined to mean that the allegation of misconduct is supported by a preponderance of the evidence. The definition of "misconduct" seems to have been somewhat reinterpreted since 2005 from a simple violation of Department policy to something requiring a "willful" intentional element. In criminal law, this implies an intention to violate a known norm. I have in the context of a number of cases over the past several years questioned this interpretation in the application of administrative discipline. In my view, the question should be whether a policy was violated. In most cases, lack of intent mistake, and good faith should be brought to bear to mitigate the resulting administrative discipline, including training or counseling.

One case illustrating these two views involved a field training officer who directed his trainee to put a person's identification into a mailbox, on the assumption that it would be delivered back to the individual, who had been transported to the hospital after an accident. While both officers should have been aware this was not a sufficient means of returning an ID, I felt that Supervisory Intervention was particularly inappropriate for the training officer. I also thought the result tended to downplay the importance of an identification card to an individual. The Director felt that the field training officer's understanding of postal procedures was not unreasonable, though inaccurate.

As noted in my report on obstruction arrests, and earlier in this Report, there is often not a bright line establishing when facts are sufficient to support a temporary detention or *Terry* stop of an individual on the street. On the other hand, the focus of the annual Street Skills training has been on this subject, and on policies surrounding this situation, which they regularly face on the street. Where there is a significant deficit of objective facts justifying detention, or failure to follow procedures, I believe Sustained is the proper outcome, however the discipline might be mitigated. For instance, given the training emphasis and public notoriety about the issue, I felt in two cases that the officers should have

had the basic understanding that they needed to call a supervisor before releasing a detained, handcuffed individual.

I disagreed with another Supervisory Intervention disposition of a Line Investigation where a Fraud Unit detective stopped a driver for using a cell phone and kept him waiting for a period of time until someone with a ticket book arrived and informed the detective that the cell phone law was not yet in effect. The driver perceived the officer as rudely abusive of his power, given the traffic situation that led to the stop, the delay, and the lack of explanation.

The Director concurred with the finding of Supervisory Intervention recommended by the Line Investigation because the named officer acted within his discretion. There was a recognized need for training in regard to Traffic Contact Reports and the finding resulted in training for the named officer and others in his unit.

In another case a Supervisory Intervention was determined because a supervisor did not understand his obligations in handling a Supervisory Referral. This is a good example of why I object to this outcome: an officer (in this case a sergeant) can simply say he didn't understand the policy, and he doesn't get a Sustained on his/her record.

I appreciate the Director's point that the percentage of cases resulting in Sustained has remained fairly consistent at the same time as the use of Supervisory Interventions has increased. However, as the above examples illustrate, my objections were specifically in cases where I thought the outcome should have been Sustained. I believe that further education on policies and practices can well come after a Sustained finding, and may have a good deal more impact at that point.

As is clear, this is a philosophical difference of opinion about how best to improve police practices. Given the increasing use of this disposition over recent years, I intend to review the returns of these cases for my Report in Spring of 2009 to see what supervisors in fact are doing in their "interventions." Such a review may add to this ongoing conversation.

Due Process *(Loudermill)* Disciplinary Hearings and Access to Files

Both the Mayor's and Council's Panels were concerned with employees presenting new information at the "hearings" before the Chief prior to discipline being imposed. Two remedies were crafted in the new Ordinance: 1/ the Director is to be present at these "hearings," which are in practice a meeting of the Chief, the employee, his representative, a representative of Human Resources, and an Assistant or Deputy Chief; and 2/ the case is to be sent back to OPA for further investigation if new information is presented. The Guild contract may make these solutions unworkable, however, since the 180-day clock is again running during the period of additional investigation.

I have been disturbed to note Guild representatives or members advising that information be purposely withheld from OPA-IS investigators in favor of presenting it directly to the Chief at the *Loudermill* hearing or even bypassing that hearing altogether and submitting new evidence in the "appeal" process. These developments should be closely watched and may require adjustment of the administrative discipline process, including the appropriate scope of review by the Public Safety Civil Service Commission in the future.

A related issue may arise in the new remand procedure: when and how does the Auditor have access to the new information presented at the *Loudermill* and the follow-up investigation? The Director has assured me I will be included in the follow-up loop.

Contrary to what many civil rights attorneys understand, the officers do not, as a rule, see the investigative file until after they have testified in their cases. In the initial notice of the complaint the officer receives a brief explanation of the allegations only. Where there is more than one officer interviewed they are directed not to discuss the matter, except with their Guild representative. Whether the Guild rep passes on information, is of course another matter.

As the Council's Panel opined, there is a sense among complainants that they are at a disadvantage, and should get an opportunity to "correct" the record, have their own appeal process, or produce information that may contradict what the officers say happened. While the Council Panel opined that access to OPA's files should be governed by the Public Disclosure laws, there are contractual obstacles that need to be addressed to accomplish that.

The public does have other avenues available now – complainants can obtain copies of the in-car video and police reports, either before or after their interviews, by making simple records requests on the first floor of the Department's headquarters. More specific and detailed closure letters after disposition, and access to in-car videos, may ameliorate the public perceptions noted by the Panels.

Separation of Criminal and Administrative Cases

Panel recommendations to separate the criminal and administrative cases were based on a concern that OPA-IS investigations not be used against complainants in court. The separation may, however, undercut the integrity of the administrative process in unforeseen ways. The prior contract allowed dual supervision of a case against an officer who, for instance, was investigated for domestic violence. The Domestic Violence Unit detectives would investigate and the OPA would be aware in real time of the interviews and evidence gathered, and thus be able to suggest avenues to be pursued. This allowed subject matter expertise to be combined with OPA oversight and insistence on timeliness.

The Panel recommendations resulted in a contractual change requiring complete separation between OPA and any criminal investigation of an employee. Now the investigating detectives have no timeline and no collaborative responsibilities. They can forward their conclusions to OPA whenever they complete their investigation, which may be too late for any meaningful OPA-IS inquiry to follow. The Auditor is deprived of any real time oversight as well, except to note to OPA that a case against an unknown employee has been pending for a long time when he/she reviews the quarterly log. The OPA, as noted above, can monitor these cases to some extent by asking the Chief to inquire on the progress of the criminal investigation.

The process is unclear where there are dual allegations in a complaint, for instance that an officer used excessive force and also stole money from an arrestee. Will the excessive force complaint await the investigation of the criminal allegation of theft? To what result under the 180-day rule?

The complexities of the interactions between criminal and OPA cases and the consequences given the 180-day rule are illustrated in a case involving one officer who committed a hit and run of occupied cars while blacked out and four colleagues who went to check on his welfare when he failed to show up for

roll-call. The case was initiated when a routine records check revealed a bench warrant outstanding for two years that the officer was ignorant of. The case was left open while that criminal case was resolved, which took almost a year. It was at that point, when the officer could be interviewed, that focus shifted to the roles of the co-workers: what did they know about the accident, given their visit to their colleague's home and observation of his seriously damaged car?; did they report the accident?; did they advise their supervisor of the employee's problems? They did attempt to investigate whether there had been a hit and run, but gave various answers about whether anyone advised the supervisor of any of these issues. Given that the events occurred three years earlier, and the officers had permission to check on their colleague, and the supervisor did not remember whether anyone reported the accident or the employee's serious drinking problems, there was a decision to give these officers a Supervisory Intervention. Factored into that decision was uncertainty as to whether the 180-day rule would prohibit a Sustained finding or discipline. The circumstances of this case illustrate the problems attendant to waiting for the completion of criminal charges against an officer before full facts are developed by OPA; the 180-day contract rule; and the use of Supervisory Intervention where a Sustained finding cannot be made.

CONCLUSION

After extensive review, Seattle decided to maintain its unique "hybrid" system of civilian oversight. The aim is to combine independent, outside review with effective investigations by sworn personnel and policy access at the Command Staff level. The OPA, Chief, Mayor, City Council, and Guild have all cooperated to put into effect substantial adjustments to that system. The collaboration among all three civilian oversight modalities will be worked out in the coming year. My extended term of office allows me to bring my experience to bear during that process and perhaps to overlap with the incoming Auditor.

I intend in the present six-month period closing out my tenure as Auditor, to examine cases exceeding the 180-day deadline where discipline was contemplated, the sufficiency of detail in letters to complainants regarding resolution of their cases, and responses of supervisors to Supervisory Referrals and to cases with a final disposition of Supervisory Intervention.

Since I am near the conclusion of five years as Auditor, it is perhaps time to reiterate some of my continuing concerns, that I believe should be addressed in

bargaining with the Guild: I have often voiced and continue to believe that the greatest flaw in our present system of administrative discipline is the contract requirement that investigations and findings must be made within 180 days. The contract should provide, at minimum, the same rule for officers who are facing criminal proceedings as for subjects or complainants. The 180-day rule should be a guideline, with flexibility specifically allowed for completion of parallel civil or criminal proceedings involving any party, and perhaps crucial witnesses. I am fully aware that timely closure of cases is an important interest to the Guild. However, using the 180-day limit as a guideline would allow immediate OPA attention to claims filed against the City, and thereby initiate timely administrative investigations, and perhaps expedite settlements of the claims through Risk Management. It would resolve many of the problems of completely separating criminal and administrative investigations.

In the alternative, the OPA-IS should proceed with all investigations without delay and offer the officer the choice of relinquishing his Fifth Amendment rights or not, the choice presently offered subjects who are facing criminal prosecutions. This might expedite administrative resolution of cases as well. Of course the third alternative would be legislation prohibiting the use of complainant and witness statements in parallel civil or criminal trials.

I would make another recommendation for the next round of contract bargaining: the contract with the Guild should be modified to put back in place concurrent jurisdiction between the OPA and criminal investigative departments over crimes alleged against officers. What evidence developed by OPA-IS may be admitted in the parallel criminal court proceedings could be dealt with as a separate matter.

Finally, I hope the City will look at modifying and simplifying the menu of outcomes so that it will be clear to employees, subjects, and the public.

Respectfully submitted,

Katrina C. Pflaumer
Civilian Auditor

Dated this 9th day of December, 2008