



CITY OF PALO ALTO OFFICE OF THE CITY CLERK

June 22, 2020

The Honorable City Council
Palo Alto, California

Independent Police Auditor's Second Report - 2018 and Supplemental Report From the City Manager

Independent Police Auditor's Report for the Second Half of 2018 and Supplemental Report From the City Manager

INTRODUCTION

On December 16, 2019, the City Council approved a three-year contract with a third-party contractor, the OIR Group (OIR), to provide independent police auditing services (IPA). The approval reaffirms the scope of services provided to the City by OIR since 2006.

The OIR Report for the second half of 2018 is attached to this memorandum. The City's independent police auditing program consists of review of the following items:

1. Taser deployments
2. Public complaints related to officer interactions
3. Police Department Internal Affairs Investigations ¹

Since the program was established in 2006, the IPA has produced 24 reports with 129 matters sent to the IPA for review (2006-second half of 2018).

SUPPLEMENTAL REPORT

In March 2020, the City Manager released a new supplemental report outlining matters that have not to date been included in the City's independent police auditing program. In order to address these matters, the supplemental report prepared by the City Manager's Office summarizes "personnel and human resources matters." The supplemental report also includes statistics on informal inquiries received from the public. The supplemental report starts on page 2 of this memorandum.

PROCESS TO FILE A COMPLAINT AGAINST A POLICE OFFICER OR POLICE DEPARTMENT EMPLOYEE

The Chief of Police is responsible for overseeing the department employee complaint process. The Chief reviews every complaint and either must agree with the determination made by the supervisor investigating the complaint or send the complaint back for further action. The Palo Alto Police Department's process to file a complaint against an officer can be found online. Go to www.cityofpaloalto.org/PDcomplaintform for the online form.

¹ Complaints and investigations of internal personnel and human resources matters are not included in the City's independent police auditing program

Community members may submit complaints directly to the IPA:

Mr. Mike Gennaco Phone: (323) 412-0334 Email: Michael.gennaco@oirgroup.com	Mailing Address: OIR Group 1443 E. Washington Blvd., #234 Pasadena, CA 91104
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SUPPLEMENTAL REPORT FOR THE SECOND HALF OF 2018

Personnel and Human Resources Matters Involving Sworn Officers Summary²-The chart below summarizes personnel and human resources allegations made against an officer, a brief general description of the issue raised and the Department’s determination. * There were no matters during the June-December 2018 reporting period.

Supplemental Report on Personnel and Human Resources Matters		
Allegation	Allegation Summary	Determination
No personnel matters during this reporting period.	N/A	N/A

*Determination Definitions

- *Unsupported*- the investigation failed to disclose evidence sufficient to prove or disprove the allegation by a preponderance of the evidence
- *Supported*-the investigation disclosed evidence sufficient to prove the allegations by a preponderance of the evidence
- *No finding*- the complainant failed to provide necessary information to further the investigation; the complainant failed to cooperate; the incident was reported to the Department after the statute of limitations for the Department to initiate a disciplinary investigation had expired; the investigation revealed that another agency was involved,

² Personnel and human resources matters are defined as workplace conflicts. These matters include, but are not limited to, investigations of human resources and personnel matters regarding sworn officers relating to assignments, evaluations, promotions, demotions and similar issues, and allegations of harassment, discrimination, and retaliation. The City Manager’s recommendation and City Council’s approval to continue addressing these matters outside the independent police auditing program reflects established multilevel review and potential relief to parties involved in such conflicts. Under State and Federal labor laws, these issues are subject to review by State or Federal agencies set up to provide third party review of labor related matters in addition to City administered reviews and potential appeals and grievance procedures.

and the complaint has been referred to that agency; or the complainant withdrew the complaint

Informal Inquiry Statistics -The chart below provides statistics of informal inquiries received by the Department involving police officers that after initial review were resolved and within Department policy and standards. Informal inquiries may include matters such as misunderstandings or minor issues of discourtesy. Allegations of officer misconduct or neglect of duty are not appropriate for resolution as an informal inquiry. As described below, three informal inquiries were handled during the June-December 2018 reporting period.

Informal Inquiry Report (IIR) Statistics: June-December 2018	
3 Inquiries Received During This Timeframe	
Officer Conduct	An officer stopped the arrestee for a lawful traffic violation. Due to arrestee’s evasive driving and uncooperative behavior, the arrestee was detained at gun point. Based on the circumstances of the stop, the officer’s actions were consistent with Department policy.
Officer Conduct	The officer while on emergency detail in an adjoining jurisdiction was flagged down regarding a non-emergency incident. Officer relayed information to the appropriate jurisdiction consistent with Department policy.
Officer Conduct	An officer was dispatched to a two-vehicle non-injury collision. Officer found one party at fault but exercised their discretion by choosing not to also issue a traffic citation. Department policy allows officers to use discretion when completing collision reports and found the officer within policy.

ATTACHMENTS:

- Attachment A: Palo Alto IPA Second Report 2018 (PDF)

ATTACHMENTS:

- Attachment A: Palo Alto IPA Second Report 2018 Final (PDF)

Department Head: Beth Minor, City Clerk

INDEPENDENT POLICE AUDITOR'S
SECOND REPORT - 2018

Presented to the Honorable City Council
City of Palo Alto
June 2020

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Introduction

This report addresses materials received by the Independent Police Auditor (“IPA”) for review from the second half of 2018. It includes four cases that were investigated by the Palo Alto Police Department (“PAPD”) during that time period. As in the past, our role is to assess the completed case files as a form of outside scrutiny into the legitimacy of the Department’s investigative process and its outcomes.

The point is not to substitute our judgment for theirs; instead, it is to help ensure through an independent perspective that the Department’s own review of these matters is appropriately objective and fair. We also offer recommendations where appropriate. While these emerge from our impressions of the individual case files, they are meant to have wider applicability to the Department’s future operations and self-review.

While certain uses of force (specifically officer-involved shootings and Taser deployments) fall within the scope of our city-designated responsibilities, there were no relevant incidents during the six-month period covered by this report, with the exception of the use of force that generated a citizen complaint and subsequent internal investigation. The four cases at issue here involve allegations of misconduct – one internally generated case involving a reserve officer and the others arising from public complaints about specific encounters with PAPD personnel.

Detailed discussions of each incident and the Department’s various responses are below. With a few notable exceptions, we found the Department’s handling of each to be reasonable and the outcomes to be sound. We also noticed a useful shift in the protocols that we note here in order to commend. Each case features a detailed memo in which a lieutenant assesses the underlying investigation in a thoughtful, holistic way. The analysis goes beyond the bottom-line determinations about violations of policy to look more broadly for issues and learning opportunities that merit attention *apart* from their influence on the ultimate question of whether a given allegation is sustained. While the concept is sound and consistent with contemporary police practices, we offer suggestions on ways to improve the process below; most notably, these include a more complete description of performance issues identified and documentation of any interventions recommended.

Proper accountability – and discipline where warranted – is of course integral to the effectiveness of a police agency’s disciplinary system. As we have long said, though, it is ideally only part of the analysis. The most constructive and worthwhile review processes also see the complaints as opportunities for feedback from the public and for the testing of individual performance and larger Department approaches. The Department’s evolving expectations for its managers are

reflective of this principle, and we were impressed by the examples of insight and corrective action that those expectations produced in this batch of cases. Our recommendations are intended to lift the already high bar set by PAPD's robust review process.

Misconduct Investigations

Case One: Reserve Officer Leaves Gun Unsecured in a Vehicle and Gun Is Subsequently Stolen

Factual Overview

PAPD was advised by another law enforcement agency that it had taken a theft report from a reserve officer¹ that a Department-issued firearm had been stolen from the officer's personally owned car. The officer acknowledged that the gun had been left in a backpack unsecured in the passenger compartment. The officer had left the car parked on the street for several hours. Upon returning, the officer noticed that a window had been smashed and that the firearm, four magazines of ammunition, a set of handcuffs, a laptop computer and other personal effects had been taken from the vehicle.

In 2017, California Penal Code 25140 went into effect that requires that handguns left inside an unattended vehicle be secured. The impetus behind the legislation stemmed from two cases in which firearms that had been stolen from vehicles of law enforcement officers had been subsequently used as murder weapons. The law requires that handguns in a vehicle must be locked in the trunk, locked in an out of view container, or locked in a container that is permanently attached to the vehicle and not in plain view, such as a glove box. The law's requirements apply to any person with a permit to carry concealed weapons, including law enforcement officers.

Violations of Penal Code 25140 can result in an infraction punishable by a fine of up to \$1,000. After the law was enacted, PAPD revised their firearms storage policy (PAPD Policy 312.4.3) to track the language of the statute.

When PAPD became aware of the conditions surrounding the theft of the reserve officer's gun, it immediately placed the officer on administrative leave and initiated an internal investigation. During the investigation, it learned that the law enforcement agency where the theft occurred had decided not to issue a citation against the reserve officer for violation of the Penal Code statute.

Outcome and Analysis

The investigation was thorough and determined that the failure of the officer to secure the Department issued firearm was a violation of policy.

¹ A "reserve" officer is one who is trained and certified to perform a range of enforcement functions, and who offers services to a police department on a part-time basis. Many agencies have a cadre of reserves, and these individuals are a valuable resource. At the same time, as we have written before, it is important for departments to ensure that their appreciation for these people's contributions does not clash with the need to maintain rigorous standards in performance and compliance with policy.

The reserve officer is no longer employed by PAPD.

Systemic Issue

When the law was enacted, PAPD discussed the new requirements with its personnel. Moreover, and to its credit, PAPD purchased locking devices for its officers so that they could secure firearms in their personal vehicles in compliance with the law.

PAPD is a subscriber to LEXIPOL, a service that keeps abreast of new developments in the law and provides new and revised policies for each subscriber agency's consideration. When a new LEXIPOL policy is adopted, each officer is electronically advised of the policy and requested to acknowledge receipt of it. To its credit, the department has advised us that anytime a new policy or significant policy update is released, officers are notified and provided with an explanation, and supervisors are encouraged to conduct related briefing training. The objective of these procedures is to ensure that all sworn personnel are aware of any new or revised policies and their impact on PAPD's mission so that all are current on the law, Departmental expectations, and internal rules.

In this case, during the investigation it was learned that while the reserve officer had an account with which the officer could have logged on, reviewed, and accepted the new policies, that account had not been used to "accept" a single policy. We were advised that the Department databases did not proactively advise when an officer "accepted" a policy. While the Department could search its databases and learn which officers had accepted new policies, as it did in this case, there was no current practice of conducting such proactive audits to ensure compliance.

PAPD has not taken full advantage of its ability to track the receipt and acceptance of new policies by its personnel, and therefore to ensure their awareness of and adherence to evolving expectations. Accomplishing this, on at least a yearly basis, would be relatively easy. An assigned staff member could conduct a computer review and determine which members, if any, had gaps in their required policy updates. Given the significance to liability exposure as well as the intrinsic value of officer knowledge and Department expectations, a regular practice of ensuring that officers are reviewing new law and policy would be significantly beneficial to PAPD.

RECOMMENDATION ONE: PAPD should develop written protocols to ensure that an audit is conducted at least annually of whether officers have acknowledged new laws and policy, and should instigate remedial measures for any officers who have not done so.

Case Two: Complainant Challenges Legality of his Detention for an Alleged Violation of Cycling Equipment Requirements

Factual Overview:

This case arose from correspondence by a member of the public to various city and Department officials regarding a stop that he considered to be unlawful. He was riding his bicycle on city streets at approximately 11:30 PM one evening when he was pulled over by a Palo Alto officer. When the officer asked him for identification, the man said he would provide it when the officer informed him of the violation that prompted the stop in the first place. What followed was an exchange that had a few different phases – all of them courteous but occasionally contentious on both sides.

After producing a Vehicle Code section and receiving the man's driver's license in return, the officer did a records check on the cyclist and then told the man he was free to go. Nonetheless, the conversation continued for several more minutes; the man continued to question the legitimacy of the initial stop and the applicability of the specific "bicycle light" requirement that the officer had provided. The officer attempted to explain his thinking and offered further details that – depending on one's perspective – either expanded upon or contradicted his initial explanation to the cyclist about the missing (and not legally required) rear light on the man's bicycle.

The man took the position that, based on the officer's initial reference to rear lighting that was missing but not a necessity, the officer had detained him in unconstitutional fashion and violated his rights. The officer made several polite attempts to justify his decision-making, and retrieved some paper at the man's request to write down the Vehicle Code section he had mentioned. The officer talked about more general lighting requirements that he asserted *were* applicable to the man's bike equipment.² And he mentioned the secondary motive of believing that the man was possibly a suspect whom he had been looking for in connection with recent property crimes. He also offered to summon a supervisor, though the cyclist declined. Eventually, some 15 minutes after the initial stop, the conversation seemed to reach an impasse and the officer excused himself. He did not cite the bicyclist for any infractions.

A couple of days after the stop, the cyclist wrote the first of several emails to the officer and various local and state officials to describe his experience and to seek appropriate accountability for what he considered to be the officer's various violations of law and policy. The Department

² Another point of confusion and contention was the fact that the man was using a headlamp to satisfy the lighting requirement, rather than something affixed to the bicycle itself. The officer seems to have been mistaken about whether that was legally sufficient; a separate Vehicle Code provision adjacent to the specific one he cited provides for a headlamp as a suitable source of illumination. But there was also the factual question of whether the headlamp – even if acceptable as an alternative – was generating the required amount of visibility. This was another disputed issue between the parties.

eventually styled this as a formal complaint and opened an investigation. The review process included outreach to the cyclist and an invitation to be interviewed; however, he demurred, citing the sufficiency of his prior correspondence about the matter in conjunction with the video recording from the patrol car camera system. (There was, in fact, a recording that captured the encounter.)

Outcome and Analysis:

The investigation included a subject interview of the involved officer, some follow-up research into his claims about specific wanted individuals whom the officer believed may have been the cyclist (there was indeed corroboration), and some legal research about “mistakes of law” by police officers and their implications for the legality of detentions. Based on his assessment of these factors, the sergeant who conducted the investigation determined that the officer was “Exonerated,” meaning the actions occurred but were found to be proper. This assessment was supported by higher-ranking decision-makers, and a notification letter to that effect was sent to the complainant approximately three months after the incident.

Having watched the video and reviewed the attendant documentation, we found the outcome to be reasonable and justified by the evidence in the case.

Lieutenant Review

The lieutenant who reviewed the investigation also prepared a memo that offered a broader analysis of the officer’s performance and made a couple of attendant recommendations for future improvement. These addressed the officer’s apparent uncertainty regarding the relevant Vehicle Code violation and some suggested guidance on effective communication with subjects who are challenging the justification of an enforcement action. The lieutenant also noted that the officer was slow to provide dispatch with information about his status during the stop – a safety issue that was unrelated to the complainant’s specific allegations but was nonetheless worthy of attention.

We found these observations to be worthwhile, and their documentation to be a noteworthy enhancement to the Department’s process. In the past, PAPD’s managers have asserted to us that this kind of analysis has happened *informally*, and that issues outside the specific contours of allegation and result have indeed been identified and addressed. While we take them at their word, we also think there is a benefit to formalizing and capturing the good work by supervisors that happens in this regard. Accordingly, we are gratified by this development.

And we would encourage the Department to take it one step further. To help ensure that good intentions and worthy insights translate into concrete accomplishments, PAPD should consider adding a brief memo to the file that, where applicable, describes the particular steps by which recommended counseling, training, or other steps are actualized.

RECOMMENDATION TWO: The Department expand its supervisory “issue-spotting” protocol to include brief documentation regarding follow-through for, or completion of, identified action items.

Justification for Stop

As for the substance of the case, it raises interesting issues about enforcement strategies and effective interactions with the public. Here, the officer seemed to genuinely believe that he had a valid basis for stopping the cyclist because of deficiencies in lighting equipment. The cyclist, however, proved to be quite knowledgeable about the particulars of the Vehicle Code with regard to bicycles. The officer’s attempts to explain to the man became an uphill battle of sorts – particularly since the officer was apparently incorrect in some of his assertions.

The officer started by mentioning the lack of a *rear* light. This is not required. Then he talked about the lack of an affixed *front* light – which is required, but for which an individually-worn headlamp is considered a potentially adequate substitute. Finally, the officer resorted to questioning whether the headlamp was on and/or provided the requisite amount of illumination, since he professed to have not noticed it when he saw the man ride across an intersection from a distance.

Assuming this last fact to be both true and an underlying basis for the stop – and lacking a definitive reason to believe otherwise – this means that the stop was legitimate even if some of the officer’s specific legal premises were faulty. Nonetheless, the cyclist clearly (and with some justification) found these offerings to be insufficient, particularly as they combined with or substituted for each other as the discussion unfolded.

Interestingly, the officer also conceded to the man that part of his motivation³ had been his belief that the cyclist was someone else – a wanted individual who was suspected of criminal activity. This was not only true (as established by later evidence) but a candid acknowledgement of a reality in policing: that “pre-text” stops often occur because of an underlying suspicion that more significant criminal activity may be discovered in the ensuing encounter.

That these stops are legal is well-established. But they are also a recognized source of distrust and strained relations, particularly when they target minority individuals to a disproportionate extent. (The cyclist in this case was white.) Consequently, it is especially important that the technical justification for these stops be legitimate and well-founded in law. The officer’s mistakes here contributed to a dynamic of suspicion and resentment, though there is no evidence of bad faith. And the case highlights the need for ongoing evaluation – by PAPD and all agencies – of the fine line between praiseworthy pro-active enforcement and divisive selective enforcement.

³ The officer also mentioned that he didn’t want the bicyclist to endanger himself by riding in the dark without proper lights – trying to take the matter out of the realm of technicality and into an issue of rider safety. It seemed like a worthy point (if unpersuasive to the complainant).

Here, and to his credit, the officer took great pains to navigate the relevant sensitivities. He was unfailingly polite and accommodating in responding to the man's various challenges. The detention itself was low-key and brief – the majority of the 15 minutes were spent in response to the cyclist's own requests for information. And the officer was gracious in attempting to explain his mindset rather than shutting down or responding with hostility. These are significant mitigators in the overall evaluation of the encounter and its reasonableness.

Notification Letter

Given the above, it is unfortunate that attempts at outreach to the complainant were not more effective as a means of bridging whatever gaps this incident may have caused. It was not for want of trying on the part of PAPD during the investigative process itself. At the same time, though, our view is that the letter that was sent ultimately sent to the man, informing him of the outcome of the case, was something of a lost opportunity.

This is because it took a terse and straightforward approach to notification. In just a few lines, it informed that man that the finding was "Exonerated," with no effort to put that bottom-line result into the context of the thorough investigation and thoughtful review that occurred. This approach satisfies the letter of the law requiring correspondence. But in its brevity and lack of supporting detail, it probably offered little in the way of satisfaction – or even assurance that the complaint had been taken seriously in the first place.

Many agencies take this minimalist approach, either out of defensiveness or worries about violating the confidential rights of officers – or both. But in many instances, there are plenty of allowable details that could be added to reflect the individual nature of the review and the basis for the decision. In this case, for the Department to have listed its investigative steps, acknowledged the officer's misstatements, and explained its final resolution could have perhaps "moved the needle" a bit for the complainant in the direction of acceptance. We would encourage PAPD to take opportunities to "show its work" to the public where possible, while of course remaining appropriately conscious of the privacy rights of its personnel.

RECOMMENDATION THREE: The Department should look for ways to enhance its notification letters to citizen complainants in an effort to promote transparency and greater confidence in its processes.

Case Three: Complainant Cites Officer Profanity in Challenging Her Son's Treatment

Factual Overview:

This case involved a complaint from a woman who alleged that an officer had directed a profanity at her teenage son. The incident allegedly occurred in the context of a meeting with school officials over a disciplinary issue involving the young man (and at which the mother was not present).

Some issues involving the student's interactions with a peer had come to the attention of the school's administration. It chose to address these concerns in the form of an intervention of sorts. The PAPD employee, who was assigned to the site as a "school resource officer," was invited to a meeting, at which school officials hoped to impress upon the student that his actions were not appropriate and needed to stop. In attendance were two vice principals, a therapist familiar with the student, and the officer. At some point after the student was summoned into the room, the officer allegedly asked the student whether he regularly acted like "an asshole" in his dealings with women.

The student later reported this to the school district and the Department, which initiated an investigation.

Outcome and Analysis:

The Department's investigation was thorough but also straightforward: there was little to no dispute about the officer's having used the profanity in the context of his interaction, as established by the consistent testimony of the percipient witnesses, the student complainant, and the officer himself.⁴ Accordingly, the issue became whether the action constituted an acceptable exception to the profanity policy that – at least as a technical matter – it clearly violated.⁵

The investigator analyzed this issue at some length in the case summary. He concluded that, in spite of his own *subjective* opinion that the officer had "acted appropriately" in using the profanity (as a tactic to make an impression on the student), the use of the word was *objectively* a

⁴ One of the five people in the meeting was on maternity leave and not available, but the investigator got formal statements from the others. One of the school administrators did not recall hearing the officer use the term at issue, but the others present were fairly consistent in their recollection.

⁵ An additional allegation emerged in the interview of the young man: he also said that the officer had "threatened" him with arrest in a way he considered inappropriate. This seems to have been a matter of interpretation or perception in terms of the manner in which the potential consequences of "student-on-student misconduct" were portrayed. This part of the case was deemed "unfounded."

violation of the plain meaning of the profanity policy. The Department's leadership agreed that the allegation was "sustained."

Profanity as "Tactic"

This is a topic that is of some interest to us, and that we have visited on several occasions in these reports. To summarize, we have found that the use of profanity is common throughout law enforcement, and that different agencies approach it with differing degrees of consistency, rigidity, and concern.

For better or worse, Palo Alto does has a policy prohibiting profanity, and our point has been simple over the years. We recognize that some circumstances exist in which formal discipline is not necessary in response to documented profanity (such as a "heat of the moment" episode, or as a calculated method to make an impression on a recalcitrant subject). In general, though, such language does not comport with the highest standards of police conduct – and can make an unwelcome impression on the general public. Therefore, and given the existence of the policy, the Department should at least consider the behavior when it arises and sanction it when the exception does not apply.

Our concern in the past has been that – given the widely acknowledged latitude that exists for "real world" interactions – shrugging at profanity can easily devolve into the standard approach. The exception gradually swallows the rule through over-application. Accordingly, we have been gratified to see the Department address the conduct when it arises in the cases we review.

In this case, we agree with the outcome and respectfully diverge from the investigator as to whether the choice of word was advisable in this context. To the officer's credit – and as corroborated by the impressions of the administrators in attendance – the use of the word was neither gratuitous nor a reflection of lost composure. Instead, he claims to have used it strategically: to convey the seriousness of the issue and jolt the student into a recognition of the need to adjust behavior. And it was consistent with the idea animating the administrators' request that the officer participate: that he would help set a firm tone in his enforcement capacity as a means of promoting the student's receptivity.

The proof, however, often turns out to be in the pudding. Part of the problem with deviations from standard professionalism is that they so easily become a basis for discrediting a larger interaction; that is what seems to have happened here. The name-calling became a distraction from the underlying behavioral issues, and gave the young man and his mother a legitimate basis for challenging the Department and the district rather than focusing on other concerns.

With these principles in mind, we concur with the outcome of this case (as well as the appropriately mild consequence for the officer). And we encourage the Department to reinforce expectations about professionalism and the rare instances in which profanity should be deployed.

RECOMMENDATION FOUR: The Department should use this incident as a learning opportunity regarding its expectations and the circumstances in which “strategic” profanity can be problematic.

Role of School Resource Officers

This is the first case we can recall that involved a complaint against a PAPD officer who was assigned to a school. School Resource Officers (“SROs”) are deployed in different ways by different jurisdictions throughout the state. A few school districts (including Stockton, San Bernadino, and Los Angeles) have their own departments; more commonly, a district will contract with local law enforcement for a set number of officers that will serve on campuses as their regular assignment.

While the presence of trained and equipped police professionals can be a reassuring response to issues of school security and violence, there is a growing interest in re-thinking the role of school police in light of different concerns. This movement recognizes that the presence of police is not something that all young people equate with safety, and that the criminalization of discipline issues or minor misconduct is problematic in its consequences. There is, therefore, more emphasis now on making sure that the roles of police on campus are defined properly, that officers recognize the unique challenges and opportunities of the environment, and that mentoring and education should be greater focal points than traditional enforcement.

Our knowledge of the specific dynamics of SROs in Palo Alto is quite limited. But the idea of utilizing the police as one component of a “scared straight” intervention – with little advance planning or subsequent assessment – seems worthy of reconsideration. It puts the officer in the role of a threat to be avoided, rather than a constructive member of the school community.

Here, it should be noted, the officer was attempting to meet the expectations of the school administration. If anything, though, this is all the more reason for the Department to recalibrate as needed and to collaborate more effectively with its district partners regarding expectations and optimal deployment strategies.

RECOMMENDATION FIVE: The Department should evaluate the role of its SROs on the city’s campuses to ensure that it is comporting with contemporary best practices, and should clarify with school district leadership as needed.

Case Four: Officer Alleged to Have Used Unnecessary Force During Detention

Factual Overview

PAPD responded to several “911” calls from a residence with regard to a possible domestic violence situation. Two officers arrived at about the same time and went to the door. A male adult answered. The officers asked the female adult resident – who had made the calls – to come out of the house. Then, while Officer 1 continued to talk to the male while standing in the threshold of the front door of the residence, Officer 2 talked to the female outside in the walkway area.

After several minutes, Officer 1 advised Officer 2 to switch places so that he could talk to the female. A third officer (Officer 3) arrived and was instructed by Officer 1 to assist Officer 2. Officer 3 walked past Officer 2, who was at the entry way of the residence interviewing the male, and went further inside the house. The male politely and repeatedly asked Officer 3 if he could move back from the interior of the house; Officer 3 said he would not do so. The male then told Officer 3 he wanted him out of his house; Officer 3 immediately grabbed the male and advised him he was detained. The male tensed his body as Officer 2 assisted Officer 3 in applying control holds to place the male in handcuffs. Officer 1 heard the struggle and also assisted with the handcuffing process.

As the three officers struggled to handcuff the male, he was captured on tape complaining about his arrest and indicating his intent to sue the City of Palo Alto for their actions. After the handcuffs were locked, the male complained of pain and asked for the handcuffs to be loosened. Officer 2 initially said no, but some 30 minutes later, as the male sat in the back of the patrol car, Officer 3 loosened the handcuffs.

The male was eventually arrested for domestic violence and resisting arrest and taken to Santa Clara County jail for booking.

The male complained about the conduct of the officers, primarily the use of force against him, and the Department investigated the incident accordingly.

Outcome and Analysis

PAPD conducted an internal investigation accordingly and found the complainant’s allegations to be not proven.

Investigative Issues

1. Body-worn camera not activated:

PAPD Policy 446.4.1 REQUIRED ACTIVATION OF THE FIELD-BASED VIDEO SYSTEMS instructs officers to activate their video systems during all law enforcement contacts.

The rationale for the policy is so that the Department has an audio/video record of each contact that can be included as investigative evidence. Investigation into this incident soon revealed that Officer 2 did not activate the audio/video equipment during any part of the incident. As a result, the initial interview of the female was not captured on her audio/visual system, nor was the beginning of the interview with the male.

While the investigation soon recognized that Officer 2 did not activate the audio/video equipment during the event, there were no questions asked during the administrative interview about the officer's failure to do so. The second-level supervisor⁶ noted that she would have Officer 2's supervisor review the audio/video policy with the officer to ensure that the officer knew when activation of audio/video equipment was required. There is no documentation in the file indicating whether such review occurred.

When we raised the issue with PAPD, we were advised that the officer had received verbal counseling as a result of the failure to activate. PAPD indicated that it was handled that way because there was no evidence of prior inactivation failures and the absence of the footage did not prejudice the administrative investigation. We acknowledge that the absence of the footage may not have prejudiced the *administrative* investigation (since Officer 3 had activated *his* body-worn camera and thereby captured the relevant encounter). However, the failure of the officer to activate the audio meant, as noted above, that the initial interview of the spouse and the beginning of the interview that Officer 2 had with the male was not recorded, resulting in important information for the underlying *criminal* investigation not being captured.

2. Supervisor not called to scene:

PAPD Policy 300.5.1 NOTIFICATION TO SUPERVISORS states in relevant part:

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (d) The individual indicates intent to pursue litigation.

It is clear from PAPD policy that once the on-scene officers heard the male exclaim his intent to pursue litigation, it was incumbent upon them to make supervisory notification. Yet there is no indication that they took this step; instead, the officers simply continued with the domestic violence investigation. As a result, no supervisor was ever called to the scene.⁷

⁶ As discussed above, the new PAPD protocol requires a holistic review of any complaint investigation by a higher-ranking supervisor than the original investigator.

⁷ The policy also requires supervisory notification when the application of force "would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort" or when the individual "subjected to the force complained of injury or continuing pain." These two situations provide additional bases for timely notifying a supervisor of the application of force in this case.

The rationale for the policy is so that a non-involved supervisor can respond and interview the complainant about the use of force and that the Department can immediately begin a use of force investigation. In this case, the male was not interviewed on scene or when he was booked at the jail about the incident. In fact, it was not until the male filed an on-line complaint 2 ½ weeks later that PAPD arranged to interview him about the use of force, and the actual interview was not accomplished until six weeks after the incident. Had the on-scene officers followed policy, a supervisor could have interviewed the arrestee on the date of the incident as opposed to hearing from him weeks later.

There is no discussion or analysis of this apparent violation of policy in the internal investigative memorandum. The only reference is a recommendation by the second-level reviewing supervisor that the involved officers be debriefed and provided training by a supervisor or manager regarding timely notifications to supervisors when a subject states their intention to file a lawsuit against an officer or the Department. There is no contemporaneous documentation of this in the file of this matter; however, we have been advised that the involved officers were, in fact, debriefed about this policy requirement.

While it is heartening that the second-level supervisor recognized the issue and addressed it informally, it would have been highly preferable for there to be some discussion and analysis within the case file of both the policy and the failure of the on-scene officers to recognize and follow it. More significantly, the officers were not asked about their decision-making and failure to call a supervisor to the scene when they were interviewed. And finally, while the recommendation was sound and a reasonable way to handle the transgression, documentation should have been prepared indicating that the recommended debriefing session did, in fact, occur.⁸

RECOMMENDATION SIX: PAPD should interview subject officers about all potential violations of policy, not just ones identified by the complainant.

RECOMMENDATION SEVEN: PAPD should include discussion about all potential violations of policy within their complaint memoranda, not just ones identified by the complainant.

RECOMMENDATION EIGHT: PAPD should memorialize in writing any responsive non-disciplinary action (such as debriefings or training) that results from administrative review and should add this documentation to the complaint file.

⁸ This observation – and the below recommendation that accompanies it – echoes a similar discussion from Case Two, above. (*See* pp. 6-7.) This reflects our initial exposure to the new protocol for further scrutiny that the Department has implemented and that we endorse (with this suggested modification for strengthening it).

3. Key civilian witness not interviewed:

One key witness that was not interviewed by PAPD was the spouse of the complainant. While she did not see the initial encounter, she was able to view the continuing struggle between her husband and PAPD officers as they placed him into handcuffs. She is even captured on the body camera video and referenced in the police report as telling her husband to “calm down”.

Despite her presence as a witness, the spouse was not interviewed during the internal investigation. Nor was there any information in the investigative reports of any effort to contact her and request an interview. When civilians are witnesses to a use of force, it is incumbent upon law enforcement agencies to interview them to gain a full picture and all perspectives of the event.

RECOMMENDATION NINE: PAPD should ensure that all witnesses to a use of force are interviewed during any subsequent complaint investigation.

Review Issues

1. Additional Issues identified during PAPD review process

a. Explaining the detention process. PAPD’s second level reviewer concluded that during the handcuffing of the male subject and immediately afterwards, he may not have understood why he was being handcuffed. The reviewer opined that it might have helped for the officers to clarify to the man that he was being detained and placed in the back of the patrol car so that officers could safely continue the investigation.

While this issue was commendably identified, the memorandum contains no recommendation about how to address this issue with the officers. We have been informed that the issue was addressed with the officers. Again, though, we reiterate the importance of both memorializing the written recommendation and of documenting any remedial action taken.

b. Checking and Loosening Handcuffs. The second-level reviewer also recommended that the involved officers be debriefed and provided training by a supervisor or manager regarding when it is appropriate to check and/or to loosen handcuffs. In this case, soon after he was handcuffed the male asked if they could loosen his handcuffs, and Officer 1 advised that they would do so when they got outside. The male was searched and seated in the back of a patrol vehicle, at which time he again asked, “could you please loosen up my wrist?” Instead, Officer 2 said “no” and Officer 1 closed the patrol car door. Over 30 minutes later, when Officer 3 was obtaining contact information from the male and explaining the charges he was being arrested for, the male asked for the third time if the officers could loosen the handcuff, and Officer 3 then did so.

Because there is no explanation about why the second level reviewer recommended a debriefing on the appropriate time to loosen handcuffs, one is left to infer that PAPD found that it would

have been preferable to have checked and loosened the handcuffs earlier in the sequence instead of waiting over 30 minutes to do so. Again, there is no record as to whether the debriefing occurred, but we were informed that it did so. As with the other training and debriefing issues discussed herein, it is important to document when such activity occurred and include such memorialization with the force investigation file.

2. Actions Precipitating the Use of Force

As noted above, PAPD determined that the use of force was within policy based on its review of the evidence. However, the following was not considered in the Department's analysis:

a. Whether the male could request the officer to leave his residence. As noted above, during the encounter with the male, Officer 1 and then Officer 2 talked with the male in the threshold of his residence. While the officers did not ask and the male did not audibly consent, his inactions could be interpreted as implied consent for the officers to remain in the threshold of his residence and speak to him. When Officer 3 arrived, he moved further into the interior of the house. The male twice asked Officer 3 to move back to the threshold area of the house, and when Officer 3 expressed that he would not do so, the male then asked him to leave the house. When that request was given, Officer 3 reached out and grabbed the male and the resulting force ensued.

What was not considered in PAPD's analysis was whether the male had the right to request (or even demand) that responding officers leave his residence. There was no apparent exigency articulated or expressed by the officers that required them to enter the residence, and the implied consent he had given initially for the officers to be in the threshold could arguably have been withdrawn – which is what the male was apparently endeavoring to do. If the officers felt the need to continue to talk with the male or physically detain him, they could have asked him to come out of the residence before immediately going hands on. The Fourth Amendment rights and implications granted to the “people to be secure in their houses” was not considered in evaluating Officer 3's conduct.

b. The articulated basis for going hands on is not supported by the other evidence. In his report, Officer 3 wrote that he made the following observations when he went into the house to join Officer 2:

- A fresh hole in the wall
- Several items that had been broken
- Numerous pieces of martial arts training equipment

The officer wrote that based on what he observed and the fact that the investigation involved domestic violence, he repositioned himself past the male and Officer 2. The officer wrote that the male became increasingly irate and told the officer he did not want him in his residence. The officer wrote that the male proceeded to clench both fists and again told him to leave his residence. The officer wrote that, based on fearing that the male's anger would escalate to a physical confrontation, he advised the male that he was detained and that he was going to be

placed in handcuffs. The officer wrote that upon grabbing the male's left arm, the male began resisting and attempting to pull away.

The initial observations of the residence documented by Officer 3 appear to be an effort to identify reasons for his concern about the male and his ultimate decision to go hands on. However, the martial arts training equipment that Officer 3 wrote about was, in fact, a martial arts outfit for the young juvenile who was in the house. Most significantly, Officer 2 was in a position to make the same observations and had not felt the need to go further into the house. And neither Officer 1 nor Officer 2, who had spent some amount of time dealing with the male, had felt the need to pat him down or place him in restraints.

The video evidence from the body-worn camera does not corroborate the information in Officer 3's police report that the male clenched his fists as he got angry and ordered him out of his house prior to the officer going hands on. Instead, any evidence of fists being clenched occurred *after* Officer 3 goes hands on. Nor does Officer 2 corroborate the assertion that supposedly was the basis for Officer 3's actions. And, most significantly, the tenor of the officer's narrative does not correspond to a transcript of the actual conversation between the male and Officer 3 prior to the initiation of the use of force.

The video unfolds as follows: Officer 3 approaches residence and Officer 1 is interviewing the female outside on the walkway to the residence. Officer 1 asks Officer 3 if he could stick with Officer 2 and advises him that there are two kids whom Officer 1 needs to talk to in a minute.⁹ Officer 3 then goes to foyer area of door where Officer 2 is standing and interviewing the seated male who is in the process of admitting to throwing things around and that he probably caused the hole in the wall. Officer 3 walks past Officer 2 into the house.

From there, the following exchange occurs:

Officer 3: Hey, how you doing?

Male: All right, can you please not walk inside?

Officer 3: Well, I can't not, not walk inside, so.

Male: I don't want you guys here in the first place.

Officer 3: I know you don't want us here, but we are conducting an investigation.

Male: I understand but this is my property, so if you could please just respect my wishes.

Officer 3: I will respect your wishes by not walking in there, but

Male: I'm not in the best of moods.

Officer 3: I totally understand that.

⁹ A juvenile son and daughter of the couple were present in the residence during the actions that led to the 911 calls.

Male: So, I would appreciate it if you would please move over there closer to the door.

Officer 3: Not gonna' happen.

Male: OK, I would like you to leave my house.

Officer 3 then says: “all right,” immediately reaches to grab the male’s upper arm and *then* says: “you are detained.” From there, the use of force and struggle commences.

In spite of Officer 3’s written characterization, the body camera audio/video of the interaction prior to the use of force does not depict a male growing increasingly “irate” and clenching his fists and presenting a potential security risk. In fact, the male is quite courteous in asking the officer to “please” not walk into his house and then again to “please” move closer to the door. It is only after the officer says that it’s “not gonna’ happen”, that the male says “he would like” the officer to leave his house. And that is when the officer grabs the male and the force ensues.

The most apparent inference to be drawn from the video recording itself is that Officer 3 grabs the male because he interprets the man’s direction that he leave – which only occurred when initial requests that the officer move to the foyer where his partner had been positioned were rejected – as constituting a bothersome challenge to his authority. Moreover, to the degree that the male appeared to become increasingly frustrated about Officer 3, the escalation appears to be a function of the officer’s failure to consider other strategies for handling the situation. Based on the situation, there does not appear to be any apparent security need for Officer 3 to insist on staying where he was and could have considered the male’s reasonable requests.¹⁰

An important tactical principle increasingly taught and emphasized in modern day policing is that officers should always attempt to use de-escalation when feasible to avoid getting into use of force incidents. In this case, Officers 1 and 2 had been able to effectively conduct a domestic violence investigation without any perceived need to search or handcuff either party and the investigation was proceeding well. When Officer 3 arrived, the male was seated quietly on a bench and in the process of admitting to Officer 2 that he had earlier been throwing objects around the house, causing a small hole in the wall. Then, within seconds of his arrival, Officer 3’s interactions with the male led to Officer 3 going hands on and resulted in a use of force.

Instead of relying on his own observations made within seconds of entering the house, Officer 3 could have benefited from taking the lead from Officer 2, who by then had engaged with both the female and the male in the house. Officer 3 could have taken a “backup” role and allowed the conversation between Officer 2 and the male to continue, given that it was seemingly going well

¹⁰ But the difference between the perceptions of Officer 3 as detailed in his report and the apparent dynamic in the room as depicted by the audio/video evidence at least merited further attention during the interview of the officer and in PAPD’s analysis.

and being productive. Instead, by becoming the center of attention, Officer 3 interrupted the interview and began a level of escalation that resulted in the use of force by all three officers.

From a review of the incident, it appears likely that the patrol response in this case could have been effectively accomplished without any use of force had Officer 3 not responded to the call in the way he did. It was incumbent upon PAPD in its review not only to determine whether the use of force was “reasonable” but whether it was the officer’s poor tactical communications that contributed to the use of force incident from occurring. That did not happen in this case, insofar as the analysis regarding the reasonableness of the force focuses more narrowly on the officers’ actions *after* the arm is grabbed and the male pulls away.

PAPD’s analysis did not discuss whether Officer 3’s approach with the male’s was consistent with the agency’s focus on de-escalation techniques. There is a reference by the second reviewer that the officers could benefit from debriefing and training on tactical communications – but with no analysis or explanation why the reviewer believed such training would be beneficial. When such a recommendation is made, it would be helpful for the reviewer to include some analysis or rationale for making the recommendation.

RECOMMENDATION TEN: PAPD’s use of force analysis should include an assessment of whether the involved officers effectively used de-escalation techniques when feasible, and/or or whether their communications contributed to an escalation requiring force.

RECOMMENDATION ELEVEN: PAPD should include some analysis or discussion about the rationale for any reviewer’s recommendation regarding training or debriefing in tactical communications.

3. Complainant not advised of concerns identified during the investigation

California state law requires that when a complaint is filed alleging police misconduct, agencies are required to conduct an investigation and, upon completion, advise the complainant in writing of the disposition of the complaint.

PAPD policy provides additional guidance on the notification requirement:

328.6.1 NOTIFICATION OF DISPOSITION The complainant and/or victim will be notified in writing of the disposition of the investigation and the actions taken to remedy or address the circumstances giving rise to the complaint.

In this case, after the investigation was closed, the complainant received a letter indicating that all of his allegations (standards of conduct, false reporting, unreasonable force, discourteous conduct, conduct unbecoming of an officer) were either unfounded or exonerated. The complainant was not advised of other issues identified during the investigation (Officer 2’s failure to activate body camera, tactical communications, failure to timely notify supervisor when complaint indicates intent to file litigation, appropriate time to loosen handcuffs). As a

result, the complaint letter provides the complainant the inaccurate impression that all of the performance by the responding officers was consistent with Department expectations.

Other agencies do not limit their complaint letters to the particular allegations made by the complainant, knowing full well the complainant may not be aware of all nuances of PAPD policy. Instead the agency speaks to “actions taken to remedy or address the circumstances giving rise to complaint.” For example, instead of going into the specific additional performance issues, PAPD could have advised the complainant:

During our investigation, we identified other performance issues by the responding officers and undertook appropriate action to address them. By bringing this matter to our attention, you provided us the opportunity for that review and to improve our officer’s performance accordingly.

This type of more holistic closing letter provides the complainant better understanding that the agency took his complaint seriously and actually uncovered issues worthy of intervention. Instead of a form letter that leaves an impression that the Department found “nothing to see here” and merely ushered the matter along, it provides an acknowledgement that potential for improvement is pursued and addressed more broadly, and that the agency identified opportunities for that improvement as a consequence of the complaint.

RECOMMENDATION TWELVE: PAPD should consider revising its complaint notification letters to convey its identification and resolution of any issues beyond the allegations raised by complainant.