

November 15, 2021

# Seventy-Sixth Report *of the Independent Monitor for the Oakland Police Department*

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## Introduction

This is our seventy-sixth status report on the Negotiated Settlement Agreement (NSA) in the case of *Delphine Allen, et al., vs. City of Oakland, et al.*, in the United States District Court for the Northern District of California under the direction of Judge William H. Orrick. I was appointed in 2010 to oversee the monitoring process of the Oakland Police Department (OPD) that began in 2003.

Following the Court's Order of May 21, 2015, we devote special attention to the most problematic component parts of the NSA Tasks that are not yet in full or sustained compliance; and discuss in our status reports the most current information regarding the Department's progress with the NSA and its efforts at making the reforms sustainable. Our monthly reports do not address all Tasks. This report describes our recent assessments of NSA Tasks 2, 24, 25, 26, 30, and 31.

Each month, our Team conducts a visit to Oakland that includes both compliance assessments and technical assistance. During our site visits, we meet with Department and City officials; observe Department meetings and technical demonstrations; review Departmental policies; conduct interviews and make observations in the field; and analyze OPD documents and files, including misconduct investigations, use of force reports, crime and arrest reports, Stop Data Forms, and other documentation.

During the September 1, 2021 Case Management Conference, the Court reiterated its five priorities for the Department:

1. Reduce racial disparities in vehicle, pedestrian, and bicycle stops, with continued use of intelligence-led policing;
2. Implement Vision and its associated dashboards in a technologically straightforward way so that the tools are used effectively in the risk management process;
3. Recruit officers who reflect the (gender, race/ethnicity, and other) diversity of Oakland;
4. Ensure that all uses of force and instances of potential misconduct are accurately reported and rigorously investigated within set timeliness standards; and
5. Ensure that disciplinary decisions and the disciplinary process are fair and equitable.

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The Department is making progress in these areas, and the Chief and the Monitor are continuing their discussions regarding these on a regular basis.

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### *Focused Task Assessments*

## Task 2: Timeliness Standards and Compliance with IAD Investigations

### **Requirements:**

*Fairness to complainants, members/employees and the public requires that internal investigations be completed in a timely fashion.*

- 1. On or before December 1, 2003, OPD shall develop policies regarding timeliness standards for the completion of Internal Affairs investigations, administrative findings and recommended discipline.*
- 2. Compliance with these timeliness standards shall be regularly monitored by IAD command and the Department's command staff. If IAD experiences an unusual proliferation of cases and/or workload, IAD staffing shall be increased to maintain timeliness standards.*

(Negotiated Settlement Agreement III. B.)

### **Relevant Policy:**

OPD most recently revised Departmental General Order M-03, *Complaints Against Department Personnel and Procedures*, on December 22, 2017.

### **Commentary:**

**Task 2.1** requires that internal investigations (IAD and Division Level) – including review, approval, findings, and discipline – be completed in accordance with the timeliness standards developed by OPD. To assess this subtask, we reviewed a list of all internal investigations resulting in formal findings (unfounded, sustained, exonerated, or not sustained) that were approved in July, August, and September 2021, and calculated the number of days between the complaint date and the approval date for each case. We excluded from the dataset cases that were administratively closed, those that involved on-duty traffic accidents or service complaints, and those that did not involve Manual of Rules (MoR) violations. We segregated the remaining cases into Class I or Class II categories. If a case involved at least one alleged Class I violation, we classified it as Class I.

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At least 85% of Class I misconduct investigations and at least 85% of Class II misconduct investigations must be completed within 180 days to be considered timely. Per DGO M-03, Class I offenses “are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution.” Class II offenses include “all minor misconduct offenses.”

For the purposes of this assessment, we calculated the number of days between the complaint receipt date and the approval date. The complaint date is the date on which the Department first becomes aware of a complaint – whether it is lodged by a community member or internally generated. Even with the removal from the denominator of those cases that were delayed due to tolling (held in abeyance in accordance with one of the provisions of Government Code Section 3304) or cases in which OPD’s failure to meet 180-day timeliness requirement resulted only from delays in the Community Police Review Agency (CPRA) completing its concurrent investigations, the Department is not in compliance with Task 2.<sup>1</sup> It is essential that the Department initiate an open dialogue with the CPRA to ensure that the efforts of both entities are contributing to the Department’s compliance with the 180-day requirement as articulated in policy.

Per DGO M-03, “In cases with a sustained finding, the discipline recommendation process shall be completed within 30 calendar days of the sustained finding.” We reviewed all 22 cases including a total of 58 sustained findings that were approved in July, August, and September 2021; 11 cases involved multiple sustained findings. All (100%) of these cases were in compliance with established discipline timelines.

OPD is not in compliance with Task 2.1.

Task 2.2 requires that IAD and OPD command staff regularly monitor compliance with these timeliness standards. The primary responsibility for monitoring compliance with timeliness standards rests with IAD, whether investigations are conducted by IAD personnel or via Division-level investigation. As part of this monitoring, the IAD Commander discusses pending deadlines for key open investigations during IAD’s weekly meetings with the Chief; the deadlines are also reflected in written agendas for these meetings. A Monitoring Team representative regularly attends these weekly meetings. IAD also occasionally, as needed, emails individual reminders on cases approaching due dates to investigators and their supervisors. The Department is in compliance with Task 2.2.

Task 2.3 requires that if IAD experiences an unusual proliferation of cases and/or workload, IAD staffing be increased to maintain timeliness standards. We routinely request and receive updates on IAD staffing levels during our site visits.

<b>Task 2 compliance status</b>	Not in compliance
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<sup>1</sup> Of the 35 applicable Class I cases we reviewed for this assessment, 29, or 83%, were in compliance with established timelines. During our last review of Task 2, we found that 75% of Class I cases were in compliance with established timelines. Of the 108 applicable Class II cases we reviewed for this assessment, 98, or 91%, were in compliance with established timelines. During our last review of Task 2, we found that 82% of Class II cases were in compliance with established timelines.

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## Overview of Our Assessments of Tasks 24 and 25

OPD had been in compliance with Tasks 24 and 25 since 2015, and we were not actively reviewing these Tasks. In November 2018, after we raised concerns regarding the identification, potential underreporting, and investigation of uses of force, the Court reactivated Tasks 24 and 25.

Between August 1-October 15, 2021, we reviewed six Level 2 uses of force for which a Force Review Board (FRB) was held. Consistent with our reviews of Level 3 and 4 use of force reports, we identified some concerns with the field reporting, which were appropriately addressed during the FRB. Level 2 uses of force are reported in the Task 26 section of this report. We did not review any uses of force for which an Executive Force Review Board (EFRB) was held. Only Level 3 and 4 uses of force are discussed in this assessment.

For purposes of this report, we reviewed 69 Level 3 and Level 4 use of force (UOF) reports that were completed by OPD personnel between November 1, 2020-January 31, 2021. We reviewed all incidents that involved at least one Level 3 use of force (nine), all Level 3 uses of force that were reduced to Level 4 (two), and a sample of Level 4 uses of force (58).

Since we resumed these reviews following the Court's reactivation of these Tasks, we have provided detailed feedback on the force investigations to OPD during each of our site visits. In cases where we have had questions or concerns, OPD personnel have continued to be responsive and have provided follow-up where necessary. In some cases, OPD has provided additional information or documentation that supports its actions, and we have concurred with the Department's assessments. In others, we have identified concerns that had not been identified or addressed by supervisors who conducted the UOF investigation, or the command personnel who reviewed the investigation. In these cases, OPD executive staff have directed additional review; directed training; entered a Supervisory Note File (SNF); or initiated an Internal Affairs Division (IAD) investigation.

In late 2018, OPD employees received training on the requirements for use of force reporting related to the pointing of weapons. In April 2019, OPD issued an Information Bulletin that provided clarification and direction regarding the documentation of use of force. The content of this bulletin included many of the concerns we had identified with the proper reporting of force. In June of 2019, the then-Chief issued a directive via email that specifically addressed boilerplate language in use of force reports; and in November 2019, she followed up with an additional email to address the use of generic or boilerplate language in the administrative section of Department reports. In December 2019, OPD completed the training developed to address deficiencies found in UOF documentation based on OIG's global use of force audit. On February 15, 2020, OPD published Special Order 9196, which expanded and clarified the use of force policy. On February 27, 2020, the Department published Special Order 9202, which temporarily modified the requirements for the reporting of Type 32 uses of force. In June and August 2020, emails from executive staff addressed delayed body-worn camera (BWC) activations, the 30-second BWC buffer, and "pat" language being used in reports. In January 2021, an information bulletin addressed ongoing BWC activation concerns; and in May 2021, OPD provided training on announcements of police during community contacts, BWC activations, accuracy in reporting, and identifying patterns prior to issuing SNFs for discovered

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MOR violations. As noted in this and prior reports, while these efforts by executive staff have resulted in some improvement, there is still an unacceptable number of deficiencies in the investigation and review of uses of force.

In September 2021, OPD began conducting line-up training that covers: inappropriate use of force commands, failure to identify oneself as a police officer, the 30-second body-worn camera buffer, late BWC activations, use of profanity and slang, professional demeanor, conclusions designed as facts, boilerplate language, ensuring equipment is functional at the beginning of each shift, avoiding multiple officers giving commands during contacts with subjects, documentation of Type 32 UOF, proper preparation of SNFs, requirements for lowering or raising the level of force), and administrative due date reminders. This most recent training repeats many of the directives already provided to employees over the past two years. We are hopeful this training will provide necessary reinforcement and increase compliance with previous directives.

This report covers Level 3 and 4 UOF reports completed by OPD between November 1, 2020 and January 31, 2021. All 69 of the cases we reviewed for this time period occurred after the publication of Special Order 9196, which clarified the use of force policy; and after Special Order 9202, issued on February 27, 2020, which temporarily modified the requirements for reporting Type 32 uses of force. While we had continued to note overall improvement in the reporting of uses of force in our reviews over our past several reports, we did not see continuing improvement for this report.

In the 69 Level 3 and 4 uses of force we reviewed, there were 216 uses of force by 167 officers, against 95 different persons. In some cases, multiple officers used force on a single person; and in others, force was used on multiple persons, either by a single officer or by multiple officers. The total breakdown for the force used on the 95 persons is as follows: African Americans, 71%; Latinos, 20%; whites, 4%; and Asians or other, 6%. The percentage of force incidents involving African Americans increased by 7%; force incidents involving whites decreased by 4%; force incidents involving Latinos remained the same at 20%, and force incidents involving Asians or persons categorized as “other” remained at 6% as we found in our last review, documented in our seventy-fourth status report.

In the nine Level 3 uses of force we reviewed, six involved the deployment of a Taser along with one or more Level 4 uses of force. Two involved only the use of a Taser and one involved only a Type 16 use of force. Type 16 is defined as “All non-carotid takedowns on a restrained subject.” In all nine, we found the uses of force to be appropriate and in compliance with OPD policies. Two additional Level 3 Type 16 uses of force were reduced to Level 4s, Type 26-16 with the approval of a supervisor. A level 4 Type 26-16 is defined as “Any level 3 force incident meeting the criteria to be reported as a Level 4 AND reviewed and approved by a supervisor or a commander.” In one of these two, we identified concerns with the reduction of force to a Level 4; and OPD is conducting additional follow-up on this investigation.

In the 58 Level 4 UOF reports we reviewed, there were 171 uses of force by 138 officers against 82 persons. Forty-five of the 58 Level 4 UOF reports reviewed involved a Type 22, pointing of a weapon only. In these 45 reports, there were 133 uses of the Type 22, by 106 officers, against 65 persons. This equates to 78% of the total 171 Level 4 uses of force we reviewed during this time period. We again found in our reviews that there were numerous incidents involving multiple subjects with numerous OPD personnel being involved in the pointing of weapons. In these 133

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uses of force, the breakdown is as follows: African Americans, 69%, an increase of 5% from our seventy-fourth report; Latinos, 23%, the same percentage as our seventy-fourth report; whites, 2%, a decrease from 6%; and Asians or other, 6%, an increase of 2% from our seventy-fourth report. Of the 58 Level 4 UOF reports we reviewed, three (5%) involved a Type 29 takedown only. Eight (14%) involved a combination of multiple Level 4 uses of force. Two additional uses of force (3%) were Level 3 Type 16 that were reduced to Level 4 Type 26-16.

Of the total 95 persons on which a Level 3 or 4 UOF was used, 68 (72%) were arrested or criminally charged for felony or misdemeanor violations. This is a decrease in arrests from the 81% in our seventy-fourth report. The remaining 26 involved mental health holds, inability to establish criminal conduct, subjects who escaped, victims who did not want to prosecute, or subjects determined not to be a suspect after the investigation was conducted. In seven of the incidents reviewed, a person claimed an injury; none of these injuries required admittance to a hospital. In five other instances, persons were transported to a medical facility for the removal of a Taser probe only, for injuries that occurred prior to the use of force, or solely to obtain a medical clearance.

In our early assessments of Task 25.3 after reactivation of Tasks 24 and 25, we found numerous instances where officers did not attempt verbal communications prior to using force. Significant improvement in this area has occurred over time; and for this report, we did not identify any uses of force where officers failed to attempt verbal communications and de-escalation where appropriate, prior to utilizing force. We did, however, again identify numerous instances where officers did not identify themselves as police officers when contacting members of the public and there was time to do so. We will continue to discuss any future concerns we identify with OPD and continue to monitor these types of instances; as is our practice during our monthly site visits, we continue to provide input to the Department on our observations.

Special Order 9196, the revision to the UOF reporting requirements, that went into effect on February 15, 2020, clarified what constitutes a “reportable use of force” and provided clearer direction on the reporting of use of force. Special Order 9196 also added a new force type: Type 32. A Type 32 use of force includes: overcoming resistance of a person during an arrest or detention; or defending oneself or another from combative action by another person. Type 32 is intended to address any use of force not already covered in Types 1-31. While we expected an increase in Level 4 use of force reporting after Special Order 9196 was issued, the immediate and significant spike in the numbers was much greater than anticipated and appeared to be primarily related to the new Type 32. We agreed with OPD’s assessment that further review of the force policy was needed due to this unanticipated increase; and Special Order 9202 was issued, that at least temporarily removed the Type 32 from the category of a Level 4 reportable use of force. Alternative means for counting these uses of force were implemented by OPD until more permanent solutions could be identified.

For our sixty-ninth report, we reviewed a sample of Type 32 uses of force. We found in these early reviews that there was some initial confusion regarding this reporting. In some cases, we identified instances where a Type 32 was documented and it did not appear that a use of force had occurred; and in others, we found that Type 32 was not the appropriate force type to have been used. We also identified concerns with officers not authoring their own supplemental reports, failures to properly document these uses of force in required reports, and the

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identification of MOR violations or training issues that did not appear to have been addressed. In June 2020, OPD began providing additional training on how to properly document Type 32 uses of force; and we began to see improvement.

As part of our reviews for this report, we reviewed the monthly Type 32 UOF audits conducted by Area Command personnel during this time period. They found again that, in general, officers are properly reporting these uses of force. They did not identify any instances in their reviews where they believed that a Type 32 UOF should have been classified as a different, or higher, level of force. They also found that the majority of these uses of force were the result of resistance during handcuffing, resisting while a subject was being escorted, or restraining persons with mental health issues.

All of the uses of force we reviewed for this report occurred after Special Order 9196 was issued, and after Special Order 9202 was issued to address the challenges created with the required reporting of Type 32 UOF. During our review of the 69 Level 3 and 4 UOF incidents for this report, we again noted numerous instances where it took multiple officers to control and secure combative persons. In most of the cases, we found that officers continued to identify and document Type 32 uses of force as required – though there were five instances identified in our reviews where we found that a Type 32 UOF had not been properly identified or reported. OPD took action when we brought these to the Department's attention.

The issuance of Special Order 9202 resulted in the identification of several challenges in collecting data regarding Type 32 UOF, as OPD's technology did not allow personnel to accurately collect the information as OPD had expected it would. There has also been a need to identify a long-term solution that will address not only how Type 32 uses of force will be documented, but how they will be reviewed. We have had several discussions with OPD and the Department has now developed a protocol that will ensure the appropriate identification, review, and reporting of these uses of force. This protocol is still pending final review and publication.

For our 74<sup>th</sup> report, we found that in the 109 UOF reports we reviewed, there were 36 instances (17%) where a BWC had not been properly activated; all were late activations. In 18 (50%) of these, a supervisor identified and properly addressed the late activation. In the remaining 18, the supervisor either failed to identify and address the late activation at the time it occurred or failed to ensure that appropriate follow-up was conducted once it was discovered.

For this report, we reviewed 69 UOF reports for the three-month period between November 1, 2020 and January 31, 2021. In 15 (22%) of the reports reviewed, we identified concerns with BWC activation. We do not include documented malfunctions of BWCs or those that have been deactivated during a struggle or other contact with persons in these numbers. Of the 15 instances we identified, eight (53%) were not identified by the supervisor. Of the eight instances not identified by the reporting supervisor, two (25%) were identified by a reviewing supervisor.

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As we have noted in numerous previous reports, the failure to properly activate a body-worn camera is a violation of policy; and more importantly, could result in the loss of critical information regarding the community contact. Beyond the late activations themselves, we are more concerned that supervisors and those who review the supervisors' reports have not been consistently identifying and addressing this violation.

While OPD has continued to conduct follow-up on each of the BWC activation concerns we have raised and has issued numerous SNFs – and in some cases, discipline – to both those who fail to properly activate their BWCs and to those supervisors who fail to identify and address the failures, our Team is still having to identify many of these failures as they were not initially identified and addressed by OPD personnel. At this point in the process, that should not be the case.

In our monthly site visit meetings with OPD, we have discussed and supported OPD's proposed transition to a new BWC system that would allow additional ways to ensure proper activations. During our October 2021 virtual site visit in, OPD advised us that the budget proposal and contract for this upgrade has been approved. As previously noted, this will not be an immediate fix; and even with this technology, it remains the responsibility of supervisors to identify and address failures to properly activate BWCs when they occur.

To determine the overall extent of BWC activation failures and the actions being taken by OPD to address these concerns, we have requested OPD provide us with a list of all incidents where the failure to properly activate a BWC has resulted in any remedial action between 2019 and 2021. We will review this data and provide our assessment in our next update on Tasks 24 and 25.

In addition to concerns with body-worn camera activations, we have continued to note the use of profanity or inappropriate use of slang terms that was clearly evident upon review of body-worn camera footage, though the number of such instances has decreased significantly from our early reviews. We have also continued to find instances where supervisory personnel have failed to ensure that no previous patterns of violations exist prior to determining if an SNF is appropriate for a late body-worn camera activation or other type of MOR violation. While we remain supportive of the use of SNFs for minor violations, we continue to emphasize that supervisors must ensure that the officer does not have a pattern of similar conduct prior to using an SNF.

The use of force analysis we conducted in 2018 established the underreporting of Level 4 uses of force where an officer pointed a weapon at a person. Following our analysis, OPD partially addressed this concern with refresher training in September 2018 for all officers, and the Department has further addressed this issue in its use of force policy revisions. In our review of Level 3 and 4 uses of force for this report, we did not identify any instances where an officer failed to report the pointing of a weapon at a person.

In OPD's 298<sup>th</sup> Biweekly Compliance Update, dated July 30, 2021, the Department provided a comparison of year-to-date Level 3 and 4 uses of force for 2021 compared to the same time period in 2020. Overall UOF decreased from 2,278 in 2020, to 1,331 in 2021. Level 3 uses of force decreased from 112 in 2020, to 45 for the same time period in 2021. The ongoing reduction in Level 3 UOF appears to be at least in part due to the institution of new policies and the reclassification of some uses of force from Level 3 to Level 4. Level 4 uses of force

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decreased from 2,133 in 2020, to 1,272 for the same time period in 2021. These decreases appear to have numerous explanations. New policies and the adjustment of Type 32 reporting that occurred in 2020 is responsible for some of the large numbers in early 2020. OPD command staff have been addressing the use of Type 22 uses of force, firearms control, and the number of officers who need to deploy weapons at incidents. OPD has been offering more training on de-escalation; there has been a reduction in stops due to the necessary disbanding of specialized units due to budget constraints; and OPD is now using a consolidated, Citywide approach to stops, focusing on violent crime. The Department's assessment has been that while there is an overall reduction in stops and arrests that has contributed to the decrease in UOF, those arrests that are occurring are of a "higher quality." We raised with the Department our concerns about the accuracy of the data in recent Biweekly Compliance Updates. We will discuss and clarify this with the Department during our next site visit.

OPD has taken numerous steps to address the proper reporting of use of force and the concerns that have been identified during our reviews. In our reviews of UOF reports for March 1-October 31, 2020, we saw evidence that OPD's efforts appeared to be having a positive effect on reporting. During our September 2021 virtual site visit, the City Administrator requested that our Team attempt to make our reviews of UOF more current. In response to this request, we agreed to review two months of reports at each site visit, which would allow us to be as current as possible by December 2021. We note, however, that much of our ability to conduct this expedited review of cases will be dependent on OPD's ability to get the cases completed and forwarded to us in a timely manner. As we have discussed with OPD, Level 3 UOF investigations are often taking between two and five months to complete. For us to become more current with our reviews, as per the City's request, OPD must also address these delays.

We reviewed December 2020 and January 2021 UOF reports during our most recent site visit. We had expected that the Department would continue to improve its reporting and there would be ongoing improvement with compliance requirements. Unfortunately, it appeared from this review that OPD's progress has stalled. The number of concerns with the investigation and review of UOF reports showed no appreciable improvement from our November reviews. We also agreed to skip February and March 2021 reviews and start reviews again for April and May 2021. We were hopeful that this additional time would allow for all of the Department's directives to take root with its personnel. While we have not finalized our reviews for the April and May 2021 uses of force, our initial assessment is that, again, the Department is not making additional progress. We will continue to monitor the impact of these revised policies, training delivered, and any directives from OPD executive staff that addresses any ongoing UOF reporting concerns.

## Task 24: Use of Force Reporting Policy

### **Requirements:**

*The policy shall require that:*

1. *Members/employees notify their supervisor as soon as practicable following any investigated use of force or allegation of excessive use of force.*
2. *In every investigated use of force incident, every member/employee using force, and every member/employee on the scene of the incident at the time the force was used, shall report all uses of force on the appropriate form, unless otherwise directed by the investigating supervisor.*
3. *OPD personnel document, on the appropriate form, any use of force and/or the drawing and intentional pointing of a firearm at another person.*
4. *A supervisor respond to the scene upon notification of an investigated use of force or an allegation of excessive use of force, unless community unrest or other conditions makes this impracticable.*
5. *OPD notify:*
  - a. *The Alameda County District Attorney's Office immediately or as soon as circumstances permit, following a use of lethal force resulting in death or injury likely to result in death.*
  - b. *The City Attorney's Office as soon as circumstances permit following the use of lethal force resulting in death or serious injury. At the discretion of the City Attorney's Office, a Deputy City Attorney shall respond to the scene. The Deputy City Attorney shall serve only in an advisory capacity and shall communicate only with the incident commander or his/her designee.*
  - c. *Departmental investigators regarding officer-involved shootings, in accordance with the provisions of Section V, paragraph H, of this Agreement.*
6. *OPD enter data regarding use of force into OPD's Personnel Assessment System (PAS).*

(Negotiated Settlement Agreement V. A.)

### **Relevant Policy:**

OPD most recently revised Departmental General Order K-4, *Reporting and Investigating the Use of Force*, on October 16, 2014.

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### **Commentary:**

To assess compliance with Task 24, we reviewed 69 Level 3 and 4 use of force (UOF) reports that were completed by OPD from November 1, 2020-January 31, 2021. We also reviewed seven Level 2 UOF investigations, for which an FRB was held between August and October 2021. These Level 2 uses of force are reported in our regular assessments of Task 26.

**Task 24.1** requires that members/employees notify their supervisor as soon as practicable following any reportable use of force or allegation of excessive use of force. In our reviews, we identified five instances where notification was not properly made or was not properly documented. All involved Level 4, Type 32 UOF. None of the five were identified and addressed by a supervisor prior to our bringing them to the attention of OPD.

**Task 24.2** requires that in every reportable use of force incident, every member/employee on the scene of the incident at the time the force was used, reports all uses of force on the appropriate form, unless otherwise directed by the investigating supervisor. **Task 24.3** requires that OPD personnel document, on the appropriate form, every use of force and/or the drawing and intentional pointing of a firearm at another person.

In the 69 Level 3 and 4 UOF incidents we reviewed; officers used force 216 times. In 49 of the reports, weapons were pointed at one or more subjects. In 45 of these 69 reports, Level 4 Type 22 was the only UOF used. We determined that officers' pointing of their firearms was appropriate in all instances we assessed. There were no instances identified where officers did not report Type 22 uses of force. We did identify five instances where officers who assisted in restraining a combative person did not properly report a Type 32 UOF. We will continue to closely monitor force reports to ensure that OPD personnel properly report uses of force in the future.

**Task 24.4** requires that a supervisor respond to the scene upon notification of a Level 1, 2, or 3 use of force or an allegation of excessive use of force, unless community unrest or other conditions makes such a response impracticable. In all eleven Level 3 uses of force we reviewed for this subtask; supervisors responded to the scene as required. Though not required, in all but three of the 56 Level 4 UOF reports we reviewed, a supervisor was either on scene at the time of the use of force or responded to the scene upon being notified of the use of force.

**Task 24.5** specifically addresses requirements for the response and handling of Level 1 uses of force. We assess Level 1 uses of force in our regular reviews of Task 30 (Executive Force Review Boards).

**Task 24.6** requires that OPD enter all use of force data into Performance Reporting Information Metrics Environment (PRIME), which is now called Vision. In all 69 of the Level 3 and 4 UOF cases we reviewed; the data was entered as required.

The Court's reactivation of Task 24 at a November 2018 Case Management Conference resulted from our serious concerns with the Department's handling and investigation of uses of force. OPD drafted Special Order 9196 to address and clarify requirements for the proper reporting of use of force. This revision to UOF reporting requirements went into effect in February 2020. OIG's global use of force audit, conducted in 2019, also identified numerous concerns with the reporting of use of force and enumerated recommendations. As noted throughout this report,

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OPD has taken a number of actions to address the identified concerns with the reporting of force. This is the second report where our assessment includes only uses of force that occurred after the implementation of Special Order 9196, the revisions to OPD's use of force policy, and Special Order 9202, and includes the review of 69 Level 3 and 4 uses of force. While we will continue to closely monitor uses of force to ensure that the desired reporting outcomes continue, we find OPD in compliance with this Task.

<b>Task 24 compliance status</b>	In compliance
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## Task 25: Use of Force Investigations and Report Responsibility

### **Requirements:**

*An on-scene supervisor is responsible for completing an investigated use of force report in accordance with the provisions of Departmental General Order K-4, "Reporting and Investigating the Use of Force."*

1. *OPD shall develop and implement a policy for conducting and documenting use of force investigations that include, at a minimum:*
  - a. *Documentation of the incident in either an Offense or Supplemental Report from the member(s)/employee(s) using force; and/or, when necessary, a statement taken from the member(s)/employee(s) using force;*
  - b. *Separating and separately interviewing all officers who were at the scene at the time of the incident;*
  - c. *A Supplemental Report from other members/employees on the scene or a statement taken, if deemed necessary by the investigating supervisor;*
  - d. *Identification and interviews of non-Departmental witnesses;*
  - e. *Consideration of discrepancies in information obtained from members, employees and witnesses, and statements in the reports filed;*
  - f. *Whether arrest reports or use of force reports contain "boilerplate" or "pat language" (e.g., "fighting stance", "minimal force necessary to control the situation");*
  - g. *Documentation of physical evidence and/or photographs and a summary and analysis of all relevant evidence gathered during the investigation; and*
  - h. *Consideration of training/tactical issues involving the availability and practicality of other force options.*
  - i. *Supervisor's justification as to why any element of the policy was not documented; and*

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2. *All supervisors shall be trained in conducting use of force investigations and such training shall be part of a supervisory training course.*
3. *Use of force investigations shall include a recommendation whether the use of force was objectively reasonable and within Department policy and training. The recommendation shall be based on the totality of the circumstances and shall consider, but is not limited to, the following factors:*
  - a. *Whether the force used was pursuant to a legitimate law-enforcement objective;*
  - b. *Whether the type and amount of force used was proportional to the resistance encountered and reasonably related to the objective the members/employees were attempting to achieve;*
  - c. *Whether the member/employee used reasonable verbal means to attempt to resolve the situation without force, if time and circumstances permitted such attempts;*
  - d. *Whether the force used was de-escalated or stopped reasonably when resistance decreased or stopped;*
4. *use of force reports shall be reviewed by the appropriate chain-of-review as defined by policy.*

*The type of force used, the identity of the involved members, and the report preparer shall be the determining criteria for utilizing the appropriate chain-of-review. Reviewers may include, when appropriate, the chain-of-command of the involved personnel, the appropriate Area Commander on duty at the time the incident occurred, other designated Bureau of Field Operations commanders, and as necessary, the chain-of-command of the involved personnel up to the Division Commander or Deputy Chief/Director, and the Internal Affairs Division.*

*Reviewers for Level 1-3 use of force investigations shall:*

- a. *Make a recommendation as to whether the use of force was in or out of policy,*
  - b. *Order additional investigation and investigative resources when necessary, and*
  - c. *Comment on any training issue(s) when appropriate.*
5. *Any recommendation that the use of force did not comply with Department policy shall result in the incident being referred to the Internal Affairs Division to conduct additional investigation/analysis, if necessary.*
  6. *Members/employees involved in a use of force incident resulting in serious injury or death and/or an officer-involved shooting, shall be separated from each other as soon as practicable at the incident scene, and kept apart until they have completed their reports and been interviewed.*

(Negotiated Settlement Agreement V. B.)

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**Relevant Policy:**

OPD most recently revised Departmental General Order K-4, *Reporting and Investigating the Use of Force*, on October 16, 2014.

**Commentary:**

As noted above in Task 24, we reviewed 69 Level 3 and 4 use of force (UOF) reports that were completed between November 1, 2020-January 31, 2021. We also reviewed seven Level 2 UOF reports, for which a Force Review Board (FRB) was held.

**Task 25.1** requires that supervisors complete a use of force report and that certain criteria are met in the report. We have found that OPD meets many of the required subtasks. However, Task 25.1f addresses the use of “boilerplate” or “pat” language in reports. While OPD has made strides in eliminating most of such language, we continue to find deficiencies. Specifically, we continue to find instances where officers justify their uses of force “based on my training and experience,” without any further information or explanation as to what training and experience they are referring to. We have discussed this with Department officials on numerous occasions; and though we now see more instances where officers provided additional details in their justifications of force, there is still need for improvement.

**Task 25.2** requires that all supervisors are trained on how to conduct use of force investigations and such training is part of a supervisory training course. OPD includes the requirement for this training in its Departmental policies. During our August 2020 site visit, we again confirmed with OPD that the Department continued to require and deliver this training. In OPD’s 279<sup>th</sup> Biweekly Compliance Update, dated January 15, 2021, the Department provided the results of its review of Task 25 requirements. OPD reviewed 15 uses of force for this audit; one was a Level 3 UOF, and 14 were Level 4 uses of force. The Department noted in this report that all supervisors had attended a Sergeants’ Transition Course, where use of force investigation is part of the curriculum. During our future site visits, we will verify that this training continues to occur. We continue to find concerns about the preparation and review of UOF reports by supervisors. While the Department has provided numerous directives on this topic, we continue to find numerous instances where supervisors fail to identify deficiencies in officer reporting and fail to identify or address MOR violations. Reviewers of the supervisor reports have also failed on a number of occasions to identify or address concerns.

**Task 25.3** requires that use of force investigations include required recommendations. Areas of recommendation include: whether the force used was pursuant to a legitimate law enforcement objective; whether the type and amount of force used was proportional to the resistance encountered and reasonably related to the objective the officers were attempting to achieve; whether the officers used reasonable verbal means to attempt to resolve the situation without force, if time and circumstances permitted such attempts; and whether the force used was de-escalated or stopped reasonably when resistance decreased or stopped.

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In our assessment of 69 Level 3 and 4 UOF reports, we did not identify any instances where we believe the force may not have been appropriate, where the use of force was not deescalated or stopped reasonably when resistance decreased, or any instances where we believe officers could have made additional efforts to explain to subjects being detained why the detention was occurring prior to using force. We *did* identify numerous instances in our reviews for this report where officers failed to identify themselves as police officers when it was appropriate and there was time to do so. During our site visits, we will continue to discuss any concerns that we identify with this Task.

**Task 25.4** requires that use of force reports be reviewed by the appropriate chain of command and appropriate recommendations are made. In all of the cases we reviewed, the reports were reviewed as required. We continue to note that while some deficiencies related to the preparation and review of UOF reports for Level 3 and 4 uses of force are discovered during the review, many are not. We continue to find instances where supervisors fail to identify and properly address concerns with body-worn camera activations, or other MOR violations. We have noted that these same concerns exist when the reports are reviewed by the chain of command. In the Level 2 UOF incidents we reviewed, we also had some concerns with the field investigations, including: Manual of Rules (MOR) violations; or training issues. These concerns were identified during FRBs and are addressed in our regular assessments of Task 26.

**Task 25.5** requires that any determination that a use of force did not comply with Department policy result in the incident being referred to IAD to conduct additional investigation/analysis, if necessary. None of the Level 3 or Level 4 investigations we reviewed resulted in our finding that the force did not comply with policy. Concerns involving compliance for Level 2 uses of force are identified during FRBs and addressed in our regular assessments of Task 26.

**Task 25.6** requires that members/employees involved in a use of force incident resulting in serious injury or death and/or officer-involved shooting, are separated from each other as soon as practicable at the incident scene, and kept apart until they have completed their reports and been interviewed. This Task is not assessed here, as we review and consider it as part of the Force and Executive Force Review Boards that OPD holds to examine Level 1 and 2 uses of force.

The Court's reactivation of Task 24 at a November 2018 Case Management Conference resulted from our serious concerns with the Department's handling and investigation of uses of force. OPD drafted Special Order 9196 to address and clarify requirements for the proper reporting of use of force. This revision to UOF reporting requirements went into effect in February 2020. OIG's global use of force audit, conducted in 2019, also identified numerous concerns with the reporting of use of force and enumerated recommendations. As noted throughout this report, OPD has taken a number of actions to address the identified concerns with the investigation and reporting of force.

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This is the second report where our assessment includes only uses of force that occurred after the implementation of Special Order 9196, the revisions to OPD's use of force policy, and Special Order 9202, and includes the review of 69 Level 3 and 4 uses of force. These revisions to policy, along with the many follow-up emails and training by executive staff, have outlined the Department's expectations of those who prepare and review UOF reports. We had hoped to see ongoing improvement in the investigation of force and the required documentation. Unfortunately, that was not the case for the investigations we reviewed for this report. We will continue to closely monitor uses of force to ensure that the desired reporting outcomes occur and that OPD addresses those deficiencies that have been identified. OPD remains in partial compliance with this Task.

<b>Task 25 compliance status</b>	In partial compliance
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## Task 26: Force Review Board (FRB)

### Requirements:

*OPD shall develop and implement a policy concerning its FRB proceedings. The policy shall:*

- 1. Set out procedures, membership and a timetable for FRB review of use of force investigations involving Level 2 incidents, as defined in Department General Order K-4, REPORTING AND INVESTIGATING THE USE OF FORCE;*
- 2. Require the FRB to review all use of force investigations;*
- 3. Require the FRB to make a recommendation as to whether the use of force was in policy or out of policy;*
- 4. Require the FRB to forward sustained policy violations to the Discipline Officer.*
- 5. Require the FRB not to review any use of force allegation until the internal investigations has been completed;*
- 6. Authorize the FRB to recommend to the Chief of Police additional use of force training or changes in policies or tactics, or additional standards, investigatory policies, or training for use of force investigations;*
- 7. Require the FRB to conduct an annual review of use of force cases examined, so as to identify any patterns of use of force practices that may have policy or training implications, and thereafter, issue a report to the Chief of Police;*
- 8. Require that the FRB membership include, at a minimum, one member from the Training Division, one member from the Field Training Officer program, and either the Bureau of Field Operations Deputy Chief or his/her designee;*
- 9. Minimally, that one member of the FRB shall be replaced at least annually.*

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**Relevant Policy:**

OPD most recently revised Departmental General Order K-4.1, *Force Review Boards*, on December 21, 2015.

**Commentary:**

OPD Force Review Boards (FRBs) are regularly convened to examine the investigations conducted relative to the deployment and application of Level 2 uses of force.<sup>2</sup> OPD first achieved compliance with this Task during the nineteenth reporting period (April 1-June 30, 2014). We continue to assess the compliance with this Task, including our analyses of force reports; our review of Force Review Board reports; attendance at Force Review Boards when conducted during our site visits; and observing Force Review Boards between site visits via online meeting software.

For this report, we reviewed 5 FRB reports that were completed and approved by the Chief of Police from June-September 2021. In general, we found the reports to be well-written and accurate accounts of the proceedings they documented. At least one member of the Monitoring Team observed all of these FRBs remotely via virtual meeting software. The reports collectively documented the assessment of 44 uses of force associated with five separate incidents. All uses of force were found to be in compliance. In all of the cases, the Chief concurred with the Boards' findings without any modifications.

We did not disagree with any of the findings in the FRB reports we reviewed.

In addition to reviewing the completed FRB reports, between August 11-October 13, 2021, we observed six of the seven FRBs convened by OPD during that period as they carried out their duties and deliberations. We observed them all remotely via an online meeting platform due to the ongoing COVID-19 pandemic, which has curtailed our monthly in-person site visits.

In general, we continue to observe substantive discussion and deliberations among the Board members. Members ask probing questions of the force investigators; and, where applicable, Department subject matter experts (SMEs) and IAD investigators. They also spend a great deal of time discussing issues ancillary to the uses of force, such as tactics, supervision, force alternatives, and training opportunities. For example, one Board reviewed the force used to take a suspect into custody who was armed with a metal pole and had just broken the rear window of a vehicle. The force was determined to be justified, but the Board spent a great deal of time

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<sup>2</sup> According to OPD, Level 2 uses of force include: "1) Any strike to the head (except for an intentional strike with an impact weapon); 2) Carotid restraint is applied that does not result in the loss of consciousness; 3) Use of impact weapons, including specialty impact munitions or any other object, to strike a subject and contact is made, regardless of injury; 4) Any unintentional firearms discharge that does not result in injury; 5) A police canine bites the clothing or the skin of a subject, or otherwise injures a subject requiring emergency medical treatment (beyond first-aid) or hospital admittance; 6) Any use of force which results in injuries to the subject requiring emergency medical treatment (beyond first-aid) or hospital admittance; (NOTE: For the purposes of this order, an evaluation by a medical professional to assess a complaint of injury is not emergency treatment) 7) Any Level 3 use of force used on or applied to a restrained subject; 7.a) A restrained subject is a person who has been fully placed in a Department authorized restraint device such as both hands handcuffed, a WRAP or Rip Hobble; 7.b) A subject with only one handcuff on is not a restrained person."

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discussing the containment of the subject and the overall supervision of the scene. The subject was allowed to walk about six blocks surrounded by officers before he was subdued. As is customary for all Boards, their feedback was conveyed in the form of training points to appropriate personnel.

Two of the Boards reviewed canine deployments with associated bites. The Boards ruled the uses of force in compliance, but they spent a great deal of time discussing de-escalation with both the force investigators and the Department canine subject-matter expert, to ensure that the bites lasted no longer than was necessary given the circumstances.

We did not disagree with any of the Boards' findings.

It is not a requirement, but all of the Board votes we observed during this reporting period were unanimous. We recognize that in some circumstances, there will be legitimate differences of opinion where the determination is not obvious. In these circumstances, we look for frank discussion and clear explanations of the differing positions.

In our last two reports on this Task, we observed that OPD was experiencing a backlog of FRB eligible cases, and the Department scheduled several FRBs dangerously close to their 3304 dates – one year from the date of occurrence. The Department appears to have addressed this issue. None of the Boards we observed for this report were in jeopardy of impacting 3304 dates. While it was not necessary, had any of the Boards recessed for follow-up investigative activity to occur, they would have had plenty of time to do so.

In addition to ruling on the appropriateness of uses of force, Force Review Boards will generally identify several follow-up items based on their review of the associated materials and the presentations made to them. These can include items such as counseling and training for individual officers, publication of Department-wide training materials, and modifications to policy. OPD tracks these deliverables in a spreadsheet, broken down into three categories: Individual Issues; Department-Wide Issues; and Quarterly Training Points.

In our last report, we noted a significant backlog of these follow-up items – 158 open items as of June 30, 2021. When we brought this issue to the attention of the Department, they immediately began to address the issue. The last accounting of open issues, dated September 29, 2021, lists 12 open training items – four for Department-wide training and eight for individual training. This is an acceptable number. We urge OPD to continue to make following up on FRB deliverables a priority. They are an outgrowth of a conscientious review of use of force incidents; they should not languish in their implementation.

Based on this review, OPD remains in compliance with this Task.

<b>Task 26 compliance status</b>	In compliance
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## Task 30: Executive Force Review Board (EFRB)

### Requirements:

1. *An EFRB shall be convened to review the factual circumstances surrounding any Level 1 force, in-custody death, or vehicle pursuit-related death incidents. A firearm discharge at an animal shall be reviewed by the EFRB only at the direction of the Chief of Police.*
2. *The Board shall have access to recordings and/or transcripts of interviews of all personnel on the scene, including witnesses, and shall be empowered to call any OPD personnel to provide testimony at the hearing.*
3. *OPD shall continue the policies and practices for the conduct of EFRB, in accordance with the provisions of DGO K-4.1, FORCE REVIEW BOARDS.*

(Negotiated Settlement Agreement V. G.)

### Relevant Policy:

OPD most recently revised Departmental General Order K-4.1, *Force Review Boards*, on December 21, 2015.

### Commentary:

Executive Force Review Boards (EFRBs), consisting of three top command-level staff, conduct thorough, detailed reviews of all Level 1 uses of force, in-custody deaths, and vehicle pursuit-related deaths and serious injuries. OPD achieved compliance with this Task during the nineteenth reporting period (April 1-June 30, 2014). We found OPD to not be in compliance with this Task based on the EFRB conducted in 2018, which reviewed the officer-involved shooting of Joshua Pawlik. We disagreed with the Board's findings in that case, and issued a detailed report on the incident on August 17, 2020.

In our last report on this Task, we described two EFRBs we observed. The first reviewed an officer-involved shooting which occurred on April 16, 2020 in Richmond; and the other reviewed a Level 2 use of force (Type 12, or baton strike) causing injuries, which occurred on May 31, 2020 during the widespread civil unrest in Oakland from May 29-June 1, 2020. The latter incident was upgraded to and investigated as a Level 1 use of force, which requires review by an EFRB. By policy, EFRBs are chaired by a Deputy Chief; and both of these EFRBs were chaired by the same Deputy Chief. We noted that both were well-run, thorough, and complete; and we found both EFRBs to be in compliance.

During this reporting period, we did not observe any additional EFRBs. We did review the EFRB report from the Richmond incident, and found it to be accurate and complete.

OPD remains in compliance with this Task.

<b>Task 30 compliance status</b>	In compliance
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## Task 31: Officer-Involved Shooting Investigations Review Protocol

### **Requirements:**

*OPD shall develop a policy to ensure that, in every officer-involved shooting in which a person is struck, Homicide and Internal Affairs investigators respond to the scene. The Homicide Section's investigation shall be conducted in partnership with, and when deemed appropriate by, the Alameda County District Attorney's Office. Interviews of the subject officer(s) shall be conducted jointly with the appropriate staff from Homicide and the Office of the District Attorney. The District Attorney and City Attorney shall be notified in accordance with the provisions of Section V, paragraph A (5), of this Agreement. Homicide shall duplicate and provide all completed reports and documents to the District Attorney's Office, the Office of the City Attorney, and the Internal Affairs Division. IAD shall provide information and/or documents as required by law.*

(Negotiated Settlement Agreement V. H.)

### **Relevant Policy:**

OPD most recently published Departmental General Order K-4, *Reporting and Investigating the Use of Force* on October 16, 2014. IAD Policy & Procedures and Homicide Policy & Procedures are also relevant to this Task.

### **Commentary:**

Task 31 requires certain notifications and responses in the event of an officer-involved shooting. The Task has long been inactive, but on November 27, 2018, the Court reactivated the Task as an active part of our responsibility.

During this reporting period (August 1-October 22, 2021), OPD officers were involved in two officer-involved shooting incidents – one on August 25, 2021; and one on September 22, 2021. OPD complied with all of Task 31's requirements, and the Department has briefed us on the associated investigations into these incidents during each successive virtual site visit since the incidents occurred.

OPD remains in compliance with this Task.

<b>Task 31 compliance status</b>	In compliance
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## Conclusion

As we noted in our last report, the public report on what has been referred to as the “Instagram case” sets out several recommendations for OPD, including that the Department should implement policies regarding social media and anti-discrimination – incorporating key concepts from AI 71; as well as “clear rules and regulations concerning the use of personal devices, private text communications, and ephemeral media in the conduct of police work.” We will discuss the Department’s plans for the implementation of these recommendations during our next site visit.

In our discussion of Task 24 in this report, we noted that we again have concerns with body-worn camera activations and the failure of supervisors to identify and address this policy violation. Of the 15 instances we identified, eight (53%) were not identified by the supervisor; and of the eight instances not identified by the reporting supervisor, only two (25%) were identified by a reviewing supervisor. To learn more about how OPD is handling these instances, we requested from the Department a list of all incidents during the last two years in which an officer’s failure to properly activate a body-worn camera resulted in any remedial action.

For the past several months, the Monitoring Team has made known to the Department and the City its dissatisfaction with the manner in which use of force investigations are being handled. Specifically, issues relevant to timeliness, body-worn camera activation, and supervisory inattention have characterized our reviews. Absent measurable progress in the remediation of these deficiencies, we will fully reevaluate our compliance findings for both Tasks 24 and 25. The Department and the City would be well-advised to address these issues.



Chief (Ret.) Robert S. Warshaw  
*Monitor*