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Re: First OIR Group Report re Monitoring Of Burbank Police Department

I. Introduction

Pursuant to the 2012 Independent Monitor agreement with the City of Burbank, this memorandum constitutes OIR Group's first report regarding internal investigations conducted by the Burbank Police Department ("BPD"). The subject matter of the report involves seventeen cases that had been completed by BPD and reached final disposition during this initial reporting period. Eleven were force investigations, while six were Internal Affairs investigations involving allegations of excessive force and/or other officer misconduct.

Each case was assessed for its own substantive merits, and as a potential representative of strengths and weaknesses within the BPD processes themselves. OIR Group's objective was not to endorse or reject the individual outcomes of these investigations (which were already complete before we received them); rather, it is to use the individual examples to illustrate noteworthy investigative and internal review practices for future reference.

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Our general impression of these cases is favorable. As discussed below, the Department's good intentions and commitment to best practices are readily apparent. At their best, the cases reflect the sort of thoughtful, thorough and rigorous self-scrutiny that produces real accountability and meaningful reform.

At the same time, and as also discussed below, the strengths we noted have seemingly yet to become routinized or "second nature" to the supervisors entrusted with executing them. We noted an inconsistency in the quality of individual cases – both in relation to each other and occasionally within the same investigation. The affected elements ranged from the timeliness of the process to the completeness of the issue-spotting and documentation. In some instances, the scope of the review was strikingly broad and forward-thinking; in others, similar questions arose, but the paperwork did not acknowledge or resolve them.

Accordingly, our observations and recommendations are intended to reinforce the many effective aspects of these cases, and to promote strategies and protocols that will make them more repeatable in the future.

II. Use of Force Reviews

A. Overview

The Department has a multi-layered review protocol for every use of force. The involved officers are expected to immediately notify a sergeant, who responds to the scene and takes a number of steps to ensure the timely acquisition of relevant evidence. This evidence should include recorded statements from available witnesses and, importantly, from the subject of the force. Additionally, the sergeants are entrusted with obtaining photographs and other potentially relevant materials.

After the initial field evidence is gathered, the sergeant compiles materials (including the written reports of the involved officers) and uses them as a basis for a formal report and a written evaluation. The watch commander from the incident (a lieutenant) then adds his or her own insight and makes a finding about the reasonableness of the use of force. That report then goes to the Patrol Bureau Captain for review. Finally, the case is reviewed by the Critical Incident Review Board ("CIRB"), which is comprised of the Deputy Chief and three Captains. This Board serves as an executive-level "check and balance" on the detailed consideration that the force has already received.

While the Board relies on the investigative work and assessments that have already occurred, it can and does bring an additional and important critical eye. We noted instances in which the CIRB found the force to be in policy, but nonetheless recognized specific aspects of the case that warranted further attention. It also provides a vehicle for putting each event into a larger Department context of performance and risk management. It should be noted that the large majority of similar-sized police agencies

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in California do not engage in this type of panel review; more typically, the “force review” process consists of a mid-level manager’s signing off and filing away the reports prepared by involved officers.

BPD’s standard process, then, is impressively thorough and shows a real commitment to careful scrutiny of these matters. In each of the eleven cases we reviewed, the final determination was that the force was justified and in-policy, and we saw no evidentiary reason to dispute those findings as to the force being used. On the contrary, we saw a considerable amount of due diligence in terms of evidence-gathering, and considerable objectivity and legitimacy in the evaluation of each event.

Additionally, we saw several instances in which the Department’s critique went beyond that “bottom line” determination in specific and constructive ways, and used the cases as a window into possible risk management issues, training opportunities, and tactical strengths and weaknesses:

- In one case involving a belligerent juvenile, supervisors noted both the potentially viability of other force options, and the tactical disadvantage that was created by encountering the juvenile when he was above the officers on a stairwell.
- In a case involving a vehicle stop that led to a foot pursuit when the suspect fled, supervisors noted a number of officer safety concerns and tactical shortcomings involving the unsafe initial approach of the vehicle and a second officer’s decision to go into solo foot pursuit.
- In a case involving a belligerent female suspect who was eventually punched, the review included a thoughtful consideration of force options (such as OC spray) and the advisability of disengaging and re-assessing once a suspect is on the ground.

Many agencies are leery about addressing these issues. There are different reasons for this, including a cultural reluctance to “second-guess” the involved officer’s actions, and a practical reluctance to invest the required time and effort needed to fully evaluate a force incident. Accordingly, BPD’s apparent inclination to make this investment is praiseworthy.

B. CIRB

An obvious manifestation of the Department’s careful attention to force issues is the CIRB process. In the examples we reviewed, the Board’s thoughtfulness and level of engagement spoke to the potential of the concept.

We do have questions about the formality, or lack thereof, with which the Department executes the CIRB process. Current practice is apparently for the Board to

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meet when it can, generally after several cases have been compiled. This means, though, that there is inevitable inconsistency in the timeliness of the review. There were instances in which several months had passed between the use of force and the CIRB assessment of the case.

Moreover, there is apparent inconsistency in when and how the “higher level” interventions occur. For example, in one case involving a foot pursuit and subsequent use of force, the Captain of the Patrol Bureau noted important issues of officer safety and tactics on the part of both involved officers. The Captain decided to hold a detailed – and seemingly quite meritorious – debriefing of the incident with the officers themselves, several weeks before the case was even considered by the CIRB. In another case that produced thoughtful critiques at the lieutenant level, it was unclear from the paperwork whether it had been reviewed by the CIRB at all.

While the end results of these individual cases seem to be appropriate, a standardization of approach would help ensure that the good work being done at individual people’s initiative is a more consistent and verifiable.

Finally, we suggest that the Department consider whether and how the CIRB can move to the “next level” of analysis – namely a synthesis of individual cases with an eye toward trend identification and relevant response. In three of the eleven cases we reviewed, for example, a foot pursuit provided the precursor to the force and raised issues of tactics and officer safety. The topic seems ripe for additional attention in terms of Department-wide training and policy review. While the perception may be that the volume of incidents is small enough that formal statistics and trend assessment is not needed, some attention to cumulative tracking may be worthwhile.

C. Thoroughness of Evidence Gathering/Documentation

We noted a range within the eleven cases in terms of comprehensiveness of the investigation and related case files. Case files were well-organized and generally contained all relevant material. For instance, we found that files contained photographs of the scene of the incident, subsequent criminal history of the charges filed against the complainant/suspect, witness statements, and record of the related call history. We also found that files contained photographs documenting injuries of the suspect and involved officers. Photographs were generally included and effective in documenting incidents, though occasional gaps existed. Similarly, force packages were of inconsistent quality regarding inclusion of secondary materials and pre-emptive attention to potential issues.

One specific concern in our review was in the Department’s approach to injuries. Obviously, from an investigative *and* risk management perspective, the proper attention to and documentation of injuries is a top priority in the effective response to these incidents. We note the following specific examples of instances in which the injury issue should have been prioritized to a greater extent:

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- In one case, a suspect verbalized a stomach injury (both present injury of being kicked by the officer and a previous injury involving being shot in the stomach years before) to Burbank personnel no less than three times before being sent to a medical facility, and some three hours after initially making the assertions to a jailer.
- Two days after officers used force to detain an uncooperative intoxicated suspect, he complained of pain while still in custody. It was subsequently discovered that he had a broken finger – a fact that the watch commander did not become aware of until reviewing the force report some two weeks later.

Packages were also of varied quality regarding whether relevant witnesses were all interviewed:

- In a case involving an off-duty officer who “took down” and restrained an alleged shoplifter while assisting a store loss prevention specialist, the store employee who may have been involved in the use of force was not interviewed.
- In a case involving a use of force against a juvenile whose version of the story differed from the officer who used force, other responding officers were not interviewed, and it is not clear what they saw.
- After a call for service regarding a man creating a disturbance, officers responded and used force to take the man into custody. No third party witnesses were identified or interviewed, though the original caller was presumably in the area.

We also note the following specific points that may warrant further attention from the Department:

- On multiple occasions, the incident reports prepared by the involved officers referred to the suspect by his first name only, a practice that seems unusually and overly informal.
- On at least one occasion, the sergeant’s interview of the subject of force made reference to the involved officer as if he were physically present and within earshot, a dynamic which could compromise the perception of objectivity.
- In one case, the involved officer was apparently utilized to bring the subject of force to the hospital for clearance – even though a non-involved officer was apparently available and on-scene.

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- A civilian witness to a use of force claimed to have observed part of the incident from her second-story window, but that vantage point was not included in any of the photographs or other documentation of the scene.
- A force incident captured on videotape seems to indicate an additional kick to the suspect by an arriving officer, but no reference to that force was included in the rest of the package.
- On several occasions, the interview of the suspect took place under circumstances in which he or she was intoxicated and/or still combative. While there are arguments for and against moving forward with contemporaneous interviews under these circumstances, the Department should at least remain conscious of the appearance of objectivity and whether alternatives – such as a follow-up interview at a later point – are advisable.

D. Scope of Review

As noted above in the discussion of the Critical Incident Review Board, the Department's willingness to engage in terms of "issue spotting" and consideration of secondary or indirect issues is a positive, if inconsistent element within the cases we reviewed. We saw impressive examples where tactical alternatives, safety issues, and other factors were given documented attention. In other cases, however, the same sorts of issues apparently existed but were not addressed or documented:

- In two cases involving the application of restraints (spit mask, padded hood¹, front leg restraints) after other force, there seemed to be little attention given to the propriety of the officers' decision to apply the restraints.
- In a case involving a foot pursuit and subsequent use of force against a juvenile, the involved officer's initial tactical decision-making (putting out over the radio that he was in pursuit and attempting to set up a perimeter) was consistent with principles of officer safety, yet his subsequent decisions (splitting from his partner and scaling a wall) were not. There is no indication that any of the officer's decisions, optimal or less so, were addressed as part of the formal review.
- In a case in which two officers were involved, one went "hands-on" with the suspect while the other continued to point his gun in the direction of

¹ Currently, BPD does not have a written policy to address the appropriate uses and application of the padded hood.

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the fight. The tactical advisability of this (as opposed to other alternatives) was seemingly not addressed.

Additionally, we saw several instances in which potential corrective measures or training updates were identified as necessary, but for which the corresponding action-items were not definitively established or documented. For example, in one case, following an officer who took police action off duty and used force, there was an after action recommendation to provide a roll call reminder regarding officer safety tactics when taking off-duty action. However, there was no documentation that this well-grounded recommendation was implemented. We recommend the Department find ways to address these gaps more consistently – not only as a way of ensuring appropriate follow-through, but also as a means of giving itself deserved credit for its commitment to self-improvement.

III. Internal Affairs Investigations

A. Timeliness of Investigations

Of the six cases we reviewed, four were reasonably timely; that is, completed within a few months of the incident. Two, however, were adversely affected by delays in the investigative process.

In one of these, the one-year statute of limitations (for disciplining a peace officer under California law) actually expired – in a case for which the allegation of misconduct was founded. The case involved an alleged failure by the handling officer to take a proper report in response to a call for service involving a juvenile and an alleged sexual battery. It is unclear from the investigation why it took eleven months to conduct four interviews in this case. As a result of the inability to meet the statutory deadline for disciplining this officer, he was not able to be held formally accountable for his failure to document the sexual battery allegation.

In the other case (an excessive force allegation), the Department's ability to adequately assess the matter was compromised by the subject officer's claim that he could not recollect the incident, and therefore could not provide definitive details. Given that eight months had passed before the officer was interviewed, the assertion was a colorable one.

These two examples illustrate the most obvious pitfalls of a delayed or sluggish process. There are other downsides as well: namely, the loss of a quick and meaningful resolution that is far more likely to impact behavior constructively. We urge the Department to be vigilant about these matters, up to and including disciplinary accountability in those instances when the Internal Affairs process is not complete in time.

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B. Citizen Notification Letters

State law requires citizens who have lodged a complaint to receive a notification letter as to the outcome of the investigation. That said, state law also places limitations on the amount of information that can be revealed from within officers' personnel files. This is one of many sources of tension between officer rights and the public's interest in transparency, and agencies succeed in balancing that tension to varying degrees.

We were struck by the quality of the notification letters produced by BPD for the complaint cases we reviewed. We appreciated the individualized effort that went into producing them, and the straightforward but respectful tone of the notifications. Especially useful were the descriptions of the specific steps that the Department took to investigate the complaint and determine objectively whether policy violations occurred.

Even when allegations were unsubstantiated, a reasonable complainant can at least take some satisfaction in knowing that the Department took the matter seriously and pursued the facts with thoroughness. BPD's letters certainly offer that opportunity, and the Department's approach is as good as any we have encountered.

C. Intake Process

A common issue for agencies is the need for consistency in how citizen complaints are received and handled. Aggrieved individuals can and do contact Departments in a variety of ways, but we take the position that the Department's response should be driven by the substance of the allegations, and not the form of notification or the seeming "appeasability" of the complainant.

This comes up most directly when people contact the Department by phone. A sergeant who is able to mollify a frustrated caller can certainly be performing a useful service, but if the underlying complaint warrants attention, then it should move forward through the process nonetheless. (Conversely, a frivolous or plainly false complaint need not receive exhaustive attention just because the complainant is belligerent.)

One of the cases we reviewed, which was eventually investigated effectively, was initially "resolved" informally by the sergeant who spoke to the complainant on the day of the incident – and who was surprised when she proceeded to submit a written complaint days later. Though the sergeant seemed earnest in his initial response, the lack of documentation and "official" resolution can make the Department vulnerable when complainants "change their minds" and turn the lack of a formal investigation against the agency. Moreover, the potential for inconsistency, arbitrariness, and even abuse of the process increases when supervisors are allowed wide-ranging discretion in these situations.

Accordingly, we encourage BPD to take an inclusive, rigorous, and standardized approach to the initial intake and processing of citizen complaints. Sergeant-level

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exercise of discretion is a desirable thing, but it should be occurring within a context of some documentation and accountability when the subject is citizen dissatisfaction.

To that point, we came across one case in which it was the vigilance of first level supervision that detected potential policy violations of a patrol officer and caused an internal affairs investigation to be initiated. The initiation of such an investigation is indicative of the willingness and ability of BPD supervisors to detect and refer policy violations where appropriate.

D. Thoroughness of Evidence Gathering

As a group, the six investigations had many strong aspects in terms of thoroughness and completeness of the respective files. Among many individual examples of this phenomenon, we noted the following:

- The files indicate that investigators frequently collected and reviewed all relevant documents, including photographs, radio traffic, and officers' daily logs.
- Investigators made commendable efforts to obtain and review surveillance video where applicable. In one case involving an allegation of racial profiling, investigators not only reviewed surveillance video from the gas station where officers were parked before initiating the stop, but also went to the scene in an effort to physically to assess the officers' vantage point.
- Investigators were appropriately persistent in attempting to contact a complainant who alleged discourtesy in a traffic stop and then perjury in court. The file documented the numerous attempts made to contact the complainant, which reflects both diligence and a commitment to the fairness of the process. After several attempts, the complainant responded and was interviewed.
- In a case involving a complainant's dissatisfaction with the responding officer's handling of a traffic collision, the investigating sergeant did a fine job of locating and obtaining statements from third-party witnesses to the incident and its aftermath.

On the other hand, there were gaps in some of the case files that included the following specific examples:

- In a case that included an allegation of perjury in a traffic court proceeding, no apparent effort was made to review materials from the hearing.

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- In a case that involved an allegation of excessive force, the complainant was not photographed for possible injury (or the lack thereof) at the time he made his allegation. The complainant was not formally contacted for an interview until two months later, and any injury that either did or did not exist was no longer documentable.
- In a case involving force, the reporting party was interviewed telephonically. We are not generally in favor of telephonic interviews, particularly given the way that gestures and other non-verbal signs can illuminate testimony about a force incident. Unless truly impracticable, we advocate the use of in-person interviews.

With these exceptions, the Department's Internal Affairs investigators did seem to take a comprehensive approach to their assignment. In our view, the case files provided a solid basis for BPD executives to make the relevant accountability determinations.

E. Scope of Review

As with force, misconduct investigations have both a "bottom line" and a potential series of relevant peripheral issues. We recognize that agencies must balance the ideal of exhaustive analysis against the practicalities and resource limitations of real life. Still, in our view, the best approach to any internal review is to treat it as an opportunity to gain insight and make adjustments regarding the actions of officers in the field. A broad filter, and a willingness to pursue relevant (if secondary) questions that may arise, are characteristics of robust and effective investigations.

Again, we note that – apart from the timeliness questions addressed above, our overall impression of the Internal Affairs cases was favorable. We do, however, note the following issues that we believe could have benefitted from more attention.

- In one case, the subject officer admitted to using profanity in his encounter with the complainant and his companion, but the Department did not appear to follow up on that potential policy violation.
- In the same case, the complainant described his driver's license being taken and not returned. This turned out to be accurate, and the license was not booked into evidence or otherwise accounted for, though it was apparently appropriate for it to have been confiscated.
- In a racial profiling investigation, the Department took an extremely legalistic approach to its analysis of whether profiling had been the underlying motivation for the traffic stop of three adult males. While the analysis seemed thoughtful and technically accurate, and while we concur with the outcome, the sensitivity of the complainant to being stopped for a very minor mechanical issue seemed legitimate in a way that the

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investigation did not directly confront. Nor was any after-action apparently devised to address the issue, either case-specifically or more systemically.

- In a case arising from a DUI arrest that stemmed from a few feet of travel in an alley, the Department did not address the appropriateness or wisdom of the enforcement, and whether the “difficult” behavior of the subject (who later claimed to be the victim of excessive force) would have made it preferable to summon a supervisor to the scene.
- In the same case, the officer suggested that he may have used his foot to kick the complainant’s feet wider during the pat down search process. There is no discussion in the review about whether such a technique would constitute reportable force or whether such a tactic is consistent with training.

F. Investigator’s Role

The investigation files include a “Conclusion/Disposition” portion of the report that summarizes – and analyzes – the evidence with regard to whether any of the allegations have been sustained, and makes recommendations accordingly. While these assessments seem thoughtful and persuasive in their consideration of the evidence, the practice appears to blur the line between investigator and decision-maker.

Department executives have explained to us that the decision-making function is indeed reserved for their level, and that the “Conclusion/Disposition” section is a reflection of their viewpoints rather than a basis for them. The task of crafting the memo is apparently left to the investigator but done at the direction of his or her superiors. While that makes sense, we encourage some type of documentation that more clearly indicates the lines of responsibility.

G. Alternatives to Standard Investigative Process and Discipline

We have long advocated progressive approaches to discipline that both streamline the process and contribute to its constructive and beneficial nature. For example, in cases where facts are not really disputed, we encourage agencies to reach “pre-disposition” settlements that offer a fair and prompt resolution prior to elaborate formal investigation. This allows both sides to move on quickly. (Ironically, the one case for which the statute of limitations expired would seemingly have been a good candidate for this approach.)

Additionally, we hope the Department will continue to bear in mind the viability of alternatives to traditional discipline (such as holding parts of suspension in abeyance, or allowing for the subject to resolve a dispute with a complainant through mediation, letters of apology, etc.) When appropriate, these approaches can help “change the culture” with regard to officer defensiveness and perception of the process as adversarial.

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IV. Recommendations

- BPD should continue to use the CIRB review process to provide holistic review to reportable force incidents.
- BPD should consider adopting a more regularized timetable for the CIRB review process to ensure consistency in the timeliness of such reviews.
- BPD should consider developing a more formalized after-action review report that documents the CIRB analysis and ensures memorialization of decisions.
- BPD should consider developing a robust feedback loop protocol to ensure that any action items emanating from the CIRB process are implemented and documented.
- BPD force reviews should ensure that injuries are given appropriate attention, even when knowledge of them occurs belatedly.
- BPD force reviews should also involve assessing the investigation to ensure that all potential eyewitnesses are identified and interviewed.
- BPD should develop protocols discouraging referring to suspects and witnesses by their first names in the narrative of the police report.
- BPD should ensure that sufficient protocols or policies exist to discourage transport of an arrestee by the officer who used force on the arrestee. Should circumstances make that impracticable, the reasons should be documented in the relevant reports.
- BPD force reviews should examine whether any interviews of the subjects were undertaken when the subject was intoxicated or still combative and, if so, determine whether a follow up interview is advisable.
- When restraints are deployed during the arrest process, BPD force reviews should include an assessment of that maneuver.
- BPD force reviews should include an assessment of tactics and circumstances (such as pursuits) that lead up to the force itself.
- BPD force reports should include reference to and/or inclusion of applicable policies.
- BPD should develop whatever internal controls and accountability measures are needed to ensure compliance with the statutory limitations period for Internal Affairs investigations.
- Field supervisors should ensure sufficient documentation and executive notification of any complaint received, even when a complaint appears to have been appropriately addressed in the field.
- BPD should ensure that Internal Affairs investigations collect relevant transcripts or other recordation of court hearings where such evidence might either corroborate or refute the complaint.
- When BPD supervisors receive a complaint of injury, they should ensure that evidence of such injury or non-injury be photographed.

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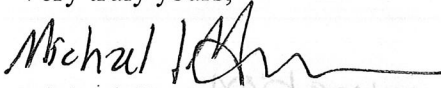
- BPD should craft a policy establishing the appropriate use and application of the padded hood.
- BPD should develop protocols for Internal Affairs and force investigations that discourage telephonic interviews unless geography or other factors make in-person interviews impracticable.
- BPD should ensure that the scope of review includes fact development and assessment of collateral issues raised by the complaint or discovered during the investigation.

V. Conclusion

The Department seems to recognize the importance and value of rigorous internal review as a vehicle for accountability and risk management. We found numerous examples of due diligence and thoughtful, effective work. While truly comprehensive and pro-active review is not yet the norm, positive signs abound. We hope BPD will continue moving in these progressive directions.

We welcome the opportunity to discuss this Report with you and respond to any remaining questions or concerns you may have.

Very truly yours,



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