

LOS ANGELES FIRE DEPARTMENT



BRIAN L. CUMMINGS
FIRE CHIEF

February 27, 2012

BOARD OF FIRE COMMISSIONERS
FILE NO. 12-039

TO: Board of Fire Commissioners

FROM: Brian L. Cummings, Fire Chief

SUBJECT: STATUS UPDATE ON THE DEPARTMENT'S RESPONSE TO THE
ASSESSMENT OF THE DEPARTMENT'S DISCIPLINARY PROCESS AND
PROFESSIONAL STANDARDS DIVISION

| | | | |
|---------------|-----------------------------------|---|------------------------------------|
| FINAL ACTION: | <input type="checkbox"/> Approved | <input type="checkbox"/> Approved w/Corrections | <input type="checkbox"/> Withdrawn |
| | <input type="checkbox"/> Denied | <input type="checkbox"/> Received & Filed | <input type="checkbox"/> Other |

Recommendations: That the Board:

1. Appoint a Liaison tasked with providing a detailed report of the Disciplinary Guidelines process to the Board of Fire Commissioners; include all updates or revisions finalized in the "MEET AND CONFER," process - this will include all "Letters of Agreement." This function shall be provided by the Liaison to the Board of Fire Commissioners, in oral and written form, as soon as an agreement has been met, or an impasse has been established. This will be an ongoing job function with the Liaison function being the responsibility of the Chief of Staff or his designated representative.
2. Request the Fire Chief to draft specific detailed language (example provided in italics) for recommendation #1 (above) for placement in the Los Angeles Fire Department's Manual of Operations under "The Chief of Staffs" job description (With Approval of the Fire Chief):

"The Chief Of Staff shall provide the Board of Fire Commissioners a quarterly report, detailing a summary of all Meet and Confer issues resulting in either a "Memorandum of Understanding" or "Letter of Agreement". This principle applies to all matters concerning the Disciplinary Guidelines or the application of discipline. In all cases, a written summary report shall be entered as an agenda item with the Board of Fire Commissioners on a quarterly basis."

3. Request the Department provide a detailed plan providing additional office space for the Professional Standards Division. Review the recommended square footage compliance chart prescribed "per employee minimum square footage" set forth by the City of Los Angeles' Workplace Standard Employee requirements. The attached document is "Attachment 2012-1" (Category/ CF 92-1154 S.4 (5/16/1995) Rev. CF 01-2337 (1/15/2002) As of 06/25/08) – PSD's current office space is below the recommended standard.

4. Request the Department provide adequate Secure Storage space to serve as an "Evidence Room", complete with an index filing system for purposes of logging, tracking, tagging and maintaining any and all items collected during the course of an Investigation or presented during a "Board of Rights" Procedure.
5. Provide an "Annual review" of its Rules and Regulations to formally establish revision dates for the Boards governing document. This process is currently in progress. The Planning Section and Professional Standards Division have been tasked with specific revision requirements.
6. In order to ensure ongoing institutional knowledge and as a means to ensure sustainability; Require the Administration to thoroughly brief the newly appointed Assistant Chief in charge of Professional Standards Division on the:
 - Assessment of the Department's Disciplinary Process and Professional Standards Division by the Independent Assessor.
 - The historical background.
 - Status report including a summary of the initial assessment and current status.
 - A report of this formal briefing provided to the Board.
7. Require the Professional Standards Division to draft a "Professional Standards Division Procedural Manual." This document shall be created utilizing a systematic implementation process, whereby individual chapters within the document are individually integrated. As various key chapters are completed, they will be presented to the Board of Fire Commissioners, Fire Chief and appropriate Command Staff for approval. The result will be an emerging master document, which shall provide the written policies reflecting the common standard of practice related to:
 - **Training** - of all selected field and Administrative employees who serve as PSD Investigators. This will account for both Sworn and Civilian employees receiving standardized and uniform codes of conduct, expectation, Department Policy, Local, State and Federally mandated training that will lessen the Department's exposure to litigation or infractions of the law.
 - **Organizational Structure** - The current and ongoing organizational structure of PSD, including all future changes updated as soon as they may occur.
 - **Skelly Procedures** - A comprehensive policy related to the Skelly process, with summary definitions and continued updates of all pertinent information related to local, State and Federal law affecting the Skelly procedures.
 - **City Attorney** - Specific Language detailing the City Attorneys role and responsibilities in providing legal advice, interpretation, counsel etc., with comprehensive definitions related to the Attorney-Client relationship between the City Attorney's Office and the Los Angeles Fire Department's Professional Standards Division.

- **Disciplinary Guidelines** - The Disciplinary Guidelines and specific establishment of uniform application and baseline practices.
- **Civilian Authority** - Language related to policy, reference source and specificity granting the newly hired Civilian Investigators sufficient authority to effectively perform their respective functions, while investigating Sworn and Civilian Members.
- **Complaint Tracking System** - Include the Complaint Tracking System policy and procedure into the Professional Standards Division Procedural Manual.
- **Confidentiality** - Once established - Language firmly requiring and establishing the use of secure and encrypted computers related to all investigations within PSD.
- **User Instructions** - Provide instruction and user policy related to the Complaint Tracking System - a secure database with a tracking/indexing system sufficient for the needs of the Professional Standards Division and stored in redundancy on the Department's Management Information System's servers.

8. Monitor the following: Facility / Logistical Enhancements and Needs

- The specifics related to this Recommendation are detailed as MISCELLANEOUS on page 8 and 9 of this Board Report.

Summary: The Los Angeles Fire Department has made significant improvements to the Professional Standards Division, many of which have been as a direct result of the "Independent Assessment of the Department's Disciplinary process and Professional Standards Division". This document was originally prepared and presented on April 10, 2010.

The Assessment Report, in summary, is a comprehensive series of recommendations, with over 362 specific actionable items or recommendations. These recommendations are intended to increase the operational efficiency and recognized legal standards of practice and statute compliance within the Department's Professional Standard's Division and related Disciplinary Procedures.

The Fire Administration accepted the vast majority of the recommendations, as a means to improve the Department's Professional Standard's Division. After a thorough research and development phase by the Fire Administration's Planning Section, the Department began a formal initiation and ongoing response process to meet and comply with the Assessment Report's recommendations. The Administration created a system whereby the recommendations were categorized into seven (7) Action Items. Similarity and common areas of responsibility within the Department's organizational structure was the primary basis used in categorizing the recommendations.

The respective Actions Items, their definitions and current status are:

ACTION ITEM #1. DISCIPLINARY GUIDELINES (46 Recommendations)

- **The Department will adopt a set of Disciplinary Guidelines, with rules for their application.**
 - A. **RESPONSIBLE PARTIES:** Fire Chief, Employee Relations Officer, Board of Fire Commissioners, City Attorney, and Stakeholders –
 - 1. Currently the Fire Chief is consulting with the Employee Relations Officer to establish and draft a series of Disciplinary Guidelines. The emphasis will be:
 - I. Adhere to the principle of holding Sworn Members to a higher standard than that of Civilian Employees – NOTE: The intent is not to lessen the current Civilian standards.
 - II. Setting a uniform baseline standard for the Application of Discipline. Any mitigation factors affecting the baseline, will be standardized and adhere to accepted practice and legal interpretation established by established Skelly procedures.
 - B. Manual – Upon completion of the Professional Standards Division Procedural Manual, a section will be dedicated to the Disciplinary Guidelines. The Section will provide a detailed accountability policy ensuring all levels, (i.e. the Board, Fire Chief, etc.) throughout the Department, are updated on any and all changes that may result from the “MEET AND CONFER” process.
 - C. The Liaison will provide a detailed report of the Disciplinary Process to the Board of Fire Commissioners; all updates or revisions finalized in the “MEET AND CONFER” process shall be provided by the Liaison in oral and written form as soon as an agreement has been met, or an impasse has been established. This will be an ongoing process with the Liaison being the responsibility of the Chief of Staff or his designated representative. (see recommendation #1 on this document above)

ACTION ITEM #2. APPLICATION OF DISCIPLINE (52 Recommendations)

- **The Department will adopt a guiding principle, with input from Management, Labor, Stakeholder Groups and the Fire Commission, that holds sworn members to a higher standard than non-sworn.**
 - A. Responsible Entities: Employee Relations Officer, Fire Chief, - A Status update from the Employee Relations Officer was provided on February 08, 2012, it consists of the following:
 - 1. The Fire Chief is currently in the process of drafting the Guidelines to achieve the following:
 - I. Standardized Guidelines with baseline disciplinary penalties, with a starting point at the upper three quarters timeline for a specific standard range.

- II. Specific language explaining the mitigation process applied during the Skelly Procedure.
- III. The above Guiding Principle shall be an included passage within the Professional Standards Division Procedural Manual.

Or

- IV. The Guiding Principles should be included within the introduction of the Disciplinary Guideline Section of the Procedural Manual.

2. The Board has begun closed session meetings regarding the Disciplinary process – their information cannot be released at this time

- B. Subject to the “Meet and Confer” process in order to finalize the adoption of the Application of Discipline – To date this process has not formerly begun and there are no projected dates for the process to begin.
- C. City Attorney Recommendations to establish the legality of impasse, should Meet and Confer prove unsuccessful, should be fully researched and included in the Professional Standards Division Procedural Manual. A formal meeting has been set for March 7th with the City Attorney. The meeting will cover the broad spectrum of City Attorney related issues that are addressed throughout the “Assessment of the Department’s Disciplinary Process and Professional Standards Division”. The results of the meeting will be provided in writing to the Board of Fire Commissioners. (NOTE- An Agenda of topics are attached to this document. See Attachment 2012-2.)

ACTION ITEM 3. STAFFING / TRAINING ISSUES (150 Recommendations)

- **The Department will develop and implement a Professional Standards Division organizational structure sufficient to enforce the good order of the LAFD, equipped and fully staffed with appropriate sworn and non-sworn personnel, properly trained and duly authorized.**
 - A. As a result of ongoing budgetary constraints:
 1. The Department has removed, or eliminated four Captains detailed to the Professional Standards Division.
 2. Although the Department recently hired a significant number of Civilians (8), the loss of four Captains has resulted in an increased caseload for the remaining staff, including the newly appointed Civilians.
 - B. A large quantity of time was invested in the hiring and selection process for those eight Special Investigators and was a major workload commitment in calendar year 2011
 - C. The requisite Training and acclimation period for those (8) individuals was a major point of emphasis in calendar year 2011/2012.

- D. The new appointments have allowed Professional Standards Division and thus the Department to show a substantial improvement in Staffing and a Civilian investigative workforce that directly addresses and meets the Assessment's recommendations.
- E. There are 27 Members currently assigned to the Professional Standards Division. There is a pending hire for one (1) Management Analyst II. The 2012 Staffing model for PSD reflects:
- One Assistant Chief (Sworn)
 - One Permanent Battalion Chief (Sworn)
 - One Detailed Battalion Chief (Sworn)
 - One Chief Special Investigator (Civilian)
 - One Senior Clerk Typist (Civilian)
 - Two Captain II's (Sworn)
 - Four Detailed Captains (Sworn)
 - Two Special Investigator II's (Civilian)
 - Nine Special Investigators (Civilian)
 - One Senior Personnel Analyst II (Civilian)
 - Two "Part-time" Sr. Personnel Analyst I (Civilian)
 - One Human Relations Advisor (Civilian)
 - One Secretary (Civilian)
 - One Management Analyst II (Pending Civilian)
 - Note: Four Captains detail positions – ELIMINATED (Sworn)
- F. The Fire Chief has provided required authority to the Civilian Investigative staff for purposes of investigating Sworn Members

ACTION ITEM 4. LABOR/MANAGEMENT AGREEMENTS (21 Recommendations)

- **The Department will establish and document a policy and process to formally capture all agreements between Management, Labor and the Stakeholder groups.**
 - A. **Responsible Entities** – Employee Relations Officer, Fire Chief, Chief of Staff,
 - B. The establishment of a Liaison and established language in the Professional Standards Division Procedural Manual will establish a formal and ongoing structure to adequately address these respective recommendations.

ACTION ITEM 5. SKELLY PROCESS (40 Recommendations)

- **The Department will establish and document a policy and process to bring the Skelly proceedings into compliance with Due Process.**
 - A. The Professional Standards Division has satisfied the vast majority of recommendations related to Skelly proceedings. In practice, the Professional Standards Division is currently applying the full scale of the recommendations.
 - B. Upon completion and assimilation into a written "Professional Standards Division Procedural Manual," the Department will be in full compliance of all 40 recommendations detailed within the Assessment.
 - C. A future meeting with the City Attorney is intended to aid in validating the Department's full compliance with its Skelly procedures. This vital component will become the definitive means to establish a documented baseline measurement of the Professional Standards Division's full compliance of current standard practice concerning Skelly. This validated measurement will reside in the Professional Standards Division Procedural Manual.

ACTION ITEM 6. FIRE COMMISSION OVERSITE (8 Recommendations)

- **The Department will establish and document a policy and process to insure that the Fire Commission is informed of, and formally acknowledges any changes in the interpretation, documentation or application of the Professional Standards Division's procedures, policies or guidelines.**
 - A. Refer to recommendations #1 and #2
 - B. Refer to recommendation #7

ACTION ITEM 7. SUSTAINMENT (112 Recommendations)

- **The Department will establish and document a written policy and procedure manual governing the Professional Standards Division and Departmental discipline, including a method of training members in the policy and tracking of that training.**
 - A. The Chief Special Investigator and various Command staff subject matter experts, in conjunction with the City Attorney's official involvement, should begin to draft the manual in earnest. Please refer to the DISCUSSION section for further clarification.
 - B. The Department has implemented a Tracking module related to training that can meet or exceed industry standard for Administrative Training documentation. The F-393 system has the ability to provide reports, categorize specific training and provide supervisors with access to a variety of statistical data in order to analyze their respective training. The obvious consideration for these purposes is to have the Liaison (if approved) provide specific training information to the Board. The Department will be able to utilize the F-393, as a means to quantify

the Department's training commitments within the Professional Standards Division.

- C. Adopt a process to ensure individual chapters, as they are completed, are adopted into a Master Document, Refer to recommendation #7.
- D. The Current CTS system may prove invaluable as a means to provide specifics related to Training for our investigators and as a means to provide feedback to the Board. NOTE: A Review of the currently used software system commonly referred to as the Complaint Tracking System (CTS), has determined several strengths and areas of vulnerabilities related to the systems capabilities, they are:

STRENGTHS

- A robust tracking system, with the ability to make multiple notifications related to the assigned and therefore responsible investigator. The system is designed to notify members of the timelines related to statute.
- CTS database resides on a server protected on a secure platform.
- There have been no known failures related to confidentiality or loss of Data.

VULNERABILITIES

- An inability to group several infractions or violations to policy in one. This ability would lessen workload and redundancy when applying charges related to multiple violations within one event.

MISCELLANEOUS

MONITOR THE PROGRESS related to the following Security Enhancements to PSD's office setting and computers:

On page, #149 of the IA REPORT refers to "Facilities." The passage states the following:

The confidentiality of investigative files and information is extremely important. The Professional Standards Division has adopted a visitor access policy in an attempt to protect confidentiality. However, anyone gaining access to the Administrative Operations suite of offices can easily access the PSD office suite whether there is anyone present in PSD or not. Oddly enough, a key card is not required to gain access to PSD from Administrative Operations but a key card is required to gain access to Administrative Operations from PSD.

- PSD has significantly improved the manner by which they secure their office environment. They have provided designated entry and exit portals with appropriate signs to indicate their respective use. They have greatly improved the entry portal security issues separating PSD from the adjacent Administrative Operations office space. However, a nexus can be established to illustrate PSD's eventual need to occupy a larger office setting,

with security measures infused into the planning of the office infrastructure.
See recommendation # 3.

Page 149 also states:

During this assessment, it was determined personal laptop computers have been used in connection with the disciplinary process, primarily due to inadequate technology provided by the Department. While the activities made known during this assessment involving the use of the personal laptop computers are quite legitimate, it is of concern that personal equipment is used to conduct work on confidential matters.

- Laptop computers have since been issued to each respective Investigator, both sworn and civilian. PSD has requested encrypted software security enhancements that will ensure the confidentiality requirements for each individual computer. This request exceeds the industry standard necessary for Security of computers. While this is a preliminary inquiry it highlights PSD's commitment in providing state of the art measures to ensure the investigative process is safeguarded. Furthermore, each laptop has sufficient security measures imbedded within the operating system. PSD made the aforementioned request to the Management Information Systems Director, Kurt Sato. He has projected a 3-4 month delivery date for acquisition and implementation of the enhanced security measures.

Fiscal Impact:

The Fiscal Impact related to the request for enhanced Computer security, has been estimated by MIS Director Kurt Sato at \$1,000.00.

The estimated cost associated with the increased square footage for PSD has yet to be determined. The Department is currently researching how best to proceed, with an emphasis on fiscal conservancy. As soon as projections are determined, that will be presented to the Board of Fire Commissioners.

Conclusion:

The Professional Standards Division was created on January 1, 2008. Tasked with the coordination and management of the disciplinary system, risk management, litigation management, equal employment opportunity, and intervention training for the Department the Professional Standards Division is a 27 Member team of professionals tasked with receiving, logging, tracking, investigating, and deliberating over 1200 complaints a year. While many of these cases are delegated to various field resources, the quality and quantity of demonstrated competencies associated with these individuals has resulted, to a large extent, in the overall progress for the Los Angeles Fire Department's ability to manage its Disciplinary Procedural process. Over the course of two years, the Department has consistently found innovative and productive methods to meet and exceed many of the challenges and recommendations addressed by the "Assessment of the Disciplinary Process and Professional Standards Division." Considering the budgetary cuts that have resulted in unprecedented changes to our

Deployment model and support function, the Department has managed to remain vigilant in its development of long range solutions towards lessening the financial exposure of this organization to litigation and bureaucratic waste.

The Department is committed to providing the Board of Fire Commissioners with continued progress reports.

Board report prepared by James P. Hayden, Battalion Chief, Battalion 10 "C" Platoon.

Attachment 2012 – 1
City of Los Angeles' Workplace Standard Employee requirements

Attachment 2012 – 2
City Attorney Agenda topics

| Job Category | Description | Space Code | Workspace Type | Usable Sq. Ft. (USF) | Size |
|--------------|---|---------------|--------------------------|----------------------|-----------------------------------|
| I | Inspection and Field | OS1A | Open systems workstation | 36 | 6'-0" x 6'-0" |
| | Includes inspection, investigative and other field-type personnel who spend most of their time out of the office. Typical classes include Tax Compliance Officer, Police Detective, and Building Inspector. This allocation provides for an open area assignment. | | | | |
| IA | Call Center Operators | OS1A/B | Open systems workstation | 36 - 64 | 6'-0" x 6'-0" up to 8'-0" x 8'-0" |
| | Allocation between 36 and 64 square feet will be determined at the discretion of the user department by the amount of paperwork generated and/or need for physical storage of reference materials and degree of occupancy. | | | | |
| II | Clerical | OS1B | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Sub-professional | OS1B | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Includes all positions requiring desk space that are not provided for in other category standards. Typical classes include all clerical (Sr. and below), Student Worker shared station, Accounting Clerk, Management Aide and System Aide. | | | | |
| III | Engineering | OS2B | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Drafting | OS2B | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Includes engineering, architectural, drafting and other personnel requiring use of a drafting table or working with employees using them. Typical classifications include Architectural Associate. Engineering management positions should use allocations provided in Categories IV-VII. | | | | |
| IV | Administrative | OS2A | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Includes positions requiring college graduation or equivalent that spend most of the day in the office. Typical classes include Personnel Analyst I and II, Accountant, Data Processing Technician, Systems Analyst I and II, Management Analyst I and II, Construction Estimator, Senior Accountant I and II, and Police Sergeant I (non-field). | | | | |
| | Supervisory Clerical/ Support | OS2C | Open systems workstation | 64 | 8'-0" x 8'-0" |
| | Includes position such as Principal Clerk, Chief Clerk, Payroll Supervisor, Title Examiner, Secretary, Executive Administrative Assistant, and Supervisory positions with interview responsibility. Work table allowance will be added when nature of work requires additional work surface in addition to basic furnishings. | | | | |

| | | | | | |
|---|---------------------|-------------|--------------------------|-----|-----------------|
| V | Supervisory | OS3A | Open systems workstation | 96 | 8'-0" x 12'-0" |
| | Senior-Professional | OS3A | Open systems workstation | 96 | 8'-0" x 12'-0" |
| | Administrative | OS3A | Open systems workstation | 96 | 8'-0" x 12'-0" |
| | | | | | |
| | Engineering | OS3B | Open systems workstation | 96 | 8'-0" x 12'-0" |
| | Drafting | OS3B | Open systems workstation | 96 | 8'-0" x 12'-0" |
| This job category includes positions which supervise administrative and professional staff. The allocation provides for visitor seating and more spacious working arrangements. Positions include Architect, Engineer, Sr. Construction Estimator and Sr. Systems Analyst I, Sr. Management Analyst I, Sr. Personnel Analyst I, Police Sergeant II, Police Detective III, and Fire Captain I. | | | | | |
| VI | Middle Management | OS5A | Open systems workstation | 96 | 8'-0" x 12'-0" |
| Category includes top level Senior or middle management positions in various administrative professional or engineering fields such as Sr. Engineer, Sr. Architect, Sr. Management Analyst II, Sr. Systems Analyst II, Police Lieutenant, Fire Battallion Chief, and Fire Captain II. | | | | | |
| VII | Management | PO2 | Private Office | 180 | 12'-0" x 15'-0" |
| This category includes highest level of departmental or division management positions in administrative, professional or engineering fields including Division or District Engineers (Principal Civil Engineer), Assistant Deputy Superintendent of building, and Principal City Planner, Chief Management Analyst, Police Captain, Police Commander, and Fire Assistant Chief. | | | | | |
| VIII | Executive | PO3 | Private Office | 250 | 15'-0" x 17'-0" |
| This category includes Department and Public Works Bureau Heads, some Assistants at the first management level below the Manager, and the City Engineer. The inclusion of Assistants will be based on department size and amount of non-departmental contact. Normally included will be those executive officer and comparable level positions in large line or staff departments and bureaus who have frequent meetings with non-departmental personnel. | | | | | |

ERO / MEET & CONFER

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PENDING ANSWERS – COS

CITY ATTORNEY AGENDA

A meeting has been scheduled for February 29, 2012 to begin dialogue regarding the following:

- Assessment overview
- February 27, 2012 Board Report
- Status update on City Attorney position
- Scheduling for follow up meeting

Attendees to include

- Battalion Chief J.P. Hayden
- City Attorney Zna Houston

Key Recommendations

Some of the recommendations the Department should seriously consider include:

1. Adopt disciplinary guidelines that set standards of conduct for sworn members of the Department that is higher than the standards of conduct for non-sworn members of the Department.
2. Apply disciplinary guidelines in a consistent manner that maintains higher standards of conduct for non-sworn members of the Department.
3. Eliminate the rule that allows union representatives up to **7** business days to schedule interviews.
4. Amend the City Charter to mirror the *Firefighter Procedural Bill of Rights Act* on the one-year statute of limitations and its tolling provisions.
5. Amend the City Charter as it relates to the composition of the Board of Rights, to include one chief officer, one administrative law judge, and one non-sworn member.
6. Ensure the Professional Standards Division receives timely and quality legal service on a consistent basis.
7. Bring the informal pre-disciplinary hearing process known as the *Skelly* hearing process into full compliance with due process requirements.
8. Employ a sufficient number of non-sworn staff with the demonstrated expertise, Experience, training and proficiency to conduct, supervise and manage investigations, prosecute disciplinary hearings, and manage the Department's disciplinary system.

ERO / MEET & CONFER

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PENDING ANSWERS – COS

9. Provide non-sworn Professional Standards Division staff the necessary tools and Authority to effectively conduct, supervise and manage the Department's disciplinary system, including investigations and prosecutions.

10. Except for *Skelly* officers, Boards of Rights and the Fire Chief, the role of sworn members in investigations and the disciplinary process should be limited to support and subject matter expertise.

DISCIPLINARY GUIDELINES

Recommendations

The following recommendations should be considered:

1. An effort should be made to determine why the Department agreed to disciplinary guidelines that are inconsistent with unanimous action taken by the Board of Fire Commissioners on November 21, 2006, why the Board of Fire Commissioners and the Stakeholders were not consulted about the guidelines during the meet and confer process that resulted in the adoption of the September 21, 2007, guidelines and three versions of guidelines in 2008, and why the Department failed to inform the Board of Fire Commissioners of the differences in the disciplinary guidelines it negotiated as compared to the guidelines approved by the Board in 2006.

2. The Board of Fire Commissioners should direct its general counsel to provide the Board of Fire Commissioners and the Department with written legal advice, with appropriate legal citations, describing the legal requirements that must be met to fully satisfy the obligation to "meet and confer;" the extent to which disciplinary guidelines, how proposed penalties are initially set within a range, and the factors used to move the penalty within a range, are negotiable; under what conditions, if any, the Stakeholder's process may be used to satisfy the "meet and confer" requirements; and at what point the Department may adopt disciplinary guidelines if unions fail to agree with the Board of Fire Commissioners' direction to the Department on what disciplinary guidelines should be adopted. The Department should direct its general counsel to provide the written advice in no more than 30 calendar days from the date it is requested.¹⁶

3. The Board of Fire Commissioners should direct the Department to take all steps necessary to adopt disciplinary guidelines consistent with the audit recommendations made by the City Controller and Personnel Department in 2006, with what the Stakeholder's recommended in 2006, and with what the Board of Fire Commissioners approved in 2006.¹⁷ The Board should set a deadline within which this task is to be accomplished.

4. The Board of Fire Commissioners should direct the Department to take all steps necessary to adopt a cover document for the disciplinary guidelines that is consistent with what the Stakeholders discussed and the Board of Fire Commissioners requested in October 2008.¹⁸ The board should set a deadline within which this task is to be accomplished.

PENDING ANSWERS – COS

5. All Stakeholders should be formally advised and fully involved in the process undertaken to adopt appropriate disciplinary guidelines for all sworn members of the Department.
6. Any disciplinary guidelines adopted and applied for use by the Department must clearly hold sworn members of the Department, and their supervisors, managers and executives to a standard that is higher than the standards set forth in the Civil Service guidelines for non-sworn employees of the City.¹⁹
7. Except for the Fire Chief, and *Skelly* officers (whose role should be advisory only), the Department should rely on non-sworn personnel with demonstrated expertise, experience and training in setting disciplinary penalties for a public safety agency when proposing and setting penalties.
8. The Fire Chief should be held accountable, as a part of his or her annual evaluation, for the disciplinary system and process, including appropriate disciplinary guidelines.
9. Disciplinary action should take into consideration all mitigating and aggravating factor at the time the penalty is first proposed.
10. Disciplinary penalties should not be changed after initial service of the proposed penalty unless newly discovered information is provided. Expressing remorse, taking responsibility and apologies expressed for the first time at a *Skelly* hearing, when there was an opportunity to express and, more importantly, actually demonstrate remorse, regret and responsibility before the *Skelly* hearing, should not qualify as newly discovered information.
11. The Department should cease mitigating penalties on the basis the employee agrees to attend training and education based discipline should not be utilized until the Stakeholders and Board of Fire Commissioners approves a policy governing such disciplinary practices. If further training is needed it should be included as a part of the proposed penalty before the *Skelly* hearing takes place.
12. The Department and Stakeholders should establish base penalties for each offense guideline range to which mitigating and aggravating factors can be applied in moving the discipline up or down a range, instead of starting at a third or mid-point of a range.²⁰
13. The Department and Stakeholders should adopt a set of standard mitigating and aggravating factors to be used in moving penalties within a range.²¹
14. In an effort to achieve consistency at every level of the process when setting disciplinary penalties, the Department should ensure those recommending penalties prior to *Skelly* hearings, *Skelly* officers, those approving final penalties after *Skelly* hearings, the Fire Chief, and the Boards of Rights consider and articulate the factors of;
 - 1) harm to the public service,
 - 2) the circumstances surrounding the misconduct, and
 - 3) the likelihood of

¹⁹ This does not mean lowering the standards of the Civil Service guidelines.

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PENDING ANSWERS – COS

²⁰ Setting base penalties may be subject to the meet and confer process.

²¹ A set of factors may be subject to the meet and confer process.

15. recurrence, when applying the applicable disciplinary guidelines and the Department's set of mitigating and aggravating standards.²²

16. When presenting cases at a Board of Rights or Civil Service hearing the Department should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is necessary in light of the "penalty setting factors" articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include;

- 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service,
- 2) the circumstances surrounding the misconduct, and
- 3) the likelihood of recurrence.

16. The Department should cease the use of "working" days when ordering a suspension without pay. Only calendar days should be used.

17. Any reference to a statute of limitations should be eliminated from the disciplinary guidelines.

18. The Department should be guided by the vision of the Stakeholders as articulated in their meeting minutes in formulating and managing the disciplinary system.

19. The Department should be required to advise, consult with and obtain direction from the Board of Fire Commissioners on how items subject to the "meet and confer" process will impact the specific goals of the April 25, 2006, *Audit Action Plan*, the Stakeholder recommendations and prior actions of the Board of Fire Commissioners.

20. The Department should not enter into oral agreements concerning matters subject to the "meet and confer" process.

21. The Department should provide the Board of Fire Commissioners with a report concerning all oral agreements currently in effect that impact how any part of the disciplinary process is to be applied or administered and the report should include the following information at a minimum:

- a. The terms of the agreement;
- b. The date the agreement was reached;
- c. The effective dates of the agreement;
- d. The parties bound by the agreement;
- e. The identity of the persons who negotiated the agreements, and
- f. A description of authority the Department's negotiators had to enter into such oral agreements.

22. The Department should direct the City Attorney's Office to provide written advice to the Department and to the Board of Fire Commissioners with legal analysis and citations to legal authorities concerning the extent to which oral agreements identified in response to recommendation 21 are binding and enforceable.

INCONSISTENT PENALTY APPLICATION

The following recommendations should be considered:

1. The Department should determine if there was an intentional failure to cite the guideline offense of falsifying work related documents when recommending and approving a penalty for the chief officer five months after the offense guideline of falsifying work related documents was cited in the clerk-typist's case.
2. Except for the Fire Chief, and *Skelly* officers, whose recommendations should be advisory only, the Department should rely on appropriately qualified non-sworn staff when proposing and setting penalties. The Department should place a non-sworn manager with demonstrated expertise, experience and training in public safety disciplinary systems in charge of the Department's Professional Standards Division, including setting proposed penalties.
3. The Department should ensure all appropriate guideline offenses are cited when preparing disciplinary recommendations for both sworn and non-sworn members of the Department.
4. The Department should take the steps necessary to ensure all employees are placed on actual notice of the Department's policies, procedures, rules, regulations and applicable disciplinary guidelines, and the Department should obtain written confirmation employees have received actual notice.
5. The Department should ensure penalty guidelines are adopted and applied in a way that hold sworn members of the Department to a standard that is higher than non-sworn employees and sworn managers and supervisors are held to a higher standard than other sworn members of the Department.³⁸
6. When presenting cases at a Board of Rights or Civil Service hearing the Department should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is appropriate in light of the "penalty setting factors" articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include;
 - 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service,
 - 2) the circumstances surrounding the misconduct, and
 - 3) the likelihood of recurrence.
7. The Department should take the action necessary to have the City Charter amended so that demotions and loss of pay are adopted as authorized methods of discipline.

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8. The Department should consult with both the District Attorney's Office and prosecutors in the City Attorney's Office to determine if the Department should take any action in connection with potential *Brady* issues involving the chief officer.

9. The Fire Chief should be held accountable through his or her annual performance evaluation for proposed and final disciplinary decisions.

³⁸ This does not mean lowering the standards for non-sworn employees.

10. The Department should establish timeframes within which investigations and each step of the disciplinary process is to be concluded. The Department should provide sufficient permanent non-sworn resources with the expertise, experience and training in conducting; supervising and managing a public safety agency's disciplinary system to ensure the timeframes are met.

11. The Department should not enter into oral agreements governing how misconduct allegations are to be investigated.

12. The Department should provide the Board of Fire Commissioners with a report concerning all oral agreements currently in effect that impact how investigations are to be conducted and the disciplinary process is to be administered, including but not limited to agreeing not to obtain compelled written reports, and the Department's report should include the following information at a minimum:

- a. The terms of the agreement;
- b. The date the agreement was reached;
- c. The effective dates of the agreement;
- d. The parties bound by the agreement;
- e. The identity of the persons who negotiated the agreements; and
- f. A description of authority the Department negotiators had to enter into oral agreements.

13. The Department should determine if members of the Department knowingly obtained the January 8, 2008, report from the chief officer in violation of an agreement to not ask for or compel written reports, and take appropriate action if they did so.

14. The Department should explain why it orally agreed to not ask for or compel written reports from its members.

15. The Department should not enter into agreements that would prevent the Department from asking for or compelling written reports, assuming the right to representation is protected when doing so.

16. The Department should direct the City Attorney's Office to provide written advice to the Department and to the Board of Fire Commissioners concerning the extent to which oral agreements identified in response to recommendation 12 are binding and enforceable.

ALCOHOL AND SUBSTANCE ABUSE

Recommendations

The following recommendations should be considered:

1. The Department should develop written policies, procedures and guidelines governing who is placed on an employment contract for alcohol and substance abuse.
2. The Department should consider the best interests of the City and the Department When entering into an employment contract for alcohol and substance abuse.
3. The Department should consider only entering into alcohol and substance abuse contracts for first time offenders.
4. The Department should continue to monitor and require full compliance with employment contracts.
5. The Department should continue to carefully monitor the prosecution of criminal cases that may serve as a basis for disciplinary action and be prepared to proceed with its own investigation in the event the statute of limitations may expire before disciplinary action can be taken on the basis of a conviction.
6. Penalties should be applied consistently. Penalties should be based on the act of misconduct that can be proven by a preponderance of the evidence in an administrative proceeding, not necessarily on the plea in the criminal case.
7. The Department must not proceed with disciplinary action on the sole basis of a nolo contendere plea in a misdemeanor case.⁵⁶
8. Boating or operating a watercraft under the influence should be treated as a DUI.
9. Proposed penalties should be based on all aggravating and mitigating factors known at the time of setting the proposed penalty, including conduct, actions and expressions of regret, remorse and responsibility.
10. Expressions of remorse, regret and taking responsibility should be considered at the time the proposed penalty is set and expressions of regret, remorsefulness and responsibility made for the first time at a *Skelly* hearing, when there was an opportunity to express them before the *Skelly* hearing, should not count as mitigation.
11. The Department should place much greater emphasis on conduct and actions that demonstrate remorse, regret and taking responsibility than on verbal expressions.
12. Proposed penalties should not be changed as a result of a *Skelly* hearing unless new information is discovered after the proposed penalty has been set.

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13. The City Charter should be amended to mirror the terms of the *Firefighter Procedural Bill of Rights Act*, including its statute of limitations and statute of limitations tolling provisions.

14. The Department should comply with disciplinary guidelines when imposing penalties for first, second and third offenses, so the penalty for a second offense exceeds the penalty for a first offense and the penalty for a third offense should exceed the discipline for a second offense.

15. Multiple acts of misconduct should be considered as aggravating circumstances when setting a penalty.

16. Belligerent, offensive, disrespectful behavior and similar misconduct toward public safety personnel, including EMS providers, when intoxicated should be considered as a basis for increasing the penalty. Later expressions of regret, remorsefulness, and taking responsibility for engaging in such misconduct should only be considered mitigating when proposing a penalty if there is evidence the member engaging in such misconduct took corrective actions with the public safety personnel involved.

17. The Department should cease imposing discipline on the basis of “working” days and should only use calendar days.

18. The Department should rely on non-sworn staff with the necessary training and experience, and expertise in recommending disciplinary penalties for public safety employees when setting proposed and final discipline.

19. A non-sworn manager with the demonstrated proficiency in conducting, supervising and managing a public safety disciplinary system should be placed in charge of the Professional Standards Division.

20. The Fire Chief should be held accountable, as a part of his or her annual performance evaluation, for proposed and final disciplinary actions, and whether they comply with the applicable disciplinary guidelines.

21. The Department should eliminate the “wet reckless” offense from the disciplinary guidelines and rely on driving while under the influence guidelines.

22. The Department should eliminate any statute of limitations connected with guideline offenses that prevents using prior offenses in calculating penalties.

Recommendations

The following recommendations should be considered:

1. The Department should conduct complete and thorough investigations of alleged dishonesty, including making false and misleading statements, involving both sworn and non-sworn members of the Department.
 2. The Department should adopt and apply disciplinary guidelines that hold sworn members of the Department to a standard that is higher than the standard for non-sworn members of the Department in all cases, including honesty and integrity issues.
 3. The Department should ensure all interview recordings, including interviews conducted in the field, are attached to the case in the complaint tracking system in a timely manner.
 4. The Department's investigators should engage in pre-interview preparation, and conduct interviews in a fashion that results in investigators knowing about prior statements made by a witness or subject concerning the matter under investigation.
 5. The Department should engage in rigorous reviews of investigative reports to ensure they accurately reflect the evidence obtained during an investigation. Insufficient investigations should be returned for further investigation.
 6. The Department should continue to provide training to Department supervisors about the right to representation.
 7. When the Department learns a supervisor questions a member suspected of misconduct that may lead to discipline without complying with the law concerning the right to representation, the Department should, at a minimum, provide the supervisor with remedial training on the issue.
 8. The Department should take the steps necessary to add an offense guideline governing making false and/or misleading statements to a supervisor to the disciplinary guidelines as was recommended by the Stakeholders and approved by the Board of Fire Commissioners in 2006.
 9. The Department should adopt policies and procedures governing education based discipline before implementing such a program. The Stakeholders and the Board of Fire Commissioners should be consulted on the adoption of such a policy that may also be subject to the "meet and confer" process.
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10. When setting proposed penalties the Department should consider all aggravating and mitigating factors, including the need for additional training and whether the member has shown remorse or has taken responsibility before the proposed penalty has been set.

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11. The Department should not consider apologies, taking responsibility, remorse and regret expressed for the first time at a *Skelly* hearing as mitigating factors when there was an opportunity for the affected employee to express, and more importantly, engage in conduct demonstrating such sentiments before the *Skelly* hearing.

12. The Department should place greater weight on conduct that demonstrates remorse, regret and responsibility than on oral expressions of the same, particularly if the corrective conduct is engaged in near the time of the misconduct and involves the victim of the misconduct.

13. The Department should not change proposed penalties unless new information is discovered after the proposed penalty has been set.

14. The Department's *Skelly* officers should not engage in settlement discussions at *Skelly* hearings.

15. The Department should adopt guidelines which set forth the time within which each step of the investigation and disciplinary process is to be completed in a timely manner, including *Skelly* hearings, and the Department should ensure adequate qualified staff is available to meet those timelines.

16. The Department should ensure recordings of *Skelly* hearings are attached to the case in either the complaint tracking system or the disciplinary tracking system.

17. The Department should ensure it provides the equipment, including software, necessary to fully support the Professional Standards Division.

18. The Department should adopt guidelines that address "off the record" statements concerning a matter under investigation.

19. The Department's disciplinary system, including the investigations, should be conducted, supervised and managed by non-sworn personnel who have demonstrated expertise, experience and training in the area of public safety personnel investigations and disciplinary systems.

20. The Department should ensure its investigators and supervisors prepare and approve accurate and complete investigations and investigative reports.

SUSTAINED EEO CASES

Recommendations

The following recommendations should be considered:

1. The Department should take all action necessary to adopt the disciplinary guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in November 2006.
2. While insuring the right to representation is protected, the Department should take all action necessary to eliminate the requirement to provide **7** business days to schedule an interview.
3. The Department should hold its sworn members to a standard of conduct that is higher than non-sworn members of the Department for all conduct, including honesty and EEO violations.
4. The Department should employ non-sworn personnel with the expertise, experience and training to conduct, supervise and manage the Department's disciplinary system, including investigations, the setting of discipline and the prosecution of disciplinary actions.
5. The Department should provide non-sworn investigators with the authority to order and admonish sworn members during investigations.
6. The Department's investigations should be conducted to determine if knowing violations of Department policy have occurred without reasonable excuse for non-compliance.
7. The Department should ensure it obtains evidence each of its members is on actual notice of its rules, regulations, policies and disciplinary guidelines.
8. The Department should ensure its investigators obtain all basic information, including document collection, scene visits or inspections, before conducting interviews. 60
9. The Department should ensure its investigators do not engage in obtaining evidence or interviews in a manner that would result in evidentiary objections.
10. The Department should ensure its investigations are conducted in a manner that prepares the case for any subsequent hearing or other legal proceeding.
11. The Department should establish benchmarks or timeframes for the completion of investigations and each step of the disciplinary process in a timely manner and should provide qualified personnel to ensure the timeframes are met.

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12. The Department should adopt and enforce guidelines for how to handle obstreperous representatives.

13. The Department should adopt a guideline whereby representatives are asked to provide legal authority for their legal claims.

14. The Department should stop using “work” days when setting suspensions and should only use calendar days.

15. Proposed penalties should not be changed at *Skelly* hearings or elsewhere unless new information is discovered. Newly discovered information should not include statements or regret, remorsefulness or responsibility where there was a chance to communicate such expressions before the *Skelly* hearing.

16. The Department should place greater emphasis on conduct demonstrating remorse, regret and responsibility than oral expressions of the same.

17. Agreements to attend remedial training, particularly training on zero tolerance policies, should not be considered as mitigating and should not be the basis for negotiating a lower penalty. If training is needed it should be considered when setting the proposed penalty and should not be negotiated.

18. The Department should require advocates and investigators to use the complaint tracking system for making notes and keeping a record of the time spent on a case, instead of separate investigative files.

19. The Department should do what is necessary to adopt an appeal process for reprimands and when doing so the Department should specify the time within which an appeal of a reprimand may be taken.

20. The Department should adopt guidelines concerning what a member will be told about being charged with a crime.

21. The Department should not assist in providing or retaining representatives for those appearing at interviews, *Skelly* hearings, or other proceedings. If reasonable notice of the time, place and the right to representation has been provided, the interview, hearing or proceeding should go forward when a member appears without a representative. A clear and accurate record of what occurred in such circumstances should be maintained.

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22. The Department should ensure EEO investigations are conducted by qualified EEO investigators assigned to the Professional Standards Division and should not assign such investigations to the field.

23. The Department should be required to advise, consult with and obtain the authority of the Board of Fire Commissioners on items subject to the “meet and confer” process that may impact the goals of the April 25, 2006 *Audit Action Plan*.

NOT SUSTAINED EEO CASES

Recommendations

The following recommendations should be considered:

1. The Department should carefully analyze and note the statute of limitations at the start of an investigation and continue to analyze and collect information about the statute of limitations throughout the investigation, particularly when the date of discovery does not match the date of incident by:

- a. Determining when and how the Department first learned of, or discovered the incident;
- b. Take affirmative steps to investigate when and how an incident was first discovered when the date of discovery and the date of incident do not match;
- c. Investigate possibilities the Department may have discovered alleged wrongdoing earlier than assumed; and
- d. Treat the date of incident as the date of discovery whenever there is any doubt about the discovery date.

2. The Department should ensure all basic information such as policies, protocols, guidelines, dispatch records, unit histories station journals, training records, and all other materials of any type related to the date and time of the incident and the conduct under investigation is obtained at the start of the investigations, before interviews begin.

3. The Department's advocates, investigators and supervisors should adopt a case management process that involves early investigative reviews requiring identification of issues, allegations, policies and training requirements, evaluations of case and investigative conflicts, evaluating the statute of limitations, planning investigative strategy, determining the documents, scene visits and other work, including legal opinions, needed before interviews are conducted, the identification of witnesses and other evidence, and timelines for the completion of investigations.

4. The Department should ensure its investigations and disciplinary actions are conducted and concluded in a timely manner including:

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a. Interviewing complainants and victims within 10 days of discovering alleged misconduct;

b. Concluding most investigations in 90 days, and more complex investigations in 150 days, and

c. *Skelly* hearings should be concluded and final disciplinary action should be filed

within 30 days after the member is served with a proposed penalty.

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5. The Department should ensure adequate qualified staff is provided to complete thorough investigations and each step of the disciplinary process within the timeframes specified.
6. The Department should ensure investigators; investigative supervisors and investigative managers use the complaint tracking system to document case progress, communications related to the case, status reports, and similar activities.
7. The Department should ensure, investigative reports, recorded interviews, recordings of *Skelly* hearings, exhibits, and all other documents related to investigations is included in the complaint tracking system.
8. The Department should ensure investigators; investigative supervisors and investigative managers record timekeeping and a description of investigative activities in the complaint tracking system.
9. The Department should ensure investigators; investigative supervisors and investigative managers conduct investigations and prepare reports as if they were preparing a case for a legal proceeding such as a Board of Rights hearing, which includes, but is not limited to:
 - a. Collecting and analyzing all written, recorded and electronic information before interviews are conducted;
 - b. Conducting all necessary field inspections before interviews are conducted;
 - c. Asking about all allegations;
 - d. Thoroughly questioning witnesses to obtain their complete knowledge of the facts;
 - e. Resolving all discrepancies to the extent possible;
 - f. Having witnesses provide a complete timeline of activities;
 - g. Addressing anticipated defense questions and arguments; and
 - h. Obtaining admissible evidence.
10. The Department should ensure investigators fully comply with all due process requirements when conducting investigations including the *Firefighter Procedural Bill of Rights Act*, or the *Peace Officers Procedural Bill of Rights Act* if applicable.
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11. The Department should ensure credibility determinations are based on complete and thorough investigations and take into consideration all of the factors set forth in *Evidence Code*, section 780.
12. The Department should ensure diagrams are properly prepared, marked and explained by witnesses when used during interviews. Diagrams should be prepared in a manner that ensures the investigator does not become a witness to what the diagram depicts or to establish a foundation for the diagram.
13. The Department should ensure interview summaries are accurate and complete.

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14. The Department should provide civilian investigators with the authority to order sworn members of the Department to tell the truth and provide sworn members with the necessary admonitions when conducting interviews.

15. The Department should ensure investigators attempt to thoroughly determine all reasons for why victims and complainants delay reporting misconduct.

16. The Department should ensure investigators attempt to thoroughly determine why victims, complainants, witnesses or subjects change their prior statements or testimony, including, but not limited to whether the change was the result of hazing, harassment, retaliation or other reasons.

17. The Department should ensure investigations, and particularly EEO investigations, are conducted by appropriately qualified Professional Standards Division staff.

18. The Department's misconduct investigations should be conducted, supervised and managed by non-sworn persons with the demonstrated expertise, training and experience to conduct investigations of public safety personnel in compliance with the foregoing recommendations.

REQUESTS FOR LEGAL ADVICE

The following are requests to which there has been no substantive response from the City Attorney's Office.

1. There was no response from the City Attorney's Office when the presence of an attorney was requested at interviews in an Equal Employment Opportunities (EEO) investigation on November 10, 2008.

2. A November 18, 2008, request for review of an investigative closure letter in an EEO case was sought. The case was closed when there was no response from the City Attorney's Office.

3. On January 30, 2009, the assistance of an attorney was requested in presenting the Department's case at a Board of Rights hearing where the member facing discipline was represented by an attorney. The City Attorney's Office did not respond to the request.

4. There was a February 10, 2009, request for advice concerning the release of information related to a member's termination, to which there was no response from the City Attorney's Office.

5. On November 4, 2009, the City Attorney's Office was asked to provide advice or an opinion concerning whether a sworn member of the Department could agree to a

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suspension in excess of 60 days as part of a settlement agreement. There has been no response.

Requests Requiring Assistance from Mayor's Office

The following are formal written requests where there was no response from the City Attorney's Office until the Mayor's Office was notified. Although the Mayor's Office intervened to request assistance, the City Attorney's Office has not provided legal advice in either case.

1. On November 12, 2008, the PSD requested an opinion concerning what constituted a Department sponsored social event as it relates to Executive Directive No. 12.⁹² Nine months later the City Attorney's Office requested another copy of the request on July 23, 2009. Almost a week later, on July 29, 2009, the City Attorney's Office indicated the Department should request guidance from the Personnel Department, who provided a written response a week later on August 6, 2009.⁹³

2. Subpoenas are an important investigative tool, some custodians of records have refused to produce records to the Department without a valid subpoena, and a complaint from an attorney alleging the Department engaged in violations of civil rights prompted the Department to request advice concerning the Department's power and authority to issue subpoenas on January 28, 2009. After the Mayor's Office became involved, the City Attorney's Office sought another copy of the request six months later on July 23, 2008, which was provided to the City Attorney the same day. On October 8, 2009, the City

Attorney's Office said advice would be provided by early November. The Department continues to wait for the requested advice over a year after the request was made. The Department recently sent another written request for the advice.

Responses from the City Attorney's Office

The City Attorney's Office provided the following responses in reply to written requests.

1. In response to a December 9, 2008, request for advice concerning mismanagement of funds, the City Attorney's Office first met with and provided verbal and later provided written advice.

2. The City Attorney's Office immediately met with and advised the Department on a January 28, 2009, request concerning whether advocates could properly continue to represent the Department in a Board of Rights hearing.⁹⁴

⁹² Executive Directive No. 12 sets forth the *Policy Against Discrimination in Employment Based on Sexual Orientation, Gender Identity or Gender Expression*.

⁹³ The City Attorney's Office indicates it is not uncommon for another City department to provide advice

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concerning the interpretation of such directives and the City Attorney's Office would normally review such directives before they were issued.

⁹⁴ This request is related to the facts appearing at pages 98 and 131 of this report.

3. On March 19, 2009, the City Attorney's Office was asked to respond to a subpoena seeking documents in a case under investigation. The City Attorney's Office provided a very timely response.

4. The City Attorney's Office provided immediate follow up in response to an April 14, 2009 request for advice on a First Amendment speech issue.

5. On May 20, 2009, assistance was requested in obtaining law enforcement investigative reports when a Department member was arrested in another state. The City Attorney's Office response was timely.

6. On May 29, 2009, the City Attorney's Office was requested to attend an interview where an attorney represented the subject. After two additional requests the City Attorney's Office responded shortly before the scheduled interview. The delay in responding caused cancellation of the June 10, interview and inconvenience.

7. There was another request for an attorney's attendance at an interview in a different case on June 4, 2009, and no response from the City Attorney's Office until the day of the June 17, interview.

8. On June 7, 2009, the Department sought clarification of prior oral advice indicating the filing of a signed complaint with the Fire Commission before the member was served could stop the statute of limitations. On July 16, 2009, the City Attorney's Office confirmed the prior advice but did not set forth any legal analysis or citations to legal authorities.⁹⁵

9. Thirty days after a June 30, 2009, request to determine the extent to which sworn members of the Department could be investigated and disciplined in connection with a particular regulation the City Attorney's Office replied. The reply was a re-wording of the request with no further legal analysis or legal citations than what was provided in the request.

10. Within four days of an August 13, 2009, request for advice, when an outside law enforcement agency sought to interview an advocate concerning a Department investigation, the City Attorney's Office provided advice.

11. On August 18, 2009, the Department requested advice after a woman who filed a sexual harassment complaint sought to contact the engineer she claimed assaulted her to make a claim for medical bills after he had been ordered to have no contact with her. While there was a timely written response, it contained no legal analysis or citation to legal authorities. The Department sought repeated clarification of the advice given.

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⁹⁵ The City Attorney's advice does not provide the Department with the strongest legal position. The

Department reports it relied on the advice in six cases and later had to reduce or modify the penalties in those cases because of the advice. The disciplinary action in one of those cases was recently rescinded and will be the subject of a future report.

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12. The Department is confronted with numerous investigations where it is contended thousands of dollars have been stolen from employee "house funds"⁹⁶ and has made the following attempts to obtain assistance from the City Attorney's Office:

- a. On August 18, 2009, the Department made a written request to the City Attorney's Labor Section asking if the Department had the authority to develop policy and procedures related to house dues accounts. The Labor Section replied on August 27, indicating such inquiries should be directed to another section of the City Attorney's Office, and if the answer was in the affirmative, the Department would need to meet and confer with the union before imposing such a policy.
- b. On September 2, 2009, the Department sent an email to a deputy city attorney assigned to the other section asking if the Department can mandate policies and procedures concerning bookkeeping systems, fund expenditure guidelines and security procedures.
- c. On September 22, 2009, the deputy city attorney was sent an email asking if she had time to review the request, to which she replied the same day, asking if the same request had been made to the Labor Section.
- d. On September 22, 2009, the Department provided the deputy city attorney with a copy of the Labor Section's response.
- e. On October 1, 2009, the Department sent an email to the deputy city attorney asking if she had time to review the issue. The deputy city attorney asked the Department to place the request on a request for legal assistance form.
- f. On October 1, 2009, the Department provided the completed form to the deputy city attorney with exactly the same information that was included in the email sent to the deputy city attorney on September 2, 2009.
- g. On October 1, 2009, the deputy city attorney acknowledged receipt and review of the request and asked to be provided a copy of any bulletins, policies and procedures related to house dues.
- h. October 1, 2009, the Department provided a reference to house dues in its rules and regulations, indicated it had no policies and procedures on the issue, and indicated the request to the deputy city attorney was the first step in attempting to develop such policies.
- i. In January 2010, the deputy city attorney provided an opinion the Fire Department could not adopt a "house dues" policy. The opinion was not in writing, did not present legal analysis or citations to legal authority, and did not explain why the law permits the Police Department to adopt an extensive policy governing similar funds⁹⁷ and the Fire Department is not.

13. Less than two weeks after an August 20, 2009 request, the City Attorney's Office met with the Department to discuss the Department's potential liability for a defamatory statement made by an employee and obtain advice concerning what action, if any, the

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Department should take. A month later the City Attorney's Office provided a written opinion and advice. The opinion presented legal analysis but no citations to legal authorities. The memo said, in part: an employer may be held liable for defamatory statements made in the course of employment; "California law requires a complainant to⁹⁶ "House funds" or "house dues" consist of assessments and contributions to pay the expense of such things as fire station meals, exercise equipment, office coffee and other drinks, snacks, sympathy cards, and a variety of other items.

⁹⁷ *Los Angeles Police Department Manual* (2008) Volume 3, Sections 340-350.

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file an action for defamation within one year of publication of the allegedly defamatory statement;" and "however, the statute for filing claims for tort actions in general is two years." The following are concerns:

a. While recommending an investigation be conducted, the memo does not address what conduct is considered to have been undertaken in the course and scope of employment and thus attributable to the employer, which investigators should know before conducting interviews and collecting evidence; and

b. The discussion of the statute of limitations and claims filing requirements is confusing if not incomplete. While the statute of limitations for personal injury actions is two years pursuant to *Code of Civil Procedure*, section 335.1, and the statute of limitations for libel or slander is one year pursuant to *Code of Civil Procedure*, section 340(c); *Government Code*, section 911.2 requires the filing of a Government Tort Claim within 6 months if there is an attempt to hold the City liable for a defamatory statement made in the course and scope of employment.

14. On August 24, 2009, review of a performance contract was requested, and subsequently provided. The contract attempted to monitor a firefighter arrested three times for public intoxication in four years, including twice in four months, while employed by the Department. There is nothing in the materials provided to indicate whether the Department sought, or the City Attorney's Office offered, an opinion concerning whether such a contract served the best legal interests of the City and Department.

15. The City Attorney's Office responded to a September 2, 2009, request for advice concerning who may attend interviews and *Skelly* hearings in a representative capacity with a written opinion that included legal analysis and citations.

16. On September 3, 2009, the Department asked for advice concerning whether disciplinary actions could be based on law enforcement investigations. Initially the City Attorney's Office said the charges could not be based solely on the results of a police investigation, but had to be based on the Fire Department's separate investigation. A day later the City Attorney's Office correctly advised it was appropriate to bring charges against a member based on statements contained in the police report and evidence obtained from the police investigation.

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17. On October 14, 2009, the Department requested an opinion concerning the order in which Board of Rights hearings may or should be presented.⁹⁸ On February 2, 2010, the City Attorney's Office provided verbal advice indicating the Department would need criteria to prioritize the order of hearings; that the Department should wait for a further written response from the City Attorney's Office and the City Attorney's Office would provide

the Fire Department with a copy of an exemplar policy from the Police Department. No further response has been provided to the Fire Department since February 2, 2010.

18. On October 28, 2009, the Department requested advice in connection with a claim a member was told to obtain a restraining order. The advice was provided.

⁹⁸ The Department has multiple Board of Rights cases pending that are months old. Excessive delays in bringing such cases to hearing may expose the Department to having to defend motions to dismiss for failure to prosecute. This report expresses no opinion about the merit of such motions.

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19. A criminal defense attorney for a firefighter prosecuted for a crime attempted to obtain

the Department's pending administrative investigation. On November 2, 2009, the Department requested assistance in evaluating whether the City had standing to object to an attempt to obtain the Department's open and pending investigation. The City Attorney's Office initial response was, "its not our fight until served with a subpoena."

20. On November 17, 2009, the Department requested advice after a subpoena was received from a criminal defense attorney attempting to obtain materials obtained during an administrative investigation. The City Attorney's Office initially advised producing all materials, although the attorney seeking the files acknowledged not being entitled to all of the materials in his written pleadings. When questioned by the Department, the City Attorney's Office agreed only those materials relied on in bringing charges should be produced. Later, the City Attorney's Office advised providing the District Attorney's Office with the Department's file materials without a subpoena. When questioned by the Department about this advice, the City Attorney's Office agreed the materials should not be released without a subpoena.

21. On November 17, 2009, the Department requested advice on whether a plea of nolo contendere in misdemeanor cases could serve as the sole basis for disciplining members.

The City Attorney's Office provided a written response with citations to legal authorities.

Recommendations

The Professional Standards Division and the Department require competent and timely legal services. Therefore, the following is recommended:

1. The Board of Fire Commissioners and Department should adopt and adhere to a client attorney model and philosophy whereby the Board and Department are the clients who provide direction and make decisions and the City Attorney provides prompt legal services, advice and opinions without making decisions or providing supervisory or

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management direction.

2. The Department should insist on a single point of contact with the City Attorney's Office when seeking legal service so Department members are not required to find the person in the City Attorney's Office, or elsewhere, who can answer their questions.
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3. The Department should adopt a policy of requiring the City Attorney's Office to provide written advice or formal opinions when appropriate, with legal analysis and citations to legal authorities, in response to its requests for legal advice and opinions.

4. The Department should quickly elevate poor service issues, the failure to provide timely legal services, and quality control issues to City Attorney managers and executives as they occur.

5. The Department should provide the Board of Fire Commissioners and the Independent Assessor with a report each month concerning any request for legal assistance, advice or opinion to which a timely, thorough, complete and adequate response has not been provided.

6. The Department should request the City Attorney's Office provide written advice with legal analysis and citations to legal authority explaining why the Fire Department may not adopt a "house dues" policy and should request the written advice be provided in 15 calendar days.

ADMINISTRATIVE CASES INVOLVING CRIMINAL CONDUCT

Recommendations

The following recommendations should be considered.

1. The Department should adopt and comply with written guidelines concerning how disciplinary cases involving criminal conduct are to be handled so conflicts are avoided.
2. The Department should ensure investigators, supervisors and managers are knowledgeable about criminal and administrative conflicts before assignment to an investigation.
3. The Department should ensure its investigators, supervisors and managers involved in the disciplinary process are trained in and comply with guidelines adopted in an attempt to avoid conflicts between administrative and criminal investigations.

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4. The Department should ensure it has the ability to conduct administrative investigations and contemporaneously monitor criminal investigations without conflict between the two separate cases, when necessary.

5. The Department should not assign alleged misconduct that involves law enforcement action to the field for an administrative investigation.

6. The Department should ensure its non-sworn supervisors and managers have the authority to supervise and manage sworn staff.

7. The Department should insist the City Attorney's Office provide timely written advice with legal analysis and citations to legal authorities concerning how the Department should satisfy the immunity language of *Government Code*, section 3253(e)(1).¹¹⁷

8. The Department should seek a legislative solution that deletes the immunity language of section 3253(e)(1) of the *Government Code* so it mirrors the language of the *Public Safety Officers Procedural Bill of Rights Act*.

9. The Department should ensure those conducting and supervising investigations understand the admissibility of such things as police reports and the information such reports contain, as well as the ability to recognize the sufficiency and insufficiency of information contained in such reports to support disciplinary action.

10. The Department should place a greater emphasis on employing non-sworn personnel who have the demonstrated expertise, experience and training to conduct, supervise and manage a wide range of investigations, setting proposed disciplinary penalties and prosecuting disciplinary cases involving public safety personnel.

¹¹⁷ Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when

requested to do so by any City officer or board. The City Attorney's Office explains there is a difference

between advice and opinions; the latter being more formal.

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11. The Department should ensure disciplinary action is actually supported by facts that can be established at a Board of Rights by a preponderance of the evidence.

12. The Department should reduce field investigations to the greatest extent possible.

13. The Department should adopt a rigorous review of completed investigations by investigation supervisors to ensure they are complete, thorough and legally sufficient to sustain disciplinary action if warranted. Incomplete investigations should be returned for further investigation.

14. The Department should adopt a practice of asking union representatives for legal authority to support their claims and assertions such as the claim disciplinary action cannot take place on the basis of the evidence set forth in a police report.

15. The Department should establish timeframes for the initial interviews of victims and

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complainants, completion of investigations and each step of the subsequent disciplinary process and the Department should provide qualified staff to ensure the timeframes are met.

16. Before offering, ordering or agreeing to education based discipline, the Department should adopt policies and procedures governing education based discipline, if approved by the Stakeholders and the Board of Fire Commissioners,¹¹⁸ that address at least the following issues:

- a. How would such a program fit in the Department's disciplinary system;
 - b. What conduct or offenses would be eligible and on what basis;
 - c. When is it most advantageous in a disciplinary process to offer such a disciplinary alternative;
 - d. What classes should be required in satisfaction of the misconduct and disciplinary action;
 - e. What record keeping and documentation of the process should be required to effectuate the education or training and document the personnel file;
 - f. Should other classes be required in addition to or as a substitute for a decision making class in light of the misconduct engaged in; and
 - g. What is the ratio of suspension days that can be substituted for education based discipline days.
17. The Department should continue to refer suspected criminal conduct to appropriate law enforcement agencies for investigation of potential criminal conduct.

SKELLY PROCEDURAL DUE PROCESS

Recommendations

It is strongly recommended the Department revise its *Skelly* procedures to ensure they fully comply with the law. In doing so, the Department should adopt a written *Skelly* policy that includes or considers the following among other things:

1. Continue to record *Skelly* hearings which allow for an independent assessment of what occurred at the hearing and upload such recordings to the complaint tracking system or disciplinary tracking system.
2. Stop using the person who *decides* to sustain charges, whether a penalty should be imposed and what the penalty should be as the *Skelly* officer.
3. Do not permit the person who *decided* to sustain charges, whether a penalty should be assessed and the level of penalty to be present at the *Skelly* hearing or communicate with the *Skelly* officer about the case, except to receive the *Skelly* officer's recommendation.

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4. Do not permit the persons who participated in or supervised the investigation or approved the investigative report to serve as the *Skelly* officer or communicate with the *Skelly* officer about the case.
5. Abandon the practice of requiring an affected employee to attend a *Skelly* hearing and adopt a uniform practice whereby the affected employee is offered and provided a *Skelly* hearing and automatically waives their right to a *Skelly* hearing if not requested within a set time.
6. Provide the affected employee with the identity of the *Skelly* officer at the time the employee is offered a *Skelly* hearing, or shortly after the offer is made, and in every case before the *Skelly* hearing, to ensure the affected employee has an opportunity to raise conflict issues.
7. Do permit an affected employee to waive the right to have an impartial and uninvolved *Skelly* officer and require all such waivers be in writing and recorded at the time of the *Skelly* hearing.
8. Do not permit the person who made recommendations concerning the charges or penalty to serve as the *Skelly* officer.
9. Adopt a training program for *Skelly* officers, limit the number of persons who serve as *Skelly* officers to ensure quality control and only use *Skelly* officers who are trained.
10. Only use individuals as *Skelly* officers, who have the authority necessary to make meaningful recommendations to the Department on whether the discipline should be imposed, modified or revoked.
11. Consider training a limited number of *Skelly* officers in each bureau and consider using a *Skelly* officer from the same bureau whose member is being considered for discipline.
12. Do not permit those who may be parties or witnesses in the same case to serve as *Skelly* officers.
13. Require *Skelly* officers to thoroughly review the formal charges the affected employee has been served with and all supporting materials prior to the *Skelly* hearing.
14. Develop a standardized script for use by all *Skelly* officers that accurately reflects the content of legally compliant policies and procedures.
15. Although *Skelly* officers may need to clarify or even resolve inconsistent information provided at the *Skelly* hearing, do not allow *Skelly* officers to question the subject of discipline at the *Skelly* hearing further than is necessary to obtain clarification.

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16. Do not permit *Skelly* officers to engage in settlement discussions related to charges or penalty. This should not be construed to limit the affected employee from seeking and

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supporting a modification or dismissal of charges and/or penalty.

17. Continue the practice of ensuring the subject understands the charges at the beginning of the *Skelly* hearing but cease the practice of asking the subject if they concur or do not concur with the charges.
18. Do not permit *Skelly* officers to confront the subject of discipline with charge or penalty options or with ultimatums at the *Skelly* hearing.
19. Require that *Skelly* officers remain objective and independent in conducting *Skelly* hearings, when requesting information or further investigation and in making recommendations.
20. After the initial *Skelly* hearing, and before making a recommendation, allow the *Skelly* officer to ask the Department for one or both of the following; 1) a response from the Department with regard to any issue raised by the affected employee, and 2) that additional investigation be conducted.
21. Require the *Skelly* officer to make one of the following recommendations to the Department; 1) the action should proceed without modification, 2) the action should be amended, modified, or reduced, or 3) the action should be dismissed in its entirety.
22. Adopt a practice whereby *Skelly* officers inform the affected employee that the *Skelly* officer's recommendation will not be announced at the *Skelly* hearing, will forever remain confidential and will be conveyed in confidence to only the Department.
23. The *Skelly* officer shall not be subject to examination by either the affected employee or the employee's representative and is not required to provide any response to the information submitted at the *Skelly* hearing, except to acknowledge receipt.
24. In making their recommendations require *Skelly* officers to consider; 1) the timeliness of the proposed disciplinary action in terms of the statute of limitations, 2) whether the Department has reasonable grounds to proceed with the proposed discipline, 3) whether the proposed discipline is based on proper legal, policy or procedural grounds, 4) whether the disciplinary action is supported by the facts, 5) whether the employee was on adequate notice of the prohibited conduct before the alleged wrongdoing occurred, and 6) whether the penalty complies with the applicable penalty guidelines.
25. Require *Skelly* officers to make all recommendations in writing.
26. Require that the *Skelly* officers written recommendation include a summary of the charges, an identification of who was present, of what was said or provided in the way of explanation, of the recommendation, and the reasons therefore, after the *Skelly* hearing.
27. Adopt a rule that requires the *Skelly* officer to attach all materials presented by or on behalf of the affected employee to the *Skelly* officer's written recommendation.

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28. Require *Skelly* officers to make their recommendations to the Department within three business days after conclusion of the *Skelly* hearing.

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29. Require *Skelly* officer's written recommendations clearly state each mitigating or aggravating fact or factor that the *Skelly* officer considered relevant in making the recommendation.

30. Adopt a rule that prohibits the use of any *Skelly* officer requests, recordings, recommendations, or other materials in any future Board of Rights hearing involving the same case, or in any other case.

31. In the event the *Skelly* officer requests further information or investigation, the Department shall endeavor to provide the *Skelly* officer with the additional information or investigation within ten (10) business days. The *Skelly* hearing shall not be considered concluded until the Department provides the response to the *Skelly* officer, and affected employee. Only allow the Department to change the effective date of discipline if necessary to accommodate additional information and investigation requested by the *Skelly* officer.

32. Prohibit the *Skelly* officer from engaging in any settlement negotiations and require the *Skelly* officer to refer any and all settlement negotiations for private discussions between the affected employee and/or employee representative and an appropriate Department representative.

33. Permit the *Skelly* hearing to be suspended for settlement negotiations to take place if each side signs a written agreement to suspend the *Skelly* hearing. If settlement negotiations result in a settlement no further *Skelly* hearing is required and the *Skelly* officer's obligations are concluded without further resumption of the hearing. If no settlement is reached the *Skelly* hearing shall resume and the *Skelly* officer shall not be informed of what was said during negotiations.

34. Prohibit *Skelly* officers from engaging in their own independent investigations and fact finding, consultations with investigators, advocates, Department members or union representatives as they prepare for a *Skelly* hearing, hold a *Skelly* hearing or formulate and communicate their requests and recommendations.

35. Permit an impartial Department representative to attend the *Skelly* hearing as a silent observer.

36. Allow the impartial Department representative to conduct a debriefing with investigators and advocates following *Skelly* hearings as a training and feedback mechanism.

37. Require *Skelly* officers to comply with the applicable penalty guidelines in making

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penalty recommendations.

BOARD OF RIGHTS HEARINGS

Recommendations

The Department should consider the following recommendations:

1. The Department needs to build the capacity to prepare and prosecute Board of Rights hearings with permanent non-sworn advocates who have demonstrated expertise, experience and training in the prosecution of misconduct cases involving public safety personnel.
2. The Department should adopt a rule that allows non-sworn persons, including attorneys, to prosecute Board of Rights cases against sworn members at hearing.
3. The Department should employ non-sworn members with the necessary expertise, experience and training to properly prepare and prosecute Board of Rights cases against sworn members at hearing, instead of relying on special assignment sworn advocates.
4. The Department should consider adopting a modified “vertical prosecution” approach to preparing and prosecuting disciplinary cases whereby the staff member assigned to prosecute cases at a Board of Rights hearing assists, advises and directs investigators in planning and conducting the investigation and the investigator assists the prosecutor in preparing and presenting the case at the Board of Rights hearing.
5. The Department should ensure appropriately qualified expert witnesses are designated and retained, and that advocates understand the difference between lay or percipient witnesses and expert witnesses in terms of preparation and testimony at hearing.
6. The Department should encourage its advocates to prepare appropriate pre-hearing motions, briefs or otherwise educate the Board of Rights about significant issues before testimony is taken.
7. The Department should ensure pre-hearing motions and opposition are properly prepared and that factual representations are properly supported.
8. The Department should streamline the way in which it presents pre-hearing motions and opposition. Serving motions and opposition before a hearing is set and brief oral arguments, if necessary, should be encouraged. Reading motions and opposition verbatim, including footnotes, is not necessary.
9. The Department should adopt timeframes within which timely pre-hearing preparation takes place, which should include but is not limited to the drafting, filing and serving of

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motions and opposition to defense motions, the preparation of hearing witnesses, including expert witnesses, determining what defense witnesses will say, and preparation of exhibits for the hearing. The Department should ensure qualified staff is available to complete the pre-hearing preparation and hearings in a timely manner.

10. The Department should adopt conflict rules that would prohibit an investigator who investigated a case, and is a potential witness, from also prosecuting the same case at a Board or Rights hearing.

11. The Department should take all necessary action to ensure the City Charter is amended as follows:

- a. Change the composition of the Board of Rights from three chief officers to one chief officer, one civilian, and one administrative law judge who shall preside at the hearing, ruling on the admission of evidence, and providing advice to the Board on matters of law;
- b. Define the role of the administrative law judge so the duties are consistent with the *Administrative Procedures Act*;
- c. Select the administrative law judge in accordance with procedures established by the State of California's Office of Administrative Hearings;
- d. Choose members of the Board of Rights by establishing a pool of chief officers who remain available to serve for two year terms and allow the Department and the defense to make a series of peremptory challenges that would result in a final selection;
- e. Select the civilian member of the Board in a manner similar to how a civilian is chosen to sit on Boards of Rights at the Police Department;
- f. The Board of Rights be required to determine discipline in accordance with the Department's penalty guidelines in effect at the time of the misconduct if a member is found guilty;
- g. Add language similar to City Charter section 1070 that would prohibit ex parte communications with the Board of Rights;
- h. Add language similar to City Charter section 1070 that would provide the Fire Department with pre-hearing internal investigation subpoena power, and specify the Board of Fire Commissioners have the power to compel compliance to a subpoena;
- i. Add language similar to City Charter section 1070 requiring Board of Rights decisions be based solely on the evidence before the Board, including the Department's disciplinary guidelines in effect at the time of the misconduct;
- j. Section 1060(a) of the City Charter concerning the statute of limitations should

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“mirror” the statute of limitations language of the *Firefighter Procedural Bill of Rights Act* by eliminating the two year statute of limitations referred to in the City Charter, and adding the tolling provisions of *Government Code*, section 3254 (d)(1-7);

k. Section 1060(d) of the City Charter concerning service of disciplinary action should reflect disciplinary action may be taken if the Department files the complaint with the Board of Fire Commissioners within one year of discovery;
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l. Section 1060(n) of the City Charter should be amended to add limitations on the access to medical records and stress the confidentiality of personnel records used in the penalty phase of a Board of Rights hearing;

m. Add subsections to section 1060 of the City Charter specifying the use of calendar days and specifying what are public records; and

n. Allow the Board of Rights to be adjourned without further hearing when the Board loses jurisdiction by resignation, retirement, or death.

12. The Department should adopt and enforce rules that prohibit ex parte communications with members of the Board of Rights.

13. The Department should adopt rules that prohibit the Board of Rights who has been appointed to hear and decide the facts of a case do not become involved in settlement discussions and issues.

14. The Department should ensure all misconduct complaints are entered in the Department’s complaint tracking system, appropriately investigated and that appropriate action is taken if misconduct is proven by a preponderance of the evidence.

15. The Department should adopt guidelines, procedures and timeframes that expedite the timely prosecution of Boards of Rights cases, and should ensure that qualified staff is made available to complete prosecutions within those timeframes.

16. In deciding to prosecute a case at a Board of Rights hearing the Department needs to ensure it has the evidence to establish knowing violations of the Department’s work rules and the defendant has no reasonable explanation for non-compliance.

17. The Department must ensure that each step of its investigations are conducted as if the case is being prepared for an evidentiary hearing, such as a Board of Rights.

18. The Department should adopt written rules that permit and set reasonable time limitations on pre-hearing discovery including but not limited to exchanging witness and exhibit lists, allowing for the interviews of hearing witnesses, the production of documents, and discovery requests.

19. When presenting cases at a Board of Rights or Civil Service hearing the Department

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should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is necessary in light of the “penalty setting factors” articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include; 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.

20. The Department should provide training to, and develop a “Benchbook” for chief officers who may be appointed to sit on a Board of Rights that addresses such issues as; their role and responsibilities, the role and responsibility of the City Attorney’s Office, the difference between the “fair administrative hearing standard” of Boards of Rights and the “fair trial” requirements synonymous with constitutional due process, the order in which the parties present their cases, the manner in which evidence is received, basic rules of evidence, including the definition of basic terms, direct and cross-examination, recurring legal issues, commonly seen law and motion issues, criminal conflict issues, frequently asked questions, controlling difficult and obstreperous subjects, witnesses, representatives and attorneys, expert witness issues, legal issues related to compelling testimony from subject’s at a Board of Rights hearing, the burden of proof, penalty setting issues, and the drafting of decisions, among others.

21. The Board of Rights should not hesitate in requiring a deputy city attorney legal advisor be more immediately available, if not physically present during hearings to provide legal advice, particularly when motions or other legal issues will be heard.

22. When assessing the credibility of witnesses, the Board of Rights should be encouraged to consider the factors set forth in *Evidence Code*, section 780, which provides guidance on how to assess the believability and credibility of witnesses in legal proceedings.¹⁴⁵

23. The Department should adopt written rules that allow for both parties to present evidence and argument during the penalty phase of a Board of Rights hearing on what disciplinary action should be taken against a member who has been found guilty. That evidence and argument should include; 1) the extent to which the affected member’s misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.

24. When determining an appropriate disciplinary penalty a Board of Rights should be required to consider and articulate in writing; 1) the extent to which the affected member’s misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence¹⁴⁶ when applying the Department’s disciplinary guidelines and set of mitigating and aggravating standards because these “*Skelly* factors” will be used to determine if the Department has abused its discretion in setting a disciplinary penalty.

25. Chief officers who may serve on Boards of Rights should receive training on how to appropriately set disciplinary penalties and how the term “harm to the public service” is defined in California law, particularly as it relates to the fire service.¹⁴⁷

26. Eliminate the provision that allows a Board of Rights decision to be submitted to arbitration.¹⁴⁸

DUE PROCESS REQUIRES NOTICE of WORK STANDARDS

Recommendations

The following recommendations should be considered:

1. The Department should ensure all basic information such as policies, protocols, guidelines, dispatch records, journals, patient care records, reports, memos, emails, training records, and all other materials of any type related to the incident and conduct under investigation is obtained and thoroughly reviewed at the start of the investigation, before interviews begin.

2. The Department should ensure its misconduct investigations determine if knowing violations of work rules occurred without reasonable explanations for noncompliance. To determine if knowing violations of policies, procedures and guidelines have occurred, Department should only employ investigators who demonstrate the ability to proficiently:

a. Obtain and thoroughly review the specific, as opposed to general policies, protocols, guidelines and other work rules governing the alleged misconduct at the start of the investigation;

b. Obtain and thoroughly review all training records to determine if the employee accused of misconduct received actual or constructive notice of the specific work rule, policy, protocol or guideline at the start of the investigation;

c. Determine if those accused of violating work related rules will contend they were inadequately trained on the issues related to the matter under investigation, and the basis for such claims;

d. Thoroughly question witnesses, and particularly the employee accused of violating a work related rule about their training on the specific rule they are accused of violating, and attempt to obtain admissions they were trained on the specific rule they are accused of violating;

e. Thoroughly question witnesses, and particularly the employee accused of violating work related rules, about how their conduct did or did not conform to the specific work rule, and attempt to obtain admissions of the violations;

f. Thoroughly question witnesses, and particularly employees accused of violating work related rules about all reasons for failing to fully comply with the rule

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alleged to have been violated; and

g. Thoroughly question witnesses, and particularly the employees accused of violating work related rules, about the reasonableness of their explanations for violating work standards.

3. The Department investigators, investigative supervisors and investigative managers should ensure investigations obtain and investigative reports document, admissible evidence to establish knowing violations of work rules without reasonable explanations for noncompliance.

4. The Department investigators, investigative supervisors and investigative managers should ensure investigations obtain and investigative reports document admissible evidence to establish every element of the misconduct violation.

5. The Department should ensure its investigators obtain all relevant legal guidance at the start of an investigation to be sure all evidence is obtained and interviews are complete. For example, legal guidance on what conduct constitutes gross negligence should be obtained before interviews are conducted.

6. The Department should ensure all potential allegations have been identified at the start of the investigation and should seek the assistance of a subject matter expert, as necessary, to assist in forming allegations and preparing a thorough and comprehensive investigative plan.

7. The Department should ensure its investigators seek the assistance of subject matter experts, as necessary, to assist in identifying what evidence needs to be obtained and what witnesses should be asked during their interviews.

8. Interview and *Skelly* recordings, the investigative report, investigative materials and exhibits should be included in the Department's complaint tracking system.

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9. Records of remedial training provided as a part of disciplinary action should be placed in the employee's file to evidence the employee was placed on actual notice of work standards he or she violated.

10. The Department should not reduce proposed penalties based on statements of remorse, or taking responsibility and agreements to attend training expressed at *Skelly* hearings. Expressions of remorse and taking responsibility should be considered when setting the proposed penalty before the *Skelly* hearing is held and if further or remedial training is required it should be included as a part of the proposed penalty, not negotiated for a lower penalty.

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11. The Department should place greater emphasis on conduct that demonstrates actual remorse and taking responsibility as opposed to oral expressions of the same.

12. The Department should develop a system to ensure it is able to provide evidence its employees are on notice of its work rules and the consequences for noncompliance. Actual notice is best evidenced by a signed acknowledgement.

13. The Department should develop and comply with a uniform policy of reporting emergency medical technicians and paramedics who have *potentially* engaged in grossly negligent patient care, incompetence and dishonesty that is substantially related to the qualifications, functions, and duties of pre-hospital personnel to the local emergency medical services agencies and to the State of California Emergency Medical Services Authority that certify, accredit and license them.¹⁵⁷

14. The Department should refer the facts involving this section of this *Assessment* to the Department's medical director for an opinion concerning whether the patient care was grossly negligent as that term is defined in *Wright v. City of Los Angeles*(1990) 219 CA3d 318, 345-347.

15. If the Department's medical director determines the medical care in this case was grossly negligent or there was a *potential* violation of *Health and Safety Code*, section 1798.200, the matter should be referred to the County of Los Angeles Department of Health Services for their consideration.¹⁵⁸

16. The Department's misconduct investigations should be conducted, supervised and managed by non-sworn persons with the demonstrated expertise, training and experience

FIELD INVESTIGATIONS

Recommendations

The following recommendations should be considered:

1. The Department's disciplinary process, including investigations, should be conducted, supervised and managed by non-sworn staff with the expertise, experience and training to perform such work involving public safety agency employees.

2. The Department should limit assigning investigations to field personnel to the greatest extent possible.

3. Although field supervisors such as captains and chief officers should be held accountable for providing active and responsible supervision, the Department should limit the number of investigators permitted to conduct investigations in the field to a smaller pool that is

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more manageable.

4. The Department should develop written conflict policies that govern who may be assigned investigative responsibilities.
5. The Department should limit those conducting and supervising investigations to those who have demonstrated proficiency in ensuring investigations; are complete, thorough and detailed; clearly address knowing violations of policy; fully address all reasons for failing to comply with policies; fully address anticipated defenses; establish all elements of the applicable offenses; and in preparing investigative reports that accurately reflect the evidence obtained.
6. The Department should adopt a rigorous report review process that ensures investigations; are complete, thorough and detailed; clearly address knowing violations of policy; fully address all reasons for failing to comply with policies; address anticipated defenses; establish all elements of the applicable offenses; and investigative reports accurately reflect the evidence obtained. Incomplete investigations and inaccurate reports should not be accepted.
7. Investigators and supervisors should ensure investigations properly address inconsistent statements made in connection with a matter under investigation.
8. Investigators should collect unit histories, dispatch records, station logs, training records and all other background information before conducting interviews as a part of preparing the investigation and before interviews take place.
9. Those conducting investigations should obtain certified copies of court records when the alleged misconduct also results in the filing of criminal charges.
10. Investigators should obtain documents offered by, referred to or relied on by witnesses and subjects during their interviews.
11. Supervisors reviewing investigative reports should provide feedback to the investigator concerning the quality of the investigative work performed.
12. The Department should adopt guidelines that address “off the record” conversations about matters under investigations and how interview breaks are to be handled “on the record.”
13. When preparing penalty recommendations and setting penalties the Department should reference all the guideline offenses that appropriately match the misconduct engaged in by the employee.
14. Until a more appropriate resolution is reached, the Department should initially set the penalty at the mid-range and then apply aggravating and mitigating factors to move the penalty within the range if appropriate.
15. When initially setting penalties the Department should consider all appropriate

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aggravating and mitigating factors that apply and not depart from the penalty initially proposed unless new information unknown at the time the initial penalty was proposed is later discovered.

16. The Department should only use calendar days when proposing and ordering suspensions and should eliminate the use of “work” days.

17. The Department should upload recordings of *Skelly* hearings to either the complaint tracking system or the disciplinary tracking system.

18. The Fire Chief should be held accountable in his or her annual performance evaluation for how the disciplinary process and system is working including how investigations are conducted, supervised and managed and for the disciplinary decisions made before and after *Skelly* hearings.

19. It is strongly recommended the Department review how its resources are being used. To the extent the Department’s helicopters, ambulances, cars, trucks, fireboats and fire apparatus, and other resources are being used improperly, the Department should take all appropriate employees are placed on notice.

20. The Department should review its policies and practices governing take home vehicles.

21. The Department should utilize non-sworn persons with expertise, experience and training in recommending penalties for public safety personnel when preparing proposed and final discipline.

22. The Department should establish timeframes for the timely completion of investigations and each step of the subsequent disciplinary process and ensure qualified staff is available to insure those timeframes are met.

FAILURE TO INVESTIGATE CIVIL RIGHTS CLAIM

Recommendations

The following recommendations should be considered:

1. The Department should ensure a thorough and complete investigation of all issues related to the misconduct allegations received on January 23, 2009, is conducted, including, but not necessarily limited to the following:
 - a. What happened at the hospital on January 22, 2009, and did anything else occur to cause the April 29, 2009 letter of complaint;
 - b. What were the advocates told by Department supervisors and managers, the City

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Attorney's Office, and the attorney's for the hospital and the member whose records were sought about the legal basis for and objections to serving a subpoena before they went to the hospital on January 22, 2009, and did they confirm the subpoena they served provided a valid legal basis for obtaining the medical record(s) they sought;

c. If Department advocates engaged in the misconduct, did they do so on their own, or were they encouraged, directed or authorized to do so by Department supervisors and managers, or the City Attorney's Office;

d. Why was there a failure to enter the January 23, 2009, complaint in the Department's complaint tracking system any sooner than February 26, 2009, and if so, who was involved in causing the delay;

e. Was a non-sworn manager treated differently in anyway when recommending how to handle the complaint, and if so, how was the non-sworn manager treated differently and who engaged in such conduct;

f. Why was the case status changed to "Closed-Not Sustained" on July 16, 2009, and who was involved in making the change, when an investigation had not been conducted; and

g. Why has the Department failed to conduct the investigation the former fire chief said would be performed on April 29, 2009, and the Department said would be conducted in October and November, 2009, before expiration of the one-year statute of limitations?

2. The investigation of these issues should be completed so that any disciplinary action that is not barred by the statute of limitations may be taken, if supported by the investigation.

3. The Department should provide assurance the Police Department has been notified of the allegations contained in the January 23, 2009, letter, and that assurance should specify the date and manner in which the notification was made.

4. The City Attorney's Office should determine if the City of Los Angeles has a valid claim for malpractice against the private attorney retained to conduct the investigation that was not completed before expiration of the statute of limitations, and whether the private attorney should be requested to place the attorney's malpractice carrier on notice.

5. The Department's disciplinary system and its investigations of misconduct allegations should be managed, supervised and staffed with non-sworn professionals with the demonstrated expertise, training and experience to conduct investigations and discipline of public safety employees.

6. The Fire Chief should be held accountable in his or her annual evaluation for the performance of the Department's disciplinary system.

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7. The Department should takes steps to ensure all complaints of misconduct are entered in the complaint tracking system in a timely manner and all such complaints are appropriately investigated in a timely manner.

8. The Department must receive timely and consistently competent legal services in support of its misconduct investigations and disciplinary system.

ASSESSMENT IMPEDIMENTS

Recommendations

It is respectfully requested the Board of Fire Commissioners take the following action:

1. Direct the Department to provide the Independent Assessor with copies of all Government Tort Claims, all Department of Fair Employment and Housing claims, all Equal Employment Opportunity Commission claims, and all other claims, pleadings or lawsuits of any kind asserting a legal claim against the Fire Department or its members within 72 hours of receipt by the Department.

2. Direct the City Attorney's Office to provide the Independent Assessor with reports and information concerning the current status of all claims, lawsuits and appeals pending against the Fire Department and any of its members every thirty (30) days.

3. Direct the City Attorney's Office to provide the Independent Assessor with complete reports and information concerning any ruling, order or decision involving all claims, lawsuits and appeals in matters where the Department or any of its employees are defendants or respondents within 72 hours of the ruling, order or decision being made known to the City Attorney's Office.

4. Direct the Department to provide the Independent Assessor immediate and unrestricted access to all Department personnel and payroll records and files regardless of format unless the City Attorney's Office can provide written advice²⁰² with citations to legal authority citing a valid legal basis for not providing access in no more than thirty (30) calendar days.²⁰³

It is respectfully suggested the Board of Fire Commissioners also adopt the following expectations:

1. If the City Attorney's Office is concerned about a legal issue, and believes the Board needs advice or an opinion on any issue, the City Attorney's Office is to inform the Board of Fire Commissioners or the Board's President, whichever is most expedient, directly and immediately, and shall not engage in the practice of sending or leaving messages through or with others indicating the Board should seek a legal opinion from the City Attorney's Office.

2. If the City Attorney's Office has an opinion about the Independent Assessor's right to access records, or any other legal issue, the City Attorney's Office is to take the initiative to provide it, instead of sending or leaving messages indicating the Board needs to ask for an opinion, and/or waiting for the Board to ask for an opinion.

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3. If the City Attorney's Office has an opinion about the Independent Assessor's right to access records, or any other issue, the City Attorney's Office is to provide timely written advice or opinions with complete legal analysis and citations to legal authority supporting the opinion, once having been placed on notice of the issue.

²⁰² Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when

requested to do so by any City officer or board. The City Attorney's Office explains there is a difference

between advice and opinions; the latter being more formal.

²⁰³ Given the amount of time that has already passed, 30 calendar days should be sufficient.

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4. If the City Attorney's Office believes the Independent Assessor does not have access to any Fire Department records or files, the City Attorney's Office is to provide a written memorandum, with complete legal analysis and citations to legal authority supporting the opinion within thirty (30) calendar days that fully explains every impediment to access.

5. If the City Attorney's Office believes the Independent Assessor does not have access to any Fire Department records or files, the City Attorney's Office is to provide within thirty (30) calendar days a written recommendation, with complete legal analysis and citations to legal authority, that identifies each such record or file and sets forth the action needing to be taken to remove all impediments to full access.

6. If the City Attorney's Office can articulate a valid written legal basis for denying the Independent Assessor access to any Fire Department records or files, the City Attorney's Office should not expose the City of Los Angeles, the Board of Fire Commissioners, the Independent Assessor, the Fire Department or their employees to an unreasonable risk of liability by advising the Board of Fire Commissioners the Independent Assessor has no legal right to access records, but then, and despite such advice, advise the Board to direct the Department to provide access.