

August 7, 2012

BOARD OF FIRE COMMISSIONERS  
FILE NO. BFC 12-124

DATE: July 27, 2012

TO: Board of Fire Commissioners

FROM: Stephen Miller, Independent  Assessor

SUBJECT: **INITIATION OF THE 2012 ASSESSMENT OF THE FIRE DEPARTMENT'S  
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 Withdrawn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:**

1. Approve the Audit Plan contained in this Board report.
2. Direct the Fire Chief to provide complete and prompt access to inspect and/or copy all Fire Department information records, files, employees and information as listed in the Audit Plan.

**Summary:**

In March 2010, the Office of the Independent Assessor released the first *Assessment of the Department's Disciplinary Process and Professional Standards Division*. The purpose of this *2012 Assessment of the Professional Standards Division (2012 Assessment)* is to assess the current status of the Professional Standards Division and the Department's disciplinary process in identified areas.

**Audit Plan:**

This *2012 Assessment* will focus on the following areas:

1. Equal Employment Opportunity (EEO) Investigations and Adjudications
2. Compliance with the Due Process Requirements of *Skelly v. State Personnel Board*
3. Board of Rights Hearing Process
4. Consistency in Penalty Application
5. Statute of Limitations Issues
6. Administrative Investigations Involving Criminal Conduct
7. Alcohol and Substance Abuse Testing Procedures and Last Chance Agreements
8. Analysis of Anonymous Complaints

Initial work on this *2012 Assessment* will include background research and preliminary discussions with the PSD. Information related to each of the areas of focus will be obtained from the Complaint Tracking and Disciplinary Tracking Systems and interviews with PSD staff. Specific cases will be selected for a detailed examination. The number of cases referred for a detailed examination will depend on a variety of factors, including the total number of cases and issues identified on initial screening. Only cases that have been completed or closed will be included in this detailed examination.

The detailed examination will consist of a complete review of all investigative materials to determine whether investigations were complete, thorough and timely and whether adjudication complied with Department policies and procedures. Only personnel, payroll and training records related to the specific cases selected for a detailed review will be examined. Information contained in personnel files is used by the Department for such things as determining if an employee has a record of prior discipline, transfers pending investigation or a member's past and current assignment. Payroll records provide information concerning the cost of discipline as well as whether discipline, such as a suspension, has been implemented. Training records may be relevant to whether an employee has adequate notice of a Department rule or regulation he or she is alleged to have violated.

The Office of the Independent Assessor will continue the practice of providing draft reports to the Fire Department and the City Attorney's Office for review before final publication. Draft reports are provided in an attempt to ensure fairness, factual accuracy and compliance with any applicable legal concerns.

In order to complete this *2012 Assessment*, the Office of the Independent Assessor will require access to Fire Department personnel as well as complete and prompt access to inspect and/or copy all Fire Department physical or electronic records and information as follows:

1. The policies and procedures of the Fire Department and the Professional Standards Division (PSD) relating to discipline and investigation of misconduct complaints.
2. The Complaint Tracking System.
3. The Disciplinary Tracking System.
4. Hard copy/physical and electronic investigative files, including investigator notes, forms, audio recordings, interviews and investigative reports.
5. Hard copy/physical and electronic files relating to penalty determinations and the application of discipline.
6. Hard copy/physical and electronic files and audio recordings related to *Skelly* hearings.
7. The Disciplinary Module of the Member Information Tracking System (MITS).
8. Access to the Fire Chief's discipline meetings with the PSD.
9. Personnel records maintained by the Personnel Services Section.
10. Payroll records maintained by the Payroll Unit.
11. Training records for Fire Department personnel.
12. Personnel including investigators, advocates, supervisors and managers of the PSD; chief officers serving on Boards of Rights; *Skelly* hearing officers; and other members of the Fire Department as deemed necessary to complete the assessment.

#### **Authority of the Board of Fire Commissioners:**

Charter section 500 says that the Fire Department is under the control and management of the Board of Fire Commissioners, who shall be the head of the Department. As head of the Fire

Department, the Fire Commission shall have the power to supervise, control, regulate and manage the Fire Department pursuant to Charter section 506.

Charter section 509(b) says that subject to the provisions of the Charter, the rules of the department and the instruction of his board, the Fire Chief has the authority to appoint, discharge, suspend, or transfer Fire Department employees. Formal City Attorney Opinion No. 2006:1, dated May 9, 2006, says, "In addition to the powers enumerated in Charter section 506, the Board has the power pursuant to Charter 509 to instruct the General Manager with respect to all matters that make up the duties and responsibilities of the General Manager."

*Patton v. Board of Harbor Commissioners of the City of Los Angeles* (1970) 13 Cal.App.3d 536, 542-43, says that a commission with the powers that are now set forth in Charter section 509 has ultimate power over discipline. The Fire Commission has the powers set forth in section 509.

Formal City Attorney Opinion No. 99-7, dated September 20, 1999, says: 1) that the Charter design for departments headed by boards calls for joint management where the board promulgates rules and instructs the chief administrative officer, and the chief administrative officer follows such rules and instructions; 2) commission instructions may be specific; and 3) the commission may issue precise directions that are operational in nature.

In 1946, a formal City Attorney opinion said that an accepted rule of law provides a commissioner with those implied powers necessary to the exercise of powers expressly granted, and that part of a Boardmember's duty is to acquaint himself with and acquire knowledge of the Department's operations, policies and its affairs over all. This knowledge is "essential to intelligent supervision by the Board over the department."

City Attorney Report No. R99.0021, dated January 25, 1999, says that as head of the Police Department, the Police Commission has access to all information available to the Department. City Attorney Report No. R99-0302, dated September 30, 1999, says that as head of the Police Department, the Police Commission has access to all information within the control of the Department. Charter section 500 places the Fire and Police Departments under the control and management of their respective commissions. The Fire and Police Commissions have the same powers as head of their respective departments pursuant to section 506, the only exception being that the Fire Commission actually has greater powers and authority over discipline and personnel matters pursuant to Charter sections 509, 571 and 574.

On May 16, 2011, the City Attorney said that the Fire Chief's functions of discharging and suspending Department employees are subject to review and corrective instruction from the Fire Commission. The City Attorney relied on the Court of Appeal decision in *Patton* and City Attorney Opinion No. 2006:1 in providing this advice.

The Mayor routinely asks that the Fire Chief be evaluated by the Fire Commission. The Fire Chief directly supervises the PSD who has the primary responsibility to handle, investigate and adjudicate misconduct cases. The City Attorney's August 23, 2010 advice says an evaluation of the Police Chief who, unlike the Fire Chief, has exclusive jurisdiction over discipline, would necessarily involve the ability to directly determine the Chief's direct handling of Department matters, including discipline matters, and, therefore, requires a review of relevant personnel files, if deemed necessary.

On June 21, 2011, Dean and Distinguished Professor of Law Erwin Chemerinsky opined that Charter section 500 makes the Fire Commission the manager of the Fire Department and that to fully exercise its management authority over the Fire Chief, it must have full access to personnel materials. Dean Chemerinsky further opined that the Independent Assessor has the same access to Fire Department information as the Fire Commission, and it is impossible to perform the Charter-mandated tasks of auditing, assessing and reviewing the Fire Department's handling of misconduct complaints without access to personnel files.

**Authority of the Independent Assessor:**

Charter section 523, subsection (a), says the Independent Assessor shall have the power and duty to, "under the rules established by the Board of Fire Commissioners, audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees, sworn or civilian, of the Fire Department." Charter section 523 also says that the Independent Assessor shall have the same access to Fire Department information as the Board of Fire Commissioners.

Charter section 523 was approved by the voters on March 3, 2009 after:

- The City Controller said independent oversight to provide assurance that the Fire Department's investigative process was objective, effective and fair was critical.
- The Personnel Department said access to complaint and disciplinary tracking systems, databases, files and people was crucial and paramount and the Personnel Department strongly recommended that access to such critical information be codified in a Charter provision, such as Charter section 573 providing the Inspector General with access.
- The City Attorney's Office assisted in drafting a job description that stated the Independent Assessor would review complaint investigations to determine whether investigations are conducted fairly, comprehensively and progress within standard time frames, and whether adjudication complies with Department policies and procedures.
- The City Attorney's Office told the City Council that the Independent Assessor would conduct audits, provide oversight in response to complaints, provide independence and autonomy, and provide "checks and balances."
- The Office of the Chief Legislative Analyst told the City Council that the intent of creating an Independent Assessor position was to provide "oversight" to ensure reforms were instituted.
- Councilmembers removed the Independent Assessor's ability to conduct investigations but did not remove the primary duty of reviewing investigations, with one Councilmember stating the Independent Assessor was "supposed to be the eyes and ears of the Commission to make sure PSD is doing its job well."
- The voters were told that an independent monitor, like the Inspector General at the Police Department, was essential in monitoring the Fire Department's efforts to implement discipline in an appropriate and consistent manner, and that the Independent Assessor would be independent from the Fire Department's chain of command.

On March 12, 2009, and after review by the City Attorney's Office, the Civil Service Commission approved a class specification that says the Independent Assessor has the duty to review investigations of misconduct complaints to determine whether investigations are conducted fairly and comprehensively and progress within standard time frames and whether adjudication complies with Department policies and procedures.

On December 15, 2009, the Fire Commission unanimously adopted the rules referred to in Charter section 523. The *Policies and Authority of the Independent Assessor* state that Fire Department employees have an affirmative duty to:

- Cooperate with the Independent Assessor.
- Provide complete, unrestricted and prompt access to inspect and/or copy all Department physical or electronic records accessible to the Fire Commission.

On July 14, 2010, the former Fire Chief issued an "access" memorandum to various parts of the Fire Department reminding Department employees that they have an affirmative duty to cooperate with the Independent Assessor, and provide complete, unrestricted and prompt access to inspect and/or copy Fire Department records pursuant to the Fire Commission's December 15, 2009 policies, the City Charter and a formal City Attorney opinion.

**Fiscal Impact:**

None.

**Conclusion:**

The *2012 Assessment* will follow up on some of the important areas covered in the first *Assessment*. Continuing to assess these areas is critical for ensuring that the Fire Department is implementing discipline in an appropriate and consistent manner, as is expected by the citizens of Los Angeles.