

April 2, 2013

BOARD OF FIRE COMMISSIONERS
FILE NO. BFC 13-039

Date: March 18, 2013
To: Honorable Board of Fire Commissioners
From: Stephen Miller, Independent Assessor **SM**
Subject: **ASSESSMENT OF THE ALTERNATIVE INVESTIGATIVE PROCESS**

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 Withdrawn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. Receive and file the *Assessment of the Alternative Investigative Process*.
2. Direct the Commission Executive Assistant to transmit this report to the City Council for its consideration.

Summary:

The Fire Department uses an alternative investigative process when the investigation of complaints could create a conflict of interest, such as those involving the Professional Standards Division (PSD), the Fire Chief or union officials. This *Assessment of the Alternative Investigative Process (Assessment)* reveals that the process does not work well, primarily because the Department lacks the necessary resources to conduct and manage such investigations. As a result, the public cannot have confidence that the same standards of conduct apply equally to everyone in the Department, regardless of assignment, rank or position.

Some of the key findings in this *Assessment* include:

1. Key witnesses were not interviewed. Those who were interviewed were not thoroughly questioned and important, relevant documents were not collected, discussed or even mentioned.
2. The alternative investigation failed to fully comply with the FBOR and relevant collective bargaining agreements.

3. The Department failed to investigate allegations that a member's constitutional rights and his right to privacy had been violated, even after the Fire Chief said such an investigation would be conducted.
4. Whether City manpower, resources and materials were misused at the request of a defense representative was not adequately investigated.

Some of the key recommendations, based on the findings in this *Assessment*, are as follows:

1. The Department must have a credible process for the complete, timely and thorough investigation of alleged misconduct engaged in by those assigned to the PSD.
2. Sufficient investigative, supervisory and management resources must be dedicated to an alternative investigative process to ensure that all members of the Department are held to the same high standards of behavior.
3. The Department should refer misconduct complaints lodged against the Fire Chief to the Mayor for investigation and adjudication. The Department should avoid having the Fire Chief's subordinates conduct such investigations.
4. In the long term, the City Charter should be amended to require that those facing a Board of Rights hearing pay their own expenses related to the hearing, which includes the cost of representation at the hearing.
5. Reducing the delay in convening a Board of Rights hearing, reducing continuances and reducing the delay between sessions of the hearing should reduce the cost to the Department.
6. The improper use and abuse of Department resources and the making of misleading statements are serious allegations that must be thoroughly and completely investigated in a timely manner. If such allegations are sustained, appropriate corrective and/or disciplinary action should be taken consistent with disciplinary guidelines.
7. The Department should ensure that it seeks legal advice when there are objections and claims that investigations: 1) constitute retaliation; 2) impinge on privileged conversations; 3) prevent members from being represented by the representative of their choice; or 4) otherwise interfere with union members' rights.

A draft of this *Assessment* was provided to the Fire Department and the City Attorney on January 28, 2013. Both were asked to conduct a review to ensure accuracy and fairness, and provide any comments and corrections within two weeks. The Department's comments were either incorporated or at least taken into consideration, and the Department was given additional time to review a final draft before publication. The City Attorney's Office did not respond to the request and did not ask for additional time to conduct a review.

LOS ANGELES BOARD OF FIRE COMMISSIONERS



ASSESSMENT OF THE ALTERNATIVE INVESTIGATIVE PROCESS



OFFICE OF THE INDEPENDENT ASSESSOR

STEPHEN MILLER
Independent Assessor

March 18, 2013

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March 18, 2013

Honorable Board of Fire Commissioners
City Hall East, Room 1840
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Dear Madam President and Honorable Members of the Board of Fire Commissioners:

An Assessment of the Alternative Investigative Process is submitted to you.

The alternative investigative process is a process used by the Fire Department when the investigation of certain complaints could create a conflict of interest, such as those involving the Professional Standards Division, the Fire Chief or union officials. This report finds that the process does not work well, primarily because the Department lacks the necessary resources to conduct and manage such investigations. As a result, the public cannot have confidence that the same standards of conduct apply equally to everyone in the Department regardless of assignment, rank or position.

In addition to making certain findings, this report provides recommendations that may assist the Department in improving the process by which these types of complaints are handled. Some of these recommendations include: 1) regularly evaluating how the Fire Chief is managing the disciplinary process; 2) holding investigators, supervisors and the Fire Chief accountable to ensure that investigations are complete and proceed in a timely manner; and 3) referring complaints involving the Fire Chief to the Mayor.

A draft of this report was provided to the Fire Department and the City Attorney on January 28, 2013. Both were asked to conduct a review to ensure accuracy and fairness, and provide any comments and corrections within two weeks. The Department's comments were either incorporated or at least taken into consideration, and the Department was given additional time to review a final draft before publication. The City Attorney's Office did not respond to the request and did not ask for additional time to conduct a review.

The level of cooperation provided by the Fire Department during this assessment has been excellent. It is critical that the Department receive strong support in working to improve this area of the disciplinary process not only from this Commission, but from the City Attorney's Office, the City Council and the Mayor.

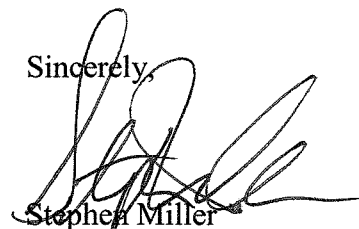
Honorable Board of Fire Commissioners

March 18, 2013

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Finally, I must acknowledge and thank Special Investigator Alexa Daniels-Shpall for her invaluable assistance in preparing this report. It could not have been done without her dedication and hard work.

Sincerely,



Stephen Miller
Independent Assessor

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EXECUTIVE SUMMARY

The Fire Department uses an alternative investigative process when the investigation of certain complaints could create a conflict of interest, such as those involving the Professional Standards Division (PSD), the Fire Chief or union officials. This report reveals that the process does not work well, primarily because the Department lacks the necessary resources to conduct and manage such investigations. As a result, the public cannot have confidence that the same standards of conduct apply equally to everyone in the Department regardless of assignment, rank or position.

This assessment reviews cases that were or should have been referred to the alternative investigative process between January 2009 and December 2011. Since its inception, less than 40 cases have been referred to the process. Allegations were not sustained in the 12 investigations we reviewed in detail. The statute of limitations period expired before investigations were completed in the 11 cases involving sworn members of the Department. The investigations that were conducted were generally poor and incomplete. Serious allegations of misconduct were not thoroughly investigated in at least two cases.

In one case we reviewed, the Department decided not to investigate allegations that PSD investigators intimidated a doctor's employees, forced a doctor to produce a member's medical record, and lied to and threatened his staff. In another case, there was a six-month delay in entering a complaint in the Complaint Tracking System when it was alleged that a PSD investigator may have made false statements while testifying under oath during a Board of Rights hearing, and those allegations were never investigated.

We reviewed how the Department handled complaints related to the amount of time defense representatives use to prepare a Board of Rights defense. In one case, it was alleged that a defense representative falsely claimed he could not work his regularly scheduled shifts so his friends could work overtime in his place and that he was also making false claims for overtime pay. In other cases, a former PSD Commander was accused of violating a member's due process rights and a former Fire Chief was accused of engaging in conduct constituting discrimination when they attempted to limit the amount of time defense representatives could spend preparing for Board of Rights hearings.

Based on our findings, we have made recommendations for how the alternative investigative process may be improved. Some of these recommendations include: 1) regularly evaluating how the Fire Chief is managing the disciplinary process; 2) holding investigators, supervisors and the Fire Chief accountable to ensure that investigations are complete and proceed in a timely manner; and 3) referring complaints involving the Fire Chief to the Mayor.

We have also made recommendations related to issues we identified in the cases that were referred to the alternative investigative process. For example, the Department has a responsibility to monitor, oversee and control expenses to ensure all expenditures are reasonable and necessary. Defense representatives have a duty to take the time necessary to prepare a defense for the members they represent. A conflict arises when, because of the nature of the arrangement, the Department is unable to oversee and question how defense representatives

actually spend their time as closely as it could in other areas. We, therefore, have recommended a Charter amendment to require that those facing a Board of Rights pay their own expenses related to the hearing, including the cost of representation, much like how cases at the Police Department are handled.

While the Department's alternative investigative process is intended to handle cases where a conflict might prevent the PSD from investigating a complaint against one of its own investigators, we have recommended that the Department consider having the PSD conduct such investigations so long as no PSD supervisor is involved as a subject or witness. The Department's investigative resources outside of the PSD are extremely limited, and cases of this nature require individuals with the skills and training to conduct professional investigations. The Department must have confidence that PSD investigators and supervisors are able to conduct these types of investigations if they are to be trusted to conduct any investigations of Department members. Additionally, this arrangement would require active supervision by the Fire Chief and meaningful oversight by the Fire Commission, through regular auditing by the Independent Assessor.

Some of the conduct and investigations examined in this report may not reflect current practices. However, the cases do reflect what happened at the time, and transparency requires the disclosure of this information. The manner in which some of the cases were handled in the past also provides valuable information on how the process may be improved. Finally, the cases provide examples of problems and conduct to be avoided in the future.

We did attempt to determine the current status of the alternative investigative process. The Department reported that the state of the current alternative investigative process is much the same as reported here. There have been no significant changes made in how the process is managed or how these investigations continue to be conducted.

As a final note, this report does not attempt to assess how the PSD currently conducts its work or how those currently assigned to the PSD perform their duties.

REVIEW OF REPORT

On January 28, 2013, the Fire Department was provided a draft of this report and asked to provide any comments and corrections to ensure accuracy and fairness. The Department was provided additional time to review a final draft before publication. The Department's comments were either incorporated or at least taken into consideration when completing this report.

On January 28, 2013, the City Attorney was also provided a draft of this report and asked to conduct a factual and/or legal review, as deemed necessary, to ensure accuracy and fairness. The City Attorney's Office did not respond to the request and did not ask for more time to conduct a review.

OFFICE OF THE INDEPENDENT ASSESSOR

On January 26, 2006, the Los Angeles City Controller published its *Review of the Los Angeles Fire Department Management Practices*. On January 31, 2006, the City of Los Angeles Personnel Department released its *Audit of Fire Department Selection and Employment Practices*. Both audits cited longstanding problems with leadership and communications, the complaint and disciplinary process, human relations issues, and the drill tower recruit training academy. Both audits made many recommendations for improvement in these four areas.

It was later proposed that an Independent Assessor position be established to assist the Board of Fire Commissioners in providing strong civilian oversight over the Fire Department. In March 2009, the voters of Los Angeles approved Charter Amendment A, which created the position of Independent Assessor. Section 523 was added to the City Charter and said, among other things, the Independent Assessor shall have the same access to Fire Department information as the Board of Fire Commissioners, and shall have the power and duty to: a) audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees; b) conduct any audit or assessment requested by majority vote of the Board of Fire Commissioners; and c) initiate any assessment or audit of the Fire Department or any portion of the Fire Department.

The first Independent Assessor was appointed and began work on October 5, 2009. The Board of Fire Commissioners approved the *Policies and Authority of the Independent Assessor* on December 15, 2009. More information concerning the Office of the Independent Assessor and its reports may be found at www.oialafd.lacity.org.

AUTHORITY OF THE INDEPENDENT ASSESSOR TO ASSESS THE ALTERNATIVE INVESTIGATIVE PROCESS

Evidence of the Independent Assessor's authority to report to the Fire Commission on the Fire Department's disciplinary system, including the alternative investigative process, can be found in Los Angeles City Charter section 523, the ballot materials accompanying Measure A from the March 3, 2009 election, and the class specification for the position approved by the Civil Service Commission on March 12, 2009.

Charter section 523:

The Independent Assessor position was created with the approval of Charter Amendment A by 53 percent of the voters on March 3, 2009. This amendment became effective on April 1, 2009. The powers and duties of the Independent Assessor described in Charter section 523 include: 1) under rules established by the Board of Fire Commissioners,¹ audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees, sworn or civilian, of the Fire Department; and 2) initiate any assessment or audit of the Fire Department or any portion of the Fire Department with prior notice to the Board of Fire Commissioners. The initiation of this *Assessment of the Alternative Investigative Process* was approved by the Board of Fire Commissioners on August 7, 2012.²

Ballot materials:

The analysis and arguments provided when voters were asked to approve the Charter amendment provide further insight into the intent of the voters when approving this provision. This excerpt from the Chief Legislative Analyst's "Impartial Summary" demonstrates what the voters were told they would be adopting by voting in favor of the amendment:

This Charter amendment would provide the Fire Commission with the authority to hire an Independent Assessor who will report directly to the Fire Commission and be responsible for auditing and reviewing the Department's activities, including the handling of allegations of misconduct and other operational issues.³

According to the City Attorney's Office, ballot materials are entitled to the greatest weight, the court's primary goal is to give effect to the intent of the voters, courts may assume ballot materials reflect the voters' intent in passing a charter amendment and voter intent is decisive.⁴ The ballot argument filed in support of the Charter amendment noted, "Local juries have imposed several multi-million-dollar verdicts in lawsuits challenging conduct in our fire stations

¹ The rules are contained in the *Policies and Authority of the Independent Assessor*, BFC 09-117 R1, approved by the Fire Commission on December 15, 2009.

² *Initiation of an Assessment of the Alternative Investigative Process*, BFC 12-125, August 7, 2012.

³ Ballot Pamp., Primary Nominating & Consolidated Elec. (March 3, 2009), analysis of Charter Amendment A by the Chief Legislative Analyst, p. 18.

⁴ Complaint for Declaratory and Injunctive Relief Regarding Interpretation of the Los Angeles City Charter filed in *The City of Los Angeles v. Los Angeles City Controller, Laura N. Chick*, Los Angeles County Superior Court, Case No. BC402345, pp. 3, 19 (citing *Howard Jarvis Taxpayers Ass'n v. County of Orange* (2003) 110 Cal.App.4th 1375, 1381 and *Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49).

... Prevent taxpayer dollars from going to pay costly courtroom verdicts. Support Measure A.”⁵ A later ballot argument said independence would boost citizen confidence, which in turn would reduce the City’s exposure to legal challenges and litigation costs.⁶

Class specification:

The voters’ intent that the Independent Assessor would provide independent oversight over how the Fire Department handles complaints of misconduct was carried over into the class specification for the position. The City Attorney’s Office assisted with drafting this class specification before it was approved by the Fire Commission in 2008 and the Civil Service Commission on March 12, 2009.

The “Summary of Duties” section includes the following descriptions of the Independent Assessor’s responsibilities: plan, assign, organize and direct the work and resources of professional and clerical personnel engaged in the oversight of the Los Angeles Fire Department’s **internal disciplinary process for sworn and civilian employees**; and assist the Fire Commission by **monitoring the Department’s disciplinary process to ensure that investigations are conducted in a thorough, fair and effective manner**.

Even more concrete examples of how the Independent Assessor is supposed to monitor how the Fire Department handles complaints of misconduct can be found in the “Examples of Duties” section of the class specification. The following are a few of these examples:

- Reviews investigations of complaints filed against Department employees to determine whether investigations are conducted fairly and comprehensively and progress within standard time frames, and to determine whether adjudication complies with Department policies and procedures.
- Reviews reports generated from the Department’s complaint tracking system.
- Conducts audits, including the annual audit, of the internal disciplinary system to identify trends and problems to ensure that oversight by the Board of Fire Commissioners is objective and comprehensive, and in compliance with recommendations.
- Reviews and evaluates citizen complaints intake procedures to ensure thorough investigations and the timely processing of complaints.
- Audits the Professional Standards Division, including EEO Section investigations, to ensure thorough and unbiased adjudication and consistent disciplinary action.

⁵ Ballot Pamp., *supra*, argument in favor of Charter Amendment A, at p. 19.

⁶ Ballot Pamp., *supra*, rebuttal to the argument against Charter Amendment A, at p. 23.

OVERVIEW OF THE FIRE DEPARTMENT'S ALTERNATIVE INVESTIGATIVE PROCESS

The Fire Department uses an alternative investigative process when complaints of misconduct are filed against Department employees assigned to the Professional Standards Division (PSD), the PSD as a whole, the Fire Chief or other individuals where the investigation of those complaints by the PSD could create a conflict of interest, such as those involving union officials. The citizens of Los Angeles have every right to expect that all Fire Department employees will be held to the same high standards that apply to everyone else in the Department.

This assessment includes a review of current and past policies and practices related to the alternative investigative process, as well as a detailed examination of individual investigations referred to the alternative investigative process. Complaints that should have been referred to the alternative investigative process according to the Department's policy, but were not, are also included in this assessment. Since its inception, less than 40 cases have been referred to the alternative investigative process, and at the height of the program there were approximately 17 active cases.

Policies, procedures and practices:

The alternative investigative process in current use was approved by a former Fire Chief. The responsibility for managing the process was originally assigned to the Chief Deputy for Administrative Operations, and the Assistant Fire Marshal was tasked with the day-to-day management responsibilities.

Typically cases are referred to the alternative investigative process by the PSD. These cases generally involve a complaint filed in the Complaint Tracking System (CTS) that alleges misconduct by the Fire Chief, the PSD or PSD personnel, or unions officials (from either the Chief Officers Association or United Firefighters of Los Angeles City). The Chief Deputy receives the case from the PSD and forwards it to the Assistant Fire Marshal, who then reviews the case and assigns investigators to conduct the investigation. If the investigator is a sworn member, he or she will typically be of the same or a higher rank than the subject. Once the investigation is complete, the Assistant Fire Marshal reviews the investigation report and recommends a resolution to the Chief Deputy.

Some of the policies related to the alternative investigative process appear to have been memorialized in a memorandum to the PSD Commander from the Internal Affairs Section Commander dated October 28, 2009. This memorandum includes the criteria to be used in determining which complaints should be handled outside of the PSD, who should receive notifications about such referrals, the criteria for selecting the investigators and the Chief Deputy to supervise the investigation, and the role of administrative support staff. The extent to which these policies are actually used in the current process is unclear, although there seems to be some overlap. **More importantly, these policies and procedures, both written and not, have never been reviewed and/or approved by the Board of Fire Commissioners.** A detailed description of the October 28, 2009 memorandum can be found in Appendix 1.

Case selection and evaluation criteria:

For this assessment, we reviewed all cases that were or should have been referred to the alternative investigative process between January 2009 and December 2011. In response to our request, the PSD provided a list of 21 cases that were referred to the alternative investigative process during this time period. After an initial review of those cases as well as others in the CTS, we requested the physical files for 13 cases from the PSD list and 11 additional investigations. Of these 24 cases, we selected a total of 12 investigations for an in-depth review.

The detailed examinations of these selected cases consisted of a complete review of all investigative materials, both electronic and physical, to determine whether investigations were complete, thorough and timely, and whether adjudication complied with Department policies and procedures. These materials included personnel and payroll records only as they related to specific cases.

The same criteria were used to evaluate each of the individual cases selected. Some of the criteria were as follows:

- Was the case identified for referral and referred to the alternative investigative process in a timely manner?
- What considerations, including rank and experience, were used in selecting investigators?
- When was the subject member notified of the investigation, and when were both the subject and complainant notified that the investigation had concluded?
- Were members provided a reasonable amount of time to schedule interviews and obtain representation?
- When being interviewed, were members informed of their rights under the Firefighters Procedural Bill of Rights (FBOR) and were the interviews recorded?
- Did the investigators interview all relevant witnesses and properly collect all relevant evidence? (This includes asking all the relevant questions and any logical follow-up questions based on the answers given.)
- Were all allegations contained in the complaint investigated, including any additional related allegations that were discovered during the investigation, and addressed in the investigation report?
- If any evidence of unrelated misconduct was uncovered during the investigation, was a separate complaint entered so an investigation could be initiated?
- What efforts were made to corroborate complaints made anonymously, made by someone other than the victim, where the complaint was withdrawn, or where the complainant was unavailable?
- Were statements contained in the investigation report accurate and complete?
- Did the investigation suggest any legal, constitutional, training, risk management or liability issues?
- How long did it take the complete each step of the investigation?
- Where warranted, were charges filed within one year of discovery by the Department and no more than two years after the date of the alleged misconduct?

- Was there a record of the complaint in the CTS and were there any related physical files? If so, did those files contain a copy of the complaint, notification letters, interview recordings, the investigation report, the executive summary report, etc.?

Complainants, subjects and investigators:

Of the 12 cases reviewed in depth, three of the complaints were made anonymously and all but one of the remaining nine were made by Department members (both sworn and civilian). A majority of the cases were complaints against PSD personnel; six against sworn investigators and one against a civilian investigator. Three complaints named a union official as the subject and two were against a Fire Chief.

In terms of the investigators assigned to these cases, three complaints were investigated by an outside investigator with the assistance of a battalion chief, two were led by civilian members of the Department, and five were conducted by sworn investigators of various ranks (assistant chiefs, battalion chiefs and captains). Finally, **we were unable to determine who was assigned to investigate the remaining two cases** (or even if there was an investigation conducted at all).

Investigation timeliness:

All but one of the 12 investigations we reviewed consisted of allegations against sworn members.⁷ Accordingly, we assessed their timeliness based on the statutes of limitations under the FBOR (one year from the date of discovery) and the City Charter (no more than two years from the date of the alleged misconduct). Allegations were not sustained in any of the investigations where a determination was made.

Eight of the complaints involving sworn members were filed before October 1, 2011, and still listed as open in the CTS on January 2, 2013. The three closed cases involving sworn members were closed **after** the one-year statute of limitations period expired. **Accordingly, all 11 cases involving sworn members were not completed before the statute of limitations period expired.** The consequence of this is that even if disciplinary action would be warranted based on the findings in any of these investigations, the Department would be unable to impose any discipline.

It is worth noting that in almost half the cases it was difficult to calculate the two-year statute of limitations period because it was unclear exactly when the alleged misconduct occurred. In some of the cases, the alleged misconduct occurred over a period of time and the investigation (if there was one) failed to determine either 1) whether any misconduct actually occurred, or 2) when the misconduct occurred with any specificity. In other cases, there was simply no mention in the materials contained in the files of when the alleged incident(s) occurred.

We also looked at the length of time between each of the important steps in the investigations to determine where the most common delays occurred. These steps included the following: 1) when the Department discovered the alleged misconduct, 2) when the complaint was entered in the CTS, 3) when the complaint was forwarded to the alternative investigative process, 4) when

⁷ In the case involving a civilian PSD investigator, the subject was exonerated and the case was closed.

investigators were assigned, 5) when the investigation report was completed, and 6) when the case was closed.

Using the dates provided in the materials we reviewed, it appeared that the time between the Department's discovery of alleged misconduct and the filing of the complaint was relatively short in most cases. The time from when the complaint was filed to when it was forwarded to the alternative process was longer than a month in six of the cases. It took more than a month for investigators to be assigned after the complaint was forwarded in four cases, and it took less than a month in three cases. The average time from when the case was forwarded to when the investigation report was completed was approximately eight months.

Record keeping:

Alternative investigation files were found in a number of different locations throughout the Department. There were entries in the CTS for all 12 reviewed cases. Additionally, five investigations had PSD files, five investigations had files in the Fire Prevention Bureau and two cases had files in the office of the Chief Deputy for Administrative Operations. We were told that once a case is completed, the Fire Prevention Bureau forwards the investigation file to the PSD for storage.

While some files contained a lot of investigative materials, such as transcripts, summaries, interview recordings and investigation reports, others contained nothing but the initial complaint. In some files there was a case tracking sheet utilized by either the PSD or the Assistant Fire Marshal, but the information contained on these was minimal and, in some cases, inconsistent with other information contained in the files. One case had no physical files at all, three were missing investigation reports and six did not have a copy of the executive summary report. Without investigation and/or executive summary reports to review, it was impossible to determine what conclusions investigators were able to make or how the case was resolved and when (in relation to the statute of limitations period). Furthermore, **ten of the 12 investigations had no interview recordings** so we were unable to fully evaluate the quality of the interviews or compare what was said during the interviews to what was written in the investigation reports.

Miscellaneous problems:

There were a number of miscellaneous problems identified by those responsible for the alternative investigative process. First, they noted that most of the investigators they have to choose from are former PSD personnel and that this can complicate investigations where the subject of the investigation is currently assigned to the PSD. Similarly, they reported that it is very awkward for these members to investigate the Fire Chief when he is the subject of a complaint because everyone in the alternative investigative process, from the investigators to the Assistant Fire Marshal and Chief Deputy, reports to the Fire Chief.

Another problem with this process is that most investigators are currently assigned full-time to the Emergency Services Bureau. To utilize these members as investigators in the alternative investigative process, the Department must use variable staffing hours to pay the investigators when they work outside their regular schedule. If they work on an investigation during their

regular schedule, the Department must pay overtime to fill the investigator's position in the field. Additionally, investigators may be assigned without considering what other projects or investigations they have already been assigned.

Other problems involve investigators who lack the necessary training, expertise, depth of knowledge or report writing skills. The lack of clerical support and delayed communications within the process are also problems.

Finally, this alternative investigative process is very time consuming for those responsible for managing it. The Assistant Fire Marshal has many other responsibilities in his current position. Unfortunately, the alternative investigative process requires a great amount of his time. The Fire Marshal, who previously managed the process, has indicated that he was told, and always believed, this process would be temporary, and that at some point it would be assigned to another entity with the expertise and time to manage it.

Quite frankly, the issue is very simple. The alternative investigative process does not work well in large part because those with more than enough to manage in their regular assignments are unable to dedicate the time and do not have the expertise an alternative investigative process requires. Such a process requires a dedication of resources that has not been committed to the task.

Unlike the Police Department, the Fire Department has very limited resources available to conduct misconduct investigations. Unfortunately there are few solutions available in the short term.

INVESTIGATION OF SUBPOENA SERVICE

We previously reported⁸ that the Department failed to complete an investigation of allegations that Professional Standards Division (PSD) investigators abused their authority and engaged in civil rights violations within the one-year statute of limitations period. The allegations were made after investigators served a subpoena at a doctor's office on January 22, 2009, in an attempt to obtain a member's medical record in preparation for a Board of Rights. Our prior report did not review the adequacy or substance of the investigation because it was completed about the same time that our prior report was submitted for a "fact checking" review before publication.

On January 23, 2009, an attorney representing a health care facility submitted a written complaint claiming that Department investigators abused their authority, abused legal process and engaged in violations of constitutional rights when they attempted to serve the subpoena a day earlier. The attorney also claimed the Department investigators intimidated doctor's office employees, lied, threatened staff and used a rough tone of voice. The complaint was not entered in the Complaint Tracking System (CTS) until February 26, 2009.

On April 29, 2009, the member whose medical records were sought said he was resigning due to violations of his constitutional rights and the continued invasion of his privacy by the Department. When accepting the resignation, the Fire Chief said the reasons for the resignation would be considered a complaint of potential misconduct that would be investigated as such, and that investigators would contact him in the near future to obtain a statement.

After the Fire Chief said an investigation of the member's complaint would be conducted, the attorney's complaint about the service of the subpoena was closed **without an investigation** on July 16, 2009, with the notation "Closed-Not Sustained." The complaint related to the serving of the subpoena was reopened in October 2009 after the Department received verbal notice that the complaint had been closed without an investigation.

Assignment to alternative investigative process:

On November 23, 2009, the Department was notified in writing that the complaint related to the service of the subpoena had not been investigated prior to the case being closed. An investigation was requested and approved the next day. Given the new alternative investigative process, the Department recognized that the PSD could not properly conduct an investigation of the PSD investigators who were accused of wrongdoing.

Once the investigation was approved on November 24, 2009, a private attorney was retained to conduct the alternative investigation with the assistance of a Department member who was not assigned to the PSD. The two PSD investigators implicated in the complaint were also notified that they were the subjects of an investigation focusing on the allegedly inappropriate service of a subpoena to obtain medical records.

⁸ See our *Assessment of the Department's Disciplinary Process and Professional Standards Division*, dated March 27, 2010, beginning at page 131.

Document collection:

The investigation report summarizes documents indicating that the PSD investigators under investigation relied on a subpoena issued by the City Clerk in an attempt to obtain a medical record for an employee who had been referred to a Board of Rights for possible termination. The PSD investigators reasonably believed the medical record was “smoking gun” evidence that would seriously undermine the employee’s credibility in the Board of Rights hearing.

The investigation report also summarizes a December 12, 2008 letter in which the health care facility’s attorney objected to the grounds for the subpoena, the broad scope of the subpoena and particularly because the doctor whose medical record was sought by the subpoena was not the facility’s employee. A summary of a January 22, 2009 letter said the letter confirmed an agreement whereby the PSD would limit the scope of the subpoena and direct a new subpoena to only the doctor.

The January 23, 2009 letter of complaint was summarized as objecting to the attempt to serve a second subpoena, the “alleged intimidation tactics” and the use of the Police Department to effect service of the subpoena.

Additionally, the investigation report references a January 28, 2009 formal request for legal advice. This request sought advice from the City Attorney’s Office concerning whether Fire Department investigators have the lawful authority to subpoena documents during an administrative investigation.

The investigation report does not mention and the interviews did not reference any other relevant documents. However, in mid-November 2008, the PSD received letters contending that the Fire Department does not have subpoena power and suggesting that a conference call with the City Attorney’s Office be arranged to discuss the matter. On November 20, 2008, the PSD investigators and their supervisors received an email from another PSD supervisor recommending that they obtain City Attorney direction on how the doctor’s records could be properly obtained.

While the investigation report does mention the January 28, 2009 legal request that was sent to the City Attorney’s Office, the report does not mention that part of the request that says PSD advocates “were advised to contact the City Attorney to establish (1) the lawful basis for any subpoena power that they had during the investigative stage and (2) if that existed, to determine the manner in which compliance to the lawful subpoena could be enforced.” The legal request suggests that the PSD investigators may have been advised to contact the City Attorney before their attempted service of the subpoena resulted in a formal complaint. The PSD investigators were asked no questions about this during their interviews.

The member’s resignation letter and the Fire Chief’s acceptance of the resignation, indicating that an investigation would be conducted, do not appear in the file materials. There is no record that the member was contacted in an effort to obtain more information about his complaints or that he was ever interviewed. There is nothing to suggest that the Department attempted to

determine whether what the member complained about in his letter of resignation was related to the medical record subpoena or something else.

Investigative interviews:

The attorney who made the formal complaint on January 23, 2009, was not interviewed about his complaint. He should have been. His complaint says he spoke directly to one of the investigators over the phone demanding that they leave his client's office and cease and desist from harassing his client's employees. His complaint alleges that after he told the investigators to leave his client's office, they returned shortly thereafter with a police officer to again attempt serving the subpoena. His complaint mentions a telephonic disagreement with an investigator about where the subpoena was to be delivered.

The attorney's complaint claims the PSD investigators intimidated, threatened and lied to employees at the doctor's office. The complaint references specific words spoken and conduct the investigators were alleged to have engaged in when they served the subpoena. The complaint provides the names of four doctor's office employees, with descriptions of their duties or job titles, who were involved in the incident. The name of the doctor involved in the incident was also provided. None of them were interviewed. They should have been.

Both of the PSD investigators and two PSD supervisors were interviewed. The interviews all took place **after** the statute of limitations period expired.⁹ Both of the PSD investigators were represented by another PSD supervisor during their interviews. Both were properly admonished as subjects of the investigation before their interviews began. Both were interviewed before the PSD supervisors were interviewed.¹⁰

The first PSD investigator recounted learning from other PSD investigators that subpoenas could be obtained from the City Clerk. He decided to get a police officer to assist in serving the subpoena because the doctor's office was not being cooperative and he thought using an officer would be "more legal." The PSD investigator was not asked to explain why a subpoena would be "more legal" by having a police officer serve it.

After the attorney's complaint letter was received, a PSD supervisor asked the investigators to explain what happened, told them they could be the subjects of an investigation and "counseled" them. The investigators were also removed from handling the Board of Rights case. Given his experience, the first investigator felt that the counseling and removal from the case was disciplinary and punitive.

The second PSD investigator described complying with past practice in obtaining a subpoena from the City Clerk, and doing what the attorney requested by narrowing the scope of the subpoena to a single record and serving it on the doctor's office instead of the health care

⁹ The Department had notice of the complaint when it was received on January 23, 2009. All four interviews were conducted on February 3, 2010, more than one year later.

¹⁰ It is usually more prudent to assess the statute of limitations, evaluate potential violations of law, rules and regulations, collect all documents and physical evidence and conduct witness interviews before interviewing the subjects of an investigation.

facility. He also pointed out that the attorney did not represent the doctor. Although the second PSD investigator mentioned having spoken to the attorney over the phone while at the doctor's office, he was asked no detailed questions about the conversation.

The second PSD investigator was called into his supervisor's office after the attorney's complaint was received. They talked a little bit about the subpoenas at that time. He felt this was a counseling session and that he was being reprimanded. He too recalled that he and the other investigator were also removed from handling the Board of Rights case.

One of the PSD supervisors told the interviewers he thought it was strange that PSD was trying to get protected documents with a subpoena from the City Clerk, and "had a generalized question of the folks that were here as to" whether "our subpoenas were sufficient." This supervisor also said, "Because of this entire subpoena thing, I was like, 'I don't know how you guys would get this.'" He says he ended the discussion by saying, "You really need to ask the City Attorney about this."

This first PSD supervisor recognized the seriousness of the attorney's complaint and that it should be entered in the CTS. He said the investigators involved in the incident wanted to talk about it right away but he believed the complaint should be handled like any other and in conformity with the Firefighters Procedural Bill of Rights (FBOR). At the time of his interview he also expressed frustration with the fact that the City Attorney's Office had not provided legal advice concerning investigative subpoenas in a year.¹¹

A second PSD supervisor discussed the past practice of obtaining subpoenas from the City Clerk, and knew at least the first subpoena had been issued in an attempt to obtain medical records in preparation for the Board of Rights hearing. Absent a clear, definitive opinion from the City Attorney, he said, the PSD continued to operate on past practice. This supervisor mentioned having talked to another supervisor about the subpoena but was not asked direct questions by the interviewers about the specifics of that conversation.

This second PSD supervisor did not know until after the incident that the investigators had actually returned to the doctor's office with a police officer in an attempt to serve the subpoena a second time. After the attorney's complaint was received, this supervisor asked the investigators what happened and whether the attorney's allegations were accurate. Given the training that had been provided to all Department supervisors, this was a conversation that should not have occurred without full compliance with the FBOR.

This supervisor confirmed that he "counseled" the investigators about the subpoena process, maintaining objectivity and "aggressiveness," although he asserted that he was not making a judgment and felt the investigators are very good at what they do. Again, this was a conversation that should simply not have occurred as this PSD supervisor described it. Such conversations create arguments that undermine the Department's ability to take disciplinary

¹¹ Advice concerning investigative subpoenas was requested in writing on January 28, 2009. The Fire Chief sent a "Followup Request" for the advice concerning investigative subpoenas to the City Attorney's Office on March 8, 2010. The City Attorney's Office provided its advice on August 16, 2010, which says that the Fire Department does not have the power to use investigative subpoenas.

action, if warranted after a timely and complete investigation conducted in full compliance with the FBOR.

During this alternative investigative interview, this supervisor was asked if he knew someone had closed the complaint that was made against the investigators. He was asked this question after the Fire Chief had said there would be an investigation and the Department had been placed on notice that the complaint had been closed without an investigation. Investigators should be very careful about asking witnesses questions of this nature. If there is information suggesting the witness may have engaged in wrongdoing, he or she is entitled to be admonished as a subject. This includes being afforded all of their rights pursuant to the FBOR and collective bargaining agreements.

The interview of this supervisor closed with his stating that the investigators had been doing their job by trying to get information to make their case involving a bad employee more solid. It is not the job of the PSD to determine whether employees are bad. The job of the PSD is to ensure that investigations are thorough, complete, timely, objective and fair, and that evidence is collected and presented in full compliance with the law. The PSD was created to ensure that inappropriate past practices were abandoned. Using a City Clerk subpoena as an investigative tool was an inappropriate past practice, and the past practice was questioned even before the subpoena was served on the doctor's office.

The interviews conducted during this alternative investigation were superficial at best. Every witness gave broad, sweeping and general information without being pinned down on specifics. While the past practice of obtaining subpoenas from the City Clerk was discussed, there were no questions about what was done to ensure that City Clerk subpoenas provide a legally sufficient basis for obtaining a medical record, regardless of who holds the record and despite whether the attorney represented the doctor or not. There was sufficient information available indicating that such questions should have been asked.

Department's review of the investigation:

The Department's March 4, 2009 report summarizes the investigation saying the allegations could be classified as two-fold: policy violations and the conduct of the investigators during the service of the subpoena. The report goes on to explain that the scope of the investigation was limited to the policy violations because the allegations of inappropriate behavior were made by a third party, not the persons who had actual contact with the investigators.¹²

The report says the attorney provided a third-person description of the alleged misconduct and included the following phrases: intimidated employees, forced the doctor into producing, lied, threatened staff at the front desk and used a rough tone of voice. The Department's further rationale for not investigating the investigators' behavior is set forth as follows:

¹² This is not entirely correct because the attorney's complaint letter says he spoke to one of the investigators on the phone while they were attempting to serve the subpoena.

- The allegations were vague, ambiguous, non-specific and nebulous, and relayed by a third party (the attorney) who was not present and had no personal interactions with the investigators.
- The staff members of the doctor's office who were supposedly intimidated, spoken to inappropriately, threatened, etc., never filed a formal complaint, including the office manager with whom the investigators had interacted on more than one occasion.
- The allegations were made in a letter dated January 23, 2009, and to date there had been no follow-up from the attorney.

We strongly disagree with the Department's rationale for failing to investigate how the PSD investigators conducted themselves at the doctor's office. Such reasons do not provide the public with confidence that complaints will be taken seriously. Allegations that investigators intimidated, threatened and lied to staff in the doctor's office, if true, may have constituted violations of the following Department rules and regulations at the time of the incident:

- Section 12(g): All members shall, while on duty, not indulge in obscene or uncivil language, altercations or conduct, which might cause adverse public reaction or injury to any person.
- Section 13(a): All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens, and no member shall commit any act tending to bring discredit upon the Department or its members.
- Section 13(b): All members shall be courteous and respectful in their contacts with the public.

Case-specific findings:

1. The alternative investigation was not timely, complete or thorough. The complaint was received on January 23, 2009, but was not entered in the CTS until February 26, 2009. An investigation was not formally approved until November 24, 2009. Interviews were conducted after the statute of limitations period had expired. The investigation report was dated February 22, 2010, and the case was closed on April 20, 2010.
2. Key witnesses were not interviewed. Those who were interviewed were not thoroughly questioned and important, relevant documents were not collected, discussed or even mentioned.
3. The scope of the investigation was mistakenly narrowed to the "policy violations." The investigators' behavior was not the focus of investigation and, if the allegations were true, the behavior likely did violate the Department's rules and regulations.
4. The alternative investigation failed to address whether the PSD investigators were justified in relying on a subpoena from the City Clerk to obtain medical records. Sworn

members of the PSD insisted on relying on the past practice of using subpoenas despite being on notice that the practice may not have been legally appropriate.¹³

5. The alternative investigation failed to fully comply with the FBOR. One of the PSD supervisors was asked about closing the complaint without an investigation but he was not told he was or may be a subject of investigation for taking such actions.¹⁴
6. The Department had no legitimate reason for failing to investigate allegations that PSD investigators engaged in misconduct at the doctor's office. The January 23, 2009 complaint provided more than enough information, including the names of numerous employees in the doctor's office, to start an investigation. The Department has a responsibility to take all reasonable steps to investigate such complaints in a timely manner.
7. The Department failed to investigate allegations that a member's constitutional rights and his right to privacy had been violated, even after the Fire Chief said such an investigation would be conducted.
8. The Fire Department failed to receive timely and accurate legal services that were needed to properly handle this and future complaints of misconduct. The legal opinion on the use of subpoenas in administrative investigations was not provided for a year and a half after it was requested.

Case-specific recommendations:

1. The Department should ensure that it accepts and investigates third-party complaints to the same degree and extent as firsthand complaints. Additionally, the Department's investigation should focus on the conduct engaged in by Department employees and avoid speculation about the complaining party's motives.
2. The City Charter should be amended to provide the Fire Department with the power to issue investigative subpoenas.¹⁵

¹³ The City Attorney's Office later confirmed that the practice was not legally appropriate.

¹⁴ The same PSD supervisor also likely violated the FBOR by asking the investigators to explain what happened and "counseling" them shortly after the January 23, 2009 complaint was received without first providing them the same admonition.

¹⁵ We previously recommended that the PSD cease issuing investigative subpoenas. We have since been told the Department no longer engages in this practice. Any subpoena power is subject to other legal requirements. For example, there are extensive protections governing medical records.

COMPLAINT OF MISCONDUCT INITIALLY CLOSED WITHOUT INVESTIGATION

The preceding section of this report discusses an attorney's complaint after investigators from the PSD served a subpoena for medical records. The CTS says that on March 8, 2010, the Department completed an investigation of alleged misconduct related to the service of a subpoena, and, as a result of that investigation, "an issue arises [concerning] why" an investigation of that prior alleged misconduct was closed on July 16, 2009, without an investigation. The new complaint concerning why the attorney's complaint was closed without an investigation was entered in the CTS on March 8, 2010, and correctly identified "A" as the person who closed the case on July 16, 2010, without an investigation.

Assignment to the alternative investigative process:

Although the Department referred this case to the alternative investigative process because the subjects of the investigation were PSD personnel, it was not referred in a timely manner. Also, the investigation report was not submitted to the Department until two months **after** the statute of limitations period had expired.

In October 2009, the Department received verbal notice from the Independent Assessor that an attorney's complaint about how a subpoena for medical records had been served had been closed without an investigation. Written notice was also provided to the Department on November 23, 2009. Despite these notices in October and November 2009, the complaint was not entered in the CTS until March 8, 2010.

What occurred at this point becomes confusing and is poorly documented.¹⁶ Two interviews took place in April and May 2010, although the file materials indicate this was before an investigation had been formally requested or approved in July 2010, and before the investigators were officially assigned in September 2010.

A formal request to conduct an alternative investigation was made on July 13, 2010. The Fire Chief approved the investigation a day later. The request correctly identified "A" as the primary subject of the investigation.

An August 19, 2010 email correctly recognized that only about 65 days remained on the one-year statute of limitations period. It was recommended that the same private attorney and Department member who had conducted the investigation of the complaint about the service of the subpoena (after it was reopened) be assigned to this new investigation.

The FBOR does not require notice to a subject that an investigation of that member has been initiated. However, the Department has collective bargaining agreements requiring that such notice be given unless the Fire Chief determines otherwise.¹⁷ On September 3, 2010, "B" (a supervisor) was notified that he was the subject of an investigation that focused on allegations

¹⁶ Please see Appendix 2 for an approximate timeline of events.

¹⁷ See Article 24, Section I, of MOU No. 22 (Fire Chief Officers) and MOU No. 23 (Firefighters and Captains).

that he closed a case without conducting a proper investigation. “A” did not receive a similar notice.

On September 7, 2010, the private attorney and Department member who had conducted the investigation of the initial complaint after it was reopened were notified in writing that they had been selected to conduct this new investigation. This notification also says “we should discuss the compressed statute dates on the case later.”

An additional brief interview of “B” was conducted on October 18, 2010, a few days before the statute of limitations period expired. The private attorney’s November 15, 2010 investigation report was forwarded to the Department on December 16, 2010, about two months **after** the statute of limitations period expired. The file materials do not explain what was going on with the investigation in the five months or more after the interviews in April and May and before the statute of limitations period expired in October 2010.

A May 29, 2011 internal Fire Department report summarizes the investigation, says that “B” had been incorrectly identified as the subject of investigation and concludes no action could be taken against “A.” Four months later, on October 3, 2011, “B” was notified in writing that the investigation had been completed and that he had been exonerated. There is nothing in the file documenting what “A,” the initial and correctly identified subject of the investigation, was told about the outcome of the investigation. The Department closed the case in the CTS on October 14, 2012.

Document collection:

The November 15, 2010 investigation report says that the PSD received letters from the attorneys representing the health care facility complaining about the attempted service of a subpoena in December 2008 and January 2009. However, the file for this case, where it was alleged that the prior complaint had been closed without an investigation, was not complete.

On April 29, 2009, the Fire Department received a letter of resignation from the firefighter whose medical record the PSD investigators had been attempting to obtain with the subpoena. The letter says the firefighter was resigning because of continued violations of his state and federal constitutional rights and the continued invasion of his personal privacy by the Department. This letter was not included in the file materials, and was not mentioned in the interviews, the investigation report or the Department’s summary of the investigation.

The Fire Chief signed an April 29, 2009 letter that says the firefighter’s reasons for resigning would be considered a complaint of potential misconduct that would be investigated as such, and investigators would be contacting the firefighter in the near future to obtain his statement. This letter too was not included in the file materials, and was not mentioned in the interviews, the investigation report or the Department’s summary of the investigation. The firefighter who resigned was never interviewed.

Investigative interviews:

“A” was interviewed in this alternative investigation on April 22, 2010. Although he was never provided formal notice that he was a subject of investigation, as required by the collective bargaining agreement, the private attorney and Department member conducting the interview did properly inform “A” that he was a subject at the start of his interview.

In an interview conducted as part of the reopened complaint, “A” was asked questions which led him to explain why he closed the attorney’s complaint without an investigation. The file materials do not mention whether the investigators considered whether they were required to provide a copy of the audio recording and/or transcript of that prior interview to “A” before interviewing him in the subsequent investigation.¹⁸ Although these were separate investigations, the subject matter was similar. Seeking legal advice on such issues is prudent.

When the complaint about how the subpoena was served was received, “A” did not believe it should have been documented in the CTS because it was “vague,” it was a “third party” complaint, there was no complaint from anyone who was there when the subpoena was served, there was no “apparent” violation of Department policy and the complaint appeared to be attorney “posturing” with the intent of muddying the Department’s Board of Rights presentation.

“A” acknowledged that his supervisor, “B,” wanted the complaint entered in the CTS to ensure that the PSD played by the same rules as everyone else. No questions were asked about what prevented the Department from investigating “third party” complaints or the specific sections of the Department’s rules and regulations that may have been violated if the allegations that PSD investigators lied to, intimidated or threatened employees at the doctor’s office were true.¹⁹ No questions were asked about why the attorney or five witnesses identified in the complaint should not be interviewed to provide more detail if “A” thought the complaint was “vague.” No questions were asked about the relevance of attorney “posturing” if the allegations of misconduct were true.

This was the first complaint made against PSD investigators that “A” was aware of. “A” tried to get advice from a deputy city attorney about how a complaint against PSD investigators should be handled. He did not recall who he spoke with but remembered not getting a response. He did not follow up with the City Attorney’s Office because things were busy, the investigators had been removed from prosecuting the Board of Rights, which he thought was punishment enough, and he did not believe the allegations would have been substantiated. “A” expressed frustration with not getting advice from the City Attorney’s Office. He did not think he sought advice from his supervisor on how an investigation of the complaint should be handled.

¹⁸ Government Code section 3253(g) says if a recording is made of an interrogation, the firefighter shall have access to the recording if any further proceedings are contemplated or prior to any further interrogation at a subsequent time.

¹⁹ The Department does investigate “third party” complaints. For example, investigations are conducted when law enforcement and other agencies submit reports of off-duty misconduct. Anonymous complaints are also investigated. This assessment includes a review of an investigation initiated after a defense representative made a vague complaint of discrimination on behalf of another member. Please see the section titled “Defense Representative Assignment for a Board of Rights.” Sections 12 and 13 of the Department’s rules and regulations would appear to prohibit lying to, intimidating or threatening members of the public.

“A” did not recall what was said by other PSD supervisors about closing the complaint. One PSD supervisor seemed to appreciate that it was one less case that would have to be handled. “A” did not recall what position “B” took on closing the case.

“A” was asked no questions concerning whether closing the case was discussed with the Fire Chief, who is directly responsible for supervising the PSD. The Fire Chief holds regular meetings with the PSD supervisors to discuss the status and progress of complaints and investigations. “A” was asked no questions about whether he asked to discuss or did discuss the complaint at one of these meetings, or why he failed to do so if he did not.

“A” closed the complaint without an investigation using a procedure called “Desk Review.” He said there was no malicious intent in doing so. He simply looked at the allegations and did not agree that it needed to be put in the CTS because it was a third-party allegation, kind of ambiguous, it was attorney posturing and no obvious Department policy was violated. That, along with taking the investigators off the case and counseling them regarding the subpoena process, was more than enough to adjudicate the case in his mind. “A” was asked no questions about his authority to close a complaint simply because he did not agree it needed to be entered in the CTS or because he thought his counseling and their removal from the case was enough.

In his prior interview, “A” said that he questioned the PSD investigators about what happened at the doctor’s office and counseled them after receiving the attorney’s complaint. During the inquiry concerning why the prior complaint had been closed without an investigation, “A” was asked no questions about why he had questioned and counseled the PSD investigators without fully complying with the FBOR.

Also in his prior interview, “A” said he did not know that the PSD investigators had sought the assistance of a police officer to serve the subpoena. However, he also said he knew that a subpoena had been issued in accordance with past practice. He was asked no questions in an effort to determine if his involvement in issuing the subpoena or adhering to the past practice presented a conflict that would prevent him from having any involvement in closing the complaint without an investigation.

“B” was first interviewed on May 19, 2010, three and a half months before he was formally advised that he was the subject of investigation (as required by the collective bargaining agreement). The investigators did not advise “B” that he was a subject of investigation during his first interview nor was he informed of his rights under the FBOR. They did confirm that he was appearing voluntarily and could leave at anytime.

“B” explained that he decided to enter the complaint in the CTS because it was potentially a serious complaint, and he knew it should be investigated before the statute of limitations period expired. He stated that he reviewed every complaint and closed a very small percentage of them at the start (without a full investigation) using the “Desk Review” procedure.²⁰

²⁰ We make no recommendations about the use of a “Desk Review” procedure at this time. During the course of this assessment, we were told the Department uses a different process now. We will examine the new process in a future audit.

“B” said he first learned that the complaint was closed without an investigation about three or four months before the statute of limitations period expired, and the case was reopened in a day or two. When a complaint involves the PSD, he explained, the standard procedure is to have an outside entity conduct the investigation. The Fire Chief would be involved in deciding who would conduct the investigation. “B” was not asked if “A” was aware of these procedures for complaints involving the PSD. When reopened, the case was referred to an outside investigator.

“A” never talked to “B” before closing the complaint without an investigation. When “B” learned it had been closed, he told “A” that it needed to be reviewed by an outside person. “B” did not believe that it was appropriate for “A” to close the complaint without an investigation. This caused “B” to push harder for an investigation once the complaint was reopened.

“B” did not believe there was any malice, ill will or attempt to cover up by “A” in closing the complaint without an investigation. The PSD had a heavy workload and there were about 12 times the number of complaints than what was anticipated when the PSD was created.

“B” clearly recognized the need to properly investigate complaints of misconduct lodged against members of the PSD and the need to be completely transparent. He was forthcoming and said he was ultimately responsible for the complaint being closed without an investigation, since he supervised “A,” as well as the delays when it was reopened.

Once “B” was formally notified that he was a subject of investigation on September 3, 2010, he was interviewed again on October 18, 2010. After being advised that he was the subject at the start of the second interview, “B” stated that he had no changes or additions to his prior interview. After having had an opportunity to review it, he confirmed that his prior statement was accurate.

Department’s review of the investigation:

The November 15, 2010 investigation report was provided to the Department on December 16, 2010, or almost two months **after** the statute of limitations period expired. An internal Fire Department report, dated May 29, 2011, says an error was made in identifying “B” as the subject of investigation and that “A” was interviewed as a witness. This is not completely accurate.

While “A” did not receive prior notice that he was a subject, pursuant to the collective bargaining agreement, an interview transcript clearly establishes that he was notified at his interview and interviewed as a subject on April 22, 2010. He should have received prior written notice given the information set forth in the March 8, 2010 CTS entry.

The Department’s report says “A” closed the complaint without an investigation using the “Desk Review” procedure, which allowed for the simple review of non-complex, routine, non-specific or frivolous complaints, and that the procedure permitted closure of a complaint without the knowledge of the PSD Commander. It was reported that “A” felt justified in closing the complaint because the PSD investigators’ actions were consistent with Department practices and

procedures, they had been removed from prosecuting the Board of Rights and no “outside” investigation had been initiated.

The Department’s May 29, 2011 report says the actions of “A” went out of statute on March 8, 2011. This is not correct. The author of the Department’s May 29, 2011 report previously sent an August 19, 2011 email correctly pointing out that the statute of limitations period would expire in October 2010.

On October 3, 2011, “B” was notified in writing that the investigation was complete and that he had been exonerated. If “A” received a similar notice indicating the outcome of the investigation as to him, it is not in the file material we received. The Department closed the case on October 14, 2011.

Case-specific findings:

9. The alternative investigation was not timely, thorough or complete. The alleged misconduct, closing the complaint without an investigation, occurred in July 2009 and the investigation did not conclude until October 2011. Moreover, the wrong person was treated as the only subject and the primary subject was treated as a witness. The investigators seemed to simply accept, without asking obvious but perhaps difficult questions, claims that the complaint was vague, was from a third-party complainant, was just an attorney “posturing,” contained no apparent policy violations and that removal of the investigators from the case was “punishment” enough.
10. The alternative investigation failed to address or consider whether a potential conflict (his knowledge related to the subpoena) should have precluded “A” from closing the complaint without an investigation.
11. The alternative investigation failed to address or consider why an investigation was not conducted after the Fire Chief said a member’s complaints about violations of his constitutional rights and privacy would be investigated.
12. The alternative investigation failed to fully comply with the FBOR and relevant collective bargaining agreements in relation to giving notice to subjects of an investigation.
13. The investigation progressed in a haphazard manner. The subject and witness were interviewed **before** a formal investigation was approved by the Fire Chief, **before** the (incorrect) subject was officially notified, and **before** the investigators were officially assigned. The second interview of the (incorrect) subject was used to affirm his statements in the prior interview where he had not been advised of his FBOR rights.

Case-specific recommendations:

3. The Department should take steps to ensure that PSD supervisors do not close cases without an investigation, especially when the Fire Chief has said that an investigation will be conducted. PSD supervisors who exceed their authority should be held accountable.

ALLEGED FALSE TESTIMONY UNDER OATH

On August 30, 2010, a PSD supervisor reported that a PSD investigator had a difficult time and appeared uncomfortable while being cross-examined by a defense attorney during a Board of Rights hearing. The supervisor characterized the investigator's testimony as evasive and stretching the truth.

Assignment to alternative investigative process:

A complaint was not entered in the CTS in a timely manner. A complaint was not entered in the CTS until February 24, 2011, almost six months after concerns were first raised that a PSD investigator may have made false statements while under oath when testifying as a witness in a Board of Rights hearing. More specifically, it was alleged that the investigator was not truthful about having a police report when conducting an interview during an investigation.

The complaint was forwarded for an alternative investigation on February 24, 2011. On April 15, 2011, the accused investigator was notified that he was the subject of an investigation as required by the collective bargaining agreement. On the same day, two members of the Department were also notified that they had been assigned to conduct the alternative investigation. Neither notice was timely. The notices were not provided until two months after the delayed entry of the complaint in the CTS, with only about four months remaining on the one-year statute of limitations period.

The only evidence that any investigation was conducted in the case file is a nine-page summary of events, including excerpts from the relevant recorded interviews and Board of Rights testimony. The complaint remained open in the CTS as of January 2, 2013, well beyond expiration of the statute of limitations period.

Document collection:

File materials state that a firefighter was arrested by narcotics detectives in another state in May 2009 for conspiracy to violate controlled substance laws. A member of the PSD monitoring the criminal case received a copy of the full police report at the end of July 2009.

The PSD investigator and his partner conducting the administrative investigation interviewed one of the detectives by phone on February 23, 2010, at which time the second investigator stated, "We have the officer's report and we also have a continuation report."

On March 22, 2010, the investigator and his partner interviewed the firefighter who had been arrested. During this interview, the firefighter's attorney asked the accused investigator if he had any reports in his possession. The investigator replied, "No we do not." The investigator also said, "Even if we had reports, they're – you're not entitled to them at this time."

During the Board of Rights hearing on August 30, 2010, and while under oath, the investigator testified that he did not have a copy of the police report when he and his partner spoke to the detective on the phone. He testified that he was referring to a police report number provided by

someone else when he recited a report number during the recorded interview. The investigator said he did not know what his partner was referring to when he told the detective, “What we have is we have the officer’s report.”

The accused investigator said that he and his partner had different notebooks with separate information when questioning the detective. The investigator said he did not review any police reports when formulating questions for the interview of the detective.

Referral to criminal law authorities:

Knowingly providing false testimony while under oath may constitute the crime of perjury.²¹ There is nothing in the file materials suggesting that the investigator’s conduct was referred to law enforcement authorities for review.

Cases involving potential criminal law violations also have a significant impact on how the Department handles administrative investigations involving firefighters. Such cases may require advising the subject of his constitutional rights before the interrogation,²² providing a formal grant of immunity before compelling incriminating answers to questions,²³ and taking steps to protect against tainting a criminal prosecution.²⁴ The file materials do not indicate whether these issues were considered during the alternative investigation.

Case-specific findings:

14. A PSD supervisor was aware of the potential misconduct as early as August 2010, but a complaint was not entered in the CTS for six months. There is nothing in the files to explain why there was a six-month delay in entering such a serious complaint in the CTS.
15. The Department failed to conduct an investigation when confronted with conflicting information in recorded interviews and transcripts suggesting that a PSD investigator may have been untruthful while testifying under oath during a Board of Rights hearing.
16. The Department also failed to evaluate whether information concerning the testimony should be forwarded to law enforcement authorities.

²¹ Penal Code section 118.

²² *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.

²³ Government Code section 3253(e)(1).

²⁴ *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Kastigar v. United States*, 406 U.S. 441 (1972).

IMPROPER USE OF DEPARTMENT RESOURCES

A Department member has a right to be represented at a Board of Rights hearing by a defense representative who is also a member of the Department. The Fire Chief must immediately assign a member selected as a defense representative, and the City Charter says the defense representative's duty is to use every legal means available, and their best efforts, to defend the accused at the hearing.²⁵ We reviewed two cases involving the conduct of a defense representative related to the use of Department resources.

In one case examined for this assessment, it was alleged that a defense representative went to the Department's GIS Maps & Graphics Section to request the enlargement and mounting of 5 items plus 50 copies of documents, with an immediate deadline. It was further reported that when asked whose authority this rush order came from, the defense representative said something to the effect that he works under the authority of the Fire Chief. Based on this information, Department staff prioritized and completed the job.

Assignment to alternative investigative process:

The incident was reported up the chain of command in a timely manner. The incident occurred on September 9, 2010, and was reported to the Fire Administrator on September 10, 2010. The complaint was filed in the CTS on September 16, 2010.

The complaint was forwarded to the alternative investigative process on September 21, 2010. An investigator was assigned to conduct the investigation on October 12, 2010. The defense representative also received written notice the same day that he was the subject of an investigation where it was alleged he requested graphics assistance from GIS Maps & Graphics without proper authority.

The case remained open in the CTS as of January 2, 2013.

Document collection:

The investigative files include a copy of the complaint, an email reporting the matter to the Fire Administrator, a summary of the only witness interviewed, the October 12, 2010 notices to the subject and investigator, and a September 15, 2011 investigation summary, which was completed **after** the one-year statute of limitations period had expired.²⁶

The copy of the work order included in the investigative file describes the work that was requested and confirms that the due date was the same day the materials were requested. The work order and a business card provide the identity of the defense representative.

An email to the Fire Administrator questions the use of City time and materials, and says it was felt that the defense representative misled GIS staff with the assumption his request would have

²⁵ City Charter section 1060(l).

²⁶ The case file also included a February 23, 2011 email reminding the investigator that his report was overdue.

the backing of the Fire Chief.²⁷ The CTS complaint says the defense representative had previously been placed on notice that the Department would not be providing support services for his role as a defense representative in a Board of Rights.

Investigative interviews:

The one and only interview conducted during the course of this investigation was a witness interview that took place on December 17, 2010. The witness said the defense representative requested the enlargement of a document for a hearing that was in progress, and represented himself as being from the Fire Chief's office. It was based on this representation that the work was completed. Over the next few days, the GIS section was told they should not have completed the request and the witness felt they needed more direction in such matters. The supervisor who forwarded the complaint to the Fire Administrator was not interviewed.

While the complaint in the CTS says the subject had been previously placed on notice that the Department would not provide support services for his role as a defense representative, there is nothing in the file indicating an attempt was made to confirm this notice.

The subject of the investigation was not interviewed. A March 22, 2011 email from the investigator to the subject says several attempts had been made by phone to arrange an interview. The email suggested March 29 or March 31 as interview dates. The file does not contain a response from, or on behalf of, the subject. There is no information concerning whether the subject was simply ordered to appear for an interview.

Department's review of the investigation:

The CTS contains a September 15, 2011 summary of the complaint, an indication that several attempts had been made to interview the subject and a summary of the witness interview. It was recommended that the matter be reviewed for possible disciplinary action. This recommendation was made **after** the one-year statute of limitations period had expired.²⁸

It is not clear whether the September 15, 2011 summary was intended to be the final investigative report. The comments section in the CTS says a report was submitted on July 18, 2012. There is nothing that explains these differing dates. There was no evidence in the files we were provided that this investigation, or a final investigation report, was reviewed by Department management.

²⁷ Section 11(a) of the Department's rules and regulations in effect at the time says members shall not make misleading statements with intent to deceive.

²⁸ The FBOR says disciplinary action shall not be undertaken for any act if the investigation is not completed within one year of discovery. The incident occurred on September 9, 2010. A supervisor clearly suspected wrongdoing the next day. It is not clear whether a supervisor suspected wrongdoing on the day of the incident. An appropriately conservative approach to managing the statute of limitations is to use the incident date if it is not clear when the Department first learned of facts suggesting misconduct.

Case-specific findings:

17. The investigation was not timely, thorough or complete. Whether the subject was placed on notice that he could not use Department support services as a defense representative was not addressed, the subject was not interviewed and the summary of the investigation, with a recommendation that the facts be reviewed, was not submitted until **after** expiration of the one-year statute of limitations period.
18. Whether City manpower, resources and materials were misused at the request of a defense representative was not adequately investigated.²⁹

Case-specific recommendations:

4. Clearly written guidelines concerning the use of Department resources from the Fire Chief provided to a defense representative at the time he or she is appointed may provide a short-term solution to educate defense representatives about using Department resources in defending a Board of Rights.

In a second case, it was reported that a union official, who often acts as a defense representative, attempted to have electronic access to the Professional Standards Division and Fire Chief's office added to a replacement Department identification card.

Assignment to alternative investigative process:

The incident occurred on March 9, 2011, and was summarized in a March 14, 2011 memorandum. Three supervisors acknowledged receipt of the memorandum on March 24, 2011. A bureau commander and the PSD received the memorandum reporting the incident on March 29, 2011.

The complaint was entered in the CTS on March 31, 2011. The complaint was forwarded to the alternative investigative process on April 4, 2011, but no further action appears to have been taken to advance the investigation. There was nothing in the file indicating that the union official was notified that he was the subject of investigation and there is nothing to indicate that investigators were assigned.

Although the one-year statute of limitations period expired in March 2012, the case remained open in the CTS as of January 2, 2013.

Document collection:

A March 14, 2011 memorandum reporting the incident says that on March 9, 2011, a union official sought a replacement identification card. After the new card was processed, the union official asked if his PSD and Fire Chief accesses were on his new ID card as they were on the

²⁹ We previously expressed concern about the misuse of Department resources. Please see our *Assessment of the Department's Disciplinary Process and Professional Standards Division*, dated March 27, 2010, in the section titled "Fire Apparatus Used to Tow Personal Trailer" starting at page 124.

card he previously lost.³⁰ The memorandum goes on to say that verification of such access authorization could not be verified. The case files we obtained contain only the complaint and minimal information on a PSD tracking sheet. Based on this lack of information, we were unable to determine what, if any, investigation was conducted.

Investigative interviews:

There was no evidence in the case file that any interviews were conducted.

Department's review of the investigation:

There was no evidence in the case file that the investigation, if one was completed, was reviewed by Department management.

Case-specific findings:

19. The Department did not conduct a timely, thorough or complete investigation of allegations that a union official misled another Department employee in an attempt to have unauthorized electronic access added to his Department identification card.

Case-specific recommendations:

5. The improper use and abuse of Department resources and the making of misleading statements are serious allegations that must be thoroughly and completely investigated in a timely manner. If such allegations are sustained, appropriate corrective and/or disciplinary action should be taken consistent with disciplinary guidelines.

³⁰ Section 11(a) of the Department's rules and regulations in effect at the time says members shall not make misleading statements with intent to deceive.

REPORT OF INAPPROPRIATE PHOTOGRAPHS

A Fire Chief reported that while he was a fire captain, he and other firefighters posed for photographs with female members of the public while on duty. At least one photograph involved a topless woman. This is one of two cases appearing in this report involving allegations of misconduct by a Fire Chief.

Assignment to the alternative investigative process:

The Fire Chief reported the incident to the PSD and requested an investigation on September 30, 2011. The complaint was entered in the CTS the same day. The complaint was forwarded to the alternative investigative process on October 6, 2011, but later returned to the PSD for investigation on October 13, 2011. While the one-year statute of limitations period has expired, the case remained open in the CTS as of January 2, 2013.

The investigation was not able to determine the dates on which the photographs were actually taken so the specific incident dates are unknown. Best estimates put the dates sometime in the late 1990s, thus the case is out of statute because it has been considerably more than two years since the incidents took place. While the one-year statute of limitations period set forth in the FOBR runs from the date of discovery, the City Charter sets a maximum two-year statute of limitations period running from the date of incident.

Document collection:

There was only a limited amount of information in the case file. A PSD tracking form provides the dates the complaint was transferred back and forth between the PSD and the alternative investigative process.

An October 3, 2011 investigation report says the Fire Chief initiated contact with the PSD on September 30, 2011, when another Department chief officer told him something was being said about female members of the public being photographed with firefighters. The Fire Chief said photographs had been taken “years ago” when he was a fire captain and provided the PSD with 13 photos. He pointed out photos depicting a female in a bikini standing on the bumper of a fire engine. The Fire Chief further explained that after photos of this woman were taken, another woman posed for a photo without her top. He said he did not have that photo.

The investigation report documents an attempt to identify the other firefighters depicted in the 13 photos and the timeframe they all worked together. A thorough review of the Department’s rules and regulations and the Manual of Operations was conducted to determine the potential violations if allegations could be proven. Potentially relevant sections require officers to set especially good examples and ensure their commands meet the Department’s high standards. One such section prohibits conduct which would tend to bring discredit on the Department.

The facts and photographs were reviewed by the Department’s EEO Coordinator, who was of the opinion that the conduct did not involve the Department’s Discrimination Prevention Policy.

After our initial request for the case file in September 2012, we later obtained a second report, dated May 9, 2012, which contained a summary of the investigation and recommendations. This report says the Fire Chief admitted being present when a woman removed her top to be photographed on or in front of a fire engine when he was a Captain II in the late 1990s. The Fire Chief's admissions were publicly revealed and documented in the media. It was also reported that he expressed deep remorse for the conduct.

The May 9, 2012 report recognized that disciplinary action, such as a suspension based on the disciplinary guidelines, is barred by the statute of limitations. It also noted that a written reprimand is not time barred if the Department acts within one year of the date of discovery because the limitations set forth in the City Charter do not bar reprimands.

The May 9, 2012 report contained two recommendations: 1) identify the appropriate entity to adjudicate the complaint and forward the matter accordingly, and 2) close the case as "sustained" with no further action based on the non-traditional penalty of 120 hours of community service that was self-imposed with the knowledge of the Mayor.

The final document was an August 22, 2012 memorandum from the PSD Commander to the President of the Fire Commission recommending that the case be closed as "sustained" with no further action based on the self-imposed, non-traditional discipline. No action has been taken since this recommendation was made.

Investigative interviews:

Other than the initial complaint intake interview on September 30, 2011, which was not recorded, it appears no interviews were conducted as part of the investigation. The other two Department members identified in the photographs were not interviewed.

Department's review of the investigation:

This case was referred to the President of the Fire Commission by the PSD Commander on August 22, 2012, for adjudication. The memorandum provided a summary of the conduct (as described by the Fire Chief during the intake interview) and a recommendation that it be closed as "sustained" with no further action based on the self-imposed discipline (community service) with the knowledge of the Mayor's office.

Case-specific findings:

20. The complaint was properly forwarded to the alternative investigative process a week after being reported to the PSD, but the case was returned to the PSD the next week for investigation.

21. No investigative interviews other than the initial complaint intake interview were conducted.³¹
22. Disciplinary action against the Fire Chief and the other firefighters in the photos was barred at the time the incident became known to the PSD because the statute of limitations period expired two years after the incident occurred in the late 1990s. The statute of limitations period on written reprimands (one year from discovery) expired at the end of September 2012.
23. After discussing the issue with her, the case was forwarded to the President of the Fire Commission for adjudication. The PSD assumed that this was the proper process given that the Fire Commission is the head of the Department. The Fire Commission President consulted with the City Attorney after receiving the file.

Case-specific recommendations:

6. Complaints against a current Fire Chief, whether or not he or she was the Fire Chief at the time of the alleged incident, should be forwarded to the Mayor for investigation, adjudication and discipline. They should not be handled by Department members who report to the Fire Chief. Charter sections 508 and 231 provide the Mayor with the authority to appoint, review and remove the Fire Chief.
7. Without the appropriate Charter authority or other direction from the Mayor, cases involving alleged misconduct by the Fire Chief should not be forwarded to the Fire Commission for adjudication. The Commission does not have the express power to appoint, review and remove the Fire Chief.
8. The Charter should be amended to mirror the statute of limitations, and its tolling provisions, as set forth in the FBOR.³²
9. In some but not all cases, conducting an investigation of an old incident, even if no disciplinary action can be taken, may allow the Department to learn important lessons that are useful in improving procedures and policies still in place. Such corrective actions can prevent similar incidents from occurring in the future.³³

³¹ PSD investigators decided not to conduct further interviews because the public statements made by the Fire Chief matched what he had initially reported to the PSD, and it was unlikely any action would be taken in such an old case.

³² The Fire Department also employs arson investigator/peace officers, so the applicable statute of limitations set forth in the Public Safety Officers Procedural Bill of Rights Act would have to be considered in amending the Charter, much like Charter section 1070(c).

³³ Investigative resources are scarce so choosing to conduct such investigations requires careful consideration of the costs and benefits.

TIMEKEEPING ISSUES

The Department pays the salary for a member appointed to defend another member who faces a Board of Rights. In one case reviewed for this report it was alleged that a defense representative falsely claimed that he could not work his regularly scheduled shifts while preparing a Board of Rights case so his friends could work his shifts for overtime pay. The same complaint also alleged that the subject falsely stated he was working overtime on the same Board of Rights case while on his regularly scheduled days off.

Assignment to alternative investigative process:

The anonymous complaint was received by the PSD on October 14, 2009, and was filed in the CTS the next day. On October 21, 2009, a request was made to the Fire Chief for an audit of the defense representative's timekeeping related to the Board of Rights case, a timeframe spanning January 1, 2009, to the date of the request. The audit was approved the next day. The case was forwarded to the alternative investigative process on November 17, 2009, and the subject was notified of the investigation on November 24, 2009.

Referral to criminal law authorities:

Whether the Department, as part of the alternative investigative process, considered referring the case to law enforcement for a review of potential criminal law violations is not mentioned in the file materials we received.

The file materials we received do not mention at what point the alternative investigative process considered the impact potential criminal law violations would have on the administrative investigation. Some of the more important issues include advising the subject of his constitutional rights before an interrogation,³⁴ providing a formal grant of immunity before compelling incriminating answers to questions,³⁵ and taking steps to protect against tainting a criminal prosecution.³⁶ The subject's attorney recognized the potential criminal law issues because he demanded that the Department provide his client with immunity from prosecution before questioning.

Document collection:

The case files contain copies of the anonymous complaint, the approved requests for the timekeeping audit and investigation, the November 24, 2009 subject notification, correspondence, timekeeping audits, the September 15, 2010 investigation report and two internal Department reports (one is an October 2010 summary of the investigation and the other is a June 2012 request that the case be closed due to the statute of limitations period having expired).

³⁴ *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822.

³⁵ Government Code section 3253(e)(1).

³⁶ *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Kastigar v. United States*, 406 U.S. 441 (1972).

The investigator reached a number of findings and conclusions. First, she found that the Department did not have “written guidelines detailing timekeeping procedures or specific expectations regarding the amount of time to be spent executing the duties of a defense representative.” However, she did find that the Employee Relations Officer’s (ERO) office began monitoring defense representative timekeeping starting in mid-2010. The investigator also found that the union did not have “written guidelines regarding the scope of representation or timekeeping procedures” for defense representatives.

Despite the lack of guidelines, the investigator concluded that the hours entered on the subject’s timekeeping appeared to be excessive. This conclusion was based on the following: 1) the timekeeping audits demonstrated a significant disparity in the amount of overtime paid to the defense representative as compared to the two Department advocates assigned to the same case; 2) this was not the subject’s first assignment as a defense representative in a Board of Rights; and 3) this particular Board of Rights never went to a hearing. However, the investigator also said that this conclusion was not supported by corroborating evidence because of the unwillingness of the subject and witnesses to participate in the investigation.

The conclusions in the investigation report were based, in large part, on timekeeping audits conducted by the Department’s Planning Section. It does not appear that the investigator attempted to conduct an independent review of the timekeeping records, but rather relied on the audits conducted by the Planning Section.³⁷

The scope of these timekeeping audits conducted by the Planning Section was a 10-month period for the defense representative and both Department advocates. The audit of the defense representative’s timekeeping found 69 entries of the overtime code accounting for a total of 404 hours in the five months from March to July 2009. The dollar amount for this time was calculated to total \$18,034.

By contrast, the timekeeping audits for the Department advocates working on the same Board of Rights revealed that one advocate logged 42 hours of overtime for a total of \$2,699,³⁸ while the other logged only nine hours of overtime for a total of \$823. Both advocates incurred the overtime in the three months from March to May 2009.

Our independent review of the documents used for these audits produced results similar to those of the Planning Section. For the audit of the defense representative, our count for the number of entries differed from the audit (we found 47 rather than 41) but we reached the same total number of hours and payments. The 404 overtime hours were paid out in \$8,487 and 243 hours of time-off (equivalent to \$9,548).

³⁷ In our review of the relevant timesheets, we noted a number of questionable entries worthy of additional investigation. These included a full 24-hour period coded as administrative time, overtime used on a regular schedule day and possible double-billing for another 24-hour period. Furthermore, there were two entries missing a code so we were unable to determine whether that time was used for the Board of Rights or some other purpose.

³⁸ In one of the Department’s audits the 42 hours is said to total \$2,699, and in a second Department audit the 42 hours is said to total \$2,400. It is unclear why these two amounts are different.

In looking at the defense representative's work schedule, we found 29 (not 28) entries for administrative time while assigned to a regular schedule totaling 398 hours (not 400). Of these, only 163 hours were categorized as time used for Board of Rights preparation (approximately 14.5% of his regularly scheduled hours).³⁹ Accordingly, it appears that the defense representative spent a total of 567 hours preparing for the Board of Rights from March to July 2009 (404 hours of overtime plus 163 hours on his regular schedule).

The same day the defense representative was notified that he was the subject of an investigation, he sent an email demanding an immediate and swift investigation, and stated his belief that the "spurious and false allegations" were being levied against him by high ranking Fire Department officials in an attempt to smear his name and retaliate against him.

A June 29, 2009 letter from the defense representative describes the amount of work involved in preparing for and defending a member at a Board of Rights hearing, complains about the Department's attempts to limit defense preparation time and not having the use of a Department car, cites a number of adverse verdicts involving the Department, and alleges retaliation and improper conduct by the Department, among other things. He references another defense representative being reassigned to a Board of Rights full-time for over six months without a complaint by the Department.

A December 10, 2009 email from an attorney for the defense representative questions the Department's retention of a private attorney to conduct an investigation instead of having it handled by the PSD, and claims an investigation would be retaliation for the defense representative engaging in protected activities. The attorney points out that questioning the defense representative about his privileged conversations with the member he was representing would not be proper based solely on a complaint that he is not doing his job.

A January 14, 2010 letter from another of the defense representative's attorneys says the pending investigation will impinge on union members' right to be represented by representatives of their choosing. It will also interfere with, restrain and coerce members in their choice of representatives, and will violate the right of confidentiality between a member and his representative.

Investigative interviews:

The investigation was conducted by an outside investigator with the assistance of a battalion chief, and the investigation report was submitted on September 15, 2010. The investigator conducted two "informational" interviews, neither of which was recorded. The complaint was made anonymously so the complainant was never interviewed. Despite numerous efforts, the investigators were unable to interview the subject.

The investigators began attempting to schedule the subject's interview on December 7, 2009. The first interview was scheduled for February 2, 2010, but did not get past the point where the subject's attorney demanded immunity from criminal prosecution. The City Attorney's Office

³⁹ It is worth noting that during the 163 administrative hours where the subject was preparing for the Board of Rights, another member was working in his place at an overtime rate.

advised the Department not to grant immunity. Later correspondence confirmed the immunity demand, that no immunity from criminal prosecution would be provided and that the subject would be charged with insubordination if he refused to appear to answer questions in the future after being denied a written formal grant of immunity.⁴⁰

The interview scheduled for April 20, 2010, did not go forward because the subject was ill. The June 10, 2010 interview was cancelled due to a death in the subject's family. The subject called the day before the July 8, 2010 interview to say he would not appear because he was out of town. No further attempts were made to interview the subject.

The investigation report also indicates that the investigator received comments from unidentified witnesses about the subject using overtime codes to attend various conferences and seminars. The investigator stated that she attempted to contact the various organizations hosting these events and hotels where participants stayed to verify whether the subject had attended but was unsuccessful. Thus, these comments could not be corroborated.

Two "informational interviews" were conducted by the investigator to obtain pertinent information. One was with an unidentified union director and the other was with the Department's ERO. The union director said that the union board met frequently but did not advise defense representatives regarding their duties nor did the union board review their timekeeping.

The ERO interview revealed that a prolonged assignment of another defense representative in late 2008 and early 2009 led the Department to begin monitoring defense representatives' timekeeping because the other representative had claimed to have worked 1,700 hours on a single case. This monitoring task was originally given to the PSD (Operations at the time) but was later shifted to the ERO's office. The current practice is to approve a certain amount of hours for defense preparation ahead of time, and to require defense representatives to submit weekly timekeeping forms to the ERO.

Department's review of the investigation:

The Department's internal memorandum summarizing the investigation was dated October 12, 2010. A second memorandum, dated June 22, 2012, recommended the case be closed due to it being out of statute, but the case remained open in the CTS as of January 2, 2013. In order to impose disciplinary action, the investigation would had to have been completed and the allegations sustained by October 14, 2010 (one year after discovery).

In the October 12, 2010 memorandum, the Department supervisor overseeing the investigation recommends that a Board of Rights be convened to hear the evidence and make a determination in the case. This recommendation was based on the complexity of the issues involved and the fact that the subject had refused to fully participate in the investigation. While the Department supervisor concludes that there was sufficient evidence to find an excessive use of overtime by the subject, he recommended a Board of Rights because it was "the only administrative method

⁴⁰ The current practice, which is generally accepted in these situations, is to inform the subject that any compelled incriminating statements will not be provided to law enforcement.

remaining to determine whether or not \$18,043 of overtime” charged by the subject was excessive. This memorandum was dated only two days before the one-year statute of limitations period was set to expire.

A recommendation that a Board of Rights be used to determine whether or not \$18,043 of overtime charged by the subject was excessive is not timely and is not an appropriate use of the Board of Rights process. The Board of Rights process should not be used to complete the investigation.⁴¹

Case-specific findings:

24. While the investigation report was submitted on September 15, 2010, the Department report summarizing the investigation and recommending a Board of Rights hearing to determine whether the overtime was excessive was dated October 12, 2010, or two days before the expiration of the statute of limitations period.⁴² This is not timely and no further action was taken.
25. The investigation was not complete. The subject was not interviewed and the investigation did not provide information concerning potential defenses. While the amount of overtime was determined, the investigation did not address the specific reasons for why the defense representative’s overtime was so much greater than the advocates’ overtime, or if claims for overtime by the defense representative, and others who backfilled his position, were appropriate, reasonable and necessary.
26. Investigators received objections claiming that an investigation would amount to retaliation, would impinge on privileged conversations and would prevent union members from being represented by the representative of their choice. We found no evidence of follow-up by the Department to determine the validity of these objections.
27. The investigative files do not indicate whether investigators sought legal advice concerning the extent to which the Department could thoroughly question the defense representative and conduct a complete investigation concerning the claims for overtime. The Department does have a responsibility to ensure that the City’s treasury is protected against unreasonable and excessive expenditures. On the other hand, a defense representative and the member he or she is representing have certain protections when preparing a defense, and have a strong interest in being fully prepared to defend the charges they face.
28. The Department did not have clear guidelines in place to monitor the amount of time defense representatives spent preparing for a Board of Rights hearing at the time this complaint was received. The Department reports that the ERO now approves a certain

⁴¹ We are aware that the stakeholders discussed convening a Board of Rights in complex cases “when the infraction is such that it requires a Board of Rights to review all the evidence in determining the appropriate penalty.” (Stakeholders Meeting for November 27, 2006.)

⁴² The incident date of October 15, 2009, listed in the CTS is incorrect. The anonymous complaint of wrongdoing was received on October 14, 2009, but the overtime was actually claimed from March to July 2009.

amount of time for the defense representative to use in preparing for a Board of Rights, and the defense representative is responsible for submitting weekly timesheets to the ERO. The defense representative may also seek approval for additional time if necessary.

29. The Department also failed to consider or evaluate whether information concerning the timekeeping should be forwarded to law enforcement authorities.

Case-specific recommendations:

10. The Department should ensure that it seeks legal advice when there are objections and claims that investigations 1) constitute retaliation; 2) impinge on privileged conversations; 3) prevent members from being represented by the representative of their choice; or 4) otherwise interfere with union members' rights.
11. In the short term, the Department must ensure that the cost it incurs when appointing defense representatives is reasonable and necessary. The Department can be assisted in this endeavor with clearly written guidelines, continued monitoring and good legal advice.
12. In the long term, the Department should consider amending City Charter section 1060 so that it mirrors section 1070, which governs the Police Department's Board of Rights process. Charter section 1070, specifically subsection (m), provides the accused with a right to representation but **at his or her expense**. Therefore the Police Department is not obligated to pay for the defense representative's time spent preparing for and defending a Board of Rights. This change in the Fire Department's Board of Rights process would eliminate many of the problems associated with monitoring defense representatives' timekeeping.
13. Cases involving alleged timekeeping fraud must be fully investigated in order to determine whether such fraud occurred, and, if so, when exactly so that the correct statute of limitations period can be calculated. Furthermore, if the alleged conduct is sufficiently serious, the Department should consider forwarding the case to law enforcement authorities.

DEFENSE REPRESENTATIVE ASSIGNMENT FOR A BOARD OF RIGHTS

Defense representatives have alleged that the Department interferes with their ability to represent members in the Board of Rights process when the Department assigns them to such duties pursuant to the City Charter. The first of these types of cases reviewed for this assessment involved a defense representative alleging that the PSD Commander attempted to improperly influence a Board of Rights hearing and obstructed the defense representative in performing his duties, thereby impacting the accused member's due process rights.

On March 3, 2010, the day after he was appointed, the defense representative was notified that in the event there was a delay of more than nine days in convening the Board of Rights, his assignment as a defense representative would be ended and reactivated nine calendar days prior to the hearing reconvening. The Board of Rights he was assigned to defend convened for a first session on March 12, 2010. The Board decided not to reconvene until April 19, 2010. The defense representative was informed that his assignment had ended and that he would be reassigned as a defense representative on April 10, 2010, or nine days before the hearing was to reconvene.

The defense representative complained that ending or suspending his assignment until only nine days before the reconvened Board of Rights hearing negatively impacted his ability to provide proper representation. Furthermore, the Department's advocates would be able to continue preparing for the hearing the entire time.

Assignment to alternative investigative process:

Members of the Board of Rights were aware of the defense representative's claims on April 22, 2010, at the latest, and there is information suggesting that the claims were made before that date. Further notice of the alleged wrongdoing was provided on May 4, 2010, and the complaint was entered in the CTS two days later. The complainant was then notified that a thorough investigation would be conducted. The Department used May 4, 2010, as the incident date and the date from which it assumed the statute of limitations would begin running. There is some information indicating that the first complaint of wrongdoing may have been received a month earlier.

The case was not forwarded to the alternative investigative process in a timely manner. It was referred on August 12, 2010, or three to four months after the complaint was received. The investigation was assigned to an assistant chief and a civilian member more than a month later on September 28, 2010, and the subject was notified of the investigation that same day. (The civilian member was later removed from the investigation because of a potential conflict of interest.) Assignment of investigators and notice to the subject of the investigation were thus not timely.

Document collection:

The case files we received for this case included the complaint (along with additional correspondence clarifying the content of the complaint), the September 28, 2010 subject and investigator notifications, the May 7, 2011 investigation report, and the June 22, 2012 Department report recommending the case be closed due to the statute of limitations period having expired.

An April 22, 2010 Board of Rights transcript contains an extensive discussion about the temporary suspension of the defense representative's assignment to defend another member at the hearing. There is a strong suggestion that the members of the Board of Rights, and other Department supervisors (perhaps even the Fire Chief), were aware of the alleged wrongdoing well before April 22, 2010, perhaps as early as April 5, 2010. Determining the correct statute of limitations date is critical and it does not appear that the investigation actively evaluated or considered the possibility that the statute of limitations was triggered before May 4, 2010.

The defense representative made a motion at the Board of Rights hearing on April 22, 2010, that the Board report the alleged wrongdoing directly to the Fire Chief. The motion was denied. A May 4, 2010 email claims that the PSD Commander attempted to unduly influence the Board of Rights hearing, violated the Department's rules and regulations, obstructed a defense representative and impacted a member's due process rights by suspending the defense representative's assignment. The City Attorney recommended that the complaint be referred to the Internal Affairs Section Commander in the PSD.

In early September 2010, the manager for the alternative investigative process asked the defense representative to provide specific written information about his allegations. The defense representative questioned the request for additional written information, requested an investigation by a neutral outside third party and suggested that he could provide his prior emails instead of providing a written summary. Some written information and prior emails were provided shortly thereafter.

The investigator relied on interviews, the Department's rules and regulations, other Department documents and the position description for Assistant Chief in evaluating the allegations. First, the investigator found that the subject had not attempted to improperly communicate with any member of the Board of Rights, Department advocates or the accused, which would have been a violation of the procedures set out in the Department's Board of Rights Manual. His only communication was the letter to the Emergency Services Bureau Commander, with a copy to the defense representative, notifying him that the complainant's assignment would be terminated until nine days before the Board reconvened pursuant to the new policy approved by the Fire Chief.

Next, the investigator found that the subject was acting as an agent of the Fire Chief in issuing the letter terminating the complainant's assignment, and that the policy had been approved by the Fire Chief. However, the investigator commented that it would have been more appropriate to have the Fire Chief's name under the signature line and have the subject sign for the Fire Chief.

Finally, based on the evidence provided by the ERO, the investigator determined that this was not an isolated incident of the policy being implemented, and that the complainant had had the opportunity to, but did not, request additional time, as outlined in the initial March 3, 2010 letter.⁴³

The investigator concluded the report by stating that the issue remains whether the subject violated the City Charter or Department policy by signing and issuing the letter to the complainant, and if it impacted the complainant's ability to defend the member in the Board of Rights hearing. This statement falls short of making a determination on whether the allegations should or should not be sustained.⁴⁴

Investigative interviews:

The complainant, subject and a witness were interviewed between January and April 2011. The investigator did not record the interviews. The absence of recordings prevents us from verifying the accuracy of what is summarized in the investigation report. There is insufficient information in the file to determine whether the subject and witness were fully and properly admonished, although each was asked if they desired to have a representative present during their interview.

An interview summary says the complainant had a representative present when interviewed on January 14, 2011, and that the representative recorded the interview. The summary of what the complainant said is somewhat confusing given the documents in the file. It is suggested that the complainant said the letter originally assigning him to be a defense representative was issued by the PSD Commander when it was not. It has the Fire Chief's name on it and was signed by a chief deputy, not the PSD Commander.

There is a March 25, 2010 memo signed by the PSD Commander explaining that the defense representative's assignment was to be suspended after the first Board of Rights session until nine days before the second session, scheduled for April 19, 2010. The complainant claimed that terminating his assignment after the first session impacted his ability to provide representation to the accused member, and he complained that there was nothing to prevent the Department's advocates from continuing to prepare for the Board of Rights hearing during that time.

It was further claimed that by issuing the letter, the PSD Commander exceeded his authority, obstructed the defense representative, attempted to unduly influence the hearing and violated the member's due process rights. This interview summary does not explain the extent to which the defense representative requested additional time to prepare, or what actual facts he had to support his claims against the PSD Commander.

The PSD Commander was interviewed on March 30, 2011, and declined representation. The interview was not recorded. He explains that the Department sought to reduce the number of

⁴³ The April 22, 2010 transcript makes reference to the defense representative having his appointment reinstated after five days. The investigation does not address this issue when concluding the representative did not request additional time.

⁴⁴ The April 22, 2010 transcript says the Board of Rights was resolved by a settlement. There is no contention that the settlement was necessitated by the defense representative not being prepared to proceed with a defense.

days a defense representative would be assigned to prepare for a hearing because a prior representative used approximately 1,700 hours preparing for a hearing.⁴⁵ The City Attorney's Office recommended nine days as a reasonable amount of time and the Fire Chief agreed.

This was the first hearing where this new policy was implemented. The original assignment letter says a deviation from the procedure (i.e., a request for additional time) shall be justified in a written request to the Fire Chief. The PSD Commander admits issuing the memorandum suspending the assignment after the first session of the hearing because it was consistent with the Fire Chief's new policy and, because he reported directly to the Fire Chief, he was authorized to act as his agent. This procedure changed after the incident so that the ERO now processes such notifications.

The ERO was interviewed on April 12, 2011, and declined to be represented. The interview was not recorded, and confirmed the limit of nine days for preparing a defense was the result of another representative using 1,700 hours in a different case. The City Attorney's Office was consulted and the new procedure was presented to the union "following employee relations procedures."⁴⁶ After the first session of the hearing, the ERO instructed the PSD Commander to apply the new policy limiting the assignment and that any questions about it should be directed to the ERO.

The ERO recalls the Fire Chief was not available so the PSD Commander authored the memo that suspended the assignment to prevent delay. After consulting with the City Attorney's Office and Fire Chief, it was decided that future communications with defense representatives should be facilitated through the ERO. The City Attorney's Office recommended that the PSD Commander should not be involved with the Board of Rights process.

The ERO also provided the investigator with letters (issued after the events at issue in this case) informing other defense representatives that their assignments had ended and would resume nine days before their hearings were to reconvene. The ERO also provided an example where another defense representative requested additional time to prepare for a Board of Rights under the new policy and it was approved.⁴⁷

When attempts to interview the Fire Chief were not successful, the investigator had the ERO convey his questions. The Fire Chief indicated, through the ERO, that he had given approval for the PSD Commander to act as his agent, and as such the PSD Commander had the authority to sign the memo on behalf of the Fire Chief.⁴⁸

⁴⁵ The financial cost is not limited to paying the defense representative. When the defense representative is not able to work his or her normal schedule, the Department also pays overtime to backfill the defense representative's position.

⁴⁶ The investigation does not explain the meaning of the term "employee relations procedures."

⁴⁷ These examples were attached to the investigation report.

⁴⁸ The investigator was unable to interview the Fire Chief. Rather, he submitted two questions to the ERO, who relayed them to the Fire Chief. The Fire Chief relayed his answers back to the ERO, who then communicated them to the investigator. Witnesses should be interviewed in person.

Department's review of the investigation:

The investigation report was submitted on May 7, 2011, **after** the one-year statute of limitations period had expired. The case remained open in the CTS as of January 2, 2013, despite a June 22, 2012 internal Department memorandum recommending it be closed due to its being out of statute.

Case-specific findings:

30. The investigation was not completed within the one-year statute of limitations period and the Department did not correctly determine the actual statute of limitations date. Although the Department assumed the statute of limitations was triggered on May 4, 2010, the statute was triggered on April 22, 2010, at the latest, if not weeks earlier.
31. The Department's implementation of a new policy attempting to control the amount of time allotted to defense preparation, and the associated costs, resulted in serious claims of misconduct being lodged against the PSD Commander.
32. The facts disclosed by the investigation indicate that the PSD Commander was implementing the Fire Chief's policy limiting the amount of time defense representatives would have to prepare for a Board of Rights hearing. Additional investigation could have been conducted on other issues, such as how and when the new policy was communicated to this defense representative. If the defense representative had evidence to support his serious claims against the PSD Commander, it was not fully explained by the representative in his interview.
33. One of the primary complaints in this case was that the communication about the nine-day rule came from the PSD Commander rather than the Fire Chief. The Department reports that it has now adopted a procedure whereby communications about the nine-day rule are communicated by the ERO and the PSD is no longer involved. This is much more appropriate than having the PSD Commander engaging in such communications.
34. The Department has legitimate reasons to monitor, oversee and control expenses to ensure expenditures are only reasonable and necessary. Defense representatives also have a duty to take the time reasonably necessary to prepare a defense for the members they represent. The extent to which nine days is enough time to prepare for a Board of Rights hearing is beyond the scope of this review. However, the Department is not expected to write a "blank check," and we note that the Department's policy permits requests for additional time to prepare for a hearing. There is evidence that such requests have been made and granted.

Case-specific recommendations:

14. In the short term, the Department should ensure, with the assistance of the City Attorney's Office, that its policies controlling the costs related to the appointment of defense representatives, and the way it manages such policies, appropriately and

reasonably balance the need for responsible financial controls with the need of defense representatives to have sufficient time to properly prepare for a Board of Rights hearing.

15. In the long term, the City Charter should be amended to require that those facing a Board of Rights hearing pay their own expenses related to the hearing, which includes the cost of representation at the hearing.
16. Cases should be closed and appropriate notices should be sent to the complainant and subject in a timely manner.
17. Reducing the delay in convening a Board of Rights hearing, reducing continuances and reducing the delay between sessions of the hearing should reduce the cost to the Department.

In another case reviewed for this report, a defense representative alleged that the Fire Chief was discriminating against a member and affecting the member's due process rights by improperly removing the defense representative from his assignment to defend the member at a Board of Rights hearing. The case file does not contain any more detail about the circumstances of this incident.

Assignment to alternative investigative process:

The earliest evidence in the file that the Department had notice of some alleged wrongdoing was an August 3, 2010 email, which said the Fire Chief hampered the due process rights of a member represented by the complainant and the defense representative was being suppressed. An email the next day alleged a member's due process rights had been hindered by illegally removing the defense representative. This email also suggested that this conduct constituted discrimination by the Fire Chief. However, there is some information suggesting that the Department became aware of the complaint before these early August emails.⁴⁹

Entry of the complaint in the CTS, referral to the alternative investigative process and the assignment of investigators were not timely. It was a month before the complaint was entered in the CTS on September 3, 2010, and another two months before the case was referred to the alternative investigative process on November 16, 2010. The investigation was assigned on March 3, 2011, to a civilian member of the Department who was assisted by a battalion chief.

The subject was notified of the investigation on March 16, 2011, as is required under the collective bargaining agreement between the City and the Chief Officers Association. The notice said the investigation would focus on the EEO intake investigation. The file materials do not indicate whether the City Attorney's Office was consulted about whether the Fire Chief is entitled to the protections set forth in the collective bargaining agreement, including notice that he or she is under investigation.⁵⁰

⁴⁹ The wording in the August 3, 2010 email indicates that there may have been prior emails on a related topic. The subject line says, "**FIFTH REQUEST**," and the body of the email states, in part, "Just **another** friendly reminder for you" (Emphasis added.) If there were earlier emails, they are not in the file.

⁵⁰ The collective bargaining agreement defines a "chief officer" as a battalion chief, assistant chief or deputy chief.

Document collection:

The documentation in this case included the complaint, the March 16, 2011 subject notification, a recording of the witness interview, the June 24, 2011 preliminary EEO investigation report, emails concerning a variety of issues and the August 5, 2011 closure memorandum to the complainant.

The emails from the defense representative to the Fire Chief assert that by limiting the amount of time the defense representative had to prepare for the Board of Rights, the defense representative was being prevented from exercising his best efforts and using every legal means possible to defend the member facing a Board of Rights, as required by the City Charter.

There are no documents in the file explaining when the complainant was assigned to act as a defense representative, during what period of time the representative's assignment was suspended or other particulars of the assignment.

Investigative interviews:

The member on whose behalf the complaint was filed was interviewed on March 29, 2011. He was represented by another union representative and not the defense representative assigned to represent him at the Board of Rights hearing. The union representative objected to the admonition form, which he alleged was subject to the "meet and confer" process but had not been approved prior to it being implemented. A second objection related to the inability of the witness to record the interview.

The member was advised that a complaint had been filed on his behalf alleging that the Fire Chief had discriminated against him, adversely affecting his due process rights, in connection with a Board of Rights hearing. The scope of the interview was limited to determining whether the Fire Chief had discriminated against him in violation of City EEO policies. The investigators said that others may be assigned to investigate other aspects of the allegations.

The member stated he did not believe any of the Fire Chief's actions were based on his membership in a protected group. Rather, the member believed the complaint stemmed from a conflict between the defense representative and the Fire Chief. He explained that after talking to others, he felt singled out and treated differently because his defense representative had been taken off his assignment to defend the Board of Rights case multiple times and, as a result, his representative's hands had been tied. The member said others had informed him that this had never happened to anyone else.

Emails and a memo in the case file refer to numerous attempts made by investigators to interview the defense representative between April 22, 2010, and July 27, 2010. One interview was cancelled when he and one of the investigators both had to cancel due to personal issues.

An August 5, 2011 letter notifies the defense representative that the EEO complaint was being closed because there was insufficient evidence to substantiate the complaint. This letter said the

investigative team was unable to secure the defense representative's participation even after he agreed to a telephonic interview. This letter also said that although the complaint was closed, it may be reopened if the defense representative contacted the EEO Unit to set up an interview.

There is nothing in the file suggesting that the defense representative who initiated the complaint contacted the Department with additional information or a request to be interviewed. The Fire Chief was not interviewed.

Department's review of the investigation:

The investigators' only finding was that "[t]here is insufficient evidence of potential discrimination to support the investigation of this complaint as an EEO issue." They recommended no further action at that time but that the complaint be reopened if the complainant made himself available for an interview at a later date.

The investigation report was received on August 3, 2011. There was no internal Department report summarizing the investigation in the case file. The charges in the case were not sustained and it was closed on August 4, 2011, one day **after** the statute of limitations period ended.⁵¹ The complainant was notified of the resolution on August 5, 2011.

Case-specific findings:

35. All investigative activities conducted in response to this complaint against the Fire Chief were performed by Fire Department employees after the case was referred to the Department's alternative investigative process.
36. The Department's attempt to control the costs related to the appointment of a defense representative resulted in serious claims of misconduct being lodged against the Fire Chief.
37. The member on whose behalf the complaint of discrimination was made failed to provide evidence of discrimination in violation of the Department's EEO policies during his interview. The defense representative who filed the complaint alleging the Fire Chief engaged in discrimination and violated the member's due process rights did not provide evidence to support the claims, and was less than fully cooperative with investigators' attempts to interview him.
38. During the member's interview, investigators said they were only investigating the EEO issues and others would be investigating the other claims. The file materials do not explain how the Department was to address or did address the other issues raised in the complaint.
39. While the Department did not conduct an investigation beyond interviewing the member on whose behalf the complaint was filed, the Department did inform the defense

⁵¹ This is based on a discovery date of August 3, 2010. If the Department had notice of the complaint before that date then the one-year statute date would also be earlier.

representative that he would be interviewed and the case would be reopened if he contacted the EEO Unit. There is nothing in the file suggesting the defense representative contacted the EEO Unit in order to be interviewed or provide further information to support his complaint.

40. This case contains objections made by defense representatives to PSD policies. These same objections are raised in multiple cases and the extent to which these objections were forwarded to the appropriate parties is unclear.
41. The witness was ordered to sign the admonition form despite the objections by his defense representative.
42. The statute date was incorrectly listed as August 4, 2010, in the case file. The Department likely learned of the complaint before August 4, 2010, and thus the statute date would also be prior to August 4, 2011.⁵²
43. It appears the Department sought advice from the City Attorney's Office regarding the proper procedure for investigating the Fire Chief in response to this complaint. There is no further information about what advice was provided, if any.

Case-specific recommendations:

18. The Department should refer misconduct complaints lodged against the Fire Chief to the Mayor for investigation and adjudication. The Department should avoid having the Fire Chief's subordinates conduct such investigations.
19. Members should not be ordered to sign the admonition form when there is a refusal or objection to signing.
20. In the short term, the Department should ensure, with the assistance of the City Attorney's Office, that its policies for controlling the costs related to the appointment of defense representatives, and the way it manages such policies, appropriately and reasonably balance the need for responsible financial controls with the need of defense representatives to have sufficient time to properly prepare for a Board of Rights hearing.
21. In the long term, the City Charter should be amended to require that those facing a Board of Rights hearing pay their own expenses related to the hearing, which includes the cost of representation at the hearing.

⁵² We were unable to determine the correct incident and discovery dates from the materials in the case file and in the CTS. The only date we could use was August 3, 2010, which was the date on the "Fifth Request" email from the complainant to the subject (the title of which indicates that four earlier requests were also sent). Using that as the date of discovery, the correct one-year statute date would be August 3, 2011. More information would also be needed to determine the incident date because it is unclear from the complaint and the other materials in the case file when the subject's actions of which the complainant was complaining took place.

AUDIT IMPEDIMENTS

Access to Fire Department information continues to be an impediment to conducting audits, assessments and reviews. This report is long overdue and delayed because of a continuing, wasteful and time consuming dispute with the City Attorney's Office over the Independent Assessor's authority to access Fire Department information.

Charter section 523 says the Independent Assessor has the same access to Fire Department information as the Fire Commission. Before the Independent Assessor criticized legal work provided to the Professional Standards Division (PSD) in early 2010, City attorneys advised, assisted and facilitated Fire Commissioners with accessing confidential personnel information. City attorneys also permitted the Independent Assessor to access confidential personnel information. After their legal work was criticized, City attorneys said that Fire Commissioners and the Independent Assessor have no authority to access confidential personnel information and took active steps to impede such access.

On April 5, 2012, the Fire Department was notified that this assessment of the Department's alternative investigative process was being initiated pursuant to City Charter section 523(a). A review of all information available in the Complaint Tracking System (CTS) was completed after the Department identified the cases referred to and handled by the alternative investigative process between January 1, 2009, and December 31, 2011.

The Department failed to promptly provide certain misconduct investigation files for cases directly related to the alternative investigative process when requested on June 12, 2012. All such information was previously provided to the Independent Assessor without delay. When the files were requested again on June 18, 2012, the Department said they were seeking advice from the City Attorney's Office concerning whether the investigation files could be provided to the Independent Assessor.

On June 26, 2012, the Fire Department said the Department's general counsel had been consulted and the misconduct investigation files would not be provided based on the advice set forth in an August 23, 2010 legal memorandum addressed to both the Board of Fire Commissioners and the Independent Assessor. On July 17, 2012, the Independent Assessor presented a report titled *Report and Recommendations Concerning Audit Impediments Caused by City Attorney Advice* (BFC 12-121) to the Board of Fire Commissioners. The Board ordered the Independent Assessor to make a formal audit requests for this and future reports. The Board would then approve the audit plan and order the Fire Chief to provide the requested documents and information.

On July 23, 2012, the Independent Assessor's access to the CTS was discontinued without warning or prior notice. Access to the CTS was restored after the Independent Assessor reported the problem.

On August 7, 2012, the Board approved the Independent Assessor's audit plan and ordered that the Fire Department provide all requested misconduct investigation files and other information

and materials despite the City Attorney's advice.⁵³ Most of the materials were provided by early October 2012. The last file was provided on January 4, 2013. The Fire Department was not responsible for the delay in producing this last file.

Fire Commissioners had complete access to all Fire Department information before the Independent Assessor position was ever proposed because the Board of Fire Commissioners is the head of the Department.⁵⁴ Charter section 523 says the Independent Assessor shall have the same access to Fire Department information as the Fire Commission because as head of the Department, the Commission has access to all Fire Department information,⁵⁵ and such access to information is paramount in order for the Independent Assessor to evaluate how the Department handles complaints of misconduct.

Voter approval of the Independent Assessor position did not reduce the Fire Commission's access to information. According to prior City Attorney advice, by creating the Inspector General position, the voters intended that the Inspector General would have full access to Police Department information in order to determine if Police Department internal affairs investigations were complete.⁵⁶ This same legal principle supports the voters' intent that the Independent Assessor have full access to Fire Department information.

City attorneys have repeatedly refused to discuss or answer basic, reasonable and responsible questions about the Independent Assessor's authority for more than two and a half years. This failure and refusal to communicate with the Independent Assessor is to be contrasted with the direct communications that took place between the City Attorney's Office and the Police Commission's Inspector General more than 15 years ago.⁵⁷

⁵³ If there was any merit to a claim that the Independent Assessor has no authority to access confidential information as claimed in the August 23, 2010 advice, the City Attorney would have advised the City Council to veto the Fire Commission's August 7, 2012 order pursuant to City Charter section 245.

⁵⁴ City Charter sections 500 and 506; 33 Ops.L.A.City Atty 46; and City Attorney Report No. R99.0021, dated January 25, 1999.

⁵⁵ Personnel Department's report to the City Council on the development of a Professional Standards Division within the Los Angeles Fire Department, Council File No. 06-2959, dated January 14, 2008, at page 7; and City Attorney Report No. R99-0302.

⁵⁶ City Attorney's advice letter to Inspector General Katherine Mader dated January 6, 1997.

⁵⁷ When the Police Commission's Inspector General was experiencing difficulty obtaining information from the Police Department, the City Attorney's Office communicated directly with and assisted the Inspector General. Please see the City Attorney's advice letter to Inspector General Katherine Mader dated January 6, 1997.

FINDINGS & RECOMMENDATIONS

Audits by the City Controller and Personnel Department published in January 2006 concluded that the processes used to investigate and ultimately discipline those who have violated Fire Department rules and policies were inadequate, inconsistent and seen by some as biased. The Controller and Personnel Department recommended hiring a professional investigative staff who would report to both the Fire Chief **and** Fire Commission to ensure that all members of the Department are held accountable for compliance with Department policies and standards.

We made similar recommendations in our *Assessment of the Department's Disciplinary Process and Professional Standards Division*, issued in March 2010. We make similar recommendations here in connection with the alternative investigative process.

Case-specific findings:

Investigation of Subpoena Service

1. The alternative investigation was not timely, complete or thorough. The complaint was received on January 23, 2009, but was not entered in the CTS until February 26, 2009. An investigation was not formally approved until November 24, 2009. Interviews were conducted after the statute of limitations period had expired. The investigation report was dated February 22, 2010, and the case was closed on April 20, 2010.
2. Key witnesses were not interviewed. Those who were interviewed were not thoroughly questioned and important, relevant documents were not collected, discussed or even mentioned.
3. The scope of the investigation was mistakenly narrowed to the "policy violations." The investigators' behavior was not the focus of investigation and, if the allegations were true, the behavior likely did violate the Department's rules and regulations.
4. The alternative investigation failed to address whether the PSD investigators were justified in relying on a subpoena from the City Clerk to obtain medical records. Sworn members of the PSD insisted on relying on the past practice of using subpoenas despite being on notice that the practice may not have been legally appropriate.
5. The alternative investigation failed to fully comply with the FBOR. One of the PSD supervisors was asked about closing the complaint without an investigation but he was not told he was or may be a subject of investigation for taking such actions.
6. The Department had no legitimate reason for failing to investigate allegations that PSD investigators engaged in misconduct at the doctor's office. The January 23, 2009 complaint provided more than enough information, including the names of numerous employees in the doctor's office, to start an investigation. The Department has a responsibility to take all reasonable steps to investigate such complaints in a timely manner.

7. The Department failed to investigate allegations that a member's constitutional rights and his right to privacy had been violated, even after the Fire Chief said such an investigation would be conducted.
8. The Fire Department failed to receive timely and accurate legal services that were needed to properly handle this and future complaints of misconduct. The legal opinion on the use of subpoenas in administrative investigations was not provided for a year and a half after it was requested.

Complaint of Misconduct Initially Closed Without Investigation

9. The alternative investigation was not timely, thorough or complete. The alleged misconduct, closing the complaint without an investigation, occurred in July 2009 and the investigation did not conclude until October 2011. Moreover, the wrong person was treated as the only subject and the primary subject was treated as a witness. The investigators seemed to simply accept, without asking obvious but perhaps difficult questions, claims that the complaint was vague, was from a third-party complainant, was just an attorney "posturing," contained no apparent policy violations and that removal of the investigators from the case was "punishment" enough.
10. The alternative investigation failed to address or consider whether a potential conflict (his knowledge related to the subpoena) should have precluded "A" from closing the complaint without an investigation.
11. The alternative investigation failed to address or consider why an investigation was not conducted after the Fire Chief said a member's complaints about violations of his constitutional rights and privacy would be investigated.
12. The alternative investigation failed to fully comply with the FBOR and relevant collective bargaining agreements in relation to giving notice to subjects of an investigation.
13. The investigation progressed in a haphazard manner. The subject and witness were interviewed **before** a formal investigation was approved by the Fire Chief, **before** the (incorrect) subject was officially notified, and **before** the investigators were officially assigned. The second interview of the (incorrect) subject was used to affirm his statements in the prior interview where he had not been advised of FBOR his rights.

Alleged False Testimony Under Oath

14. A PSD supervisor was aware of the potential misconduct as early as August 2010, but a complaint was not entered in the CTS for six months. There is nothing in the files to explain why there was a six-month delay in entering such a serious complaint in the CTS.

15. The Department failed to conduct an investigation when confronted with conflicting information in recorded interviews and transcripts suggesting that a PSD investigator may have been untruthful while testifying under oath during a Board of Rights hearing.
16. The Department also failed to evaluate whether information concerning the testimony should be forwarded to law enforcement authorities.

Improper Use of Department Resources

17. The investigation was not timely, thorough or complete. Whether the subject was placed on notice that he could not use Department support services as a defense representative was not addressed, the subject was not interviewed and the summary of the investigation, with a recommendation that the facts be reviewed, was not submitted until **after** expiration of the one-year statute of limitations period.
18. Whether City manpower, resources and materials were misused at the request of a defense representative was not adequately investigated.
19. The Department did not conduct a timely, thorough or complete investigation of allegations that a union official misled another Department employee in an attempt to have unauthorized electronic access added to his Department identification card.

Report of Inappropriate Photographs

20. The complaint was properly forwarded to the alternative investigative process a week after being reported to the PSD, but the case was returned to the PSD the next week for investigation.
21. No investigative interviews other than the initial complaint intake interview were conducted.
22. Disciplinary action against the Fire Chief and the other firefighters in the photos was barred at the time the incident became known to the PSD because the statute of limitations period expired two years after the incident occurred in the late 1990s. The statute of limitations period on written reprimands (one year from discovery) expired at the end of September 2012.
23. After discussing the issue with her, the case was forwarded to the President of the Fire Commission for adjudication. The PSD assumed that this was the proper process given that the Fire Commission is the head of the Department. The Fire Commission President consulted with the City Attorney after receiving the file.

Timekeeping Issues

24. While the investigation report was submitted on September 15, 2010, the Department report summarizing the investigation and recommending a Board of Rights hearing to

determine whether the overtime was excessive was dated October 12, 2010, or two days before the expiration of the statute of limitations period. This is not timely and no further action was taken.

25. The investigation was not complete. The subject was not interviewed and the investigation did not provide information concerning potential defenses. While the amount of overtime was determined, the investigation did not address the specific reasons for why the defense representative's overtime was so much greater than the advocates' overtime, or if claims for overtime by the defense representative, and others who backfilled his position, were appropriate, reasonable and necessary.
26. Investigators received objections claiming that an investigation would amount to retaliation, would impinge on privileged conversations and would prevent union members from being represented by the representative of their choice. We found no evidence of follow-up by the Department to determine the validity of these objections.
27. The investigative files do not indicate whether investigators sought legal advice concerning the extent to which the Department could thoroughly question the defense representative and conduct a complete investigation concerning the claims for overtime. The Department does have a responsibility to ensure that the City's treasury is protected against unreasonable and excessive expenditures. On the other hand, a defense representative and the member he or she is representing have certain protections when preparing a defense, and have a strong interest in being fully prepared to defend the charges they face.
28. The Department did not have clear guidelines in place to monitor the amount of time defense representatives spent preparing for a Board of Rights hearing at the time this complaint was received. The Department reports that the ERO now approves a certain amount of time for the defense representative to use in preparing for a Board of Rights, and the defense representative is responsible for submitting weekly timesheets to the ERO. The defense representative may also seek approval for additional time if necessary.
29. The Department also failed to consider or evaluate whether information concerning the timekeeping should be forwarded to law enforcement authorities.

Defense Representative Assignment for a Board of Rights

30. The investigation was not completed within the one-year statute of limitations period and the Department did not correctly determine the actual statute of limitations date. Although the Department assumed the statute of limitations was triggered on May 4, 2010, the statute was triggered on April 22, 2010, at the latest, if not weeks earlier.
31. The Department's implementation of a new policy attempting to control the amount of time allotted to defense preparation, and the associated costs, resulted in serious claims of misconduct being lodged against the PSD Commander.

32. The facts disclosed by the investigation indicate that the PSD Commander was implementing the Fire Chief's policy limiting the amount of time defense representatives would have to prepare for a Board of Rights hearing. Additional investigation could have been conducted on other issues, such as how and when the new policy was communicated to this defense representative. If the defense representative had evidence to support his serious claims against the PSD Commander, it was not fully explained by the representative in his interview.
33. One of the primary complaints in this case was that the communication about the nine-day rule came from the PSD Commander rather than the Fire Chief. The Department reports that it has now adopted a procedure whereby communications about the nine-day rule are communicated by the ERO and the PSD is no longer involved. This is much more appropriate than having the PSD Commander engaging in such communications.
34. The Department has legitimate reasons to monitor, oversee and control expenses to ensure expenditures are only reasonable and necessary. Defense representatives also have a duty to take the time reasonably necessary to prepare a defense for the members they represent. The extent to which nine days is enough time to prepare for a Board of Rights hearing is beyond the scope of this review. However, the Department is not expected to write a "blank check," and we note that the Department's policy permits requests for additional time to prepare for a hearing. There is evidence that such requests have been made and granted.
35. All investigative activities conducted in response to this complaint against the Fire Chief were performed by Fire Department employees after the case was referred to the Department's alternative investigative process.
36. The Department's attempt to control the costs related to the appointment of a defense representative resulted in serious claims of misconduct being lodged against the Fire Chief.
37. The member on whose behalf the complaint of discrimination was made failed to provide evidence of discrimination in violation of the Department's EEO policies during his interview. The defense representative who filed the complaint alleging the Fire Chief engaged in discrimination and violated the member's due process rights did not provide evidence to support the claims, and was less than fully cooperative with investigators' attempts to interview him.
38. During the member's interview, investigators said they were only investigating the EEO issues and others would be investigating the other claims. The file materials do not explain how the Department was to address or did address the other issues raised in the complaint.
39. While the Department did not conduct an investigation beyond interviewing the member on whose behalf the complaint was filed, the Department did inform the defense

representative that he would be interviewed and the case would be reopened if he contacted the EEO Unit. There is nothing in the file suggesting the defense representative contacted the EEO Unit in order to be interviewed or provide further information to support his complaint.

40. This case contains objections made by defense representatives to PSD policies. These same objections are raised in multiple cases and the extent to which these objections were forwarded to the appropriate parties is unclear.
41. The witness was ordered to sign the admonition form despite the objections by his defense representative.
42. The statute date was incorrectly listed as August 4, 2010, in the case file. The Department likely learned of the complaint before August 4, 2010, and thus the statute date would also be prior to August 4, 2011.
43. It appears the Department sought advice from the City Attorney's Office regarding the proper procedure for investigating the Fire Chief in response to this complaint. There is no further information about what advice was provided, if any.

General findings:

44. The alternative investigative process has not been well managed.⁵⁸ The primary cause is that those tasked with managing the process simply do not have the large amount of time, expertise or experience it takes to ensure the process is well managed. It was reported that the process is not well defined or known throughout the Department.
45. The failure to properly manage the alternative investigative process results in a serious lack of accountability, a lack of public confidence and leaves the Department exposed to claims that certain members of the Department, including members of the PSD and union representatives, are not held to the same standards as all other members of the Department.
46. As compared to the Police Department, the Fire Department has very limited resources and alternatives available when an investigation of alleged misconduct is required. Even fewer resources are available when the PSD is unable to conduct the investigation due to a conflict.

Case-specific recommendations:

Investigation of Subpoena Service

1. The Department should ensure that it accepts and investigates third-party complaints to the same degree and extent as firsthand complaints. Additionally, the Department's

⁵⁸ For example, one person assigned to conduct an investigation later learned someone else had already been assigned the same investigation.

investigation should focus on the conduct engaged in by Department employees and avoid speculation about the complaining party's motives.

2. The City Charter should be amended to provide the Fire Department with the power to issue investigative subpoenas.

Complaint of Misconduct Initially Closed Without Investigation

3. The Department should take steps to ensure that PSD supervisors do not close cases without an investigation, especially when the Fire Chief has said that an investigation will be conducted. PSD supervisors who exceed their authority should be held accountable.

Improper Use of Department Resources

4. Clearly written guidelines concerning the use of Department resources from the Fire Chief provided to a defense representative at the time he or she is appointed may provide a short-term solution to educate defense representatives about using Department resources in defending a Board of Rights.
5. The improper use and abuse of Department resources and the making of misleading statements are serious allegations that must be thoroughly and completely investigated in a timely manner. If such allegations are sustained, appropriate corrective and/or disciplinary action should be taken consistent with disciplinary guidelines.

Report of Inappropriate Photographs

6. Complaints against a current Fire Chief, whether or not he or she was the Fire Chief at the time of the alleged incident, should be forwarded to the Mayor for investigation, adjudication and discipline. They should not be handled by Department members who report to the Fire Chief. Charter sections 508 and 231 provide the Mayor with the authority to appoint, review and remove the Fire Chief.
7. Without the appropriate Charter authority or other direction from the Mayor, cases involving alleged misconduct by the Fire Chief should not be forwarded to the Fire Commission for adjudication. The Commission does not have the express power to appoint, review and remove the Fire Chief.
8. The Charter should be amended to mirror the statute of limitations, and its tolling provisions, as set forth in the FBOR.
9. In some but not all cases, conducting an investigation of an old incident, even if no disciplinary action can be taken, may allow the Department to learn important lessons that are useful in improving procedures and policies still in place. Such corrective actions can prevent similar incidents from occurring in the future.

Timekeeping Issues

10. The Department should ensure that it seeks legal advice when there are objections and claims that investigations 1) constitute retaliation; 2) impinge on privileged conversations; 3) prevent members from being represented by the representative of their choice; or 4) otherwise interfere with union members' rights.
11. In the short term, the Department must ensure that the cost it incurs when appointing defense representatives is reasonable and necessary. The Department can be assisted in this endeavor with clearly written guidelines, continued monitoring and good legal advice.
12. In the long term, the Department should consider amending City Charter section 1060 so that it mirrors section 1070, which governs the Police Department's Board of Rights process. Charter section 1070, specifically subsection (m), provides the accused with a right to representation but **at his or her expense**. Therefore the Police Department is not obligated to pay for the defense representative's time spent preparing for and defending a Board of Rights. This change in the Fire Department's Board of Rights process would eliminate many of the problems associated with monitoring defense representatives' timekeeping.
13. Cases involving alleged timekeeping fraud must be fully investigated in order to determine whether such fraud occurred, and, if so, when exactly so that the correct statute of limitations period can be calculated. Furthermore, if the alleged conduct is sufficiently serious, the Department should consider forwarding the case to law enforcement authorities.

Defense Representative Assignment for a Board of Rights

14. In the short term, the Department should ensure, with the assistance of the City Attorney's Office, that its policies controlling the costs related to the appointment of defense representatives, and the way it manages such policies, appropriately and reasonably balance the need for responsible financial controls with the need of defense representatives to have sufficient time to properly prepare for a Board of Rights hearing.
15. In the long term, the City Charter should be amended to require that those facing a Board of Rights hearing pay their own expenses related to the hearing, which includes the cost of representation at the hearing.
16. Cases should be closed and appropriate notices should be sent to the complainant and subject in a timely manner.
17. Reducing the delay in convening a Board of Rights hearing, reducing continuances and reducing the delay between sessions of the hearing should reduce the cost to the Department.

18. The Department should refer misconduct complaints lodged against the Fire Chief to the Mayor for investigation and adjudication. The Department should avoid having the Fire Chief's subordinates conduct such investigations.
19. Members should not be ordered to sign the admonition form when there is a refusal or objection to signing.
20. In the short term, the Department should ensure, with the assistance of the City Attorney's Office, that its policies for controlling the costs related to the appointment of defense representatives, and the way it manages such policies, appropriately and reasonably balance the need for responsible financial controls with the need of defense representatives to have sufficient time to properly prepare for a Board of Rights hearing.
21. In the long term, the City Charter should be amended to require that those facing a Board of Rights hearing pay their own expenses related to the hearing, which includes the cost of representation at the hearing.

General recommendations:

22. Sufficient investigative, supervisory and management resources must be dedicated to an alternative investigative process to ensure that all members of the Department are held to the same high standards of behavior.
23. While an alternative investigative process is required, the Department should consider having the PSD conduct investigations of complaints against PSD personnel so long as no PSD supervisor is involved in the investigation either as a subject or a witness.
24. The Fire Chief should immediately adopt a practice of ensuring that he receives regular reports concerning the status of all cases assigned to the alternative investigative process, except those involving himself, to ensure that investigations are timely, complete and thorough, and that both the investigation and adjudication of such cases comply with Department standards.
25. The Fire Commission should ensure that the manner in which the Fire Chief manages the disciplinary process, including the alternative investigative process, is evaluated on a regular basis. This oversight requires the Commission have access to the same information relied on by the Fire Chief to make disciplinary decisions, and have discussions about the management of specific complaints in order to evaluate compliance with Department policies.⁵⁹
26. The PSD should be sufficiently staffed, supervised and managed by professionals with substantial training and experience in the following areas: conducting, supervising and managing administrative and/or criminal investigations; prosecuting disciplinary cases; and complying with the laws governing such matters. The role and responsibility of

⁵⁹ Authority to engage in such oversight is found in Charter sections 500, 506 and 509, as well as numerous City Attorney opinions, reports and advice memoranda.

sworn personnel in the PSD should be limited to supporting professional investigators, prosecutors, supervisors and managers, and providing subject matter expertise relating to emergency services.

27. If an investigation is referred to an outside investigator, the Department must verify that the individual has the required experience and expertise to conduct a complete, timely and thorough investigation in compliance with the FBOR and Department policies. The Department must also supervise all outside investigators to ensure investigations meet those standards.
28. Investigations must proceed in a timely manner, and investigators, their supervisors and ultimately the Fire Chief must be held accountable if they are not. The first step in every case must be determining the correct statute of limitations date. Then deadlines should be set and met for each important milestone in the investigation, including notifying the subject of the investigation, assigning the investigators, gathering all relevant evidence, conducting interviews, completing the investigation and executive officer reports, filing charges if the complaint is sustained and notifying the subject and complainant of the resolution. Emphasis should also be placed on the following: identifying potential violations of law, rules and policy; avoiding the compromise of potential criminal charges; and ensuring full compliance with due process and other statutory requirements. Most importantly, the investigation must be completed and charges must be filed before the statute of limitations period has expired.
29. If investigators, supervisors or managers discover additional allegations of misconduct during the course of an investigation, those allegations must be entered as a separate complaint in the CTS as soon as possible and an investigation must be initiated.
30. All relevant investigative materials (including complaints, subject notification letters, interview recordings, final investigation reports, etc.) should be maintained in a case file (hard copy and/or in the CTS) in a single location. The files for the cases reviewed for this report were found in multiple locations throughout the Department. Some cases had files and documents in multiple locations, and the individuals who maintained some of these records had no knowledge that others also had files on the same case.
31. The Department should provide ongoing training for supervisors on the FBOR and collective bargaining agreements in order to increase overall compliance. This is especially true with respect to questioning potential subjects about allegations made against them and notifying individuals they are the subjects of an investigation. Supervisors who violate these standards, especially after such training, should be held accountable.
32. Investigators must make every effort to interview all complainants, subjects and relevant witnesses. In seven of the 12 cases reviewed for this report, investigators failed to interview the subject, and in 10 cases they failed to interview the complainant. This failure to gather information from the primary individuals involved seriously undermines the factual conclusions reached, and in some cases prevents such conclusions from being

made all together. Those complainants, subjects and witnesses who fail to cooperate with attempts to be interviewed should be held accountable.

33. The Department must adopt clear rules for how defense representatives use Department resources. This includes the use of printing resources and office access as well as using variable staffing hours or working overtime to prepare for Board of Rights hearings. Furthermore, when such policies are violated, they must be reported.
34. With respect to the time used by defense representatives to prepare defenses for Board of Rights hearings, the long-term solution is to amend the City Charter so that the Department is not responsible for paying the expenses related to the work of a defense representative.
35. The Department must have a credible process for the complete, timely and thorough investigation of alleged misconduct by those assigned to the PSD.⁶⁰

Investigations involving the Fire Chief:

Unlike complaints against PSD personnel or union officials, complaints against the Fire Chief should not be investigated by the Fire Chief's subordinates. This creates a clear conflict of interest as anyone within the chain of command ultimately reports to the Fire Chief. Investigations of the Fire Chief by one of his subordinates may raise substantial questions about the integrity of the investigation that can and should be avoided.

The more appropriate course of action is to submit complaints against the Fire Chief to the Mayor for investigation and adjudication, as it is the Mayor who has the authority to appoint, evaluate and remove the Fire Chief.⁶¹ The Mayor would then have the option of hiring an outside investigator or perhaps having the City Personnel Department conduct the investigation.⁶² The Mayor could also delegate certain responsibilities to the Fire Commission.

⁶⁰ The Department has considered at least four options for conducting such investigations, which include: 1) the current internal process, 2) referring all such investigations to the Police Department's Internal Affairs Group or Inspector General, 3) retaining outside contractors to perform such investigations, or 4) having the Independent Assessor conduct the investigations.

⁶¹ City Charter section 508.

⁶² The Department reports there was no positive response from the Police Commission's Inspector General when an effort was made to determine if investigations of misconduct complaints lodged against the Fire Chief could be investigated by that office. A former PSD Commander reports that the Police Department's Internal Affairs Group responded positively to the suggestion that alternative investigations be conducted by the Police Department.

APPENDIX 1

ALTERNATIVE INVESTIGATIVE PROCESS POLICIES MEMORANDUM SUMMARY

According to the Department's October 28, 2009 memorandum summarizing the alternative investigative process, the PSD Commander would determine the necessity of referring a case to the alternative investigative process by taking into consideration the following conditions:

1. PSD members have been alleged of activities that, if true, would be considered misconduct.
2. The investigation, if conducted by PSD, would create a conflict of interest that would potentially impact the Division's ability to be impartial (e.g., complaints received about UFLAC or COA Board Members).

Once it is determined that a case would be referred, the Fire Chief and Independent Assessor would be notified. Currently, the Independent Assessor is not notified when a case is referred to the alternative investigative process. Then the appropriate Chief Deputy would be assigned to manage the investigation, taking the place of the PSD Commander. He or she would also be responsible for serving as the *Skelly* hearing officer and make any proposal for discipline to the Fire Chief. This Chief Deputy selection would include consideration of any conflicts of interest and the complainant's chain of command.

After receiving a copy of the original complaint, a list of qualified investigators and a list of qualified chief officers,⁶³ the Chief Deputy would select the investigative team as well as a chief officer to take the place of the Internal Affairs Commander. At least one member of the investigative team must be of a rank equal to or higher than the subject member, and where the PSD is named as the subject, the investigative team must include an assistant chief.

At this point the scope of the Independent Assessor's role would also be determined. This may be simply reviewing the case upon completion or participating as a "real time" moderator with full access to the investigation, including investigative strategy meetings, interviews of witnesses/subjects, completion of reports and the adjudication process. Currently, the Independent Assessor plays no role in the alternative investigative process.

In selecting the investigative team, the Chief Deputy would take into consideration training and experience, rank, availability, current caseloads and a potential investigator's current affiliation with the PSD. With respect to the parameters and policies governing how the investigation is conducted, the memorandum only states that investigators "will comply with all applicable laws and provisions set forth in the City Charter, MOUs, Firefighters Bill of Rights, etc." Finally, the selected chief officer (acting as the Internal Affairs Commander) would complete the executive summary report and participate in the *Skelly* hearing, as necessary.

Clerical staff in the PSD would prepare required forms for cases referred to the alternative investigative process, and the PSD Moderator would close the entry in the CTS and forward the

⁶³ A list of qualified investigators and chief officers is attached to the October 28, 2009 memorandum.

appropriate disposition notifications. If any of these personnel were implicated in the complaint, other appropriate staff would assist in these duties.

APPENDIX 2

INVESTIGATION TIMELINE

2009

April 29, 2009 – Member resigns [Board of Rights ends]
July 16, 2009 – Incident date [“A” closes complaint without investigation]
October 21, 2009 – Discovery date [Independent Assessor verbally informs the PSD of the closed complaint]
November 23, 2009 – Written notice received

2010

March 8, 2010 – CTS entry
April 22, 2010 – “A” interviewed [as subject]
May 19, 2010 – First interview of “B” [as witness, no admonition]
July 16, 2010 – CTS statute date [wrong]
July 17, 2010 – Advocate request sent to FC
September 2010 – Forwarded to the alternative investigative process
September 3, 2010 – “B” notified he is a subject
September 9, 2010 – Investigators assigned
October 18, 2010 – Second interview of “B” [as subject]
October 21, 2010 – 1-year statute date
December 16, 2010 – Investigation report complete

2011

May 29, 2011 – Investigation supervisor’s report complete
October 3, 2011 – Closure notice to “B”
October 14, 2011 – Complaint closed