

September 17, 2013

September 4, 2013

BOARD OF FIRE COMMISSIONERS
FILE NO. BFC 13-109

TO: Board of Fire Commissioners
FROM: Stephen Miller  Independent Assessor
SUBJECT: *Review of the Fire Department's Disciplinary 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 Withdrawn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

SUMMARY

On March 5, 2013, the Fire Commission directed us to conduct a review of the current disciplinary process for sworn members of the Fire Department. The primary objective was to determine the extent to which the current process complies with prior audit recommendations, applicable laws, collective bargaining agreements, Fire Commission directives and other standards.

This *Review of the Fire Department's Disciplinary Process* begins with a summary of historical and background information and a review of staffing in the Professional Standards Division. The bulk of this report provides information concerning the five major parts of the current disciplinary process, which include: Complaint Tracking Systems, Investigative Process, Deciding Disciplinary Penalties, *Skelly* Process and Disciplinary Appeals and Boards of Rights.

We generally found that the disciplinary process complies with applicable standards. Many of the complaints we heard about the process can be attributed to the failure to deviate from the standards adopted in response to negative audits and expensive litigation. We express concerns throughout this report and provide a number of recommendations.

RECOMMENDATION(S)

That the Board:

1. Receive and file the *Review of the Fire Department's Disciplinary Process*.
2. Direct the Commission Executive Assistant to transmit this report to the City Council for its consideration.

3. Direct the Fire Department to provide the Board of Fire Commissioners with a written response in 60 days describing how the Department responds to and/or intends to implement the recommendations.

DISCUSSION

We set forth a number of recommendations at the end of our report that are intended to increase the effectiveness of the Department's disciplinary process while at the same time reducing the risk of litigation and outside intervention. Recently negotiated conciliation agreements with the U. S. Equal Employment Opportunity Commission serve as a reminder of the need to properly manage a credible and effective disciplinary process. Some of our key recommendations include the following:

1. The Fire Department should not modify or change any aspect of the Department's disciplinary process without the full knowledge and consent of the Fire Commission.
2. The Mayor's Office and Fire Commission should ensure that the manner in which the Fire Chief manages the disciplinary process is evaluated on a regular basis. This oversight requires that the Commission has access to the same information relied on by the Fire Chief to make disciplinary decisions, so the Commission may determine whether the Fire Chief is properly executing his or her duties, if it needs to issue corrective instructions, and whether the Commission needs to make changes to the Department's rules, regulations, policies and procedures.
3. The Department should develop a training and evaluation process to ensure that every Department manager and supervisor provides consistent, fair, effective and timely supervision, including counseling, instruction and/or verbal admonishments, without violating members' due process rights.
4. The Department should ensure that its policies, procedures, rules, regulations and training promote and/or require the prompt reporting of suspected misconduct. The Department should continue to make information about the complaint process available to the public and its employees, and should continue to accept verbal, unsigned and anonymous complaints. The Department should also continue to allow anonymous complainants to remain anonymous.
5. The Department should adopt programs that effectively reduce the frequency and severity of work environment issues and conflicts.
6. The Department should employ a sufficient number of non-sworn staff with the demonstrated expertise, experience, training and proficiency to conduct, supervise and manage investigations, prosecute disciplinary hearings and effectively manage the Department's disciplinary system. The role of sworn personnel should be limited to providing support and subject matter expertise.

7. The Department should ensure that the complaint and disciplinary tracking systems are fully capable of not only tracking complaints and disciplinary actions effectively and efficiently but are also able to provide accurate and detailed management reports. The Management Analyst position that was authorized more than two years ago must be filled in order to accomplish this goal. The systems should also be used to reduce and eliminate work environment issues and the risk of litigation.
8. The Department should eliminate agreements and/or past practices that: 1) do not comply with industry practices; 2) prevent investigators from controlling the progress of investigations; 3) contribute to the Department being unable to complete disciplinary actions in a timely manner; 4) are based on mistaken assumptions of law; 5) reduce management rights; 6) fail to ensure that firefighters and their supervisors and managers are held to standards that are higher than the standards for civilian employees; 7) expand rights and privileges beyond those provided by the voters; and 8) threaten the reliability and integrity of investigations.
9. The City Charter should be amended to ensure that provisions governing the discipline of firefighters are more consistent with the FBOR and Charter provisions governing the discipline of police officers. This would require amendments related to expanding disciplinary options, tolling of the statute of limitations, paying for defense representatives, and *ex parte* communications. The Charter should also be amended to allow an Administrative Law Judge or hearing officer to preside over Board of Rights hearings.
10. The Department should ensure that the chain of command places a greater priority on conducting thorough and complete field investigations in a timely manner. This includes an emphasis on training field investigators and their supervisors, using the evaluation process to encourage accountability, increasing variable staffing hours and improving the reporting template in CTS. The chain of command should also be satisfied with the quality of field investigations and recommendations before submitting them to the PSD for adjudication.
11. The Department must adopt an informal hearing procedure for the appeal of written reprimands without further delay.

On August 9, 2013, the Fire Department was provided a draft of this report and asked to conduct a review and provide any comments and/or corrections as deemed necessary to ensure accuracy and fairness. The Department's comments were incorporated, or at least taken into consideration, in finalizing and publishing this report. On August 27, 2013, the Department was authorized to provide a draft of this report to the Department's General Counsel for review. On September 4, 2013, the Department provided notice that it had no further comments or corrections.

Attachment

LOS ANGELES BOARD OF FIRE COMMISSIONERS



REVIEW OF THE FIRE DEPARTMENT'S DISCIPLINARY PROCESS



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Independent Assessor

September 4, 2013

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September 4, 2013

Honorable Board of Fire Commissioners
City Hall East, Room 1840
200 North Main Street
Los Angeles, CA 90012

Dear Honorable Members of the Board of Fire Commissioners:

A Review of the Fire Department's Disciplinary Process (Review) is submitted to you.

Negative audits by the City Controller and the Personnel Department in 2006, and expensive litigation involving allegations of retaliation, hazing, harassment and discrimination led to the current disciplinary process. Payments on claims involving these issues in the Fire Department amounted to almost \$18 million.

It is more important than ever that the Fire Department have an effective and credible disciplinary process. In the last two years, the Department signed three conciliation agreements with the U.S. Equal Employment Opportunity Commission (EEOC) which require that the Department comply with federal laws prohibiting employment discrimination, sexual harassment, racial discrimination and retaliation. (These three agreements resolved claims that were brought before the current system was put in place.) They also require that the City pay more than \$1 million to compensate the affected members of the Fire Department.

Failure to comply with the conciliation agreements can result in expensive and embarrassing litigation as well as other negative consequences. The Department must make every effort to avoid this outcome. To ensure that complaints are handled properly, the Department is required to provide highly confidential investigative information to the EEOC upon request.

As head of the Department, the Fire Commission has the ultimate authority and responsibility over the Fire Department's disciplinary system and must ensure compliance with the conciliation agreements. To execute these duties, it is imperative that the Commission have access to the same confidential personnel information available to the EEOC.

Generally, our *Review* found that the disciplinary process complies with prior audit recommendations, applicable laws and other standards. However, this *Review* has significant limitations.

We were directed to not examine how policies and procedures were applied in specific cases. The focus of this *Review* was largely limited to what we were told about the process. Only specific audits, many of which are suggested by this *Review*, will verify the accuracy of the information provided to us. However, this *Review* does provide an informative history of the discipline process and an overview of what the stakeholders have to say about the process. We have also included a few of our own thoughts and recommendations on the issues that were raised.

It is critical that the Fire Commission and Fire Department receive strong support from the Mayor, City Council and City Attorney to ensure that the Department has an effective and credible disciplinary process. This is especially true given the conciliation agreements with the EEOC. The City and Fire Department simply cannot afford to fail.

The level of cooperation provided by the Fire Department during this review has been excellent. We also extend our sincere appreciation to the many people who took so much time to speak with us concerning these issues.

Finally, and once again, 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,

A handwritten signature in black ink, appearing to read 'Stephen Miller', written over a horizontal line.

Stephen Miller
Independent Assessor

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EXECUTIVE SUMMARY

This review of the Fire Department's disciplinary process begins with a summary of historical and background information and a review of staffing in the Professional Standards Division. The bulk of this report provides information concerning the five major parts of the current disciplinary process which include:

- Complaint Tracking Systems
- Investigative Process
- Deciding Disciplinary Penalties
- *Skelly* Process
- Disciplinary Appeals and Boards of Rights

We generally found that the disciplinary process complies with applicable standards. Many of the complaints we heard about the process can be attributed to the failure to deviate from the standards adopted in response to negative audits and expensive litigation. We express concerns throughout this report and provide a number of recommendations.

Objectives, Scope and Methodology

On March 5, 2013, the Fire Commission directed us to conduct a review of the current disciplinary process for sworn members of the Fire Department. The primary objective was to determine the extent to which the current process complies with prior audit recommendations, applicable laws, collective bargaining agreements, Fire Commission directives and other standards.

The scope of the review was limited to reporting on the process, policies and procedures related to discipline. While we provide some general information about cases and investigations, we were directed not to examine how the policies and procedures were applied in specific cases. Without a more detailed review of actual cases, or independent verification in other areas, we are unable to verify the accuracy of some of the information provided to us.

We interviewed union officials as well as other sworn and civilian members of the Department. After each interview we summarized the comments and concerns in writing and asked that each person we spoke with confirm that the comments were complete and accurate. We presented the comments and concerns to the Professional Standards Division to obtain their response.¹ All comments are either included in the body of our report or attached as appendices. We also reviewed a substantial amount of written material and conducted research as indicated in this report.

¹ We edited the comments submitted to us in an effort to eliminate typographical errors, increase understanding and provide clarity. All but two of the individuals who provided comments agreed to our editing suggestions. Those unedited comments are included in the report as submitted.

Summary of Results

The Fire Department's chain of command was largely removed from managing the Department's disciplinary process following negative audits and expensive litigation. The disciplinary process was centralized in the Professional Standards Division (PSD) which reports directly to the Fire Chief, and ultimately to the Fire Commission as the head of the Department.

Professional Standards Division Staffing

Prior audits strongly recommended staffing the PSD with civilians who possess the necessary expertise, experience and training. While civilian staffing has been increased, staffing is still not adequate to ensure that investigations are completed in a timely and thorough manner. The average caseload in the PSD is substantially higher than at the Police Department. Inadequate staffing also results in long delays in prosecuting Board of Rights hearings.

The number of civilian investigators has not kept pace with the increasing number and complexity of EEO cases. This is of particular concern because of the Department's history of alleged retaliation, hazing, harassment and discrimination that resulted in negative audits and expensive litigation. The Department needs programs to reduce the frequency and severity of work environment issues. While a Management Analyst position was authorized to provide critical statistical information and trend analysis to aid the Department in targeting corrective actions, the Managed Hiring Committee has not approved the filling of the position for more than two years.

Complaint Tracking Systems

The Complaint Tracking System (CTS) was established after audits found that the Fire Department failed to maintain even minimal records of discrimination complaint activity. The prevalence of harassment, hazing and hostile work environment complaints was thought to be greater than what was being reported through channels. This was attributed to a fear of retaliation if complaints were reported, the lack of a tracking system and an inability to investigate such complaints.

It was determined that the Fire Chief and bureau chiefs were unable to identify the number of disciplinary actions taken against firefighters at the fire-station level, nor whether the same offense received the same level of discipline. There was also inconsistency in what was being recommended for formal investigations and a major problem with complaints being "squashed" by station supervisors.

We are deeply troubled by suggestions that complaint information and instructions should not be made available on the Department's website, that the Department should refuse to accept or investigate anonymous complaints or that the Department only accept signed complaints. These suggestions are antithetical to open government, transparency, accountability and effective management. Adopting some of these suggestions may only increase the City's exposure to litigation.

The purpose of accepting all complaints is to protect the public and Department employees, and to provide the Department with an opportunity to initiate timely corrective action. The fact that an investigation may ensue is not a reason to avoid filing a complaint. There is no obligation to advise the accused of the right to representation before or even at the time a complaint is filed. An initial “fact finding” inquiry is not required. The extent to which complaints are investigated, particularly anonymous complaints, is determined by the amount and quality of information provided.

The standard for deciding whether to enter a complaint into the CTS is not whether a particular supervisor is subjectively “bothered” by the conduct. The standard is an objective one: whether the known facts, if true, would constitute misconduct for which the disciplinary guidelines provide a possible penalty.

The total number of complaints has steadily declined since 1,165 complaints were filed in 2009. In 2012, a total of 658 complaints were filed. The PSD reported that since the CTS was created in 2008, just over 20% of all complaints were determined by the PSD to be non-disciplinary and closed before an investigation was conducted. Almost 9% of all complaints were later determined to be non-disciplinary after an investigation was completed.

The requirement that suspected misconduct be reported in the CTS does not remove the chain of command and supervisors from their responsibility to supervise. The *Firefighters Procedural Bill of Rights Act* (FBOR) has changed how the Department handles discipline. However, the law does permit non-disciplinary counseling, instruction and verbal admonishments. Such supervisory contacts are permitted with or without a CTS complaint, so long as due process violations do not occur. Such supervision should and must occur.

Investigative Process

Prior audits found that investigations were inadequate, inconsistently handled, poorly tracked or documented and subjective. The use of inexperienced and untrained sworn personnel to conduct investigations on two-year rotational special duty assignments did not assure consistent, comprehensive and independent investigations. It was also found that the use of written statements, rather than face-to-face interviews, was not sufficient.

The PSD Commander reviews all complaints and decides whether to assign a case to the PSD or to the field for investigation. Allegations related to job performance, behavior, punctuality, absenteeism, driving, parking and lost equipment are typically referred to the field for investigation. More serious complaints are referred to the PSD for investigation.

Most investigations are referred to the field for investigation. Field investigators are selected by the chain of command, and are usually the subject’s direct supervisor. The chain of command has the authority to monitor and supervise field investigations to ensure they are completed to the satisfaction of the chain of command.

Generally, investigations involving sworn members of the Department must be completed within one year after discovery of the alleged misconduct. The City Charter does not permit tolling of

the statute of limitations for firefighters as it does for police officers. The PSD reported that between 2009 and 2012, a total of 224 cases were closed as out of statute. Of those, 83.5% involved non-PSD investigations and 16.5% were investigations assigned to the PSD.

Collective bargaining agreements require that Department members be advised they are under investigation when an investigator is assigned. The FBOR does not. Witnesses and subjects of an investigation are advised of the nature of the investigation at the time an interview is conducted. Providing this notice at the time of the interview, not before, is a sound investigative practice.

The Department uses admonition forms at the time of interviews to provide information to witnesses and subjects of an investigation. These forms are substantially similar to the forms used by other public safety agencies. The City Attorney has opined that the forms are not subject to the “meet and confer” process, and the court of appeal recently confirmed that not all investigative procedures are subject to negotiation because discipline is a management right.

Witnesses and subjects are entitled to be represented at interviews and interrogations. In a case involving the Fire Department, the court reiterated that the right to representation is not unlimited. The court confirmed that a Department member must choose a representative who is reasonably able to represent the employee at a reasonably scheduled interview.

More than four years ago, the Department made a very poor decision when it agreed to give representatives up to seven business days to schedule interviews. There are a number of problems with this seven-day rule including: 1) it does not comply with the industry practice; 2) it prevents investigators from controlling the progress of investigations; 3) it contributes to the Department being unable to complete disciplinary actions within the one-year statute of limitations; and 4) it is based on the mistaken assumption that the Department is obligated to accommodate the representative’s schedule.

Deciding Disciplinary Penalties

Complaints that discipline is too harsh are not new. Similar complaints resulted in the Department negotiating disciplinary guidelines for sworn personnel that are now generally lower than the civilian standards the Department relied on before 2006.

It would be one thing to claim that discipline is too harsh if the Department was imposing discipline in excess of the disciplinary standards that were negotiated. However, the PSD reports setting penalties that substantially comply with the standards agreed to by the unions and long standing Department practices.

The Department appears to consistently consider the same penalty setting factors used by the Federal Government when setting disciplinary penalties. These factors consider both mitigating and aggravating information.

The PSD reported that less than 12% of cases investigated between 2009 and 2012 resulted in sustained allegations and punitive action. Less than 5% of all complaints resulted in a

suspension or referral to a Board of Rights. More than 60% of all punitive actions were written reprimands issued by the immediate supervisor.

Supervisors and the chain of command were removed from adjudicating complaints because negative audits and expensive litigation found inconsistent and arbitrary discipline was being imposed. The problems were documented at virtually every level of the Department.

While supervisors were removed from adjudicating complaints, the chain of command does have the authority to review investigative recommendations made to the PSD to ensure they are appropriate and consistent. The chain of command also has the authority to ensure that supervisors are providing timely and consistent counseling, instruction and verbal admonishments, so long as they do so without violating due process rights.

The PSD recommended that the Fire Commission consider a change in disciplinary philosophy and proposed alternatives to the formal disciplinary process. The Commission authorized further work in developing these proposals. The Department's disciplinary system, including any alternatives to formal discipline, should comply with and advance the City's policy of fair, equitable and progressive discipline.

***Skelly* Process**

The *Skelly* process permits an affected employee to request a review of proposed discipline before it is imposed. More than seven years ago, the Controller recommended that the Department stop negotiating disciplinary penalties at *Skelly* hearings. Three years ago, we found that the Department was continuing the practice, as well as committing other *Skelly* violations. A *Skelly* hearing is not a settlement conference and is not intended to provide an opportunity to negotiate discipline.

Since then, the Department has developed *Skelly* procedures and a training program that fully addresses the concerns raised by the Controller in 2006 and that we raised again in 2010. So long as the Department is fully complying with these procedures and the *Skelly* officer training program, no further procedural changes are required at this time.

Disciplinary Appeals and Boards of Rights

All employees have a right to appeal discipline and the Department refers cases involving sworn members to a Board of Rights when a dismissal or suspension of sworn members exceeding 30 days is sought.

Three years ago we expressed concern about the failure to complete Board of Rights hearings in a timely manner. The problem has only gotten worse. The cause of the problem is not the level of discipline being sought but rather the failure to provide the staff necessary to handle the large number of appeals resulting from discipline imposed in compliance with Department standards.

There is little merit to the claim that penalties determined by Boards are excessive due to the Boards not using the Department's disciplinary guidelines. In the 39 Boards convened since

November 2008, penalties were increased in three cases. Penalties were reduced by Boards after a hearing in 18 cases. If anything, it appears the failure of Boards to use the Department's guidelines may work in the accused's favor (which may explain, in part, the large number of appeals).

We encourage the Department to comply with the disciplinary guidelines at every step of the process, whether it be when a penalty is first calculated, at a *Skelly* hearing, at a Board of Rights or when the Fire Chief decides whether to accept a Board of Rights' recommendation. We strongly favor a system that results in known, predictable and consistent discipline.

Due process does not require that the taxpayers pay the salary of the Department member appointed to defend a firefighter accused of misconduct. This benefit is a right and privilege provided by the Charter. The Department placed limits on the amount of time that could be used to prepare for a Board of Rights after a defense representative claimed he spent 1,700 hours to prepare for a hearing. Until the Charter is changed, the Department should ensure, with the City Attorney's assistance, that the need for responsible financial controls is appropriately balanced with the need of defense representatives to have sufficient time to properly prepare for hearings.

No legal authority supports the claim that defense representatives should be trained by the Department or provided with cars, cell phones or print services. The Board of Rights process is not a partnership or team effort analogous to firefighting. It is, by its very nature, an adversarial proceeding. The Department should not expose the City to a risk of litigation by providing confidential information about pending hearings to the unions when a member fails to select a union member as a defense representative.

The Department's civilian employees and Los Angeles police officers have no right to seek binding arbitration following a disciplinary appeal. The voters did not provide for binding arbitration following a Board of Rights hearing when adopting the City Charter's disciplinary procedures for firefighters. A Petition for Writ of Mandamus in superior court provides an adequate remedy and protection against abuse.

The process for appealing a written reprimand remains undefined more than five years after the FBOR categorized them as a form of punitive action. The Department has a backlog of 82 requests to appeal written reprimands. The Department must resolve issues and move forward to implement a process for appealing written reprimands without further delay. In addition to appropriate and consistent supervision, written reprimands play a critical role in the disciplinary process.

Key Recommendations

We set forth a number of recommendations at the end of this report that are intended to increase the effectiveness of the Department's disciplinary process while at the same time reducing the risk of litigation and outside intervention. Recently negotiated conciliation agreements with the U. S. Equal Employment Opportunity Commission serve as a reminder of the need to properly manage a credible and effective disciplinary process. Some of our key recommendations include the following:

1. The Fire Department should not modify or change any aspect of the Department's disciplinary process without the full knowledge and consent of the Fire Commission.
2. The Mayor's Office and Fire Commission should ensure that the manner in which the Fire Chief manages the disciplinary process is evaluated on a regular basis. This oversight requires that the Commission has access to the same information relied on by the Fire Chief to make disciplinary decisions, so the Commission may determine whether the Fire Chief is properly executing his or her duties, if it needs to issue corrective instructions, and whether the Commission needs to make changes to the Department's rules, regulations, policies and procedures.
3. The Department should develop a training and evaluation process to ensure that every Department manager and supervisor provides consistent, fair, effective and timely supervision, including counseling, instruction and/or verbal admonishments, without violating members' due process rights.
4. The Department should ensure that its policies, procedures, rules, regulations and training promote and/or require the prompt reporting of suspected misconduct. The Department should continue to make information about the complaint process available to the public and its employees, and should continue to accept verbal, unsigned and anonymous complaints. The Department should also continue to allow anonymous complainants to remain anonymous.
5. The Department should adopt programs that effectively reduce the frequency and severity of work environment issues and conflicts.
6. The Department should employ a sufficient number of non-sworn staff with the demonstrated expertise, experience, training and proficiency to conduct, supervise and manage investigations, prosecute disciplinary hearings and effectively manage the Department's disciplinary system. The role of sworn personnel should be limited to providing support and subject matter expertise.
7. The Department should ensure that the complaint and disciplinary tracking systems are fully capable of not only tracking complaints and disciplinary actions effectively and efficiently but are also able to provide accurate and detailed management reports. The Management Analyst position that was authorized more than two years ago must be filled in order to accomplish this goal. The systems should also be used to reduce and eliminate work environment issues and the risk of litigation.
8. The Department should eliminate agreements and/or past practices that: 1) do not comply with industry practices; 2) prevent investigators from controlling the progress of investigations; 3) contribute to the Department being unable to complete disciplinary actions in a timely manner; 4) are based on mistaken assumptions of law; 5) reduce management rights; 6) fail to ensure that firefighters and their supervisors and managers are held to standards that are higher than the standards for civilian employees; 7) expand

rights and privileges beyond those provided by the voters; and 8) threaten the reliability and integrity of investigations.

9. The City Charter should be amended to ensure that provisions governing the discipline of firefighters are more consistent with the FBOR and Charter provisions governing the discipline of police officers. This would require amendments related to expanding disciplinary options, tolling of the statute of limitations, paying for defense representatives, and *ex parte* communications. The Charter should also be amended to allow an Administrative Law Judge or hearing officer to preside over Board of Rights hearings.
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11. The Department must adopt an informal hearing procedure for the appeal of written reprimands without further delay.

REVIEW OF REPORT

On August 9, 2013, the Fire Department was provided a draft of this report and asked to conduct a review and provide any comments and/or corrections as deemed necessary to ensure accuracy and fairness. The Department's comments were incorporated, or at least taken into consideration, in finalizing and publishing this report. On August 27, 2013, the Department was authorized to provide a draft of this report to the Department's General Counsel for review. On September 4, 2013, the Department provided notice that it had no further comments or corrections.

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.

HISTORICAL BACKGROUND INFORMATION

Creation of the current disciplinary process took place between early January 2006 and mid-2008. Audits by the City Controller (*Review of the Los Angeles Fire Department Management Practices*) and Personnel Department (*Audit of Fire Department Selection and Employment Practices*) were issued in January 2006.² These were followed by the Department's *Audit Action Plan* in April 2006, and the stakeholders' process which began in July 2006 and continued for approximately one year.

In addition to negative audits, litigation involving allegations of retaliation, hazing, harassment and discrimination had a major impact on developing the current disciplinary process. From Fiscal Year 2002 to mid-2011 the payments made on Fire Department claims and lawsuits involving these issues amounted to almost \$18 million.³

The Professional Standards Division (PSD) was officially established on January 1, 2008. The Personnel Department also published a second report (*Development of a Professional Standards Division within the Los Angeles Fire Department*) in January 2008. The Fire Commission approved the Department's *Audit Implementation Plan* in March 2008, and the Controller issued a *Follow-Up Audit of LAFD's Management Practices* in May 2008.

This section reviews the major audits, plans and reports that are directly related to creating the current disciplinary process, and highlights a few of the most important issues. Appendix 1 provides a brief historical timeline.

2006 City Controller audit:

On January 26, 2006, the City Controller published its *Review of the Los Angeles Fire Department Management Practices*. One of the four main problem areas identified in the audit was the complaint and disciplinary process.

The Controller's audit found that complaint handling and disciplinary practices were poorly documented, inadequately tracked, inconsistent and perceived to be unfair. Workplace harassment, hazing and hostile work environments were more prevalent than reported. This was due to a general fear of reporting complaints, the inability to investigate such complaints and the lack of a system to properly track complaints. Investigative and disciplinary actions on these and other complaints were inconsistently handled by the chain of command (beginning at the station level through the Operations Commander), poorly tracked and subjective. The broad range of possible punishments led to results that were perceived as unfair and based on favoritism.

² The audits from the Controller and Personnel Department correctly note that the Fire Department was the subject of an extensive audit by the Personnel Department in 1995. In 2006, the Personnel Department found that the "failure to effectively implement the City Council recommendations from 1995 is a significant contributing factor in the continued presence of inappropriate and discriminatory workplace behavior in the LAFD." [Emphasis in original.] The Controller's audit suggested that interest in the 1995 plan was initially active and strong but waned over time.

³ Please see our April 26, 2012 *Audit and Assessment of Fire Department Litigation*.

The Controller found that formal investigations were poorly documented, lacked independence and conducted by inexperienced and untrained fire captain investigators on two-year special duty assignments. The audit expressed concern about the appearance of a conflict in investigator independence because investigators would return to work with those they had been investigating. Pre-disciplinary *Skelly* hearings were poorly documented, and there was inconsistency in setting disciplinary penalties because the Department would routinely propose excessive penalties in order to increase its negotiating position.

The Controller's major recommendations included: 1) establish a separate EEO investigative function outside the LAFD chain of command; 2) create a comprehensive centralized mandatory complaint tracking and reporting system capable of providing case-status feedback to supervisors; 3) develop a standard set of disciplinary penalty guidelines for sworn firefighters; 4) eliminate the practice of proposing greater discipline to create a better bargaining position for negotiating lower punishments; 5) allow *Skelly* hearings to be continued when new information is presented and fully document all decisions; 6) establish a separate Internal Affairs Division within the LAFD with experienced investigative staff permanently assigned to the section; and 7) have the Internal Affairs Division report to both the Fire Chief and Fire Commission, but otherwise be removed from the chain of command.

2006 Personnel Department audit:

On January 31, 2006, the Personnel Department released its *Audit of Fire Department Selection and Employment Practices*. The audit cited problems with the complaint and disciplinary process, among other areas.

The Personnel Department found that the LAFD's system failed to meet the City's policy standard of fair, equitable and progressive discipline. The discipline system was found to be marked by inadequate investigations, poorly trained advocacy and arbitrary penalties; deficiencies that were both pervasive and systemic. Stakeholders, who were interviewed by the Personnel Department as part of the audit, identified the system as "arbitrary," "biased" or "rigged."

The Personnel Department also found that discrimination complaints had not been handled effectively, and that the Department had failed to maintain "even minimal records of internal or external discrimination complaint activity." This was particularly true of discrimination complaints that were informally resolved in the field. Another important finding was that though the EEO Section (which reported to the Fire Commission) existed, it had no authority or responsibility for investigating complaints. Finally, the Board of Rights process was reported as being marked by conflicts of interest, favoritism and nepotism, as well as excessive both in leniency and in stringency.

The Personnel Department's recommendations included: 1) establish an EEO section outside the Fire Commission Office with investigation, analysis and reporting duties; 2) amend the Charter to include a civilian member on the Board of Rights; 3) civilianize staff assigned to investigate and present cases; 4) adopt new disciplinary guidelines that reflect the Department's unique operating conditions; 5) ensure all pertinent witnesses are interviewed, not just asked for a

written statement, and that the interviews are documented; and 6) provide training to first-level supervisors to effectively establish appropriate behavior standards and hold employees accountable for meeting those standards.

2006 Fire Commission's *Audit Action Plan*:

The Fire Commission's April 25, 2006 *Audit Action Plan* was the result of more than 25 public and committee meetings, more than 50 firehouse visits and numerous discussions with the Department, labor unions and various employee organizations. The Commission set the following five goals directly related to the complaint and disciplinary process:

1. The Department will adhere to disciplinary guidelines that are equitable, consistent, free of undue influence, and clearly understood by all levels of the Department. They will also reflect the best practices with demonstrated success in achieving a self-disciplined workforce, as well as the core values and vision of the Department.
2. The Department will have an Equal Employment Opportunity (EEO) Unit that is independent from the chain of command, and is responsible for all EEO investigations, EEO policies, training of Department members in EEO-related issues, and use complaint tracking information to maximize recognition of trends and implement proactive solutions to reach equitable conclusions.
3. The Department will have a Code of Conduct and a disciplinary process that is fair, consistent, easily understood by all members and reflects the Department's core values and Rules and Regulations.
4. The Department will create an independent body of permanently assigned civilian and sworn investigative staff possessing the necessary expertise, experience and training to conduct a wide range of investigations to ensure public accountability of the LAFD, as well as prepare and maintain professionally documented investigative files.
5. The Department will develop a comprehensive tracking and reporting system to serve as a central repository for all complaints and discipline. This system will allow an employee to comment at every appropriate step in the tracking/reporting of his or her complaint.

Work on the *Audit Action Plan* progressed through 2006 and 2007. The Fire Commission was provided a status report in June 2006, which included a plan for the new complaint and discipline tracking systems, drafts of the disciplinary guidelines and an organizational chart for the new Professional Standards Bureau.

In April 2007, the Fire Commission was presented with another status update where the Department reported the disciplinary guidelines (approved by the Commission in November 2006) were being vetted through the "meet and confer" process with UFLAC, the organization of the new division was ongoing (including creating the EEO Unit), the complaint tracking and

reporting system was still in the testing phase and the related policies would be vetted through the “meet and confer” process.

Stakeholders’ process:

A group of stakeholders was brought together to discuss the disciplinary process and other issues. These meetings took place between July 7, 2006, and July 30, 2007. This group included representatives from the Fire Commission, Fire Department, employee organizations and labor unions.⁴ Representatives from the Mayor’s office, Personnel Department and other City offices and commissions also participated. The Federal Mediation & Conciliation Service provided a mediator, and two interns provided research assistance.

A wide variety of concerns, opinions, experiences and viewpoints were expressed during the process. With the passage of time and subsequent events, memories now differ on whether a consensus was reached on some issues and what exactly that consensus was. Therefore, instead of trying to reconstruct a consensus from the memories of those who participated, we have limited our report to those that are clearly documented in the notes from the stakeholders’ and Fire Commission meetings.

Consensus was reached in four broad areas relevant to this report: 1) structure and staffing of the Professional Standards Division (PSD); 2) Code of Conduct/Department Rules and Regulations preamble; 3) oversight; and 4) disciplinary guidelines. What ultimately came about after the stakeholders’ process concluded may be different from the agreements reached by the stakeholders. Some issues or subjects, such as how Boards of Rights were to be handled, were not addressed by the stakeholders’ process.

PSD structure and staffing:

The stakeholders’ meeting summaries reflect a consensus that a Director of Professional Standards was needed. They agreed the person must feel comfortable disagreeing with the Fire Chief and delivering unexpected decisions, must not feel the need to please the Fire Chief in order to keep his or her job, and should not be hired, fired or evaluated by the Fire Chief. Also, it was agreed that this person should not be hired or fired by the Fire Commission and be a civil-service-exempt, at-will employee. The Director was to be selected by a group of individuals who would be determined in the future. There was a consensus that the title be Director of Professional Standards instead of Inspector General.

The meeting summaries also reflect a consensus on the need for investigator positions and having investigator-advocate teams consisting of a mix of sworn and civilian employees. It was thought that four full-time civilian exempt employees should be hired, and that the current Operations staffing should be augmented with two additional sworn members. The hiring panel for the new civilian employees was to consist of a Battalion Chief, the Personnel Director, the EEO Director and a Department representative. In the short term, variable staffing hours would be used to hire additional sworn investigators and qualified retired City employees.

⁴ UFLAC declined to participate on September 7, 2006, but returned to the discussions on November 20, 2006.

Code of conduct/Department Rules and Regulations preamble:

There was a consensus that a code of conduct should be included as a preamble to the Department's Rules and Regulations, which also needed modification and updating at a later date. Agreement was reached on a final draft preamble, but the approved final draft document was not included with the meeting summaries we received. The Fire Commission approved the code of conduct as presented by the stakeholders in February 2007.

Oversight:

The stakeholders agreed that the Fire Chief is ultimately responsible for discipline within the Department and must be held accountable. No matter what kind of new positions or structures emerged, it was important to build in "fail safes" at many levels to ensure fairness at every step of the complaint filing and disciplinary process.

The stakeholders also agreed on a need for oversight; the process must be transparent with guidelines, tracking for consistency, fairness and effectiveness. On a related note, consensus was reached on the Disciplinary Tracking and Complaint Tracking Systems.

Disciplinary guidelines:

The stakeholders reached agreement on a set of disciplinary guidelines to be used for sworn members of the Department. There was a consensus that offenses requiring a minimum of a Board of Rights, which may ultimately lead to termination, included: 1) theft; 2) fraud; 3) insubordination; 4) on-duty consumption of alcohol; 5) driving while under the influence; 6) acts of discrimination, harassment or retaliation; 7) acts of violence; 8) criminal acts; and 9) possession, sale or use of illegal drugs or controlled substances.

There was further consensus that the minimum penalty should be a 30-day suspension when the misconduct justified sending a member to a Board of Rights. The guidelines agreed to by the stakeholders included an express reference and comparison to the Civil Service Guidelines used for civilian employees. The stakeholders agreed to a statement for presentation to the Fire Commission, which included the following language:

The stakeholders have revised specific disciplinary guidelines that reflect the unique working conditions, core values, visions of the Los Angeles Fire Department and expectations of the public. As directed by the Fire Commission Audit Action Plan and consistent with Civil Service Guidelines 33.2 (Guide to Disciplinary Standards) which states "Employees in supervisory positions and those performing safety/security functions are generally expected to demonstrate a higher level of conscientiousness and integrity with respect to their employment. Accordingly, these employees may be subject to more severe levels of discipline for violations of behavior and/or performance standards because they are held to a higher standard of conduct."

The disciplinary guidelines agreed to by the stakeholders included broad penalty ranges, in some cases allowing for anything from a reprimand to dismissal. The stakeholders' meeting

summaries do not reflect agreement on the standards or criteria to be used in setting actual disciplinary penalties within these broad ranges. While there are differing recollections of what was decided, we found nothing in writing reflecting an actual agreement.

In November 2006, the Fire Commission adopted the revised guidelines presented by the stakeholders, subject to review by the City Attorney's Office. However, these are not the disciplinary guidelines currently being used for sworn personnel. The Fire Department subsequently negotiated different disciplinary guidelines:

- The disciplinary guidelines used for members represented by UFLAC are part of an October 28, 2008 letter of agreement.
- The disciplinary guidelines used for members represented by the COA are part of a January 12, 2008 letter of agreement.

The Fire Department relies on the City Personnel Department's disciplinary guidelines in matters involving civilian members of the Department, and the Fire Commission and Department have no authority to alter these guidelines.

2008 Personnel Department report:

In response to the 2006 audits and after the conclusion of the formal stakeholders' process, the Personnel Department provided the City Council and Mayor with a report containing specific and detailed options to address the problems related to EEO complaints and discipline in the Fire Department. The Personnel Department's January 14, 2008 report discussed a number of component pieces, including the division manager, a disciplinary function (i.e., Internal Affairs), an EEO function, an EEO-related risk reduction function, a litigation function, an oversight function, a mediation and training function, the organizational structure and an implementation strategy.

Professional Standards Division Manager:

The Personnel Department believed that truly effective reform depended on a division manager with subject matter expertise in the areas of employment and labor law, investigations and discipline. This individual would also need to have the fortitude to recommend appropriate action in the face of opposition. The manager should review every complaint, decide who at what level should handle the complaint, ensure the investigation is sound and supports the charges, and verify that the recommended discipline is appropriate to the case and consistently applied in similar cases.

To avoid the problems raised in prior audits related to investigatory and disciplinary subjectivity, as well as investigator inexperience and credibility, the Personnel Department believed a strong case could be made for making the division manager a civilian position. In addition to increasing objectivity, which may result in less oversight being necessary, this would also provide for greater continuity.

Alternatively, the Personnel Department recommended that the division could be headed by a sworn member of the Department provided there was robust oversight. Such a situation could include a sworn division manager and a civilian assistant manager. This pairing would balance the need for Department knowledge with the need for legal and investigative expertise. This was the option that was ultimately implemented.

Internal Affairs:

The Personnel Department saw the chief duty of the Internal Affairs Section as conducting thorough and objective investigations of administrative complaints, but not the investigation of EEO cases. Considering the overwhelming majority of disciplinary issues involved behavioral offenses, and not firefighter duties, the Personnel Department saw little reason for all investigations to be conducted by sworn members.

A system of sworn and civilian investigators working side by side was recommended to ensure investigators had both institutional and operational knowledge (sworn), as well as continuity of service and expertise (civilians). The Personnel Department did not believe that a completely civilian Internal Affairs staff could be successful at that time.

EEO function:

It was recommended that an EEO section conduct timely, thorough, objective and well-documented investigations of allegations of unlawful discrimination, as well as track all complaints and analyze trends or emerging issues. Most importantly, should any improprieties be substantiated, EEO investigations must stand on their own, meaning they must be able to support the discipline imposed without needing any additional investigation. Ultimately the EEO section would be staffed by civilian special investigators to ensure the Department could attract and retain individuals with the proper training and experience.

Risk reduction and litigation functions:

The Personnel Department recommended that the PSD have a risk reduction function, which would be tasked with proactively identifying and seeking solutions to recurring or emerging problems that could lead to costly employment-related litigation. Examples included indentifying increases in hazing complaints in a particular station and determining whether it could be cured by customized training or coaching, or recognizing a delay in the investigative process that could be solved with a policy change.

It was also recommended that the litigation function, being performed by the Risk Management Section at the time, be moved to the new PSD under the supervision of the civilian assistant division manager. The other risk management areas, namely health and safety-related issues, would remain with the sections currently handling them. While this was the Personnel Department's recommendation, this move never took place and the litigation function has remained with the Department's Risk Management Section.

Oversight function:

The creation of a new Independent Assessor position was recommended to provide strong, independent and effective oversight, and to ensure that sworn and civilian employees act with honesty, integrity, dignity and respect. This position would be responsible for conducting procedural and operational audits of the Department's administrative and EEO investigations as well as the application of discipline.

The Personnel Department saw flexibility and unfettered access to confidential information (including complaint and disciplinary tracking systems, databases, files, members, investigations, and management) as two crucial elements. To guarantee and preserve the requisite access, it was strongly recommended that access be codified through ordinance or Charter provision, such as Charter section 573 that grants the Police Commission's Inspector General access to Police Department information.

Mediation and training function:

It was recommended that the PSD include a human relations education program to foster positive attitudes, improve human relations behavioral patterns and enhance departmental compliance with EEO laws. A data-based management tool, such as the Complaint Tracking System, would be used to identify members whose performance or behavior was problematic. Once identified, individualized behavioral effectiveness coaching could be designed and used to improve self-awareness, decision making, consequence planning and conduct.

Complaint Tracking and Disciplinary Tracking Systems:

The Personnel Department found that the Department had already developed the Complaint Tracking System (CTS) and the Disciplinary Tracking System (DTS). The fact that anyone, either inside or outside the Department, could enter a CTS complaint was seen as advantageous because a major problem had been complaints being "squashed" by station-level supervisors.

There was some debate about whether records should ever be deleted. Given that the need for a complaint tracking system arose from complaints not being reported or tracked, the ability to delete a record seemed contrary to this purpose and may create a dangerous temptation. It was thought more advisable to retain all complaints and allow the investigatory process to annul any unsubstantiated or frivolous complaints.

Organizational structure and implementation strategy:

The Personnel Department's recommendations included the PSD having one Assistant Chief as the division manager and one Special Investigator III (which later became the Chief Special Investigator) as the assistant division manager. These managers would supervise three sections of the division: the Internal Affairs Section, the EEO & Risk Reduction Section and the Mediation & Effectiveness Unit. The assistant division manager would also supervise the Litigation Section.

The Personnel Department recommended a four-phased approach for implementation, beginning in April 2008 and ending by June 2010. The first phase included establishing the necessary authorities and beginning to organize the EEO, Litigation and Mediation sections. The second phase focused on the Internal Affairs Section, and the third focused on completing the work on the Mediation and EEO sections. In the final phase, the Internal Affairs workload would be reassessed to determine what staffing changes should be made, and the oversight function would be created.

Department's Audit Implementation Plan:

The Fire Commission adopted the Department's *Audit Implementation Plan* on March 18, 2008. The plan set forth six goals to address the audit recommendations from the Controller and Personnel Department related to the complaint and disciplinary process. They included:

- The EEO Unit handles EEO complaints fairly, consistently, professionally and in a timely manner.
- The Department's tracking and reporting system enhances the credibility of the complaint and disciplinary process by providing increased accountability and effectiveness.
- The Department's Code of Conduct enables members to make informed decisions about their performance by providing clear standards and expectations.
- The Department's disciplinary guidelines, developed and maintained through a collaborative process, restore members' and the public's confidence that the disciplinary process is fair.
- The procedures and outcomes of Department complaint and disciplinary processes are consistent with the stated standards.
- The Department's investigatory process ensures public accountability and protects the rights of all parties involved.

The plan adopted by the Fire Commission identified strategic action steps intended to outline how the goals were to be achieved and indicators of progress/measures of success that were to be used to determine whether the goals had been achieved. The plan also set forth a list of accomplishments that had been completed as of January 31, 2008. Some of the tasks listed as having been completed included:

- An EEO unit within the PSD had been staffed, recommendations had been made to address the audit concerns and there was a consensus on how to restructure the unit.
- A system that included a process for tracking offenses and reprimands across all levels of the Department had been developed and tracking systems were in the final testing phases.

- A preamble to the Department's Rules and Regulations, intended to serve as a Code of Conduct for all sworn and civilian employees, was developed through collaboration with stakeholders, and communicated to all officers by the Fire Chief.
- The Fire Chief signed letters of agreement about the disciplinary guidelines that acknowledged agreement had been reached through the "meet and confer" process and training on how to use and apply the new guidelines was complete.
- The Fire Chief directed that proposed penalties be consistent with the negotiated disciplinary guidelines, *Skelly* hearings be continued when new information was provided and that *Skelly* outcomes and decisions be fully documented.
- The structure of the PSD was developed, the PSD Commander was appointed and PSD staff received investigative and FBOR training.

2008 City Controller follow-up audit:

The Controller released a follow-up audit on May 30, 2008. The Controller credited the Department for successfully implementing standard disciplinary guidelines, creating a separate EEO investigative unit, assigning an Assistant Chief as the division commander and restructuring the PSD so that it was outside the Operations chain of command.

However, the Controller found a number of outstanding issues,⁵ including the continued use of Captains for investigations and allowing them to also work overtime in the field, the lack of permanently assigned civilians in the PSD and incomplete procedures for documenting and tracking complaints and disciplinary actions.

The Controller found that the tracking systems had been designed but were still in the testing phase, and that the workflow policies and access privilege issues still had to be resolved with UFLAC. Finally, the Controller noted that the responsibilities of the Litigation Section were assigned to the Risk Management staff rather than the PSD.

The Controller's follow-up audit reported on the progress made by the Department on each of the prior audit recommendations. What follows is a summary of the Controller's findings related to the disciplinary process recommendations.

Separate EEO investigative function outside the LAFD chain of command:

The Controller found that this recommendation had been partially implemented. With the EEO Unit reporting to the PSD Commander, who reported directly to the Fire Chief, it was found that this organizational structure sufficiently met the intent of the recommendation to remove the EEO investigative function from the Operations chain of command.

⁵ The Controller noted two factors that had slowed the Department's implementation of the prior recommendations: the appointment of a new Fire Chief and the involvement of multiple stakeholder groups.

At the time of the follow-up audit, the EEO Unit was staffed with one Senior Personnel Analyst II and two retired Personnel Department employees on 90-day employment contracts. However, new funding for permanently assigned staff had recently been approved. The addition of permanent full-time staff, according to the Controller, would help ensure that investigations were conducted in a timely manner.

The Controller expressed concern about investigations continuing to be conducted jointly by civilian EEO staff and sworn investigators from the Internal Affairs Unit who were assigned to two-year rotations and still permitted to work overtime in the field. Using only civilians for EEO investigations was believed to help further support independence and objectivity, as well as create an environment where employees would feel comfortable coming forward with complaints.

The Controller noted that the EEO Unit was located on the same floor as the Fire Department's executive offices, within the same suite as the PSD. This was contrary to the comments in the 2006 audit about this situation potentially intimidating and deterring employees from seeking assistance from EEO personnel. The Controller accepted the current location, however, because EEO investigators were willing to meet off-site with members.

Finally, it was noted that the Department planned to develop a comprehensive procedure manual. This manual would establish guidelines for file documentation, case tracking and routine reporting, as well as ensure that consistent, sound investigative practices were utilized.

Centralized mandatory tracking and reporting system capable of providing feedback to supervisors and accused members on case status:

The Controller found that work on these recommendations was in progress. The CTS and DTS had been developed, were currently in the testing and refining stage, and were scheduled to become operational in the summer of 2008. The Department was encouraged to monitor this progress to meet the target implementation date as this would further support improvement in the investigative and disciplinary process.

As envisioned, the CTS and the DTS would be able to capture comprehensive data and allow for pre-defined and ad hoc reports to support centralized tracking and reporting. All actions taken on a complaint could be tracked in the CTS. The Controller believed it was important to ensure that the DTS would sufficiently capture supervisory actions, including actions taken by the Battalion Chief and the PSD Commander. It was noted that the actions at each supervisory level were clearly documented in disciplinary case files at that time.

In reviewing the Department's actions in implementing this recommendation, the Controller noted two new issues: 1) that CTS training had not been adequately addressed and the effectiveness of any system is greatly dependent on the effectiveness of its users; and 2) the CTS complaint form may be too complicated.

With regard to the recommendation that the tracking system have the capability to provide feedback regarding case status, the Controller found that work was still in progress. The

Department had not yet determined how access rights would be assigned. Additionally, while the CTS had the capability to send notifications via the City's email system, the majority of Department members did not have City email accounts. The Controller suggested that the assignment of City email accounts may provide a cost-effective means to disseminate information related to disciplinary cases and other Department matters.

Periodic and systematic review of tracking systems for consistency, compliance, trends, training needs and changes:

Like many of the other recommendations, the Controller determined that work on this recommendation was in progress. Upon approval, the Department planned to use a vacant Management Analyst II position as the PSD Moderator. That person would be responsible for managing and reporting disciplinary data, overseeing case progress and would report directly to the PSD Commander. The Controller thought it was important that the person performing these tasks be able to do so in an independent manner and have the time necessary to carry out those duties.

The Controller also thought it would be important for the Department to develop expectations for the reports on disciplinary tracking data, including who would receive the reports and the extent of the data provided. It would also be helpful, the Controller noted, to ensure regular communications between the Moderator and the Human Relations Training Coordinator to address training needs identified from behavioral trends (as evidenced by complaints and disciplinary data).

Develop standard disciplinary guidelines, assure they are consistently applied and fairly administered:

The Controller found that this recommendation had been partially implemented. The guidelines had been developed, and both the COA and UFLAC had formally agreed to them in January 2008. Furthermore, all supervisors had received training on the guidelines.

The Controller stated that the guidelines would mitigate subjectivity at the fire station level because any offense listed in the guidelines would progress through the chain of command to the PSD. Supervisors were no longer able to issue reprimands; rather, the PSD Commander would determine whether the conduct warranted a reprimand or more severe penalty.

The Controller noted there was no detailed guidance for selecting a specific penalty within the established range of discipline. Given the wide range of discipline that could be applied, the Controller emphasized the importance of developing formal criteria for what factors should be considered in determining penalties. This would minimize the perception of subjectivity and ensure fairness and consistency.

Eliminate the practice of proposing greater discipline simply to create a bargaining position and only propose penalties that are consistent with disciplinary standards:

This recommendation was found to be partially implemented. The Fire Chief informed the Controller that the practice of proposing harsher discipline as a negotiating tool had ceased. After a review of selected cases, the Controller determined that the Department still needed to improve its documentation of the reasons for changing or reducing disciplinary penalties. The Controller noted that the issue may be resolved once the Department began recording *Skelly* hearings as that would create a record of what new or mitigating evidence was presented at the hearing.

Skelly hearings should be continued when new information is presented and Skelly decisions should be documented and supported:

The Controller reported that the recommendation had been implemented. The Department reported that the need to continue *Skelly* hearings because of new evidence happened infrequently.

Create a separate Internal Affairs Unit with permanently assigned investigative staff who possess the necessary expertise to conduct a wide range of investigations, and maintain professionally documented investigative files, to ensure public accountability:

The Controller reported that the Department was in the process of implementing this recommendation.

The Internal Affairs Unit should report to both the Fire Chief and Fire Commission, but otherwise be removed from the chain of command, and work closely with the Fire Commission's EEO staff on EEO-related complaints; its mission should be to hold all Department members accountable:

The Controller reported that this recommendation had been partially implemented. The investigative function had been moved from Operations to the newly created PSD, with the PSD Commander reporting directly to the Fire Chief. This met the intent of the recommendation.

Issues still existed with regard to the lack of permanently assigned investigators. The Controller saw the addition of permanent, specially trained civilian investigators as helping to improve consistency and better addressing the intent of the recommendation. Of great concern to the Controller was the potential impairment to the objectivity and independence, either actual or perceived, of the investigative function since sworn members assigned as PSD investigators (either for a two-year special duty or short-term assignments) were still permitted to work overtime in the field, potentially alongside members they were investigating or had investigated. Sound investigative and case handling practices, it was noted, require independence, objectivity and confidentiality, and the practice of working overtime in the field was seen as compromising these qualities.

In addition to training already provided to investigators, the Controller recommended that the investigative process be formalized with written policies and procedures. Manuals should define investigator responsibilities (based on position) and timeframes for the completion of investigations. While case files were generally found to be well-organized with clear explanations, there was a need to clearly indicate that a supervisory review of the file had been conducted.

Correspondence related to the Controller's follow-up audit:

In September 2008, the Controller evaluated the Department's response to the follow-up audit. The Controller commented on the following : 1) continuing potential conflicts of interest with rotating sworn investigators being involved in EEO cases; 2) the need for a comprehensive information system that will track all levels of supervisory actions taken in disciplinary cases; 3) the lack of a plan for detecting behavioral trends that indicate a need for training; 4) questioning what factors the Department will consider in determining penalties and whether penalty guidelines will be reviewed for continued relevance and appropriateness; and 5) the failure of the Department to change its policy allowing sworn PSD personnel to work overtime in the field, which continued to create a perceived or real conflict of interest.

In July 2009, the Department reported to the Controller that all but two of the Controller's recommendations had been fully implemented; one had been partially implemented (new civilian investigators were still paired with sworn investigators who continued to work overtime in the field) and one was still in progress (hiring an Independent Assessor to provide oversight).

Fire Department litigation:

Litigation has contributed to the perception that the disciplinary function should be removed from the chain of command and placed in a unit reporting directly to the Fire Chief and Fire Commission. Voters were told that several multi-million-dollar verdicts involving misconduct in fire stations justified appointing an Independent Assessor to oversee how misconduct complaints are handled.

In addition to gross misconduct in fire stations, improper and inconsistent management, labor relations and disciplinary practices were alleged or documented in claims, lawsuits, court testimony and appellate decisions.⁶ Claims that the Department violated statutory protections in connection with misconduct investigations were raised in at least one lawsuit where the plaintiffs sought \$25,000 for each violation.⁷

One appellate decision documents a failed attempt to handle a hazing incident in an informal manner at the station level. Another decision suggests that the manner in which a *Skelly* hearing

⁶ Please see for example: *Bressler v. City of Los Angeles*, 2009 Cal.App.Unpub.LEXIS 788; *Lima v. City of Los Angeles*, 2009 Cal.App.Unpub.LEXIS 2502; *Burton v. City of Los Angeles*, 2010 Cal.App.Unpub.LEXIS 1125; *Lee v. City of Los Angeles*, 2010 Cal.App.Unpub.LEXIS 1151; and *Mattson v. City of Los Angeles* (C.D. Cal., Nov. 23, 2010, No. CV05-08861).

⁷ *Miller & Rueda v. City of Los Angeles*, Los Angeles County Superior Court Case No. BC416479 (the City successfully defended these claims and an appeal is pending on issues related to an alleged retaliatory transfer).

was conducted did not conform to the law. In some of the cases, the courts found evidence of discrimination, a hostile work environment and retaliation, and upheld large verdicts against the Department.

PROFESSIONAL STANDARDS DIVISION STAFFING

The 2006 audits by the Controller and Personnel Department contained recommendations relating to the creation of EEO and Internal Affairs divisions within the Fire Department but outside the chain of command. It was recommended that these divisions be staffed with individuals who had experience in conducting and documenting investigations.

One of the goals of the Fire Commission's 2006 *Audit Action Plan* was "[t]o create an independent body with permanently assigned civilian and sworn investigative staff who possess the necessary expertise, experience, and training to conduct the wide range of investigations to ensure public accountability of the LAFD, as well as prepare and maintain professional documented investigative files."

In implementing the *Audit Action Plan*, a proposed organizational chart was developed.⁸ This organization included a civilian bureau commander, a civilian or sworn assistant bureau commander, an Executive Officer (either a Battalion Chief or Chief Personnel Analyst) who would supervise the EEO Complaint Unit and the Investigative Unit, and a Support Section (headed by a Battalion Chief or Senior Personnel Analyst) that would supervise the Complaint Tracking/EEO Training Unit. The EEO Complaint Unit would be staffed with two Senior Personnel Analysts, the Investigative Unit would have four Senior Personnel Analysts and two Captains, and the Complaint Tracking/EEO Training Unit would have a Captain, a Senior Personnel Analyst and two Management Analysts.

How the new Professional Standards Division (PSD) would be staffed was also a topic discussed by the stakeholders. They agreed that the investigative teams should be made up of both civilian and sworn members. The stakeholders also determined that four full-time civilians should be hired and that the current Operations staff should be augmented with two additional sworn members. The Department could use variable staffing hours to hire additional sworn investigators as well as hire retired City employees.

Finally, we addressed PSD staffing in our March 27, 2010 *Assessment of the Department's Disciplinary System and Professional Standards Division (Assessment)*. One of the recommendations we made in that report was employing a sufficient number of non-sworn staff with the demonstrated expertise, experience, training and proficiency in conducting a wide range of investigations, ensuring those investigations are complete and timely, prosecuting disciplinary hearings, etc.⁹ We also urged the Department to ensure that EEO cases were only assigned to qualified EEO investigators and not to the field.

Two other recommendations from our 2010 *Assessment* included limiting the role of sworn PSD staff to providing support and subject matter expertise to the non-sworn investigators,¹⁰ and hiring an experienced non-sworn manager to lead the PSD.

⁸ See Appendix 2 for this organizational chart.

⁹ This recommendation was made again in both our April 26, 2012 *Audit and Assessment of Fire Department Litigation* and our March 18, 2013 *Assessment of the Alternative Investigative Process*.

¹⁰ This recommendation was also made in our March 18, 2013 *Assessment of the Alternative Investigative Process*.

Adding positions to the PSD:

The numbers of authorized civilian Special Investigator positions assigned to the PSD, based on the budgets for each year, are as follows:

- FY 2008-09: Four Special Investigator positions
- FY 2009-10: Three Special Investigator positions
- FY 2010-11: Three Special Investigator positions
- FY 2011-12: Three Special Investigator positions
- FY 2012-13: Eleven Special Investigator positions

In a report to the Fire Commission's HRDC/Personnel Committee in September 2012 (BFC 12-145), the PSD reported that after the PSD was established, the caseload became immediately overwhelming because the numbers of complaints received exceeded the estimates by ten fold.¹¹ There was no allocation of staff to prosecute Boards of Rights. At that time, the PSD investigative staff consisted of three civilian Investigators, four sworn Captains and two contract (part-time) Senior Personnel Analysts.

In 2010, the Department proposed a new staffing plan that was more closely aligned with the actual workload. This proposal included eight new Special Investigators and one Management Analyst.¹² The Special Investigator positions were approved and filled by the beginning of 2012. However, since the beginning of 2010, two Special Investigator positions became vacant, the contracts for the Senior Personnel Analysts were not renewed for FY 2012-13, and the number of Captains assigned to the PSD dropped from seven to four in 2012.

Current PSD staffing and caseload:

The positions assigned to the PSD, according to the Department's Fiscal Year 2013-14 organizational chart, include the following:

- Assistant Chief (PSD Commander)
- Chief Special Investigator
- 2 Management Analyst IIs (one is the PSD Moderator)
- Battalion Chief (Investigations Section Commander)
- Senior Personnel Analyst II (EEO Coordinator)
- 11 Special Investigator IIs (Investigators/Advocates)
- 5 Captain IIs (Investigators/Advocates)
- Clerical support: Senior Clerk Typist, Secretary

One of the Special Investigator positions is held by a Senior Personnel Analyst I (with a background in EEO issues), and the Department has hired a retired Senior Personnel Analyst I on a 120-day contract to conduct investigations. Of the positions listed on the organizational chart,

¹¹ The original PSD staffing plan assumed they would receive 100 complaints. More than 1,100 complaints were received in 2009.

¹² While the Department sought funding for eight new Special Investigators, we recommended 15 new positions.

there are currently five vacancies: three Captain IIs, one Special Investigator II and one Management Analyst II.

Additionally, the PSD staff is supplemented with sworn members detailed to PSD. These include one Battalion Chief in charge of the Board of Rights Section and four Captains working as investigators and Advocates. These Captains are only detailed to the PSD for one year based on a past Department practice of returning members to their ESB assignment after one year.¹³

The investigator caseload averages, as of June 16, 2013, are as follows:

- For all PSD members both investigating cases and preparing for Boards of Rights, the caseload is **13.7 cases/Boards per investigator/Advocate**.¹⁴
- For investigators not also preparing for Boards, the caseload is **12.9 cases per investigator**.

For a comparison, we looked at the caseload for the Administrative Investigation Division of the LAPD Internal Affairs Group. The Administrative Investigation Division has approximately 50 investigators with an average caseload of **only 10 cases per investigator**.¹⁵ The LAPD Internal Affairs Group distributes cases differently than the Fire Department so the Administrative Investigation Division is not responsible for exactly the same types of cases as the PSD. However, the 10 cases-per-investigator workload is still useful for assessing the size of the PSD's investigator caseload.

Comments by the Independent Assessor:

We make the following comments and recommendations in light of the past audits, our prior reports and the information provided to us in the course of preparing this report about the current situation.

EEO Unit staffing:

One of the key audit recommendations was establishing an EEO Unit with the responsibility of investigating EEO-related complaints. While the number of EEO complaints has increased sharply over the past few years (from 46 complaints in 2009 to 78 complaints in 2012¹⁶), the number of dedicated EEO staff has decreased. A compounding issue is the increased complexity

¹³ This one-year detail limit is similar to the one-year limit on a member's right to retain his or her assignment when he or she is off duty due to an injury. Please see Department Bulletin No. 09-09 – *IOD/NIOD Tracking/Recovery/Light Duty Procedures* (April 2, 2009).

¹⁴ This figure includes a lower caseload for both one investigator who is leaving the Department and another who just started at the PSD. If these individuals' caseloads are factored out, then the averages are a bit higher.

¹⁵ These figures were provided by representatives from the LAPD's Internal Affairs Group in late June/early July 2013. The Administrative Investigation Division is not the only LAPD unit assigned to investigate misconduct complaints. Also, a separate Advocate Section within the LAPD prosecutes Boards of Rights with five advocates and an average caseload of 10 cases per Advocate.

¹⁶ *Professional Standards Division Statistical Review 2012*, p. 22 (BFC 13-047).

of these complaints, including more involved parties, varying statutes of limitations and longer histories of the conflicts giving rise to the complaints.

Recently, the PSD hired a new staff member who is dedicated to investigating only EEO complaints. There are two other investigators who spend approximately 80-90% of their time on EEO investigations. The rest of the PSD investigative staff, both sworn and civilian, carry at least one or two EEO cases in addition to their Internal Affairs caseload.

The best practice in this area, and the clear intent of the audit recommendations, is to ensure EEO investigations are only assigned to qualified investigators who are experienced in conducting EEO investigations. This is likely not an appropriate role for sworn investigators who have only a basic training in investigations and who are only in the PSD for a limited period of time (either a one-year detail or two-year assignment). Ensuring that EEO investigations are of the highest quality is even more important given the Department's history of lawsuits by members alleging discrimination, harassment and retaliation, in addition to the three conciliation agreements with the U.S. Equal Employment Opportunity Commission (EEOC).

Detailed/Special Duty Captains:

One of the key problems identified in the Controller's audit was the Department's use of sworn investigators assigned to Operations for only a limited time period:

“Formal investigations are conducted by inexperienced and untrained investigators, who are fire captains on a two-year rotational special duty assignment to the Operations command. They are charged with conducting investigations against firefighters primarily from the Bureau of Emergency Services – the same division to which most will return upon completing their investigative assignment. This places them in the untenable position of investigating a member with whom they may work in the future – causing the appearance of a conflict to their independence.”

The Controller went on to say, “Investigations require in-depth training, knowledge, and experience – at level usually taking more than two years to attain.” Related to this finding, the Controller recommended that the Department create an internal affairs unit staffed with permanently assigned, experienced investigators.¹⁷

Despite this recommendation, the Department has continued to use sworn investigators assigned to the PSD for varying amounts of time (some are detailed for one year¹⁸ and others have a two-year assignment). The same problems identified by the Controller still exist, and are even exacerbated by the current procedure of using only a single investigator for most cases.

While the Department has been successful in obtaining some additional civilian investigators, it must continue to shift the investigative workload to those investigators who are permanently assigned to the PSD and have the requisite experience and expertise to conduct high-quality

¹⁷ We have made similar recommendations in our prior reports.

¹⁸ As explained earlier, these details are limited based on a past Department practice of returning members to their ESB assignment after one year.

investigations. This may require the addition of more civilian investigators to the PSD. As we have recommended in prior reports, the role of sworn members in the PSD should be limited to providing support and subject matter expertise.

Work Environment Unit:

In our 2012 *Audit and Assessment of Fire Department Litigation*, we discussed the history of the Department's Workforce Excellence Unit (WEU),¹⁹ and recommended that the Department develop and implement a comprehensive, consistent and integrated plan to ensure human relations, work environment and leadership training needs are effectively met at every level of the Department.

The Department's most recent response to our report, presented to the Fire Commission on November 20, 2012,²⁰ stated that the Department's Human Relations Advocate was developing a "cradle to grave" plan of items noted in the audit, and that "Training will have the ability to infuse 'as needed' training that may come from PSD or Risk Management Section." The Department's response indicated that this recommendation would be implemented by July 1, 2013.²¹

In July 2013, we were told the Department has conducted research on a variety of different training programs and initiated preliminary discussions with a number of organizations regarding the possibility of coordinating efforts and leveraging resources. Currently the Department does provide some training through the LAFD Leadership Academy.²² The Department plans to provide leadership and human relations training first to the new recruit classes in the Drill Tower, adding this component to the Company Officers Responsibilities and Expectations (CORE) training for officer candidates, and finally incorporating this training into the Department's training for officers and chief officers (OCEP and COCEP).²³

Since the hiring of the Department's Risk Manager in March 2013, there have been some changes made to how the Department addresses work environment issues. The current process involves the Risk Manager visiting the workplace where the issue arose to interview the involved members, as well as others, to determine what is at issue. Sometimes a third-party assessment is also done, and the Department uses that recommendation as well as a review of the members' work histories to make a final decision. The Department's main priority is keeping the members at their work location but if a transfer is deemed necessary, the Department tries to do it right away. If the Department decides not to transfer anyone, the Risk Manager will give the members tools to help them resolve conflicts in the future or recommend specialized training. The Department reported that there is currently no mediation process in place.

¹⁹ The WEU was created as part of the new PSD in 2008. Its purpose was to provide tools and training to help resolve workplace environment issues before they become official misconduct complaints requiring disciplinary action or resulting in litigation. It was eliminated as a result of budget cuts.

²⁰ *Response to Audit and Assessment of Fire Department Litigation* (BFC 12-184).

²¹ No updates on the progress of this plan have been provided to the Fire Commission since last year.

²² Student participation in this program is voluntary. Instructors are paid using v-hours and materials are paid for with VET funds.

²³ We are concerned about whether leadership and human relations training of recruits will be effective once they transition from the Drill Tower if the same training is not already well entrenched in the field.

We continue to support the establishment of a unit within the Department to work with members in order to resolve work environment issues before they become official misconduct complaints. Training members how to deal with these issues when they first arise is also an important component and should be a training priority. If these issues can be resolved earlier and in a less adversarial way, it will not only allow the Department to better utilize its investigative resources but it may also reduce the incidence of members filing consecutive complaints about the same workplace issues. The Department should consult with other agencies that have employed these types of units, including the Police Department's Work Environment Liaison Section (WELS).²⁴

Management Analyst for CTS analysis:

In our 2010 *Assessment*, we found that the PSD staffing levels were inadequate, particularly with respect to the Moderator position that is responsible for managing the Complaint Tracking System. This inadequate staffing had led to delays in processing complaints as well as investigation and discipline-related documents correspondence. At that time, we recommended that the Department use the complaint and/or the disciplinary tracking systems to provide management reports that will provide information concerning the statute of limitations, time keeping, the identification of certain types of complaints, work locations (to focus attention on work environment problems) and other necessary case management information.

As of June 2013, no staffing changes had been made to improve CTS management, and in the five years since its creation, the PSD has provided relatively little statistical and trend analysis to the Fire Commission. Relying on a tracking system to provide information for "targeting" corrective action has not been realized. The two most recent reports provided some information²⁵ but when asked to clarify some of the statistics, the PSD told the Fire Commission at its May 21, 2013 meeting that it had discovered problems with the system that made it impossible to provide further detail.

The maintenance and effective utilization of the CTS and DTS are of critical importance for the Department. These systems must be modified and improved in order for the disciplinary process to run smoothly and efficiently. Because of the importance of these databases in the disciplinary process, the role of the PSD Moderator remains a critical one. The Department does have authorization for another Management Analyst position in the PSD; however, that position has not been approved through the Managed Hiring Committee yet so it cannot be filled. The Department should consider prioritizing the approval of this position.

²⁴ We also mentioned the WELS in our 2012 litigation audit. The purpose of WELS is to "provide guidance to create collaborative agreements and resolutions to environmental conflicts." The complaints referred to the WELS are non-misconduct or minor misconduct complaints. WELS officers provide mediation, conciliation, environmental evaluations and informal counseling and advice. WELS officers reported spending approximately half of their time on informal counseling and advising employees.

²⁵ *Professional Standards Division Statistical Review 2011* (BFC 12-037) and *Professional Standards Division Statistical Review 2012* (BFC 13-047).

COMPLAINT TRACKING SYSTEMS

The Complaint Tracking System (CTS) is a product of audit recommendations and became operative in mid to late 2008. Complaints may be filed by Department members, other City employees or members of the public, and complainants have the option of remaining anonymous. Complaints are documented on the “Complaint Record Form,”²⁶ then forwarded to the PSD for review and follow-up action. Each complaint is automatically assigned a tracking number, and complainants can use this number to track the current status (either open or closed) of their complaint.

After a complaint is entered into the CTS, it is forwarded to the PSD Commander for review. The PSD Commander uses a “Complaint Intake Worksheet” when reviewing new complaints and the completed form becomes part of the PSD case file. In conducting the initial review, the PSD Commander attempts to determine if: 1) immediate action is needed to prevent the loss or destruction of evidence; 2) an act of violence or a threat of violence is involved;²⁷ 3) criminal conduct is involved;²⁸ and 4) the alleged misconduct may result in punitive action. After this initial review, the PSD Commander decides and directs how the complaint is to be assigned. If the alleged misconduct may result in discipline, the case is referred to either the PSD or the field for investigation.

Generally, cases involving performance, behavior, driving/parking violations, punctuality/absenteeism and lost equipment are referred to the field for investigation.²⁹ More serious cases that are either high profile or involve crimes, off-duty conduct, significant EMS issues, EEO/discrimination, alcohol/drugs, sensitive matters, hazing/horseplay, litigation/liability or complex matters are referred to the PSD for investigation.

As the investigation progresses, either by field or PSD investigators, information should be added to the electronic CTS record. This information may include the names of the investigators assigned to the case, the names of the involved members, witness statement summaries (these are not regularly included), a preliminary investigation report (this is not regularly included), progress notes, and a variety of uploaded documents and interview recordings.

Audit findings, recommendations and implementation progress:

The Controller’s January 2006 audit described the Department’s system of handling complaints as being very subjective. Immediate supervisors would determine if an event would be handled at the local level or would progress through channels, without the assistance of any standards to aid in this decision. Thus, in two identical inquiries, one might be “managed or suppressed at the fire station level” and the other might be advanced through channels with a written reprimand. This resulted in inconsistency, confusion and the perception of unfair treatment.

²⁶ Complainants can submit complaints using the online form, via fax or by contacting PSD staff.

²⁷ Complaints involving violence or a threat of violence are referred to the Department’s Risk Management Section, and perhaps other authorities.

²⁸ The PSD has developed internal procedures to address evidence issues and criminal conduct.

²⁹ These categories are the subject of an October 28, 2008 letter of agreement between the Department and UFLAC.

At the time of the audit, the Fire Chief and his bureau chiefs were unable to identify the number of disciplinary actions taken against firefighters at the fire station level, nor whether the same offense received the same level of discipline.

If the supervisor issued a reprimand and the preliminary inquiry information was forwarded up the chain of command, the Bureau Commander would subjectively determine whether the event warranted progression up to the Operations Commander. Reprimands were not being tracked at the bureau level, which eliminated the opportunity to identify behavioral trends that may require training or intervention, either individually or on a Department-wide basis.

For disciplinary cases that were forwarded to Operations, the Operations Commander would subjectively determine if the conduct warranted additional penalties and/or further investigation.

One issue of critical importance is that the Controller's audit found a greater prevalence of harassment, hazing and hostile work environments than the number of complaints reported through channels or investigations indicated. This was attributed to a fear of retaliation if complaints were reported, the lack of a tracking system for complaints and the Department's inability to investigate such complaints.

The Personnel Department's January 2006 audit found that the Department failed to maintain even minimal records of internal or external discrimination complaint activity. Due to the absence of discrimination complaint records, it was impossible for the Personnel Department to draw definite conclusions regarding discrimination trends.

Some of the key recommendations from the 2006 audits included:

- Establish a centralized mandatory tracking and reporting system for disciplinary and corrective actions that includes all measures taken at each Department level.
- Develop within the tracking system the capability to provide feedback to supervisors and accused members, within an established timeframe, regarding the status and actions taken in disciplinary cases that have progressed through channels.
- Hire someone within the PSD to periodically and systematically review the disciplinary tracking and reporting system for consistency and compliance, as well as to detect behavioral trends, training needs and possible policy/procedure changes.

The Fire Commission's 2006 *Audit Action Plan* set a goal of including a comprehensive tracking and reporting system that would serve as a central repository for complaints and discipline. This system would allow an employee to make comments related to his or her complaint at every appropriate step in the tracking/reporting process.

In January 2008, the Personnel Department reported the successful development of the CTS and companion Discipline Tracking System (DTS). The new CTS allowed anyone with access to a computer and the internet to file a complaint; thereby eliminating the major problem of complaints being squashed at the station level by supervisors. The Personnel Department

supported combining duplicate complaints, recommended that all complaints be retained and believed that the investigatory process should be relied on to annul unsubstantiated complaints. These recommendations were based on the fact that the need for a complaint system was identified as a result of complaints not being reported or tracked. One concern raised was the complexity and length of the complaint form.

Later in 2008, the Controller's follow-up audit revealed that the CTS and DTS were currently in the testing and refining stage, and set to become operational a few months later. The Controller noted that the CTS and DTS would be able to capture comprehensive data and allow for pre-defined and ad hoc reports to support centralized tracking and reporting. All actions taken on a complaint could be tracked in the CTS, but it was also important to the Controller that the DTS sufficiently captured supervisory and PSD actions. It was noted that the actions at each supervisory level were clearly documented in written documents at that time.

The Controller also identified two new issues related to the CTS:

- **CTS training has not been adequately addressed:** it was scheduled to begin after the system became fully operational, and PSD staff were unable to provide detail on the content or method of training.
- **The CTS complaint form may be too complicated:** it was lengthy and asked for a substantial amount of information, which may have made it difficult to understand what was being asked without sufficient training or instruction.

Finally, the Controller found that the Department had not yet determined how access rights to the new tracking systems would be assigned, and that while notifications related to the progress of complaints could be sent via the City's email system, most Department members did not have City email accounts.

Employee organization responses to audits:

A number of employee organizations provided written responses to the recommendations made by the Controller and Personnel Department in their 2006 audits.³⁰ Only the Chief Officers Association (COA) and United Firefighters of Los Angeles City (UFLAC) provided responses to the recommendations related to the complaint tracking system.

The COA supported a complaint tracking system because analysis could provide information on trends, training needs, and accurate information to be provided to all members. The COA also believed that supervisors should be kept informed of personnel issues within their commands; but to ensure due process and personnel rights were secured, the City Attorney should provide more specifics relative to who (other than the accused) could be provided information on case status, information and actions taken in disciplinary cases.

³⁰ A brief description of the different Fire Department employee associations and labor organizations is provided in Appendix 3.

The COA agreed that the system should be periodically and systematically monitored for consistency and compliance, as well as for identifying behavioral trends, training needs and policy changes.

UFLAC agreed with the intent of the recommendations to create a tracking system but believed it should be looked at as part of the overall changes to the disciplinary system so that the system as a whole was compatible. UFLAC cautioned that the creation of a tracking system should not sacrifice privacy or confidentiality where warranted and appropriate. UFLAC's position was that line supervisors do not always have the right to know all the details regarding the accused or the charges.

UFLAC also cautioned that the recommendation related to periodically and systematically monitoring the tracking system be implemented in coordination with and informed by how the other related recommendations were implemented and developed.

CTS statistical information:

The PSD provided statistical reports to the Fire Commission for 2011 (BFC 12-037) and 2012 (BFC 13-047).³¹ These reports provided statistical information regarding:

- Total cases by year
- Caseload information (how many cases were open/closed by year)
- Cases referred to the EEO Unit
- Resolutions of anonymous complaints
- PSD vs. Non-PSD cases
- EMS vs. Non-EMS cases
- Internal vs. External complaint sources
- Total sustained relative to total cases closed by year
- Top 10 complaint types
- EMS complaint types
- DUI cases by year
- Punitive actions by year (reprimands, *Skellys*, suspensions, terminations, Boards of Rights)
- Boards of Rights information (resolutions, Department-directed vs. member-opted, etc.)

For this report, we requested additional statistics from the PSD. The numbers we were provided relating to how many cases were filed from 2009 to 2012, and how many cases were assigned to either the PSD or elsewhere for investigation, were not consistent with the publicly reported numbers. Additionally, our own inquiry in the CTS produced results that differed from both of these previous sets of figures. For purposes of this report, we decided to present the publicly reported numbers where there was a discrepancy.

This situation presents a serious management problem. The PSD is aware of this problem and has communicated with the Fire Commission regarding what steps it will be taking in the future

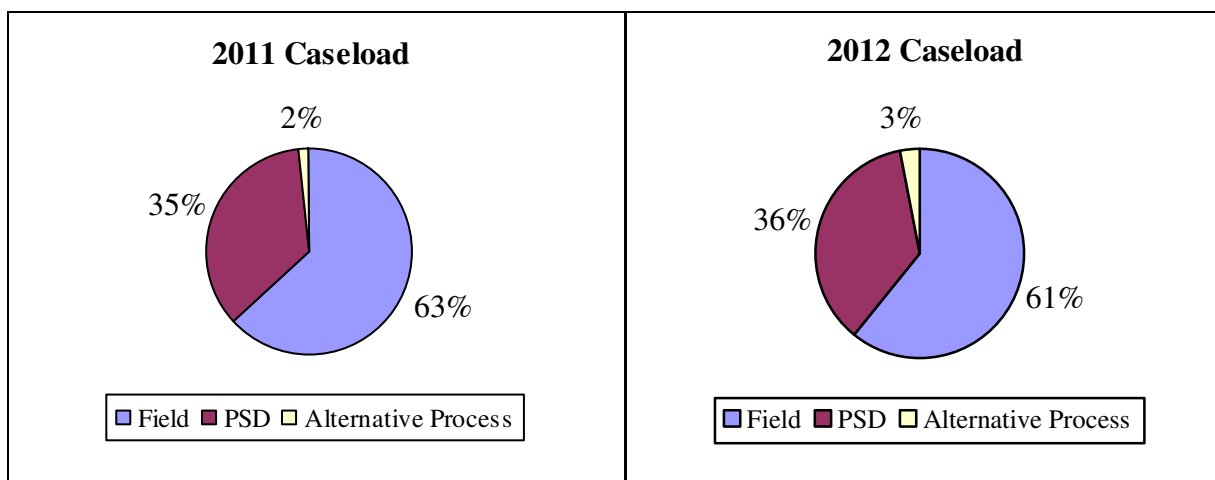
³¹ We were unable to independently verify all the numbers provided by the PSD in these reports.

to remedy the situation. We have chosen to raise this issue here to stress the importance of taking corrective action without further delay.

Caseload:

The majority of complaints filed are referred back to the field for investigation. In 2011, 63% of all complaints were field investigations, and in 2012 they comprised 61% of all complaints. The rest remained with the PSD except for a few (2-3%) that were forwarded to the Alternative Investigative Process. The following chart illustrates that caseload distribution in 2011 and 2012 between the field, the PSD and the Alternative Investigation Process.

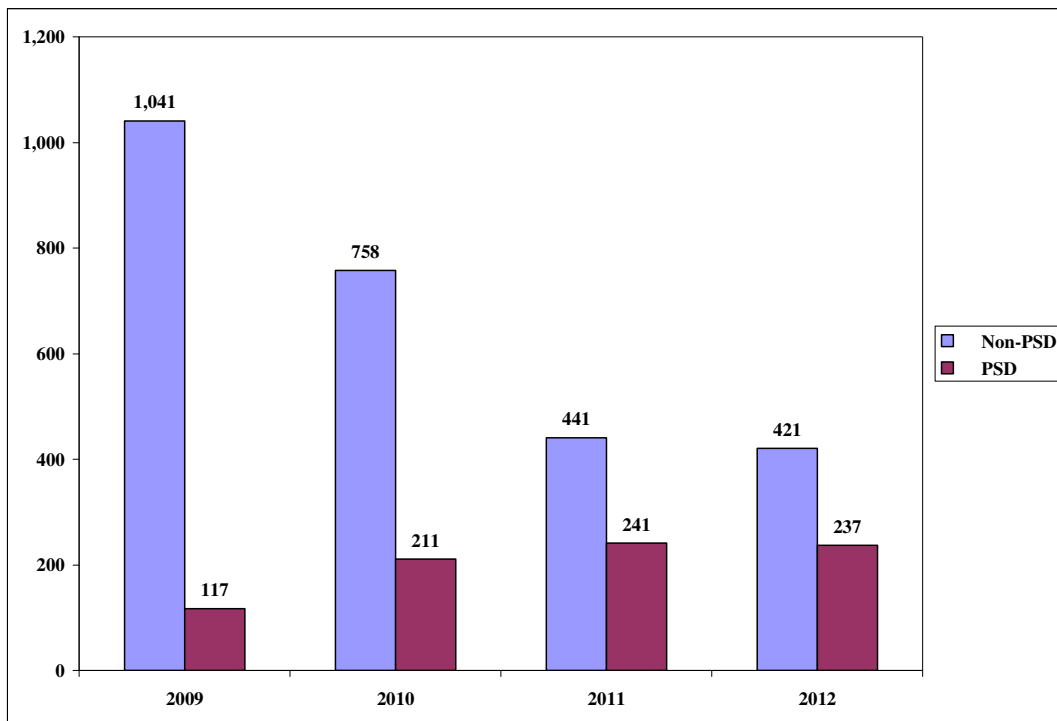
Chart 1: 2011 and 2012 Caseloads by Assignment



Source: Professional Standards Division Statistical Review 2012 (BFC 13-047)

The total number of complaints filed in the CTS has steadily declined since 2009. However, this decline has been mostly in field investigations as the total number of complaints investigated by the PSD has remained relatively steady over the last three years. The following chart illustrates that decline and provides information about the number of cases assigned to both the field and to the PSD for investigation.

Chart 2: PSD vs. Non-PSD Cases, 2009-2012



Sources: *Professional Standards Division Statistical Review 2012* (BFC 13-047); Professional Standards Division

The CTS is able to track general categories of complaints. Some of these categories include EMS and EEO issues, as well as the source of a complaint (whether it is external, internal or anonymous).

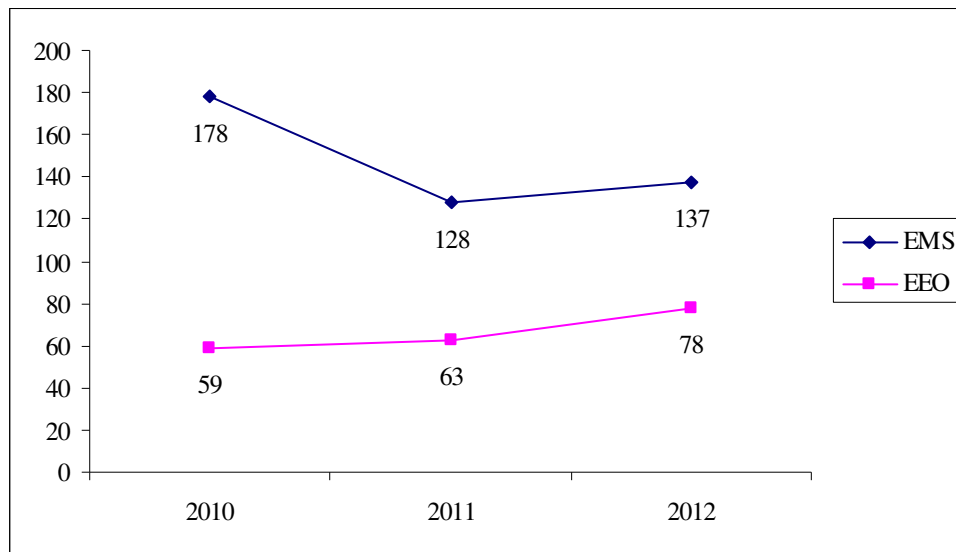
In 2011, approximately 18% of all complaints involved EMS issues, and 9.2% were referred to the EEO Unit. In 2012, the number of EMS complaints rose slightly to 20.8% and the number of cases referred to the EEO Unit rose to 11.8%. The numbers of internal versus external complaint sources did not change significantly between 2011 and 2012 (internal rose by less than 1% and external fell by the same amount).

Table 1: PSD, EMS and EEO Complaints, 2011-2012

	2011		2012		% Change
All Complaints	682		658		
PSD	241	35.3%	237	36%	0.7%
EEO	63	9.2%	78	11.8%	2.6%
EMS	128	18.7%	137	20.8%	2.1%

Source: *Professional Standards Division Statistical Review 2012* (BFC 13-047)

Chart 3: EMS and EEO Complaints, 2010-2012



Source: Professional Standards Division Statistical Review 2012 (BFC 13-047)

Anonymous complaints:

Of the 985 complaints received in 2010, 77 (7.8%) were anonymous. In 2011, 682 complaints were received and 59 (8.6%) were anonymous. Finally, of the 658 complaints received in 2012, 63 (9.5%) were anonymous.

Another analysis that can shed light on the nature of anonymous complaints is looking at how they break down by resolution category.

Table 2: Anonymous Complaints by Resolution, 2011-2012

	2011		2012		% Change
	Total	% of Total	Total	% of Total	
Open	24	40.7%	35	55.6%	14.9%
Exonerated	4	6.8%	2	3.2%	-3.6%
Non-Disciplinary	11	18.6%	10	15.9%	-2.8%
Not Sustained	12	20.3%	8	12.7%	-7.6%
Sustained	3	5.1%	4	6.3%	1.3%
Unfounded	3	5.1%	4	6.3%	1.3%
Out of Statute	2	3.4%			
TOTAL	59		63		

Sources: Professional Standards Division Statistical Review 2011 (BFC 12-037); Professional Standards Division Statistical Review 2012 (BFC 13-047)

The largest resolution category for anonymous complaints was “Open,” followed by “Non-Disciplinary” and “Not Sustained.” In 2011, the PSD reported that 20% of the closed complaints were sustained, and in 2012, the figure was 18%. The same calculations resulted in

approximately 8.6% of closed anonymous complaints being sustained in 2011, and 14.3% being sustained in 2012. This comparison shows that relatively fewer anonymous complaints were sustained in 2011 but the figure was closer to the overall number in 2012.

Complaints closed as “non-disciplinary”:

The Department reported that not all complaints are referred for an investigation. Some complaints are either closed or referred to the appropriate bureau for non-disciplinary action if, during the initial screening, the PSD Commander determines that the allegations, if true, would not provide the basis for discipline. This procedure allows the PSD to manage its workload more effectively. It also alerts other areas of the Department to issues such as the need for new policies or safety problems that need to be addressed.

The Department reported that between when the CTS began tracking complaints in 2008 and June 18, 2013, 856 complaints have been closed as non-disciplinary without an investigation. Another 374 complaints were closed as non-disciplinary after an investigation was conducted. Therefore, a total of 1,230 complaints were determined to be non-disciplinary, either before or after an investigation.

Out of a total of 4,211 complaints filed in CTS,³² 856 were closed as non-disciplinary before an investigation was conducted. That means that just over 20% of all complaints were closed before an investigation was conducted because the PSD determined they were non-disciplinary in nature. Almost 9% of all complaints were later determined to be non-disciplinary after an investigation had been completed. The table below shows the categories used by the Department as well as the total number of complaints in each non-disciplinary case category.

Table 3: Non-Disciplinary Cases by Type, 2009-2012

Non-Disciplinary Case Type	Total
Policy/Procedure	57
Not Misconduct	856
Demonstrably False	2
Member Not Involved	54
Alternative Complaint Resolution	73
Complaint Withdrawn/Retracted	50
Referred to Another Bureau/Department/Agency	55
Filed with an Outside Agency/Office	3
Total	1,150³³

Source: Professional Standards Division

³² As of June 18, 2013, a total of 4,505 misconduct complaints had been filed in CTS since tracking of complaints began in 2008. Of those, 248 were coded as duplicates and 46 were coded as entry errors. Therefore, the total number of complaints is 4,211.

³³ The total of 1,150 noted in this table differs from the total of 1,230 given above because they cover different periods of time.

Required entry of complaints into the CTS:

The Department's Discrimination Prevention Policy requires that complaints of discrimination, harassment, hazing, hostile work environment and all other equal employment opportunity (EEO) claims be entered into the CTS. There should be no exceptions or failures to understand this policy given the training the Department has implemented pursuant to an agreement with the EEOC.

Additionally, at least two Department Bulletins address situations where CTS entries are required:

- Department Bulletin No. 10-12 requires a hearing officer to initiate a CTS complaint if a traffic accident is determined to have resulted from inattention, misjudgment, deficiency in driving or violations of the Department's Rules and Regulations, policies and procedures.
- Department Bulletin No. 11-03 requires that a CTS entry be made when a member may have contributed to an injury or illness by failing to follow Department policies and procedures. The same is required when a supervisor may have contributed to an injury or illness by failing to *enforce* Department policies and procedures.

Effective April 17, 2013, Los Angeles Administrative Code section 20.60.4 requires all departments to report matters involving potential fraud, waste or abuse to the City Controller and City Ethics Commission within 10 days of discovery. To effectuate this requirement, Fire Department supervisors, managers, officers and chief officers are required to enter such information into the CTS immediately.

Reporting EMS violations:

The Los Angeles County Department of Health Services (DHS) requires that the Fire Department report possible violations of the California Health and Safety Code in the following types of cases involving an EMT or paramedic:³⁴

- Fraud in the procurement of a certificate or license
- Gross negligence
- Repeated negligent acts
- Incompetence
- Any fraudulent, dishonest, corrupt act or criminal conviction which is substantially related to the qualifications, functions and duties of prehospital personnel
- Violating, or attempting to violate, any federal or state statute or regulation which regulates narcotics, dangerous drugs or controlled substances
- Addiction to, the excessive use of, or the misuse of, alcoholic beverages, narcotics, dangerous drugs, or controlled substances

³⁴ Health and Safety Code section 1798.200; Los Angeles County Department of Health Services, Prehospital Care Policy Manual, Reference No. 214 (Base Hospital and Provider Agency Reporting Responsibilities).

- Functioning outside the supervision of medical control in the local field care system
- Unprofessional conduct such as mistreatment or physical abuse of any patient, failure to maintain confidentiality of patient medical information or the commission of any sexually-related offense as specified under Penal Code section 290

The Department is also obligated to report any time an EMT or paramedic: 1) is terminated or suspended for disciplinary cause; 2) resigns or retires following notification of an impending investigation; or 3) is removed from his or her EMT/paramedic duties for a disciplinary cause.

The manner in which the Department has attempted to comply with the DHS protocol has changed over the years. The PSD took over responsibility for reporting information to the DHS after some Department members complained about the medical director reporting possible violations to the Department of Health Services.

We were told that the prior PSD practice was to report possible violations in writing three business days after they were “validated,” and this validation took place before investigations were initiated.³⁵ We were told that the current practice is to provide telephonic reports to the DHS when an investigation will lead to the charges being sustained and that disciplinary action will likely be imposed. Those notifications are followed by written reports that are generated every six months.

Other external complaint procedures:

Department members are permitted to file complaints with other City departments or external agencies which may result in the Fire Department conducting an investigation. Examples include the City Controller, the Personnel Department’s Office of Discrimination Complaint Resolution (ODCR), the California Department of Fair Employment & Housing, and the EEOC.

At least three current conciliation agreements with the EEOC require the Department to offer an external EEO complaint procedure through the ODCR. These conciliation agreements also require that the Department provide a clear, precise explanation of what steps are required to file a complaint of discrimination and/or harassment.

The Department appropriately refers complaints of alleged criminal conduct to law enforcement authorities for investigation.

Comments on the current complaint tracking process:

In preparing this report, we interviewed a number of individuals to obtain information related to the Complaint Tracking System. These individuals included union officials, chief officers, rank-and-file members, and individuals in Department management. We also asked the PSD to respond to the comments.

³⁵ Validation involves a review of the available information to determine, within a reasonable certainty, whether a violation may have occurred and if so, whether the violation may provide a basis for taking disciplinary action.

All of the comments are set forth in their entirety in Appendix 4. Given the length and detail of the comments provided to us, we have provided summaries of the key comments and responses in this section.

Anonymous complaints:

Numerous people said the Department should not accept or investigate anonymous complaints or should establish criteria to evaluate whether such complaints should be investigated. Some people believed that anonymous complaints result in people getting away with filing frivolous or false complaints without being held accountable. Others claimed anonymous complaints have even been used to harass or pressure supervisors so that they won't supervise, hold subordinates accountable or counsel members.

The PSD explained that it not only accepts anonymous complaints to protect members who are fearful of being retaliated against for making a complaint but also to ensure important issues are raised. This decision was made by a prior Fire Chief after balancing these pros against the potential for anonymous complaints being used for retaliation.

The PSD will investigate anonymous complaints containing specific information as to date, time, location, witnesses and specific acts which, if true, would constitute misconduct. Broad, generalized and non-specific claims of a less serious nature will generally be closed without an investigation.

Deciding to enter a complaint into the CTS:

Some individuals reported there was confusion or a lack of information about what complaints should be entered into the CTS and what matters can be handled by training or counseling. At least one person reported that while one supervisor might be "bothered" enough by certain conduct to enter a complaint into CTS, another supervisor might not. We also heard complaints that the Department fails to provide adequate information or current training on these issues.

The PSD said there is a clear mandate to report all EEO and hazing incidents, but there is no policy regarding the reporting of other misconduct. Although it has been four years, the PSD training in 2008 instructed that an allegation should be entered into the CTS if a supervisor becomes aware of allegations which, if true, may result in disciplinary action. This is still the standard supported by the PSD, and ongoing assistance in this area is provided through online resources and PSD staff being available to provide advice.

Signing complaints and providing complaint information to the public:

Some of the opinions expressed to us included that complaints should have to be signed by the individual making the complaint, holding complainants accountable would reduce the number of frivolous complaints, the PSD creates or solicits complaints and complaints are encouraged by making complaint information and instructions available to the public on the Department's website.

The Department's response was that a transparent process requires the ability of anyone to make a complaint or have access to information related to complaint procedures. While the PSD does not solicit complaints, it does treat information it receives as a complaint if the allegations, if true, may result in discipline. The PSD is concerned about the liability associated with failing to act after having received information suggesting misconduct.

Initial review of complaints:

Individuals we spoke with believed that complaints should be screened or triaged, that criteria should be established to determine how complaints should be handled, and that the PSD Moderator currently makes those decisions.

The PSD said that the PSD Commander uses a "Complaint Intake Worksheet" to determine how each complaint is to be handled based on criteria agreed upon in a 2008 collective bargaining agreement with UFLAC. Based on the criteria contained in that form, the PSD Commander will instruct the Moderator to assign the case to the chain of command, alternative investigative process or PSD.³⁶ The Moderator does not decide how the case is assigned. Additionally, complaints that are non-disciplinary on their face are promptly closed. Non-disciplinary cases are those where the allegations, if true, would not violate a Department rule or policy.

The chain of command is excluded:

A number of people told us that Captains no longer have the discretion to handle cases, particularly more minor issues that could be handled with training, and that the current system excludes the chain of command, which has caused negative unintended consequences.

The PSD explained that the negative audits in 2006 resulted in the strong recommendation that the chain of command be removed from reviewing disciplinary decisions and adjudicating cases, and that this responsibility be centralized in the new PSD. The PSD also explained that while supervisors should not engage in interrogations or dispense punitive action in misconduct cases where discipline could be imposed, there is nothing that prevents a supervisor from counseling or training a member while a misconduct investigation proceeds. Finally, allowing more minor issues to be handled in a non-punitive manner would require changes to the Department's disciplinary philosophy and guidelines.

Fear of transfer for making a complaint:

One person said that the fear of being transferred or detailed from a work assignment prevents some members from entering complaints into the CTS.

The Department explained that it has a zero-tolerance policy for retaliation for reporting misconduct. The intent of the CTS was to welcome complaints from all sources, including anonymous complainants who may fear retaliation or retribution for reporting misconduct.

³⁶ If the PSD Commander is absent, the same process is followed by the Chief Special Investigator.

The PSD said it only details or assigns a member to their residence, not to another work location. There are others in the Department who detail or assign members to other work locations. The PSD strongly recommends that the decision to detail members from one workplace to another be based on the likelihood that leaving the member in his or her current assignment would result in either disruption to the workplace or harm to the Department. While the Department is amending its policy to minimize the unnecessary movement of personnel, the PSD has strongly advocated that blameless complainants not be transferred or reassigned.

Better email notification to the field:

It was suggested that the CTS could be better utilized if the Department had an administrator with the time to ensure that notification emails are more targeted to the officer required to take action.

The PSD explained that the Emergency Services Bureau (ESB) has two “sub-moderators” who confer with the ESB chain of command to determine which Captain or chief officer within the ESB will conduct an investigation assigned to the field. When the sub-moderator assigns the field investigator, the ESB chain of command is added to the workflow, allowing them to see and review the information contained in the CTS under the complaint number assigned to the investigation.

The expectation is that field investigations will be completed within 30 days from assignment of the complaint. An automatic notification is sent to only the field investigator if the investigation is not completed within 30 days of the initial due date. Subsequent automatic notifications are sent to the field investigator as well as the involved Division when the investigation is 60, 90 and 120 days past the initial due date. The email notification only references the CTS number to avoid identifying the subject(s) of the investigation and the allegations.

The PSD reported that it does not control who receives the notification emails and is not involved in targeting the email because the ESB, through its sub-moderators, assigns the field investigators.

Comments by the Independent Assessor:

We make the following comments, findings and recommendations in light of the concerns expressed to us and the Department’s responses.

Anonymous complaints:

We received numerous complaints about the Department accepting and investigating anonymous complaints. In a cover letter to the 2006 audit, the Controller noted that Fire Department employees were failing to report incidents of harassment and hazing due to a fear of retaliation. To lend credibility to the Controller’s concern, we found a complaint in the Department’s CTS where the anonymous complainant stated in the initial complaint that everyone in the work location was afraid to stand up to the subject member, and that he or she was making the

complaint anonymously because the complainant would have to work with the subject in the future and was afraid of retaliation.

That complaint provided enough information to initiate an investigation because it identified the subject and where he or she worked. The complaint was ultimately sustained but no punitive action was taken. It should be obvious that anonymous complaints without investigative leads simply cannot result in lengthy investigations and discipline.

We strongly support the Department's decision to accept and investigate anonymous complaints to the extent the information provided allows for an investigation. To exclude what may prove to be a valid complaint of misconduct for no other reason than because it was made anonymously is inappropriate and unwise. Prohibiting anonymous complaints would lead to a risk that those engaging in misconduct would not be held accountable, and it would expose the City to claims the Department failed to correct inappropriate behavior and conditions. As the Controller's audit noted:

“The failure of an organization to make potentially victimized employees feel secure in coming forward breeds an environment conducive to creating more victims. Further, a lack of an appropriate avenue for disclosure could mask pervasive issues that ultimately tend to come to the attention of those higher in the chain of command only when an instance becomes public and results in an explosion of accusations.”

We note that other entities receive and investigate anonymous complaints. One relevant example is the City Controller's Fraud Hotline. This is “a confidential hotline for City employees, contractors, citizens and other interested parties to report fraud, waste and abuse affecting City resources.” The Controller allows complainants to remain anonymous. Additionally, the Fire Department has investigated anonymous complaints received by other agencies that were forwarded to the Department.

We share the concern about false complaints being lodged against Fire Department employees, including supervisors. There is a potential that they result from or may create supervisory and work environment issues. The answer to that problem, however, is not banning anonymous complaints. That problem should be addressed with timely and effective strategies to improve the work environment.

On a related note, the standard of proof required to sustain an allegation is not changed by the mere fact that a complaint was made anonymously or by the complainant's motivation in filing it. The PSD reports that it adjudicates complaints based on the evidence of misconduct rather than the complainant's motivation for filing a complaint. The PSD also reports that unsustained complaints, whether anonymous or not, are not used for personnel purposes.

Deciding to enter a complaint into the CTS:

Individuals reported that they were confused about what should be entered into the CTS and what could be handled as a supervisory issue. It is important that every firefighter, company

officer, union official and chief officer has a clear understanding of what may be handled as a supervisory issue and what should be entered into the CTS.

The purpose of filing complaints is to protect the public and Department employees, and provide the Department with an opportunity to initiate corrective action. For EMTs and paramedics, for example, the rationale for required reporting of possible violations to the County is to permit an evaluation of potential threats to public health and safety.³⁷ The FBOR does not discourage or prevent the filing of complaints.

The standard for deciding whether to enter a complaint into the CTS is not subjective. The standard is not whether the involved supervisor is “bothered” by the conduct. Whether the accused or others might be angered by the filing of a complaint is irrelevant. The fact that an investigation may ensue is not a reason to avoid filing a complaint. There is no obligation to advise the accused that he or she has a right to representation before or even at the time a complaint is filed. An initial “fact finding” inquiry is not required.

The standard for deciding whether to enter a complaint into the CTS is an objective one. **A CTS complaint should be entered when the known facts, if true, would constitute misconduct for which the disciplinary guidelines provide a possible penalty.** The accused employee should not be questioned or interviewed when deciding whether to enter a CTS complaint. Such conduct may result in FBOR violations, which can lead to civil penalties. The PSD should continue to be available with advice if there is any confusion about whether a CTS complaint should be filed.

A supervisor can always provide counseling, training, direction or a verbal admonishment, whether or not a CTS complaint is required, because such supervisory contacts do not constitute “punitive action” under the FBOR. The Department should take steps to ensure that supervisors do this in a timely and appropriate manner. However, the FBOR does prohibit, and supervisors should refrain from, questioning or interrogating when counseling, training, directing or verbally admonishing a subordinate suspected of misconduct.

It is our recommendation that the Department provide continuing training, notice and supervision to all Department members to improve their overall understanding of what should be entered into the CTS. These actions will reduce ambiguity about what kinds of conduct should be reported, as well as bring clarity to the process and increase consistency. Additionally, the Department should also consider adopting and enforcing a formal policy requiring that any suspected misconduct that may result in punitive action be reported and entered into the CTS. Such a policy is justified by prior audits and expensive litigation.

Signing complaints and providing complaint information to the public:

One opinion expressed to us was that the PSD creates, solicits and encourages complaints by providing complaint information and instructions on the Department’s website. It was suggested that complaints should be signed and that by enforcing the “malicious gossip” rule, the number of frivolous complaints would be reduced.

³⁷ Health and Safety Code section 1798.200.

We are deeply troubled by the suggestion that complaint information and instructions should not be made available to the public on the Department's website. This suggestion is antithetical to open government, transparency and accountability. The public has every right to such information, whether they want to file a complaint or commendation. Citizen complaint procedures are intended to promote greater accountability.

The suggestion that complaint information and instructions should not be provided to the public is also inconsistent with at least one statute. Penal Code section 832.5 requires that written information about complaint procedures be made available to the public by each department or agency employing peace officers. The Fire Department's Arson Investigators are peace officers; thus the Department is obligated to provide this information.

The PSD routinely receives information that does not come in the form of a complaint but will ultimately result in one. If the information amounts to an allegation which, if true, may result in punitive action, it is properly treated as a complaint. Such information triggers the protections of the FBOR, and failing to comply with the requirements of the FBOR exposes the City to an unreasonable risk of civil penalties. Failing to make a CTS entry when misconduct is suspected also results in a risk of further negative audits and litigation based on the Department's failing to take timely corrective action.

We strongly disagree with the suggestion that the Department only accept signed complaints and thus ignore unsigned or verbal complaints. Such a rule creates the risk that employees engaging in misconduct will not be held accountable and that the Department will be unable to initiate timely corrective action, only because the complaint was verbal or unsigned. We are concerned that a policy of refusing verbal and unsigned complaints exposes the City to an unnecessary and unreasonable risk of First Amendment litigation.

Initial review of complaints:

There is no merit to claims that the PSD Moderator decides how complaints are handled. The Moderator simply prepares a file for each new complaint, including a "Complaint Intake Worksheet" for the PSD Commander to use in deciding how the complaint is to be handled. While the Moderator enters information into the CTS and sends notifications, it is the PSD Commander who makes those decisions. This system was set up in an attempt to achieve some consistency in complaint handling, as the lack of consistency was a major problem cited in repeated audits and expensive litigation.

Claims that the Department is investigating every complaint are also not accurate. Complaints that do not involve possible punitive action are closed and may be referred to other parts of the Department, or even outside the Department, for follow-up. Approximately 20% of all complaints are closed as non-disciplinary without an investigation. Another 9% are closed as non-disciplinary after an investigation has been completed.³⁸

³⁸ For additional discussion on non-disciplinary complaints, see page 37.

Any complaint alleging misconduct that, if true, may result in punitive action is referred for investigation because the protections set forth in the FBOR are triggered by such allegations. An October 28, 2008 letter of agreement with UFLAC calls for allegations related to job performance, behavior, punctuality, absenteeism, driving, parking and lost equipment to be referred to the field for investigation. More serious complaints are referred to the PSD for investigation.

We received multiple comments that patient care complaints should be addressed by supervisors as training issues rather than being entered into the CTS and referred for investigation. The Department and UFLAC agreed to disciplinary guidelines calling for punitive action for both negligent failure to follow medical protocols and negligent failure to monitor and/or care for a patient. Therefore, until the guidelines are changed, such complaints are properly entered into the CTS and referred for investigation.

The chain of command is excluded:

Many individuals we spoke with complained that supervisors are removed from the disciplinary process under the current system. Removing station-level supervisors and the chain of command from the disciplinary decision-making process was intentional and based on the inconsistency and prior abuses documented in repeated negative audits and expensive litigation. Now a single individual, the PSD Commander, reviews and makes decisions on all proposed discipline in an attempt to address these issues.

We also heard complaints that supervisors no longer have the discretion to handle complaints or engage in supervision at the station level. All supervisors should be using the same criteria when deciding whether to enter a complaint into the CTS. The chain of command, and the Department as a whole, has a responsibility to ensure this occurs. The chain of command also has a duty to make certain supervisors are engaging in appropriate counseling, instruction and verbal admonishments, while ensuring that FBOR violations do not occur, with or without a CTS complaint.

INVESTIGATIVE PROCESS

Depending on the allegations, the PSD Commander will assign a case to the PSD or to the field for investigation. Investigations assigned to the PSD are assigned to either the Internal Affairs Section or the EEO Section. When the PSD was first created and there were relatively few civilian investigators, a sworn-civilian investigative team was employed.³⁹ As additional civilian investigators have been added to the PSD, single investigators are now used whenever possible in an attempt to use investigative resources more efficiently.⁴⁰

The majority of field investigations are assigned to the Emergency Services Bureau. Complaints are directed to the Division chief, who then assigns an investigator. Typically the investigator will be the subject's immediate or direct supervisor. Once the field investigation is completed, the investigator can make one of two recommendations: 1) that no further action be taken by the Department, or 2) that the PSD review the case for possible disciplinary action. Field investigations are reviewed by the PSD before a final determination is made. Even if the field investigator recommended taking no further action in a case, the PSD can send it back if more investigation is needed or choose to impose discipline if it is warranted.

The activities involved in a typical investigation include collecting evidence, conducting interviews of the complainant, witnesses and the subject, and completing a final investigation report. The specific procedures for conducting an investigation may vary between PSD and field investigations, as well as between EEO and Internal Affairs investigations.

Legal standards governing investigations:

As confirmed by a recent decision from the Court of Appeal, a public safety department must: 1) conduct prompt, thorough and fair investigations to ensure public confidence and trust; 2) adopt "best practices" to ensure the integrity and reliability of internal affairs investigations; and 3) make management decisions to ensure the integrity of internal affairs investigations of alleged misconduct.⁴¹ The court also noted that some management decisions involving the disciplinary process are not subject to collective bargaining.

The rules and procedures that govern the investigative process can be found in a number of sources. Some are specific to the Department while others are used Citywide or are required by state law. The main rules governing the investigative process are included in the following sources:

- COA and UFLAC collective bargaining agreements (MOU No. 22 and No. 23)
- Letters of agreement with the COA and UFLAC⁴²

³⁹ Where the subject is a chief officer, the sworn member of the investigative team must also be a chief officer. This was part of an agreement made between the Department and the COA in April 2010.

⁴⁰ See *Discipline Philosophy; Consideration of Alternative Discipline Resolution Strategies to Modify or Correct Behavior In Lieu of Punitive Action*, p. 4 (BFC 12-145).

⁴¹ *Assn. of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29.

⁴² Some investigative procedures are contained in an October 28, 2008 letter of agreement between the Department and UFLAC, and can be downloaded from the CTS Help webpage.

- Department's Manual of Operations
- EEO Unit's investigative procedures
- Charter section 1060
- Personnel Department's policies (used for the Department's civilian members)
- *Firefighters Procedural Bill of Rights Act* (FBOR)⁴³

The applicability of each of these sources will be discussed as they come up in the discussion that follows.

Audit findings, recommendations and implementation progress:

The Controller's 2006 audit found that the Department's investigations were inconsistently handled, poorly tracked or documented and subjective. One key problem identified was the Department's use of inexperienced and untrained investigators on two-year rotational special duty assignments. The independence of these investigators was also an issue because they often had to investigate members they would likely be working with in the future, either when working an overtime shift or after their PSD assignment ended. This arrangement, according to the Controller, did not assure "consistent, comprehensive and independent" investigations. The Controller also found that the Commission's EEO office had become ineffective in investigating EEO complaints, which may have led to fewer EEO-related issues being reported.

Similarly in its 2006 audit, the Personnel Department found that Department investigations were inadequate, conducted by rotating untrained staff and lacking in documentation. It found that the Department, rather than the Fire Commission's EEO office, was handling EEO complaints. The Personnel Department also found that the Department's practice of requesting written statements from involved members, rather than face-to-face interviews, was insufficient because it limited the scope of the inquiry to those topics included in the request.

Both the Controller and Personnel Department recommended that responsibility for investigating EEO issues be assigned to an EEO Unit. Recommendations from both audits also focused on developing an Internal Affairs Unit with staff who possess the necessary training in conducting disciplinary investigations. They also emphasized the importance of documentation.

The Personnel Department made a separate recommendation that the Department's investigation procedures include interviewing all pertinent witnesses, and recommended substantial civilianization of the disciplinary system.

The only major difference in the recommendations from the Controller and Personnel Department was that the Personnel Department recommended the EEO Unit be moved into the chain of command (under the Fire Administrator), while the Controller recommended that the Internal Affairs Unit report to both the Fire Chief and Fire Commission but otherwise be removed from the chain of command.

⁴³ The *Firefighters Procedural Bill of Rights Act* (FBOR), enacted on January 1, 2008, sets forth procedural requirements related to conducting administrative investigations, the discipline of firefighters, administrative appeals and personnel records. The statute does not apply to those who have not passed probation. Peace officer/Arson Investigators are covered under the *Public Safety Officers Procedural Bill of Rights Act* (PBOR).

The Fire Commission's 2006 *Audit Action Plan* contained two goals related to the investigative process: 1) have an EEO Unit that would be independent from the chain of command and responsible for all EEO investigations and training on EEO issues; and 2) create an independent body with permanently assigned civilian and sworn investigative staff with the necessary expertise and training to conduct investigations and maintain professional investigative files.

The stakeholders were able to reach a consensus on the need for investigator positions and that the investigative teams should include both a sworn and civilian employee.

The Personnel Department's 2008 report to the City Council accepted the use of sworn and civilian investigators working side by side to conduct disciplinary investigations. The report also stated that the EEO Unit's reporting relationship had not been changed (to the Fire Administrator) as had been recommended. The new recommendation was to assign those duties to an EEO section of the PSD instead, and in the long term have civilian special investigators assigned to that section to conduct EEO investigations.

The Controller's 2008 follow-up audit reported that the Department had successfully created an EEO Unit staffed with permanent, experienced personnel that was outside the Operations chain of command. The Internal Affairs Unit was also outside the Operations chain of command and efforts to hire additional full-time, civilian investigators were ongoing. The Controller continued to recommend ending the practice of having civilians work with sworn members on investigations because the sworn investigators were still allowed to work overtime in the field.

The Controller made a new recommendation that the Department formally document its investigative processes into policies and procedures. These manuals would define the responsibilities of the PSD Commander, Battalion Chief and investigators, as well as formalize timeframes for completing investigations.

Employee organization responses to audits:

The various organizations representing Department members responded to the Controller and Personnel Department audit recommendations to varying degrees.⁴⁴ What follows is a summary of the organizations' responses by topic area.

EEO Unit outside the chain of command that investigates EEO complaints:

All of the employee organizations responding to the recommendation that the EEO Unit be moved outside the chain of command mostly agreed. The COA wanted clarification on what was meant by "chain of command," and emphasized the need for a separate EEO component (or participation by a personnel investigator) for investigations of EEO-related complaints. Both UFLAC and Los Bomberos wanted the EEO Unit to report directly to the Fire Commission.

⁴⁴ A brief description of the different Fire Department employee associations and labor organizations is provided in Appendix 3.

Los Bomberos wanted the EEO Unit to be compared to equivalent units of similarly sized organizations, both public and private, to determine the appropriate scope of responsibilities, staffing and resource levels, as well as reevaluating the job description to ensure it reflects those responsibilities and had a comparable salary grade. The Stentorians wanted the EEO Unit empowered to review all workplace complaint issues, to ensure compliance with the law, and add confidentiality for individuals reporting complaints.

Personnel Department's recommendation that the EEO section report to the Fire Administrator rather than the Fire Commission:

The COA, UFLAC, Los Bomberos and Stentorians all disagreed with the recommendation to have the EEO section report to the Fire Administrator rather than the Fire Commission. The COA wanted the reporting relationship to remain with the Fire Commission, Fire Chief or Operations. UFLAC wanted the unit to report directly to the Fire Commission without interference from the Fire Chief, the command staff or the Personnel Department. Stentorians did not want the unit to report to the Fire Administrator because that position is under the Fire Chief's supervision.

Los Bomberos objected to this change in the reporting relationship because the current Fire Administrator did not have the experience or credentials required to fulfill the requirements of the Personnel Department's recommendation. Additionally, their belief was that the current EEO office had been rendered ineffective by the Department administration and the recommendation was in direct contradiction with the Personnel Department's 1995 audit recommendations.

Internal Affairs Unit with permanently assigned, experienced investigative staff:

The COA agreed that Internal Affairs Unit needed permanently assigned and experienced staff with one exception: Advocates should be sworn members of the Department. UFLAC agreed with the recommendation because using professional investigative staff would end the practice of members investigating other members who they may work with later; creating a more trusted and fair process. The SIRENS wanted to see the Internal Affairs Unit staffed with sworn and civilian investigators permanently assigned to provide consistency.

Los Bomberos agreed with the recommendation and asserted that the Internal Affairs Unit should be part of a Civilian Oversight Unit that reported directly to the Fire Commission. The investigative staff should be assigned for a period of no less than four years with off-setting replacement (two year intervals), receive a bonus for the second two years in the assignment, and receive training by outside subject matter experts. Additionally, the permanently assigned investigative staff would be paired with qualified and experienced civilian investigators for no less than five years. The Department would need to develop investigative policies and procedures, specific job descriptions, selection criteria and an annual evaluation process.

Internal Affairs Unit reports to both the Fire Chief and the Fire Commission but is otherwise removed from the chain of command:

All of the employee organizations that responded agreed with the recommendation that the Internal Affairs Unit should report to both the Fire Chief and Fire Commission. The COA agreed with one exception: EEO issues must be handled by the Fire Commission's EEO office. This was also echoed by the SIRENS who asserted that EEO complaints should be handled by the EEO/Sexual Harassment Counselor. UFLAC agreed with the recommendation because it would ensure investigative outcomes would be safe from manipulation by the chain of command and members would not have to worry about retaliation or retribution.

Investigative procedures should ensure all pertinent witnesses are interviewed and interviews are fully documented:

The COA, UFLAC and Stentorians all agreed with the recommendation that all witnesses be interviewed and that interviews be documented. The COA added that interviews should be recorded.

Statute of limitations:

The Charter requires that disciplinary charges be filed with the Commission within one-year of the Department's discovery of the act or omission by a member and in no event later than two years from the date of the act upon which the disciplinary action is based.⁴⁵ The similar Charter section for the Police Department and the FBOR both provide for tolling of the statute of limitations that is not available to the Fire Department without amending the Charter.

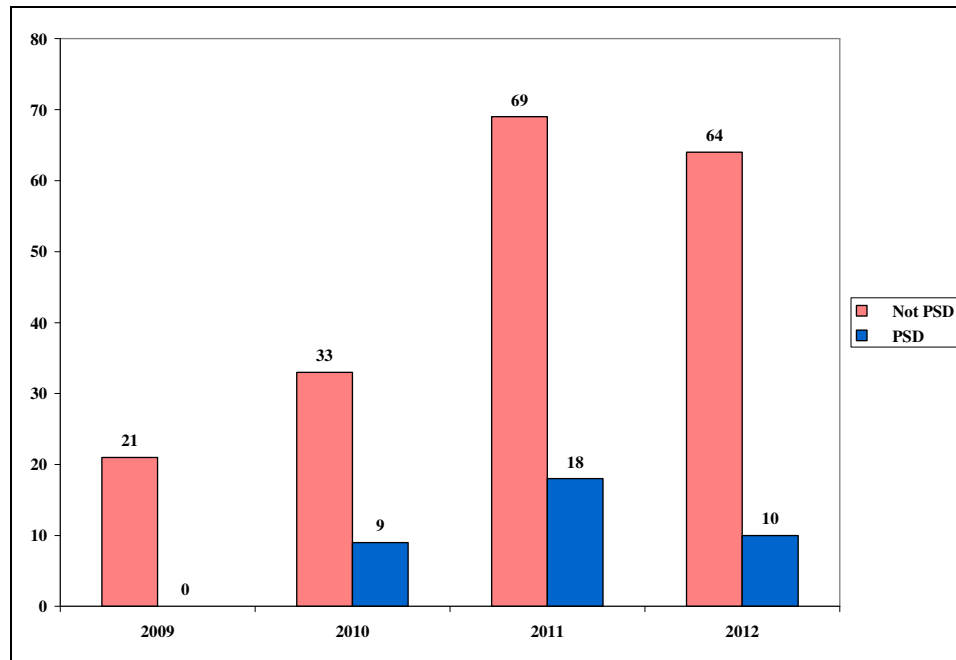
The Department has proposed amending the Charter to provide for tolling of the statute of limitations in circumstances similar to those set forth in the Charter provision governing the discipline of police officers and the FBOR. The proposed amendment was opposed by UFLAC and has not been approved by City Council committees.

The PSD provided statistics for "out of statute" cases between 2009 and 2012. During that time period, a total of 224 cases were closed as "out of statute." Of those, 83.5% (187 cases) involved non-PSD investigations and 16.5% (37 cases) were investigations conducted by the PSD.⁴⁶ The following chart provides information about the number of investigations that went out of statute between 2009 and 2012.

⁴⁵ Charter section 1060, subdivision (a).

⁴⁶ We have not attempted to verify or examine the information more closely.

Chart 4: Out of Statute PSD vs. Non-PSD Cases, 2009-2012



Source: Professional Standards Division

Requirement to report investigative findings:

The preceding section of this report discussed the Department's obligation to report validated violations of the California Health and Safety Code to the County's Department of Health Services. At least three conciliation agreements require the Department to provide the EEOC, upon request, with certain investigative findings and documentation. With respect to complaints of gender, racial or sexual discrimination, the Fire Department is required to provide the names of complainants and those accused; their races and genders; the dates of complaints; and the findings and results of the investigations. The same conciliation agreements also require the Fire Department to continue to enforce its discrimination and harassment prevention policies and procedures, and such policies are to be issued annually to all employees.

The same information that must be provided to the EEOC under the conciliation agreements must also be provided to the Fire Commission. As head of the Department, it is the Commission's responsibility to oversee and monitor the Fire Chief's administration of the disciplinary system, and this information is critical to such supervision. The Commission must also be involved in approving any necessary changes to the Department's policies, procedures, rules and regulations. Failure to comply with conciliation agreements can result in expensive and embarrassing litigation or other consequences. The Department must make every effort to avoid this outcome.

Current investigative process issues:

There are many elements involved in the investigative process. We have chosen to highlight a few of the areas raised by the various stakeholders we spoke with in preparing this report. The

discussions below include some background on these areas, followed by summaries of some of the comments made by individuals we interviewed and the responses to those comments provided by the PSD. Please see Appendix 5 for a complete set of all the comments and responses.

Investigative interviews:

Conducting investigative interviews includes informing the subject of the nature of the investigation, giving admonitions at the start of the interview and recording the interview. The member's right to representation during the interrogation will be addressed in the next section.

The FBOR applies when a firefighter is under investigation and subjected to an interrogation that could lead to punitive action.⁴⁷ The law does not apply to counseling, instruction, informal verbal admonishment, or other routine or unplanned contact with a supervisor or any other firefighter. Generally speaking, the protections apply if the employee is suspected of misconduct.

Procedural protections during an interrogation under the FBOR include requiring that interrogations be conducted at a reasonable hour, while the firefighter is working unless there is an imminent threat to public safety. If the interrogation occurs when the firefighter is off-duty, he or she must be paid for that time. The Department's Manual of Operations states that interviews should be conducted between 8:00 a.m. and 5:00 p.m. on weekdays unless the investigation is time-sensitive.

The FBOR also mandates that prior to the interrogation, a firefighter under investigation must be informed of the nature of the investigation. He or she must also be informed of the name, rank and command of the person in charge of the interrogation and any other individuals who will be present. All questions must be asked by and through no more than two interrogators. There are additional protections if the charges being investigated could subject the firefighter to criminal prosecution. Both collective bargaining agreements also require that members be informed of the nature of the interview prior to the interview.

The PSD provides all this information to members verbally and in writing using an admonition form provided at the start of an interview.⁴⁸ Different admonition forms are used depending on whether the individual being interviewed is a sworn or civilian member; is a witness, complainant or subject; and whether the investigation is purely administrative or if there are potential criminal implications.⁴⁹ All the forms include this basic information:

- Date, time and location of the interview
- Name of the member being interviewed and his or her representative (if applicable)

⁴⁷ "Punitive action" is defined in the FBOR as any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfers for purposes of punishment. The City Charter limits punitive action to suspensions and terminations.

⁴⁸ Civilian PSD investigators have been authorized to provide these admonitions to Department members being interviewed, other than chief officers, through a letter signed by the Fire Chief.

⁴⁹ There is also a separate admonition form for members of the Arson Section who fall under the PBOR.

- Names of the investigators
- Identification of any other parties present
- Whether the interview is being recorded
- Description of the nature of the investigation
- Limitations of the interview
- Questions related to the member's ability to answer questions
- Written order to answer questions truthfully
- Right to representation and the representative's role
- Signatures of the member and investigators

The most significant difference between the forms is that the admonition forms used for interviews where there are potential criminal implications contain two additional sections: information regarding the member's Fifth Amendment rights and a use immunity statement.

Agreements with the COA provide additional benefits for chief officers. In April 2010, the Department reached an agreement with the COA that only chief officers, in connection with the admonitions given at the start of an interrogation, are able to order another chief officer to answer truthfully. Additionally, chief officer subjects have a right to have a chief officer interrogator present, although this right may be waived.

Finally, the FBOR states that the interrogation may be recorded by the employer and/or the firefighter under investigation. The Department's Manual of Operations states that interviews may be recorded, and must be recorded if the investigation is serious in nature (where the potential penalty is a 6-day suspension or greater). If the interrogation is recorded, the member is entitled to access a copy if further proceedings are contemplated or prior to any further proceedings at a subsequent time. The current practice is not to allow witnesses or complainants to record their interview; however, exceptions are sometimes made for EEO complainants.

Comments and response – Nature of the investigation

We were told that subjects are sometimes told about the nature of the investigation while witnesses usually are not told. The nature of the investigation is sometimes provided in writing and sometimes not.

The PSD stated that sworn members are notified that they are the subject of an investigation upon assignment of Advocates. They are told the nature of the investigation by the interrogator, through the use of the admonition form, before formal questioning commences. The FBOR does not require that this notice to be given in a specific manner.

The PSD also stated that nothing in the FBOR, City Charter section 1060 or the MOUs require that witnesses be told the nature of the investigation prior to the interview. There is no property interest at issue for witnesses because they are not suspected of misconduct that could result in punitive action, so they do not need the same procedural safeguards as subject members. As employees, they also have a duty to cooperate with the Department's investigation. Once the interview begins, the Advocates should provide the witness with enough information to allow them to recall the incident at issue.

Comments and response – Admonition form

We were told that there is no need to have the member sign the admonition form because his or her acknowledgement is recorded. Furthermore, some individuals we spoke with stated that the form should not define the representative's role, and that the form itself had been unilaterally imposed without first going through the "meet and confer" process.

The PSD acknowledged that evidence that members were advised of and understood the admonitions is captured on the audio recording so those who follow the advice of their representatives and refuse to sign the form are not ordered to do so. The PSD reported that it includes information about the role of the representative on the admonition form so that all parties are educated about factors affecting the interrogation, and that the PSD believes the information is accurate pursuant to the *Weingarten* case. Finally, the PSD's position is that the admonition form is not subject to the "meet and confer" process based on City Attorney advice.

Comments and response – Recording by witnesses

Individuals we spoke with complained that the Department does not allow witnesses to record interviews but that they should be able to do so. It was reported that a letter of agreement provides witnesses the same rights to representation as those afforded to subjects, and this was claimed to include the right to record the interview.

The PSD stated that allowing witnesses to record interviews is not required by MOU, statute or other written policy, and it is harmful to the investigation. Such recordings could be shared with the subject members who could then base their compelled statements on the statements of witnesses rather than their personal knowledge and recollection. The PSD believes that only subjects of an investigation must be allowed to record their interrogations under the FBOR.

Right to representation:

Under the FBOR, a firefighter is entitled to be represented at all times during an interrogation by a representative of his or her choice. This choice of representative is limited to one who is reasonably available; an interrogation cannot be indefinitely or unreasonably delayed because a firefighter's first choice of representative is unavailable.⁵⁰

Both collective bargaining agreements require that sworn members be informed of their right to representation and given a reasonable amount of time to obtain a representative. The UFLAC agreement also states that a member may request representation if, during an interview or inquiry, the potential for discipline is evident.

A letter of agreement with UFLAC states that representatives will be allowed reasonable time to schedule the interview; "reasonable time" is defined as a maximum of seven business days. Application of the seven-day rule has now been extended to all sworn members of the

⁵⁰ *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1306 (interpreting the identical provision related to representation in the PBOR).

Department. However, if management determines that an investigation is time-sensitive, and the member is unable to obtain representation within 90 minutes, the Department reserves the right to assign or detail an available representative of the member's choice to provide representation.

Finally, the letter of agreement with UFLAC states that members who are interviewed as witnesses have the option of requesting representation. If such representation is requested, the same representation provisions for a member accused of misconduct will apply.

There were numerous complaints about how the PSD schedules interviews and members not getting their representative of choice for interrogations. One complaint we heard from multiple people was that the PSD only communicates with the member and not the representative. We were told that the seven-day rule was adopted in order to accommodate platoon duty representatives' schedules, and that it allowed representatives up to seven business days to schedule an interview. This did not mean that the interview had to take place in seven days. Additionally, we were told that the PSD sometimes makes accommodations for busy representatives but other times does not, and that the Department will not detail a member who is working to represent another member at an interview.

The PSD stated that the FBOR requires that an interrogation be conducted at the convenience of the accused. The PSD will generally attempt to reschedule an interview if the member has a true conflict, but may choose not to due to statute issues. The PSD stated that the FBOR is silent as to accommodating the accused's representative, and it is the PSD's position that the member is responsible for securing the attendance of a chosen representative at the interrogation.

If the member's chosen representative is unable to attend, the member should select an alternate so that the interrogation can proceed. Based on advice from the City Attorney's Office, the PSD believes the Department has given the member the required "reasonable time" to secure representation by notifying the member at least seven days prior to the interview.⁵¹ Thus the interview should move forward as scheduled even if the member does not have a representative.⁵² From a practical standpoint, PSD investigator caseloads make it difficult to manage investigations based on the schedules of the specific representatives.

The PSD stated that a member's right to a representative of his or her choice is not unlimited (citing the *Upland* case). While there is no appellate decision interpreting this area of the FBOR, there is case law interpreting the same issue under the PBOR. Courts have said that a member's choice of representative must reasonably accommodate the department's interests in conducting a prompt and efficient investigation. This means a member must choose a representative who is reasonably available and physically able to represent the employee at a reasonably scheduled interrogation.

⁵¹ The PSD noted that seven days is an extraordinarily long time compared to other public safety agencies. Also, PSD reported that UFLAC has requested arbitration on this issue.

⁵² The PSD reported that there have been several incidents where after a request to reschedule was denied, due to the representative's unavailability, the member suddenly called in sick or went on leave, forcing the PSD to reschedule the interview.

Written statements:

Some individuals interviewed for this report stated that the Department should not go back to using written statements by members involved in a complaint. Other individuals stated that written statements should be used because they would lighten the investigator's workload by necessitating fewer interviews.

The PSD stated that the decision to discontinue the practice of demanding written statements was a policy decision made by a prior Fire Chief and that one of the PSD's mandates was to implement a process which required interviews instead of written statements. This decision was based on a history of the Department receiving identical written statements from multiple members, apparently prepared by their union representatives, even though it was expected that members would personally author the statements. There was also a concern that compelled written statements violated mandates under the FBOR.⁵³

Investigation help:

One issue that was raised to us was the lack of written materials regarding the discipline system. It was suggested that these materials should include an investigation manual, a departmental statement of discipline philosophy,⁵⁴ disciplinary guidelines and informational materials about leadership and the role of supervisors. Additionally, it was reported that station Captains need help with handling and adjudicating complaints. One suggestion was to provide a template for investigation reports that includes all the key elements.

The PSD stated that 40 hours of training on the disciplinary process was provided in 2008 and 2009 to over 700 officers and chief officers. Additionally, the PSD fields numerous calls on a daily basis from members and supervisors seeking guidance on how to handle potential misconduct. The CTS Help webpage, which can be accessed through the Department intranet, also contains resources to assist members. The chain of command is another resource for investigators since they are given access to view the CTS entry for the complaint investigation. Finally, the PSD has previously recommended that a LAFD discipline philosophy statement be finalized and disseminated.

Chain of command:

Various individuals we spoke with said that the chain of command needs basic information about complaints, and that the chain of command should be able to sign off on an investigation before it goes to the PSD. It was also reported that some Captains feel undermined when they complete an investigation and recommend that no further action be taken but then the PSD directs that disciplinary action be taken.

⁵³ The PSD stated that the law is unsettled in this area and that the City Attorney's Office and Employee Relations Officer would have to be consulted before returning to a system with compelled written statements.

⁵⁴ One of the persons we spoke with provided us with a proposed "LAFD Discipline Philosophy" in addition to verbal comments, which is attached as Appendix 6.

We received some information indicating that there is more involvement by the chain of command in EMS cases. There were also complaints that the corrective action summaries received in the field contain inconsistent or insufficient information.

The PSD stated that when it is determined that a complaint should be assigned as a field investigation, to be handled by the chain of command, the PSD sends the case to the proper bureau. For example, a case that is sent to the Emergency Services Bureau is received by the sub-moderator – designated by ESB – who then confers with the ESB chain of command to determine who should be assigned to the case. Once the case is assigned, the chain of command is manually added to the complaint’s “workflow,” allowing the chain of command to see and review the information in the CTS under that complaint number.

The PSD also stated that the CTS generates automatic notifications to those in the “workflow” after preset deadlines are passed. It is expected that a field investigation will be completed and a report will be submitted within 30 days of the complaint being assigned. The first notification is sent via email to the field investigator alone when the investigation is 30 days beyond the initial 30-day due date.

Subsequent notifications are sent to both the field investigator and Division when the investigation is 60, 90 and 120 days past the deadline. The email is specifically written with only the CTS number in order to avoid identifying a specific member or members and the nature of the allegations. Once the investigation is closed, those in the “workflow” are notified and have the ability to view the record, including the adjudication, for up to 30 days after closure.

The PSD stated that the current disciplinary assignment process was created with the intent that immediate supervisors would conduct the investigation of their members in order to reinforce their obligation to hold their members accountable. The degree and extent to which the chain of command is involved in providing input in the investigation is up to the chain of command.

At the same time, the current disciplinary process places the sole responsibility for adjudicating all complaints with the PSD. This decision was based on the 2006 Controller and Personnel Department audits, which found that immediate supervisors may incorrectly recommend that no further action be taken because they are either too close to the accused members or are more concerned with maintaining morale. The PSD reported that it is common to receive field investigations recommending no further action be taken despite evidence that the accused has violated Department policy.

With regard to corrective action summaries, the PSD stated that there are concerns about what information can be made public. These concerns include the potential for violating the privacy of the members involved and possibly subjecting members to ridicule because of discipline they receive. A sample corrective action summary is attached as Appendix 7.

Statute of limitations:

The FBOR sets forth a one-year statute of limitations within which both the investigation must be completed and the firefighter is served with the notice of the proposed disciplinary action.

The one year begins to run when the Department first discovers the alleged misconduct, but the FBOR permits the statute to be extended or tolled when certain conditions exist.

Unlike the FBOR, the City Charter does not permit tolling of the statute of limitations for firefighters.⁵⁵ Charter section 1060 sets forth the disciplinary procedures for sworn members of the Fire Department (who have successfully completed probation). The Charter says charges (not just the notice of proposed discipline) must be filed within one year of the Department's discovery of the act committed or omitted by the member and in no event later than two years from the date of the act or omission. Charges must be filed with the Board of Fire Commissioners within five days of the member being served with a verified complaint containing a statement of the charges, and both must be completed before the statute of limitations period expires.

Under the Charter, a member may be personally served by being handed a copy of the charges or, if after due diligence the member cannot be found, the member can be served by sending a copy by certified mail to his or her last known address of record.

One individual we spoke with supported tolling of the statute of limitations in criminal cases. Others complained that investigations are initiated too long after the complaint is filed and too close to the statute date. Another reason raised for why cases go out of statute was because field investigators get transferred or detailed, are given new responsibilities or work on different shifts than their partners or the involved parties.

The PSD stated that it proposed amending the Charter to include tolling provisions on two occasions. The PSD also stated that there are numerous reasons for delays in investigations, including heavy investigator caseloads, the one-year statute of limitations period, the seven-day rule for obtaining representation, and other duties for PSD staff such as Boards of Rights.

Civilian investigators:

We received complaints that a lot of time is wasted explaining simple things and answering basic questions for civilian investigators when they do not work partnered with a sworn member. Some individuals stated that civilian investigators have no authority to order sworn members to tell the truth or answer questions.

The PSD stated that the original direction was to use teams of sworn and civilian investigators. As time passed and caseloads increased, civilian investigators began conducting interviews alone unless they required the expertise of a sworn member. The PSD suggested that what may seem like basic questions are actually necessary to establish that a member knew about the policies that were allegedly violated at the time of the incident – a key element of a complete investigation.

⁵⁵ Charter section 1070, which establishes the disciplinary procedures for the Police Department, does allow for tolling of the statute of limitations. The Department has recommended amending the Charter so that section 1060 mirrors section 1070, but the City Council has not moved those changes forward. (See BFC 12-040, Council File 12-0349, BFC 12-149 and BFC 12-167.)

When a member objects to an order to be truthful from a civilian investigator, he or she is presented with a letter signed by the Fire Chief advising the member that the civilian investigator has been delegated the authority to conduct the interview and that the order to be truthful is based on the Fire Chief's authority.

The PSD reported that normally interviews are required to be conducted at the PSD rather than fire stations because doing otherwise can create issues and disruptions. However, some ESB Division Commanders are currently urging that interviews be conducted in fire stations because of staffing shortages.

Comments by the Independent Assessor:

We make the following comments, findings and recommendations in light of the concerns expressed to us and the Department's responses.

Investigative interviews:

Nature of the investigation

To comply with the notice requirements of the collective bargaining agreements, the Department has a form letter it uses to advise Department members that an investigation has been initiated against them. While not required by the FBOR, the form can provide the subject of the investigation with general information about the nature of the investigation.

The Department has adopted a procedure whereby the subject of the investigation is also told about the nature of the investigation before formal questioning begins. The procedure adopted by the PSD complies with the FBOR and is very similar to the procedure used by other public safety agencies.⁵⁶

The law does not require the Department to provide the same notice concerning the nature of the investigation to witnesses that is provided to the subject of an investigation. Obviously, a witness must be provided sufficient information to answer questions intelligently. **The best investigative practice is to provide the witness or subject with that information at the time of the interview, not before.**⁵⁷

In a recent case, the Orange County Sheriff issued an order, without entering into collective bargaining, unilaterally ending the practice of permitting the subject of an investigation to access investigative information before being interviewed in order to ensure the integrity and reliability of investigations.⁵⁸ The Sheriff's Department noted that subjects and witnesses will have more reason to be truthful if they do not know what the investigator knows before the interview.

⁵⁶ The best investigative practice would be to provide the information at the start of the interview and not when the investigation begins.

⁵⁷ As the Supreme Court noted in *Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 578-79, providing too much information would be contrary to sound investigative practices.

⁵⁸ *Assn. of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29.

Investigators will also be better positioned to assess credibility. The court held the Sheriff's order was appropriate.

Admonition form

It is contended that the PSD unilaterally adopted admonition forms that improperly define the representative's role during the interview and are intended to intimidate the member being interrogated. The Department's admonition forms are consistent with the forms used by other public safety agencies and appear to be accurate in describing the representative's role. The admonition forms have been used for years without legal challenge.

Additionally, the City Attorney's Office has opined that the admonition forms are not subject to the "meet and confer" process. The union representatives who claim they are subject to "meet and confer" provide no legal support for their claim. As noted earlier, not all investigative procedures are subject to negotiation. **Based on this, we consider the issue settled and recommend the continued use of the admonition forms without modification.**

Recording by witnesses

It is contended that witnesses should be able to record their interviews because: 1) the PSD records witness interviews; 2) an agreement with UFLAC provides a witness the same rights to representation as those afforded to subjects; and 3) there was a past practice of recording witness interviews that the PSD unilaterally stopped. There is no legal authority to support the claim that a witness' right to representation also means the witness has a right to record an interview.

A recent Court of Appeal decision confirms that management has a right to unilaterally end past practices that may threaten the integrity and reliability of internal affairs investigations.⁵⁹ Prohibiting a witness (and his or her representative) from recording interviews is a sound investigative practice that tends to increase the integrity and reliability of an investigation. **Accordingly, we support the Department's policy of disallowing witnesses to record their interviews.**

Right to representation:

The claim that Department members are entitled to a specific representative of their choice is not supported by the law. Department members under investigation do have an absolute right to be represented at the time of an interrogation pursuant to the FBOR. However, a firefighter must choose a representative who is reasonably able to represent him or her at a reasonably scheduled interrogation.⁶⁰

In one case involving the Department, a firefighter claimed the Department failed to provide him a *Skelly* hearing by denying his requests for continuances so his chosen representative could be present. The court found no merit in this claim because the right to a representative is not

⁵⁹ *Ibid.* This does not mean the Department may end practices that are part of a collective bargaining agreement.

⁶⁰ *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1306.

unlimited. The court confirmed that the member must choose a representative who is reasonably able to represent the employee at the reasonably scheduled appearance.⁶¹

In October 2008, the Department and UFLAC reached an agreement that investigators would give representatives a reasonable amount of time to schedule interviews, and the agreement defined “reasonable time” as a maximum of seven business days. In practice, this has meant that interviews take place in no less than seven business days after the notification, and sometimes even later given the firefighter’s work schedule. Now, some people are interpreting this provision to mean seven days to arrange a convenient interview date, not necessarily conduct the interview.

Providing seven days to accommodate a representative’s schedule was an extremely poor management decision. The law does not require that the Department accommodate the representative’s schedule. The law requires the member to choose a representative who is reasonably able to represent the firefighter at the reasonably scheduled interrogation.⁶² By making this agreement, the Department seriously compromised and sacrificed its obligation and ability to conduct prompt investigations.

It was suggested that clerical staff from the union and the PSD simply work together in setting interviews, like they do in the “legal arena.”⁶³ That is not the industry practice. Conducting internal affairs investigations is not comparable to litigation where there is no statute of limitations and both sides are compelled to cooperate. We are aware of at least one case where the court documented a lack of cooperation by both a firefighter and his representative when the Department attempted to accommodate scheduling difficulties.⁶⁴

The Department has a serious problem completing investigations and serving disciplinary actions within the one-year statute of limitations set forth in the City Charter. Thus far, the union has actively resisted the Department’s attempts to amend the Charter to add tolling provisions consistent with the FBOR and Charter section 1070 involving the Police Department. The Department should resist providing even more time to schedule interviews, as this would only make it more difficult to complete investigations in a timely manner.

Three years ago we strongly recommend that the seven-day rule be eliminated. No action has been taken to effectuate our recommendation. We again strongly recommend that the rule be eliminated because: 1) it does not comply with the industry practice; 2) it prevents investigators from controlling the progress of investigations; 3) it contributes to the Department being unable to complete disciplinary actions within the one-year of statute of limitations; and 4) it is based on the mistaken assumption that the Department is obligated to accommodate the representative’s schedule.⁶⁵

⁶¹ *Caceres v. City of Los Angeles*, Los Angeles County Superior Court Case No. BS133960 (July 20, 2012).

⁶² *Ibid.*

⁶³ We believe that such a requirement would require additional staff in the PSD.

⁶⁴ *Caceres v. City of Los Angeles*, Los Angeles County Superior Court Case No. BS133960 (July 20, 2012).

⁶⁵ Elimination of the seven-day rule is likely subject to collective bargaining because it was part of a 2008 letter of agreement.

Written statements:

In 2006, the Personnel Department noted that relying on written statements, rather than face-to-face interviews, was insufficient because such an investigative practice was too limiting. In 2010, we noted that the Department had abandoned that practice and expressed concern about potential FBOR violations if it was resumed. Similarly, the PSD is concerned about ensuring adequate due process protections are in place before returning to the use of such statements. The PSD also noted problems related to the reliability of such statements.

We certainly agree that investigations must proceed expeditiously. However, we are also concerned about the reliability of the information obtained through written statements and investigative practices must comply with all procedural requirements. **Until these issues are fully addressed, the Department should not go back to using written statements in the place of interviews.**

Chain of command:

The chain of command has the ability to supervise virtually every step of field investigations, including the recommendations made to the PSD. Consistent and informed supervision of field investigations by the chain of command should be a priority. The Department has an obligation to provide continuing training and information on the difference between appropriate daily supervision and what is prohibited by the FBOR. The chain of command must also ensure these standards are put into practice on a daily basis.

Counseling and training

Some Department members contend that the current system, by removing supervisors and the chain of command from the adjudication process, prevents them from being able to supervise, and that lengthy delays in completing investigations prevents timely training. **In most cases, neither of these situations should prevent supervision.** The FBOR does not apply to counseling, instruction, informal verbal admonishment, or other routine or unplanned contacts. Even when misconduct is suspected, and punitive action is possible, the supervisor may provide counseling, instruction or informal admonishments, so long as the supervisor does not question, interview or interrogate the member who is suspected of having engaged in the misconduct.

For example, the Department receives numerous complaints of Department members being discourteous by engaging in verbal altercations with members of the public. While such complaints are entered into the CTS because the disciplinary guidelines say that punitive action may be imposed for engaging in such conduct, nothing prohibits a supervisor from counseling, instructing or verbally admonishing a Department member to not engage in such conduct in the future. The chain of command can and should ensure that such supervision is provided, while also ensuring that FBOR violations do not occur.

In 2006, the Personnel Department discussed bringing the Department's disciplinary system into compliance with the City's policy of fair, equitable and progressive discipline. The Personnel Department noted that the most important step in doing so was to be sure that first-level

supervisors were trained to effectively establish appropriate workplace behavior standards and hold all employees to those standards. The Department should ensure that supervisors receive such training and put that training into practice on a consistent basis.

Supervising field investigations

We were told that the current process prevents or discourages supervisors from supervising field investigations, and that the chain of command is not provided information about complaints and their adjudication. Much like PSD supervisors are obligated to appropriately supervise PSD investigations, the chain of command is obligated to appropriately supervise field investigations. While the PSD may adjudicate all misconduct complaints, that adjudication by the PSD does not prevent or substitute for supervision of field investigations by the chain of command.

Once an investigation is referred for a field investigation, the chain of command selects the investigator, who is most often the subject's immediate supervisor. The chain of command has the authority to provide each person in the investigator's chain of command, including the investigator's Battalion Chief, Division Chief and Bureau Commander, with access to the CTS record so they can view the factual background and offense information.

Such access also allows the chain of command to monitor the field investigator's progress in completing the investigation, including whether or not interviews have been conducted, other evidence has been collected, whether investigative information has been entered into the CTS, what witnesses have said and whether the investigation is progressing in a timely manner. Nothing prevents the chain of command from discussing the case with the assigned investigator and determining whether the investigation is complete and thorough.

Field investigators are supposed to make certain CTS entries. These include identifying the involved parties, providing interview summaries and a preliminary investigation report. The instructions provided in the CTS inform the investigator that the complainant is to be contacted immediately to determine the cause, severity and appropriateness of the complaint. The investigation report format provided in the CTS calls for providing a summary, findings and a conclusion. Nothing prevents the chain of command from reviewing these entries to ensure satisfactory information is provided. CTS access is available to the chain of the command 24 hours a day.

Field investigators and the chain of command would be assisted with an improved reporting format or template in the CTS. Such a template could prompt investigators to provide critical information. This would also assist the chain of command in appropriately supervising investigations and the recommendations sent to the PSD.

At the conclusion of a field investigation, the assigned investigator either recommends "no further action" or a review by the PSD. Any "no further action" recommendation is to be accompanied by a thorough justification. The current system does not prevent the chain of command from reviewing the final investigation report, recommendation and justification for the recommendation before it is submitted to the PSD. Good supervision compels such a review, and the ability to provide this supervision is within the control of the chain of command.

To facilitate timely investigations, the CTS provides an initial automatic notice to the assigned field investigator when the investigative assignment has not been completed after a certain amount of time. Subsequent notices are provided to the field investigator and whoever else in the chain of command has been granted access to the case in the CTS. A member of PSD management meets regularly and routinely with a chain of command representative to discuss the status of field investigations. **Only appropriate monitoring and supervision by the chain of command will ensure field investigations are being completed to the satisfaction of the chain of command.**

Adjudication by the PSD:

The PSD reviews field investigations to determine whether further investigation is needed and, in some cases, to determine what discipline should be imposed. The authority to adjudicate complaints was removed from the chain of command and centralized in the PSD because audits and litigation found the prior system resulted in poorly conducted investigations, inconsistency and some abuses in the application of discipline.

We heard complaints that immediate supervisors feel undermined when the PSD rejects a “no further action” recommendation and decides instead to impose discipline. However, the goal of the system where the PSD makes all these determinations was to ensure consistency and adherence to the disciplinary guidelines negotiated with the unions. It was also intended that the PSD would provide investigative expertise that was found to be severely lacking.

We have not conducted a review to determine how many field investigator recommendations are rejected by the PSD. A review of field investigator recommendations by the chain of command before submission to the PSD may provide an opportunity to reduce the number of recommendations rejected by the PSD and improve consistency.

There are complaints that the chain of command lacks information about the Department’s disciplinary philosophy. While the Preamble to the Department’s Rules and Regulations provides some information, the Commission asked about a “cover sheet” to the disciplinary guidelines in the fall of 2008. We recommended that the Department provide information about the nature and purpose of the disciplinary guidelines three years ago. The PSD reports that it has repeatedly identified the need for a Department statement of philosophy. We believe it is long overdue.

Short-form investigation reports:

The PSD has adopted a “short form investigative” process in an effort to manage its limited resources. Once an investigation reaches a point where the investigator believes the allegation cannot be sustained, the investigator is authorized to seek approval to close the investigation. Authorization to close such a case requires the approval of a PSD supervisor.

Once approval is obtained, the investigator prepares a report documenting what steps the investigator had already taken in investigating the complaint and explaining why the

investigation should be closed without further investigation. The report provides evidence of what was done and why the investigation was closed. We have not conducted a formal review of this process so we have no comment on it at this time.

Civilian investigators:

Some individuals we interviewed for this report complained that civilian investigators ask too many background or foundational questions. Prior audits, and our report in 2010, found that investigations were incomplete and the Fire Department lacked the expertise to recognize whether an investigation was complete and thorough. Too often sworn investigators were making assumptions or jumping to conclusions about critical issues. When cases go to a Board of Rights hearing, we often hear defense representatives complaining about the lack of information or foundation provided by investigators in their investigation reports. **For these reasons we see no immediate problems with the current practice.**

It was indicated to us that the Department's Rules and Regulations do not permit civilians to order or compel sworn members to tell the truth during investigations and civilians should not be permitted to do so at fire stations because civilians do not "run" Department members. The fact that the Department's Rules and Regulations do not provide civilians with the express authority to conduct interviews of sworn members and order them to provide truthful testimony is easily remedied.

At least insofar as UFLAC members are concerned, the Department adopted our prior recommendation that the Fire Chief delegate to civilian investigators the authority to conduct interviews and issue orders to provide truthful testimony.

The Department has an agreement with the COA whereby only a chief officer may admonish and order another chief officer to tell the truth at the start of an interrogation.⁶⁶ The agreement also provides chief-officer-subjects the right to be interrogated only by another chief officer. We recognize these privileges are often waived. However, **we advocate elimination of this agreement.** The law does not require these procedures, which are burdensome for the PSD staff, and their elimination does not undermine the day-to-day authority of chief officers.

While it is true that civilians do not "run" fire stations, it is important to remember that a civilian Board of Fire Commissioners supervises, controls, regulates and manages the Fire Department as the head of the Department.⁶⁷ The Commission has the power to instruct the Fire Chief in carrying out all of the Fire Chief's duties, and has the Charter authority to make and enforce all rules and regulations it deems necessary to running the Fire Department.⁶⁸ That includes, but is not limited to, the disciplinary process.

⁶⁶ This agreement concerning the disciplinary process was entered into without consulting with or obtaining the authority of the Fire Commission. It was also never memorialized in a formal letter of agreement.

⁶⁷ Charter sections 500 and 506.

⁶⁸ Charter section 509 and City Attorney Opinion No. 2006:1, dated May 9, 2006.

DECIDING DISCIPLINARY PENALTIES

Once an investigation has been completed and allegations of misconduct are sustained, the Department sets a proposed penalty. This penalty is determined by matching the sustained rule violations to the corresponding penalty range in the Department's disciplinary guidelines. A standard set of penalty factors are used to move the penalty up or down within the range. This proposed penalty is sent to the member who can then request a *Skelly* hearing. A member receives notice of the final discipline only after he or she has had an opportunity to respond to the proposed discipline, either orally or in writing.

The Department is not using the disciplinary guidelines recommended by the stakeholders and approved by the Fire Commission in November 2006. The guidelines used for chief officers are contained in a January 12, 2008 letter of agreement with the COA. The guidelines used for all other sworn members of the Department are set forth in an October 28, 2008 letter of agreement with UFLAC.

Although the Department advised the Fire Commission that disciplinary guidelines were the subject of a "meet and confer" process, the Department failed to obtain the Commission's final approval. In some cases, the new guidelines not only set forth lower penalties than what had been recommended by the stakeholders and approved by the Commission, but also provide lower penalties than the Civil Service guidelines the Department had been using at the time of the Controller and Personnel Department audits two years earlier. More specifically, there was a general reduction of penalties in the areas of alcohol abuse, dishonesty, theft, discrimination, harassment, sexual harassment and hazing.

Once guidelines were negotiated, the proposed penalty for both chief officers and UFLAC members was determined by first going to the mid-point of the applicable range of potential discipline and then applying the aggravating and mitigating factors.⁶⁹ When UFLAC complained that starting at the mid-point was too harsh, the Department started using the bottom third of the range as a starting point for members represented by UFLAC.⁷⁰

Legal standards governing disciplinary penalties:

During the stakeholders' process, the City Attorney's Office advised that the disciplinary guidelines are subject to the "meet and confer" process. The City Attorney's Office later provided written advice stating that penalty guidelines are a mandatory subject of collective bargaining.

Disciplinary or "punitive action" under the FBOR means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand or transfer for purposes of punishment. Punitive action or discipline under Charter section 1060 is limited to suspension or dismissal; written reprimands are not considered formal disciplinary action.

⁶⁹ The mid-point is determined by taking into consideration the minimum and maximum number of days of suspension that could be imposed, to a maximum of 30 days. Written reprimands and dismissals are not considered.

⁷⁰ The process for selecting a proposed penalty for chief officers still starts at the mid-point of the range before application of the aggravating and mitigating factors.

Charter section 509 says that the Fire Chief shall appoint, discharge, suspend or transfer Department employees, subject to the instruction of the Fire Commission. The City Attorney has provided written advice stating that the Fire Chief's functions of discharging or suspending a member are subject to review and corrective instruction from the Fire Commission.

The Charter permits the Fire Chief to suspend a sworn member for up to 30 days. If a dismissal or suspension of more than 30 days is sought, the Charter calls for a member to be referred to a Board of Rights. The member may be relieved from duty pending a hearing and decision by a Board of Rights, and no suspension by a Board may exceed six months.

In cases involving public employee challenges to discipline, the courts use the following "penalty setting factors" to determine whether there has been an abuse of discretion by the employer: 1) the extent to which the misconduct resulted in, or if repeated is likely to result in, harm to the public service; 2) the circumstances surrounding the misconduct; and 3) the likelihood of recurrence.

Audit findings and recommendations:

The Controller's 2006 audit found that the Fire Department was using the Civil Service disciplinary guidelines without any criteria to assist supervisors in setting discipline penalties within the broad penalty ranges. Many in the Department reported they did not know what discipline to expect for engaging in misconduct.

The Controller believed that once specific discipline guidelines were developed in collaboration with the unions, it would be important to administer them in accordance with policy. The Controller noted that while it may be useful to have a range of options and some discretion in setting penalties, mitigation on a case-by-case basis can leave the impression that some individuals are treated differently, which may create the perception of favoritism.

The Personnel Department believed that the relative lack of reprimands, when compared to suspensions, indicated a work environment where initial inappropriate behavior is tolerated or ignored, and then escalates into more egregious behavior (requiring a suspension). The failure to address problems through appropriate progressive discipline was seen as hampering the Department's ability to establish a consistently appropriate work environment.

The Personnel Department found the most problematic area was in the implementation of appropriate penalties. In addition to being inconsistent, the discipline system was marked by excessive leniency in some cases and excessive strictness in others. To be effective, the penalty must be appropriate for the offense, and the same offenses must be punished similarly.

The Controller's January 26, 2006 audit recommended that the Fire Department:

- Develop, with input from the firefighters' and chiefs' unions, a set of standard disciplinary penalty guidelines for sworn firefighters that reflect the unique accountability resulting from their public safety responsibilities; and, once developed assure that they

are consistently applied and fairly administered. The standard disciplinary guidelines should include specific penalties for specific offenses, repeat offenses and include criteria for progression through channels.

- Eliminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a lesser punishment with the accused member or the union. Rather, only propose penalties that are consistent with a set of disciplinary penalty standards developed through joint cooperation of the firefighters' and chiefs' unions.

The Personnel Department's January 31, 2006 audit also recommended that the Fire Department develop and implement its own guidelines to disciplinary standards that reflect the unique operating conditions of the Fire Department and model the new guidelines after Personnel Department Policy 33.2.

Employee organization responses to audits:

The various employee organizations representing Department members were in general agreement with the recommendations to develop and implement a standard set of disciplinary guidelines for firefighters.⁷¹ What follows is a summary of the responses from the employee organizations.

The COA believed that guidelines designed to more accurately reflect appropriate penalties for sworn members of the Department were needed instead of the civilian guidelines. It was thought that the administration of discipline should depend on a balance of factors in each situation. The COA also believed that intermediate officers should have the ability to review and respond to reports as they progressed through the chain of command.

Los Bomberos believed that disciplinary standards should be just, timely and comparable to other fire departments, should meet the criteria of the Civil Service guidelines and that the civilian oversight unit should be responsible for development and review of the standards. The Stentorians agreed with the recommendation to establish guidelines for the Fire Department but the group was concerned with how they would be implemented.

UFLAC believed that the disciplinary system in place at the time resulted in unequal application and unnecessarily severe discipline. Department members generally respond to fair and consistent disciplinary policies, so the Department's guidelines should be based on a benchmark study of penalties imposed by other comparable fire departments.

Fire Commission's *Audit Action Plan*:

The Fire Commission's April 25, 2006 *Audit Action Plan* included one goal related to the disciplinary guidelines:

⁷¹ A brief description of the different Fire Department employee associations and labor organizations is provided in Appendix 3.

The Department will adhere to disciplinary guidelines that are equitable, consistent, free of undue influence, and clearly understood by all levels of the Department. They will also reflect the best practices with demonstrated success in achieving a self-disciplined workforce, as well as the core values and vision of the Department.

Stakeholders' process:

The stakeholders agreed that sworn members should be held to a higher standard. To incorporate this intent, the guidelines recommended by the stakeholders set forth the discipline for first, second and third offenses by sworn members. The guidelines also indicated what the discipline would be for similar offenses if engaged in by civilian employees of the City. As for holding supervisors to a higher standard, the stakeholders approved and presented a statement to the Fire Commission that included the following language:

The stakeholders have revised specific disciplinary guidelines that reflect the unique working conditions, core values, visions of the Los Angeles Fire Department and expectations of the public. As directed by the Fire Commission Audit Action Plan and consistent with Civil Service Guidelines 33.2 (Guide to Disciplinary Standards) which states "Employees in supervisory positions and those performing safety/security functions are generally expected to demonstrate a higher level of conscientiousness and integrity with respect to their employment. Accordingly, these employees may be subject to more severe levels of discipline for violations of behavior and/or performance standards because they are held to a higher standard of conduct."

The stakeholders agreed on a set of disciplinary guidelines to be used for sworn members of the Department.⁷² There was a consensus that offenses requiring a minimum of a Board of Rights, which may ultimately lead to a termination, included: 1) theft; 2) fraud; 3) insubordination; 4) on-duty consumption of alcohol; 5) driving while under the influence; 6) acts of discrimination, harassment or retaliation; 7) acts of violence; 8) criminal acts; and 9) possession, sale or use of illegal drugs or controlled substances. There was further consensus that the minimum penalty should be a 30-day suspension when the complaint, if true, would justify sending the member to a Board of Rights.

Independent Assessor's Assessment in 2010:

Our 2010 *Assessment* found that to the extent the disciplinary guidelines set standards of behavior, the standards recommended by the stakeholders, and approved by the Commission, generally held sworn members to a higher standard because sworn members could be disciplined more severely than civilian members of the Department for similar misconduct. This changed, however, when the Department negotiated new disciplinary guidelines with the unions in 2008. This had the effect of lowering many of the penalties for sworn members, even below the Civil Service guidelines in some cases.

⁷² These guidelines were approved by the Fire Commission in November 2006.

The following table provides an example of the difference between the guidelines approved by the Commission and the guidelines negotiated with UFLAC:⁷³

HAZING	1st Offense Stakeholder/BFC 2006	1st Offense Department/UFLAC 2008
Participated in an act of hazing or horseplay	16-Day Suspension to Board of Rights	Reprimand to 15-Day Suspension
Participated in an act of hazing or horseplay with injury	Board of Rights	11 to 30-Day Suspension

Among other things, our 2010 *Assessment* recommended:

- That the Charter be amended to permit demotions and reductions in salary as disciplinary options, in addition to dismissals and suspensions, in appropriate circumstances. One of our concerns was that with “constant staffing” requirements, the Department was required to backfill the positions of those serving a suspension at an overtime rate.
- Adopt disciplinary guidelines that set standards of conduct for sworn members of the Department that are higher than the standards of conduct set forth in the Civil Service guidelines for non-sworn members of the Department. Sworn managers and supervisors should also be held to a higher standard than other sworn members of the Department.
- The Department and stakeholders should establish base penalties for each offense guideline range to which mitigating and aggravating factors can be applied in moving the discipline up or down a range, instead of starting at a bottom third or mid-point of a range.
- Disciplinary action should take into consideration all mitigating and aggravating factors known at the time the penalty is first proposed, including conduct, actions and expressions of regret, remorse and responsibility.
- In an effort to achieve consistency at every level of the process when setting disciplinary penalties, the Department should ensure those recommending penalties prior to *Skelly* hearings, *Skelly* officers, those approving final penalties after *Skelly* hearings, the Fire Chief, and the Boards of Rights consider and articulate the factors of: 1) harm to the public service; 2) the circumstances surrounding the misconduct; and 3) the likelihood of recurrence.
- The Department should adopt a policy or guideline governing the standards or factors that should be considered in settling disciplinary cases after the proposed penalty has been served on the affected member. Some of the factors that should be considered before settling a case include:
 - Flaws and risks in the case (such as evidentiary problems, witness unavailability, questions of law) that could not be reasonably considered or were not known at

⁷³ The Mayor’s Executive Directive No. 8 sets a citywide “zero tolerance” standard for acts of hazing.

- the time the charges were served on the affected member, or which have been significantly exacerbated since the service of charges;
 - Whether conditions can be obtained through settlement that cannot be obtained solely through continued prosecution of the charges;
 - The member's record of disciplinary action;
 - Whether in accordance with the principle of progressive discipline, the settlement continues to have the effect of preventing future misconduct;
 - Whether any court orders or corrective action plans have an impact on the decision to settle the disciplinary case;
 - The risk of harm to the public service if such misconduct reoccurs; and
 - The gravity of the conduct that brought about disciplinary action.
- A "cover document" for the disciplinary guidelines should be adopted. The proposed "cover document" presented to the Commission in December 2008 explained the need for investigating misconduct and taking disciplinary action.⁷⁴

Penalty setting factors:

Much like the Civil Service disciplinary guidelines, the guidelines the Department negotiated with the unions do not provide guidance on how a specific penalty should be selected within the broad range of potential penalties. The Department explained in a November 24, 2008 report to the Fire Commission⁷⁵ that absent direction from the stakeholders regarding the application of a specific penalty within a range, and with the assistance of the City Attorney, the same factors used by the federal Merit Systems Protection Board are used by the Department to determine the appropriate penalty to impose.

The Federal Government's penalty setting factors, adopted by the PSD, include the following:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities. This includes whether the offense was intentional, technical or inadvertent; was committed maliciously or for personal gain; or was frequently repeated.
2. The employee's job level and type of employment (including supervisor or fiduciary role), contacts with the public and prominence of the position.⁷⁶
3. The employee's past disciplinary record.⁷⁷
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability.⁷⁸

⁷⁴ The Commission was told that the "cover document" was "being reviewed by labor" and would eventually be returned to the Commission for approval and distributed with the disciplinary guidelines Department wide. Nothing further has been communicated to the Commission about this document.

⁷⁵ *Professional Standards Division Response to Audit Implementation Plan Questions Presented by Fire Commission October 8, 2008*, Attachment #4 (BFC 08-181).

⁷⁶ When the Department applies this factor, officers receive four aggravating points.

⁷⁷ A prior record of discipline could receive up to three aggravating points.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses.
7. Consistency of the penalty with any applicable agency table of penalties. (This refers to the Department's disciplinary guidelines.)
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.
11. Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

When discipline involves a chief officer, the PSD selects a disciplinary penalty by starting at the mid-point of the applicable range, and then applies the penalty setting factors to move the penalty either up or down the range. When discipline involves a member represented by UFLAC, the Department begins at the bottom third of the applicable range, then applies the penalty setting factors to move the penalty either up or down the range.

Application of penalty factors:

In June 2008, the PSD developed a form or worksheet it uses to evaluate each of the 12 penalty factors considered in setting a proposed disciplinary penalty. We reviewed 158 of the forms in an attempt to determine if the Department consistently considers the 12 penalty factors when setting a proposed disciplinary penalty. Some information was provided concerning the employee's identity on 151 of the forms we reviewed. We could not determine the identity of the employee on seven of the worksheets.

In all but one case, the forms provided evidence that the PSD considered whether an offense was intentional, technical or inadvertent; was committed maliciously or for personal gain; or was frequently repeated. We also found evidence that the PSD considered the employee's past work

⁷⁸ Outstanding evaluations result in four points of mitigation, excellent evaluations result in three points of mitigation, satisfactory evaluations result in two points of mitigation and unsatisfactory evaluations result in four points in aggravation.

record, including length of service, performance on the job, ability to get along with fellow workers, dependability and/or performance evaluations in setting a proposed penalty on all 158 forms.

We attempted to determine whether the 12 penalty factors were considered in the 21 cases now waiting for a Board of Rights hearing where the member requested the Board. While some of the forms do not provide information about the employee involved, we were able to verify worksheets in 16 of the 21 cases. In all but one of the 16 cases, the forms provided evidence that the PSD considered whether an offense was intentional or inadvertent.

Grievance resulting in binding arbitration:

Collective bargaining agreements with the COA and UFLAC permit binding arbitration as a final step of the grievance procedure. In June 2010, UFLAC sought arbitration when the Department issued a new policy about maintaining a valid driver's license. The policy was issued after some employees lost their licenses or endorsements as a result of off-duty drunk driving arrests.

Department Bulletin No. 10-05, dated May 19, 2010, said that a valid driver's license was a condition of employment and that members shall maintain a valid license or endorsement of the specific type required of their rank and assigned duties. Those without a valid license or endorsement would be deemed ineligible to work and placed off-duty.

UFLAC contended that the Department Bulletin represented a unilateral change from the October 28, 2008 Memorandum of Understanding setting forth penalties for a failure to maintain a valid driver's license with proper endorsements. The Department argued that maintaining a Class "B" driver's license had been a minimum job requirement since at least 2000.

The arbitrator found that the Department unilaterally, without meeting and conferring with UFLAC, implemented new standards related to maintaining a valid driver's license. The order was to vacate and rescind the May 19, 2010 Department Bulletin and to comply with the penalty guidelines that had been negotiated in October 2008. The arbitrator also ordered that the Department cease and desist from changing disciplinary penalties without first meeting and conferring with UFLAC. The Department's Petition to Vacate Arbitration Decision was denied by the Superior Court in October 2012.⁷⁹

Comments on the current process for deciding disciplinary penalties:

Below we have provided summaries of some of the comments made by individuals we interviewed for this report and the responses to those comments provided by the PSD. Please see Appendix 8 for a complete set of all the comments and responses.

⁷⁹ *City of Los Angeles v. United Firefighters of Los Angeles City*, Los Angeles County Superior Court Case No. BS135411.

Starting point:

One individual we spoke with said that discipline should start at the bottom of the penalty range for the first offense, and that there was never an agreement to start at the bottom third. Two union officials said they do not know how penalties are set, that the PSD has been inconsistent, with some individuals in the PSD starting at the top of the range and others starting at the bottom third.

The PSD responded that the one-third starting point was based on a “meet and confer” with UFLAC and approved by the Fire Chief at the time. (The starting point for COA is the one-half mark.) Currently, the PSD believes the starting point should be based on the significance of the underlying behavior to the Department, City and Fire Service. The PSD has recommended a “base penalty” approach where the starting point is determined by the Fire Chief based on the Core Values. This proposal is pending before the Fire Commission.

Mitigating factors:

One individual stated that the Department does not consider mitigating factors when setting penalties. More specifically, it was claimed that the Department consistently fails to consider the intent behind members’ actions. Additionally, it was asserted that the rules must be enforced fairly but that does not necessarily mean equally. For example, a member with a good employment history should be disciplined less severely than someone with a prior record of misconduct.

The PSD stated that mitigating factors and the member’s intent are taken into consideration. Members are able to provide their version of events, and why they acted that way, both in the investigative interview and at the *Skelly* hearing. Other factors, such as prior employment history, are also taken into account in calculating penalties.

The PSD reported that when the Internal Affairs Commander recommends that allegations be sustained, he or she also determines the applicable disciplinary guideline. This is done by starting at the bottom one-third (for UFLAC) or one-half (for COA) of the range and then evaluating the case against the 12 factors used by the Federal Government’s personnel board.

Adjudicating complaints:

We were told that the PSD should sustain complaints where there had been a clear rule violation even if nothing will be done in terms of punitive action. It was also reported that a lot of misconduct does not warrant time off, and that suspensions are expensive and anger members. It was proposed that alternative measures involving supervisors, such as notices and reprimands, would be more effective.

The PSD reported that in situations where there has been a clear rule violation but no punitive action will be taken it uses the classification “Sustained – Non-Punitive.” In terms of cases where punitive action was imposed, the PSD reported that only 11.8% of cases investigated between 2009 and 2012 resulted in sustained allegations and punitive action (411 cases out of

3,490 complaints). Furthermore, only 4.8% of complaints (166 out of 3,490 complaints) resulted in a suspension or Board of Rights. Approximately two-thirds of all punitive actions were reprimands issued by the immediate supervisor.

The PSD also noted that supervisors are always free to counsel or train members after a complaint has been filed, provided that the subject is not interrogated. These actions can be used to educate members to ensure that they are clear on the Department's expectations in that area in the future.

Alternatives to the formal disciplinary process:

We were told that implementing education-based discipline as an alternative to the current system is a priority for some individuals. They would also like to see the creation of a settlement unit, which would seek to settle discipline cases before investigations are started.

The PSD stated that it has been evaluating alternatives to the formal disciplinary process since 2009, and submitted proposals to the Fire Commission in September 2012, April 2013 and June 2013.⁸⁰ These proposals recommend shifting the Department's current disciplinary philosophy to incorporate education and learning as alternatives to discipline, and allowing for pre-disposition resolutions.

Communicating with the chain of command:

Supervisors complained that they do not receive information about the final penalty imposed in cases, and union officials said that even if information is provided, it is often too vague to be helpful.

The PSD stated that even though it is constrained by privacy issues, it should consider how more information can be provided to the Department.

Comments by the Independent Assessor:

We make the following comments, findings and recommendations in light of the concerns expressed to us and the Department's responses.

Starting point:

The claim that there was no agreement to start at the bottom third of the range, and that the starting point should be the very bottom of the range when deciding discipline for UFLAC members, is not consistent with the long-term practice. More than three years ago, we confirmed that the starting point was moved from the mid-point to the bottom third of the range because UFLAC complained discipline was too harsh.

The PSD has openly used the bottom third of the range as the starting point for more than three years. If there was no agreement to do so, or if there was an agreement to begin the penalty

⁸⁰ See BFC 12-145 and BFC 13-062.

calculation at the bottom of the range, an unfair labor practice charge or complaint should have been lodged long ago. No such charges have been lodged on this issue since the PSD began calculating penalties from the bottom third and we publicly reported the practice in March 2010.

We find no evidence to support the contention that the PSD inconsistently starts the penalty calculation from the bottom third in one case and at the top of the range in other cases. We did find substantial evidence that the penalty may move up or down the range, or even remain the same, as a result of applying the 12 penalty factors.

Finally, we continue to urge that the Department adopt a “base penalty” approach to penalty setting. Instead of starting at the same starting point for each range, our recommendation in 2010 was that the Department should predetermine the starting point for each range.

The predetermined or base penalty would be dependent on the value or importance of the particular conduct or range involved. Integrity issues, such as theft or lying under oath, should have a higher value, and hence a higher base penalty or starting point than other issues. The Department has presented more specific information about this recommendation that the Fire Commission should consider.

Mitigating factors:

There is no merit to claims that “lack of intent” and a “positive work history” are not considered when setting discipline. More than four years ago, the Department publicly disclosed it uses the same 12 penalty factors used by the Federal Government when calculating discipline. Our review of more than 150 penalty calculation forms confirms that the Department consistently considers the 12 penalty factors in calculating discipline from starting points agreed to by both unions.

“Lack of intent” and a “positive work history” are some of the factors used in setting a disciplinary penalty. However, they are not the only factors that should be considered in setting discipline. The final penalty is determined by considering all 12 penalty factors in each case, which may result in moving the penalty up or down the range, or keeping the penalty at the starting point.

Adjudicating complaints:

We were told that written notices and reprimands from supervisors are often effective, supervisors need a set of guiding principles to assist in handling and adjudicating complaints and cases go out of statute before adjudication. Some people we spoke with would like to return to the days when such matters were handled either less formally or by the chain of command.

The law has changed. Tools previously used for informal discipline, namely written reprimands, are now considered formal punitive action under the FBOR. Every sworn member of the Department is entitled to the protections of the FBOR whenever misconduct is suspected so these prior informal actions can no longer be the Department’s practice.

Supervisors and the chain of command were removed from adjudicating complaints because negative audits and expensive litigation found inconsistent and arbitrary discipline was being imposed. Problems were documented at virtually every level of the chain of command, from first-level fire station supervisors, to mid-level chief officers, to the Operations Commander.

The fact that first line supervisors and the chain of command no longer adjudicate complaints does not mean they have been excluded from the disciplinary process entirely. Most reprimands will result from field investigations. Most investigations are assigned to the field for investigation. The chain of command has the authority and the responsibility to see that these investigations are complete, thorough and timely. The chain of command also has the authority to review investigative recommendations before submission to the PSD, if the chain of command chooses to exercise that authority. We urge them to do so.

Alternatives to the formal disciplinary process:

We believe the best alternative to the formal disciplinary process is good supervision. In 2006, the Personnel Department said that in order to bring the Department's disciplinary system into compliance with the City's policy of fair, equitable and progressive discipline, first-line supervisors must hold all employees to appropriate workplace standards. That fair, equitable and progressive system of discipline starts with making sure every supervisor consistently provides appropriate counseling, instruction and verbal admonishments, before more formal action is required. That is the major daily responsibility of the chain of command.

In September 2012, the PSD suggested that the Fire Commission modify the Department's disciplinary philosophy and consider alternatives to discipline, such as an early settlement program and education-based discipline. The Commission authorized further work in developing these proposals. We believe that the disciplinary system, including any alternatives to formal discipline, should comply with and advance the City's policy of fair, equitable and progressive discipline.

While we support the protection of collective bargaining rights, as well as good communication and collaboration between the Department and labor representatives, we are concerned about engaging in full collective bargaining over each and every aspect of the disciplinary process. The City's Administrative Code clearly states that discipline is a management right.⁸¹ Not every step of the disciplinary system is subject to negotiation or collective bargaining, and this principle was recently confirmed by the court in the *Association of Orange County Sheriffs* case.

Communicating with the chain of command:

We heard complaints about the lack of useful disciplinary information being communicated to the field and chain of command. The PSD says it does not provide detailed disciplinary information to the field or to the chain of command due to privacy concerns. The PSD also says it should consider how to appropriately provide information. We agree.

⁸¹ Los Angeles Administrative Code section 4.859.

The Department also has a responsibility to provide information about the adjudication of discipline to the Commission on a consistent basis.⁸² This information is critical to the Commission's oversight responsibility because the Commission has the ultimate authority over the Fire Department's disciplinary system.⁸³

Discipline is too harsh:

Complaints that discipline is too harsh are not new. In 2006, the Personnel Department found that the Fire Department's disciplinary system was marked by arbitrary penalties. The Controller found that the Department was intentionally setting discipline artificially high in an effort to provide room to negotiate lower penalties. Sometimes those negotiations resulted in penalties lower than what was called for in the guidelines. Both the Controller and the Personnel Department recommended adopting and complying with disciplinary guidelines unique to the Fire Department.

Complaints that discipline was too harsh resulted in negotiating disciplinary guidelines that are lower than what were recommended by stakeholders and approved by the Fire Commission in 2006. Although the civilian guidelines said safety employees may be subject to more severe levels of discipline because they are held to a higher standard of conduct, the Department's guidelines for sworn personnel are now generally lower than the civilian standards the Department relied on before 2006.

Despite having lower penalties than what was recommended by the stakeholders and approved by the Fire Commission, complaints that discipline is too harsh persist. The starting point for members represented by UFLAC was later lowered from the mid-point to the bottom third. It would be one thing to claim that discipline is too harsh if the Department was imposing discipline in excess of the disciplinary standards that were negotiated, or if the discipline imposed was inconsistent with long-standing practices that had not been formally negotiated. However, the PSD reported, and provided some evidence, that it is setting penalties that substantially comply with the standards agreed to by UFLAC and long-standing practices.

We were told that suspensions are expensive and anger Department members. Three years ago we recommended that the Charter be amended to permit salary reductions or demotions in lieu of suspensions. Both are permitted by the FBOR and the City Charter permits the Police Department to impose demotions. Such alternatives would permit a member of the Department to continue working without the complete loss of salary.⁸⁴ Our recommendation has not been implemented.

⁸² The Department does file complaints with specific information with the Commission's Office as required by Charter section 1060, subdivision (c). The Department should continue to provide monthly corrective action summaries.

⁸³ *Patton v. Board of Harbor Commissioners* (1970) 13 Cal.App.3d 536, 542-43 and City Attorney Opinion No. 2006:1, dated May 9, 2006.

⁸⁴ We were also concerned about the cost of having to pay overtime to backfill the suspended member's normal shift.

Double jeopardy:

There was a contention that supervisory contacts, such as counseling, instruction and verbal admonishments, preclude any further disciplinary action on “double jeopardy” grounds. This claim lacks merit. Counseling, instruction and verbal admonishments do not constitute discipline or punitive action under either the FBOR or the City Charter. As such, the imposition of punitive action, following counseling, instruction or verbal admonishments, does not constitute double jeopardy.

To avoid legitimate claims of double jeopardy, supervisors should avoid issuing written reprimands without the approval of the PSD. Supervisors should also avoid violating the FBOR when providing counseling, instruction or verbal admonishments. Such violations can occur when a firefighter is questioned or interrogated about suspected misconduct where punitive action is possible without being afforded his or her statutory rights.

SKELLY PROCESS

If disciplinary charges are sustained and the Department seeks to impose discipline, the employee is entitled to a hearing before discipline is imposed. In *Skelly v. State Personnel Board*,⁸⁵ the California Supreme Court held that due process standards require that certain pre-disciplinary safeguards must be provided to permanent civil service employees before the disciplinary action is effectuated. These safeguards include: 1) notice of the proposed action; 2) the reasons therefore; 3) a copy of the charges and materials upon which the action is based; and 4) the right to respond, either orally or in writing.

Once charges are sustained and a proposed penalty has been determined, the affected employee is served with the “*Skelly* package,” which includes notice of the proposed action and materials the Department intends to rely on in taking disciplinary action. If the employee seeks a *Skelly* hearing, the Department schedules a hearing and provides the affected employee a minimum of seven business days to secure a representative. At the hearing, the member is allowed to give his or her version of events as well as present new and/or mitigation evidence for consideration by the *Skelly* officer.

The two critical issues to be decided by a *Skelly* officer are: 1) whether there is a reasonable basis to believe the affected employee engaged in the misconduct that has been charged in the complaint; and 2) whether the proposed discipline appears to be within the range of reasonable penalties.

After the hearing, the *Skelly* officer makes a written recommendation to the Department and a final decision is made by the Fire Chief. The affected member is served with a formal complaint, which must be lodged with the Fire Commission. The Charter requires that the formal complaint must be filed with the Commission before the expiration of the one-year statute of limitations period.

Legal standards governing the *Skelly* process:

A *Skelly* hearing is an informal proceeding intended to protect against injustice.⁸⁶ The *Skelly* officer is not supposed to substitute his or her judgment, but rather is to reach a conclusion as to whether there are reasonable grounds to justify the proposed discipline.⁸⁷ As the United States Supreme Court explained in *Cleveland Board of Education v. Loudermill*:

“[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”⁸⁸

⁸⁵ (1975) 15 Cal.3d 194.

⁸⁶ *What You Should Know as a Skelly Officer: Survey of the Law Governing Skelly Hearings and Practice Tips for Skelly Officers*, State Personnel Board Technical Training Program, February 2005, pp. 1, 17.

⁸⁷ *Instructions for Skelly Review Officers*, California State University, Office of the General Counsel, September 2004, p. 1.

⁸⁸ 470 U.S. 532, 545-46 (1985).

The Personnel Department's policies, which apply to civilian members of the Department, say:

"After being given a reasonable opportunity to review the ... documents and materials, the employee may respond, either orally, in writing, or through a representative (at the employee's option). If a meeting is held to allow the employee to respond, it should not be an adversarial proceeding. Such a meeting does not require calling or cross-examining witnesses or formally presenting a case supporting the proposed discipline.

"A reasonably impartial and uninvolved reviewer, who possesses the authority to recommend a final disposition of the matter, reviews both sides of the case and makes a recommendation to the appointing authority. The reviewer should not be the same person who investigated the incident(s) which form the basis for the proposed discipline."⁸⁹

Courts have held a violation occurs when the same person who originally imposed the discipline also reviews the reasonableness of that decision.⁹⁰ Impartiality means the decision maker cannot be embroiled in the controversy to be decided.⁹¹

The *Skelly* officer is supposed to listen to the affected member's side of the story, and must have the authority to make an impartial recommendation concerning whether the proposed discipline should be sustained, modified or revoked.⁹² The *Skelly* officer should not make settlement offers, enter into settlement discussions or agree to any settlement during the course of the hearing.⁹³

Controller's audits:

The Controller's 2006 audit found that the Operations Commander, who decided or approved disciplinary penalties, was attending *Skelly* hearings with the Operations Executive Officer, the Department's Advocate (when assigned), the accused and their representative. The Operations Commander often reduced the proposed discipline at the time of the *Skelly* hearing without getting additional information or documenting the reasons for such reductions.

The Controller found a long tradition of proposing excessive discipline in order to allow the Department to negotiate discipline at *Skelly* hearings, resulting in the appearance of less discipline to satisfy both the member and the union. A survey of cases found that a number of proposed suspensions were substantially reduced, sometimes to a reprimand, when the disciplinary guidelines called for discipline ranging from a suspension to discharge.

The Controller recommended that the Department eliminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a lesser

⁸⁹ *Policies of the Personnel Department*, January 24, 2008, Section 33.1, subdivision D.

⁹⁰ *Civil Service Assn. v. Redevelopment Agency of the City and County of San Francisco* (1985) 166 Cal.App.3d 1222, 1227; *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 734, 736-37.

⁹¹ *Mennig v. City Council of the City of Culver City* (1978) 86 Cal.App.3d 341, 351.

⁹² *What You Should Know as a Skelly Officer: Survey of the Law Governing Skelly Hearings and Practice Tips for Skelly Officers*, State Personnel Board Technical Training Program, February 2005, p. 17.

⁹³ *Id.* at p. 20.

punishment with the accused. The Controller also recommended that proposed penalties be consistent with the disciplinary guidelines, and that changes to the proposed discipline be documented.

At the time of the Controller's follow-up audit in 2008, the PSD staff reported that a proposed penalty was only reduced when new or mitigating evidence was presented during the *Skelly* hearing. It was found that the Department still needed to improve its documentation for changing disciplinary penalties as a result of information provided at the *Skelly* hearing.

Employee organization responses to audits:

The COA and UFLAC provided written responses to the Controller's recommendations concerning *Skelly* hearings.⁹⁴ Both unions agreed that the Department should eliminate the practice of proposing greater punishment simply to create a bargaining position, and that the Department should only propose penalties that are consistent with penalty guidelines developed in cooperation with the unions.

The COA pointed out that adhering to the guidelines would result in greater consistency. UFLAC noted that the Department was undermining its authority and creating a morale problem by bargaining disciplinary penalties at *Skelly* hearings.

Both unions agreed that *Skelly* hearings should be continued when new information is presented, and that all hearings should be properly documented.

Independent Assessor's Assessment in 2010:

Four years after the Controller's audit, our March 27, 2010 *Assessment of the Department's Disciplinary Process and Professional Standards Division (Assessment)* found significant continuing problems with how the Fire Department was conducting *Skelly* hearings. We expressed concern that the manner in which the Department was conducting hearings unreasonably exposed the City to a risk of litigation. Some of the problems included:

- The PSD Commander decided whether charges should be sustained, what the proposed penalty should be, signed the formal charges, and was also acting as the *Skelly* officer.
- The *Skelly* officer was often asking affected employees to explain their conduct and whether they concurred with the charges.
- The *Skelly* officer was often negotiating settlements.
- Penalties were lowered at the *Skelly* hearing based on regret and remorse expressed at the hearing even when they had already been taken into consideration when setting the proposed penalty.

⁹⁴ A brief description of the different Fire Department employee associations and labor organizations is provided in Appendix 3.

Some of the recommendations we made in our 2010 *Assessment* included the following:

- Require *Skelly* officers to comply with the applicable penalty guidelines in making penalty recommendations.
- Disciplinary penalties should not be changed after initial service of the proposed penalty unless newly discovered information is provided. Expressing remorse, taking responsibility and apologies expressed for the first time at a *Skelly* hearing, when there was an opportunity to express and, more importantly, actually demonstrate remorse, regret and responsibility before the *Skelly* hearing, should not qualify as newly discovered information.
- In making their recommendations, require *Skelly* officers to consider: 1) the timeliness of the proposed disciplinary action in terms of the statute of limitations; 2) whether the Department has reasonable grounds to proceed with the proposed discipline; 3) whether the proposed discipline is based on proper legal, policy or procedural grounds; 4) whether the disciplinary action is supported by the facts; 5) whether the employee had adequate notice of the prohibited conduct before the alleged wrongdoing occurred; and 6) whether the penalty complies with the applicable penalty guidelines.
- Stop using the person who decides to sustain charges, whether a penalty should be imposed and what the penalty should be, as the *Skelly* officer.
- Do not permit the persons who participated in or supervised the investigation or approved the investigative report to serve as the *Skelly* officer or communicate with the *Skelly* officer about the case.
- Adopt a training program for *Skelly* officers, limit the number of persons who serve as *Skelly* officers to ensure quality control, and only use *Skelly* officers who are trained and have the authority necessary to make meaningful recommendations to the Department on whether the discipline should be imposed, modified or revoked.
- Require *Skelly* officers to thoroughly review the formal charges the affected employee has been served with and all supporting materials prior to the *Skelly* hearing.
- Do not permit *Skelly* officers to confront the subject of discipline with charge or penalty options or with ultimatums at the *Skelly* hearing.
- Require that *Skelly* officers remain objective and independent in conducting *Skelly* hearings, when requesting information or further investigation and in making recommendations.
- Permit the *Skelly* hearing to be suspended for settlement negotiations to take place if each side signs a written agreement to suspend the hearing. If settlement negotiations result in a settlement, no further hearing is required and the *Skelly* officer's obligations are concluded without further resumption of the hearing. If no settlement is reached, the

Skelly hearing shall resume and the *Skelly* officer shall not be informed of what was said during negotiations.

- The Department's *Skelly* officers should not engage in settlement discussions related to charges or penalty at *Skelly* hearings. All settlement negotiations should be referred for private discussions between the affected employee (and the employee's representative) and an appropriate Department representative. This should not be construed to limit the affected employee from seeking a modification or dismissal of charges and/or penalty.

Comments on the current *Skelly* process:

The following comments concerning the *Skelly* hearing process were provided to us during the course of preparing this review.

COMMENT	DEPARTMENT RESPONSE
<p>A former union official was of the opinion that deputy chiefs should not conduct <i>Skelly</i> hearings. Too often <i>Skelly</i> officers do not read the investigative report and are not qualified to hear it.</p>	<p>As to the qualification to be a <i>Skelly</i> officer, the <i>Skelly</i> officer must be reasonably impartial. (<i>Skelly v. State Personnel Board</i> (1975) 15 Cal.3d 194, 208.) This does not necessarily mean that the <i>Skelly</i> officer must be totally unfamiliar with all of the facts and persons involved in the case, but rather that he or she is reasonably impartial and uninvolved. However, the further removed the <i>Skelly</i> officer is from the circumstances giving rise to the case, the less likely there will be any perception of potential bias.</p> <p>The <i>Skelly</i> officer must also have the authority to make a recommendation, based on the <i>Skelly</i> hearing information, to the final decision maker.</p> <p>As to whether the <i>Skelly</i> officer is prepared to hold the hearing, PSD attempts to provide the <i>Skelly</i> officer with the <i>Skelly</i> package with sufficient time to review the materials prior to the hearing.</p> <p>The Department considers whether the <i>Skelly</i> officer had a direct involvement in a case before recommending that a specific chief serve as the <i>Skelly</i> officer.</p>
<p><i>Skelly</i> hearings should be conducted by a neutral person from outside the Department.</p>	<p>There is no requirement that someone outside of the Department serve as the <i>Skelly</i> officer. That is a policy decision for the Fire Chief.</p>

COMMENT	DEPARTMENT RESPONSE
<p>A former union official believed that most of the time, but not always, the charges are proper but the disciplinary penalties are too high and <i>Skelly</i> officers will not reduce the penalties when provided mitigating information because of prior audits and the Independent Assessor's report.</p>	<p>PSD follows the disciplinary guidelines that were met and conferred upon.</p> <p>The reasons why <i>Skelly</i> officers will or will not amend the penalty is up to the <i>Skelly</i> officer who holds the hearing to determine and recommend a penalty.</p> <p>However, the 2006 Controller's audit specifically criticized a past practice of the Department proposing a high penalty only to have it reduced later, including at the <i>Skelly</i> hearing. The Controller recommended that the Department "eliminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a lesser punishment with the accused member or the union."</p> <p>Further, PSD had been criticized by the union for its refusal to "wheel and deal" the penalty downward at the <i>Skelly</i> hearing. Under the true intent of the <i>Skelly</i> process, such bargaining is inappropriate.</p>
<p>Similar to setting the proposed penalty, the mitigating information that <i>Skelly</i> officers do not consider is "lack of intent" to engage in misconduct.</p>	<p>The 2006 Controller's audit recommended that the Department "assure that <i>Skelly</i> hearings are continued when new information is presented so that a response from key witnesses or supervisors can be obtained. Also, ensure that all outcomes and decisions that result from <i>Skelly</i> hearings are sufficiently documented and supported."</p> <p>The member is free to present evidence as to intent (or any other relevant information) for the <i>Skelly</i> officer to consider.</p> <p>However, if that information was already presented and considered by the Department in the investigation itself or in the adjudication of the complaint, the member should not benefit from repeated mitigation for factors already considered by the Department.</p>
<p>A union official believed that the <i>Skelly</i> officer should be a professional civilian employee.</p>	<p>See prior response on using an outside <i>Skelly</i> officer.</p>

COMMENT	DEPARTMENT RESPONSE
<p>Union officials reported that the Department refuses to lower penalties at <i>Skelly</i> hearings, even when presented with mitigating information such as an employee's good work history, exemplary discipline record, and excellent candor. Accordingly, they think these hearings are an absolute waste of time.</p>	<p>The opportunity for a pre-deprivation hearing is one personal to the accused member. As such, the accused is free to attend, not attend, submit a written response, etc.</p> <p>PSD does not advise, influence or control the recommendations of the <i>Skelly</i> hearing officer.</p> <p>In 2006, the Controller recommended that the Fire Department "[e]liminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a lesser punishment with the accused member or the union." At the time, it was perceived that the <i>Skelly</i> process was commonly used by the Department and the member as a bargaining session to lower the penalty based on the artificially high proposed penalty. As such, the previously accepted practice of reducing penalties simply to avoid a Board of Rights and/or appease the member has stopped under PSD.</p>
<p>Union officials believe the Department refuses to lower penalties at <i>Skelly</i> hearings because a big lack of leadership, and they are all afraid of being criticized by the Independent Assessor (EMPHASIS ADDED).</p>	<p>The Department will consider the recommendation of the <i>Skelly</i> hearing officer prior to finalizing the final disciplinary action. PSD believes that in many instances, the information about a member's "good work history" was already considered during the adjudication and setting of the proposed discipline and thus, should not be considered again in the <i>Skelly</i> recommendation.</p> <p>The <i>Skelly</i> hearing is not an opportunity to bargain the penalty to appease the member and/or to avoid a Board of Rights.</p>

Relevant superior court litigation:

In a Petition for Writ of Mandate, a member claimed that the Department acted in excess of its authority and violated his due process protections by failing to provide him with a *Skelly* hearing before imposing discipline.⁹⁵

The member claimed that the Department essentially denied providing him with a *Skelly* hearing by denying his requests for continuances, so that his chosen representative could be present, before imposing a 10-day suspension without pay. The court found no merit in this claim because the right to a representative is not unlimited. Rather, the employee must choose a

⁹⁵ *Caceres v. City of Los Angeles*, Los Angeles County Superior Court Case No. BS133960 (July 20, 2012).

representative who is reasonably able to represent the employee at the reasonably scheduled appearance.⁹⁶

In this case, the court found that the *Skelly* hearing was reasonably scheduled and the Department could not extend the hearing to the member's requested date because the hearing officer would not be available. Nor could the Department be expected to extend the hearing indefinitely without first getting a waiver of the one-year statute of limitations, which both the member and his representative refused to provide.

The member also claimed that he was not properly served with the Notice of Suspension because he was not personally served with the notice and the Department failed to exercise due diligence before sending a copy to him by certified mail. The court found no merit in this claim because the Department made three unsuccessful attempts to personally serve the member with the notice at his residence of record before mailing it to him. City Charter section 1060 permits service by mail if, after due diligence, the member cannot be found. The court found that two or three attempts at personal service at a proper location is generally sufficient.

Department's *Skelly* officer training:

The Department developed a *Skelly* officer training curriculum in response to our 2010 *Assessment*. It properly describes the purpose of the *Skelly* hearing and the role and responsibilities of the *Skelly* officer. It adequately and appropriately responds to the many concerns that were expressed by the Controller in 2006 and we expressed in 2010.

Some of the key issues addressed by the Department's training curriculum include:

- The scope of *Skelly* rights and the purpose of the due process protections provided.
- The nature of the *Skelly* hearing, including the role and responsibilities of the *Skelly* officer, and what constitutes a reasonably impartial reviewer.
- Preparing for and conducting the hearing, which includes allowing the accused to present his or her side of the case.
- The prohibition against discussing settlements and instructions on how to handle requests for further investigation.
- Making a decision and recommendation concerning whether the misconduct occurred and reaching a just and proper penalty.

Comments by the Independent Assessor:

There is no legal support for a contention that *Skelly* officers should be professional civilian employees or neutral persons from outside the Department. *Skelly* officers are most often

⁹⁶ *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1306.

higher-level employees with the authority to make independent and meaningful recommendations.

The law simply requires a reasonably impartial reviewer who is able to provide the affected employee the time to fully explain and provide other information concerning his or her version of the events. *Skelly* officers should only conduct the hearing after having conducted a complete review of the evidence upon which the proposed discipline is based. A *Skelly* hearing is simply not intended to be an evidentiary hearing.

In June 2010 the Department developed *Skelly* procedures and a training program that fully addresses the concerns the Controller raised in 2006 and that we raised again in 2010. So long as the Department is fully complying with these procedures and the *Skelly* officer training program, we are satisfied that no further procedural changes are warranted at this time.

Complaints that the Department refuses to permit *Skelly* officers to negotiate discipline because it fears being criticized for doing so ignores the factual and legal basis for the rule that prohibits *Skelly* officers from negotiating discipline. As the Controller said in 2006, *Skelly* officers should be guided by the disciplinary guidelines. A *Skelly* hearing is not a settlement conference, nor is the purpose of the *Skelly* hearing to negotiate discipline.

Both the Controller and our office strongly criticized negotiating discipline at *Skelly* hearings. We have not conducted a review of *Skelly* hearing documents and recordings for this report. However, we assume that the procedures adopted by the Department have effectively stopped the practice of negotiating discipline because we received numerous complaints that the Department no longer negotiates penalties at *Skelly* hearings.

When the Controller criticized the practice of *Skelly* officers negotiating discipline in 2006, UFLAC noted that the Department was undermining its authority and creating a morale problem by bargaining penalties. We agree.

Repeated claims were made to us that *Skelly* officers do not consider mitigating information, such as a “lack of intent” or a “good work history,” to reduce proposed discipline. The Department has provided evidence that proposed penalties are determined using the same penalty setting factors used by the Federal Government in setting penalties. These factors take into consideration information that may mitigate and/or aggravate the penalty from the starting point. In the case of UFLAC, the starting point before application of the factors is at the bottom third of the applicable range. For the COA, it is at the midpoint of the range.

As we note in a prior section of this report, the first factor the Department considers in setting a penalty is “whether the offense is intentional, technical or inadvertent; was committed maliciously or for personal gain.” This factor clearly goes to the member’s intent. The employee’s past work record, including length of service, job performance, ability to get along with fellow employees and dependability, is the fourth factor to be considered.

When we reviewed *Skelly* hearings in 2010, we found examples where the Department’s *Skelly* officer was further mitigating penalties at the *Skelly* hearing based on the same information that

had already been considered in setting the proposed discipline under review by the *Skelly* officer. So long as the Department is following its policy in considering both mitigating and aggravating factors consistently when determining the proposed penalty, the Department should not return to the practice of using the same information again at the *Skelly* hearing to further reduce the penalty.

A complete and thorough investigation should reduce, if not eliminate, the amount of “new” information raised by the affected employee at the *Skelly* hearing. This, in turn, should also reduce the number of times a *Skelly* hearing is continued for further investigation.

For more than three years, we have heard suggestions that the PSD Commander should act as the *Skelly* officer. This was the practice at the time of the Controller’s audit seven years ago and at the time of our 2010 *Assessment*. The practice was appropriately abandoned in response to our *Assessment* because the PSD Commander was directly involved in deciding the discipline that was the subject of the *Skelly* hearing. The Department should not return to having the PSD Commander act as the *Skelly* officer.

DISCIPLINARY APPEALS AND BOARDS OF RIGHTS

All Department employees have a right to appeal the discipline imposed. Civilian employees may appeal discipline to the Civil Service Commission, and sworn members are entitled to appeal final disciplinary decisions to a Board of Rights. The Department also refers cases to a Board of Rights when a dismissal or suspension of a sworn member exceeding 30 days is sought.

A Board of Rights is comprised of three chief officers. The basic function of a Board of Rights hearing is to determine whether charges should be sustained, and if so, to recommend a disciplinary penalty to the Fire Chief. The Fire Chief may choose to impose the penalty recommended by the Board or reduce the penalty. He or she may not increase the penalty.

Sworn members of the Department may request binding arbitration after the Fire Chief imposes discipline following a Board of Rights hearing. While the Department's civilian employees have no right to seek binding arbitration following a Civil Service Commission hearing, both civilian and sworn members of the Department may seek review by way of writ proceedings in superior court.

One area of disciplinary appeals that has not been resolved involves the appeal of written reprimands issued to sworn members of the Department.

Legal standards governing disciplinary appeals:

The FBOR entitles a firefighter to an administrative appeal whenever subjected to punitive action. The statute also requires that the appeal be conducted in conformance with certain provisions of the Administrative Procedures Act (APA).⁹⁷

The APA procedures that apply include: 1) notice and an opportunity to be heard; 2) written hearing procedures; 3) hearings open to the public for most purposes; 4) separate investigative, prosecutorial, adjudicative and advocacy functions; 5) a presiding officer subject to disqualification; 6) a written decision based on the record that includes a factual and legal basis; and 7) restrictions on *ex parte* communications.

City Charter section 1060 permits the Fire Chief to suspend a sworn member of the Department for not more than 30 days. Cases where the Department seeks a penalty exceeding a 30-day suspension or termination are referred to a Board of Rights. A Board may not recommend a suspension of more than six months.

The Charter permits a sworn member to appeal discipline, including suspensions of less than 30 days, by requesting a Board of Rights. The superior court recently confirmed that neither the FBOR nor the Charter requires an automatic post-discipline appeal, and that a written request for a Board of Rights must be timely filed with the Fire Chief.⁹⁸

⁹⁷ Government Code section 3254.5.

⁹⁸ *Caceres v. City of Los Angeles*, Los Angeles County Superior Court Case No. BS133960 (July 20, 2012).

Charter section 1060 sets forth how the Board is selected and the member's right to representation. In most cases, but not all, the accused draws six names from a box containing the names of all chief officers who are qualified, and then selects three of those to sit on the Board.

The accused has a right to be represented by counsel or representative, or both, and has the right to select any member of the Department of any rank not higher than Captain to act as his or her representative at the hearing. The Fire Chief must immediately assign the member selected to act as defense representative, and it is the duty of such member to use every legal means available and exercise his or her best efforts to defend the accused.

Finally, under the Charter, the Board of Rights must make a finding of guilty or not guilty on each charge. If found guilty, the Board can recommend one of the following penalties: 1) suspension without pay not to exceed six months, with or without a reprimand; 2) reprimand without further penalty; or 3) removal from office or position. The Fire Chief may either impose the penalty recommended by the Board or choose a penalty that is less severe. The Fire Chief may not impose a penalty that is greater than what was recommended by the Board.

The COA and UFLAC have collective bargaining agreements with the Department that permit an accused to request binding arbitration following a decision by a Board of Rights. Sworn members of the Department, like all other City employees, may also appeal their discipline to the superior court by way of a Petition for Writ of Mandamus.

In addition to the FBOR, Charter and collective bargaining agreements, the Department also has a variety of manuals and written procedures governing the Board of Rights process. They include the Advocate Manual, Board of Rights Manual, Board of Rights Guidelines, Board of Rights Procedures, Board of Rights Hearing Verbiage and Defense Manual.

Audit findings and recommendations:

The Personnel Department's January 2006 audit found that the limited number of chief officers who could sit on a Board of Rights made it difficult to establish a Board whose members have not supervised or had extensive contact with the accused prior to the hearing. The unanimous opinion of those interviewed for the audit was that Boards were marked by conflicts of interest, favoritism, nepotism and excessive in both leniency and stringency of penalties. The Personnel Department recommended amending the City Charter section 1060, subdivision (g) to add a non-sworn, independent civilian member to the Board of Rights.

Employee organization responses to audits:

The Stentorians agreed with the Personnel Department's recommendation but had concerns about the implementation.⁹⁹ UFLAC was open to the idea of adding a civilian member to the Board and thought it would be an improvement from the current system. However, UFLAC also thought other models should also be considered.

⁹⁹ A brief description of the different Fire Department employee associations and labor organizations is provided in Appendix 3.

The COA disagreed with the recommendation because they believed the audit failed to provide objective facts or evidence to support the opinions of stakeholders that the Boards were marked by conflicts of interest, favoritism, etc. The problem with Boards, according to the COA, was not that they had been too lax but rather that findings had not been supported by evidence or recommended penalties were reduced. It was urged that further examination of recent decisions (including the findings of fact and penalty determinations) was needed to determine whether changing the composition of the Boards would have a positive impact on the administration of discipline.

Independent Assessor's Assessment in 2010:

Our March 27, 2010 *Assessment* expressed concerns about the Board of Rights process. A few of the concerns were:

- The chief officers sitting on Boards and the Department Advocates prosecuting disciplinary actions lacked sufficient expertise, experience and training.
- To properly prepare for and present hearings was time consuming, and there were long delays in conducting and concluding hearings.
- Boards were not required to follow the disciplinary guidelines when deciding a penalty if the accused was found guilty.
- The Department was assigning the same people who conducted the underlying investigation of the facts to prosecute cases before a Board of Rights.

Some of the recommendations we made in our 2010 *Assessment* included the following:

- Hire civilians with sufficient expertise, experience and training to prosecute disciplinary hearings, and ensure sufficient staff is available to complete hearings in a timely manner.
- Change the composition of the Board to include an administrative law judge, one civilian and one chief officer, and establish a pool of chief officers who can regularly sit on Boards to ensure that such officers are better trained and more experienced.¹⁰⁰
- Improve the training for those sitting on Boards in a wide range of relevant areas related to hearing and deciding disciplinary cases, and provide them with a “Benchbook”¹⁰¹ covering critical issues.
- Require Boards to comply with the Department’s disciplinary guidelines when recommending penalties, and explain why discipline and a particular penalty is necessary

¹⁰⁰ One of our concerns was that chief officers are not trained in the law and typically do not sit on a Board as often as is needed to develop and maintain competency.

¹⁰¹ A “Benchbook” could provide guidance on a variety of factual and legal issues ranging from how to conduct a hearing to the duties and responsibilities of a Board, evidentiary issues, how to set a disciplinary penalty and a host of other related issues.

in light of the “penalty setting factors” articulated by the Supreme Court, which include: 1) the extent to which the misconduct resulted in, or if repeated is likely to result in, harm to the public service; 2) the circumstances surrounding the misconduct; and 3) the likelihood of recurrence.

- Establish procedures, guidelines, and potentially amend the Charter, to eliminate *ex parte* communications and conflicts, and streamline how hearings are conducted.
- Eliminate the provision that allows the discipline imposed following a Board of Rights hearing to be submitted to binding arbitration because, as with all other City employees, a Petition for Writ of Mandamus to the court provides an adequate legal remedy.

Appeal of written reprimands:

Charter section 1060 defines disciplinary action as either a suspension or dismissal, and the Charter provides a Board of Rights as an appeal mechanism for such discipline. Before the FBOR came into effect in January 2008, the Fire Department issued written reprimands but such reprimands were not subject to appeal to a Board of Rights because reprimands were not considered discipline under the Charter.

A written reprimand is now considered punitive action under the FBOR. The Department continues to issue written reprimands but has no process in place to handle their appeal or review. The Department reports that it is developing a process for those who wish to “appeal” a written reprimand and that the City Attorney recently provided an opinion on the issue. The Department favors a more informal process than a formal Board of Rights hearing.¹⁰²

The Department reported that it issued a total of 243 written reprimands between 2009 and 2012.¹⁰³ The Department also reported that it received 57 reprimand appeals for the same period of time. There have been a total of 82 appeal requests in response to written reprimands from January 2008 to June 7, 2013.

Number of completed and pending Boards:

The Department provided information indicating that 65 sworn members have been referred to or have sought a Board of Rights hearing in connection with discipline received since January 2008. The Department sought a Board in 30 of those cases, and the remaining 35 Boards were requested by the member.

A review of all the completed Boards revealed that in most cases, the Board of Rights hearing resulted in either the same discipline being imposed or reductions in the final penalty. A Board imposed a penalty greater than what had been proposed after the *Skelly* hearing in three cases.

¹⁰² The APA does permit an informal hearing procedure for written reprimands and suspensions of less than five days. The APA’s informal hearing procedure does not involve pre-hearing discovery or cross-examination of witnesses, and the results are not subject to appeal through the courts.

¹⁰³ *Professional Standards Division Statistical Review 2012*, p. 6 (BFC 13-047).

As of June 19, 2013, there were 26 Board of Rights hearings pending.¹⁰⁴ Of those, only five were directed by the Department; the remaining 21 have been requested as an appeal of lesser discipline. Additional information about pending and completed Board of Rights cases can be found in Appendices 9 and 10. We are particularly concerned about the information related to how long it takes to get some Boards to a hearing, as indicated in these appendices.

Binding arbitration cases:

Collective bargaining agreements permit sworn members of the Department to seek binding arbitration following a Board of Rights hearing. Binding arbitration has been requested twice in individual cases following a Board of Rights hearing since 2008. One of the cases was settled without going to an arbitration hearing; the other resulted in a dismissal being overturned by the arbitrator.

In 2006, a firefighter was arrested on a charge of domestic battery but was not prosecuted by the District Attorney. He served a 14-day suspension after the Department charged him with committing an act of physical violence against his wife and bringing discredit to the Department when he was arrested.

The firefighter was arrested a second time for domestic battery three years later, and the Department sent him to a Board of Rights to determine his discipline. During his Board of Rights hearing, the member pled guilty to the charge that he committed an act of domestic violence against his wife. However, he pled not guilty to the charge that he brought discredit to the Department when he pled “no contest” to a misdemeanor charge of non-injury domestic violence.

The Board found him guilty of both charges and he was terminated. The firefighter appealed his dismissal to binding arbitration pursuant to the collective bargaining agreement with UFLAC. The arbitrator reversed the decision to dismiss the firefighter and he was reinstated with an award of backpay. The arbitrator’s decision was based on the following reasons:

- Knowledge of the firefighter’s conduct and arrest was limited to the arresting officers, judge, bailiffs, prosecutor, public defender and jailer. Such evidence was not sufficient to show a “reasonably discernable” or a “demonstrable adverse” effect on the Department’s business or reputation.
- The Department failed to meet its burden of showing that the firefighter rendered himself unsuitable for continued employment by the Department.
- The Department charged, and the Board found, that the firefighter brought discredit to the Department by the narrow and limited action of pleading “no contest” to the

¹⁰⁴ The information provided by the Department noted 28 hearings were pending. One member withdrew his request for a hearing and another hearing was completed since the receipt of this information, leaving 26 hearings.

misdemeanor domestic violence charge. A plea of “no contest” to a misdemeanor cannot provide the basis for bringing disciplinary action.¹⁰⁵

Comments on the current process for appealing discipline:

Given the extensive and repetitive nature of the comments we received, we have chosen to highlight the major issues in this section for the sake of brevity. All comments and responses we received concerning disciplinary appeals and Boards of Rights during this review are included in Appendix 11.

Limiting defense representatives’ time to prepare:

Numerous complaints were made about the Department limiting the time defense representatives could use to prepare for a Board of Rights hearing to nine days. It was suggested that defense representatives should receive a fully paid release from duty while the hearing is pending, that the Department should continue to pay defense representatives to assist the accused after a hearing has ended and that each Board be included in deciding how much time representatives should be granted to prepare for a hearing.

The Department responded by explaining that a former Fire Chief adopted the policy limiting defense preparation time to nine days after a defense representative used an extraordinary number of hours preparing for a hearing. While the PSD does not monitor this issue, they believe that any policy should provide representatives with sufficient time to prepare a defense, based on the complexity of the case, while also ensuring that hours claimed are not being used for purposes other than hearing preparation.

The PSD supports the union’s desire to assist a member with issues after a Board of Rights hearing has concluded. However, the Department believes that the Charter limits such time to that required to “defend the accused at the hearing.”

The Department opposes having each Board decide how much time a defense representative should have to prepare for hearing. It is believed that this would lead to an inconsistent application of the policy, and that having the ERO oversee the issue provides more consistency.

Large number of Boards because discipline is too harsh or severe:

There were complaints that a large number of Boards were requested because disciplinary penalties were too severe or harsh, and also that the large number of requests for Boards has caused excessive delays in getting to a hearing.

The Department responded by saying that the audits in 2006, and subsequent actions by the Fire Commission and Fire Chiefs, resulted in the adoption of disciplinary guidelines that were agreed to by the unions and a requirement that discipline be applied consistently. It was reported that the PSD applies the guidelines uniformly in all cases. Until the disciplinary guidelines are

¹⁰⁵ Please see Penal Code section 1016 and *County of Los Angeles v. Civil Service Commission of Los Angeles County* (1995) 39 Cal.App.4th 620. This was an issue raised in our 2010 *Assessment*.

amended and/or the Department is authorized to resolve discipline in some other manner, the intent is to follow the current process.

The PSD reported that it has recommended an approach allowing the use of learning and education in lieu of discipline to allow members to attend training targeted at resolving the underlying behavior, with an offset in the actual penalty days.

The Department agreed there is a delay in getting Boards to a hearing and said this is due to a lack of resources. They acknowledged claims that members appeal based on a belief that discipline is too severe. The Department does not believe delays in bringing cases to a hearing result in a “gross violation of due process rights” because property interests are not impacted until discipline is effectuated following a hearing. The Department does acknowledge that a member is free to argue that a delay prejudices his or her ability to present a defense at the time of a hearing.

Limiting the chief officer pool:

We were told that the Department was unilaterally limiting the pool of chief officers who could be selected to sit on a Board of Rights. This was done by not allowing a chief officer to sit on more than one Board at a time or by making a chief officer near retirement unavailable.

The PSD responded by saying that some of these decisions were based on the need to consider the Department’s day-to-day operational needs and to keep the Board process moving forward. There was a risk of unnecessary delays if the same chief officer sat on multiple Boards or one of the Board’s members retired while the Board was still pending.

Ex parte communications and inappropriate conduct:

Some complained that while the Department contends that speaking with Board members outside of the hearing is improper, the Sergeant-at-Arms at a hearing is permitted to pass notes and act as a “third Advocate,” resulting in more than one Board chair admonishing a Sergeant-at-Arms for engaging in such conduct. While this may be a training issue, these actions indicate that a culture shift is necessary.

The PSD responded by saying that a ban on inappropriate communications should be applied equally. The Sergeant-at-Arms serves the Board and is not part of the Department’s Advocate team. The PSD also said it will ensure that Sergeants-at-Arms are properly trained in this area.

Defense representatives meeting with the Fire Chief:

There were complaints that defense representatives are not permitted to meet with the Fire Chief following a Board of Rights so they can attempt to get the Fire Chief to reduce the penalty assessed by the Board, as provided for in the City Charter, Department’s Defense Manual and the Board of Rights Manual.

The Department acknowledged that the Defense Manual suggests making an immediate effort to obtain an appointment to meet with the Fire Chief if the accused believes the penalty is unjust. There is no requirement in the Charter, Department policy or the FBOR requiring such a meeting. It is the Fire Chief's decision whether he or she will meet with defense representatives after the Board has concluded.

Inexperienced chief officers:

There were a significant number of complaints about chief officers being too inexperienced, insufficiently trained or unqualified to sit on Boards. This was believed to result in conflicts, Board members improperly admitting evidence saying that it would only be given the weight it deserves, permitting witnesses to testify by phone and Board-imposed discipline being excessive in some cases.

The Department reported that it provided Board of Rights training for all chief officers in 2010, that PSD conducts a briefing for selected chief officers before each hearing and that each Board has access to a dedicated city attorney during a hearing. It was also reported that two attempts to amend the Charter to replace a chief officer with a civilian hearing officer have failed.¹⁰⁶

The Department noted that the Charter provides a Board the authority to impose any penalty it believes is supported by the evidence. The formal rules of evidence do not apply in administrative hearings, and, in general, any relevant evidence is admissible if it is the sort of evidence which responsible persons are accustomed to rely on in the conduct of serious affairs. One of the responsibilities of a Board is to weigh evidence and afford it the weight it deems credible. Boards also have the discretion to permit telephonic testimony.

With regard to the claim that Boards are insufficiently qualified in some areas, the Department responded by saying it is the responsibility of both sides to present sufficient evidence on the issue to the Board. This might include providing expert witnesses.

Training and resources for defense representatives:

There were suggestions that the Department has unlimited resources to prepare for a Board, that the Department should train defense representatives and that representatives should be provided with the same resources provided to Department Advocates, such as cars, cell phones and printing services.

The Department responded by saying that the role and function of a defense representative is one specific and personal to the accused member, and that the member should select a representative taking into consideration the knowledge and experience of the representative. Since the Charter permits a member to choose anyone up to the rank of Captain as a representative, the Department would have to provide training to the more than 3,000 members who could potentially serve as a representative, which is a tremendous drain on scarce resources. Taking responsibility for providing this training would also expose the Department to claims that inadequate or poor

¹⁰⁶ The proposal to replace a chief officer with a hearing officer was part of a package of proposed Charter amendments prepared by the Department that did not progress beyond being discussed by City Council committees.

training resulted in an accused member being unfairly deprived of an adequate defense. The Department believes the union should train defense representatives, like most other public sector unions.

The Department denied that it has unlimited resources and said the PSD has to allocate its resources based on current priorities. Except for assigning a defense representative, the Department does not believe the City should support the defense at a Board. The Board of Rights is an adversarial hearing, and when the member so chooses, the union should support the accused. The union is supported by dues for that reason.

Providing the union with notice of every hearing:

Some individuals we spoke with suggested that the union should be notified of every case involving a Board of Rights because sometimes an accused does not select a union member as a defense representative (so the union may not know about the proceeding). The union has an interest in the Board proceedings since only the union has the authority to determine if a Board of Rights decision will go to arbitration.

The Department's position is that an accused member's disciplinary action, as well as the selection of his or her defense representative, is personal to the accused. The Department should not notify anyone other than the accused about confidential matters related to disciplinary actions. That burden should be placed on the accused member to protect his or her privacy rights.

Comments by the Independent Assessor:

We make the following comments, findings and recommendations in light of the concerns expressed to us and the Department's responses.

Limiting defense representatives' time to prepare:

We received a number of complaints about the Department limiting the amount of time a defense representative has to prepare for a Board of Rights to nine days.¹⁰⁷ Some people wanted a full, paid release while a hearing is pending until it is concluded. Some people believed the Department should continue the defense representative's paid release to assist the member even after the conclusion of the hearing.

The Charter requires the Fire Chief to appoint a member of the Department chosen by the accused to represent the accused at a Board of Rights hearing.¹⁰⁸ As we pointed out in our *Assessment of the Alternative Investigative Process*, the defense representative has a duty to take the time reasonably necessary to prepare a defense for the members they represent. We also found that the Department has legitimate reasons to monitor, oversee and control expenses

¹⁰⁷ These issues were addressed in our March 18, 2013 *Assessment of the Alternative Investigative Process*.

¹⁰⁸ Charter section 1060, subdivision (l) permits the accused to be represented any member of the Department not higher than the rank of Captain.

related to that representation to ensure that expenditures are reasonable and necessary. The Department is simply not obligated to write a “blank check.”

The Department adopted the nine-day limitation in consultation with the City Attorney’s Office after a defense representative claimed to have spent 1,700 hours preparing for a hearing that never took place. We are familiar with that case. A claim of needing 1,700 hours to prepare for the hearing was not reasonable. An experienced defense representative told us that 250 hours was a sufficient amount of time for most Boards, with 300 hours being the upper limit (but perhaps more in a complex case).¹⁰⁹

The Department’s policy permits a defense representative to request more than nine days to prepare for a hearing. **We previously recommended that the Department ensure, with the assistance of the City Attorney’s Office, that its policies controlling costs related to 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. This continues to be our recommendation to the Department.**

The nine-day policy is currently managed by a single person, the Department’s Employee Relations Officer (ERO), and consistent application of the Department’s policy is critical. The responsibility of the Board of Rights is difficult enough and should be limited to hearing and deciding the facts, ruling on evidentiary issues and making a penalty determination (if warranted by the evidence). Most chief officers would not have the necessary training or experience to decide issues related to how long it takes to prepare a defense, especially before they have heard any of the evidence needed to evaluate the level of complexity involved. We therefore recommend against each Board of Rights deciding how long a defense representative should be granted to prepare for a hearing.

It is a voter-approved Charter provision that provides each accused with the right and privilege to be represented by another member of the Department. Due process does not require that the Fire Department pay to defend firefighters who are accused of misconduct.¹¹⁰ Because the risk of uncontrolled expenses and even abuse is so great, we recommend that the Department ask the voters to amend the Charter to eliminate this right and privilege to be represented at taxpayer expense. This situation is not without precedent. The Police Department no longer pays for the representation of police officers at their Board of Rights hearings under Charter section 1070. **Like police officers, firefighters should be responsible for paying for their own defense.**¹¹¹

Finally, under the Charter, the accused has the right to be represented by another member of the Department “at the hearing.” No provision of law, including the Charter, requires that the Department pay the cost of representation after the hearing has concluded. We recommend

¹⁰⁹ We provide this information without agreeing that even 250 hours would be reasonable.

¹¹⁰ It is worth noting that the cost of a defense is not limited to paying a representative’s salary and benefits while assigned to defend the accused. The Department must also pay the cost for backfilling the positions normally worked by both the defense representative and the accused at an overtime rate.

¹¹¹ Please see Charter section 1070, subdivision (m) involving the representation of police officers at a Board of Rights. In reality, it is not likely that members will actually pay this expense themselves; unions typically pay such expenses for their members.

against extending representation at the Department's expense beyond the conclusion of the Board of Rights hearing.

Large number of Boards because discipline is too harsh or severe:

We were told that a large number of Boards are requested by members because they believe the discipline they receive is too severe. It would be one thing to claim that discipline is too harsh if the Department was imposing discipline in excess of the disciplinary standards that were negotiated; however, the PSD reported that it is setting penalties that substantially comply with the standards agreed to by UFLAC and the COA and long-standing practices.

At least one person told us that the penalties set by Boards were excessive due to Boards failing to use any guidelines. The Department correctly noted that the Charter permits a Board to impose any penalty it deems appropriate. Three years ago we recommended that Boards be required to follow the Department's disciplinary guidelines when setting disciplinary penalties. While such a requirement would promote consistency, it does not appear as though this recommendation has been put into practice.

There is little merit to the claim that penalties determined by Boards are excessive due to the fact that Boards do not use any guidelines. Appendix 10 summarizes 39 Boards of Rights convened since November 2008. A Board of Rights hearing resulted in penalties being increased in three cases.¹¹² Penalties were reduced by Boards after a hearing in 18 cases. If anything, it appears that the failure of Boards to use the Department's disciplinary guidelines works in the accused's favor with Boards often recommending a lower penalty.

We again recommend that Boards be required to strictly comply with the applicable guidelines when setting a disciplinary penalty. There is some merit to the thought expressed to us by a chief officer who said certainty, even more than severity, is a good motivator in discipline. It may also reduce the number of decisions that are appealed to binding arbitration or writ proceedings in superior court. We do not believe that each succeeding step of the disciplinary process should represent still another opportunity to shave a little more off of the discipline initially set when that discipline complies with the negotiated standards.

Some people we spoke with believed that the large number of disciplinary appeals has led to excessive delays in getting hearings completed. Three years ago we expressed concern about the failure to complete Board of Rights hearings in a timely manner. The problem has only gotten worse. **The cause of the problem is the failure to provide the staff necessary to handle the large number of appeals filed in response to penalties that substantially comply with Department standards and practices.**

Ex parte communications and inappropriate conduct:

We were told that while the Department takes the position that no one may speak to members of the Board outside of the hearing, there have been instances where a Sergeant-at-Arms passed

¹¹² Penalties were increased from a two days suspension to six days, from six days to eight days and from three days to six days.

notes and acted as a third Advocate for the Department. *Ex parte* communications with members of a Board of Rights and such conduct by a Sergeant-at-Arms are not appropriate or acceptable.¹¹³ Additionally, attempts by defense representatives to communicate directly with members of a Board outside of the hearing are similarly inappropriate.

Administrative appeals under the FBOR require restrictions on *ex parte* communications. Both sides are prohibited from engaging in *ex parte* communications. The prohibition against *ex parte* communications is intended to preserve the integrity of the hearing process. **We raised this issue three years ago, and our recommendation continues to be that the Department adopt and enforce rules that prohibit *ex parte* communications with members of the Board of Rights.**

In developing a clear Department policy, one source to look at is the language of Charter section 1070, subdivision (k), which prohibits *ex parte* communications in the Police Department's Board of Rights process. That provision states, "Ex Parte communication with members of a Board of Rights regarding the subject matter of the hearing while proceedings are pending is prohibited. No person shall attempt to influence the decision of a Board of Rights except during the hearing and on the record." The Department should also pursue an amendment to Charter section 1060 so that it mirrors this provision.

Another good source for the Department to consult is a transcript we reviewed of proceedings that took place shortly after the publication of our March 2010 *Assessment*, where a Board gave clear direction on how to properly communicate with the Board and avoid *ex parte* communications. The Board stated that communications to the Board should be contained in a formal business letter with a copy to the opposing party's representative. In an emergency, communications should be by phone call to a staff member for the Board's chair, with a phone call to the representative for the opposing party.

Training and resources for defense representatives:

It was suggested that the Department should provide defense representatives with training on how they should execute their responsibilities. It was further suggested that defense representatives be provided with Department vehicles, print services and cell phones.

No legal authority supports the claim that defense representatives should be provided training, cars, cell phones or print services by the Department. The disciplinary process, and particularly the right to an administrative appeal of either the charges or the penalty, is not a partnership or team effort. It is by its very nature an adversarial proceeding.

It would be unwise for the Department to undertake the obligation to train defense representatives. To do so would simply expose the Department to claims that the training was

¹¹³ Government Code section 11430.10 (relating to *ex parte* communications under the APA) says, "While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer [Board members] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication."

inadequate. Furthermore, the City should not be responsible for the costs of presenting a defense (beyond what it already provides in terms of compensation for the representative). The duty to train defense representatives or provide them with other resources is not the City's responsibility. Rather, it is the duty of the union to provide its members with the necessary resources and a trained defense representative.

Providing the union with notice of every hearing:

We were told that the union should be notified of every case involving a Board of Rights because an accused does not always select a union member as a defense representative and only the union has the authority to determine if a Board of Rights will go to arbitration. **We strongly disagree.**

The Department should not expose itself to a lawsuit by disclosing confidential information in such a manner. The Department's collective bargaining agreement with UFLAC does not say that UFLAC has the sole authority to determine whether a Board of Rights decision will go to arbitration. It simply says a request for arbitration must be filed within 15 days and the failure of the grievant to serve the request shall constitute a waiver.¹¹⁴ Identical language appears in the COA's collective bargaining agreement. We find no language barring employees from requesting arbitration on their own, regardless of whether they choose to be represented by their union or not.

Binding arbitration:

The right to request binding arbitration following a Board of Rights hearing is the result of the collective bargaining process. The Department has an obligation to ensure that its personnel practices are consistent with the City's policies and practices. All other City employees are able to appeal their discipline to the superior court by way of a Petition for Writ of Mandamus.

The Department needs to fully understand the implications involved before entering into collective bargaining agreements. The voters approved Charter section 1060 which describes the Fire Department's disciplinary procedures, including the Board of Rights process. The voter-approved procedures do not provide for binding arbitration.

In the absence of binding arbitration, the member's remedy when dissatisfied with the discipline imposed following a Board of Rights hearing is a writ proceeding where the legal standard of review is the "abuse of discretion" standard. An arbitrator uses a lower "de novo" standard. Therefore, by agreeing to binding arbitration, the Department agreed to a lower standard of review that was not approved by the voters.

In March 2010, we recommended that the language providing for binding arbitration be deleted from the collective bargaining agreements. We make the same recommendation three years later.

¹¹⁴ Memorandum of Understanding No. 23, Article 2.1, Section IV, dated October 13, 2011.

Appeal of written reprimands:

The process to be used when appealing a written reprimand remains undefined more than five years after the FBOR became operative in January 2008. The Department has a backlog of 82 requests to appeal written reprimands. As the Personnel Department correctly pointed out in 2006, written reprimands play a crucial role in progressive discipline.

The Department reported that it must engage in the “meet and confer” process to establish an informal hearing procedure for the appeal of written reprimands.¹¹⁵ We certainly encourage conversation and collaboration. **However, the Department must resolve issues involving the appeal of written reprimands without further delay.**

¹¹⁵ The FBOR/APA permits an informal hearing process for written reprimands, demotions and suspensions of five days or less. (Government Code section 11445.20, subdivision (b)(3).)

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.

Most of the recommendations we make in this report are the same or similar to recommendations made by the City Controller, the Personnel Department and our office over the past seven years.

General recommendations:

1. The Fire Department should not modify or change any aspect of the Department's disciplinary process without the full knowledge and consent of the Fire Commission.
2. The Mayor's Office and Fire Commission should ensure that the manner in which the Fire Chief manages the disciplinary process is evaluated on a regular basis. This oversight requires that the Commission has access to the same information relied on by the Fire Chief to make disciplinary decisions. Only with this information can the Commission determine whether the Fire Chief is properly executing his or her duties, if it needs to issue corrective instructions, and whether the Commission needs to make changes to the Department's rules, regulations, policies and procedures.
3. The Fire Chief should be required to consult with and obtain the Fire Commission's approval and authorization before signing conciliation agreements related to how the Fire Department handles complaints of misconduct committed by Fire Department employees. While the Commission has no authority to approve or reject settlements involving the payment of money, the Commission has the power to supervise, control, regulate and manage the Fire Department and all of the Fire Chief's powers are subject to instructions issued by the Commission.
4. The Department should develop a training and evaluation process to ensure that every Department manager and supervisor provides consistent, fair, effective and timely supervision, including counseling, instruction and/or verbal admonishments, without violating members' due process rights. This training and evaluation process should also ensure that supervisors consistently provide such counseling or training even if a formal complaint of misconduct is pending.
5. The Department should eliminate agreements and/or past practices that: 1) do not comply with industry practices; 2) prevent investigators from controlling the progress of investigations; 3) contribute to the Department being unable to complete disciplinary actions in a timely manner; 4) are based on mistaken assumptions of law; 5) reduce management rights; 6) fail to ensure that firefighters and their supervisors and managers are held to standards that are higher than the standards for civilian employees; 7) expand

rights and privileges beyond those provided by the voters; and 8) threaten the reliability and integrity of investigations.¹¹⁶

6. The Department should adopt programs that effectively reduce the frequency and severity of work environment issues and conflicts.
7. The Department should provide email access and addresses to all Department employees to facilitate effective and timely communication and enhanced training opportunities.
8. The Department should adopt a disciplinary philosophy that is consistent with the City's disciplinary philosophy, bearing in mind that the citizens of Los Angeles must have confidence in the Department's ability to engage in self discipline under the Charter.
9. The Department should continue to develop appropriate and effective alternatives to formal discipline that comply with and advance the City's policy of fair, equitable and progressive discipline.

Issue-specific recommendations:

Professional Standards Division Staffing

10. The Department should employ a sufficient number of non-sworn staff with the demonstrated expertise, experience, training and proficiency to conduct, supervise and manage investigations, prosecute disciplinary hearings and effectively manage the Department's disciplinary system. This would also include providing substantial support to field investigations without compromising other PSD responsibilities. The Department must increase staffing to reduce PSD caseloads and increase the timeliness of disciplinary actions. Of particular concern is the management of EEO cases, which are increasing in number and complexity. EEO issues are the subject of at least three conciliation agreements.
11. The role of sworn personnel in the PSD should be limited to providing support and subject matter expertise.
12. The Management Analyst position that was authorized to manage the tracking systems more than two years ago must be filled to ensure that the complaint and disciplinary tracking systems are used as intended.

Complaint Tracking Systems

13. The Department should ensure that its policies, procedures, rules, regulations and training promote and/or require the prompt reporting of suspected misconduct.
14. The Department should continue to make information about the complaint process available to the public and employees, and should continue to accept verbal, unsigned

¹¹⁶ We again acknowledge that the Department may not unilaterally end collective bargaining agreements.

and anonymous complaints. The Department should also continue to allow anonymous complainants to remain anonymous.

15. The Department should ensure that all information related to complaints, statute of limitations, investigations, disciplinary actions, *Skelly* hearings, Board of Rights hearings and related actions is promptly entered into the complaint and disciplinary tracking systems.
16. The PSD Commander, under the direct supervision of the Fire Chief and subject to the ultimate authority of the Fire Commission, should continue to triage all complaints and adjudicate all disciplinary actions in an attempt to achieve consistency and fairness.
17. The complaint and disciplinary tracking systems should be updated and modified to ensure they are fully capable of providing accurate and detailed management reports. The systems should also be designed to assist with identifying work environment and risk management issues requiring correction.
18. The Department should communicate information about disciplinary actions, to the extent permitted by law, to the disciplined member's chain of command as well as the Department and to the public. This keeps supervisors informed about the conduct of their subordinates. It demonstrates that disciplinary action is being taken consistent with Department policies to both members and the public.
19. The Department must ensure that it fully complies with laws and protocols related to the required reporting of possible violations of the California Health and Safety Code after validation of a complaint or when an EMT or paramedic: 1) is terminated or suspended; 2) resigns following notice of an impending investigation; or 3) is removed from EMT or paramedic duties for disciplinary cause.

Investigative Process

20. The Department should eliminate the rule that provides representatives seven business days to schedule interviews. The rule: 1) is not consistent with the industry practice; 2) prevents investigators from controlling the progress of investigations; 3) contributes to the Department being unable to complete disciplinary actions within the one-year statute of limitations; and 4) is based on the mistaken assumption that the Department is obligated to accommodate the representative's schedule.
21. The Department should not permit or engage in practices that would compromise the effectiveness, reliability and integrity of investigations. As such, the Department should not provide investigative information before interviews and interrogations, and should not permit witnesses to record their interviews.
22. The Department should not negotiate investigative procedures, or other fundamental managerial or policy decisions related to the disciplinary process, that are not by law mandatory subjects of bargaining.

23. The Department should continue to use its admonition forms without modifying or negotiating them. Objections to their use and refusals to sign should simply be noted on the interview recording without debate.
24. The Department should ensure that the chain of command places a greater priority on supervising field investigations to ensure they are thorough, complete and done in a timely manner.
25. The Department should provide regular and continued training, sufficient variable staffing hours and an evaluation process that increases accountability to ensure that field investigations are complete, thorough and timely. The Department should provide relevant training as soon as possible and take steps to ensure that the training is put into practice.
26. The Department should improve the reporting template in the CTS to assist field investigators in fully, completely and accurately documenting their investigations.
27. The Department should ensure that the chain of command reviews and is satisfied with the quality and consistency of field investigations and recommendations before they are submitted to the PSD for adjudication.
28. The Department should complete preparation of the PSD Manual.
29. The Department should eliminate all barriers that prevent civilian investigators, supervisors and managers from engaging in all activities related to investigating, admonishing, questioning, charging and prosecuting sworn members of the Department, and managing all other aspects of the disciplinary system on behalf of the Fire Chief and Fire Commission.
30. The Department should not use written statements as a substitute for face-to-face interviews unless and until adequate and appropriate protections are in place to guard against due process violations. Written statements should also not be used or relied on unless their reliability can be verified.
31. All information provided to the EEOC pursuant to conciliation agreements must also be provided to the Fire Commission as the head of the Fire Department.
32. The Charter should be amended to permit tolling of the statute of limitations, consistent with the FBOR and Charter provisions governing the discipline of Los Angeles police officers.

Deciding Disciplinary Penalties

33. The Charter should be amended to permit reductions in pay, demotions and transfers for purposes of punishment, as permitted by the FBOR. Such an amendment would make

firefighter disciplinary options consistent with what is available for police officers, would reduce lost firefighter income due to discipline and would reduce the overtime cost associated with suspending firefighters.

34. The Department should continue to use the same 12 penalty factors used by the Federal Government, and set disciplinary penalties in strict compliance with the disciplinary guidelines negotiated with the unions. The Department should consider how to more effectively communicate how it determines disciplinary penalties generally as well as in specific cases to the affected member. The Department also needs to improve its consistency in documenting the identity of Department members on the forms used to calculate a disciplinary penalty.
35. The Commission should adopt disciplinary guidelines that set a standard of conduct for firefighters that is higher than the standard of conduct for civilian employees of the City. Additionally, supervisors and managers should be held to an even higher standard.
36. The Commission should adopt disciplinary guidelines that set forth baseline penalties rather than the same starting point for each penalty range. Until baseline penalties are adopted, the Department should continue to begin the penalty calculation at the mid-point for COA members and the bottom third for members of UFLAC.
37. Discipline should be known, predictable and consistent. When deciding to impose discipline, the Department should consider: 1) the extent to which the misconduct resulted in, or if repeated is likely to result in, harm to the public service; 2) the circumstances surrounding the misconduct; and 3) the likelihood of recurrence. The Department should not permit each successive step of the disciplinary process to be viewed as another opportunity to further reduce the penalty.

Skelly Process

38. The Department should fully comply with its *Skelly* procedures and training program the Department developed in response to concerns the Controller raised in 2006 and the Office of the Independent Assessor raised in 2010.
39. *Skelly* hearings should not serve as a settlement conference or opportunity to negotiate discipline.
40. The Department should not adopt *Skelly* officer recommendations to reduce disciplinary penalties based on mitigating information that has already been considered in setting the proposed discipline. Any deviations from the proposed penalty should be well documented and fully justified.
41. The Department should continue to use well trained, impartial chief officers who have the authority to make meaningful recommendations as *Skelly* officers. The Department should not return to using the PSD Commander as the *Skelly* officer.

Disciplinary Appeals and Boards of Rights

42. The Department must adopt an informal hearing procedure for the appeal of written reprimands without further delay.
43. Like police officers, firefighters should be responsible for paying for their own Board of Rights defense; the Charter should be amended to eliminate the right and privilege to have a defense representative appointed at taxpayer expense. Until the Charter is amended, the Department should ensure, with the assistance of the City Attorney's Office, that its policies controlling costs related to 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 prepare for a Board of Rights hearing.
44. The Department should not pay the cost of a defense representative beyond the conclusion of the Board of Rights hearing.
45. The Department must devote the staff necessary to prosecute hearings in a timely manner. They should be experienced and qualified civilian staff who were not involved in the investigation.
46. The Charter should be amended to allow an Administrative Law Judge or hearing officer to preside over Board of Rights hearings. In the meantime, the Department should provide continuing training and a "Benchbook" for chief officers who may sit on a Board of Rights.
47. The Charter should be amended to prohibit *ex parte* communications during a Board of Rights hearing, as it does for police officers.
48. The Department should not provide training, cell phones, print services or other support to defense representatives. The Department should also not expose the City to a risk of litigation by providing confidential discipline information to the unions when the Department member has not chosen to be represented by the union.
49. The right of firefighters to appeal the Department's final disciplinary decision should be no greater than the rights provided to other Department employees and Los Angeles police officers. A writ proceeding in superior court provides an adequate protection against abuse. Therefore, the right to request binding arbitration following a Board of Rights hearing should be eliminated.
50. A Board of Rights should be required to comply with the Department's disciplinary guidelines when making penalty recommendations.

APPENDIX 1

HISTORICAL TIMELINE

2006

Jan. 26, 2006 – Controller's *Review of the Los Angeles Fire Department Management Practices*

Jan. 31, 2006 – Personnel Department's *Audit of Fire Department Selection and Employment Practices*

Feb. 24, 2006 – Department's 1st response to Controller's audit

April 25, 2006 – Department's *Audit Action Plan*

May 2, 2006 – Department's 2nd response to Controller's audit

June 20, 2006 – Department's *Audit Action Plan Update*

July 7, 2006 – First stakeholders meeting

July 26, 2006 – Controller's response to Department

Nov. 21, 2006 – BFC approves disciplinary guidelines

2007

Feb. 27, 2007 – BFC approves code of conduct

March 15, 2007 – Department's *Audit Action Plan Status Report*

July 30, 2007 – Last stakeholders meeting

2008

Jan. 14, 2008 – Personnel Department's *Development of a Professional Standards Division within the Los Angeles Fire Department*

Mar. 18, 2008 – Department's *Audit Implementation Plan*

May 30, 2008 – Controller's *Follow-Up Audit of LAFD's Management Practices*

Aug. 26, 2008 – Department's response to Controller's follow-up audit

Aug. 26, 2008 – Department's updated *Audit Implementation Plan*

Sept. 30, 2008 – Controller's response to Department

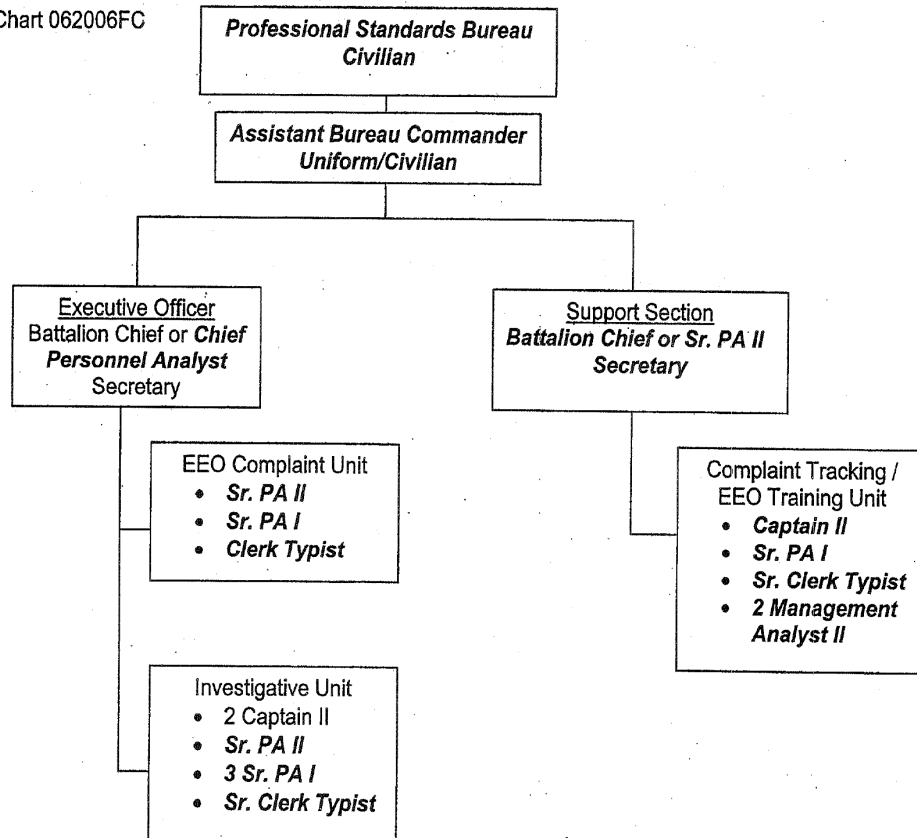
2009

July 20, 2009 – Department's *Update of Audit Action Plan*

APPENDIX 2

FIRE COMMISSION *AUDIT ACTION PLAN* PROPOSED ORGANIZATIONAL CHART

DRAFT – PSB Org Chart 062006FC



Note: New positions
identified in ***bold italics***

APPENDIX 3

LAFD EMPLOYEE ASSOCIATIONS & LABOR ORGANIZATIONS

SIRENS (now Los Angeles Women in the Fire Service)

The mission of LAWFS (formally SIRENS, Professional Association of Fire Service Women) is to provide a proactive network that supports, mentors and educates current and future fire service women and men of the Los Angeles area.

Los Bomberos

Los Bomberos is a non-profit organization composed of Los Angeles City firefighters and their families in partnership with businesses and community groups dedicated to community service. Based in the City of Los Angeles, the organization is dedicated to supporting education, leadership development, networking opportunities, public policy advocacy and cultural awareness.

Stentorians

The Stentorians organization is a community-based firefighter association made up of more than 300 African American men and women firefighters and paramedics. The organization provides entry-level and career advancement consulting and recruitment guidance.

United Firefighters of Los Angeles City (UFLAC)

UFLAC is the labor representation organization of the firefighters and emergency medical personnel of the Los Angeles Fire Department (though the rank of Captain II). The organization takes great pride in providing leadership and influence on issues that involve public safety and worker welfare.

Chief Officers Association (COA)

The COA is the labor representation organization for the chief officers (the rank of Battalion Chief and above) of the Los Angeles Fire Department. The goals of the COA are to: 1) maintain and improve wages, hours, and working conditions; 2) provide improved communications among all members; 3) promote and provide leadership, direction, and counsel to all members; 4) provide a social relationship among all members; and 5) establish effective membership participation by developing and implementing a committee structure.

APPENDIX 4

COMPLAINT TRACKING SYSTEMS

COMMENT	DEPARTMENT RESPONSE
<p>A former union official said the Department should not accept anonymous complaints because they are often not accurate and are being used to create a hardship on the accused.</p>	<p>The policy decision to accept anonymous complaints was made by Fire Chief Douglas Barry. This decision was made after weighing the pros and cons, including the potential havoc that a vindictive anonymous complainant could wreak as revenge or retaliation against any member. That discussion also recognized the stigma that members fear being labeled as an informant or “rat” by coming forward with a complaint and the concern that without the ability to receive anonymous complaints, those issues would never surface.</p> <p>When an anonymous complaint is received, the Professional Standards Division will enter the complaint into CTS. When the anonymous complaint is initially reviewed by the PSD Commander, he or she will evaluate the information for specificity in detail and inherent credibility. Complaints that allege broad, generalized non-specific claims of a less serious nature will generally be immediately closed out because they are unworkable, given the harm that an unfocused and generalized inquiry would create. However, many of the anonymous complaints received by PSD contain specific information as to date, time, location, witnesses and specific acts, which if true, would be misconduct. The fact that the complainant preferred to be anonymous does not preclude PSD’s responsibility to begin an investigation, with full knowledge that they will not be able to immediately interview a willing complainant.</p>
<p>A former union official said that while most serious complaints are being entered into the CTS, there are captains who follow the Emergency Services Bureau directive that all complaints be entered and there are some who use some discretion.</p>	<p>With the exception of a clear reporting mandate for EEO and hazing incidents under the Discrimination Prevention Policy Handbook (DPPH), there is no policy as to the reporting of other misconduct or procedures as to how that policy would be satisfied.</p> <p>However, the direction given by PSD at the 2008 Officer Continuing Education Program (OCEP) and to this date is that if a supervisor becomes aware of allegations which if true, may result in disciplinary action, they should enter the matter into CTS.</p> <p>PSD is unaware of an ESB Directive on this issue. Through the course of multiple investigations, PSD is</p>

	<p>aware that some officers who become aware of misconduct failed to report the misconduct and/or enter it into CTS.</p>
<p>A former union official said that it has been too long since the Department provided training on the difference between misconduct that should be entered into the CTS and matters that can be handled with supervisory action, training or counseling.</p>	<p>PSD acknowledges the length of time since the 2008 COCEP. However, the parameters that were taught at the 2008 COCEP are still same: If the conduct would violate a rule, statute, policy or procedure that could result in punitive action, the matter cannot be resolved without a complaint and investigation. However, the immediate supervisor is free to counsel or train his or her members in the aftermath of a complaint being filed, provided that the supervisor does not interrogate the member. Despite this message being part of the 2008 COCEP Training and repeated reminders by PSD staff to the field, PSD has heard on numerous occasions that supervisors will wipe their hands of providing non-punitive measures via counseling or training because of the pending disciplinary investigation. A disciplinary investigation finds the facts of what happened. The supervisor is free to utilize non-punitive measures to educate their members to ensure that the members are clear as to what the Department's expectations in that area are in the future.</p> <p>From its inception, PSD has made itself available to the field for assistance in complaint investigations. During regular business hours, members call PSD for specific or general advice on complaint issues. Further, there is a comprehensive library of resources available under the help menu in CTS.</p>
<p>A former union official said that a fear of being transferred or detailed from a work assignment prevents some complaints from being entered into the CTS.</p>	<p>The Fire Department has a zero-tolerance towards retaliation for reporting misconduct. The intent of the complaint tracking system was to welcome complaints from all sources, including anonymous complainants who may fear retaliation or retribution for reporting misconduct.</p> <p>Unless the subject member is detailed to PSD and assigned to their residence, PSD is not involved in a decision to detail a member. PSD has strongly recommended that an entity that makes a decision to detail do so based on a specific basis related to disruption to the workplace or harm to the Department if the member were to remain present. PSD is aware that the Department is amending its policy regarding details to</p>

	<p>minimize unnecessary movement of personnel. PSD has strongly advocated that a blameless complainant should not be transferred or reassigned.</p>
<p>A union official believed that the Department should establish criteria to triage or determine how complaints should be handled based on whether they involve allegations of misconduct, if an investigation is required and what should be done with a complaint.</p>	<p>A process for evaluating and classifying complaints is in place at PSD. When a complaint is received, it is reviewed by the PSD Commander and assigned to the chain of command, the alternative process or PSD. On PSD cases, investigators are required to conduct, analyze and strategize their investigation to identify evidence to be seized, witnesses to be interviewed, etc. When the investigator determines that nothing can be done with the complaint or that it will not give rise to a policy violation, there are mechanisms in PSD that with supervisory approval, those complaints can be closed out and the investigation closed.</p>
<p>A union official said the PSD moderator does the intake, reviews and decides how complaints are handled and assigned when first received. He believed that someone with a badge should be performing this function.</p>	<p>When a complaint is received in the Complaint Tracking System, the PSD Moderator sends the complaint to the PSD Commander. The PSD Commander will review and evaluate the complaint and based on a number of criteria, determine (1) if immediate action needs to be taken on the complaint such as gathering evidence that could be destroyed; (2) if it involves violence or the threat of violence; (3) whether it involves criminal conduct; (4) the appropriate entity for investigative responsibility, based on the 2008 LOA. The assignment information is communicated back to the Moderator, who will complete the assignments in CTS.</p> <p>In the absence of the Assistant Chief, the review, evaluation and assignment of complaints is done by the civilian Chief Special Investigator.</p>
<p>A union official complained that captains no longer had the discretion to handle cases, and were fearful to take any action against subordinates for fear they would become the target of a retaliatory complaint.</p>	<p>The disciplinary process created in 2008 was based, in part, on the perception that the chain of command had failed to take appropriate action when they discovered misconduct, including EEO/discrimination/hazing/horseplay incidents. Therefore, the investigation and adjudication of complaints that could result in punitive action was taken from the chain of command and given to PSD.</p> <p>As to the failure of officers to “take any action against subordinates for fear they would become the target of a retaliatory complaint,” PSD believes that retaliation</p>

	<p>against a supervisor who is performing supervisory duties is unacceptable.</p> <p>PSD believes that there are supervisors who properly intervene when appropriate and some supervisors who do not want to engage subordinates and/or would rather handle complaints “informally” or “at the kitchen table.” PSD has heard anecdotally that some supervisors justify their failure to take non-punitive corrective action before a matter gives rise to misconduct because “their discretion has been taken away” when in fact, they have been encouraged to do so before a matter becomes a complaint.</p>
<p>A union official said investigations take too long, that cases are lost to the statute and that the system is being crushed under its own weight. The system needs to be re-set which may result in some cases being dropped and only the serious cases being handled.</p>	<p>PSD acknowledges that the time to complete investigations is lengthy. However, PSD has followed the 2008 Audit Implementation Plan which requires the Department to investigate complaints which could result in punitive action.</p> <p>PSD is concerned about a suggestion that “some cases be dropped and only the serious cases be investigated.” What is serious to an individual member, the union, or an accused member is different than what the Department believes is serious. The Controller and Personnel Department concluded that the existing perception at the time of their audits was that discipline was unevenly and unfairly meted out based on subjective decisions about the conduct and/or the individual accused by the Department. Both the Controller and Personnel Department recommended that the Fire Department create disciplinary guidelines which are consistently applied and fairly administered. (2006 Controller’s Audit, Page 46; Personnel Department Management Audit of 2006). LAFD’s 2008 Audit Implementation Plan set the creation of disciplinary guidelines as Goal #10, which has been implemented by PSD.</p>
<p>A chief officer reported that the current system excludes the chain of command and that this has caused negative unintended consequences. Supervisors should be, to some degree, ultimately accountable for their subordinates’ behavior but the current system only provides</p>	<p>Public safety discipline policies and industry practice in public administration consistently recommend that the supervisory chain of command of an employee facing discipline provide input into that decision. However the 2006 Controller’s Review and the 2006 Personnel Audit both raised concerns about the perceived unfairness of the former disciplinary process, focusing on the belief that adjudication and imposition of discipline was</p>

<p>notification about the status of complaints filed within their commands (opened, closed, overdue or out of statute). They have no ability to affect the adjudication of those complaints, and without any responsibility for the investigations they tend to not do anything.</p>	<p>inconsistent. The inconsistency was based on the lack of a centralized point of adjudication and review of disciplinary decisions and the perceived influence that the “chain of command” had in those decisions. The Controller recommended that the Fire Commission direct the LAFD to “Require that the separate Internal Affairs Division report to both the Fire Chief and Fire Commission, but otherwise removed from the chain of command...” (2006 Controller’s Review, page 46). The stakeholders’ process, as early as its second meeting on July 14, 2006, focused on the perceived influence that Department supervisors and managers had on the disciplinary process and adjudication. Based in part on this information, the Fire Chief proposed and the Fire Commission approved creating a separate Professional Standards Division that would independently review and adjudicate disciplinary cases.</p> <p>Based on findings that the alleged influence of the chain of command in disciplinary decisions at the LAFD resulted in inconsistent application of discipline suggesting favoritism and/or disparate treatment, the Fire Chief decided to centralize the disciplinary investigation and adjudication within the Professional Standards Division.</p>
<p>A chief officer stated that he is frequently asked about what should go into the CTS. He said the guidelines on the CTS website and the training that has been provided has not been helpful. A clearly defined Department policy concerning the level and type of complaints that should be captured in this system will help our supervisors do their job.</p>	<p>See other responses related to CTS entries.</p>
<p>A chief officer said that the CTS could be improved by an administrator who has the time to ensure that notification emails are more targeted to the specific officer required to take action.</p>	<p>When an Officer or Chief Officer is assigned a “field investigation” to be handled by the “chain of command,” PSD sends the case to the Emergency Services Bureau. ESB has two “sub-moderators” who confer with the chain of command to determine what Officer or Chief Officer the case should be assigned to. When the “sub-moderator” assigns the field investigation to the assigned Officer, the chain of command is manually added to that</p>

	<p>Complaint's "workflow," allowing them to see and review the information in CTS under that complaint number.</p> <p>There are several automatic notifications to the "workflow" which are generated by the Complaint Tracking System after preset deadlines are passed. It is expected that a field investigation will be completed and a report submitted within 30 days after the complaint is assigned. The first notification is sent via email to the assigned Officer alone when the investigation is 30 days beyond that initial 30 day due date. Subsequent notifications are sent to both the assigned Officer and Division when the investigation is 60, 90 and 120 days past the initial 30 day due date. The email is specifically written with only the CTS number in it to avoid identifying a specific member or members and the type of allegation.</p> <p>Because ESB, through its sub-moderators, assigns the field investigations to the appropriate Officer or Chief Officer for investigation, PSD does not control who receives the late notification emails and thus, cannot assist in "targeting" the email to the specific Officer.</p> <p>The notification emails have been crafted in a manner that alerts the involved investigator and chain of command that the investigation is delayed while also ensuring the confidentiality of the accused members.</p>
<p>A chief officer reported that allowing all anonymous complaints has resulted in the targeting and harassment of supervisors. For some, this has also become an excuse for supervisors not to supervise. He said that PSD has stated they use some sort of screening process, and he believes that there should be a system/set of criteria in place to evaluate the complaints and make determinations about which ones should be investigated. Things to consider would be the totality of the circumstances and the motivation of</p>	<p>See other responses related to anonymous complaints.</p>

the complainant.	
An EMS supervisor reported that the PSD came about because of employees' interpersonal issues but that the system now includes investigations into everything, including EMS-related complaints.	The creation of the Professional Standards Division was intended to address all complaints of alleged misconduct entered into CTS, which could result in punitive action. This includes EMS complaints. One of the most time-intensive types of complaints investigated by PSD is violations of EMS protocols, especially when the patient suffers great bodily injury or death.
He reported that in the medical community, the general approach to correcting behavior is to begin with non-punitive measures. When individuals are subject to punitive measures, it makes it much harder to have an open discussion about what occurred and what lessons can be learned from the incident.	<p>When a violation of EMS protocols is proven, the current disciplinary guidelines require the imposition of punitive action. To make a violation of EMS protocols non-punitive would require a policy decision after discussion with the involved experts and presentation to the Board of Fire Commissioners.</p> <p>PSD has proposed "learning and education alternatives to discipline" where a member may be able to attend training/classes directed at resolving the underlying behavior in lieu of suspension.</p>
Under the Department's current system, remedial training is not productive because supervisors/trainers must speak in hypotheticals rather than about the specific incident. Trainers are also concerned about being subpoenaed to testify about conversations that took place during training. Additionally, members are not forthcoming because they are concerned about the outcome of the investigation and being disciplined. These circumstances prevent them (and the rest of the Department) from learning from their mistakes.	<p>Because of the FFBOR, the City Charter and the MOUs, a member who is questioned by the Department about matters which could result in punitive action have specific due process rights prior to interrogation. In fact, the FFBOR allows the member to receive up to \$25,000 per violation of their interrogation rights under FFBOR.</p> <p>As such, it has been PSD's recommendation that supervisors/trainers focus on the area of training versus "what happened?" when conducting post-incident training. Done properly, a member should not be concerned about what they say during the training because it should not require them to speak about the underlying incident.</p> <p>If the quality of training is severely diminished unless the accused member is allowed to speak freely about their actions during the actual incident, the Department should consider not allowing those statements made during training to be used for disciplinary purposes. Allowing this is problematic within the LAFD because (1) what is said in training often is revealed to others outside of the training arena; (2) the member may admit to other previously unknown misconduct to the trainers; and/or (3)</p>

	the member may later tell PSD or testify at a DHS/EMSA hearing or a board of rights something entirely different than what they said in training, making those trainers impeachment witnesses.
An EMS supervisor reported that a few of the union reps have said the members are facing double jeopardy because they have already received training for their conduct and cannot also receive discipline.	Because training is considered “non-punitive,” there is no double jeopardy prohibiting the Department from both providing post-incident training and imposing discipline.
An EMS supervisor stated that allowing anonymous complaints is problematic. Supervisors are also afraid to counsel members because they are worried about being accused of creating a hostile work environment.	See other responses related to anonymous complaints and supervision.
It is important to screen the complaints for a number of reasons. First, for every complaint that is filed against a member, there are probably many other similar incidents that were not reported. Second, some complaints are from individuals who are simply upset because of the bill and so they are just frustrated and venting. Third, investigations of low-level medical complaints take a toll on morale.	<p>When it receives a complaint, PSD will review it to determine whether it violates a rule, statute, policy or procedure that if true, would result in punitive action under the disciplinary guidelines.</p> <p>The argument that it is unfair to punish a member simply because their actions were reported while others got off without punishment has many tentacles: Why aren’t supervisors reporting all misconduct? Is the act something that should be under the disciplinary guidelines as opposed to training? Should there be a policy against something that is not being enforced?</p> <p>PSD takes into account the complainant’s motive and potential bias when investigating a complaint. However, the fact that a complainant may have a motive or bias does not automatically mean that their complaint has no factual basis. PSD looks at the evidence either supporting or refuting the complaint.</p> <p>To not investigate perceived “low-level medical complaints” would require a change in the disciplinary philosophy by the Fire Chief and Commission and the appropriate amendments to the disciplinary guidelines.</p>
Under the current system, most	A large proportion of complaints related to EMS are

<p>EMS complaints are attitude-related. He believed investigations of these kinds of complaints are a waste of time because it often comes down to the member's word against that of the patient (and potentially corroborating witnesses). The member always gets the benefit of the doubt so these complaints usually result in no further action.</p>	<p>based on the perceived attitude of the members. In most of these situations, there is no outside evidence (video/tape recording) which would give either the members or the patient more or less credibility.</p>
<p>An EMS supervisor believes that the PSD does not do a good job of tracking when the same member receives the same types of complaints; rather each complaint is treated as a single occurrence and the member is exonerated each time.</p>	<p>From a disciplinary standpoint, PSD cannot judge a member because of their past non-sustained complaint history. Each individual must be judged by the facts from that case, versus their perceived reputation or unsustained past complaints. PSD has proposed the Department look at a structured "early intervention system" which would alert the Department to a pattern of problematic behavior before it reaches a complaint, where a formal process then takes over.</p> <p>The true solution is that the immediate supervisor should intervene with training, counseling and other non-punitive measures when such a pattern is recognized. The field supervisor or company commander is the person best situated to actually make a difference before it becomes a discipline issue.</p>
<p>An EMS supervisor believed that a better system would involve first screening complaints to determine whether they are simple attitude-related issues or something more egregious. Where the complaint is related to a member's attitude toward a patient, these should be referred back to the member's supervisor. That supervisor would then have a discussion with the member about the incident and provide counseling so the member does not do the same thing next time. They may also receive a verbal warning not to engage in the same kind of conduct again. This counseling would be documented</p>	<p>PSD does not disagree with this recommendation because what is outlined should be the purview of a responsible supervisor. The reason why the current discipline process is structured the way it is is because of the uncertainty that all officers and chief officers will actually do what is expected. That lack of consistency, especially in zero-tolerance areas such as EEO/discrimination/hazing, has led to civil judgments, threat of EEOC intervention and poor media attention for the Department.</p>

<p>(i.e., in a spreadsheet) so the supervisor could keep track of how many complaints of a similar nature the same member receives.</p>	
<p>Similarly, complaints that are related to policy violations should be handled as training issues (including giving a warning for the first offense). These training issues would be addressed either in the field for more minor issues or by the In-Service Training Section. The more serious violations that are apparent on the face of the complaint can be forwarded to the PSD for assignment to Advocates.</p>	<p>To address “minor issues” as non-punitive matters would require a change in the disciplinary philosophy by the Fire Chief and Commission and the appropriate amendments to the disciplinary guidelines.</p>
<p>Once a pattern emerges (the member receives more than two of the same type of complaint even after counseling), then it could be forwarded to the PSD for investigation. The PSD would look at the totality of the complaint history and then move forward with potential disciplinary action. They should consider providing training in addition to discipline. This action by the PSD would need to have “teeth” in order for it to be effective. Too often the investigations take too long to be completed.</p>	<p>If some officers resolve issues with “informal” counseling at the “kitchen table” while others do so through documented training and formal counseling and still others do nothing, this process will not be successful.</p>
<p>Two union officials do not believe that the Department should accept or investigate anonymous complaints. They believe that complaints should be signed. By holding complainants accountable, and enforcing the ‘malicious gossip’ rule that never gets enforced by the LAFD, would significantly reduce the number of frivolous complaints . The union officials did not know how many anonymous complaints are received by the Department.</p>	<p>It is not uncommon in the workplace for complainants to want to report misconduct but fear retaliation or retribution. Such complainants are stuck between “a rock and a hard place” in that they believe misconduct is occurring but realize that they have to return to the workplace to earn a living. Because of this, PSD will enter the complaint on behalf of the complainant. In such cases where a complainant wishes to be anonymous while contacting PSD, PSD will respect that and carry the investigation only as far as other evidence or information will take it.</p> <p>The fact that a complaint was not sustained does not</p>

	<p>mean that it was false. It may be that there simply was insufficient evidence to prove the allegation. To pursue a complainant when a complaint could not be proven would chill those who wish to report misconduct and could expose the Department to potential civil liability.</p> <p>If PSD can prove that a complaint was made falsely with malice, it will pursue administrative charges against the complainant for making a false statement. However, proving that a complaint was both (1) false and (2) made with malice requires a high level of evidence, which is commonly not present in non-sustained cases.</p> <p>Also see other responses related to anonymous complaints.</p>
<p>Additionally, the union officials were concerned that reports concerning the number of anonymous complaints are not accurate. Some anonymous complaints are relayed to PSD staff, who then enter them into the CTS. This causes the complaints to be attributed to the PSD staff members rather than the anonymous complainants, which results in overall underreporting of anonymous complaints.</p>	<p>It is not uncommon in the workplace for complainants to want to report misconduct but fear retaliation or retribution. Such complainants are stuck between “a rock and a hard place” in that they believe misconduct is occurring but realize that they have to return to the workplace to earn a living. Because of this, PSD will enter the complaint on behalf of the complainant. In such cases where a complainant wishes to be anonymous while contacting PSD, PSD will respect that and carry the investigation only as far as other evidence or information will take it.</p> <p>When PSD enters a complaint on behalf of a known complainant who wishes to be anonymous, PSD should be entering the complainant as “anonymous.” PSD will conduct training to ensure that this practice is followed.</p> <p>Also see other responses related to anonymous complaints.</p>
<p>While the union officials do not believe that anonymous complaints should be investigated, they believe that such complaints should only be given the weight they deserve.</p>	<p>PSD believes that anonymous complaints, on their own, should be given the weight accorded to them by the adjudicator, based on the totality of the evidence in the complaint investigation.</p>
<p>Two union officials said that the PSD creates complaints by encouraging and soliciting complaints. They believed that</p>	<p>Openness and transparency in the acceptance of complaints was one of the hallmarks in creating PSD. The process is intended for anyone to make a complaint, with an intake, investigation and adjudication process to</p>

<p>complaints are encouraged by making complaint information and instructions available to the public on the Department's website.</p>	<p>ensure that complaints that lack substance are not used to unjustly punish members. The 2006 Controller's Audit concluded that the disciplinary process was perceived to be unfair, in part, because of the secrecy in how it functioned. To remedy that perception, the Department makes its complaint information and procedures available to anyone.</p> <p>PSD does not "solicit" complaints. However, when PSD becomes aware of allegations, which if true would result in discipline, it has a duty to treat that information as a complaint. There have been numerous cases where the employer's liability was increased because the management knew about misconduct but failed to act on it.</p>
<p>They stated that many things that are not clear rule violations clutter the CTS (things that would bother some supervisors would not bother others). The Department could increase consistency by providing training and clear expectations.</p>	<p>PSD agrees that a high percentage of its less serious complaints could have been avoided had a supervisor, with proper training and clear expectations, intervened at an early stage before the situation erupted into misconduct.</p> <p>Having said that, PSD does not and cannot evaluate cases based on whether a rule or policy would "bother some supervisors" but "would not bother others." Instead, PSD identifies rule or policy violations regardless of the subjective opinions of an individual officer or chief officer. When it encounters a rule or policy that is being unevenly enforced, PSD will notify the involved chain of command of that issue. If PSD encounters a rule or policy that is procedurally flawed, it will notify Planning to consider an amendment to the rule or policy.</p>
<p>Two union officials said that cases that could be handled by station captains and battalion chiefs were being entered in the CTS instead of being handled at the station level. They reported that officers are fearful of handling supervisory issues on their own and lack the training needed to be able to discern the difference between misconduct and supervisory issues. It is an embarrassment that all of the 'Officers' of the LAFD last received</p>	<p>The question raised by this comment is "what constitutes being 'handled'?" The Department acknowledges that the 24-hour work shift setting in the fire station is unique, sometimes leading to the "handling" of issues in a manner that is inconsistent with the Department's and City's expectations. This is of great concern when the situation involves "zero-tolerance" issues such as EEO and hazing.</p> <p>The need for training to identify the difference between misconduct and supervisory issues may be invaluable. However, the Department needs confidence that every officer and chief officer will "handle" a situation in a manner consistent with the expectations of the</p>

<p>training (on how to do an investigation, the Bill of Rights for Firefighters, how to ‘paraphrase’ an interrogation after, etc...) in the Fall of 2007. Yet, the PSD staff often sends investigations to the field where the Officers haven’t a clue on what to do, and are given little guidance.</p>	<p>Department and the City. The inconsistencies among the Department’s supervisors and managers makes the discretion suggested in this comment a potential landmine for workplace problems, litigation and unrest in the workplace.</p> <p>The training referred to in the comment was provided in 2008, not 2007.</p>
<p>Union officials complained that members currently do not have access to the Department’s files related to cases that were not sustained against them. They believe they are entitled to view investigation records, especially if the allegations are brought up at a later date.</p>	<p>Government Code section 3255 states, in part, that “[a] firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment.”</p> <p>Government Code section 3256.5 states that personnel purposes include items “that are used or have been used to determine that firefighter’s qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.”</p> <p>The Department has taken the position that non-sustained complaints are not used for any “personnel purpose” by the employer. The Department maintains the investigative file pursuant to the City’s retention policies but will not use the record for any other personnel purpose.</p>
<p>They would also like to expunge frivolous complaints with no merit and records of complaints where the accused member was exonerated.</p>	<p>Although the Department understands the frustration with having a record of a complaint where the member was found to have acted in accordance with policy and/or where the complaint was unfounded, the Department has no mechanism to “expunge” complaints in a manner contrary to the City’s record retention policy.</p> <p>The Department would also be the arbiter of what is “frivolous” with “no merit,” which would likely clash with what the member and/or the union believed.</p> <p>The Department currently limits access to non-sustained complaints, and as such, those records will not be made available except as allowed by law or with the member’s consent.</p>

APPENDIX 5

INVESTIGATIVE PROCESS

COMMENT	DEPARTMENT RESPONSE
<p>A former union official said that the Department should not return to having investigations conducted with members submitting reports up the chain of command because supervisors and managers have a habit of changing, omitting or slanting what is said.</p>	<p>The decision to centralize the adjudication of complaint investigations is a policy decision made by the Fire Chief and the Commission pursuant to the 2008 Audit Implementation Plan. PSD does not create policy but is charged with implementing policy direction.</p>
<p>A former union official reported that witnesses are not usually told the nature of the investigation prior to their interviews, and that some subjects are told in advance while some are not. He also reported that sworn investigators provide more of this information in advance than civilian investigators.</p>	<p>Under the requirements set forth in the FFBOR, City Charter and MOUs and based on current California state law, there is no requirement to advise a witness of the nature of the investigation prior to their interview. As a City employee, they have an obligation to assist the Department in the investigation. There is no property interest at issue for a witness because they are not suspected of misconduct that could result in punitive action.</p> <p>As to whether subjects are told in advance of the nature of the investigation, sworn LAFD members are notified they are the subject of an investigation upon assignment of advocates. FFBOR requires that the sworn subject be advised of the nature of the investigation prior to the interrogation. PSD uses an admonition form which requires the interrogator to advise the member of the nature of the investigation before formal questioning commences.</p> <p>As to whether sworn investigators provide more information than civilian investigators, PSD staff have been trained in Roundtable training as to what satisfies the requirement to provide the nature of the investigation. If it is true that sworn members are providing additional information inappropriately, that is a training issue that will be again addressed by PSD.</p>
<p>A former union official complained that complainants and subjects were being detailed from their work sites for lengthy periods of time without the PSD knowing about the detail and without a timely investigation</p>	<p>If a member has been detailed by an entity other than PSD, the handling of that detail, including where the member is assigned or the duration of the detail, is the responsibility of the entity that initiated the detail. PSD has repeatedly stated that a detail should not be predicated on the length of a PSD investigation but that</p>

<p>being conducted. He stated his belief that investigations are delayed but does not know why. Additionally, the detailed members may be moved between multiple stations during the detail. The former union official also stressed that the PSD should prioritize investigations in which members have been detailed because of the impact that details have on members.</p>	<p>the detailing entity should have an articulable basis for the detail, which should be evaluated to determine whether the detail should be terminated at a later date.</p> <p>PSD evaluates cases based on other priorities which include the fact that a member is detailed. However, it should be noted that when detailed, the member is still receiving his salary and benefits and has not suffered a detriment simply because he is performing the same tasks in a different workplace.</p>
<p>A former union official reported his perception of the way PSD is being run is that the member is guilty until proven guilty.</p>	<p>By the very nature of the type of investigation that PSD does, the questioning and the evidence gathering will always require a focus on the alleged wrongdoing. That is what is being investigated. The key is whether PSD is gathering all relevant evidence, both showing guilt and showing innocence as to the alleged misconduct.</p>
<p>A former union official complained that the PSD deals only with the Department member who is the witness or subject when scheduling interviews and does not arrange the interview with the member's union representative. When a member's representative calls to reschedule, some in the PSD will accommodate the representative's schedule while others will not.</p>	<p>Since the creation of PSD, union representatives have insisted that the Department must schedule interviews based on the union representative's availability.</p> <p>The FFBOR requires that an interrogation be conducted at the convenience of the accused. It is silent as to accommodating the representative.</p> <p>There is no case law interpreting the FFBOR in this area. However, there is case law interpreting this issue under the POBOR.</p> <p>A member's right to a representative of his or choice is not unlimited. There is no absolute right to a specific representative of the employee's choosing under POBOR. (<i>Upland POA v. City of Upland</i> (2003) 111 Cal.App.4th 1294.) The courts have said that to allow the member to have the right to the specific representative of his or her choice would effectively empower the member to prevent any interrogation simply by choosing a representative who would never be available for an interrogation. (<i>Upland</i>, 111 Cal.App.4th at 1303-1306.)</p> <p>The courts have said that a member's choice must reasonably accommodate the department's interests in conducting a prompt and efficient investigation. The</p>

	<p>employee must choose a representative that is:</p> <ol style="list-style-type: none"> 1. Reasonably available to represent the employee; 2. Physically able to represent the employee; 3. At a reasonably scheduled interrogation. <p>The member has the responsibility to secure the attendance of a chosen representative at the interrogation. If representative is unable to attend, the member should select another representative so that the interrogation may proceed “at a reasonable hour.”</p> <p>If the member did receive notice of the interview and their right to representation over seven (7) working days prior and the Department can prove it gave the member “reasonable time” to secure representation, the interview should move forward at the appointed time, even if the member does not have a representative.</p> <p>This position has been supported by the Los Angeles City Attorney’s Office, Labor Relations Section.</p>
<p>A former union official said that members have the right to be represented by the individual representative of their choice, and that it was intended that interviews be conducted with a minimum 7 business day notice. The 7 day rule was adopted in order to accommodate the schedules of representatives on platoon duty. While the PSD is fairly good about complying with the 7 day rule, field investigators are not.</p>	<p>If the field investigators are not following the LOA, that is a training issue for the Department and a potential grievance to be raised by the member.</p>
<p>A former union official also reported that the Department is not good about detailing representatives who are representing members on their shift. This is particularly true with representatives that are not on the union board because those members can not use union time to provide representation.</p>	<p>See earlier response regarding scheduling at the convenience of the representative.</p>

<p>A former union official says that while he believes that witnesses should be able to audio record their interviews, he can find no law that provides witnesses the right to do so. He provided one example where the Department lost the tape of the witness' interview in a case involving a board of rights.</p>	<p>The Department believes that providing recordings of witness interviews when not required by law and allowing witness members to record their interviews is harmful to the investigation and is not required by MOU or statute. If a witness or complainant is allowed to leave PSD with a recording of their interview, it can be shared with the subject member so that the subject can base their compelled statement on the statements of the witnesses, rather than the subject's personal knowledge and recollection. Further, a witness is not subject to a deprivation of his or her "property interest" because he or she is not suspected of misconduct which could result in punitive action.</p> <p>To PSD's knowledge there is no statute, memorandum of understanding provision or other written policy requiring the Department to allow a complainant or witness to record their interview and/or requiring the Department to give a witness or complainant a copy of the Department's recording.</p> <p>The only statute addressing the recording of interviews pertains solely to subject members. The Firefighters Procedural Bill of Rights (FFBOR), Government Code section 3253(g), which only applies to members that are subject to punitive action, states:</p> <p style="padding-left: 40px;">(g) The complete interrogation of a firefighter may be recorded. If a recording is made of the 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. The firefighter shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those portions that are otherwise required by law to be kept confidential. Notes or reports that are deemed to be confidential shall not be entered in the firefighter's personnel file. The firefighter being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation.</p> <p>The Department believes this Government Code section 3253(g) requires the Department to allow subject</p>
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	members to record their interrogations and to afford the subject member access to the Department's recording if a second interview is done. However, because the FFBOR only applies to members subject to punitive action, the Department believes that none of its provisions apply to witnesses and complainants who are Department members.
A former union official says there is no need to have subjects and witnesses sign the admonition because their acknowledgement is already recorded.	Union representatives routinely "advise" members to refuse to sign the admonition form. Members who follow the advice of their representative are not ordered to do so. The evidence that they were advised of the admonition and that they understood the admonition is captured on the audio recording.
A former union official said he would support the tolling of the statute of limitations in criminal cases.	PSD has drafted amendments to the City Charter section 1060 statute provisions on two occasions, both of which recommended including tolling provisions to match the FFBOR tolling provisions in Government Code section 3254(a).
A former union official also reported that when a civilian investigator is conducting an investigation without a sworn partner, a lot of time is wasted explaining simple things.	The original direction given to PSD was to have teams of sworn and civilian investigators. Because of caseload, civilian investigators have been told to do interviews alone unless they require the expertise of a sworn member. For some cases which do not require specific LAFD expertise (off-duty, mere discourtesy, etc.), the sworn expertise is not necessarily required. However, if the civilian investigator believes that they need the sworn knowledge, they have to ability to do so.
A former union official reported that 10-hour EMS captains do not do investigations.	If true, this is a policy decision not made by PSD.
A union official complained that the state of the current disciplinary system was a political problem and the fault of the Mayor's office, a former Fire Chief and Fire Commissioners. The primary problem, in his view, was that the chain of command had been removed from the process and the process was too susceptible to political pressures.	[No response by the PSD.]

<p>A union official said that the chain of command, including the captain, battalion chief, division chief and bureau commander, needs to get basic information about complaints like the factual background, the offenses, when it is adjudicated and the outcome.</p>	<p>When an Officer or Chief Officer is assigned a “field investigation” to be handled by the chain of command, PSD sends the case to the Emergency Services Bureau. ESB has two “sub-moderators” who confer with the chain of command to determine what Officer or Chief Officer the case should be assigned to. When the “sub-moderator” assigns the field investigation to the assigned Officer, the chain of command is manually added to that Complaint’s “workflow,” allowing them to see and review the information in CTS under that complaint number.</p> <p>There are several automatic notifications to the “workflow” which are generated by the Complaint Tracking System after preset deadlines are passed. It is expected that a field investigation will be completed and a report submitted within 30 days after the complaint is assigned. The first notification is sent via email to the assigned Officer alone when the investigation is 30 days beyond that initial 30-day due date. Subsequent notifications are sent to both the assigned Officer and Division when the investigation is 60, 90 and 120 days past the initial 30-day due date. The email is specifically written with only the CTS number in it to avoid identifying a specific member or members and the type of allegation.</p> <p>Because ESB, through its sub-moderators, assigns the field investigations to the appropriate Officer or Chief Officer for investigation, PSD does not control who receives the late notification emails and thus, cannot assist in “targeting” the email to the specific Officer.</p> <p>Those within the “workflow” are notified when the investigation is closed and have the ability to view the record, including the adjudication, for 30 days after the complaint is closed.</p>
<p>A chief officer reported that there are too few written materials regarding the discipline system, and this leads to a lack of understanding in the Department about why discipline is important. Written materials that would improve this understanding</p>	<p>In 2008 and 2009, the Department provided 40 hours of COCEP training on the disciplinary process to over 700 Officers and Chief Officers. During regular business hours, the Professional Standards Division fields numerous calls on a daily basis from Department members and supervisors seeking guidance on how to handle potential misconduct.</p>

include both a manual for how to properly conduct investigations as well as an overall Department statement of discipline philosophy explaining the importance and purpose of discipline. Other written materials would include disciplinary guidelines and informational materials about leadership and the role of supervisors.	Further, the Complaint Tracking System's (CTS) Help Page contains numerous resources to assist members and supervisors with their questions. The CTS Help Page can be reached by anyone with access to the Department Intranet.
He believes that a discipline philosophy would help with organizational alignment.	PSD has repeatedly identified the need for a LAFD discipline philosophy statement.
A chief officer explained that the importance of discipline is three fold: 1) to modify the offending employee's behavior; 2) to set expectations for all employees by communicating to the organization that there are consequences for rule violations; and 3) to assure the public that the Los Angeles Fire Department, as a self-disciplining Department, is maintaining the public trust by holding employees accountable. Fairness and consistency, combined with clear expectations, form the second part of an effective discipline system.	<p>PSD does not disagree with this statement about discipline philosophy and systems.</p> <p>PSD believes that its process is fair and consistent in the manner it investigates, adjudicates and proposes discipline for all members, without the perceived bias that plagued the past process.</p>
A chief officer explained that the PSD sends new complaints requiring a field investigation to the division chiefs, who then assign the investigator. In a high percentage of cases, the subject's immediate or direct supervisor is assigned as the investigator.	<p>Within the City, it is part of a supervisor's job responsibilities to investigate allegations of misconduct against subordinates directly assigned to them.</p> <p>The current disciplinary assignment process was created with the intent that the immediate supervisor would conduct the investigation of their members in order to reinforce their obligation to hold their members accountable.</p>
A chief officer reported that station captains who conduct investigations need help with adjudicating complaints. Sometimes they mix the	The current disciplinary process places the sole responsibility for adjudicating complaints with the Professional Standards Division.

<p>facts of what happened with mitigating factors, etc. The captains need a set of guiding principles to assist them in handling and adjudicating cases. Additionally, cases often go out of statute because the investigator is transferred, detailed, gets new responsibilities or is on a different shift than his partner investigator and/or involved parties.</p>	<p>If the captain needs assistance, he or she can contact PSD, utilize the PSD resources identified above and/or consult with their chain of command which is aware of the complaint via “workflow” access.</p>
<p>A chief officer stated that no longer requiring the involved parties to prepare written statements regarding an incident has shifted the entire workload to the investigating supervisors. Whereas they used to be able to simply review the statements and conduct limited interviews to clarify certain items, now they must rely exclusively on interviews. It is also difficult to complete investigations because they are frequently interrupted while working at the station. He believes that there would be no harm in requiring a written statement from the subject in addition to interviewing him or her, and it would be useful because it captures the member’s state of mind closer to the incident. (Waiting for a written statement would also not likely delay the interview any more than they are already delayed because of the 7-day rule.)</p>	<p>Prior to the Firefighter’s Bill of Rights (FFBOR), in situations where misconduct was suspected, the LAFD commonly required members to provide a written statement about what happened. Although it was expected that members would personally author the written statement and include what he or she actually perceived or knew, the Department would often receive identical written statements from multiple members. When questioned as to their written statements, members would state that their union representative would present the prepared documents to the member to sign and present.</p> <p>The Fire Chief discontinued this practice of demanding a written involuntary statement from the member out of concern that it violated mandates required by the FFBOR. As such, one of PSD’s mandates was to implement a disciplinary investigation process which required interviews rather than written statements.</p> <p>The law is unsettled as to what due process is required before compelling a written statement from an employee. Law enforcement has and continues to compel the completion of required written reports, including use of force reports or police pursuit incident reports from police officers, despite the potential for discipline in those cases. Either through policy or MOU agreements, different agencies have allowed protections for the officers, such as the right to confer with a representative prior to writing the report. If directed by the Fire Chief to consider the use of written statements as a means of streamlining the investigative process, PSD would consult with the City Attorney and the ERO to create a process that allows for admissible written statements which protects the due process rights of the member.</p>

<p>A chief officer reported only being able to review an investigation report by someone in his chain of command as the case was being reviewed by PSD or after the case has been closed. He would like to see a system where the chain of command reviews and approves the investigation prior to it being sent to the PSD. Clearly, more resources are needed for investigations.</p>	<p>As stated above, the chain of command, as assigned in the “workflow” added by the sub-moderator, have access to the CTS complaint through closure and for 30 days after closure. The degree and extent that the chain of command is involved in providing input into the investigation is up to the chain of command. However, the adjudication rests with PSD per Department policy.</p>
<p>A process that involves the chain of command may also include a requirement that the supervisor report what he or she did in terms of counseling or training in response to the incident prior to forwarding the investigation report. The current process only requires the investigator to do fact finding and mark whether they recommend “no further action” or PSD review. They are not required to draw any conclusions about whether a rule was violated, etc.</p>	<p>The current disciplinary process places the sole responsibility for adjudicating complaints with the Professional Standards Division.</p> <p>The chain of command has the authority to request or demand specifics about the counseling or training conducted by the immediate supervisor.</p>
<p>Field investigators could also be assisted by the development of a report template that includes the key elements (i.e., was a Department rule violated? What mitigating factors exist?). Additionally, if investigations are made more of a priority in the field and investigators know that their supervisors will not only review their work but that they will be evaluated on it, it may increase the completion rate.</p>	<p>See other responses related to chain of command input.</p>
<p>A chief officer reported that supervisors are often satisfied with the current system which excludes them from supervising investigations because it means less work and they</p>	<p>The true answer to addressing misconduct is to create an environment where it is known that misconduct will not be tolerated. That can be and should be done by the immediate supervisor before complaints arise.</p>

<p>won't become targets of a lawsuit. A fear of lawsuits sometimes provides supervisors with an excuse not to confront employees.</p>	
<p>One problem reported by a chief officer is the lack of a required feedback loop. If any counseling or training is provided in response to an incident (that later provides the basis for a complaint of misconduct), it is often generic because the supervisor does not have the specific facts regarding the incident. If they wait until the investigation is done, at which point they do have all the facts, so much time has passed that the training may not be as effective. This process is formalized with EMS complaints in "Post Incident Training" conducted by In-Service Training, but it is generic and often not directed at issues surrounding the specific incident. This process could be improved in all complaint areas.</p>	<p>If the chain of command entered the complaint, the basis for the complaint is already known to them. If they are in the "workflow" and are able to view it and/or speak to the assigned field investigator, they have access to the basis for the complaint.</p> <p>As to needing the specifics of the underlying incident in order to perform post-incident training, the following information should be considered. Because of the FFBOR, the City Charter and the MOUs, a member who is questioned by the Department about matters which could result in punitive action have specific due process rights prior to interrogation. In fact, the FFBOR allows the member to receive up to \$25,000 per violation of their interrogation rights under FFBOR.</p> <p>As such, it has been PSD's recommendation that supervisors/trainers focus on the area of training versus "what happened?" when conducting post-incident training. Done properly, a member should not be concerned about what they say during the training because it should not require them to speak about the underlying incident.</p> <p>If the Department believes that the quality of training is severely diminished unless the accused member is allowed to speak freely about their actions during the actual incident, the Department should consider prohibiting those statements made during the training from being used for disciplinary purposes. Allowing this is problematic within the LAFD because (1) what is said in training often is revealed to others outside of the training arena; (2) the member may admit to other previously unknown misconduct to the trainers; and/or (3) the member may later tell PSD or testify at a DHS/EMSA hearing or a board of rights something entirely different than what they said in training, making those trainers impeachment witnesses.</p>
<p>A chief officer believed that the level of proof used by the PSD to sustain</p>	<p>The quantum of proof to sustain an allegation of misconduct for purposes of imposing punitive action is</p>

<p>complaints is too high. It is closer to 90% certainty than simply by preponderance. As a result, he believes too many cases are not sustained. He provided examples of cases where he believed there was a clear rule violation on the face of the case but it was not sustained. This situation results in PSD resolutions not matching expectations and leads supervisors to wonder why they should report issues if nothing happens with them.</p>	<p>preponderance of the evidence.</p> <p>PSD often hears from the chain of command about “information” or “proof” that they have heard. PSD has also found that what members actually tell PSD, under orders and on tape, often can be different than what is said at the kitchen table.</p> <p>PSD devotes a great deal of time in reviewing and weighing the evidence in the completed investigative report. Because of the inexperience of the field Officers and Chief Officers, PSD often struggles with the sufficiency of the investigation. When weighing the completed investigation under the “Seven Tests of Just Cause,” which requires that the employer meet numerous thresholds before discipline can be taken, PSD often finds that it cannot proceed with discipline. These issues often arise when having to prove that there was a clear rule, that the member had proper notice of the rule and/or that the Department could prove that the rule had been applied equitably to all members similarly situated.</p> <p>The reason why PSD evaluates these issues is because when the Department imposes disciplinary action, it must be able to do more than prove the allegations by preponderance. It must also prove that the manner in which it gathered evidence provided the member with due process, that it was disciplining the member based on clearly established and equally applied policies and procedures, and that it can later prove that to a Board of Rights, an arbitrator or a superior court jury. The perception of a past disciplinary style of “ready, shoot, aim” has been replaced by an adjudication process that weighs the evidence documented in the investigative report against these other legal and due process concerns. PSD’s ability to do so is only as good as the thoroughness and lack of bias of the investigation and the quality of the investigative report.</p>
<p>A chief officer stated that the Department practice of detailing both the subject and complainant while the investigation is pending (since transfers are no longer an option based on recent litigation involving the Department) causes</p>	<p>Issues and concerns regarding details authorized by the chain of command are being addressed by the Risk Management Section.</p> <p>Details requested by PSD and approved by the Fire Chief have always involved only the accused member based on the significance of the alleged wrongdoing and the</p>

<p>issues. Detailing personnel results in two uninvolved members being displaced to allow for the moving of the involved parties. When this is combined with a prolonged investigation, it creates problems when the members are eventually returned to their stations. Detailing personnel is currently reserved for only the most egregious cases. The inability to transfer personnel remains a significant problem.</p>	<p>impact of the member's presence in the workplace on operational needs.</p>
<p>An EMS supervisor reported that there are not enough penalties for members who lie to investigators. These actions, he believed, are even worse in some cases than medical errors.</p>	<p>PSD agrees that all members should be held to a standard where intentionally making false statements with intent to deceive should not be tolerated.</p> <p>The current disciplinary guidelines include guidelines for lying during an official inquiry and lying under oath. However, there are no guidelines for other instances of lying such as to the police, to a supervisor, etc.</p> <p>As to whether lying should be treated more harshly than some medical errors and subject to a higher degree of penalty, that would require a change to the disciplinary guidelines which is a meet and confer issue.</p>
<p>An EMS supervisor reported that he receives an email when a complaint is first entered in the CTS. He goes into the record, reads the available information and pulls the ePCR if there is one from the incident involved in the complaint. He will send an email to the PSD if he thinks the conduct is particularly egregious to ensure Advocates are assigned. Once the investigation is complete, he receives another email saying it is ready for his review. He will then review the file and add his own comments on the case in the system. If the PSD differs with his opinion on the case, the IA Commander will discuss it with him.</p>	<p>PSD agrees with this statement reflecting solid investigative strategy and investigation.</p>

<p>Two union officials said that the Department was inconsistent about how the subject was provided notice about the nature of the investigation. Sometimes it was in writing and sometimes it was not.</p>	<p>Under Government Code section 3253(c), “The firefighter under investigation shall be informed of the nature of the investigation prior to any interrogation.” There is nothing in FFBOR that requires that notice of the “nature of the investigation” be given in a specific manner.</p> <p>PSD provides the member with the nature of the investigation at the beginning of its admonition. This portion of the admonition is read before any questions about the allegations themselves are asked.</p>
<p>While the subject is given notice about the nature of the investigation before the interview is scheduled, witnesses are often times given no information about the nature of the investigation.</p>	<p>Nothing in the FFBOR, City Charter section 1060 or the MOUs requires that a witness be advised of the nature of the investigation prior to their interview.</p> <p>There are several reasons for this. Witnesses are not suspected of misconduct and as such are not subject to a deprivation of their property interest because of punitive action. As such, they are not entitled to the same procedural safeguards as subject members. Further, as City and Department employees, they have a duty to cooperate with a Department investigation.</p> <p>Once the interview has begun, the Advocate or Investigator should provide the witness with sufficient information to allow them to recollect the incident at issue, including additional verbal facts or being presented with documents to refresh their recollection.</p>
<p>Two union officials complained that captains and chief officers are being undermined when they recommend no further action be taken after a field investigation is conducted, but the PSD then directs that discipline be taken. They attribute this to a lack of training and a failure to communicate expectations to captains and chief officers.</p>	<p>The 2006 Controller and Personnel audits noted that the Fire Department is a workplace culture where the immediate supervisor works, eats and lives with his or her members on 24-hour shifts. The audits noted the immediate supervisor may be too close to the accused members and/or do not see the larger issues out of concern for maintaining morale and camaraderie in the station. Because of this, the immediate supervisor who believes that no further action should be taken may be making that recommendation in a vacuum.</p> <p>The audits recommended that the adjudication be done without the involvement of the chain of command specifically to address that concern.</p> <p>It is common for PSD to receive field investigations</p>

	<p>recommending “no further action” despite evidence that the accused had committed policy violations, which in the disciplinary guidelines mandates punitive action. These are the very instances that the creation of PSD was intended to prevent.</p>
<p>While monthly information was previously provided to the field about disciplinary actions taken, there are inconsistencies in the information when corrective action summaries are provided. Any information provided to the field about disciplinary actions is too vague to provide a learning opportunity.</p>	<p>The concern about what information can be made public has been and will continue to be weighed against protecting the privacy of the members involved. Were PSD to include too much information which identifies the accused and his or her actions and/or the accused was later subject to ridicule because of the discipline, that would arguably breach their privacy and create additional issues.</p>
<p>Two union officials said that admonition forms used by the Department at the start of interviews should not define the representative’s role by PSD staff unilaterally in representing the person being interviewed. The role of the representative is clearly defined by the Supreme Court in a 1975 ruling with <i>Weingarten</i>, not in a paragraph unilaterally authored by PSD, with intentions to intimidate the member being interrogated.</p>	<p>PSD includes this information in its admonition so that all parties are educated about factors which affect the upcoming interrogation. PSD believes that portion of the admonition accurately reflects the role of the representative, based on cases and arbitration decisions decided after the <i>Weingarten</i> case.</p> <p>For instance, in <i>Yellow Freight Systems, Inc.</i>, 317 N.L.R.B. 115 (1995), during a disciplinary meeting, a union representative repeatedly interrupted the employer's agent as he read from a company document explaining sexual harassment. The union representative proceeded to "disrupt the process by verbally abusive and arrogantly insulting interruptions, by conduct that grossly demeaned the supervisor's managerial status in front of an employee and fellow manager and that consisted of violent desk pounding and shouted obscenities, and finally by point-blank falsely calling [the supervisor] a liar" The interview was terminated, and the steward received a warning letter regarding his conduct. The union filed an unfair labor charge, alleging that the interview's termination and the steward's subsequent discipline violated the employee's representation rights. The Administrative Law Judge concluded that the union representative had impermissibly transformed the "coaching session into an adversarial confrontation," and had lost protection under the Act. The ALJ reasoned that <i>Weingarten's</i> prohibition against representatives obstructing "the employer in exercising the legitimate</p>

	<p>prerogative of investigating employee misconduct" called for a more restrictive test than that which would be applied in other contexts. The National Labor Relations Board adopted the ALJ's findings, concluding that union stewards receive significantly less protection in <i>Weingarten</i> interviews than they do in other employer-union interactions.</p>
<p>They accuse the PSD of unilaterally imposing the use of admonition forms without first submitting the forms to the meet and confer process.</p>	<p>Based on City Attorney advice, PSD does not believe that the creation of an admonition form and using the admonition form during an interview is subject to "meet and confer."</p>
<p>Two union officials claim that the PSD is not properly interpreting an agreement that allows a representative reasonable time, which is defined as a maximum of 7 business days, to schedule an interview. While the PSD takes the position that the interview take place in a maximum of 7 days, the union officials interpret the language as requiring that the representative have 7 days to schedule the interview, which simply means collectively in good faith getting it put onto 3 calendars (the member, PSD, and the representative – like they professionally do in the legal arena), which could take place after expiration of the 7 days.</p>	<p>The "seven business days" language which UFLAC relies upon is contained in instructions on conducting field investigations. It should be noted that "seven business days" to obtain representation is extraordinarily long compared to other public safety agencies.</p> <p>For PSD investigations, PSD uses the "seven business day" period to define the reasonable time to obtain representation as required under MOU Article 2.4, Section II.</p> <p>The <i>Upland</i> case specifically refutes the notion that the reasonable time for the accused member to obtain representation is not tied to a specific representative's availability.</p> <p>UFLAC has requested arbitration on this issue.</p> <p>Also see other responses related to the right to representation.</p>
<p>Two union officials complain that the PSD does not want to coordinate interviews with the representatives; rather they want to deal directly with the members. The also said that if an investigator needs to reschedule an interview because of a problem such as a sick family member, interviews are absolutely and always rescheduled, but if a union representative has a similar personal</p>	<p>As to whether all investigators will reschedule an interview is based on the needs of the Department. PSD will generally attempt to reschedule an interview if the member has a true conflict. However, if PSD has complied with the seven business day requirement, it may choose not to reschedule due to statute issues.</p> <p>PSD has encountered numerous instances since 2008 where a member, who has been given at least seven business days to secure representation, will attempt to delay his or her interview because a specific</p>

<p>problem then the members are told they need to get another representative, and PSD is moving forward with or without representation. Not all investigators extend the professional courtesy when a need to reschedule arises, but some are professional and apply the ‘good faith’ courtesy. Union officials also believe that the Department uses the excuse of the statute of limitations running out to prevent members from scheduling interviews for when their representatives are available. They believe secretaries from the union and the PSD should simply work together, to assist both the representatives and the department to arrange convenient dates for interviews.</p>	<p>representative is unavailable. PSD has and continues to maintain that a member has a right to a representative of his or her choice, but not a specific representative. This is consistent with PSD’s understanding of the current California case law (see the Court of Appeals decision in <i>Upland POA</i>).</p> <p>In the instances where a representative cannot appear because of a true personal emergency, PSD has accommodated those exceptions, provided that the investigation’s integrity will not be compromised (such as with statute issues).</p> <p>However, PSD has experienced several incidents where the member will request to reschedule an interview because their specific representative is unavailable for non-emergent reasons. When that request is denied, the member will suddenly call in sick or go on family leave, resulting in a rescheduling which allows the specific representative to appear.</p> <p>Because of its caseload and its inability to take advantage of tolling, PSD cannot manage its investigations on the schedules of the specific representatives. The member is given seven business days to obtain representation. That period is “reasonable” by all standards. The <i>Upland</i> case clearly states that once given reasonable time to obtain representation, the member has the obligation to appear with a representative of his or her choice able to attend the reasonably scheduled interrogation.</p> <p>The Department has an obligation to schedule its interviews at the convenience of the accused member. As such, the PSD investigator schedules the interviews with the member and does not delegate that to the secretaries from the union.</p> <p>Also see other responses related to the right to representation.</p>
<p>Two union officials said that the PSD does not permit witnesses to record their interviews. They believe that if the PSD gets to record a witness interview the union should be able to do so as well. They cite a</p>	<p>Pursuant to Section 2.4 of the UFLAC and COA MOUs, PSD provides members with the right to representation. Except for the provisions of Section 2.4, PSD is not aware of any agreement with the unions that a witness has additional rights beyond those articulated in Section 2.4, including a right to tape record.</p>

<p>October 28th, 2008 disciplinary letter of agreement signed by the union and the department that provides witnesses the same rights to representation as those afforded to subjects, which they believe includes recording. The witness recordings were done following the 2008 letter of agreement, but out of bad faith the PSD staff one day unilaterally stopped that practice. They believe any concern about the sharing of recordings can be mitigated by simply giving witnesses a gag order.</p>	<p>Also see other responses related to interviewing witnesses.</p>
<p>Two union officials said that the Department's Rules and Regulations do not permit civilians to order or compel sworn members to tell the truth or answer questions. According to the Fire Chief, civilians may provide such orders and admonitions when interviews take place at the PSD offices, however, the union officials believe civilians should not be permitted to do so at a fire station alone because civilians do not "run" sworn members of the Department.</p>	<p>When conducting interviews without a sworn partner, the PSD civilian investigator will read the admonition, including an order to the member to be truthful. When objected to by the member (or through the representative), the civilian investigator will present the member with a letter from Fire Chief Brian Cummings advising the member that the civilian investigator has been delegated the authority to conduct this interview and that the order to be truthful is based on the Fire Chief's authority.</p>
<p>Allowing civilians to conduct investigations in the fire station, with a uniformed officer present to give the direct order to compel a statement is an acceptable practice.</p>	<p>Conducting a disciplinary interview in the fire station, where the accused and possibly witness members live and work, is disruptive regardless of whether the investigator is sworn or civilian. Disciplinary matters are confidential and conducting interviews at the workplace only serves to shine a light on those issues. When the matter involves workplace environment issues, pitting member against member, those concerns are greatly heightened.</p> <p>PSD believes that regardless of where the interview is conducted, the tone and professionalism of the interview setting should be the same. However, PSD believes that conducting investigations at the member's fire station creates issues (such as whether the member would truly be comfortable being interviewed with his or her peers nearby) and as such, normally requires that interviews be</p>

	<p>conducted at PSD.</p> <p>PSD is currently being urged by ESB division commanders to conduct interviews at the fire station instead of detailing members to PSD for interviews because of staffing shortages. These are the kinds of issues facing PSD when considering how and where to conduct its interviews.</p>
<p>Two union officials claim that civilian investigators ask too many basic questions during interviews. The civilian investigators often take a large part of the interrogation process to simply 'learn' about the fire department, and a small part of the interrogation process soliciting the facts of the matter.</p>	<p>However, good investigative practice would require that an investigator ask more than "did you do this?" Under the Seven Tests of Just Cause, the Department has to conduct a fair and objective investigation. In that investigation, the Department has to determine whether there was a rule, policy or procedure related to the conduct. It also has to show that the employee was on notice of the rule, policy or procedure. Finally, the Department has to find admissible evidence showing by a preponderance that the employee did, in fact, violate the rule, policy or procedure.</p> <p>PSD investigators are encouraged to probe the member's knowledge of the existence of policies, when they were put on notice of the policies and what their knowledge of the policies was at the time of the incident. Although this may seem basic to the union representatives, it is necessary for fulfilling the requirements of a complete investigation.</p> <p>Further, the use of civilian investigators not as versed in LAFD policies or fire procedures may sometimes have to ask "basic" questions so they are sure they understand the facts sufficiently to complete an accurate investigation.</p>
<p>They also reported that it is sometimes difficult to get breaks during interviews, particularly right after being told the nature of the investigation or key questions are asked.</p>	<p>Under Government Code section 3253(c), the FFBOR states, "The interrogating session shall be for a reasonable period taking into consideration the gravity and complexity of the issue being investigated. The person under interrogation shall be allowed reasonable breaks to attend to his or her own personal physical necessities."</p> <p>The members should also have the opportunity to confer with their representatives, balanced against the disruption to the interview process. As such, if a member requests a break after being told the nature of the investigation, such</p>

	<p>requests should normally be considered, provided that the length of the break or the frequency of the breaks do not disrupt the investigatory process.</p> <p>The member's right to be allowed breaks is one based on "reasonableness." Requesting a break after each question is asked is not "reasonable." The Department may choose to require an answer to a pending question before allowing a break if, under the totality of the circumstances, that short delay to answer one question is reasonable.</p> <p>Because this is a fact-dependent scenario, those decisions are left to the PSD investigator to determine based on the situation in that particular interview at the time the request for a break is made.</p>
Two union representatives believe that the Department should provide interview transcripts instead of paraphrasing interviews. The paraphrasing was last taught to Officers in 2007, and paraphrasing puts the report in words of the investigator, instead of transcribing and putting the words of the member.	<p>Between summarizing, paraphrasing and transcribing interviews, it is clear that the preferable manner for documenting interviews is transcription. However, that mode is either the most costly (if done by a third party such as a court reporter) or time-consuming (if done by the investigator). As such, PSD attempts to balance which of the methods is used in an investigatory report.</p> <p>As a rule, interviews are paraphrased where the investigator will document information relevant to the allegations, to credibility and/or that goes to the weight of the statement. However, not every statement in the interview will be documented in a paraphrased statement.</p> <p>If the investigator believes that the allegations will not be sustained, the investigator may be given supervisory approval to summarize interviews. This is done to document an investigation that will not result in a sustained finding.</p> <p>On rare occasions, the Department will transcribe portions of an interview or an entire interview after weighing whether the need for a transcribed interview outweighs either the time and/or expense to create the transcription.</p>
Two union officials object to complaints being served by mail or being left on a member's front door	Under Charter section 1060(d), "The service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing

<p>at home. They believe that a member should be personally served with a complaint, preferably when the member is on duty.</p>	<p>the member a copy personally or by sending a copy by certified mail to his or her last known address of record with the Fire Department if, after due diligence, the member cannot be found.”</p> <p>The parameters of section 1060(d) are clear. If the notice, order or process is contained in section 1060, the manner in which it is served is very specific: The Department must personally serve the member and failing to do so, may serve the member via certified mail only after it has exercised due diligence and has been unable to find the member.</p>
<p>They wanted it to made known that the union does not play games with attempting to have their members avoid service.</p>	<p>PSD has encountered situations where, during time sensitive periods (such as the statute of limitations ending), a member will become unavailable through the sudden taking of leave time, calling in sick or claiming family illness issues. PSD has also encountered situations where the member is notified that PSD is coming to a location to serve the member only to find the member gone.</p>
<p>Too often, the PSD is not providing a closure letter to complainants and/or subjects at the conclusion of investigations. A union official made a formal complaint in 2010 that the Commander Assistant Chief of PSD interfered with a Board of Rights, and to this day the complainant (an officer of the department and Union) has yet to receive a closure letter.</p>	<p>PSD strives to ensure that complainants and/or subjects receive a closure letter.</p> <p>Where a complaint has been made against the PSD Commander, that case is assigned to the Alternative Process because of the potential conflict of interest that would arise if PSD were to conduct the investigation. As such, PSD has no knowledge whether a closure letter was issued in that specific case.</p>
<p>Two union officials said that the Department should consider providing certain protections for defense representatives following the Dorner incident and did not specify what those protections should be.</p>	<p>For trained professionals involved in the discipline arena, even prior to the <i>Christopher Dorner</i> incident, the potential for an adverse or unexpected response by an employee facing discipline as been a real consideration.</p> <p>The Department has and will continue to monitor information it receives about threats or potential threats stemming from its disciplinary investigations and actions. Where PSD becomes aware of that information, it will immediately assess the information and follow the workplace violence policy where appropriate. That policy would place the responsibility for notifications on</p>

	the Risk Management Section.
One of the union's top priorities is that PSD be provided better and less argumentative leadership.	See next page.

Comment: One of the union's top priorities is that PSD be provided better and less argumentative leadership.

PSD applauds the union working with the Department in providing a heightened level of leadership in PSD. PSD also agrees that a more collaborative relationship with all parties involved in the disciplinary process would be ideal. PSD recognized the ongoing disagreement between the Department and the union over aspects of the disciplinary process as a source of concern in its report to the Board of Fire Commissioners (BFC 13-062 entitled "Learning and Education Based Alternatives to Modify or Correct Behavior in Lieu of Formal Punitive Action").

However, PSD offers the following perspective as to whether what it is doing is "argumentative" in an obstructive or disingenuous way.

One of the most significant features of public employment is the tenured employee's constitutional expectation in continued employment. Permanent public employees enjoy constitutional and statutory protections, including a "property interest" which cannot be removed without "due process of law." (*Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).)

"Due process" for permanent employees includes the key rights to:

1. Be notified of the charges against the employee;
2. Respond to those charges before the agency makes a final determination affecting the employee's employment (*Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985); *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194); and
3. Appeal the decision, including a full evidentiary hearing, after implementation of disciplinary action.

Employees who have a property interest in continued employment are entitled to due process upon proposed deprivation of their employment. Those employees who have passed probation can be terminated or suspended only for good cause as specified in local or state laws defining their due process rights.

Section 4.859 of the City of Los Angeles Administrative Code, Division 4, Charter 8, "Employer-Employee Relations" entitled "City Management Rights," states, in part, that it is "the exclusive right of City management to take disciplinary action for proper cause, provided, however, that the exercise of these rights does not preclude employees or their representatives

from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.”

Prior to the creation of PSD, the prior disciplinary process was heavily critiqued and criticized for being unfair because it failed to follow the law or City policies. The anecdotal evidence, confirmed by the 2006 Controller and City Personnel Department audits, showed that the Department relaxed its adherence to the law, standards and policies dictating the disciplinary process in favor of resolving discipline cases.

One of PSD’s mandates was to ensure consistency in the disciplinary process by following the applicable statutes, policies and rules governing the disciplinary process. In determining what is due to a sworn firefighter in the context of the disciplinary process, PSD has generally been guided by the procedural due process and other mandates found in the Firefighters Procedural Bill of Rights (California Government Code §§ 3250, et seq.), City Charter section 1060 and the applicable UFLAC or COA MOUs.

When developing its current process, PSD first looked to what the law requires, whether it is the FFBOR, the City Charter or some other statute. PSD then looked at the MOUs to see if, through the labor relations process, the Department and the unions had agreed to some aspect of the disciplinary process. Finally, PSD evaluated its response in terms of what was consistent with the exclusive right of City management to take disciplinary action for proper cause.

What is different today from the former Operations process is that PSD is staffed with both sworn and civilian members who review disciplinary decisions in a centralized manner, free from the influences of the Fire Department workplace. A number of the comments made to the Independent Assessor are not new to PSD. During the past four-plus years, former and present Chief Officers and union officials have repeatedly raised them as challenges to the PSD process since 2008. When responding to those concerns, PSD will generally ask if the inquiring party can cite the appropriate statute, policy or procedure supporting their position. When the questioning party does not have that information, PSD will attempt to determine the basis for their challenge. The majority of unresolved differences, as reflected in the comments made to the Independent Assessor, stem not from PSD’s refusal to follow the law or a policy, but from the individual perspective of the inquiring party. The following are some of the most prevalent examples:

1. Despite clear direction in the 2008 Audit Implementation Plan to adjudicate discipline exclusive of the chain of command, the Independent Assessor received numerous comments about PSD’s refusal to allow chain of command input in those decisions.
2. Despite clear case law allowing a member to have a representative of their choice but not the specific representative of their choice, the Independent Assessor received a number of comments pointing to this as evidence of PSD’s lack of cooperation.
3. Despite clear direction in the 2008 Audit Implementation Plan to consistently apply the disciplinary guidelines and not settle disciplinary cases at the *Skelly* hearing by lowering

penalties, the Independent Assessor received a number of comments criticizing this as evidence of PSD's rigidity.

Although the unions believe that they are on equal footing with the Department in individual PSD investigations and disciplinary decisions, the Administrative Code is clear: disciplinary action for just cause is a management right. The Department acknowledges that some aspects of the disciplinary **process** have been deemed as meet and confer issues with the unions, and PSD has followed the applicable MOU provisions in those areas. However, the imposition of discipline is a management right which is confidential between the Department and the accused member. Many of the "disagreements" between PSD and the unions arise when demands are made for things that are not required under the law, policy or the MOUs and impinge on management's right to discipline its employees. Many of these demands are made under a constant barrage of threats of lawsuits or FFBOR sanctions.

If what has been described as "argumentative leadership" and refusal to collaborate on discipline issues is a reaction to PSD's strict adherence to the law, rules and policies and refusal to stray from that standard, then PSD is doing what it was mandated to by the Fire Chief and Fire Commission.

APPENDIX 6

LAFD DISCIPLINE PHILOSOPHY

- The Importance of Discipline
- The Purpose of Discipline
- The LAFD Penalty Guidelines for Sworn Members
- Accountability and the Role of the Supervisor
- Leadership

Thoughts on Discipline Philosophy

It is essential that the public have confidence in the ability of the Fire Department to investigate and properly adjudicate complaints against any member. It is also the Fire Department's responsibility to seek out and discipline those whose conduct discredits the Department or impairs its effective operation. It is always the Fire Department's goal to use positive discipline to gain employees' compliance to policies, procedures, and daily tasks. All officers are encouraged to lead through inspiration, explanation, and encouragement. When an employee fails to respond to positive discipline, they are subject to negative discipline, such as a verbal warning, written reprimand, suspension, or termination. Discipline may be administered after weighing the severity of the misconduct with the employee's history, work performance, and attitude. The impact of misconduct on the public, fellow employees, and the Department must also be considered.

Nearly every employee wants to abide by Department policies, procedures and rules, and will follow the rules when provided with a clear set of expectations. It is much better to prevent unprofessional conduct than to deal with it after the fact. Officers must ensure that values and expectations are reinforced and discussed on a daily basis. Chief officers must ensure that company officers are communicating our expectations, including keep your people out of trouble and make certain they understand how and why you want them to conduct themselves in a professional manner. Experience and technical proficiency do not replace or supersede professionalism.

The purpose of discipline within the Los Angeles Fire Department is to:

- Modify the offending employee's behavior;
- Set expectations for other employees; and
- Ensure the Los Angeles Fire Department maintains the public trust by holding employees accountable.

These three elements form the first of **two** parts that all officers must balance to maintain an effective discipline system. Each of the above elements must be weighed carefully when recommending what actions are appropriate in adjudicating complaints. An employee's immediate supervisor is usually the best person to determine what form of discipline will best serve to modify the employee's behavior. However, the recommendation by the employee's immediate supervisor will not be sustained by the chain of command if it either does not set consistent expectations for all employees or if it fails to uphold the public trust.

Fairness and consistency, combined with clear expectations, form the second part of an effective discipline system. Fire Department members will be accepting of punishment when it is imposed fairly and consistently. However, all Department members must understand that consistency and fairness are not synonymous.

Consistency within the Department's disciplinary system means holding every employee equally accountable for unacceptable conduct. Unacceptable behavior for one member is unacceptable

for all members, regardless of rank, status, or tenure. These actions, along with good policy and proper training help establish clear expectations for employees.

Fairness within a discipline system means understanding the wide range of circumstances that may contribute to an act of misconduct. An officer's recommendations for corrective action or discipline must reflect consideration of these factors and circumstances. For any two employees accused of the same misconduct, the consequences for one may be different than for the other. Two employees facing discipline may view the application of different consequences for similar acts as blatantly unfair. It is the officer's role to help the members understand the difference.

The *LAFD Disciplinary Philosophy and the Penalty Guidelines for Sworn Members* will provide much-needed tools to improve fairness and professionalism, and prevent and correct substandard behavior. Each of us as officers has a role in this system. Our Department still possesses some bad behaviors that are deeply entrenched in our organization. We as officers have a role in the system. We have a duty to address these issues not in heavy-handed way, but rather by clearly communicating expectations and correcting misguided behavior when it has been identified.

Accountability is also a very critical part of our job. Everyone up and down the chain of command needs to be held accountable. We are all responsible for doing our jobs correctly. Supervisors have an ongoing responsibility to ensure that appropriate workplace standards are maintained, and need to have the guts to enforce the rules. Without the public trust, we have very little. Without ethical conduct, we can easily lose this trust. Single events that go awry can have long-term consequences.

Lastly, there cannot be a rule for everything. As most of the Department's work is performed without close supervision or performed under extraordinary circumstances, the responsibility for proper performance of each member's duties lies primarily with each Department member. Protect yourself and your people by establishing clear expectations and by setting the correct example. No one forces us to be here, we all agreed to comply with lawful orders and follow the rules and policies of the Fire Department when we took the Oath of Office.

APPENDIX 7

**MONTHLY CORRECTIVE ACTION SUMMARY
MAY 2013**

RANK	OFFENSE	ACTUAL PENALTY	DEPARTMENT HISTORY
Non-Officer	G-1: Improper remark/abusive language/gesture directed to fellow Department member	2 working days	Seniority: 25-30 years Previous Discipline: None
Non-Officer	J-20: Negligent failure to monitor and/or care for a patient	8 working days	Seniority: 10-15 years Previous Discipline: None

REPRIMANDS			
RANK	OFFENSE	ACTUAL PENALTY	COMMENT
Non-Officer	J-17: Left work assignment without securing proper relief	Reprimand	
Non-Officer	M-1: Violation of safe working practices during non-emergency operations	Reprimand	
Non-Officer	R-3: Violation of Department or City work rule or policy	Reprimand	EMS Protocol
Non-Officer	B-8: At fault for accident involving Department vehicles/apparatus – non-emergency	Reprimand	
Officer	J-28: Inappropriate self-dispatch to incident	Reprimand	
Non-Officer	B-11: Failing to maintain a valid driver's license with proper endorsements	Reprimand	
Civilian Non-Supervisor	Personnel Policy § 33.2: Using abusive language toward or making inappropriate statements to the public, supervisors, or co-workers	Notice to Correct Deficiencies	

APPENDIX 8

DECIDING DISCIPLINARY PENALTIES

COMMENT	DEPARTMENT RESPONSE
<p>A former union official said that discipline should start at the bottom of the penalty range for a first offense and there was never an agreement to start at the bottom third.</p>	<p>According to a former PSD Commander, the “one-third” starting point was based on a meet and confer with a former UFLAC president and approved by the Fire Chief at the time.</p> <p>PSD disagrees that discipline should automatically start at the bottom of the penalty range. Instead, the starting point should be based on the significance of the underlying behavior to the Department, the City and the Fire Service. PSD has recommended a “base penalty” approach where the starting point is determined by the Fire Chief based on the Core Values. That proposal is pending before the Board of Fire Commissioners.</p>
<p>A former union official said that the Department does not take mitigating factors into consideration when setting a proposed penalty. He believes as many as 1 in 5 cases warrant mitigation. The mitigating factor the Department consistently fails to take into consideration is the member’s intent behind their actions.</p>	<p>The current process does take “mitigation” and the member’s intent into account. The member is able to provide their version of what happened and why at their interview and if discipline is imposed, at the <i>Skelly</i> hearing. Other mitigating factors, such as the member’s intent or lack thereof, prior employment history, etc., is taken into account when the proposed discipline is calculated by PSD.</p> <p>PSD believes that it is not the fact that mitigation is not considered that is the issue. Instead, PSD believes that the member and/or the union believe that mitigation should lower the punishment or erase it totally when the current process will not allow that.</p>
<p>A union official said that the Department should never have negotiated disciplinary guidelines. While labor should have input and be part of the process, discipline is a management right and should not be negotiated. Notwithstanding having negotiated the current disciplinary guidelines, labor is unhappy with the current system they negotiated with the Department.</p>	<p>PSD has no response.</p>
<p>A chief officer stated that the rules must be enforced fairly, and that</p>	<p>PSD agrees with this statement and applies what it says in its process.</p>

<p>doing so may not mean they are applied equally. Certain factors, such as mitigating circumstances and a member's record of employment, must be considered. He believed that an employee with a good employment history should be disciplined less severely than someone with a prior record of misconduct.</p>	<p>When the Internal Affairs Commander recommends that an allegation or allegations should be sustained, he or she will determine the applicable disciplinary guideline. Using the starting point of "one-third" (for UFLAC) or "one-half" (for COA), the Internal Affairs Commander will evaluate the case against twelve factors used by the Federal government's personnel board to determine discipline.</p> <p>These factors are:</p> <ol style="list-style-type: none"> (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) the potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
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<p>A chief officer complained that the PSD should sustain complaints where there has been a clear rule violation even if they are not going to do anything about it.</p>	<p>PSD does so through the use of a classification of “sustained – non-punitive.”</p>
<p>It was a chief officer’s belief that a lot of the misconduct present in the Department does not warrant time off; other actions could be more effective in correcting behavior. Additionally, suspensions are expensive and anger members. Written notices and reprimands that their supervisors are involved with would be more effective.</p>	<p>As to the perception that the discipline system results in excessive suspensions or Boards of Rights, PSD sustained allegations and imposed punitive action (reprimand, suspension or a Board of Rights) in 11.8% of the complaints investigated between 2009 and 2012 (411 cases out of 3,490 complaints). Members received suspensions or a Board of Rights in 4.8% of those complaints (166 cases out of 3,490 complaints). Thus, in 88.2% of the complaints, no punitive action was imposed. About 2/3 of the punitive actions were reprimands, which are issued by the immediate supervisor.</p> <p>In all cases, the immediate supervisor is free to counsel or train members in the aftermath of a complaint being filed, provided that the supervisor does not interrogate the subject member. Despite this message being part of the 2008 COCEP training and repeated reminders by PSD staff to the field, PSD has heard on numerous occasions that supervisors will wipe their hands of providing non-punitive measures via counseling or training because of the pending disciplinary investigation. A disciplinary investigation finds the facts of what happened. The supervisor is free to utilize non-punitive measures to educate members to ensure that the members are clear as to what the Department’s expectations in that area are in the future.</p>
<p>A chief officer stated that certainty, even more than severity, is a good motivator in discipline.</p>	<p>[No response by the PSD.]</p>
<p>The EMS supervisor does not recommend a specific discipline but the PSD usually goes along with his opinion on how the case should be resolved. He does not receive any notification about the final penalty imposed in a case.</p>	<p>PSD is charged with making its disciplinary decisions independently of the chain of command.</p> <p>Although it is constrained by privacy issues, PSD should consider how to provide what information it can to the chain of command where appropriate.</p>

<p>Two union officials said they do not know how disciplinary penalties are set, because PSD has been so inconsistent for years. Some in PSD have started at the top of the range and some start at the bottom third.</p>	<p>The manner in which penalties are proposed has been communicated by PSD chief officers to union officials numerous times since 2008.</p> <p>Based on a verbal meet and confer between a former PSD Commander, and UFLAC President, it was agreed that one-third would be the starting point for UFLAC members.</p>
<p>Two union officials said one of their top priorities is implementing education-based discipline as an alternative to the current disciplinary system.</p>	<p>Since 2009, PSD has been evaluating alternatives to the formal disciplinary process. On September 28, 2012, PSD recommended to the HRDC/Personnel Committee shifting the current disciplinary philosophy to one incorporating education and learning as alternatives to discipline (BFC 12-145). In April 2013, PSD submitted a Board Report (BFC 13-062) recommending Learning and Education Alternatives to Discipline, which is scheduled for Commission consideration on June 4, 2013.</p>
<p>Another top priority is creating a settlement unit (like the one used by the LAPD) that would seek to settle disciplinary cases before investigations are started. Often times PSD states they want to emulate the LAPD, but only when it benefits PSD. When the union offers suggestions that the LAPD does, but that doesn't fit into PSD's plan, then they answer that we do not have to follow LAPD. PSD follows LAPD's internal affairs only when it benefits their agenda.</p>	<p>Since 2009, PSD has been evaluating alternatives to the formal disciplinary process. On September 28, 2012, PSD presented shifting the current disciplinary philosophy to one incorporating education and learning as alternatives to discipline to the HRDC/Personnel Committee. (BFC 12-145). In April 2013, PSD submitted a Board Report (13-062) recommending Pre-Disposition Resolution, which is scheduled for Commission consideration on June 4, 2013.</p> <p>PSD management does not claim that it wants to "emulate the LAPD." Since it was created, PSD recognized there are vast differences between law enforcement and the fire service, the cultures of LAPD versus LAFD and the expectations of the sworn members of both agencies. As such, PSD has purposefully avoided "copying" LAPD's processes (or any single agency's processes). Instead, PSD will look for whatever solution or example best suits its specific needs, regardless of origin. For example, PSD's proposal of using an education-based alternative discipline (developed by the Los Angeles County Sheriff's Department) was recommended over LAPD's "Conditional Official Reprimand." In fact, some union representatives have criticized PSD practices in the past because PSD was "not doing what LAPD does."</p>

Two union officials reported that the Department either does not provide the field with information about discipline that has been administered or the information is too vague to be helpful or educational.	Although it is constrained by privacy issues, PSD should consider how to provide that information to the Department, such as through the Disciplinary Action Summary.
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APPENDIX 9

PENDING BOARDS OF RIGHTS (AS OF JUNE 19, 2013)

	Rank	Type	Nature of Board	Proposed Penalty	BOR Request Year	Pending time (to 6/1/13 in days)
1	Captain I	Sexual harassment	Member requested	20 days	2010	1137
2	Firefighter III	DUI	Directed BOR	BOR	2010	1004
3	Captain II	Improper remarks & abusive language toward member; Closed ambulance to deal with personnel issue	Member requested	3 days	2010	983
4	Firefighter/Paramedic	Disrespectful to patient	Member requested	22 days	2011	670
5	Firefighter III	DUI	Directed BOR	BOR	2011	682
6	Engineer	Failure to treat	Member requested	10 days	2011	620
7	Captain I	Patient assessment	Member requested	14 days	2011	564
8	Firefighter/Paramedic	DUI	Member requested	16 days	2011	530
9	Captain I	Sexual harassment	Member requested	16 days	2011	620
10	Engineer	Disrespectful to police when cited for illegal fireworks	Member requested	12 days	2012	330
11	Firefighter/Paramedic	DUI	Directed BOR	BOR	2012	312
12	Firefighter III	Patient assessment	Member requested	8 days	2012	270
13	Firefighter III	Failure to treat	Member requested	8 days	2012	243
14	Firefighter III	Failure to treat	Member requested	6 days	2012	247
15	Captain I	Traffic accident	Member requested	16 days	2012	439
16	Firefighter/Paramedic	Domestic violence arrest	Member requested	2 days	2012	206
17	Captain I	Inappropriate language during a station line-up; Discredit	Member requested	26 days	2012	207
18	Firefighter III	Failure to document patient information	Member requested	8 days	2012	205
19	Firefighter III	Abandoned 9-1-1 caller	Member requested	4 days	2012	199
20	Firefighter III	DUI	Directed BOR	BOR	2012	193
21	Firefighter III	Multiple off-duty alcohol (criminal)	Directed BOR	BOR	2012	164
22	Captain I	Patient assessment	Member requested	2 days	2013	149
23	Firefighter/Paramedic	Hazing	Member	6 days	2013	115

			requested			
24	Firefighter/Paramedic	Hazing	Member requested	6 days	2013	115
25	Firefighter/Paramedic	Inappropriate ePCR comments	Member requested	8 days	2013	86
26	Firefighter/Paramedic	Harassment	Member requested	20 days	2013	75

APPENDIX 10

COMPLETED BOARDS OF RIGHTS (AS OF JUNE 19, 2013)

	Rank	Type	Nature of Board	Proposed Penalty	Outcome	New Penalty	Time from request to effective date (days)	Penalty Change
1	Engineer	Drug influence in violation of contract	Directed BOR	BOR	Resigned pending BOR	Voluntary resignation	254	n/a
2	Firefighter/ Paramedic	Allowed female civilian to sleep in dormette area	Directed BOR	BOR	Penalty mitigated from directed BOR to 13 days	13 days	n/a	↓
3	Firefighter III	Disobeying an order	Member requested	7 days	Settlement	Reprimand	340	↓
4	Firefighter III	DUI	Directed BOR	BOR	Dept withdrew proposed BOR 11/19/09	None	n/a	↓
5	Firefighter III	Theft	Member requested	10 days	Settlement	3 days	381	↓
6	Inspector	Bribery	Directed BOR	BOR	Resigned pending BOR	Retired	201	n/a
7	Firefighter/ Paramedic	Patient discourtesy	Member requested	2 days	Guilty verdict by BOR	6 days	482	↑
8	Firefighter III	Theft	Directed BOR	BOR	Guilty verdict by BOR	Termination	57	n/a
9	Firefighter/ Paramedic	Horseplay/hazing	Member requested	6 days	Guilty verdict by BOR	8 days	442	↑
10	Firefighter/ Paramedic	Sexual harassment	Member requested	10 days	Member rescinded BOR application	10 days	56	No change
11	Firefighter III	Off-duty drug sales	Directed BOR	BOR	Guilty verdict by BOR	Termination	118	n/a
12	Firefighter III	Failure to treat	Member requested	3 days	Guilty verdict by BOR	6 days	190	↑
13	Firefighter/ Paramedic	Off-duty felony assault	Directed BOR	BOR	Guilty verdict by BOR	Termination	200	n/a
14	Engineer	Domestic violence (2nd offense)	Directed BOR	BOR	Guilty verdict by BOR	BOR: Termination, reversed by	169	n/a

						arbitrator		
15	Captain I	Supervisory misconduct	Member requested	14 days	Guilty verdict by BOR	4 days	680	↓
16	Captain I	On-duty prostitution	Directed BOR	BOR	Retired pending BOR	Retired	107	n/a
17	Firefighter III	Domestic violence	Member requested	6 days	Not guilty verdict by BOR	None	295	↓
18	Firefighter III	Off-duty sexual assault	Directed BOR	BOR	Settlement	16 days	25	↓
19	Firefighter III	Hazing	Member requested	8 days	Guilty verdict by BOR	4 days	233	↓
20	Firefighter III	Failure to assess	Member requested	20 days	Settlement	16 days	772	↓
21	Firefighter/ Paramedic	Outside scope of practice	Member requested	12 days	Guilty verdict by BOR	10 days	727	↓
22	Firefighter III	Theft (2nd offense)	Directed BOR	BOR	Terminated	Termination	49	n/a
23	Firefighter III	Discredit for conviction	Member requested	16 days	Guilty verdict by BOR, settled while arbitration was pending	BOR: 16 days, Settlement: Reprimand	248	↓
24	Firefighter/ Paramedic	DUI with prior offenses	Directed BOR	BOR	Settlement	20 days/contract	497	↓
25	Firefighter III	DUI	Directed BOR	BOR	Settlement	16 days/contract	55	↓
26	Engineer	DUI	Directed BOR	BOR	Settlement	16 days/contract	112	↓
27	Captain II	DUI (2nd offense)	Directed BOR	BOR	Settlement	60 days/contract	85	n/a
28	Firefighter III	Failure to perform patient care	Member requested	12 days	Settlement	10 days	678	↓
29	Firefighter/ Paramedic	Rx influence and discourtesy	Directed BOR	BOR	Settlement	120 days/contract	82	n/a
30	Apparatus Operator	Multiple alcohol arrests (criminal)	Directed BOR	BOR	Settlement	180 days/contract	342	n/a
31	Firefighter/ Paramedic	Drug use and dishonesty	Directed BOR	BOR	Guilty verdict by BOR	Termination	384	n/a
32	Battalion Chief	Off-duty employment; Use of Department resources for personal gain	Member requested	14 days	Guilty on one charge, not guilty on another by BOR	2 days (arbitration pending)	652	↓
33	Firefighter III	DUI	Directed BOR	BOR	Settlement	16 days	108	↓
34	Assistant Chief	Falsifying training	Directed	BOR	Retired	Retired	10	n/a

		records	BOR		pending BOR			
35	Firefighter III	Workers' comp fraud (criminal)	Directed BOR	BOR	Resigned during BOR	Voluntary resignation	189	n/a
36	Firefighter III	Drug possession (criminal)	Directed BOR	BOR	Resigned prior to BOR	Voluntary resignation	265	n/a
37	Inspector	Falsifying records; failure to perform inspections	Directed BOR	BOR	<i>Skelly</i> response rec'd out of statute	No further action	n/a	↓
38	Captain I	On-duty theft and dishonesty (criminal)	Directed BOR	BOR	Resigned on date of BOR selection	Voluntary resignation	n/a	n/a
39	Captain I	Off-duty drug possession (criminal)	Directed BOR	BOR	Retired prior to BOR	Retired	n/a	n/a

APPENDIX 11

DISCIPLINARY APPEALS AND BOARDS OF RIGHTS

COMMENT	DEPARTMENT RESPONSE
<p>A former union official said the biggest problem with the Board of Rights system was that the Department was limiting the amount of time defense representatives had to prepare for a Board of Rights to nine (9) days. He believed 250 hours was a sufficient amount of time to prepare for most Boards with 300 hours being the upper limit, more if a complex case.</p>	<p>In 2008, a defense representative used an extraordinary number of v-hours to prepare for a Board of Rights. The Department believed the number of hours used was grossly inappropriate for that case in light of the fact the member resigned prior to the Board convening.</p> <p>A former Fire Chief authorized the current policy of paying a representative for nine days prior to a Board to prepare.</p> <p>PSD believes that any policy should balance providing the member with sufficient time to prepare their defense, given the complexity of the case, and the potential that hours claimed are being used for purposes other than Board preparation.</p>
<p>A former union official said there are a large number of member-opted or requested Boards because the disciplinary penalties are too severe.</p>	<p>One of the mandates in the 2008 Audit Implementation Plan was to consistently apply the appropriate disciplinary guidelines in all cases.</p> <p>PSD follows the appropriate disciplinary guidelines, which were the product of the meet and confer process, when proposing discipline.</p>
<p>Discipline is too severe because mitigating factors are not considered in setting the penalty before the <i>Skelly</i> hearing takes place.</p>	<p>See responses in the <i>Skelly</i> Process section.</p>
<p>He also stated that in some cases the penalties determined by the Boards are excessive due to the fact the Board does not use any Guidelines.</p>	<p>Under City Charter section 1060, the Board has the jurisdiction to impose any penalty it believes the evidence supports from none to termination.</p>
<p>A former union official complained that chief officers do not get enough training and do not know what they are doing as members of a Board of Rights.</p>	<p>The Department conducted Board of Rights training in 2010. Prior to the convening of a Board of Rights, PSD conducts a briefing of the selected Board members. The Board has access to a dedicated Deputy City Attorney to advise them on legal matters.</p> <p>PSD has attempted to amend the City Charter to allow replacing one of the Chief Officers with a civilian hearing officer who would act as chairperson. That</p>

	<p>civilian would provide stability to the process and adherence to proper procedural protocols. Both attempts to amend the Charter have failed.</p>
<p>They put themselves in the member's shoes rather than simply listening to the evidence, and do not follow the Board of Rights Manual.</p>	<p>A member may object to the way the Board conducts a hearing in several ways, including objections on the record and/or seeking arbitration or relief via writ.</p> <p>A Board of Rights must articulate its findings of fact and penalty rationale in writing. Those documents must reflect that the conclusions are supported by the evidence.</p>
<p>He complained that chief officers are encouraged to make a guilty finding no matter what.</p>	<p>PSD has and will object to <i>ex parte</i> communications with a Board in all cases.</p> <p>It should be noted that in the context of litigating the Board, the Department's role is to present evidence to convince the Board to find a member guilty. That is the role of the Department in an adversarial hearing. However, the Department's case should be based on the evidence and proper argument and should not resort to improper tactics to secure a guilty verdict "no matter what."</p>
<p>A former union official complained that some Chiefs on the Boards of Rights allow all evidence to be admitted, saying it will be given the weight it deserves.</p>	<p>The Evidence Code and civil court rules do not apply in administrative hearings absent a specific rule or statute. In general, any relevant evidence is admissible if it is the sort of evidence which responsible persons are accustomed to rely on in the conduct of serious affairs. (Cal. Gov't Code § 11513(c).) One of the responsibilities of the Board is to weigh the evidence and afford it the weight it deems credible.</p>
<p>He also complained about witnesses being permitted to testify over the phone, which makes it difficult to identify and discuss documents.</p>	<p>The Board has the discretion to allow testimony by telephone or other means. The manner in which testimony is elicited will affect the ability of the witness to identify and discuss exhibits.</p> <p>If the Department or the member believes that a telephonic appearance is improper, it should move to compel live testimony, at the risk of not being able to produce the witness due to distance. Similarly, if the Board chooses to give a telephonic witness less weight because their testimony is less credible, that is within the Board's discretion.</p>

A former union official complained that the Fire Chief chastises members of a Board of Rights if a member is found not guilty instead of thanking them for getting to the truth.	PSD is not involved in any discussions between the member and the Fire Chief after the conclusion of a Board of Rights.
A former union official stated that members should not have to pay for their representation at a Board of Rights.	The Department currently pays the salary of the member's representative of their choice, provided that the representative is a Department employee, in accordance with policies established by the ERO to prevent an abuse of the overtime opportunity presented by Board preparation.
A former union official supported adding a civilian member to the Board.	See other responses related to adding a civilian to the Board of Rights.
He also reported that the Department's nexus witnesses are very poor; they rarely connect the violation to the offense.	If the member convinces the Board that the Department's nexus witness failed to connect the violation of a rule or regulation to the offense, that failure in the Department's case can be used to the member's advantage.
A union official commented that there are long delays in getting Board of Rights cases to hearing, sometimes years. There was no sense of urgency in getting hearings completed.	PSD agrees that there is a delay in bringing Boards of Rights to hearing.
He believes this is a gross violation of due process rights to the member.	<p>Under the Board of Rights process stated in City Charter section 1060, the member does not receive any punitive action until a Board has found them guilty and prescribed a penalty. Thus, at the time a Board is convened, the member has suffered no detriment to their property interest.</p> <p>If the member can convince the Board that the delay prejudiced his or her ability to defend himself or herself, the member is free to make that argument at the Board or at arbitration.</p> <p>However, the mere delay in holding the hearing itself is not a "gross violation of due process rights."</p>
A union official believed most chief	See other responses related to adding a civilian to the

officers had insufficient training to sit on a Board of Rights.	Board of Rights.
A chief officer stated that he believed one important measure of the effectiveness of our discipline system is how many people are willing to accept their discipline. A large number of member-opted Boards may be evidence that members are not accepting the discipline determinations made by the Department. He believes the cause is a mixture of a lack of Department philosophy, union influence, penalties that are too harsh, etc.	<p>PSD has implemented processes based on the 2008 Audit Implementation Plan. The plan is based on the conclusions of the Fire Commission and the Fire Chief as well as other numerous sources, including the 2006 Controller's audit, the 2006 Personnel Department audit and the stakeholders' process.</p> <p>As such, PSD continues to uniformly apply the current disciplinary guidelines in all cases. The member has the right under Charter section 1060 to request a Board. Until the disciplinary guidelines are amended and/or the Department has authorization to resolve discipline in other manners, the process remains.</p> <p>PSD has recommended an approach allowing the use of learning and education in lieu of discipline to allow the member to attend training targeted at resolving the underlying behavior, with an offset in the actual penalty days.</p>
An EMS supervisor stated that the Board of Rights system is incestuous and has many problems. First, no one on the Boards is a subject matter expert; most have no medical training other than their EMT cards. Second, there is no one external to the Department on the Board who can be objective. Finally, the members of the Board are not required to recuse themselves if they have a conflict (because they know the accused, etc.). He believed the Board members should have to sign under oath that they don't have any conflicts in sitting on the Board.	As to the Board being a subject matter expert, it is up to both sides to present evidence to provide that information to the Board. This may mean the Department would bring an expert witness to provide the necessary testimony.
One issue reported by an EMS supervisor was that a member whose actions constituted gross negligence could be found "not guilty" by a Board but still have his license taken away by the state. In this scenario	<p>It is entirely possible, based on the evidence presented, the manner in which it was presented and the defenses raised, that two entities could reach conflicting verdicts on related issues.</p> <p>As to the effect of the loss of an EMT status, that issue</p>

the member would still be on duty for the duration of the state's investigation, which could take years.	requires further discussions in light of the <i>Albarran</i> Board of Rights and the lack of clarity of whether the lack of EMT certification breached a mandatory condition of employment.
Two union officers believed the large number of opted or member requested Boards of Rights is the result of disciplinary penalties being too severe.	PSD has been told by union representatives several reasons for the high number of member-requested Boards of Rights, including the perception that the current disciplinary guidelines are too severe. However, PSD has not polled members who have requested a Board of Rights on this issue.
Union officials complained that the Department was improperly and unilaterally limiting the pool of chief officers who could sit on a Board of Rights. When a chief officer has been assigned to one Board of Rights, the Department says the officer is not available to sit on another Board until the first hearing has been concluded. Chief officers who are close to retirement are also unavailable.	<p>The chief officers sitting on a Board of Rights must be impartial. The Department must provide the accused member with a pool of chief officers from which the accused can obtain an impartial board.</p> <p>Charter section 1060 allows the member to select six names from the available pool of chief officers and exclude three names to create the Board of three chief officers.</p> <p>PSD has to consider the needs of both the Department's day-to-day operational needs and PSD's attempts to keep the Board process moving forward when fulfilling its Board of Rights function. Limiting exposure for selection to a Board of Rights to chiefs not currently sitting on a panel and eliminating those close to retirement precludes the possibility of unnecessary delays after a Board is convened and reduces the impact if the same chief or chiefs are serving on multiple boards simultaneously.</p> <p>Again, the true question is whether the accused's right to an impartial board has been compromised.</p>
The union officials believe that chief officers should be permitted to sit on multiple boards at the same time and the members should be allowed to pick who they want to sit on the board, which they say is permitted at the Police Department. Another example of when PSD chooses to not follow the LAPD.	See other responses related to chiefs sitting on more than one Board at a time.

<p>Union officials complained that the Department made a unilateral decision to limit the amount of time defense representatives have to prepare for a hearing. While acknowledging that the policy allows a representative to request more than the nine days allotted, it was believed that no additional time beyond the nine days was provided in more than 95% of the cases.</p>	<p>This is a policy decision that should be addressed by the ERO or the Fire Chief. Because PSD is not involved in the allocation and renewal of time for defense representatives during Boards of Rights, PSD cannot confirm the 95% claim made by the union officials.</p>
<p>They also believe that the Board of Rights should be included in determining how much time to give the defense to prepare for the hearing on the day the hearing is convened</p>	<p>PSD believes that the application of the Fire Chief's policy, whatever it may be, should be done consistently. The ERO is the designated union contact for the LAFD. Having decisions about this policy and its application made through the ERO ensures that consistency. Leaving these decisions to individual Boards of Rights will result in inconsistent application of the policy, subject to the whims of a particular board.</p>
<p>Union officials believe that a defense representative should be placed on full time status. A defense representative is arguably the toughest assignment in the entire LAFD. A defense representative is charged with a duty to defend a member to the best of their abilities, provide a reputable defense, interview witnesses, go over normally hundreds of pages of PSD documents, review evidence, prepare for motions, opening statements, closing statements, work with an attorney if the accused so pays for on their own dime, an alternate defense theory, cross examination, and direct examination to name just a few of the defense representativesas provided in the charter and decades of past practice, while the Board of Rights is pending (unless there is a very long delay). Defense representatives often get assigned and were not apart of the intial</p>	<p>The City Charter controls when a defense representative should be appointed full-time to a disciplinary matter. Charter section 1060(l) provides the accused with "the right and privilege to select and name any other member of the department of any rank not higher than the rank of captain (who is not otherwise disqualified by reason of prejudice or being a party to the action in any capacity) to act as his or her defense representative at the hearing. The Fire Chief must immediately assign the member selected to act as defense representative, and it is hereby made the duty of such member to use every legal means available and exercise the best efforts of which he or she is capable to defend the accused at the hearing."</p> <p>If the defense representative will be working on preparing for the Board of Rights, he or she falls under this provision. A representative involved in the investigation itself does not fall under this provision.</p> <p>Also see other responses related to paying defense representatives.</p>

<p>process, did not sit through the interrogations, and have a lot to learn and catch up on in comparison to their internal affairs prosecuting PSD staff,</p>	
<p>Union officials further stated that all of the defense representative's duties are expected to be done within a 9 day timeframe (while the PSD has unlimited time to prepare) at the defense representatives home, on their personal computers, using their own dime to print defense exhibits, drive their own personal car while working for the fire chief to interview civilian witnesses in the City of Los Angeles, all while receiving less pay because they do not fall below the FLSA threshold of overtime during their defense work. Conversely, the internal affairs prosecuting members, enjoy unlimited overtime, an unlimited time to work on the case, a department vehicle, and unlimited printing and duplicating resources, to name a few that keeps the playing field unequal.</p>	<p>The Department does not have "unlimited resources" to prepare for a Board of Rights hearing. PSD weighs the allocation of its staff to whatever priorities arise at a specific time.</p> <p>This comment assumes that the defense role in a disciplinary hearing is supported by the City or the Department. It is not. The Board of Rights is an adversarial hearing between the employer and the employee. When the member so chooses, the union is the support mechanism behind the accused. The union is supported by its dues for that reason.</p> <p>With the exception of the Department detailing a chosen representative, the employer should not bear the cost, expense or provide support for the accused's defense.</p>
<p>Union officials stated that acting as defense representative is the most difficult job assignment on the Department. Since the defense representative is assigned to such duty by the Fire Chief, the Department should provide training for the union's defense representatives. Currently the Department only provides training to the PSD prosecuting internal affairs staff and chief officers who might sit on boards. This is no different then taking the 3 Firefighters assigned to a Truck Company, and shunning one of them while only providing training</p>	<p>Acting as a defense representative is a difficult job assignment. However, the role and functions of a union representative as a defense representative in a Board of Rights is one specific and personal to the accused member in that Board. The accused member selects the representative of his or her choice, and it is hoped the accused takes the knowledge and experience of the representative into account during selection.</p> <p>Because the accused has the right to select a representative of his or her choice, there is no set pool: the member can select anyone of the rank of firefighter or captain. To suggest that the Department should train 3000+ members on the chance that one would be one day selected as a representative would be a tremendous drain on already scarce resources.</p>

<p>to two of them.</p>	<p>Conversely, if the Department were to train only a specific pool of representatives, it would open the Department to a challenge that it was limiting the accused's choice of representative. Again, this choice is personal to the representative. If the Department was to "train" the representatives and the Board was to turn out negatively for the accused, the Department would be open to claims that the member was unfairly deprived of an adequate defense because the Department's training was inadequate or poor.</p> <p>As stated above, the accused member should take the knowledge and experience of the representative into account during selection. If the union intends to represent members at a Board of Rights, it should do what most other public sector unions do: train defense representatives through union funding and time to ensure they are competent to perform the task.</p> <p>The union's analogy is irrelevant because it assumes the Department and the union are on the same side of the issue. A more appropriate analogy would be if the District Attorney were required to train the criminal defense attorney on trial tactics.</p>
<p>The union officials do not believe it is fair that the Department has unlimited resources to prepare for a Board of Rights hearing. They believe that the Department should provide the same resources to defense representatives that are provided to the Department's advocates for the hearing. This would include such things as cars, cell phones and print services.</p>	<p>The Department does not have "unlimited resources" to prepare for a Board of Rights hearing. PSD weighs the allocation of its staff to whatever priorities arise at a specific time.</p> <p>This comment assumes that both the defense role in a disciplinary hearing is supported by the City or the Department. It is not. The Board of Rights is an adversarial hearing between the employer and the employee. When the member so chooses, the union is the support mechanism behind the accused. The union is supported by its dues for that reason.</p> <p>With the exception of the Department detailing a chosen representative, the employer should not bear the cost, expense or provide support for the accused's defense.</p>
<p>Union officials believe that the Department advocates are not consistent about the sharing of</p>	<p>This ban should be equally applied to all parties. The Sergeant-at-Arms is expected to serve the Board and to maintain confidentiality to that Board with all parties.</p>

<p>information before and during a hearing. They complained that while the Department takes the position that no one may speak to members of the Board of Rights outside of the hearing, the Department's sergeant-at-arms assigned to the hearing is permitted to pass notes to the advocates and act as a "third" internal affairs advocate for the Department. In more than one particular Board, the sergeant-at-arms was admonished by the chair for passing a note to the advocates. This may be a training issue, but the actions indicate a culture change is necessary.</p>	<p>PSD will ensure that Sergeants-at-Arms are properly trained in this important and critical area.</p>
<p>Union officials complained that defense representatives are not permitted to meet with the Fire Chief after a Board of Rights hearing in an attempt to have the Chief reduce the penalty assessed by the Board as provided in the Charter. They say that Board members and advocates are permitted to meet with the Chief but defense representatives are not, contrary to what is in the Department's Defense Representative Manual, Board of Rights Manual, and City Charter.</p>	<p>The Department's Defense Manual states:</p> <p>3. Appointment With Fire Chief: At the conclusion of the hearing, and after the Board has recommended a penalty, the Fire Chief has the power, under expressed provisions of the Charter, to reduce the penalty, but not to increase it. If the accused is of the opinion that his/her penalty is unjust, it is suggested that the representative make an immediate effort to obtain an appointment for the accused and himself/herself to personally discuss the case with the Fire Chief before the penalty is certified.</p> <p>PSD is not aware of any provision in the City Charter, Department policy or FFBOR requiring the Fire Chief to meet with the defense representative prior to certifying the penalty. That is the decision of the Fire Chief.</p>
<p>They also believe that the defense representative should continue to be on full time defense representative status immediately after the hearing has been concluded to follow through with the charged duties of the Defense Representative clearly defined in the Defense Representative Manual. Such items charged to the defense representative</p>	<p>The Charter states that the duty of the assigned defense representative is "to use every legal means available and exercise the best efforts of which he or she is capable to defend the accused at the hearing."</p> <p>PSD supports the union's wishes to assist the accused member with issues outside of the disciplinary realm, including enrolling in EAP or applying for his or her pension. However, since those tasks are outside of the duties required to "defend the accused at the hearing,"</p>

<p>include, but are not limited to; assisting with such things as helping the accused enroll in the Employee Assistance Program, setting up a meeting with Los Angeles Fire and Police Pension department, help educate and rehabilitate the member if needed, and in the case of exoneration assist with clearing their name and reviewing their files. After a Board of Rights the defense representative also often has boxes of documents, filing, and notifications to make. The department believes that the defense representatives' duties end when the gavel ends the proceedings. Yet once again, the PSD staff has unlimited hours, overtime and resources to correctly file their paperwork after a hearing is complete.</p>	<p>the representative should not be paid pursuant to Charter section 1060(l) for those actions.</p>
<p>Union officials believe that the Department should be required to notify the union of every Board of Rights, ideally at the time the Board is being selected. Often times the accused member does not select a defense representative that is a member of the union. The union has an absolute interest in the potential arbitration of the Board's ultimate decision, it is clearly defined under M.O.U. #23 and the Administrative Code. Under the Employee Relations Ordinance, and M.O.U. #23 the Union/UFLAC bargaining unit has the sole authority to determine whether a Board of Rights decision will go to arbitration for a member of the Firefighter and Fire Captains' bargaining unit.</p>	<p>This comment presupposes the accused member's right to select a representative of his or her choice. The accused member's disciplinary action and the selection and role of the representative is a selection personal to the accused member. The Department should not be notifying anyone other than the member about confidential matters related to the member's disciplinary action. That burden should be placed on the member because it is the member's privacy at issue.</p> <p>Should the member, at the conclusion of a Board that has rendered an adverse decision against him or her, wish to have that decision arbitrated, the member is free to contact the union.</p>
<p>Two union officials noted that while the Police Department has approximately 700% more Boards of</p>	<p>PSD does not have a response to this comment.</p>

<p>Rights, they have significantly fewer grievances. They did not know what was subject to the grievance procedure at the Police Department, but mentioned that LAPD management exceeds LAFD management in basic labor/management relations.</p>	
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