

## INTRADEPARTMENTAL CORRESPONDENCE

May 10, 2011  
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BPC #11-0099A

**TO:** The Honorable Board of Police Commissioners

**FROM:** Inspector General, Police Commission

**SUBJECT:** OIG'S REVIEW OF THE DEPARTMENT'S QUARTERLY DISCIPLINE  
REPORT FOR THE FOURTH QUARTER OF 2010

### **RECOMMENDED ACTION**

1. REVIEW and APPROVE the Office of the Inspector General's (OIG) Review of the Department's Quarterly Discipline Report for the Fourth Quarter of 2010 (Department's Report).

### **DISCUSSION**

The Office of the Inspector General has reviewed the Department's Quarterly Discipline Report for the Fourth Quarter of 2010. Our review and analysis of the Department's Report is attached hereto.

First, as we have done in past reports, we provided an analysis of some of the statistical information contained in the Department's Report. Next, as we have also done in each quarterly review, the OIG selected a specific allegation type upon which to focus our review.

This quarter, the OIG reviewed six cases closed during the quarter that contained at least one allegation of Retaliation. The OIG reviewed these cases to determine the overall quality of the investigations as well as the propriety of the adjudication of each allegation.

The OIG also reviewed the discipline imposed in connection with two complaints closed during this quarter related to the Commission adopting a finding of Out of Policy or Administrative Disapproval in connection with Categorical Use of Force incidents. Finally, no cases were closed this quarter that were determined to be Out of Statute.

The OIG recognizes that retaliation and other workplace complaints are some of the most complex investigations confronting the Department. However, we believe that, given the severity of retaliation allegations, and the fact that the incidents surrounding these complaints often result in litigation against the Department, it is essential that these investigations are thorough and comprehensive. In four of the six cases we reviewed, no interviews were conducted with the employees accused by the complainant as being responsible for the alleged misconduct, based on the Department's determination that the described behavior did not

actually constitute misconduct. We believe that it should be the rare occasion when the Department makes such a determination, so as to obviate the need for further investigation, including interviewing any of the involved employees identified by the complainant.

Moreover, in two of the six cases we reviewed, the Department did not frame allegations against any of the employees identified by the complainant, but rather framed allegations against the Department, and adjudicated the allegations as Non-Disciplinary -- Employee's Actions Do Not Constitute Misconduct.

We continue to be concerned about the Department's practice of adjudicating complaints that initially involve claims of retaliation against identified employees as Non-Disciplinary against the Department. We believe that the Non-Disciplinary system was not envisioned as a mechanism for addressing more serious allegations such as retaliation. Further, framing retaliation allegations against the Department as opposed to specific supervisors identified by the complainant results in there being no record of any retaliation allegations on these supervisors' TEAMS, regardless of adjudication. Even though Unfounded complaints cannot be used for promotional purposes, we believe it is important to know when assessing the merits of a subsequent retaliation complaint whether a supervisor had previously been accused of retaliation, as multiple such complaints, regardless of outcome, may, at a minimum, portend the possibility of poor supervisory and/or communication skills deserving of further attention. Finally, the practice of naming the Department as the accused in these types of workplace cases can lead to seemingly illogical results, such as an allegation being framed that "the Department made an improper remark."

As always, I am available to provide any additional information the Commission may require.

**E-copy – Original Signature on File with the Police Commission**

NICOLE C. BERSHON  
Inspector General  
Police Commission

Attachment

c: Executive Director Richard M. Tefank  
Chief of Police Charlie Beck  
Deputy Chief Mark Perez, Professional Standards Bureau  
Commander Richard Webb, Internal Affairs Group  
Police Administrator Gerald Chaleff, Special Assistant for Constitutional Policing

**LOS ANGELES POLICE COMMISSION**

***Review of the  
Department's Quarterly Discipline  
Report  
Fourth Quarter 2010***



Conducted by the

**OFFICE OF THE INSPECTOR GENERAL**

**NICOLE C. BERSHON**  
Inspector General

May 10, 2011

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**OFFICE OF THE INSPECTOR GENERAL  
REVIEW OF THE DEPARTMENT'S QUARTERLY DISCIPLINE REPORT  
FOURTH QUARTER 2010**

**I. INTRODUCTION**

The Office of the Inspector General (OIG) has completed its review (Review) of the Los Angeles Police Department's (Department) Quarterly Discipline Report (Report) for the Fourth Quarter of 2010, which the Board of Police Commissioners (Commission) received on March 8, 2011. This Review assessed the quality of investigations and determined if the resulting discipline imposed, if any, was appropriate based on the underlying incident, the results of the investigation, and the involved employee's relevant disciplinary history.

The Department's Report publishes information regarding discipline imposed in connection with cases closed during the Fourth Quarter of 2010. The Report includes any discipline imposed for Categorical Uses of Force (CUOF) found to be out of policy. The Report also identifies any investigations that exceeded the applicable statute of limitations period, though there were no such investigations during the Fourth Quarter of 2010.<sup>1</sup>

Section II of the OIG's Review contains the OIG's analysis of information found within select tables contained in the Department's Report and expands upon the information contained therein. As discussed below, the OIG has selected for review this Quarter those cases which contained at least one allegation of Retaliation. Section III delineates the Department's retaliation policy.

Section IV contains a discussion of the OIG's review of the six cases closed during this Quarter that contained at least one allegation of Retaliation.<sup>2</sup> Paragraph 92 of the former Federal Consent Decree between the Department of Justice and the City of Los Angeles required the Commission to regularly review the Department's anti-retaliation policy and its implementation. On behalf of the Commission, the OIG began issuing the first of a series of such reviews in February 2004. These reviews contained a number of recommendations which led, among other things, to the revision of the Department's anti-retaliation policy in 2005, the institution of new, mandatory anti-retaliation training, and the creation of a special unit of Internal Affairs Group – the Workplace Investigation Unit (WIU) – specifically designated to investigate retaliation and other workplace complaints. Though the requirements of Paragraph 92 have not as of yet been formally codified into Department policy in the aftermath of the Consent Decree, the OIG believes such a review is valuable to assess how the Department is handling workplace concerns. Accordingly, the OIG is endeavoring to review the Department's handling of these types of complaints at least annually in connection with one of its Quarterly Discipline Reports.

In Section V, we discuss other cases which we believed might be of interest to the Commission and/or the public. Section VI contains our review of the discipline imposed relative to the two CUOF incidents where the Commission adopted a finding of Out of Policy and/or Administrative Disapproval, and which are enumerated on Table L of the Department's Report.

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<sup>1</sup> Per Government Code Section 3304(d), any discipline imposed on peace officers must be administered within one year of the date that an uninvolved supervisor discovered the misconduct, absent applicable tolling provisions.

<sup>2</sup> In total, there were eight cases closed during the quarter that contained at least one allegation of Retaliation; however, one complaint involved a claim of retaliation from a member of the public alleging that an officer retaliated against the complainant by giving him a citation. The other investigation contained allegations of retaliation made against individuals who the investigation determined were not Department employees. Therefore, the OIG deselected these investigations and did not include them in this Review.

On April 26, 2011, OIG staff met with personnel from the Department's Internal Affairs Group (IAG) to discuss our preliminary findings regarding the cases we reviewed. Information provided by IAG during this meeting was taken into consideration prior to finalizing this Review. Though there was consensus on many issues, the Commanding Officer (CO) of IAG has indicated that the Department will be submitting a written response to this Review.

**II. ANALYSIS OF STATISTICAL INFORMATION WITHIN THE REPORT**

In this Review, we utilized information provided in the Department's Report and conducted additional analysis to aid the Commission in its review and evaluation of the discipline imposed during this quarter.

Sustained Information Summary

A classification of an allegation as Sustained means that, utilizing a preponderance of the evidence standard, the Department's investigation revealed that the act complained of did occur and constituted misconduct.

Using the information contained in the Report, we determined that the percentage of Sustained allegations was 10.4% (total number of sustained allegations/total number of allegations =  $236/2275 = 10.4\%$ ). We also determined the percentages of Sustained allegations for each of the 10 most common allegations this Quarter as follows, in descending order of Sustained Rate.

<b>Allegation</b>	<b>Sustained Rate</b>	<b>No. of Sustained Allegations/ Total Number of Allegations</b>
Accidental Discharge	100.0%	2/2
Alcohol Related	100.0%	13/13
Insubordination	100.0%	7/7
Misleading Statements	75.0%	3/4
Narcotics/Drugs	66.7%	2/3
Failure to Appear	38.5%	5/13
Failure to Qualify	37.5%	6/16
False Statements	27.8%	22/79
Improper Remark	25.0%	4/16
Neglect of Duty	17.3%	80/463

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OIG'S Review of the Department's Quarterly Discipline Report

Fourth Quarter 2010

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Allegation Summary

The table below utilizes data from the Report's Tables C and I1 to provide a summary of the Sustained Rate by misconduct type, the misconduct type as a percentage of total allegations, and the number of accused employees with Sustained allegations for each misconduct classification.<sup>3</sup>

<b>Classification</b>	<b>Sustained Allegations/ Total Allegations</b>	<b>Sustained Rate</b>	<b>Misconduct Type as a Percentage of Allegations</b>	<b>Number of Accused Employees</b>	<b>Number of Employees w/ Sustained Allegations</b>
Accidental Discharge	2/2	100.0%	0.1%	2	2
Alcohol Related	13/13	100.0%	0.6%	13	13
Biased Policing	0/79	0.0%	3.5%	67	0
Discourtesy	10/411	2.4%	18.1%	261	8
Discrimination	1/10	10.0%	0.4%	4	1
Dishonesty	0/5	0.0%	0.2%	3	0
Domestic Violence	2/17	11.8%	0.7%	6	2
Ethnic Remark	0/15	0.0%	0.7%	8	0
Failure to Appear	5/13	38.5%	0.6%	13	5
Failure to Qualify	6/16	37.5%	0.7%	16	6
False Imprisonment	3/169	1.8%	7.4%	140	3
False Statements	22/79	27.8%	3.5%	51	8
Gender Bias	0/1	0.0%	0.0%	0	0
Improper Remark	4/16	25.0%	0.7%	8	3
Insubordination	7/7	100.0%	0.3%	5	5
Misleading Statements	3/4	75.0%	0.2%	4	3
Narcotics	2/3	66.7%	0.1%	3	2
Neglect of Duty	80/463	17.3%	20.4%	286	48
Off-Duty Altercation	0/2	0.0%	0.1%	2	0
Other Policy/Rule	1/48	2.1%	2.1%	25	1
PTC <sup>4</sup>	0/1	0.0%	0.0%	1	0
Retaliation	0/14	0.0%	0.6%	5	0
Service	0/10	0.0%	0.4%	9	0
Sexual Misconduct	1/11	9.1%	0.5%	8	1
Theft	0/23	0.0%	1.0%	17	0
Unauthorized Force	2/250	0.8%	11.0%	177	2
Unauthorized Tactics	2/67	3.0%	2.9%	50	2
Unbecoming Conduct	69/438	15.8%	19.3%	247	26
Unlawful Search	1/88	1.1%	3.9%	75	1

<sup>3</sup> Narrative accompanying Table I1 of the Report indicates, "The allegation total is the number of instances of an allegation for the year. One employee may have multiple instances of the same allegation. One employee may also have multiple allegation types made against him/her."

<sup>4</sup> Preventable Traffic Collision.

Allegation Summary by Employee Rank and Listed by Allegation Type

Using the information from the Report's Table F, the OIG calculated Sustained Rates by rank of the employee. These Sustained Rates are calculated below in two ways: when Preventable Traffic Collision (PTCs), Failure to Appear (FTAs), and Failure to Qualify allegations (FTQs) are included, and when these three types of allegations are excluded.

	<b>Sustained Allegations/ Total Allegations</b>	<b>Overall Sustained Rate (Including PTCs, FTAs, &amp; FTQs)</b>	<b>Sustained Allegations/ Total Allegations (Minus PTCs, FTAs, &amp; FTQs)</b>	<b>Overall Sustained Rate (Minus PTCs, FTAs, &amp; FTQs)</b>
Command Staff	2/14	14.3%	2/14	14.3%
Lieutenant	1/20	5.0%	1/20	5.0%
Sergeant	6/110	5.5%	5/108	4.6%
Detective	27/152	17.8%	26/149	17.4%
Police Officer III	21/366	5.7%	21/361	5.8%
Police Officer II	144/1108	13.0%	136/1091	12.5%
Police Officer I	14/110	12.7%	14/109	12.8%
Reserve Officer	1/5	20.0%	0/3	0.0%
Detention Officer	1/10	10.0%	1/10	10.0%
Civilian Personnel	19/380	5.0%	19/380	5.0%
Allegation Total	236/2275	10.4%	225/2245	10.0%

During this quarter, 10.4% of all misconduct allegations against Department employees were Sustained. When PTCs, FTQs, and FTAs were excluded, 10% of all allegations were Sustained.

**III. RETALIATION POLICY**

To conduct its review of retaliation investigations, the OIG identified the relevant Department policy and consulted with Command Staff from IAG as well as the Department entity responsible for investigating retaliation complaints, the Workplace Investigations Unit.

**A. Anti-Retaliation Policy**

Volume 1, Section 272 of the Department Manual (Manual) defines retaliation as “an adverse employment action taken against an employee for engaging in protected activity.”<sup>5</sup> According to this Manual section, an adverse employment action includes the following:

[A]n action that would cause a reasonable employee to be deterred from engaging in a protected activity or an action in direct response to an employee engaging in a protected activity. Adverse employment actions may include, but are not limited to, negative performance evaluations,

<sup>5</sup> Manual Volume 1, Section 272, *Policy Prohibiting Retaliation*.

negative Employee Comment Sheets,<sup>6</sup> the imposition of discipline, denial of a pay grade advancement, coveted assignment or promotional opportunity, or change of assignment.

Under the Department's Policy (Policy),<sup>7</sup> protected activities include:

- Opposing, reporting, or participating in any claim, lawsuit, or investigation concerning unlawful discrimination or sexual harassment;
- Filing a grievance or participating in any unfair labor complaint;
- Taking advantage of any labor right or benefit such as using sick or family leave, seeking compensation for overtime worked, or filing an objectively valid work-related claim for damages;
- Reporting misconduct of another Department or City employee to the OIG, or any Department or governmental entity; or,
- Supporting, assisting, or cooperating in a misconduct investigation.

The Department prohibits all employees from engaging in any act or incident of retaliation in the workplace and also expressly prohibits employees from targeting other employees for engaging in protected activity.<sup>8</sup>

Prohibited behavior may include, but is not limited to:

- Refusing to provide or intentionally delaying response to a request for assistance or back-up;
- Creating a dangerous working environment;
- Ostracizing employees for participating in an investigation; and/or,
- Spreading rumors impugning the character or reputation of a complainant or an accused [employee].

## **B. Internal Affairs Group's Workplace Investigations Unit (WIU)**

In response to concerns identified by the OIG in its first two retaliation reports in 2004, the Department established WIU, a specialized unit within IAG that is responsible for investigating all retaliation, discrimination, and other workplace complaints of misconduct. These types of cases are among the most challenging investigations at IAG and can involve multiple issues, large numbers of employees, and numerous incidents spanning years.

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<sup>6</sup> An Employee Comment Sheet is used when a supervisor documents positive or negative duty performance, training needs, and accomplishments of employees.

<sup>7</sup> The retaliation policy is comprised of two parts: retaliation by fellow employees and managerial retaliation involving adverse employment actions against subordinate employees.

<sup>8</sup>Manual Volume 1, Section 272.10, *Prohibited Acts That Contribute To Retaliation*.

The WIU does not investigate non-misconduct<sup>9</sup> (i.e., workplace conflict that does not rise to the level of misconduct) nor does it conduct formal environmental or workplace assessments. With the creation of the WIU, the Department centralized all workplace investigations. The OIG agrees centralization can provide a much-needed, single point of contact for all retaliation cases. Moreover, we believe that, as a general matter, it has resulted in the development of investigators who are knowledgeable about Department policy, procedures, rules, and protocols relevant to workplace investigations.

It is the OIG's understanding from its past reviews that WIU seeks to address the following issues to ensure that all investigations are both thorough and consistent:

- Identifying and describing the behavior at issue;
- Analyzing the behavior;
- Examining whether the behavior potentially violates federal, state, or local laws related to retaliation and/or workplace discrimination;
- Determining whether the described behavior constitutes misconduct; and,
- Assessing whether or not the employee had the opportunity in other processes or venues to resolve the issue(s).

#### **IV. REVIEW OF RETALIATION CASES**

##### **A. Methodology**

All six cases the OIG reviewed for our Report were investigated by WIU. The OIG conducted in-depth reviews of all six investigations. In conducting these reviews, a matrix specifically designed for evaluating retaliation complaints was used by first- and second-level reviewers. This matrix contained 53 questions designed to evaluate the quality, completeness, and findings of retaliation complaint investigations, including whether the evidence supported the rationale, whether necessary investigative steps were taken, and whether material inconsistencies, if any, were resolved. The matrix also included targeted questions assessing whether the investigation revealed the existence of workplace issues that could have led to the perception of retaliation and whether the adjudicator recognized such issues and recommended any remedial steps.

The OIG staff also reviewed audio recordings of the interviews conducted in all six cases. In reviewing the tape-recorded interviews in these cases, the OIG utilized a separate tape matrix containing 18 questions designed to evaluate whether: (1) the interviews were properly paraphrased to include all relevant testimony; (2) all allegations raised by the complainant were properly formed; (3) any additional allegations raised during the interviews were addressed in the completed investigation; (4) the interviews themselves were conducted properly (e.g., whether the interviewer used inappropriate or leading questions or adopted a hostile or inappropriate tone with the witness); and (5) the interviewer asked logical follow-up questions.

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<sup>9</sup> Manual Volume 3, Section 805.25, *Misconduct-Defined*, defines misconduct as: commission of a criminal offense; neglect of duty; violation of Department policies, rules or procedures; and conduct which may tend to reflect unfavorably upon the employee or the Department.

## **B. Findings**

Overall, in the cases we reviewed, we believed that WIU's interviews with the complainants were comprehensive and conducted in a professional manner. We commend the WIU Investigating Officers (I/Os) for endeavoring to elicit pertinent information from complainants who could at times be described at times as emotional, challenging, and/or vague. Moreover, we found the I/O's inclusion in all of the investigations of a timeline of relevant events to be extremely useful.

In four of the six cases we reviewed,<sup>10</sup> no interviews were conducted with the employees accused by the complainant as being responsible for the alleged misconduct, based on the Department's determination that the described behavior did not actually constitute misconduct. Moreover, in two<sup>11</sup> of these six cases, the Department did not frame allegations against any of the employees identified by the complainant but rather framed allegations against the Department, and adjudicated the allegations as Non-Disciplinary – Employee's Actions Do Not Constitute Misconduct.

As a general matter, we have concerns with the practice we have observed previously in WIU investigations to frame retaliation allegations against the Department and, in many cases, to adjudicate the allegations under one of the Non-Disciplinary classifications, either "Employee's Actions Do Not Constitute Misconduct" or "Policy/Procedure." We do not believe that the Non-Disciplinary system was designed for such potentially serious allegations as retaliation. Indeed, we had previously expressed concern with this practice in our prior review of the Department's handling of retaliation complaints in our "*Review of the Department's Quarterly Discipline Report for the Third Quarter 2009*," dated February 4, 2010, at Page 8.

Department Policy specifies that a Non-Disciplinary complaint may only be adjudicated as "Policy/Procedure" when "[t]he facts of the case revealed that the complaint relates to Department policy/procedure and not to a specific employee's actions."<sup>12</sup> The Policy also specifies that a complaint may be classified as Non-Disciplinary only when all of six factors are satisfied at the time the complaint is initiated. Included among these factors is that the complaint must not allege, among other unlawful acts, "retaliation/retribution against another employee."

Further, all six retaliation investigations we reviewed involved supervisory employees, most of whom were Commanding Officers (COs). Framing retaliation allegations against the Department as opposed to specific superiors identified by the complainant results in there being no record of any retaliation allegations on these superiors' TEAMS reports, regardless of adjudication. Even though unfounded complaints of retaliation cannot be used for evaluation or promotional purposes, we believe it is important to know when assessing the merits of a subsequent retaliation complaint whether a superior had previously been accused of retaliation,

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<sup>10</sup> Cases A, B, D, and E.

<sup>11</sup> Cases D and E.

<sup>12</sup> Manual Volume 3, Section 818, *Non-Disciplinary Complaints*.

as multiple retaliation complaints against the same superior, regardless of outcome, may portend the possibility of poor supervisory and/or communication skills deserving of further attention.

The practice of naming the Department as the accused in these types of workplace cases can lead to seemingly illogical results, such as what occurred in Case E discussed below, in which an allegation was framed that “the Department made an improper remark.”

We have discussed our concerns with the Department, who generally agreed with the findings we identified here. The following are the five cases which the OIG believed merited further discussion in this Review.

### **Case A**

#### **UNDISPUTED FACTS**

This complaint arose as a result of the complainant, an African-American supervisory employee, not being selected for a bonus position within a specialized division for a period of two years.

The complainant transferred into the involved specialized division in January 2006, and he immediately expressed an interest in the bonus position. During 2006, the complainant was first considered for the bonus position in an informal selection process<sup>13</sup> under a Chain of Command (COC) which included a Bureau CO, a CO, an Assistant CO (ACO), an Officer in Charge (OIC), and an Assistant OIC of the specialized unit. During this first selection process, a Latino supervisor was selected.<sup>14</sup> The complainant stated that he was more qualified than the person chosen.

In 2007, the complainant was again involved in an informal selection process for the bonus position under a slightly different COC. In this second selection process, an Asian supervisor was selected for the position.

During 2008, the complainant participated in three more separate selection processes. The third was a “semi-formal” selection process (discussed in the Investigative Analysis section below) in which an African-American supervisor was selected in June 2008. The fourth was an informal selection process in which a Caucasian supervisor was selected in September 2008. The complainant believed that he was more qualified than the supervisor selected in September 2008.

After the September 2008 selection process, the complainant went to meet with the CO<sup>15</sup> of the specialized division regarding how the complainant could improve his chances of being selected for the bonus position. The ACO of the specialized division also attended the meeting at the

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<sup>13</sup> The COC was interviewed in connection with the complaint investigation. The COC indicated that supervisors were selected through an informal process wherein all eligible supervisors who were in the specialized division were considered for the bonus position, a recommendation was made up the COC, and the Bureau Chief made the final selection. This process did not include interviewing candidates, rating candidates as Outstanding, Excellent, Satisfactory, or Unsatisfactory, or choosing from the Outstanding or Excellent pools of candidates.

<sup>14</sup> During the complainant's interview, the complainant claimed that the selected supervisor was Caucasian.

<sup>15</sup> The CO was African American.

request of the CO. During his interview with WIU, the CO stated that he asked the ACO to join the meeting because the CO knew that the complainant wanted to discuss his non-selection to the specialized unit and the CO had experienced a similar situation in the past. As a result, the CO wanted to proceed cautiously to avoid any "drama." The CO also said that he had heard at some time (he did not remember if it was before or after the meeting) that the complainant had filed a complaint or a lawsuit because he was not selected for the bonus position. However, the CO did not remember asking the complainant during the meeting if he had filed a complaint, lawsuit, or grievance. During the ACO's interview with WIU, the ACO said that he was asked by the CO to join the meeting because the CO thought the complainant had filed a lawsuit. However, the ACO stated that during the meeting the complainant denied filing a lawsuit. In his interview, the complainant also stated that during the meeting with his COs he denied filing a lawsuit.

Finally, the complainant participated in a fifth selection process, this time formal,<sup>16</sup> in which a male Caucasian supervisor was selected for the position in December 2008. In their interviews, the COC indicated that the decision was based in part on the selected supervisor's technical expertise and leadership style. According to the complainant, he was in the Outstanding pool for selection though the investigation revealed that the complainant was in the lower Excellent pool.

On August 19, 2009, the complainant filed a complaint against the City of Los Angeles and the Department with the Department of Fair Employment and Housing (DFEH), alleging that on, about, or before August 20, 2008, the following conduct occurred: denial of employment, promotion, and transfer; retaliation; and failure to prevent discrimination or retaliation. In September 2009, upon receiving notice of the DFEH complaint, the Department initiated this investigation. The complainant also filed a lawsuit in January 2010, which included allegations of race discrimination and retaliation.<sup>17</sup>

The Department framed the following four allegations naming the Department as the accused: (1) the complainant was denied a promotion based on his ethnicity; (2) the complainant was treated disparately when he was not selected as a supervisor for the specialized unit from 2006 through 2008; (3) the Department retaliated against the complainant in August 2008 when he was not selected as a supervisor for the specialized unit, based on a belief that he was participating in a lawsuit; and (4) the Department failed to prevent discrimination against the complainant in 2008 when he was not selected as a supervisor for the specialized unit.

The adjudicator determined that all allegations were Unfounded based on the rationale that, for allegations one and four, the investigation provided no evidence to support the allegations based on the definition of discrimination, and also that "these allegations were refuted by each of the personnel involved in the selection process."

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<sup>16</sup> During this formal process, the position was posted in a notice, interviews were conducted, and candidates were rated Outstanding, Excellent, Satisfactory, or Unsatisfactory. The person chosen had been rated Outstanding.

<sup>17</sup> The lawsuit is currently set for trial.

For allegations two and three, the adjudicator reasoned that the investigation provided no evidence to support the allegations based on the definitions of disparate treatment and retaliation, reasoning that "each selection was supported by a fair method and process." For allegation three, the adjudicator also reasoned that none of the evidence supported the complainant's claim that the Department engaged in any retaliatory action. Finally, the adjudicator noted that "the most appropriate selections were made based upon the needs of the unit and their ability to accomplish their missions."

#### DISPUTED FACTS

The witnesses involved in the selection processes stated that neither race, ethnicity, nor the complainant's lawsuit were factors in the complainant's non-selection for the bonus positions. Each witness gave a non-discriminatory, non-retaliatory reason for selecting candidates other than the complainant.

#### INVESTIGATIVE ANALYSIS

##### a. Framing Allegations Against the Department Rather than the Individuals Responsible for the Selection Process

First, IAG named the Department rather than an individual employee or employees as the accused in this case. The investigation identified a universe of people who were potentially involved in the selection processes at issue. Furthermore, the Bureau CO stated that he had the ultimate discretion to select the final candidate for the bonus position. This CO also indicated that he made the final selection for the five positions in question in this investigation. The OIG would have preferred if the I/O had explored, with specificity, the role each of the other supervisors in the COC played in the various selection processes. For each selection process, it is unclear exactly which OIC recommended which candidate and if the CO who made the final selection accepted all of the recommended candidates or rejected any particular candidate. We believe this information may have assisted the Department in framing and adjudicating allegations against specific individuals.

Second, the complainant questioned whether the informal selection process (and the semi-formal process) used for choosing people to fill the bonus positions violated Department policy. The OIG did not believe the investigation adequately explored what was specifically required by applicable Department policy or whether the selection processes at issue were consistent with any such requirements.

Indeed, we believe that the informal process for the bonus position repeatedly sought by the complainant created a lack of objective criteria for applicants and resulted in an absence of documented evidence of each candidate's qualifications based on pre-determined criteria. A formal process,<sup>18</sup> in contrast, should include documentary evidence which presumably would support the reasons a particular candidate was selected. Without this information, it is difficult

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<sup>18</sup> It should be noted that the specialized division began using a formal selection process in December 2008.

to evaluate the credibility of the disputed selection process and, more specifically, to assess whether a particular candidate was de-selected because he was not deemed to be the most qualified for the position, as opposed to as a result of his being part of a protected class.

b. General Investigative Concerns

First, although they provided various reasons for selecting candidates other than the complainant, the COC was generally consistent in stating that candidates other than the complainant were chosen for the bonus positions because of their leadership style, experience, and, in some cases, former experience in the specialized unit or particular technical expertise.<sup>19</sup> The informal and semi-formal nature of the first four selection processes resulted in an absence of documentary evidence supporting the COC's claims regarding the successful candidates. The OIG would have preferred if the I/O had sought to obtain documentary support of the qualifications the COC identified as the reasons for ultimately selecting the successful candidates. This information could have assisted the adjudicator in evaluating the complainant's claim that there was an improper motive behind his de-selection, even though the witnesses in the COC all indicated that the selections did not involve the race of the chosen candidate, that of the complainant, or in response to a (mistaken) belief that the complainant had filed a lawsuit.<sup>20</sup>

Second, the Department engaged in a formal selection process in December 2008, in which the complainant participated but was not selected for the bonus position. The I/O included the interview worksheets for the complainant and the person who was selected for the position in December 2008 but did not include the worksheets for all of the other candidates. The OIG would have preferred if all the worksheets had been included to allow the adjudicator to better assess whether the entire process was fair and free from retaliation/discrimination.

Third, in June 2008, the bonus position seems to have been filled using a formal process for those applying from outside the specialized division and the informal process (discussed above) for those being considered for the bonus position from within the specialized division. According to witnesses within the COC, applicants from outside the specialized division were interviewed and rated, but those applicants from within the specialized division were not interviewed. Again, the OIG believes that the adjudicator would have been better able to assess the propriety of this selection process if he had been presented with a clearer picture of the process that was used to select the candidate ultimately chosen. More specifically, the OIG would have preferred if evidence had been included in the investigation indicating whether all the candidates had been rated similarly or if different criteria were used for those already in the specialized division.

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<sup>19</sup> The investigation contained a memo dated June 21, 2007. The subject was "Sworn Paygrade Advancement and Lateral Transfer Opportunity Competitive Selection." Attached to the memo was a "Task List" for the bonus position. The particular technical skills referenced were not included on this list. The investigation did not include a list of required job qualifications for this bonus position.

<sup>20</sup> The complainant did not file a lawsuit until after this complaint investigation was initiated and the selection processes completed.

### ADJUDICATIVE CONCERNS

The adjudicator Unfounded all four allegations indicating that based on the definition of discrimination, disparate treatment, and retaliation, no evidence existed to support the complainant's claims. Further, the adjudicator claimed the witnesses refuted the complainant's allegations and that the selections were made based on the needs of the unit. The witnesses in the COC all stated that neither racial discrimination nor retaliation played a role in the complainant's non-selection for the bonus positions. Their statements were viewed as credible by the adjudicator.

However, because the I/O did not confirm that the selection processes at issue were consistent with applicable Department policy nor did the I/O elicit evidence to assess the credibility of the justifications asserted by the COC for the selection of the successful candidates, we do not believe the investigation contained sufficient information for an adjudicator to evaluate whether those processes were truly unbiased and/or free from retaliatory motive. Accordingly, we believe that a preponderance of the evidence included in the investigation does not support a finding of Unfounded.

The adjudicator opined that the Department engaged in a fair method and selection process. However, as indicated above, the complainant called into question the propriety of the informal selection process, but the investigation did not adequately explore whether this process was consistent with Department policy or, more specifically, whether it was indeed fair and objective. Accordingly, we do not believe there was sufficient support for the adjudicator's conclusions.<sup>21</sup>

Finally, this case was adjudicated by a Lieutenant not a Commanding Officer. Department policy states, "as a general rule, the commanding officer who managed the employee at the time of the occurrence shall adjudicate the complaint."<sup>22</sup> Although the Department was listed as the accused and the majority of the command staff were somehow involved in the case, the OIG would have preferred if the complaint had been adjudicated by a person at the level of a CO.

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<sup>21</sup> Technically, the complainant's retaliation allegation may not fall within the legal definition of or the Department's policy requirements for employee retaliation claims because the complainant did not actually engage in a protected activity before allegedly being subjected to an adverse employment action, as the complainant's lawsuit was filed *after* his de-selection from the bonus positions. However, the OIG could not locate a case that addressed whether an employer's mistaken belief that an employee may have engaged in a protected activity could satisfy this prong of a retaliation claim. Nonetheless, to the extent the adjudicator's rationale was based in part on the premise that the selection processes at issue were fair and objective, as opposed to based on any improper motives, we do not believe the investigation sufficiently supported such a conclusion.

<sup>22</sup> Manual Volume 3, Section 825, *Adjudicating the Complaint and Skelly Responsibility*.

## **Case B**

### **SUMMARY**

The complainant alleged in a Claim for Damages, and later in a lawsuit,<sup>23</sup> that he received a negative performance evaluation<sup>24</sup> (SBA) from his superior in retaliation for “complaints”<sup>25</sup> that the superior imposed an illegal quota<sup>26</sup> of traffic citations. The complainant claimed that the superior wanted to issue the complainant an unsatisfactory SBA and, to that end, had the complainant’s supervisor conduct an audit of the complainant’s citations. The complainant believed that the superior was changing the parameters of the audit while it was in progress in order to target the complainant. The complainant alleged that the retaliation was also a result of his visit to the Work Environment Liaison Section (WELS).<sup>27</sup>

Additionally, the superior allegedly gave the complainant single days off, did not select him for special units within the division, and threatened the complainant with de-selection from his assignment, reducing the number of overtime hours he was allowed to work at a specialized location, and eliminating his work permits.<sup>28,29</sup>

The complainant received Employee Comment Sheets (ECS) before and during the period of the SBA in question. Each ECS included a summary of the total number of citations and the number of major moving violation citations the complainant wrote during that Deployment Period (DP). The ECSs also reflected the expectations of the complainant’s superiors regarding enforcement. Three of the ECSs included the phrase, “Goal: 18 citations per day worked.”

In August 2008 the complainant received a negative ECS about which he had a meeting with the superior, his supervisor, and perhaps another supervisor. The purpose of the ECS and the meeting was to inform the complainant that he needed to improve his productivity by writing more citations for major moving violations. The complainant went to WELS in October 2008.

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<sup>23</sup> The lawsuit has not yet gone to trial.

<sup>24</sup> The formal name of a performance evaluation is a “Standards-Based Assessment.” The SBA in question was for the period of March 27, 2008, to March 27, 2009.

<sup>25</sup> Prior to filing the Claim for Damages, the complainant did not file a formal complaint of misconduct against the superior. However, the complainant claimed that many people knew he thought that the superior imposed an illegal quota for traffic citations.

<sup>26</sup> Requiring officers to meet a quota for number of tickets written is illegal under California law. California Vehicle Code Section 41600 provides in relevant part that an “‘arrest quota’ means any requirement regarding the number of arrests made, or the number of citations issued, by a peace officer, or parking enforcement employee.”

<sup>27</sup> According to the Department’s intranet website, WELS can “provide confidential assistance to employees . . . to resolve conflicts and misunderstandings in the workplace and prevent them from escalating into Personnel complaints, grievances, or lawsuits.”

<sup>28</sup> Department Manual Section 744.48 provides, “Each commanding officer shall examine [outside employment] permit records each month and check to ensure that outside employment of employees is not impairing their performance of duty,” and if so the commanding officer will recommend “that the permit be revoked.”

<sup>29</sup> The complainant claimed that the majority of his complaint likely did not involve misconduct but rather bad management. However, he believed the issue surrounding his SBA and the audit constituted retaliation and was criminal.

Evidence included in the investigation revealed that the complainant was among the top three producers at his division during certain DPs for the period covered by the SBA for Impounds and Average Daily Citations, for Average Daily Citations, for Citations (Major Movers/Movers) and Total Citations, and for Citations (Major Movers/Movers) and Total Citations.

On April 3, 2009, the Employee Relations Administrator sent a Notice to all superiors regarding citation and arrest quotas. The Notice referenced State law which prohibits quotas and advised that superiors "shall not compare officers to any other officer or group of officers." In May 2009, the Department entered into a Settlement Agreement Regarding Traffic Citation and Arrest Quotas (Agreement) with the Police Protective League (PPL). Pursuant to the Agreement, the PPL agreed to refrain from suing the Department in exchange for the Department taking action regarding ECSs and SBAs pertaining to the number of citations and arrests made by officers.

On May 10, 2009, the complainant received and signed his SBA for the period of March 27, 2008, to March 27, 2009. In the section labeled "Initiative and Productivity," the complainant received a rating of "Needs Improvement" in one of the three categories. In the section labeled "Initiative and Productivity," the complainant received a rating of "Needs Improvement" in one of the three categories,<sup>30</sup> and the rater checked the box indicating that the complainant "[p]roduces unacceptably low quantity of work product in functions deemed important by employee's supervisor or commanding officer." The complainant filed a grievance with the Employee Relations Group (ERG), and this disputed component of the rating was subsequently raised to "Meets or Sometimes Exceeds Standards."

The complainant filed his Claim for Damages on September 23, 2009. This investigation was initiated because of that Claim. The complainant subsequently filed a lawsuit.

Five allegations were framed against the superior: (1) the superior retaliated against the complainant by issuing an "Unsatisfactory" SBA because the complainant went to WELS; (2) the superior created a quota system that required the complainant to write 18 citations; (3) the superior retaliated against the complainant when the superior threatened to de-select the complainant from his assignment because he disagreed with the quota system; (4) the superior retaliated against the complainant when the superior threatened to assign the complainant to patrol and take away the his specialized overtime assignment if he did not write the required

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<sup>30</sup> The SBA consisted of two Parts. Part I included six sections, each containing several categories for which the evaluator could rate the employee as "Greatly Exceeds Standards," "Meets or Sometimes Exceeds Expectations," or "Needs Improvement." Part II allowed the evaluator to make an overall assessment of the employee as "Satisfactory" or "Unsatisfactory." The copy of the SBA in the investigation is missing the page that contained the overall rating. The complainant said that the superior wanted to give him an overall rating of Unsatisfactory but ultimately rated him as "Needs Improvement" in one category and gave him an overall rating of Satisfactory.

number of citations, because the complainant went to WELS; and (5) the superior retaliated against the complainant when he was not selected for special units at the division and caused him to miss out on promotional opportunities.<sup>31</sup>

The allegations were adjudicated as Unfounded based on the rationale that the complainant received an ECS arising from an audit which revealed that only 22% of the complainant's productivity occurred within an area designated by the superior for traffic enforcement. The adjudicator also claimed that there was no evidence that the superior created a quota system but instead had established expectations and goals designed to reduce traffic collisions and save lives and that the division had a daily goal of 80% major moving violations, but there was no specific number associated with this percentage.

The adjudicator also stated that the complainant's SBA had been overturned and that the investigation did not identify any corroboration to substantiate the complainant's assertions of retaliation nor that the superior had threatened to de-select the complainant from his assignment, caused the complainant to miss out on promotional opportunities, issued the complainant an unsatisfactory rating, or threatened to reassign the complainant to patrol.

#### DISPUTED FACTS

The complainant's supervisor stated that he prepared an SBA with satisfactory ratings for the complainant. While the SBA was going through the approval process, the superior directed the supervisor to conduct an audit of the complainant's work product. The supervisor stated that the superior was "fine tuning" the audit directions as the supervisor was conducting the audit (rather than, as the complainant believed, changing the audit parameters to target the complainant). Although the supervisor conducted the audit, he still believed that the complainant's work was satisfactory, but the superior changed the one category to "Needs Improvement."

The complainant alleged that the superior imposed an illegal quota for the number and type of citations required per day worked: 18 citations, with 80% to be major moving violations. The complainant said that no one used the word "quota" when referring to the superior's expectation. Of the five supervisors who were interviewed, four said officers were not told to write 18 citations, but one said there were expectations and goals that employees write 18 citations. Two said that 80% of the citations written within the area targeted for enforcement by the superior were to be major moving violations, and one could not recall if a specific percentage of major moving violations was required.

None of the witnesses heard the superior threaten to deselect the complainant from his assignment, threaten to send him to patrol, or reduce the number of hours he could work

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<sup>31</sup> The complainant's statement regarding missing out on promotional opportunities was vague. The complainant acknowledged that he was already a Police Officer III when he went to the Division. However, the complainant said that he had not taken any further promotional exams because he did not know who would promote him with an unsatisfactory rating. This contradicted his earlier statement that his evaluation was satisfactory and that the Needs Improvement rating was overturned by ERG.

overtime at a special location.<sup>32</sup> One witness indicated that the superior believed in progressive discipline and it was clear that de-selection was an option. Further, the witness said he would not doubt if the superior had spoken to the complainant about de-selection from his assignment.

The complainant indicated that he applied at least twice for two special units within the division but was not selected for either. One supervisor said he thought the complainant may have been selected for one of those positions, but the complainant declined to take the position. None of the witnesses were aware that the complainant missed promotional opportunities as a result of actions taken by the superior.

The complainant said that an unknown supervisor told him that at a supervisors' meeting, the superior displayed the complainant's work permits and threatened to take them away if the complainant did not increase his productivity. The witnesses who remembered attending a meeting where the superior discussed work permits did not recall any comments specifically about the complainant's work permits.

Finally, the complainant alleged that the superior gave the complainant single days off in retaliation for his failure to write the required number of citations. A manager who at times supervised the complainant indicated that employees submitted their requests for days off, that every effort was made to give employees the days off that they requested, and that there had never been a time when an employee requested a day off and did not get it.

## INVESTIGATIVE ANALYSIS

### a. Protected Activity

The complainant claimed the superior retaliated because the complainant went to WELS and because he was vocal in his opposition to what he perceived as the superior's illegal quota system. The investigation indicated that the complainant "engaged in a protected activity when he met with WELS." However, the I/O did not provide evidence to support the claim that going to WELS is a protected activity. The investigation also indicated that the complainant met with WELS "to seek resolution to his concerns about a Quota System in [the division]." However, OIG staff reviewed the complainant's recorded interview and located no questions to the complainant, or statements by him, regarding his reason for meeting with WELS. The I/O told the complainant that the proceedings at WELS were confidential and that the I/O did not want to discuss the matter. However, the complainant said that he did not consider his interaction at WELS to be confidential, that he had told the people at WELS that he wanted a transparent process, and that he did not sign a form indicating that the process would be confidential.

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<sup>32</sup> The complainant said he did not like being threatened by the superior, so the complainant chose to reduce the number of days of overtime for which he applied.

Despite this, the I/O asked no questions regarding his meeting with WELS, nor did the I/O include any information to evaluate whether the complainant could waive<sup>33</sup> such confidentiality in the context of an already confidential complaint investigation addressing the complainant's claim that he was retaliated against in part for going to WELS.

The OIG believes the adjudicator would have been better assisted in making an informed decision if the I/O had attempted to explore the circumstances surrounding the complainant's visit to WELS, including whether a causal connection existed between the complainant's contact with WELS and the alleged adverse employment actions by the superior. Further, the fact that the superior was not interviewed precluded an assessment as to whether the superior even knew that the complainant had gone to WELS, let alone why the complainant went to WELS.

#### b. The Complainant's Quota Claim

Regarding the complainant's claim that his superior was requiring officers to meet a citation quota, the complainant and the witnesses all stated that neither the superior nor subordinate supervisors ever used the word "quota" in regard to officer productivity. Three supervisors made reference to a goal that 80% of citations written within the area targeted for traffic enforcement were to be for major moving violations.

Additionally, the complainant's ECSs contained within the investigation contained a "RECAP" section which included the number of citations the complainant wrote during that DP. Some of the ECSs referenced the cumulative average number of citations written by the other officers who worked a similar watch and assignment. Other ECSs showed the average number of citations the complainant wrote and ranked the complainant among the other officers in the detail, based on the average number of citations written, e.g., "[The complainant] was 6 of 10 officers for average citations written during DP 04-08." During the complainant's interview, he (and his lawyer) said that the PPL had met with the superior and "told [the superior] that this was something [the superior] could not do."

The I/O did not include the relevant California Vehicle Code sections in the investigation, which could have provided the adjudicator with a standard of review to evaluate whether a preponderance of the evidence showed that the superior had created an illegal quota system, based on the applicable legal standards. Further, the I/O included the Agreement and the Notice in the investigation but did not interview witnesses who may have been able to explain their genesis and relevance nor did the I/O include a note or other explanation for their inclusion in the investigation. Therefore, one is left to speculate as to how and why these documents and the references to ERG's involvement added value to the investigation.

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<sup>33</sup> According to a Department pamphlet, available on the Department's intranet, which explains the services available from the section, "Mediation and conciliation are treated as confidential unless serious misconduct is alleged, confidentiality is waived, or a court orders disclosure. Environmental Evaluations are also confidential in the sense that the identities of the employees interviewed are not disclosed." There is no indication in the investigation whether the complainant engaged in mediation/conciliation when going to WELS, or, alternatively, requested that an environmental assessment be conducted. Moreover, if he did engage in mediation/conciliation, the investigation never assessed whether one party could unilaterally waive confidentiality.

c. Interviews Not Conducted

The Department decided not to interview the accused superior. An investigator's note stated, "[The CO of AID] opined the allegations did not rise to the level of misconduct and that it was not necessary to interview [the superior]." However, the I/O did not explain why the Department made this determination. Further, the complainant's allegations revolved around his belief that the superior required an illegal quota for citations and that the superior engaged in an adverse employment action resulting from the complainant going to WELS. Because the superior was not interviewed, the adjudicator was not provided with information to determine if the superior even knew the complainant went to WELS let alone his reason for going. More importantly, not interviewing the accused superior deprived the adjudicator of the opportunity to assess the credibility of any explanations the superior might have for any of the various actions the superior either took or threatened to take, or directed toward the complainant, or to evaluate whether such actions even occurred.

Further, the complainant alleged that the superior had threatened to take away overtime hours the complainant could have worked at a special location. The complainant claimed that the person who scheduled the overtime said that he was told by the superior to limit the amount of overtime assigned to the complainant because the complainant was not writing the number and type of tickets required by the superior. The I/O asked a number of witnesses about this but did not interview the overtime coordinator. The OIG would have preferred if the I/O had interviewed this person in an effort to corroborate this aspect of the complainant's retaliation claim.

d. Selection to the Specialized Unit

The complainant alleged that he was not selected for two specialized units to which he had applied at the division. The superior, according to the complainant, was not going to select him because of his lack of productivity. However, during the investigation, a supervisor told the I/O that the complainant had been selected for one of those units, but the complainant may have declined the offer. The investigative package included a document entitled "[Specialized Unit] Loan Waiting List." It included an entry which read, "[Complainant]. . . Ofcr Canceled 4-17-08 verbal [Supervisor]/Superior advd 8/11 Ofcr Cancel verbal." The I/O did not ask the complainant about this entry.

ADJUDICATIVE ANALYSIS

Given the issues identified in our Investigative Analysis above, the OIG disagrees with the adjudicator's determination that the allegations were Unfounded, based upon the following elements which we believed were missing from the investigation: an interview with the accused superior to explain the justification for the various actions the superior took as well as to determine whether the superior knew about the complainant's visit to WELS; the standard of review for determining if a quota system existed; and an assessment of why the complainant went to WELS and whether that could constitute a protected activity.

Finally, as to the third, fourth, and fifth allegations, the adjudicator opined, "This investigation does not establish or identify any corroborating facts to substantiate [the complainant's assertion

that [the superior] created a Quota System, threatened to deselect him from [his assignment], retaliated against him, caused him to miss out on promotional opportunities, issued him an unsatisfactory rating or threatened to reassign him to patrol." However, without interviewing the superior, we do not believe the adjudicator's statement that the complainant's claims lack corroborating information is supported by a preponderance of the evidence.

## Case C

### SUMMARY

This complaint arose when a civilian employee filed two complaints with the Equal Employment Opportunity Commission (EEOC). In the first EEOC complaint, the complainant alleged discrimination by a junior supervisor. In the second EEOC complaint, the complainant alleged retaliation, discrimination, and the creation of a hostile work environment by a senior supervisor. The complainant believed that she was subjected to these allegations after participating in protected activity and due to her race and religion.

The Department framed four allegations. One allegation was framed against the junior supervisor for discrimination, and three allegations were framed against the senior supervisor for creating a hostile work environment, discrimination, and retaliation. All four allegations were adjudicated as Unfounded based upon the rationale that, "There is clearly no preponderance of evidence to support a finding of misconduct related to discrimination, retaliation, and/or a hostile work environment."

On April 16, 2008, the complainant reported alleged misconduct to the principal supervisor<sup>34</sup> regarding two clerical employees. The claims she reported, an act she believed to be a protected activity, involved employees sleeping at work, being disrespectful, and issues regarding watch assignments and days off. A complaint investigation was not initiated.

On September 4, 2008, the complainant was accused of acting unprofessionally by making an inappropriate remark to the junior supervisor. On September 9, 2008, the junior supervisor served a Notice to Correct Deficiencies (NTC) for this incident on the complainant which she refused to sign. On September 30, 2008, the complainant filed a grievance and on October 10, 2008, the principal supervisor denied the grievance. On October 20, 2008, the complainant appealed to the Employee Relations Administrator (ERA), and on December 18, 2008, the ERA denied the appeal. The complainant believed that she was served this first NTC due to her race.

On February 19, 2009, the complainant was accused of not performing her duties including not signing onto her computer after being directed to do so twice by the junior supervisor. On March 11, 2009, the junior supervisor served a second NTC to the complainant regarding this issue. On April 18, 2009, the complainant grieved the second NTC, and on May 7, 2009, the principal supervisor denied the grievance. No appeal was filed by the complainant.

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<sup>34</sup> We will refer to three levels of civilian supervisors working in the complainant's workplace: junior, senior, and principal, in increasing order of rank.

On March 9, 2009, the senior supervisor told the complainant that she had to make up time off to attend a police officer's funeral, although the complainant believed she had previously been approved to take time off to attend the funeral. Later, a senior manager told the complainant that she did not have to make up the time because the junior supervisor volunteered to cover for her. The complainant believed that the NTC from March 11, 2009, was in retaliation for attending the funeral because she was served with the NTC two days after attending the funeral on March 9. Also, the complainant believed she was singled out due to her race when told to make up time for the funeral, because, according to the complainant, another employee allegedly had been allowed to attend the March 9 funeral without being asked to make up time.

On March 25, 2009, the complainant was in a meeting regarding her performance with the senior supervisor. The complainant made a religious statement, and the senior supervisor directed the complainant to go to Behavior Sciences Services (BSS), although according to the complainant, the senior supervisor did not provide details of why the referral to BSS was being made. The senior supervisor said she then met on April 21, 2009, with the principal supervisor, who determined the BSS referral was not necessary. Therefore, the senior supervisor told the complainant she would not be directed to BSS. The complainant believed she was belittled by being initially directed to BSS because of her religious beliefs.

During her interview with the I/O, the complainant stated that some time after a holiday in May or July, a senior clerk typist called the complainant by a derogatory name. The complainant reported this incident to the junior supervisor, who the complainant believed had heard the name calling. According to the complainant, the junior supervisor indicated she would handle the matter. The complainant believed that this incident constituted misconduct. The complainant also indicated during her complaint interview that in the past she had reported (unspecified) incidents with the senior clerk typist to her supervisors but that no action had been taken.

On September 28, 2009, the complainant allegedly engaged in a loud and disruptive argument with the senior clerk typist.

On October 6, 2009, the complainant alleged that the senior supervisor used profanity toward the complainant during a counseling session. The complainant reported this incident to the principal supervisor the same day but did not allege that the act was discriminatory. The complainant believed that she was reporting misconduct and that it was a protected activity. On October 9, 2009, the principal supervisor notified the complainant that no complaint would be initiated but indicated that appropriate action had been taken, which was confidential.

On October 19, 2009, the senior supervisor served the complainant with a third NTC for the September 28 argument with the senior clerk typist, which the complainant refused to sign. On October 27, 2009, the complainant grieved the third NTC, and on January 7, 2010, the principal supervisor denied the grievance. On January 12, 2010, the complainant appealed to the ERA, and on March 11, 2010, the ERA denied the appeal. The complainant believed she was served this third NTC because of her race and in retaliation for when she reported the use of profanity by the senior supervisor on October 6, 2009.

On October 27, 2009, the complainant submitted a request to change her start of watch time due to family care issues. The complainant was told to submit a written request and turn in a note from the family member's doctor. The complainant complied with this direction. The senior supervisor denied the request due to staffing shortages but notified the complainant that adjusted hours would be considered when requested on an as-needed basis. The principal supervisor concurred due to deployment concerns. The complainant believed that this was discrimination based on race because another employee of a different race was allowed to change her watch time to night watch, which allowed for increased pay. After being granted that change to night watch, that employee subsequently went off on maternity leave.

#### UNDISPUTED FACTS

The complainant filed two claims with the EEOC. The complainant received three NTCs which were grieved and denied. No improper remarks were directed to the complainant by her supervisors with regard to race or religion.

#### DISPUTED FACTS

Because the involved personnel were not questioned regarding several of the specific allegations made by the complainant, we are unable to identify the universe of disputed facts in this case.

#### INVESTIGATIVE ANALYSIS

The OIG believed that the complainant's interview was thorough and objective, and the I/O did not ask leading questions.

However, we identified several investigative concerns which we believe merit further comment. The OIG noted that when the complainant alleged that another employee had been allowed to attend the March 9 funeral without being asked to make up time, the I/O did not question the complainant in an effort to identify the other employee, and consequently, to address the complainant's claims of disparate treatment/discrimination.

Moreover, in the interview with the junior supervisor, the I/O asked what we believed to be leading questions. The OIG also noted that the I/O did not ask the junior supervisor about the NTCs that she issued to the complainant regarding alleged inappropriate remarks made to the junior supervisor, and for not signing on to the computer one day after previously being instructed to do so.

Additionally, there was an incident where a co-worker allegedly called the complainant a derogatory name and the complainant believed no action was taken against that employee. The complainant reported this incident to the junior supervisor who, according to the complainant, said she would handle it. The OIG would have preferred that the I/O had questioned the junior supervisor about this incident, since this incident contributed to the complainant's belief that she was subjected to disparate treatment.

The OIG noted that during the senior supervisor's interview, the I/O did not ask any leading questions. However, we believe the I/O should have attempted to clarify questions concerning the complainant's start of watch request. The complainant alleged in her interview that at least

one employee of a different race was allowed to change to night watch with a pay differential and then subsequently took maternity leave. The complainant claimed she had requested a watch change due to family issues, which was denied due to deployment shortages. However, the senior supervisor was not questioned regarding this claim of discrimination by the complainant.

The complainant claimed she was also denied overtime for several months. Per the complainant, overtime was granted to any employee who requested it, unless employee sick time use was an issue of concern. However, another employee of a different race was allegedly granted overtime and that person allegedly used excessive sick time. Therefore, the complainant believed that these actions collectively supported her claim of disparate treatment, yet the I/O did not ask the senior supervisor about this issue.

With regard to the allegation of a hostile work environment, the complainant alleged that prior to moving to a new building, she talked to the principal supervisor regarding seating arrangements. The complainant requested to not have her desk near the employee who called the complainant by a derogatory name because of her prior problems with that employee which the complainant claimed the supervisors had failed to address. The complainant's request was not granted, and she was told she had to sit in the designated desk, which was near the employee she had problems with. Subsequently, another incident occurred between the complainant and the other employee for which both received NTCs. Neither the junior nor senior supervisor was asked about this issue in their interviews with the I/O or about the complainant's claim that she had unsuccessfully reported prior "incidents" with the same employee.

#### CONCLUSION

The OIG believes that, as described above, the investigation lacked sufficient evidence to make an informed decision regarding the adjudication of the allegations. In Unfounding all four allegations, the adjudicator reasoned in relevant part that, "there are no witnesses and no evidence to support these claims." The OIG believes that in several instances, there was insufficient information contained in the investigation to refute the complainant's claims under a preponderance of the evidence standard.

Regarding the complainant's retaliation claim, the complainant alleged that on October 6 she reported her senior supervisor for using profanity, and on October 29, the senior supervisor served the complainant with a NTC. Moreover, the complainant alleged that there was a causal connection between the two. However, during the senior supervisor questioning, she was not questioned regarding this specific issue. Accordingly, we do not believe a preponderance of the evidence contained in the investigation supported the adjudicator's conclusion that this allegation was Unfounded.

Regarding discrimination, the complainant alleged that on October 27 she requested a change of watch for family reasons. This request was denied due to purported staffing concerns, but the complainant alleged that an employee of a different race was approved for a watch change, with an accompanying salary increase, who then subsequently went off on extended leave. However, the principal supervisor was not questioned regarding these specific claims of the complainant.

In general, a hostile work environment ensues when there is discriminatory conduct or behavior in the workplace which is unwelcome and offensive to an employee who has protected class status (e.g., race, gender, disability, etc.).<sup>35</sup> Regarding her hostile work environment allegations, the complainant alleged that she reported incidents of a problem with a co-worker and requested seating arrangements away from the co-worker and was denied, after which the two engaged in a loud and disruptive argument resulting in NTCs. Again, we believe that in order to adequately adjudicate this allegation, the involved supervisors should have been questioned about this specific issue.

Accordingly, absent a thorough interview of all involved superiors regarding several of the complainant's specific allegations, we do not believe that the adjudicator's rationale was adequately supported by the investigation.

### **Case D**

#### **SUMMARY**<sup>36</sup>

This complaint, a supervisor, alleged that in response to the complainant filing two lawsuits against the City of Los Angeles, two superiors retaliated against her by reassigning the complainant to another section against her wishes. The causes of action in the lawsuits involved alleged Fair Labor Standards Act (FLSA)<sup>37</sup> violations. One complaint allegation was framed against each of the complainant's two superiors.<sup>38</sup>

In July 2009, during a deposition, the complainant identified both of her superiors by name, indicating that they had relayed information to supervisors about the then-Police Chief's desire to have FLSA matters strictly addressed to avoid future lawsuits.

On August 13, 2009, the Department's Retaliation Prevention Unit (RPU)<sup>39</sup> e-mailed the complainant, confirmed their knowledge that she was involved in a "Protected Activity" and referred to the lawsuits that the complainant had filed against the City of Los Angeles. By receiving this email, the complainant assumed that her superiors had knowledge that she was involved in a lawsuit. In an e-mail response to RPU, the complainant stated that if they wanted further contact with her, they would have to contact her attorney.

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<sup>35</sup> Department Training Bulletin, *Anti-Discrimination and Retaliation*, Volume XXXVII, Issue 3 (Nov. 2005); see also Judicial Council of California Civil Jury Instruction, section 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant* (Gov. Code § 12940(j)).

<sup>36</sup> Because the complainant was the only one interviewed in this investigation, this summary is based entirely upon the complainant's account of the underlying events.

<sup>37</sup> FLSA law requires that employees be compensated for overtime worked. Implementation of FLSA guidelines within the Department resulted in lawsuits from employees alleging failure to be compensated for overtime worked.

<sup>38</sup> One officer commanded the employee's immediate work group, and the other officer commanded the unit in charge of that work group.

<sup>39</sup> The former RPU, recently renamed the Protected Activity Evaluation Unit, is responsible for the monitoring and processing of all employment actions that involve employees actively engaged in a protected activity and providing Department command staff, commanding officers, and supervisors with information regarding work performance documentation. This unit also provides training to Department personnel on topics related to retaliation prevention and provides guidance to Department employees who need assistance with the reporting of retaliation concerns.

On September 1, 2009, one superior advised the complainant of possible movement within the complainant's section because of a supervisory need in another section.<sup>40</sup> (The superior advised that several non-supervisory employees were also being considered for movement.) According to the complainant, during this meeting the superior did not provide any insight about the proposed changes, but the complainant stated that she did not want a new assignment.

Although lacking anything tangible, the complainant believed the specific reason for making the assignment change was because the superior found out that the complainant had identified the superior during the July 2009 deposition. The complainant replied that if the superior insisted on the reassignment, then the complainant would have no other choice but to accept the assignment. During the complainant's interview, she also stated that she was aware of personnel issues in the new assignment unit and that was why she did not want to be transferred.<sup>41</sup>

On November 12, 2009, the complainant's supervisor advised that he had received an e-mail from both superiors directing that the complainant and other non-supervisory employees were to be moved from their sections. The complainant asked for an explanation, but the supervisor stated that he did not know because he had no further information.

On November 17, 2009, the complainant met with her supervisor and asserted that both superiors were retaliating against the complainant for her lawsuits. In a follow-up meeting that same day, the supervisor said that after having met with both superiors, each denied having knowledge of the complainant's lawsuits. Still later that same day, the complainant met with one of her superiors who said that he was unaware of any lawsuits filed by the complainant. The superior stated to the complainant that the reason for the move was to give other personnel the opportunity to work within the specialized unit to which the complainant was currently assigned. The superior also said that he did not have any issues with the complainant as she was a good supervisor who had done well. However, the superior needed to make the changes and have the complainant switch sections.

During her interview, the complainant said she believed that it was predetermined that she was going to be transferred from the unit based on the two lawsuits and the deposition from July 2009. However, the complainant acknowledged that, according to the supervisor who met with each superior, each superior said he had no knowledge of the complainant's lawsuits.

On November 18, 2009, the supervisor met with the complainant and presented an informal document that contained information about their November 17, 2009, meeting. The supervisor assured the complainant that the document was not an Employee Comment Sheet but that it contained a summary of a previous meeting that the complainant had with her superior in regards to the personnel movement. The supervisor said he would need to record a statement from the complainant if she was making allegations of misconduct. The complainant replied that she did not want to make a recorded statement and that she was going to seek advice from her attorney.

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<sup>40</sup> The investigation does not address whether the superior specifically told the complainant that *she* might be moved or only spoke in more general terms about unnamed employees possibly being moved.

<sup>41</sup> The alleged "personnel issues" did not involve retaliation concerns.

According to WIU, the complainant was not actually moved between sections until approximately February or March 2010.

The CO of AID determined that, “based on the preponderance of evidence standard, that the investigation revealed the complained of acts did not meet the legal and Department definitions for the allegations, did not violate Department policies and procedures, and did not rise to the level of misconduct as defined by Manual Section 3/805.25.” Therefore, the CO of AID directed that the two accused superiors be removed as accused employees in accordance with Department Manual Section 3/810.01.<sup>42</sup> The CO also stated that in accordance with City Management Rights as delineated in Memorandum of Understanding No. 24, Article 1.7,<sup>43</sup> both accused superiors had the authority to move personnel from loan positions within their command. Accordingly, the CO of AID recommended that both allegations be framed against the Department and classified as NON-DISCIPLINARY, POLICY/PROCEDURE.

#### DISPUTED/UNDISPUTED FACTS

There was no one interviewed who could dispute and/or affirm any of the claims made by the complainant, as recounted above in the “Summary” section.

#### INVESTIGATIVE ANALYSIS

The OIG believed that the complainant's interview was thorough. The I/O applied objective questioning to the complainant and did not ask any leading questions. Additionally, the OIG noted that the investigation contained a descriptive timeline containing the progression of events as stated by the complainant.

However, we identified other investigative issues which we believe merit further comment.

First, the superiors identified by the complainant were removed as accused from the investigation and not interviewed. The OIG does not believe that removing the named accused superiors from the complaint and naming the Department as the accused was justified by the investigation. To begin with, we believe the Department did not adequately support its claim that “the complained of acts did not meet the legal and Department definitions for the allegations, did not violate Department policies and procedures, and did not rise to the level of misconduct.”

Moreover, for the reasons discussed above – most notably, the need to track these types of serious allegations on the involved supervisors' TEAMS – we believe the decision to remove an accused employee from a retaliation complaint should occur on rare occasion and only after proper justification. We do not believe any such proper justification was provided in this investigation.

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<sup>42</sup> Manual Volume 3, Section 810.01, *Complaint – Defined* describes what acts constitute misconduct.

<sup>43</sup> A Memorandum of Understanding is an agreement between certain employees and the City of Los Angeles. Section 1.7 provides in relevant part, “It is also the exclusive right of City management to . . . relieve City employees from duty because of lack of work or other legitimate reasons and determine the methods, means and personnel by which the City's operations are to be conducted and to take any necessary actions to maintain uninterrupted service to the community.”

### ADJUDICATIVE ANALYSIS

The OIG does not believe that framing the allegations against the Department and adjudicating them as Non-Disciplinary/Policy-Procedure was appropriate in this case. Moreover, we have larger concerns about this practice in general, as the OIG does not believe that the Non-Disciplinary system was designed for such potentially serious allegations as retaliation.

Department Policy provides for classifying a complaint as Non-Disciplinary when all of six criteria are met at the time the complaint is initiated,<sup>44</sup> including that the complaint does not allege retaliation/retribution against another employee.

Additionally, Department Policy specifies that a Commanding Officer may make a final adjudication of "Non-Disciplinary -- Policy/Procedure" when "The facts of the case revealed that the complaint relates to Department policy/procedure and not to a specific employee's actions."<sup>45</sup> However, in this case, the complainant identified the actions of two specific superiors' in reassigning the complainant, which the complainant believed was in retaliation for the protected activity of filing lawsuits, as the basis for the her allegations.<sup>46</sup>

Further, the Department Manual provides that "IAG shall have no review responsibility for Non-Disciplinary complaints."<sup>47</sup> Here, the CO of IAG's AID signed the Non-Disciplinary adjudication on behalf of the division commanding officer, the group/area commanding officer, and the bureau commanding officer.

The rationale to adjudicate the complaint as Non-Disciplinary – Policy/Procedure against the Department was as follows: "Based on the preponderance of evidence standard, the investigation revealed the Department's action was consistent with Department policies and procedures and did not violate the Department's retaliation policy." Absent further justification for this conclusion, we cannot support it using a preponderance of the evidence standard.

The investigation properly cited Department Policy in identifying retaliation as "an adverse employment action taken against an employee for engaging in a protected activity." The Policy indicates that protected activities include taking advantage of any labor right or benefit and that an adverse employment action could include a change of assignment.

Here, the investigation revealed that at least some in the Department were aware the complainant had engaged in a protected activity by joining as a plaintiff in a lawsuit regarding overtime and that the RPU sent the complainant an e-mail confirming that the action was a "protected activity." Further, the investigation confirmed that the complainant was subsequently subjected to a change of assignment, which the complainant did not desire.

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<sup>44</sup> Manual Volume 3, Section 818, *Non-Disciplinary Complaints*.

<sup>45</sup> *Ibid.*

<sup>46</sup> The OIG is aware that under California Fair Employment and Housing Act, retaliation lawsuits may properly proceed with "the Department" named as the defendant (*See Jones v. Torrey Pines*, 42 Cal.4th 1158 [2008]). However, we note that such party identification is based upon case law precedent, which is distinguishable from the Department policy that recognizes retaliation as a type of misconduct allegation against individual employees.

<sup>47</sup> Manual Volume 3, Section 818.05, *Adjudication of a Non-Disciplinary Complaint*.

Moreover, the complainant asserted that the complainant's participation in a lawsuit (a protected activity) was the cause of the complainant's re-assignment.

Accordingly, we do not agree with the Department's claim that the reassignment was "consistent with Department policies and procedures and did not violate the Department's retaliation policy," especially absent further support for this conclusion and especially without interviewing those responsible for the disputed reassignment. Accordingly, for the reasons outlined above, the OIG does not believe the adjudication of this case was adequately supported by the investigation.

### Case E

#### SUMMARY

The complainant, a supervisor with approximately 29 years of employment with the Department, filed a complaint against Department employees including her peers and managers alleging retaliation, creation of a hostile work environment, and other issues (discussed below). These alleged acts took place over approximately one year.

A promotional position became available in the complainant's division for which she applied. After the selection process concluded, the complainant alleged that she asked another supervisor if he knew who was to be promoted, and he said he did not know. However, the complainant indicated that she became aware that the supervisor had in fact known who was to be promoted and that the complainant had not been selected for the position at the time she spoke with the supervisor. The complainant felt that by being untruthful, the supervisor created a hostile work environment. The complainant then met with the division CO and related that the supervisor had not been truthful with her. According to the complainant, the division CO said that he had instructed the supervisor, along with other supervisors, not to discuss the final selection process until all of the candidates had been notified. The complainant believed that the division CO created a hostile work environment because he did not take action against the supervisor for being untruthful.

The complainant decided to speak to her direct superior regarding the supervisor withholding the promotion information. However, instead of discussing the complainant's concerns, the complainant claimed her direct superior discussed an unrelated matter about the complainant. The complainant felt that by ignoring her concerns, her direct superior retaliated against her for raising the issue regarding the supervisor being untruthful. After this meeting with the superior, the complainant told a co-worker that the supervisor had accused her of not doing her job. The co-worker thought the complainant's concerns were humorous and laughed about it. The complainant felt that the co-worker created a hostile work environment.

According to the complainant, an unidentified subordinate told her that another supervisor said, "[the complainant] will never obtain the [promotional] position because she has an attitude." The complainant considered this statement to constitute an improper remark.<sup>48</sup>

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<sup>48</sup> The term "other supervisor" is used to differentiate the employee from the "supervisor" referred to in earlier paragraphs of this complaint summary.

The complainant's accusations led to nine allegations of misconduct being framed against six Department employees. Three of the allegations related to management creating a hostile work environment and two allegations of retaliation were framed, one each against a manager and a supervisor. One allegation was framed against a supervisor for an improper remark and three allegations were against supervisors for neglect of duty not involving retaliation or hostile work environment. (The neglect of duty allegations were minor in nature and were addressed by the I/O. We reviewed the I/O's conclusions and concurred.)

The CO of AID determined, "that through the preponderance of the evidence standard presented in the investigation, the involved Department employees followed the Department's policy and procedure." As such, the CO of IAD adjudicated<sup>49</sup> all allegations in this investigation were adjudicated against the Department as NON-DISCIPLINARY, POLICY/PROCEDURE.

#### DISPUTED FACTS

There was no one interviewed who could dispute and/or affirm any of the claims made by the complainant, as recounted above in the "Summary" section.

#### UNDISPUTED FACTS

In December 2009, the complainant filed a complaint with IAG including allegations of retaliation and hostile work environment. The complainant was interviewed by WIU in January 2010. There was no information included in the investigation that the complainant's work performance was interfered with or disrupted, an element of a hostile work environment claim.

The Department removed the accused employees from the investigation and named the Department as the accused. Additionally, the CO of AID determined that no further interviews needed to be conducted other than that of the complainant and recommended that the investigation be closed.

#### INVESTIGATIVE ANALYSIS

The I/O applied objective questioning to the complainant and did not ask any leading questions. Additionally, the OIG noted that the investigation contained a descriptive timeline containing the progression of events as stated by the complainant. However, we identified other investigative issues which we believe warrant further comment.

The I/O did not ask the complainant specific questions in an attempt to establish the elements of a hostile work environment nor for a retaliation claim (such as what protected activity she was alleging and what adverse action occurred as a result to that activity). The OIG believes that when a complainant who claims to be the victim of retaliation or other workplace complaints does not independently offer facts to satisfy the elements of such claims, to prevent subsequent claims by the complainant that the Department failed to adequately address his/her workplace concerns, a more prudent practice would be for the I/O to conduct a focused inquiry with the

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<sup>49</sup> As in Case D above, the CO of IAD signed the Complaint Adjudication Form on behalf of the Division, Group, and Bureau COs.

complainant regarding the specific elements of the complainant's generalized misconduct allegations in an effort to establish whether further investigation is merited.

Additionally, the only person interviewed was the complainant. However, as discussed above, in adjudicating the complaint against the Department, the CO of AID determined that "the involved Department employees followed the Department's policy and procedure." We do not believe such a determination could have been made by a preponderance of the evidence standard without interviewing the involved employees themselves to determine: a) what actions, if any, they took in regards to the complainant; and b) whether the justifications, if any, they provided for such actions were indeed consistent with Department policy and procedure.

#### ADJUDICATIVE ANALYSIS

According to the Department Manual, a Non-Disciplinary complaint may only be adjudicated as "Policy/Procedure" when "The facts of the case revealed that the complaint relates to Department policy/procedure and not to a specific employee's actions." In this complaint, the complainant identified individual actions by specific employees as the basis for her claims. Moreover, according to the Department Manual, "IAG shall have no review responsibility for Non-Disciplinary Complaints."<sup>50</sup> Here, the Commanding Officer of IAG's AID assumed the signatory roles for all three command officers.

Finally, by not interviewing the involved employees, the OIG does not believe that sufficient evidence was included in the investigation to support the rationale for adjudicating the complaint as Non-Disciplinary against the Department: that "the involved Department employees followed the Department's policy and procedure."

#### **V. OTHER CASES OF INTEREST**

In this section, we summarize six additional cases closed during the Fourth Quarter which we believe may be of interest to the Commission or the public, including cases involving neglect of duty, alcohol misconduct, off-duty misconduct, and inappropriate social media usage.

##### **Case AA**

#### **SUMMARY**

An anonymous caller alleged that the accused officer committed criminal misconduct on and off duty for approximately four years. The complainant provided photographic evidence, chat room conversations, and electronic mail conversations to support these allegations. Specifically, the complainant claimed the accused queried the Department's computers for personal information on prior girlfriends, attempted to convert official on-duty contacts into social relationships, and queried his personal computer to participate in chat rooms with minors for sexual gratification.

The Department obtained search warrants for the accused's residence and recovered a laptop computer, computer hard drives, and cellular telephones and Department documents that were

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<sup>50</sup> Department Manual Volume 3 Section 818.05, *Adjudication of a Non-Disciplinary Complaint*.

removed without authorization. The Department obtained photographic images of minors in various stages of undress in what appeared to be a sexual nature and emails where the accused agreed to engage in the act of prostitution and pandering with minors. Also recovered were the personal email accounts and screen names that were used to communicate with minors. Lastly, the accused inappropriately registered with a racist internet forum and sent harassing messages of a racist content, which caused the accounts to be suspended. The accused admitted to most of these allegations for the purposes of gathering dialogue for a book.

The Department conducted a criminal investigation and framed 35 allegations of misconduct. The I/O presented the investigation to the Los Angeles County District Attorney's Office, Justice System Integrity Division.

Based on the evidence, including witness statements and the accused's admission, all 35 allegations were Sustained. The Department recommended that the accused be assigned to home pending a Board of Rights (BOR). Consequently, the accused officer submitted a resignation prior to the BOR hearing date.

We commend the Department for properly addressing the serious misconduct revealed by this investigation.

## **CASE BB**

### **SUMMARY**

The complainant (a Department employee) reported to her superior that she had received a series of annoying text messages on her personal cellular telephone from an unknown person. Additionally, the complainant's personal email account had been compromised without her permission. Employee A and the complainant had had a relationship outside of the Department. Employee A denied compromising the complainant's email account. Employee B was also involved with Employee A outside of the Department. Ultimately, a search warrant was executed at Employee B's residence where several copies of email transmittals between the complainant and the complainant's attorney were recovered.

This complaint led to four allegations being framed against two Department employees: (1) that Department Employee A, while off-duty, inappropriately accessed the complainant's email account and changed the complainant's email profile, (2) that Department Employee B, while off duty, inappropriately accessed the complainant's email account and changed the complainant's profile, (3) that Department Employee B, while off duty, inappropriately accessed the complainant's email account and downloaded the complainant's confidential emails between the complainant and his attorney, and (4) that Department Employee B, while off duty, sent annoying and inappropriate text messages to the complainant's cellular telephone.

Based on the investigation, the first allegation framed against Employee A was Unfounded. The last three allegations against Department Employee B were Sustained, and the employee was directed to a BOR and ultimately terminated. Again, we commend the Department for taking appropriate action in this case.

## Case CC

### SUMMARY

A security guard (Complainant) working at a baseball stadium was notified by another security guard that an off-duty Department employee (Employee) while entering the stadium attempted to conceal two beer bottles. The security guard who made the observation told the Employee that he would not be permitted to enter the stadium. The Employee then showed his Department identification and asked to be given a break and allowed into the stadium. The security guard told the Complainant what had happened and the Complainant then contacted the Employee. The Employee asked the Complainant, "Why do you have to be a f\*\*\*ing a\*\*hole?" Additionally, the Employee was smoking a cigar and blew smoke in the Complainant's face. The Complainant asked the Employee to stop because of the Complainant's allergies to smoke; however, the Employee continued to blow smoke in the Complainant's face. The Complainant warned him that he would be arrested for trespassing if he came back. The Employee again displayed his Department identification and asked, "Don't you have any courtesy for off-duty [employees]?" The Employee ultimately left the location.

This complaint led to four allegations being framed: (1) that the Employee was discourteous when he said, "Why do you have to be a f\*\*\*ing a\*\*hole?"; (2) attempted to enter a stadium while concealing two beers on his person in violation of posted stadium rules; (3) was discourteous when he intentionally blew cigar smoke in the Complainant's face; and (4) inappropriately displayed his identification card and asked, "Do you give [employees] a little courtesy?" after being denied entry into the stadium.

All four of the allegations were Sustained. The Employee received a seven-day suspension and was directed to BSS to address alcohol and anger management related issues.

We commend the Department for taking this matter seriously and appropriately addressing the issues raised by the complaint.

## Case DD

### SUMMARY

A Department employee reported misconduct to his supervisor that another subordinate was accessing "Facebook" on a Department computer during work hours. The Department initiated a complaint alleging that the employee inappropriately utilized a Department computer for personal use when accessing a personal social network page.

The allegation was Sustained. The employee received an Official Reprimand. We believe the Department handled this matter appropriately, as it involved relatively minor misconduct.

## **Case EE**

### **SUMMARY**

This complaint was initiated by a Department supervisor alleging Insubordination, Unbecoming Conduct, Dishonesty, and Alcohol Related misconduct. The employee contacted several co-workers and his supervisor via telephone to request a day off for a family illness. However, all of the co-workers noticed the employee's speech was slurred and believed that he might be intoxicated. Due to the employee's prior history of alcohol related misconduct, the supervisor was concerned about his employee's safety as it appeared that the employee was operating a motor vehicle at the time, as well as the fact that it appeared that the employee was using a family illness as an excuse to avoid responding to work due to his intoxicated condition.

The supervisor attempted to ascertain the location of the employee to meet with him to check on his welfare. However, the employee continued to drive around and appeared to be avoiding contact with the supervisor. The supervisor ordered the employee several times to park his vehicle and wait at the location until a Department employee contacted him. During the next four hours, the supervisor periodically attempted to ascertain the location of the employee. Finally, the employee parked his vehicle and agreed to await the arrival of a Department employee. A traffic officer responded to the location, contacted the employee, and awaited the arrival of the supervisor. An administrative investigation was then conducted, and it was determined that the employee was under the influence of alcohol and prescription drugs.

The employee had two prior arrests for driving under the influence which resulted in suspension days. The employee had also previously signed an Agreement Regarding Proposed Discipline, which prohibited him from consuming alcohol and or driving under the influence of alcohol or prescription drugs. All of the allegations were Sustained, and the employee was directed to a BOR. Prior to the BOR, the employee retired from the Department.

We commend all the Department personnel involved in this case for appropriately responding to this incident, both on the day it occurred, as well as at the conclusion of the investigation.

## **Case FF**

### **SUMMARY**

This complaint came to the Department's attention when Witness A, a retired LAPD detective, contacted the Department and advised that he had in his possession a box full of Department complaint investigations, photos, and interview tapes that he wanted to return to the Department. Witness A stated that Witness B, his son, was involved in antiques and participated in various auctions. Witness B won an auction for items at a storage unit that was put up for sale for non-payment of the rent. When Witness B searched through the boxes from the storage unit, he discovered the Department documents and turned them over to Witness A.

An investigation revealed that the storage unit had been rented by Superior A. Superior A confirmed that he had rented the storage unit and placed several boxes at the location; however, he was unaware that the complaints were among them. Superior A said he was not aware that he

was behind in the rent and that he did not receive any notices in the mail. Superior A said that he visited the storage unit intending to cancel the rental, and when he went through the boxes, he found the box of complaints from when he worked at an internal complaints unit. Superior A stated he intended to return the next day and retrieve the box of complaints, but he did not return for four days. When Superior A returned, the manager of the storage unit advised that the items in the storage unit had been sold at auction for non-payment of rent.

The Department alleged that Superior A failed to properly maintain confidential Department records and failed to properly book evidence relating to confidential complaint investigations. Both allegations were Sustained for Neglect of Duty, which resulted in an Official Reprimand.

#### INVESTIGATIVE ANALYSIS

In reviewing the investigation, the OIG believes that Superior A should have had an additional allegation of misconduct framed against him for Neglect of Duty. As documented in the investigation, Superior A found the box of complaints when he returned to his storage locker to cancel the contract and retrieve his belongings. However, Superior A, despite discovering the documents, did not take them with him in order to return them to the appropriate entity within the Department. Superior A left the box of complaints intending to return the next day but failed to do so for four days, by which time the contents of the storage locker had been auctioned and sold. Fifteen days lapsed from the time the contents were sold until Witness A contacted the Department. During that time, Superior A did not advise the Department that the box of complaints had been sold. Moreover, if Witness A had not contacted the Department, the Department might never have learned about the missing documents.

#### ADJUDICATIVE ANALYSIS

The OIG believes that the penalty of an Official Reprimand was too lenient given the actions (or, in this case, inaction) by the accused, a Department supervisor. Considering the documents contained confidential information regarding Department employees, a serious breach of trust occurred. It was only a matter of fortuity that Witness A had ties to the Department and recognized the need to return the documents. Had someone else purchased the contents of the storage unit, it is possible that these confidential documents could have been made public. Given the dereliction of duty committed by the accused employee, which was compounded by his failure to properly notify the Department of the discovery of the complaints and their subsequent sale, we believe that a more severe penalty was merited in this case.

### **VI. CUOFS ADOPTED AS OUTF OF POLICY OR ADMINISTRATIVE DISAPPROVAL BY THE COMMISSION**

During this quarter, two CUOF incidents were closed in which the Commission adopted a finding of Out of Policy/Administrative Disapproval as reported in Table L of the Department's Report. Of the two CUOF incidents, one was a negligent discharge and the other was an officer-involved shooting. These two cases are discussed in more detail below.

### **Case GG – Negligent Discharge**

Officers A, B, and C were off-duty at a restaurant outside of the City. Officers A, B, and C each consumed a combination of food and alcoholic beverages over a 90-minute period. Officer A had his off-duty pistol in a strapless holster inside his right side, lower pants pocket. After finishing their meals and drinks, Officers A, B, and C walked to a bar at a nearby hotel. The officers consumed more alcoholic beverages for a period of time lasting between 30 and 60 minutes. After that, Officers A, B, and C walked to another hotel and rented a room. Officers A, B, and C went inside the hotel room to change their clothing before going out for dinner.

Officer A stood on the south side of the bed next to the counter with the sink facing in a southeast direction. Officer B retrieved the ironing board from the closet and began to iron his clothes. Officer C moved back and forth between the closet area and the bathroom as he changed his clothes.

Officer A, deciding not to take his off-duty pistol with him out, opened the cylinder of his revolver and positioned the pistol upward to allow the rounds to fall out into his left hand. Officer A believed he had all five rounds and placed them inside his right pocket and closed the cylinder. Officer A believed the pistol was empty and pulled the trigger to simulate a motion check. One round unexpectedly discharged, and he observed Officer B fall to the floor.

The Commission found that Officer A's Unintentional Discharge (UD) required a finding of Out of Policy, Administrative Disapproval – Negligent Discharge.

The Commission determined that Officer A failed to adhere to the basic firearm safety rules when he did not verify the pistol was empty, pointed the pistol in an unsafe direction, and placed his finger on the trigger of his pistol causing his pistol to discharge. Officer A's round struck Officer B in the abdomen, producing an injury which required hospitalization, and placed other potential bystanders at significant, unnecessary risk of being struck by Officer A's gunfire.

Therefore, the Commission determined that the UD of Officer A's pistol unjustifiably and substantially deviated from approved Department training and was negligent in nature. A finding of Out of Policy, Administrative Disapproval – Negligent Discharge is a finding where it was determined that the UD of a firearm resulted from operator error, such as the violation of the firearms safety rule(s), which occurred in this incident. Indeed, the Commission determined that Officer A's actions were reckless, hazardous, and unbecoming of a Department officer trained in the safe handling of firearms.

In addition to providing Officer A with extensive retraining, the Chief of Police (COP) directed that a personnel complaint be initiated, for which Officer A ultimately received a five-day suspension. Though Officer A did not have a prior history of similar complaints, in light of the egregiousness of his actions, which severely injured another Department employee, the OIG questions whether a more significant penalty should have been imposed upon Officer A.

Officer C was aware that a fellow officer had been shot and required emergency aid. Officer C went to the hotel lobby and called 911 from his cellular telephone. While the involved officers were not on-duty at the time of this incident, Officer C's 911 call was akin to an "Officer Needs Help" call. Based on his experience as a police officer, Officer C should have known the type of information that would be required by the local law enforcement and fire dispatchers and been prepared to immediately provide all pertinent information. However, a review of the 911 calls pertaining to this incident revealed that not only did Officer C fail to provide critical information to the dispatchers in a timely manner, but he also failed to answer direct questions from dispatchers about the incident.

In addition, because the dispatchers did not know if there was an outstanding shooting suspect, fire department personnel staged until the police could secure the scene rather than immediately responding to the hotel room to render medical aid to Officer B. This resulted in a delay in Officer B receiving critical medical treatment.

Accordingly, the Commission determined that Officer C's failure to provide timely information contributed to a situation which could have had tragic consequences. His vague and misleading information caused the outside agency police officers to assume a tactical response posture versus one oriented toward an officer needs help situation. The Commission found that Officer C's actions unjustifiably and substantially deviated from approved Department tactical training and that his tactics required a finding of Administrative Disapproval.

The Commission was very concerned about the level of evasiveness demonstrated by Officer C during his 911 calls. Accordingly, the COP directed the Department to initiate a complaint for Neglect of Duty against Officer C. At the conclusion of the personnel complaint investigation and a BOR, Officer C was suspended for a period of 10 days.

Due to the nature of Officer C's evasiveness which led to the delayed response of trained medical personnel to give assistance to an injured Department employee, the OIG believes that the penalty ultimately imposed upon Officer C was appropriate.

### **Case HH – No Hit**

Uniformed Police Officers A and B were on-duty in a marked police vehicle. The officers drove to a fast-food restaurant intending to purchase food. As they drove into the parking lot, the officers observed Subject 1 quickly exit a vehicle backed into a parking space. Subject 2 stayed inside the vehicle in the driver's seat. Subject 1 appeared surprised by the officers' presence and jogged toward the restaurant holding onto his waistband, as an unknown object bounced in his right front pocket.

Officer A parked the police vehicle outside the entrance while Officer B entered the restaurant. Officer B observed Subject 1 at the restaurant counter ordering food. Officer B believed that Subject 1 appeared scared and nervous. Officer B formed the opinion that Subject 1 was possibly going to commit a robbery of the restaurant. Officer B asked to speak to Subject 1, who then ran past the officer while holding onto his right front pants pocket. Officer B pursued Subject 1 out of the restaurant into the parking lot. Subject 1 turned his torso as he ran and

pointed what appeared to be a pistol (ultimately determined to be a BB pistol) at Officer B who then drew his pistol and fired several rounds at Subject 1, missing him. Officer B believed that Subject 1 then dropped his pistol. Officer A observed his partner's activity and drove around an island in the parking lot intending to cut off the escape of Subject 1. The officers passed by the vehicle Subject 1 had exited earlier, still occupied by Subject 2.

Subject 1 ran through an opening in a wall between the restaurant and a gas station, with Officer B on foot and Officer A following in the police vehicle. Officer A yelled to Officer B to notify Communications Division (CD) of their activity. Officer B did not immediately broadcast their location or activity at that time, due to re-holstering his pistol and running after Subject 1.

As Subject 1 ran across the street and behind a building, Officer B broadcast a "shots fired" call; however, he did not include the foot pursuit in the broadcast. Officer B followed Subject 1 behind the building, and Officer A followed in the police vehicle. Subject 1 ran around the building and jumped over the wall into a restaurant drive-thru area. Officer A exited his vehicle, drew his pistol, and ordered Subject 1 to stop. Subject 1 dropped his pistol and ran toward the rear parking lot. Officer A told Officer B to run around the other side and cut off Subject 1. Officer A, with his pistol still draw, ran parallel on the other side of the restaurant wall after Subject 1 as Officer B ran around the rear of the building. The officers were out of view of each other; however, they claimed they were in verbal communication with one another.

Subject 1 found the restaurant parking lot blocked by a high fence, so he turned around and ran back through the drive-thru lane. Subject 1 ran to the sidewalk in front of the restaurant, encountered Officer A, and surrendered voluntarily, placing himself in a prone position. Officer A holstered his pistol and placed his knee across the back of Subject 1 in order to take him into custody. Subject 1 would not comply with Officer A's order to stop resisting. As Officer A continued to struggle to handcuff Subject 1, Officer A's pistol fell out of his holster and landed a few feet away from Subject 1's left shoulder. Officer A feared that Subject 1 could obtain the pistol, so Officer A used his fist to strike Subject 1 on the right side of his head.

Officer B arrived and observed Subject 1 flailing his arms as Officer A attempted to take him into custody. Officer B placed his foot on the back of Subject A's head/neck area to stop him from moving. Meanwhile, Subject 2, who had seen the officers chasing Subject 1, exited the vehicle and watched the incident unfold from across the street from where Subject 1 was being taken into custody. According to Subject 1, Officer B kicked him in the head while he lay on the ground. Subject 2 also alleged that she observed Officer B kick Subject 1 in the head. The Commission found that Officer A and B's tactics required a finding of Out of Policy, Administrative Disapproval. Officer B initiated contact with Subject 1, a possible robbery suspect, without Officer A being present or aware of Officer B's activity.

Officer B also initiated contact without notifying CD of his location or activity. Additionally, both officers passed the vehicle Subject 1 had exited from, without clearing it, which exposed them to a potential threat.

The officers did not notify CD of their location or that they were involved in foot pursuit until later. Indeed, CD showed the officers' last status as "Code Six" at another location.<sup>51</sup> When asked about the responsibility of who should broadcast the foot pursuit, Officer B said, "The driver will stay with the vehicle and attempt to broadcast." However, Officer A did not follow this plan when he told Officer B to advise CD that they were in a foot pursuit. Despite the fact that Officer A was able to maintain sight of Officer B while driving, Officer A would have been delayed in his response if Officer B needed assistance. Officer A drove in front of Subject 1 in an effort to cut off his escape; however, Officer A placed himself in a dangerous tactical position if he needed to exit his vehicle due to a threat from Subject 1. Additionally, if Subject 1 engaged either officer in a firefight, Officer A could have driven into a crossfire situation.

As Subject 1 ran across the street, Officer A drove parallel to him which again placed Officer A in a poor tactical position if Subject 1 were to fire at him. Officer A exited the vehicle to chase Subject 1 on foot. Officers A and B separated while they chased Subject 1 around opposite sides of a restaurant and at no time did they attempt to establish a perimeter to contain Subject 1.

After Subject 1 stopped and complied with the instruction to place himself in the prone position on the ground, Officer A did not wait for Officer B to arrive and assist with the handcuffing which placed Officer A at a tactical disadvantage.

The Commission found that Officer B's Drawing/Exhibiting was In Policy as Officer B was confronted by Subject 1, who brandished a handgun and pointed it in the direction of Officer B.

The Commission found that Officer A's Drawing/Exhibiting was in Policy, as Subject 1, had removed a pistol from his pocket then tossed it to the ground. Subject 1 then ran through a drive-thru lane and attempted to scale a fence, whereupon Officer A again pointed his pistol at Subject 1 and ordered him to surrender. Subject 1 did not comply, then returned to the area where he had tossed his pistol earlier. Officer A followed Subject 1, pointed his pistol at Subject 1, and ordered him to surrender which he did.

The Commission found Officer B's use of Lethal Force to be In Policy, as Officer B was in foot pursuit of Subject 1 when Subject 1 turned and pointed what appeared to be a pistol at Officer B. Officer B felt he was in danger of serious bodily injury or death, believed that the situation warranted the application of lethal force. Officer B then fired several rounds at Subject 1. The Commission found Officer A's Non-Lethal Use of Force to be In Policy, given the fact that Officer A's pistol had fallen out of its holster, coupled with Subject 1 resisting arrest, Officer A's punch to the head of Subject 1 was reasonable to overcome resistance and prevent Subject 1 from obtaining Officer A's pistol.

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<sup>51</sup> Per Manual Volume 4, Section 120.40, *Radio Codes & Procedures*, a "Code Six" broadcast informs CD that a unit is conducting a field investigation at a specified location and that no assistance is anticipated.

The Commission found that Officer B's Non-Lethal Use of Force to be Out of Policy, requiring Administrative Disapproval. By placing his foot on the back of Subject 1's head/neck, not only did Officer B place his balance in jeopardy, but it could also be viewed by the public in a negative manner and it could cause an injury to the suspect. Therefore, Officer B deviated from applicable Department tactical training.

The Commission determined that Officer A and B's actions would most appropriately be addressed through extensive re-training and a personnel complaint. A complaint of Unauthorized Tactics was framed against Officer A. A complaint of deficient tactics and Unauthorized Force was framed against Officer B.

In addition, this incident resulted in at least six separate complaint (CF) numbers being generated, some of which were consolidated with others. These CF numbers included not only allegations regarding the Commission's findings, but also that Officer B made misleading statements to investigators regarding the events that led to his possession of an airsoft pistol recovered from his police vehicle after the OIS. Additional allegations included that both officers failed to book the airsoft pistol as evidence. Another allegation was from the mother of the juvenile from whom the pistol had been recovered prior to the OIS and who claimed that the officers entered her residence and conducted an unlawful search of her and her son's bedrooms.

Officer B was directed to a BOR. He resigned in lieu of termination. Officer A received a Conditional Official Reprimand which provided that if he received a Sustained allegation of deficient tactics within the next five years, he would receive a minimum 5-day suspension.

In light of the ancillary misconduct issues which arose from this incident, we agree that the Department imposed appropriate discipline on both officers in this case, and commend them for taking Officer B's acts of dishonesty seriously.

## **VII. CONCLUSION**

The OIG recognizes that retaliation and other workplace complaints are some of the most complex investigations confronting the Department. However, we believe that, given the severity of such allegations, and the fact that the incidents surrounding these complaints often result in litigation against the Department, it is essential that these investigations are thorough and comprehensive. Toward that end, we believe that it should be the very rare occasion when the Department makes the determination that the employee's claims, if true, would not constitute misconduct, so as to obviate the need for further investigation, including interviewing any of the involved employees identified by the complainant. Further, we believe that such determinations must be fully documented and properly justified within the investigation.

Moreover, we continue to be concerned about the Department's practice of adjudicating complaints that initially involve claims of retaliation against identified employees as "Non-Disciplinary" against the Department, based on our belief that the Non-Disciplinary system was not envisioned as a mechanism for addressing more serious allegations such as retaliation. Further, framing retaliation allegations against the Department as opposed to specific superiors

identified by the complainant results in there being no record of any retaliation allegations on these superiors' TEAMS, regardless of adjudication. Even though Unfounded complaints cannot be used for promotional purposes, we believe it is important to know when assessing the merits of a subsequent retaliation complaint whether a supervisor had previously been accused of retaliation, as multiple such complaints, regardless of outcome, may, at a minimum, portend the possibility of poor supervisory and/or communication skills deserving of further attention.