U.S. Department of Justice

Civil Rights Division

Special Litigation Section - PHB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

April 12, 2004

By Electronic and Regular Mail

Virginia Gennaro, Esq.
City Attorney
City of Bakersfield
1501 Truxtun Avenue
Bakersfield, CA 93301

Re: Investigation of the City of Bakersfield Police Department

Dear Ms. Gennaro:

As you know, the Civil Rights Division is conducting an investigation of the Bakersfield Police Department ("BPD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(3). We would like to take this opportunity to express our appreciation for the cooperation we have received thus far from the City of Bakersfield ("City") and the BPD.

To date we have reviewed relevant BPD policies and conducted interviews with City officials, all of the BPD command staff, and a cross-section of BPD supervisors. We have also talked with representatives of the Association of Bakersfield Police Officers, community leaders, and other citizens.

At the beginning of our investigation, we committed to providing the City with technical assistance to improve BPD's practices and procedures and ensure compliance with constitutional requirements. During our meetings with you and the BPD command staff in September and October of 2003, we told you that we would provide in writing more specifics about recommendations our police practices experts had made orally. In this letter, we convey our recommendations regarding the BPD's written policies. Important aspects of our fact-gathering process have yet to be completed, most notably reviewing the

incident reports that you have produced. Therefore, this letter is not meant to be exhaustive, but rather focuses on significant recommendations we can provide at this preliminary stage of our investigation.

Additionally, we hope this letter will assist in our mutual goal of ensuring that the BPD provides the best possible police service to the people of Bakersfield. We look forward to continued cooperation towards this goal. We would be happy to provide examples of policies used by other police departments that might address some of the issues we raise below.

I. Use of Force and Force Reporting

- **The BPD's use of force policy should clearly define when officers are permitted to use force.**

The BPD's "Use and Escalation of Force Policy" does not adequately limit officers' use of force to those cases in which it is required to make a lawful arrest or protect an officer or third-party from an immediate safety threat. Appropriately, the BPD policy states that officers may use the amount of force reasonably necessary "to gain and maintain compliance with the law."[1] However, the policy fails to provide any guidance to officers of when force is required to "maintain compliance with the law." This ambiguity may lead officers to believe they are justified in using force in situations in which it would be unreasonable. For example, BPD officers would not be justified in using force to disperse an unlawfully assembled crowd without first giving the group an opportunity to disperse on its own. A well drafted use of force policy should give an officer clear guidance on the type and level of force that is objectively reasonable in light of the facts and circumstances confronting him/her in a given situation.

The "Use and Escalation of Force Policy" is not the only general order that relates to the use of force. In fact, there are currently eleven other general orders that relate to the use of force.[2] However, none of these orders are cross-referenced in

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[1] Use and Escalation of Force Policy, General Order ("G.O.") 01-01-05.

[2] Firearms Policy, G.O. 98-12-17, Suspect Behavior/Types of Force and Authorized Restraints Policy, G.O. 98-03-04, Impact Weapons Policy, G.O. 02-02-25, Positional Asphyxia--Addendum, G.O. 00-04-17, Positional Asphyxia-Sudden Death, G.O. 95-09-28, Aerosol Weapons Procedures, G.O. 99-03-16, Canine Program and Policy, G.O. 99-02-05, Patrol Rifle Program Policy, G.O. 97-05-22, Pepperball Weapons Procedure, G.O. 01-04-16, Stunbag System-Less Lethal, G.O. 00-07-21, and Taser Electronic Control

the "Use and Escalation of Force Policy." These orders should be cross-referenced in the use of force policy because they provide supplemental information regarding the procedures BPD officers should follow when using the various types of force. For example, the stated purpose of the BPD firearms policy is "to set forth guidelines officers should consider when they are faced with circumstances which would cause them to resort to the use of a firearm."[3] The use of force continuum does not identify firearms as a type of deadly force or provide a cross-reference to the firearms policy. As such, officers may not be aware of the guidelines for employing deadly force. We advise the BPD to review all of its policies and procedures and where appropriate provide adequate cross-references.

- **The BPD should clearly define what type of force can be used at each level along the force continuum.**

The BPD has a use of force continuum in the "Use and Escalation of Force Policy," but this continuum does not list or define all of the use of force options that are available to BPD officers. It also does not adequately define the force that can be used in response to varying levels of resistance from a subject. Much of the information regarding resistance levels and description of the type of force used by the BPD is contained in a separate general order entitled, "Suspect Behavior/Types of Force and Authorized Restraints Policy." We recommend that the BPD consider consolidating these two general orders into a comprehensive use of force continuum. This consolidation will benefit the officers because the constitutional requirements regarding the use of reasonable force will be conveniently contained in one general order that they can quickly reference to ensure compliance with the law.

The current use of force continuum classifies force levels in three general categories: Non-Physical/Non-Deadly Force, Physical/Non-Deadly Force and Physical/Deadly Force. Under each category, the policy lists force options available to an officer. Although the policy states that "officers should begin an arrest at the lowest level of force possible and should only escalate through each succeeding level of force after the lower levels of force have been tried and failed,"[4] there is not an established

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Device, G.O. 97-03-04.

[3] Firearms Policy, G.O. F98-12-17.

[4] We recommend that the BPD revise its instruction that higher levels of force should only be used once the lower levels of force have been "tried and failed." This guidance may lead an officer to believe that they must first actually use each lower level of force before moving to a higher level of force.

hierarchy within the categories of force.[5] For example, the policy does not make any distinction between the use of a firm grip and the use of a baton, even though a baton strike can be deadly force. The current policy may lead BPD officers to believe incorrectly that all of the types of force that are listed under each of the three categories are of equal gravity and can be used interchangeably.

The use of force continuum also does not provide any guidance regarding what level of force is appropriate in response to different types of resistance. The failure to match the varying levels of force with the corresponding levels of resistance is confusing. The policy states that "[i]t is impossible within the confines of this policy to instruct officers how to react in each and every situation where the need to use force may occur."[6] This statement is problematic and should be removed because it suggests that there are no parameters for an officer to follow when the use of force is necessary. When properly designed and implemented, a use of force continuum is a fluid and flexible policy guide. The BPD should utilize the suspect behavior descriptions that are included elsewhere in the continuum to provide clearer instruction on when an officer should utilize a specific type of force. For example, the policy could instruct officers that control hands/pain compliance, which consists of "grasping the suspect and applying a control hold or pain compliance technique" should be used to overcome a suspect who is actively resisting (i.e., using hands, arms, legs, or any body part to physically resist arrest).[7]

In addition, the continuum fails to recognize that certain types of force can fall under more than one of the three general categories. For example, the use of a baton is only categorized as a Physical/Non-Deadly type of force, but as discussed above, the baton could constitute Physical/Deadly force.

Taken literally this would mean that in response to an armed subject they may only use their firearms after trying chemical spray. Instead, officers should be instructed to "consider" whether they can safely and effectively use a lower level type of force before turning to a more serious type of force, keeping in mind that all uses of force must be objectively reasonable under the circumstances.

[5] Use and Escalation of Force Policy, G.O. 01-01-05.

[6] Id.

[7] Suspect Behavior/Types of Force and Authorized Restraints Policy, G.O. 98-03-04.

- **The BPD should provide officers additional guidance on the new use of force reporting system.**

During our interviews with the BPD command staff last Fall, we were informed that the only means that the BPD utilized to document use of force incidents were its arrest reports. However, we were also advised that the new Records Management System that went into operation in November 2003 now allows officers to document use of force incidents on forms generated specifically for that purpose. We are pleased that the BPD has taken steps to better monitor its officers' use of force. In January 2004, the BPD forwarded us copies of a memorandum regarding the roll-out of the new use of force reporting requirements and an exemplar of the use of force form. We have reviewed these documents and identify here some aspects of the process that we recommend be clarified.

As currently written, the new reporting guidelines require only supervisors and not officers to provide information for the use of force forms. We recommend that the BPD revise the use of force reporting form to include a space for an officer narrative. The officer would describe the facts surrounding an incident and provide such other information that would assist the supervisor in reviewing the use of force employed by that officer.

In addition, the reporting guidelines do not clearly indicate when a use of force form should be completed. They state that a form should be filled out when an officer uses a level of force higher than "standard searching and handcuffing techniques." This phrase is ambiguous. Although the memorandum cross-references the "Use of Force Reporting Guidelines, Medical Treatment, and Supervisor Responsibility Policy," a review of that policy does not provide any additional guidance on what this phrase means. We recommend that the BPD clarify this ambiguity by requiring officers to complete a use of force form to document all types of physical and instrumental (i.e., baton, taser, or firearm) acts that impose any degree of force on a civilian, including acts that would currently be regarded as "body weight techniques"[8] under the BPD "Suspect Behavior/Types of Force and Authorized Restraints Policy," but not including unresisted handcuffing.

The guidance provided in the memorandum regarding the information that should be included on the use of force forms

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[8] Body weight techniques is defined as an "application of body weight by one or more officers to overcome resistance and establish control of the suspect." Suspect Behavior/Types of Force and Authorized Restraints Policy, G.O. 98-03-04.

should be clarified to ensure that all uses of force, including those that may occur absent an arrest, are documented. The memorandum instructs supervisors that the correct entry in most cases for the field that identifies the subject of the force (i.e., Related Person Role), is "Arrestee." We recommend that this instruction be deleted because it suggests that the use of force only occurs during an arrest. Instead of suggesting an entry that may be appropriate for this field, the BPD should consider providing a description of all of the various choices that are provided on the use of force form. Providing explanations of the available choices would be particularly helpful, because the application of many of these descriptors (e.g., "missing per," "registered," "runaway," "applicant," "legal owner," etc.) is unclear. Providing this additional information would also help the supervisor to select the descriptor that best applies to a given situation.

We also recommend that the BPD revise other aspects of the use of force reporting form. First, the use of force form suggests that a supervisor is not required to respond to the scene of a use of force. The form gives the supervisor the option of choosing "yes" or "no" in the field that inquires whether a supervisor responded to the scene. We recommend that a supervisor be required to respond to the scene any time force is used, and we suggest that the BPD revise this field to indicate what time the supervisor responded to the scene. Second, some of the descriptors provided in the "Subject's Resistance" field should be changed. We suggest that the BPD substitute "aggressive" for the "assaultive" option and "aggravated active aggression" for the "deadly" option. These substitutions are broader definitions that will more accurately reflect a subject's level of resistance.[9]

Finally, the BPD's 2004 training schedule does not indicate that officers will receive training on the use of force reporting requirements. The memorandum regarding the roll-out of the new system also does not mention training. We recommend that the BPD schedule training sessions to ensure that officers fully understand the new reporting requirements.

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[9] The "aggressive" descriptor covers a broader category of situations. For example, if a subject is lunging or moving toward an officer despite orders to desist with such behavior, the subject's actions are best described as aggressive not assaultive. Similarly, if a subject is moving toward an officer with a blunt object (e.g., heavy metal rod) that could potentially cause grave injury, the "aggravated active aggression" option is a better descriptor than "deadly" because it is not certain that the subject intended to inflict deadly harm.

- **The BPD's policies on the use of chemical spray should be reviewed to clarify procedures for general use and decontamination.**

We have received reports that BPD officers may be utilizing chemical spray within too close a proximity of the subject. None of the general orders that discuss the use of chemical spray provide sufficient guidance on this issue.[10] Using chemical spray within too close a proximity can cause injury to a subject. The BPD "Aerosol Weapons Procedures Policy" "recommends" that an officer refrain from using a chemical spray less than three feet away from a subject. The use of the word "recommend" suggests that whether to use spray less than three feet from the subject is left entirely to the officer's discretion. We suggest that the BPD revise this policy to require, absent exceptional circumstances, that chemical spray not be used if the officer is less than three feet away from a subject. Additionally, the BPD should provide regular in-service training on the proper amount of spray to use and how to deliver the spray effectively.

We have also received information regarding the use of chemical spray on subjects who have complied with an officer's orders. Many of the Bakersfield citizens with whom we spoke alleged that BPD officers occasionally continue to use chemical spray on a resisting subject, even after that individual has complied with an officer's orders. Although we obviously have no way of assessing the validity of these allegations, they are, if true, of some concern to us because force should be discontinued as soon as the threat dissipates. We recommend that the BPD policy explicitly require officers to immediately discontinue the use of chemical spray once a subject becomes compliant.

The BPD's Aerosol Weapons Procedure does not require that subjects who have been sprayed be promptly decontaminated. In fact, it discourages decontamination. The policy states that, "[i]t is not routinely necessary to medically clear all Oleoresin Capsicum exposures... and [n]o medical treatment is necessary unless a more serious reaction is evident."[11] This policy is contrary to the widely accepted police practice.[12] We recommend

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[10] Use and Escalation of Force Policy, G.O., 01-01-05; Suspect Behavior/Types of Force and Authorized Restraints Policy, G.O., 98-03-04; and Aerosol Weapons Procedures, G.O., 99-03-16.

[11] Aerosol Weapons Procedures, G.O. 99-03-16.

[12] The International Association of Chiefs of Police Model Policy on Pepper Aerosol Restraint Spray states that "[i]mmediately after spraying a suspect, officers shall be alert to any indications that the individual needs medical care." The

that the policy be amended to require BPD officers to decontaminate subjects within a short period of time after order has been restored to the scene.

Finally, the BPD currently utilizes a chemical spray that contains a flammable carrier that could cause a fire if used where there is exposure to an open flame or where sparks may exist. The aerosol policy and the "Taser Electronic Control Device Policy" caution officers that chemical spray should not be used in conjunction with the taser device because the electrical current from the taser could cause the flammable carrier in the chemical spray to ignite. We recommend that the BPD review recent research regarding chemical spray and switch to a different product that does not contain a flammable carrier.

- **The BPD should clarify its policy regarding positional asphyxia.**

The BPD has experienced at least three in-custody deaths in recent years that may be related to complications due to positional asphyxia. Although this letter is not intended to reflect a judgment by the Department of Justice regarding any individual cases, the BPD's policy related to positional asphyxia should be clarified. The BPD has two general orders on the issue and has classified one as an addendum to the other.[13] In general, we believe that the BPD's "Positional Asphyxia - Sudden Death Policy" adequately identifies factors that precipitate this condition and provides good guidelines in order to help minimize the risk of it occurring. Most importantly, the BPD's policy explicitly prohibits officers from using hogtie restraints.[14] However, the legal analysis and discussion of a case involving positional asphyxia contained in the "General Order Addendum - Positional Asphyxia Policy" creates ambiguity regarding BPD's prohibition on hogtie restraints.

Instead of providing additional information to clarify the BPD's policy on positional asphyxia, the addendum provides only a lengthy discussion of Price v. County of San Diego, 990 F. Supp. 1230 (S.D. Cal. 1998). The BPD suggests that the Price court does not believe that there is medical evidence to support the idea that hogtying subjects causes positional asphyxia which

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policy further states that "once the suspect has been restrained, officers shall assist him by rinsing and drying the exposed area."

[13] Positional Asphyxia-Sudden Death, G.O 95-09-28; Positional Asphyxia-Addendum, G.O. 00-04-17.

[14] Positional Asphyxia-Sudden Death, G.O. 95-09-28.

in turn can lead to death.[15] This interpretation creates ambiguity with respect to whether the broad prohibition against hogtie restraints that was set forth in the "Positional Asphyxia - Sudden Death Policy" has been modified by the Price decision. We recommend that the legal analysis be deleted from the addendum. In fact, if the legal analysis is deleted, little else remains, so the BPD should consolidate any remaining information from the addendum into the "Positional Asphyxia - Sudden Death Policy."

- **The BPD should revise its canine deployment policy and track and monitor the frequency with which BPD canines bite subjects.**

During our interviews with the command staff, we were informed that the BPD employs the "find and bark" methodology that trains canines to bark, rather than bite, upon locating a subject. Such a policy is a good practice because it prevents canines from biting subjects in situations in which such force is not necessary. However, the BPD should develop appropriate safeguards to ensure that its canine unit actually operates in conformance with this methodology.

The BPD canine policy states that the decision to use or deploy a police canine during a specific law enforcement operation rests "solely" with the canine handler.[16] According to the policy, and conversations with canine unit supervisors, there is no oversight of canine handlers when it comes to the deployment of canines. The policy does not require, nor is it a practice of canine handlers, to seek approval from a supervisor before a dog is deployed. Moreover, the policy only requires a deployment to be reported if the canine bites a subject. We recommend that the canine policy be changed to require, absent exigent circumstances, supervisory approval prior to the deployment of a canine unit and that guidelines for deployment be established.

In general, canine deployment for purposes of apprehending a person should be limited to searches for serious felons, and cases where a subject is armed, or has the potential to use force or cause harm to the officer, the subject or others. Many of the descriptions contained in the policy regarding how the BPD utilizes canines are contrary to this practice. For example, the policy states that canine units will be "primarily utilized" in domestic disturbance calls, and to apprehend persons under the influence of drugs and/or alcohol or persons with mental

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[15] Positional Asphyxia-Addendum, G.O. 00-04-17.

[16] Canine Program and Policy, G.O. 99-02-05.

illness.[17] The use of a canine in such situations, unless they involve armed subjects or an imminent threat to an officer or a civilian, should be prohibited.[18] The policy should also prohibit the release of a canine from the leash prior to a deployment, unless the canine is conducting a building search.

The supervisors who command the canine program should have the expertise to be able to assess appropriately a particular situation and decide whether canine deployment should be authorized. However, we understand that the canine coordinator and other supervisors who have direct responsibility for the canine program (i.e., watch commander/field sergeant) do not receive formal standardized training in canine handling procedures. Such training should be provided to the canine coordinator as well as any officer in the chain of command who exercises supervisory authority over the canine unit.

The BPD canine policy provides no guidelines on how officers should document deployments and apprehensions. All deployments, regardless of the outcome, should be reported. A canine deployment refers to any situation in which a canine is brought to the scene and either: 1) the canine is released from the police car; or 2) the suspect surrenders to the police immediately after an announcement is made that if the suspect does not surrender the canine will be released. Properly documenting and tracking deployments will allow the BPD to monitor the use of canines. Similarly, it is important for BPD to track apprehensions because BPD needs to be able to properly calculate bite ratios. An apprehension is defined as any time the canine is deployed and plays a clear and well-documented role in the capture of a person. A bite ratio is the number of apprehensions accomplished by means of a dog bite divided by the total number of canine apprehensions (both with or without a bite). Bite ratios enable a police department to assess its canine unit and individual canine teams. Additionally, the ratio will help the department determine whether canines are functioning under the "find and bark" methodology employed by the BPD.

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[17] Id.

[18] The BPD has authorized the use of canines for routine crowd control and disturbances inside of bars. However, during our meetings with canine supervisors, we were informed that the BPD canines have not been trained for use in large crowds. The BPD's deployment of untrained canines in crowd situations places citizens at an unreasonable risk of harm. We recommend that the BPD refrain from deploying canines in situations that necessitate specialized training that the canines have not received.

Finally, the BPD's canine policy lacks clarity with respect to the warnings that should be provided prior to releasing a dog. We recommend that the canine policy be revised to ensure that deployments are made in accordance with appropriate safeguards. The BPD's canine policy states that a handler should give a warning prior to the release of a canine dog unless it is tactically inappropriate.[19] However, the policy does not set a certain time period between the warning and the release to allow the subject to surrender. Proper verbal warnings, in English and Spanish, should precede the release of a canine.[20]

II. Firearms and Impact Weapons

- **BPD officers should only carry weapons that are authorized by BPD policy and BPD policy should require all officers to be trained and certified on the weapons they carry.**

During our meetings with the BPD command staff and officers, we learned that officers in the department carry weapons that are not authorized by BPD policy. Officers should only be allowed to carry authorized equipment. The BPD cannot effectively manage the risk of injury associated with the use of weapons by officers if there is no control or accounting of the weapons that officers carry. For example, the BPD "Firearms Policy" prohibits BPD officers from carrying "weapons or ammunition other than that authorized by the Chief of Police or his designee."[21] The policy does not say, however, which weapons and type of ammunition are authorized. We recommend that the BPD conduct a review and inventory of all of its weapons in order to determine what weapons should be authorized. A comprehensive list of the authorized weapons, including the intended purpose of each one, should be set forth in the general orders. With respect to firearms, the list should identify the weapons that are authorized as well as the specific type of ammunition. To ensure that officers are only carrying authorized equipment, we recommend that supervisors conduct regular integrity checks for unauthorized weapons and ammunition.

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[19] Canine Program and Policy, G.O. 99-02-06.

[20] Mexican-Americans comprise thirty-two percent of the population in Bakersfield. See U.S. Census Bureau, Fact Sheet for Bakersfield, California, available at http://www.factfinder.census.gov. Reportedly, many of these individuals are recent immigrants who speak very little or no English.

[21] Firearms Policy, G.O. F98-12-17.

We were told that a majority of BPD officers carry a sap,[22] but the sap is not listed as an authorized weapon anywhere within the BPD's policies. Moreover, no BPD officer could articulate a valid law enforcement purpose that would require the use of a sap. BPD officers are not trained to use the sap nor is it included in the BPD's use of force continuum. We recommend that the BPD prohibit use of the sap. The high rate of injury associated with saps has led many police agencies to discontinue their use. There are other non-deadly force options available that have lower risks of injury to citizens.

- **The BPD should clarify the language within its firearm guidelines that prohibits officers from shooting at moving vehicles.**

The language in the firearm policy prohibiting officers from shooting at moving vehicles is ambiguous. Although the policy states that "no officer shall discharge a firearm at a suspect in a vehicle unless the officer has reasonable belief the suspect poses a significant threat of death or serious physical injury to the officer or another person," the policy also permits "shooting at persons in moving vehicles ... under the direst of circumstances."[23] The language "direst of circumstances" may cause an officer to believe that a circumstance other than the threat of death or serious injury to an officer or citizen could justify shooting at a moving vehicle. We recommend that this ambiguous language be removed from the policy. In addition, the firearms policy is silent with respect to how officers should handle those situations when the subject uses the car as a weapon (e.g., the subject attempts to run an officer down with a vehicle). We recommend that the policy prohibit officers from shooting at vehicles that are used as weapons, unless the officer is unable to move out of the path of the oncoming vehicle or the driver or occupants of the car (for some reason other than the fact that they are using the car as a weapon) pose an imminent threat of death or serious injury to the officer or the public.

The potential for serious injury, including death, is high when officers are allowed to shoot at moving vehicles. The bullets could ricochet off the moving target and hit the officer or an innocent bystander, or the bullet could disable the driver of the vehicle causing the car to crash into the officer or a third party. Since the risks presented by officers firing at

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[22] A sap is a small impact weapon that generally measures eight to eleven inches in length and is constructed of durable leather. This weapon is commonly used to strike subjects at close range in the head and upper torso area of the body.

[23] Id.

moving vehicles far outweighs any benefit that could be attained by such an action, because it is very difficult to disable a moving vehicle by shooting at it, officers should be prohibited from firing at moving vehicles.

III. Policy Development

- **The BPD should revise its policy development process and seek input from the community on policies that are of particular concern to citizens.**

During our meetings with supervisors from the Planning and Research Division, we learned that the BPD does not have a formal process for policy development. As a result, there is no mechanism to ensure that policies are being developed with the benefit of feedback from the entire police department or the community. We recommend that the BPD create a policy development committee, and that this committee seek input from the community on policies of particular interest to the community, including gang enforcement. While we recognize that all changes and recommendations by the community may not be practical, the very act of asking for such feedback increases community acceptance and provides an opportunity for public education. The BPD could also involve the community in the implementation of new policy by holding outreach meetings when policies that relate to community policing, such as the Special Enforcement Unit procedures that we discuss below, are developed. This will give the BPD the opportunity to explain the purpose of the new policies and how the policy might affect community/police relations.

We also recommend that major policy changes that impact the policing practices of the BPD be evaluated by the City Attorney's office to ensure that the policies comply with federal and state law. The Planning Section should retain all the comments that they receive from the policy development committee, the public and the City Attorney's Office in a central file. This information can be used to justify the adoption of new policy and changes to existing BPD policy.

- **The BPD should develop a formal policy for the operation of the Special Enforcement Unit.**

We were told that the Special Enforcement Unit's ("SEU") primary mission is to partner with the community to stop gang violence. We have received complaints from minority citizens that the SEU tends to target members of their community for investigative stops, regardless of whether these individuals are suspected of planning or engaging in criminal activity. There is also a perception that the SEU conducts unlawful searches of the minority citizens that they encounter during these stops. We have no way of assessing the validity of these allegations, and we pass no judgment here.

We are nevertheless concerned that there is no policy or procedure in the BPD General Orders that governs the operation of the SEU. To be sure, our interviews with the BPD command staff revealed that there are *informal* procedures that have been devised by the command staff that supervises the SEU that govern the operation of the unit. Although it appears that thoughtful consideration has been taken to devise informal procedures that officers can use on the street, the lack of a formal policy may lead to inconsistency and create the perception that BPD officers treat members of racial minorities differently. We recommend that the BPD develop formal policies and procedures for the SEU that will give the officers in this unit clear guidance on SEU operational issues including the mission of the unit, the role of the community, selection procedures for officers assigned to the unit, and procedures for deployment of the unit. In addition, the SEU policy should have cross-references to the proposed discriminatory policy and the Search and Seizure General Order.

IV. Public Accountability

- **The BPD should establish procedures for internal affairs investigations.**

Our interviews with community members revealed a perception that the BPD citizen complaint process is not an effective tool for citizens to complain about police misconduct. We heard complaints that there are discrepancies in how individual complaints are handled and that the investigations that are conducted are often deficient. There is no policy or procedure in the BPD General Orders governing the operation of Internal Affairs ("IA"). In addition, our interviews with the BPD command staff revealed that there is no consistent procedure that IA investigators follow when conducting an investigation. For example, our interviews with the command staff indicated that IA investigators do not always interview all of the available witnesses. Although some IA detectives return to the scene of an alleged incident of misconduct to track down independent witnesses, others only contact the witnesses that have been identified by the complainant, or by the involved officer.

We recommend that formal procedures governing IA investigations be promulgated to ensure that there is consistency in the investigation process. The BPD may also want to consider revising the provision of the citizen complaint policy that states that interviews with police officers "may be recorded" to "shall be recorded." (emphasis added). We recommend this revision because it will ensure that there is a complete and accurate transcript of all interviews that are conducted in conjunction with investigations. This revision will serve the interests of all parties concerned and preserve the integrity of the investigation process.

We have received a number of complaints from the community alleging that they have been harassed by members of the BPD shortly after filing a citizen complaint against an officer. In devising an IA investigations procedure, the BPD should consider adding a provision that would prohibit officers from having contact with citizens who file a complaint (or citizens who witnessed the alleged police misconduct) that could be characterized as harassing or intimidating. Violation of this provision should be subject to disciplinary action. Implementing this provision might help to allay concerns that the community has expressed regarding harassment and intimidation.

- **All citizen complaints should be forwarded to the Internal Affairs Division where the complaint can be designated as a "Citizen Complaint" or "Citizen Inquiry."**

The BPD citizen complaint policy mandates that BPD personnel accepting complaints from citizens determine whether a complaint will be handled through IA, or whether it will be handled more informally at the division level. We were told that the latter complaint is designated a citizen inquiry, while the former is called a citizen complaint. According to BPD policy, a citizen complaint is "an allegation of employee misconduct."[24] A citizen inquiry is defined as a "complaint regarding service, department policy or procedures . . . [that] should be handled at the division level."[25] An inquiry is also defined as an "[a]llegation of misconduct which is minor in nature . . . ."[26] No further clarification beyond these ambiguous definitions is provided to guide personnel in making a proper designation, nor are there any examples provided to assist personnel in determining what constitutes a "minor" allegation of misconduct. Given the ambiguity surrounding these designations, some citizen complaints that should be forwarded to IA may actually end up being handled more informally as an inquiry.

To alleviate this confusion, we recommend that the BPD provide additional guidance on the distinction between a citizen inquiry and a citizen complaint. Furthermore, we suggest that IA review all complaints and be responsible for designating them as a citizen inquiry or a citizen complaint. The implementation of these recommendations will increase the likelihood that complaints are handled properly.

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[24] Citizen Complaint Procedure, G.O. 95-01-18.

[25] Id.

[26] Id.

- **The citizen complaint policy should explicitly explain the different means citizens can use to file complaints.**

During our interviews with the command staff, we were told that the BPD accepts complaints from citizens through a variety of means including in person at the station, by telephone, or by letter. We were also told that the BPD accepts complaints on unsigned forms, or that are filed anonymously. We recommend that the complaint policy explicitly describe the different methods citizens can use to file a complaint. Once this revision is made, the new policy should be disseminated to the community and to BPD personnel.

Additionally, we understand that citizen complaint forms are not available on the BPD website, nor are they available in any language other than English. To ensure that information regarding the citizen complaint process is available to as many residents as possible, we recommend that the BPD make an electronic version of the citizen complaint form available on the internet, and that a complaint form be developed for members of the community who only speak Spanish.

- **The BPD should revise the disposition provision of the citizen complaint policy.**

The citizen complaint policy provides that the Chief of Police can choose one or more of the following dispositions after completing a review of an IA investigation: unfounded, exonerated, not sustained, sustained and commended.[27]

In general, we recommend that a single disposition be selected after an IA investigation is completed to eliminate any confusion that might be generated by inconsistent findings. However, it may be appropriate, in certain situations, to combine the "policy review" finding with one of the other dispositions. For example, the Chief might conclude that a citizen complaint, which involves an issue that is not covered by BPD policy, should be "sustained" in light of evidence corroborating a citizen complaint. Nevertheless, there could not be any discipline meted out because there is no underlying policy violation. In this case, it would be appropriate to select the "policy review" finding as well as "sustained."

- **The BPD should revise its "officer involved shooting" procedures.**

It is not clear from BPD policy whether the IA division is involved in administrative investigations concerning officer involved shootings ("OIS"). We recommend that the BPD clarify

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[27] Citizen Complaint Procedure G.O., 95-01-18.

IA's role in the administrative OIS investigations.

The guidelines and procedures regarding use of force (including shooting incidents) and the citizen complaint process are silent with respect to how the BPD should proceed with parallel administrative and criminal investigations. However, it appears that BPD initiates an administrative investigation before any criminal investigation when a shooting incident occurs. The "Officer Involved Shooting Procedures" states that "[i]f during an [administrative] investigation, evidence suggests that an involved officer may be responsible for a criminal act, the OIS investigator will immediately notify the duty chief before continuing his/her investigation."[28] In addition, the policy directs the responding supervisor and the assigned OIS investigator to obtain "public safety statements" from the involved officer(s). The timing of these investigations is imprudent in light of the Supreme Court's ruling in Garrity v. New Jersey, 385 U.S. 493 (1967) with regard to the use of compelled statements in criminal proceedings. Protocols should be developed to provide guidance on how parallel investigations should proceed to avoid evidence contamination in the event that the criminal investigation leads to prosecution.

There are other aspects of the OIS procedures that should also be revised. An OIS is defined as a "shooting incident directed toward a human being, whether intentional or accidental . . . ."[29] The policy should be revised to cover all instances when an officer discharges his/her weapon, including those instances when an animal is involved.[30] The only exception should be discharges that occur on the firing range. Under the current policy, officers that are involved in a shooting are not relieved of their weapon. The policy directs supervisors arriving on the scene to, "[r]emind involved officer(s) not to unload or reload their weapons; however, allow them to maintain control of their weapon unless you have probable cause to believe the officer(s) have committed a criminal act."[31] This policy is unwise because it can lead to contamination of the evidence and because it requires the supervisor to make a legal determination in what is already a very stressful situation. The policy should

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[28] Officer Involved Shooting Procedures, G.O. 01-01-05.

[29] Id.

[30] A full-scale shooting investigation should not be done when there is an incident involving an animal. The investigation should be limited to interviews of the pet owner, any available witnesses and the involved officer. Furthermore, the incident should be documented on a use of force form.

[31] Officer Involved Shooting Procedures, G.O. 01-01-05.

be revised to require the involved officer(s)to relinquish his/her weapon following an OIS.

V. Monitoring Officer Conduct

- **The BPD should develop a risk management system to track trends and patterns related to officer conduct.**

As discussed above, during our interviews with the BPD command staff, we learned that the BPD has a new Records Management System ("RMS"). It was unclear whether the RMS has an adequate risk management system component, but the command staff expressed interest in learning how such a component could be developed and utilized. We recommend that the BPD evaluate the risk management system component of the RMS to determine whether the RMS will allow it to adequately track and monitor any trends or patterns related to officer conduct. If the RMS does not have a risk management component, the BPD should determine whether the system can be so modified. Alternatively, the BPD may be able to procure a low-cost risk management software program or develop a non-computerized system that could track officer conduct. The BPD should be able to obtain a great deal of information regarding the development of risk management systems from other police agencies and national and state law enforcement organizations, which will assist them in developing an appropriate and economical system.

A risk management system is most effective if it accounts for shootings, uses of force, citizen complaints, criminal charges against officers, civil lawsuits alleging officer misconduct, and disciplinary actions (including counseling, redirecting, and reinforcing). The system should also track the conduct over a reasonable period of time. The BPD currently retains citizen complaints for a period of five years. We recommend that the BPD track all forms of officer conduct for the same period of time. Finally, with respect to the tracking of citizen complaints, the BPD should track all citizen complaints, including those complaints that are designated "not sustained." It is important to track such complaints because they may be indicative of a problem if they involve similar types of alleged misconduct.

The benefit of a well-designed risk management system is that it will allow the BPD to have relevant information regarding officers' conduct to ensure effective management and early intervention. It is important to be mindful of the fact that a risk management system is not meant to be used punitively, but as a tool to identify and take proactive steps in regard to those officers who may be in need of supervisory counseling and non-disciplinary corrective action (i.e., remedial training). It can be used by the BPD Training Division to determine the need for curriculum revision and supplementation as well as remedial

training. Finally, the risk management system can also be used to identify those officers who are providing exemplary service and should be commended.

VI. Officer Accountability

- **The BPD should develop a formal disciplinary framework to bolster the Rules of Conduct and the citizen complaint process.**

There is no policy or procedure in the BPD General Orders that sets forth a disciplinary framework. In addition, our interviews with the BPD command staff revealed that there is no consistent procedure that is followed when discipline is meted out. Such discretionary practices with respect to discipline can lead to lack of fairness. An appropriate disciplinary framework should allow for a flexible range of discipline to fit the offense. For example, there should be a range of discipline that can be meted out when an officer engages in a less serious offense like tardiness. The disciplinary framework should be more rigid with respect to serious offenses. For instance, if a citizen complaint alleging that an officer provided false information in an arrest report is sustained against an officer, he/she should be terminated.

We recommend that the BPD devise a disciplinary framework that contains levels of discipline within the framework that are progressively more serious and ultimately culminate in termination. Furthermore, training mechanisms should be incorporated to make the framework even more useful. Remedial training should not be considered a form of discipline. Instead it should be considered a mechanism that is used to correct behavior that needs to be improved or changed. However, remedial training is not a substitute for disciplinary action.

- **The BPD should revise certain aspects of the Rules of Conduct.**

Portions of the BPD Rules of Conduct should be revised to provide clear guidance on the subject areas covered. Rule eight provides that, "[n]o officer or employee of the Department shall knowingly and willfully commit any act or neglect any duty which violates any Federal statute, State law, local ordinance, or any rule of the Department."[32] This rule should be revised to cover violations that are not knowing and willful. Rule fifteen provides that "[o]fficers and employees shall not consume intoxicants while off duty to the extent that evidence of such

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[32] Rules of Conduct G.O., 96-04-05.

consumption is detectable when reporting for scheduled duty."[33] The BPD should revise this rule to prohibit the use of intoxicants within a certain period of time prior to reporting for duty to avoid any ambiguity. In addition, the policy should prohibit officers from reporting to duty if they exhibit signs of the residual effects of intoxicants, regardless of when the intoxicant was consumed.

In conclusion, please do not hesitate to contact us if you have any questions about the recommendations contained in this letter. We appreciate the cooperation we have received from City and BPD officials and look forward to working with you and the BPD in the coming months as our investigation proceeds.

Sincerely,

Shanetta Y. Cutlar
Chief
Special Litigation Section

cc: McGregor W. Scott, United States Attorney

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[33] Id.