

Oakland Police Commission’s Statement
September 19, 2023 Case Management Conference Court Filing

The Court, in its April 2023 Order, made a self-reflecting statement that the Court is “wrestling with the utility of its role in helping the City achieve constitutional policing after 20 years of monitoring compliance with the NSA.” Court proceedings – albeit a critical mechanism for systemic reform – have their limitations; and after a certain point, could have diminishing returns. Transition to community oversight and local control should be the strategic, collective direction for all parties.

The Oakland Police Commission appreciates the Court asking parties how the Court can help the Oakland Police Department and the City make progress on constitutional policing reform and come into compliance with the Negotiated Settlement Agreement. We humbly answer that at this juncture of more than 20 years of court oversight and with the current status of progress, the best way for the Court to help is to begin the process of a smooth and successful transition to community oversight. What the Court is missing in its oversight is meaningful input from the very community that is being policed.

The Court is correct to suggest that the Department has proven it is not capable of policing itself, which is why the City’s Reimagining Public Safety Task Force also suggested transitioning all IAD cases (not just public complaint ones) to the Community Police Review Agency (civilian investigators) which is overseen by the Commission.¹ Such recommendation would not come from a Court Monitor whose purpose is to monitor the NSA tasks, and not ensure a smooth transition to community oversight. This community-driven recommendation to transfer most of IAD to CPRA would have the added benefits of freeing up sworn officers to do public safety work while being less expensive than investigations conducted by sworn officers.

Culture change requires an infusion of community values in policing, as Mayor Thao said in her response to the Court’s question. The Commission is the vehicle for such infusion of community values, as the Commissioners are volunteers from the community.

The Court Monitor is not well equipped to think about and implement policy changes about how racial bias/racial profiling/race discrimination cases are being investigated by IAD, for instance. DGO M-19, the Department’s policy prohibiting racial bias, has not been updated since 2004. This dated policy prevents IAD and the Community Police Review Agency from holding officers to a standard reflective of present-day community expectations. Another example, when presented with a request to monitor matters of importance to the community, the Court Monitor declined to investigate the Bey matter that the Commission believes is related to the Task 5 and the heart of the *Delphine Allen* case (alleged police misconduct and racial and religious profiling of the Black and Muslim communities).

Other Consent Decrees/Settlement Agreements That Have Transitioned to Community Oversight Entities

Courts have historically transitioned oversight from a court monitor to a civilian oversight agency of several city police departments.

When U.S. District Court Judge Gary Allen Feess terminated Los Angeles Police Department's consent decree, he granted primary oversight responsibilities to the Los Angeles Police Commission (a five-member civilian oversight board) and the Office of the Inspector General.ⁱⁱ Judge Feess granted a motion for a transition agreement to phase out the consent decree and oversight of the court monitor. Under a recent joint motion to approve a compliance agreement, the U.S. Department of Justice agreed to transition oversight of the Seattle Police Department from the court monitor to the Office of the Inspector General as the city's police department began to transition out of federal oversight while calling on the court monitor to assess the Community Police Commission's capacity to provide accountability for the Seattle Police Department.ⁱⁱⁱ When the federal government's consent decree with the Detroit Police Department terminated, U.S. District Court Judge Avery Cohen noted the importance of the eleven-member Detroit Board of Police Commissioners and that it should continue as a civilian oversight board dealing with complaints.^{iv}

Culture Change in OPD

The Court asked two major questions: what needs to happen to create culture change in the Department, and how can court oversight support such efforts.

The Commission has taken several actions, including approving the policy recommendations by the outside investigation firm Clarence Dyer Cohen ("CDC"). Additionally, since the April hearing and Court Order, the Commission has engaged in several in-depth discussions around the Court's question of culture change.

To set direction about ongoing reform efforts, the Commission had established an NSA Tasks 5 & 45 Ad Hoc Committee of Commissioners and featured community members earlier this year. In the Commission's March 30, 2023 NSA Memorandum filed with the Court in April, it identified four culture change issues:

- Chain of Command Instilling a Fear of Insubordination If Subordinate Officers Speak Up
- Lack of Distributed Leadership and Accountability at OPD
- Availability of Mental Health Services and Support for Sworn Officers
- OPD Officer Perception of Alleged Favoritism in Discipline

The Commission continued this ad hoc committee to deliberate on a response to the Court's question about what is needed to create culture-change in the Department. The ad hoc identified 3 top issues for culture-change, which is elaborated further in a second, follow-up NSA Memorandum (Exhibit 2). The ad hoc committee also conducted public meetings for public feedback on the NSA Memo, and the exhibit reflects those public sentiments.

- Acknowledge bad past practices and their lessons.
- Strengthen discipline for a culture of accountability, including making modifications to the Discipline Policy/Matrix (also mentioned in March 30, 2023 NSA Memo)
- Foster ethical leadership through a culture-shaping initiative for low- to mid-level managers (also mentioned in March 30, 2023 NSA Memo)

We hope that the Court recognizes that through the Commission, there is a formal public/community voice perspective to the NSA for the court to consider.

To answer the Court's questions, for all the aforementioned reasons, the Commission recommends the following three major steps that the Court could take to support organizational culture change in OPD: 1) Partnership with Court Monitor and Commission, 2) Plan for transition to community oversight, and 3) Process improvement of current NSA/court oversight efforts.

I. Recommendation One: PARTNERSHIP - Order a Partnership Between the Court (with the Court Monitor/IMT) and Commission (with OIG/CPRA).

Below are possible immediate actions that the Court could order the Court Monitor to take to establish a partnership with the Commission related to its four main functions (community-input, investigation, policy recommendations, and auditing):

- The Court Monitor accepts the Commission's invitation for the Court Monitor to regularly present to the Commission in closed and open sessions.
- The Court Monitor provides the Commission with drafts of the court monitor reports before filing (giving the Commission an opportunity to respond whether it is in agreement or not with Monitor's assessment).
- The Court Monitor, IMT, and IAD should coordinate with CPRA on all investigations (especially ones by outside investigators and serious incident matters including ones involving the police chief and other senior command officers).
- The Court Monitor/IMT should collaborate with OIG on auditing & policy recommendations.

Currently, there is no formally required communication between the Court Monitor and his team with the Police Commission and its agencies (Office of Inspector General & Community Policing Review Agency). Such partnership would have given the Court the ability to gain an alternative perspective from the community (versus the Court Monitor and investigating firm that are not from the community). For instance, the Court Monitor initiated an outside investigation that resulted in the former police chief being placed on administrative leave (without notifying the Commission for an opportunity to conduct a parallel investigation – knowing that the outside investigation would have major impact on NSA compliance findings). The outside investigating firm also put forth policy recommendations without input from the Office of the Inspector General that is tasked to provide policy recommendations.

The result we witnessed this year is a Court Monitor being questioned by the community through protests and rallies such as ones held by the NAACP Oakland Chapter. It is an understandable sentiment: 1) this is the third time the city was nearing exiting the NSA when an issue brought it out of compliance, 2) the former police chief's administrative leave (or that he was even implicated in the outside investigation in the first place) was a surprise to many people including the Commission, and 3) still today, there is a serious lack of transparency and communication by the City and Court Monitor team in disclosing to the Commission critical information about the cases.

Furthermore, it is within the best interest of all parties for the Court Monitor to partner with the Commission in order to, minimally, avoid incongruent findings and recommendations between the Court Monitor and CPRA, and between the Court Monitor and OIG.

For instance, had the Commission known in advance that a serious matter was involved and then ordered CPRA to conduct a parallel investigation within the POBAR timeframe, what would happen then if CPRA had a different finding and discipline recommendation than from ones made by the outside investigation firm? The Court Monitor/Compliance Director signed and approved the CDC's findings. Under the Charter, the Commission would be the one adjudicating and may conclude differently from CDC's findings. The Commission invoked its Charter authority under Section 604(g)(5) to conduct a discipline committee to review the CDC findings since CPRA would not have been able to start and complete an investigation within the POBAR timeline. Although the Mayor's dismissal without cause of the former police made our process moot, what if the Commission had found that the findings against the former police chief were unfounded or not risen to the level of discipline set forth by the Court Monitor/CDC? Under the City's laws, the Commission's adjudication would be final. How would the court rule?

What if the OIG's policy recommendation to the Commission differed from CDC's policy recommendations? Who should the department listen to? The voters of Oakland overwhelmingly voted for Measure LL and Measure S1 which revised the City Charter to include the Office of the Inspector General. The City Charter states that the Inspector General (who reports to the Commission) "shall audit the Department's compliance with the fifty-two tasks described in the Settlement Agreement in United States District Court case number C00-4599, Delphine Allen, et al. v. City of Oakland, et al., and make recommendations to the Department, the Commission, and the City Council based on its audit(s), *even after the Settlement Agreement expires (emphasis added)*." Had there been a partnership between the Court Monitor and the Commission, the policy recommendations by CDC would have been vetted with OIG so OIG could make recommendations to the Commission on whether CDC's policy recommendations were warranted and should there be other policy recommendations.

II. Recommendation Two: PLAN - Order Court Monitor to Work with Parties, in Partnership with Commission, to Develop Plan to Transition to Community Oversight.

Transitioning from court oversight to community oversight can be challenging, especially considering that the City has been only used to court oversight for more than two decades. Also, the community oversight body is relatively new and is deemed as one of the more innovative police reform structures in a country that is still struggling to find systemic solutions to police brutality and racial profiling.

Nevertheless, court oversight must end at one point (whether in the near or distant future), and it is within the best interest of all parties to plan for that inevitability.

The Court should consider ordering the Court Monitor to work with the parties (City/OPD and Plaintiffs' Counsel), in partnership with the Commission, to develop a transition

plan that includes a timeline, staged process, and budget. The transition plan does not mean exiting the NSA. Even while there is court oversight, there still needs to be a transition plan that could be immediately implemented once the court declares full compliance and the City exits the NSA. That plan may span a number of years and can be implemented earlier if the City is in compliance earlier.

Currently, court oversight is costing the city approximately \$1 million per year in direct payments to the Court Monitor and his team, untold time and resources of police officers on litigation processes versus police work, and unnecessary attention on matters that do not matter to the community or actually advance constitutional policing. The financial resources going to individuals and entities outside of Oakland could be better spent on community oversight where the investment would stay in Oakland and have an aggregate, capacity-building effect that would more likely help the department stay in compliance and not relapse once court oversight ends.

III. Recommendation Three: PROCESS IMPROVEMENT - Enhance “Utility of Court Oversight” (Court Mediates with City/OPD and Plaintiffs’ Counsel to Amend NSA: Set End Date, Clarify/Renegotiate Compliance Standards, and Establish Selection Process for New Court Monitor).

When the Negotiated Settlement Agreement was entered into in 2003, it had stated an end date of 5 years with the possibility of an extension for 2 years – total of 7 years. It is now more than 20 years and there is no end in sight. We suggest parties get back to the negotiation table with the Court as a mediator to set an end date to the NSA. This may include clarifying the compliance standards the parties previously set, including what constitutes sustainability.

During the past few months, the inner-workings and decision-making authority of the Court Monitor/Compliance Director have unnecessarily destabilized Oakland’s police department leadership. Even plaintiffs’ counsel in the April court filing stated that it did not agree with all of the findings by CDC because “some of the findings were not supported by direct evidence.”^v

The Commission anticipates identifying police chief finalists for the mayor to choose next month (October), per Oakland City Charter Section 604(b)(10). During the five community fora that the Commission conducted last month to seek community input as to the qualities the community wishes to see in the next police chief, community members also talked about the NSA and court oversight and expressed discontent with the Court Monitor. Will the new police chief really be able to lead the department, when the Court Monitor in his dual role of Compliance Director also makes personnel department hiring decisions and policy approvals?

The Commission recognizes that there are community members who want continued court oversight and more police accountability. There are also many people in Oakland, including the NAACP Oakland Chapter and public members at Commission meetings, who also want police reform, but have expressed concerns about the NSA and court oversight, and they have lost confidence in the impartiality of the Court Monitor. Even before the dismissal of former Police Chief Armstrong this year, the community through the Reimagining Public Safety Task Force wanted to “determine feasibility of the Commission filling Warshaw’s Compliance

Monitor role” and had strong views about the Court Monitor.^{vi} In the Task Force report, there was a specific recommendation (No. 3) “consider requesting Judge Orrick implement a separate monitor and compliance director in effort to speed up compliance process.”^{vii}

Until the NSA ends, the parties should reconsider the role of the Court Monitor and insist that the Court Monitor practice the principles set forth by the U.S. Department of Justice as explained below: not overseeing other cities, short-term, and community engagement (including visiting Oakland and working closely with the community oversight body, the Commission). Since the current Court Monitor does not practice these principles, we also suggest that the Court select a new Court Monitor through a transparent, competitive process that is aligned with community values and in collaboration with the Commission and the parties. The selection process should lay out the job duties and competencies expressed by the community, including demonstrated ability and experience in working on racial profiling/discrimination/bias issues – which was the origin of the NSA in the first place.

The Commission recognizes that the NSA is a negotiated settlement agreement between plaintiffs’ attorneys and the City/OPD. The Commission recommends that the Court mediate with the parties a revised NSA to take into consideration community sentiments and possible barriers to compliance with the current Court Monitor and the current structure of both a Compliance Director (serving almost like a shadow police chief) and a Court Monitor. The parties may want to reconsider the combination of a “Compliance Director” and a “Court Monitor” in one person.

A. Department of Justice Standards on Court Monitoring

The United States Department of Justice has published a guide in 2021⁸ that provided the basis for federal standards and recommendations for the use of court monitors in civil settlement agreements and consent decrees.^{viii}

First, monitors must also be accountable to the court, parties, and public. Specifically, the court should solicit input from the parties and the public as to the monitor's performance, cost-effectiveness, provision of technical assistance (if any), and engagement with the community, and then evaluate before determining whether to continue with the current monitoring team. Such monitors should be subject to term limits that can be renewed only through judicial evaluation and judicial reappointment, with evaluation taken from the public as well. The DOJ recommends a term limit of only two to three years as monitor before consideration of appointing a new monitor or reappointing the current monitor.^{ix} Mr. Warshaw has served as the Independent Monitor since 2010. In addition to that role, he has also served a dual role as Compliance Director since February of 2014.

Additionally, monitors should be designed to minimize the cost to jurisdictions, which the Department of Justice stated could be accomplished using partnerships with nonprofit organizations that could serve as the monitor, on the monitoring team, or facilitate the overall goals of the consent decree.

The DOJ also noted that sustained, meaningful engagement with the community is critical to the success of a monitorship.^x The court should select monitors who will prioritize stakeholder input and require them to seek consistent local feedback. Unlike the Court Monitor who lives out of state and has not visited Oakland in the past four years, the Commission is in a much more prime position to garner feedback from city residents and understand the needs underlying the residents' feedback.

Further, the DOJ recommended that one who participates as a lead monitor on one team should not participate as a lead monitor on another.^{xi} Mr. Robert Warshaw currently serves as a court monitor for both the OPD and the Maricopa County Sheriff's Office.

Most significantly, the DOJ recommended that monitorships should be structured in a manner so as to shift the responsibility for monitoring to the agency or oversight entities within the jurisdiction to demonstrate sustained compliance.^{xii} The DOJ noted that success of a consent decree should be measured by the jurisdiction's ability to engage in reform and monitor itself. Pursuant to these standards, the court should consider allowing the Commission to partially or completely take on the role of monitor should the Department not be deemed to have complied with all tasks. With adequate support from the Court and the City as suggested in the aforementioned transition plan, the Commission can serve as a court-monitor and work with department to engage in reform – as mandated by the voters of Oakland.

B. Court Monitor's Inconsistent Application of Compliance Standards for Tasks 5

The parties should clarify or reconsider the standards of compliance for Task 5 where the Court Monitor has identified as out-of-compliance, specifically the compliance standards for sub-tasks 5.18 and 5.19.

The parties originally agreed to a compliance standard of 90% and 95% respectively for these sub-tasks. These sub-tasks appear to be sub-tasks for which OPD is struggling to maintain compliance, according to the Court Monitor. The Court Monitor found OPD to have been in compliance with Task 5 in its First Sustainability Period Report (October 2022), noting that the monitor did not disagree with any findings of the department's internal investigations, even if it had procedural concerns regarding only a couple of the sample cases in the report.^{xiii}

However, since CDC published its investigation findings in December 2022, a shift in the Court Monitor's report also occurred. In the Second Sustainability Report (December 2022), all sub-tasks were deemed to be in-compliance.^{xiv} The monitor did not disagree with any of the findings of the sampled cases reviewed per sub-task 5.19, but Task 5, this time, was found to be not in compliance. In the Fourth Sustainability Report (June 2023), the monitor also did not disagree with the conclusions of any cases reviewed under sub-task 5.19 and only took concern with procedural issues, yet Task 5 also received a finding of not in compliance – despite having a similar review in the First Sustainability Report where it was found to be in compliance.^{xv} In only the Third Sustainability Report (filed April 3, 2023) and the latest Fifth Sustainability Report (filed September 14, 2023 for this upcoming Case Management Conference) did the monitor demonstrate that sub-task 5.19 fell below the 95% and therefore, Task 5 to be out of compliance.

A clarification of the standards for these sub-tasks is not being suggested for the purpose of just making it easier for the OPD to meet compliance. Rather, it needs to be made clearer as to what standards are being measured and their consistent application, and what actions or events cause compliance to fall below the required agreed upon standards.

If it turns out that meeting these agreed upon compliance standards is not sufficient to be in compliance with the NSA and the real consideration is the Court Monitor’s subjective assessment of department culture in general, then such statement should be made clear to the public. The Commission would be willing to provide the Court with a monitor-like report on our assessment of department culture that is grounded in and defined by community values.

The Commission has a strong desire for OPD to operate in a constitutional reformed manner and achieve full NSA compliance. These recommended improvements to the current court oversight process could greatly increase that likelihood.

In Summary

The Court has asked what it takes to create organizational culture change in OPD, and the Court has asked how it could help support that culture change while questioning the court’s own utility in doing so. The best way for the Court to support such culture change is to help the parties reach a revised agreement that transitions such oversight to community oversight. And in the meantime, the Court should re-evaluate whether the compliance standards are actually being applied accurately and fairly and whether a new Court Monitor and team are needed to help monitor compliance.

ⁱ Oakland Reimagining Public Safety Taskforce Report and Recommendations, p. 15 and p. 220

ⁱⁱ United States v City of Los Angeles, TA Order, July 17, 2009 p. 3

ⁱⁱⁱ United States of America v. City of Seattle, Joint Motion to Approve Compliance Agreement, p. 2

^{iv} United States v City of Detroit, Comments of Court (Revised) on Order Terminating Consent Judgement and Entering Transition Agreement (Doc. 731) p. 3

^v Allen, et al v City of Oakland, Joint Case Management Statement, Apr. 11, 2023 p. 8

^{vi} Oakland Reimagining Public Safety Taskforce Report and Recommendations, p. 182

^{vii} Id. at 182.

^{viii} “Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Governmental Entities” (Memorandum for Heads of Civil Litigating Components United States Attorneys, From Attorney General Merrick Garland, September 12, 2021).

^{ix} Id. at 5.

^x Id. at 7.

^{xi} Id. at 5.

^{xii} Id. at 9.

^{xiii} First Sustainability Report, October 2022

^{xiv} Second Sustainability Report, December 2022

^{xv} Fourth Sustainability Report, June 2023