



OAKLAND POLICE COMMISSION

MEETING AGENDA

May 9, 2019

6:30 PM

City Council Chamber, 3rd Floor
1 Frank H. Ogawa Plaza, Oakland, CA 94612

- I. **Call to Order**
Chair Regina Jackson
- II. **Roll Call and Determination of Quorum**
Chair Regina Jackson
- III. **Welcome, Purpose, and Open Forum** (2 minutes per speaker)
Chair Regina Jackson will welcome and call public speakers. The purpose of the Oakland Police Commission is to oversee the Oakland Police Department's (OPD) policies, practices, and customs to meet or exceed national standards of constitutional policing, and to oversee the Community Police Review Agency (CPRA) which investigates police misconduct and recommends discipline.
- IV. **Pawlik Investigation Update**
The Commission will discuss CPRA's recent findings on the Pawlik investigation. Karen Tom and Joan Saupe will review the process. ***This is a new item.*** ([Attachment 4](#))
 - a. Discussion
 - b. Public Comment
 - c. Action, if any
- V. **Personnel Committee Update and IG Position Update**
The Personnel Committee will provide an update from its meeting on May 6, 2019. The Committee will also provide an update on the status of the Inspector General position. ***This was discussed on 9.27.18, 10.11.18, 1.24.19, and 4.11.19.*** ([Attachment 5](#))
 - a. Discussion
 - b. Public Comment
 - c. Action, if any
- VI. **Bey Update and Discussion**
The Commission will discuss the status of the issues such as hiring an outside investigator raised by the Bey brothers. ***This was discussed on 9.13.18, 10.11.18, 4.11.19, and 4.25.19.***
 - a. Discussion
 - b. Public Comment
 - c. Action, if any
- VII. **Performance and Financial Audit of Police Commission and CPRA**
City Auditor staff will discuss the Police Commission and CPRA audit required by City Charter section 604(a)(4). ***This is a new item.***
 - a. Discussion
 - b. Public Comment
 - c. Action, if any

VIII. Meeting Minutes Approval

The Commission will vote to approve the revised meeting minutes from March 28 and April 11, 2019. *This is a recurring item.* ([Attachments 8a, 8b](#))

- a. Discussion
- b. Public Comment
- c. Action, if any

IX. R-02: Searches of Individuals on Probation and Parole

The Commission will review an amended version of R-02: Searches of Individuals on Probation or Parole, and will discuss the status of collaboration with OPD. *This was discussed on 1.24.19, 3.14.19, 3.28.19, and 4.11.19.* ([Attachments 9a, 9b, 9c](#))

- a. Discussion
- b. Public Comment
- c. Action, if any

X. Oakland Black Officers Association (OBOA) Letter

The Commission will discuss allegations in the OBOA letter in the Oakland Post suggesting disparate and/or racist implications for OPD hiring and discipline practices, and may hear from a representative on behalf of the OBOA. *This was discussed on 4.11.19 and 4.25.19.* ([Attachment 10](#))

- a. Discussion
- b. Public Comment
- c. Action, if any

XI. Budgeting Process Overview and Review of CPRA and Commission Budgets

Finance Department staff will provide an overview of the City's budgeting process and will also guide the Commission through a review of CPRA and Commission budgets. *This is a new item.* ([Attachment 11](#))

- a. Discussion
- b. Public Comment
- c. Action, if any

XII. OPD Budget Review

OPD staff will present the Department's budget for the Commission to review. *This is a new item.* (<https://www.oaklandca.gov/documents/fy-2019-21-proposed-budget>)

- a. Discussion
- b. Public Comment
- c. Action, if any

XIII. Pro Bono Legal Services Agreement

The Commission will discuss and review an agreement from Henry Gage, III for pro bono legal services that was approved by the Personnel Committee, and may vote to approve the agreement. *This is a new item.* ([Attachment 13](#))

- a. Discussion
- b. Public Comment
- c. Action, if any

XIV. Report from Ad Hoc Committee on CPRA Appellate Process

The Ad Hoc Committee on CPRA Appellate Process will present its on-going analysis on a potential appellate process for closed CPRA and/or CPRB cases, if any. ***This was discussed on 9.13.18, 10.11.18, 4.11.19, and 4.25.19.***

- a. Discussion
- b. Public Comment
- c. Action, if any

XV. Committee/Liaison/Other Commissioner Reports

This time is set aside to allow Commissioners to present a brief report on their own activities, including service on committees or as liaisons to other public bodies. No action may be taken as a result of a report under this section other than to place a matter for consideration at a future meeting. ***This is a recurring item.***

- a. Discussion
- b. Public Comment
- c. Action, if any

XVI. National Association for Civilian Oversight of Law Enforcement (NACOLE) Annual Conference

The Commission will discuss and may vote on participation at the National Conference in Detroit September 22-26, 2019. ***This was discussed on 4.25.19. ([Attachment 16](#))***

- a. Discussion
- b. Public Comment
- c. Action, if any

XVII. Agenda Setting and Prioritization of Upcoming Agenda Items

The Commission will engage in a working session to discuss and determine agenda items for the upcoming Commission meeting and to agree on a list of agenda items to be discussed on future agendas. ***This is a recurring item. ([Attachment 17](#))***

- a. Discussion
- b. Public Comment
- c. Action, if any

THE OAKLAND POLICE COMMISSION WILL ADJOURN TO CLOSED SESSION IN CITY HALL BUILDING BRIDGES ROOM, 3RD FLOOR AND WILL REPORT ON ANY FINAL DECISIONS DURING THE POLICE COMMISSION'S OPEN SESSION.

XVIII. Closed Session

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

Title: Chief of Police

Gov't Code § 54957(b)

XIX. Oral Report of Disclosable Final Decisions Made During Closed Session

- a. Report of disclosable final decisions, if any
- b. Public Comment

XX. Adjournment



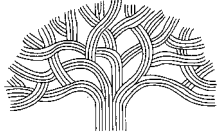
This meeting location is wheelchair accessible. To request disability-related accommodations or to request an ASL, Cantonese, Mandarin or Spanish interpreter, please e-mail ktom@oaklandca.gov or call 510-238-7342 or TDD/TTY 510-238-2007 at least five working days before the meeting. Please refrain from wearing scented products to this meeting as a courtesy to attendees with chemical sensitivities.

Esta reunión es accesible para sillas de ruedas. Si desea solicitar adaptaciones relacionadas con discapacidades, o para pedir un intérprete de en español, Cantones, Mandarín o de lenguaje de señas (ASL) por favor envíe un correo electrónico a ktom@oaklandca.gov o llame al 510-238-7342 o 510-238-2007 por lo menos cinco días hábiles antes de la reunión. Se le pide de favor que no use perfumes a esta reunión como cortesía para los que tienen sensibilidad a los productos químicos. Gracias.

會場有適合輪椅出入設施。需要殘障輔助設施, 手語, 西班牙語, 粵語或國語翻譯服務, 請在會議前五個工作天電郵 ktom@oaklandca.gov 或致電 (510) 238-7401 或 510-238-2007 TDD/TTY。請避免塗搽香氛產品。參加者可能對化學成分敏感。

Because some persons are sensitive to certain chemicals, persons attending this meeting are requested to refrain from wearing scented products.

CONFIDENTIAL DOCUMENT



**CITY OF OAKLAND
COMMUNITY POLICE REVIEW AGENCY**

**REPORT OF INVESTIGATION: OIS OF JOSHUA PAWLIK
APRIL 22, 2019**

250 FRANK OGAWA PL *STE. 6302 *OAKLAND, CA 94612 *510-238-3159 *FAX 510-238-6834 *TTY# 238-2007

Complainant's Name: **(5)(B)**, mother of Mr. Joshua Ryan Pawlik, decedent

CPRA Case Number: **18-0249**

Subject Officers: **Officer William Berger #9264
Officer Brandon Hraiz #9285
Officer Josef Phillips #9446
Officer Craig Tanaka #9484
Sgt. Francisco Negrete #8956
Lt. Alan Yu #8605**

Date of Incident: **March 11, 2018**

Statute of Limitations (3304): **TOLLED**

CPRA Investigator: **Joan Saupé**

I. INTRODUCTION

This is the Report of Investigation of a two-part report in the OIS (Officer-Involved Shooting) case of Mr. Joshua Pawlik, in which the facts of each of eight allegations against the subject officers are analyzed to reach a finding for each officer, and training and policy recommendations for OPD are made.

The report is divided into two-parts to stream-line the voluminous information in the case for ease of reference and reading. The other part of this two-part report is a separate document entitled Investigation for Case 18-0249, which contains a summary of the facts, rules, evidence, law, materials and information reviewed in the case, which were reviewed and/or relied upon in making an analysis of the facts and law, and in reaching the findings as to the eight allegations contained in this Report of Investigation.

Section VII of this Report of Investigation, is an analysis of the use of lethal force in general which is applicable to the first four allegations. Section VIII contains the eight allegations against the subject officers individually, the analysis as to each, and the

findings. Section IX contains training and policy recommendations, and an officer commendation.

II. CPRA AUTHORITY TO INVESTIGATE

Measure LL, an Amendment to the Charter of the City of Oakland states in part that the Agency (Community Police Review Agency) shall receive, review and prioritize all public complaints concerning the alleged misconduct or failure to act of all (Police) Department sworn employees (Section F, Investigations). The Measure further states in part, that the Agency shall investigate public complaints that include uses of force. The Agency shall also investigate any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint, as directed by the Commission. The Commission also gave to the Director the discretion to select for investigation any other possible misconduct or failure to act of a Department sworn employee, whether or not the subject of a public complaint.

III. SCOPE OF THE INVESTIGATION

The investigation of this case was generated internally by then-CPRA Director Anthony Finnell. The initial scope of the investigation was into the OIS shooting; namely whether the lethal force in the death of Mr. Joshua Pawlik by Oakland police officers was proper. The investigator also looked into whether the non-lethal force (a beanbag round) used against Mr. Pawlik was proper.

On October 5, 2018, the CPRA received a complaint from (5)(B) Mr. Joshua Pawlik's mother, on his behalf. The complaint was sent by the Law Offices of John L. Burris, Oakland. Her complaint named Officers Berger, Hraiz, Tanaka and Sgt. Negrete as the subject officers, as well as "Holgrem (sic), Roland A." Capt. Holmgren was a part of the CID investigation, and did not participate in the use of force against Mr. Pawlik. He was not on scene at the time the force took place. The complaint did not list any improper action by Capt. Holmgren. Therefore, no CPRA investigation was conducted as to Capt. Holmgren.

Oakland Police Department's Internal Affairs Division (IAD) also named two supervisors as subject officers in its investigation, to determine if they performed their supervisory duties in accordance with Departmental Policies and Procedures. The CPRA Investigator similarly added and reviewed these same allegations.

Finally, IAD added an additional allegation against an officer for failing to advise Communications of his rifle deployment. CPRA additionally added and reviewed this issue.

IV. POSSIBLE FINDINGS AND STANDARD OF PROOF USED FOR REACHING A FINDING

The possible findings as to each allegation are as follows:

Unfounded: The investigation clearly established that the allegation is not true.

Exonerated: The investigation clearly established that the actions of the police officer that formed the basis of the complaint are not violations of law or departmental policy.

Not-sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation made in the complaint.

Sustained: The allegation disclosed sufficient evidence to clearly prove the allegation made in the complaint.

The CPRA standard of proof is a preponderance of the evidence. A “preponderance of the evidence” means that the superior weight of evidence upon the allegations involved, while not enough to be completely free from reasonable doubt, is sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other; it is more likely to be true than not.

V. INVESTIGATIVE STEPS

When this case was assigned to this CPRA Investigator in July 2018, the only materials available were PDRDs and scene photos. It was not until January, 2019 when Internal Affairs informed the CPRA that OPD’s CID (Criminal Investigations Division) homicide investigation was completed, that the CPRA could start to obtain the rest of OPD’s materials to begin the full investigation at the end of January, 2019.

The Investigator’s steps included independently researching and reviewing materials: the law pertaining to issues in this case; reviewing OPD’s applicable rules and training materials; reviewing and summarizing all interviews in the case; reviewing and summarizing all Crime Reports; reviewing all agency reports; reviewing and researching internet information; reviewing and summarizing all the PDRD videos of all the officers on scene. One interview was conducted. Further interviews were not conducted due to concerns as to the reliability of the information given the time that has passed. The materials reviewed are set forth in the second part of this Report of Investigation, in a document entitled “Investigation for Case 18-0249.” From relevant parts of these materials, the pertinent facts were obtained to formulate the analysis of the allegations in this case. The Report of Investigation was submitted to the CPRA Director on April 22, 2019 for review and approval.

VI. BACKGROUND

On March 11, 2018, a 911 call was made about 1817 hours (6:17 p.m.) by Oakland resident [REDACTED] (5)(B) who was out walking his dog regarding a man (later identified as Mr. Joshua Pawlik) passed out between two houses located between 922 and 928 40th Street, which is a residential neighborhood. The man was described as having a gun in his hand. The weather was clear and dry, and it was still daylight outside.

Oakland Police Officer Josef Phillips was the first officer to arrive on scene. He observed a man lying in the side yard as described. Officer Phillips stepped onto the porch of 928 40th Street to get a closer look at the man. Officer Phillips radioed in that the man was a male Hispanic, 20's, black hoodie, white shirt and blue jeans. Officer Phillips reported that the man looked like he was under the influence of 922 (drunk on the street). He reported the man had a small, semi-automatic in his right hand. Officer Josef Phillips waited for back-up, and did not engage the man.

The next officer on scene was OPD Sgt. Herbert Webber, who arrived on scene in his OPD vehicle with with lights and sirens. He blocked the west-bound entrance to 40th Street, which is a divided street. Sgt. Webber went up to Officer Phillips, who was behind his OPD-marked SUV. Sgt. Webber reported that he had less-lethal (less-lethal shotgun). Officer Phillips' SUV was parked in front of the walkway area of the two homes in the street. Sgt. Webber stated that the subject appeared "not to be aware of our presence."

At approximately 1829 hours, (6:29 p.m.), OPD Sgt. Francisco Negrete (an OPD SWAT member), along with Patrol Rifle Officers (PRO) Officer Brandon Hraiz and Officer William Berger arrived in response to a radio call of a man with a gun. All three had AR-15 rifles. Officers Hraiz and Berger were assigned as lethal cover by Sgt. Negrete. Officer Phillips was assigned as less-lethal beanbag, and was given Sgt. Webber's less-lethal shotgun (holding beanbag rounds). Officer Berger was initially positioned to the right behind a small pick-up parked at the curb. Officer Hraiz and Officer Phillips were originally behind Officer Phillips' SUV. The BearCat, OPD's armored vehicle, was requested by Sgt. Negrete to come quickly to the scene. Officer Craig Tanaka, another PRO, drove the BearCat to the scene and also brought his AR-15 rifle. The decision by Sgt. Negrete was made not to attempt to wake the man until the BearCat arrived to provide better cover for the officers. Later, OPD Officer Julie Yu arrived and acted as lethal cover for Officer Berger. Officers were set up around the perimeter, and potentially directly-affected homes nearby were ordered to be evacuated.

While waiting for the BearCat, Sgt. Negrete discussed his plans with Officers Berger, Hraiz and Sgt. Webber for taking the man into custody. He stated once the BearCat gets here we're going to do some announcements, Code 3, siren, announcement, Code 3, siren; If there's no response, we're going to thump him with the beanbag. If there's a response, we're going to challenge him. We're going to bring him back to the BearCat, handcuff him, obviously unarmed. Once we thump him, then we're probably going to go to a Taser. We'll have someone stand up there with a Taser, and come

down and Tase him. If that doesn't work, then we'll finally come up with a shield or two.

Lt. Alan Yu arrived on scene, and took the role of the Incident Commander, but stayed on the south side of the divided street. Lt. Yu made Sgt. Negrete supervisor of the DAT. Sgt. Negrete discussed his plans with him.

No Crisis Intervention trained officer (CIT) was incorporated into any contingency planning. The Tactical Operations Team was not called for assistance. No Spanish-speaking officer was called to the scene, though Officer Phillips thought the subject could be Hispanic.

In the interim, officers noted Mr. Pawlik breathing and swallowing. Sgt. Mark Rowley arrived on scene, and obtained Officer Berger's binoculars. Sgt. Rowley noted that "the gun is pointed kind of in our direction."

The BearCat arrived at 1903 hours (7:03 p.m.). The SUV was moved, and Officer Tanaka placed the BearCat in a canted position where the SUV had been, as directed by Sgt. Negrete. Officer Tanaka shut off the engine, and got out of the BearCat. Officer Tanaka, not assigned a role by Sgt. Negrete, took a spot on the passenger side of the BearCat railing with his rifle as lethal cover. Officer Berger moved over to the passenger side of the BearCat. Officer Hraiz positioned himself in the turret. Sgt. Negrete's position was on the front passenger side of the BearCat. Officer Phillips was also on the passenger side of the BearCat. Sgt. Webber moved into the BearCat PA system as announcer.

Within seconds of the BearCat's arrival, someone yelled out, "hey movement." What occurred next can be seen because Sgt. Webber had placed his PDRD on top of the BearCat. The other officers' PDRDs do not show Mr. Pawlik's movements.

Commands were given to Mr. Pawlik. Those commands, along with Mr. Pawlik's actions, as seen and heard on Sgt. Webber's PDRD, with the timeframe denoted so that the amount of time can be understood, are as follows:

24:16 Someone yells, police don't move. Put your hands up.

24:18 Someone yells, hands up. Mr. Pawlik can be seen lifting his head. His head is on the left side. His face is facing towards the officers.

24:22 Someone says, get your hand off the gun. Mr. Pawlik's head is still raised.

24:24 Mr. Pawlik's head is raised even higher.

24:25 Someone yells, hey, do not move.

24:29 Someone yells, get your hand off that gun young man. Mr. Pawlik's head bobbles a bit.

24:32 Mr. Pawlik's head goes up higher. Someone says, get your hand off the gun.

24:36 Mr. Pawlik's head lowers a little bit more. Someone yells, get your hand off the gun.

24:39 Officer Julie Yu on the PA (Public Address system—a loudspeaker) says, get your hand off the gun.

24:42 Officer Berger yells in flawed Spanish, "suerta la pistol" (let go of the gun; suelte la pistol is the correct term; Officer Berger says it wrong in Spanish, but perhaps close enough to understand if the subject was a Spanish-speaker).

24:49 Officer Berger says to Officer Phillips, if that gun moves—bag him. Someone else says yep.

24:56 Someone yells, get your hand off the gun. Mr. Pawlik's head is still raised.

25:00 Mr. Pawlik appears to be trying harder to sit up now. He may have been trying to push off on elbow (Cannot see detail of the gun). Someone says, get your hand off the--. Firing immediately commences.

25:01 Mr. Pawlik falls backwards and is down. It appears his right arm flings back as he is falling.

25:03 Firing stops.

Officers thereafter got a shield, and approached Mr. Pawlik. First aid was commenced immediately, and medical (an ambulance) which had been positioned nearby arrived. Mr. Pawlik was pronounced dead at the scene.

The officers at the scene who fired weapons were determined to be Officers Berger, Hraiz, Tanaka, and Sgt. Negrete. Officer Berger fired six rounds, Officer Hraiz fired five rounds, Officer Tanaka fired four rounds, Sgt. Negrete fired seven rounds, and Officer Phillips fired one beanbag round.

VII. GENERAL ANALYSIS OF THE USE OF LETHAL FORCE

A. Whether Officers Had the Right to Detain Mr. Pawlik and the Method of Detention

The circumstances leading up to this deadly use of force began when the Oakland Police Department (OPD) was notified through a 911 Fire Dept. Communications call from a passerby, that there was an unknown man (later identified as Mr. Joshua Pawlik) asleep or unconscious on a lawn/walkway area between two homes in a heavily residential neighborhood and facing towards 40th Street which has two lanes of traffic in each direction, with what looked like a gun in his right hand during the day time. OPD Officer Josef Phillips responded to the scene, and confirmed the facts as called in. He

radioed in that the unknown subject, "has a small, semi-automatic in his right hand." As such, Mr. Pawlik presented a possible danger to the public and the police. There was reasonable suspicion for the police that he was in violation of several possible laws: California Penal Code section 26350 which makes it a crime to openly carry an exposed unloaded handgun in a public place; section 25860 which makes it a crime to carry a loaded firearm in a public place; possibly California Penal Code sections 647(e), for lodging in place, whether public or private, without the permission of the owner or person entitled to the possession or control of it; or California Penal Code 647(f), for a person who is found in any public place under the influence of intoxicating liquor, or any drug, etc. Therefore, the police had the right to detain Mr. Pawlik.

However, detaining Mr. Pawlik involved danger to the police and the public since Mr. Pawlik had a gun in his hand and could wake and potentially start firing it at any moment. Officers have the legal right to take necessary actions for officer and public safety.

Per OPD training, the first officer on the scene when encountering a person with a gun (a high-risk incident response/high-risk arrest/crimes in which innocent bystanders are in danger) is to call for back-up and assess the scene. They are not to take steps to force an incident to a conclusion. OPD Officer Josef Phillips did that; He radioed a physical description of the subject; reported it looked like the subject was under the influence of 922 (drunk on the street); and that he had a small, semi-automatic in his right hand. The second officer on scene was OPD Sergeant Herbert Webber. Sgt. Webber used his vehicle to block some traffic, and took cover with Officer Phillips while observing the subject, while other officers arrived on scene and a plan for the detention and arrest of the subject by the DAT (Detention and Arrest Team) was formulated by OPD Sgt. Francisco Negrete, who was assigned as the supervisor by OPD Incident Commander Lt. Alan Yu, and who also approved the plan.

Pursuant to the plan, OPD police officers closed off 40th Street to traffic and pedestrians, set up a perimeter, evacuated nearby homes as needed and possible, assigned lethal (AR-15 rifles) and non-lethal cover (Taser/beanbag rounds), and established cover for the officers observing the subject—initially behind Officer Phillips' patrol vehicle and a pick-up truck parked at the curb, and later behind OPD's BearCat, an armored vehicle which among other things, allowed the officers better protection from any bullets should the subject awake and fire his weapon. Cover behind an armored vehicle provides superior coverage as unlike a regular vehicle, bullets from a handgun cannot penetrate it. However, officers' heads and some of some officers' extremities were still exposed while observing Mr. Pawlik.

The plan was to take Mr. Pawlik into custody peacefully. Basically, the initial plan was to wake Mr. Pawlik after the BearCat arrived on scene. The plan was first to wake Mr. Pawlik verbally. If Mr. Pawlik did not wake up with the verbal announcements, the plan was to wake him with loud noises (not specified), and then to use physical means (a beanbag round to the legs). Finally, if that did not work to wake him, the plan was for officers to approach him behind shields and physically remove the gun. Once the subject was awake, he was going to be "challenged" per Sgt. Negrete. What exactly Sgt. Negrete meant by "challenged" isn't clear as heard on his PDRD (Portable Digital

Recording Device), but Sgt. Negrete did say if the subject was not compliant, "he's going to get thumped right away" to whom is believed was Officer Phillips (Negrete PDRD/3:27), which means Mr. Pawlik would get hit with a beanbag. The plan to take Mr. Pawlik into custody was not carried out as Mr. Pawlik woke up on his own, moments after the BearCat was positioned into place, and he began to move. Once Mr. Pawlik started moving, commands were given by multiple police officers.

B. Whether Officers Used Proper Verbal Commands Before Resorting to the Use of Physical Force

OPD officers pursuant to DGO K-3, are taught verbal commands are the minimum means of halting an offense, gaining compliance or overcoming resistance. Officers are taught that verbal commands shall be courteous, and clearly relay the police objective. To the extent possible and without ever compromising safety, members are required to use verbal commands to accomplish the police objective before resorting to physical force.

The officers gave contradictory orders initially when Mr. Pawlik woke up. An officer did immediately yell, "Police, don't move!" However, the next orders by officers that followed were contradictory and given by multiple officers. The next order was, "Don't move, put your hands up." Putting hands up and not moving are contradictory to each other. Mr. Pawlik, if he had put his hands up at that time, could have resulted in Mr. Pawlik raising the gun in his right hand also which is inconsistent with the order, don't move. Raising of his hands could have resulted in officers thinking he was a threat, and firing at him. This contradictory order was repeated. However, Mr. Pawlik did not raise his hands or hand at that time. For the next 27 seconds preceding the use of force only one order was given, and that was "hands off the gun" five times (six with Spanish, which we don't know if Mr. Pawlik understood or not).

C. The Rules and Law Regarding the Right of an Officer to Use Force and Lethal Force

Mr. Pawlik did not respond verbally to the officers' commands, nor are there any facts or video evidence that Mr. Pawlik ever took his hand off the gun he had. Rather, while the commands were being given, Mr. Pawlik looked in the direction of the officers, and his head bobbed several times. Mr. Pawlik started to sit up. He went back down. This happened three times. On the fourth time, Mr. Pawlik tried to sit up further. It appears that Mr. Pawlik may have been pushing off with his right arm to help get up. Per the officers' post-shooting statements, when Mr. Pawlik sat up, he raised the pistol at them. It was at this point Officers Tanaka, Hraiz, Berger and Sgt. Negrete used lethal force by firing their rifles, and Officer Phillips fired a less-lethal bean bag shot, all within 2.3 second's time.

The rule for OPD officers regarding use of force, and the standard that the officers are trained on, is found in OPD's Departmental General Order (DGO) K-3, "Use of Force"

policy. DGO K-3, states that, "Reasonable force is that amount of force that is objectively reasonable to affect a lawful police purpose and protect the safety of members or others based upon the totality of the circumstances."

Force must also be analyzed under the Fourth Amendment's objective reasonableness test. The application of this test requires an analysis of the totality of the circumstances, including these factors to determine if the seizure is reasonable: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of law enforcement officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The determination of reasonableness is not based on the 20/20 vision of hindsight.

Under DGO K-3, Section II." Force Considerations," sub-section B., "Immediate Threat", an immediate threat is considered to exist if a suspect has demonstrated actions that would lead one to reasonably believe that the suspect will continue to pose a threat of death or serious bodily injury if not apprehended without delay.

A person is an immediate threat if the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated.

Per DGO K-3, Section II, "Force Considerations," Subsection E., "Lethal Force," lethal force is defined as any force that creates a substantial risk of causing death or serious bodily injury. A member may use lethal force to protect themselves or others when the member objectively and reasonably believes that his/her life, or the life of another, is in immediate danger of serious bodily injury, based upon the totality of the facts known to the member at the time.

Lethal force includes, but is not limited to, the discharge of a firearm with lethal ammunition. Lethal ammunition is ammunition that, by design and application, is intended to cause serious bodily injury or death.

D. Review of Evidence In Regards to the Use of Lethal Force

Therefore, in determining whether the officers were in compliance in using lethal force on Mr. Pawlik pursuant to K-3 and the Fourth Amendment, we must look at whether the facts were there that warranted lethal force. It must be determined: Did Mr. Pawlik have a gun in his hand at the time he was shot, and if Mr. Pawlik had a gun in his hand, was it a reasonably perceived immediate threat to the officers and/or the public at the time the officers used lethal force on him?

1. Did Mr. Pawlik have a gun in his hand at the time officers fired on him?

Mr. Pawlik was observed with a gun in his hand at all times up to the time of the fatal use of force, as heard in statements made and conversations heard on OPD officers' PDRDs. There were never any statements made or discussion heard, or any facts to support that the gun was anywhere other than in Mr. Pawlik's right hand at all times.

The gun was first seen by an independent citizen who called 911 and said, "I 'seen' something in the man's hand...it could be a pistol."

Officer Phillips, the first officer on scene, described that Mr. Pawlik had a smaller-sized, semi-automatic in his right hand (Phillips PDRD/:54).

Officer Berger said while looking at Mr. Pawlik, oh yeah, gun just moved, the gun just moved (Berger PDRD/20:25).

Officer Hraiz acknowledged the presence of the gun by saying "yeah," when someone else says it's in his right hand (Hraiz PDRD :17).

Sgt. Negrete is shown a photo Sgt. Rowley took with his phone of Mr. Pawlik with the gun (Sgt. Negrete PDRD/10:45).

Sgt. Rowley looked at the gun through binoculars. He is heard saying when discussing the gun, "that's his hand on top of the kind of trigger/handle area." Sgt. Rowley said the gun is pointed kind of in our direction (Rowley PDRD/3:25).

Officer Julie Yu, who also looked at the gun with binoculars, said the barrel (of the gun) looks "insanely protruding" (Rowley PDRD/8:33). Officer Julie Yu tells Officer Berger, so he's got the base of it (the gun). His thumb's up. He hasn't twitched that hand at all... uh—his thumb is moving. Uh, his thumb is moving. You see his right thumb. It just moved up. It was on the butt of the gun at first—like this flat—and he just picked it up...Do you see how he has it canted like a square. It was down earlier. (Yu PDRD/one of two, 13:47). Officer Yu also commented at one point, "I can barely hold my phone when I fall asleep with it in my hand. He's not letting go" (Yu PDRD/one of two, 26:35).

Officers were yelling after Mr. Pawlik woke up, to put the gun down, indicating their perception he was holding a gun in his hand.

All of the subject officers who used lethal/non-lethal force stated in interviews with the Oakland Police Department CID (Criminal Investigations Division) and Internal Affairs that Mr. Pawlik raised his gun at them prior to the time they fired.

2. If Mr. Pawlik had a gun in his hand, was he reasonably perceived to be an immediate threat to the officers at the time they used lethal force on him?

a) Video evidence as to whether there was an immediate threat

There is only one PDRD/video recording of the shooting. Sgt. Herbert Webber had placed his PDRD on top of the BearCat (and earlier on Officer Phillips' patrol vehicle) facing towards Mr. Pawlik prior to the shooting. The other involved officers had on their PDRDs, but due to their locations behind cover at the time, their PDRDs did not capture the shooting. The Sgt. Webber PDRD video shows important information for

this analysis, but it is not true-to-life size as the officers would have seen the events, it is grainy when enlarged, and per expert analysis, it is not possible to see the movement of the gun.

OPD's Sgt. Ramirez, at the request of CID, Homicide Division, did an analysis of Sgt. Webber's PDRD, and concluded with "a high level of confidence," the following: that the subject was lying on his back in a supine position with his right-hand palm up, with a gun in his hand. As the armored vehicle was put in place, the subject started to move. The subject lifted his head and torso towards the street where the officers were located. It appeared that as the subject was moving to a sitting position, the OIS (Officer Involved Shooting) occurred. Sgt. Ramirez stated there is not enough information to clearly see the gun and/or its exact movement. He did note in the area of the right hand, there were some changes in contrasting areas. The movement was slight, but as shown in the control video, it supported the movement was in an upward position.

CID had an outside agency, Imaging Forensics of Fountain Valley, CA. analyze Sgt. Webber's PDRD video footage. Mr. Reis of that agency has been an expert witness in forensic image analysis, forensic video analysis, and forensic and technical photography through Imaging Forensics. Mr. Reis concluded that due to several factors, resolution, compression, distance from the camera, lighting, and angle of view, discerning if the adult male (Mr. Pawlik) in the PDRD video was in possession of a firearm is not possible. The position of the right hand during the 30 seconds prior to the first shot is not possible for the same reason. However, he stated it is possible to see his overall head movement, some movement of his right arm just prior to the first shot, his overall body position, and some movement of his feet, and possibly his left arm and hand. Given that Mr. Reis is an expert in this field and Sgt. Ramirez is not, Mr. Reis' analysis of the Webber PDRD was considered by the CPRA Investigator as the credible analysis of the two conflicting findings.

The video work accompanying Mr. Reis' work, shows Mr. Pawlik raising and lowering his head four times before he is shot. It is the last time he raises his head that he appears to be making the effort to raise completely. What appears to be his left arm moves twice before the shooting. Mr. Pawlik's right hand movement cannot be discerned, but after Mr. Pawlik is shot, his right arm is thrown backwards as he is falling backwards.

Precision Simulations was hired by Internal Affairs. The videos it produced from the Webber PDRD provide various views in different modes—frame by frame, cropped and enhanced, zoom, no zoom. Likewise, in these videos the movement of the right hand and gun before the officers fired cannot be discerned.

Mr. Pawlik was trying to sit up. It appears to the CPRA investigator in watching the video that Mr. Pawlik may be using his right elbow to help him in trying to sit up.

b) The ability of the officers to see Mr. Pawlik's right hand and his gun in order to determine if there was an immediate threat.

Per measurements taken by OPD following the incident, the involved officers were approximately 37 to 41 feet away from Mr. Pawlik at the BearCat. Officer Hraiz on his PDRD can be heard acknowledging the gun was in Mr. Pawlik's right hand before the shooting, meaning he had the belief that what he was looking at was the gun (Hraiz PDRD starting at :14). Officer Hraiz was positioned in the BearCat turret, and said in his interview that he had a better view from up there.

Officer Berger said multiple times prior to the shooting, that he could see Mr. Pawlik breathing, showing some ability to see detail. He was likely the first person that saw movement right as Mr. Pawlik was waking. Officer Berger is also heard on Sgt. Rowley's PDRD telling Sgt. Rowley where the gun is. Officer Berger says, "it looks like a revolver, in the right, just to the—see his knee here. Right there." However, Officer Berger is also heard on his PDRD asking, "Is that it (referring to the gun) down to our right?" Officer Berger then asks, does he have his hand on it? (Berger PDRD/6:34). Officer Berger says, "I've seen him swallow a few times. It's hard for me to tell from here, but--." At 20:25 on his PDRD, Officer Berger asks Officer Julie Yu, did you look through the binos Julie? Officer Berger asks her, were you able to see, is that his hand on the bottom of the gun? Officer Yu told him yes, and then something about the thumb's up. A short time later Officer Berger says though, "Oh the gun just moved. The gun just moved." In his Internal Affairs interview, Officer Berger said he looked through binoculars he had and "confirmed there was a firearm." However, this was not something Officer Berger mentioned in his first interview, nor is his looking through binoculars seen or verbalized on his PDRD.

Sgt. Rowley looked through the binoculars, and was discussing the gun. On his PDRD at around 3:25, Sgt. Rowley says that gun is pointed kind of in our direction. Who sounds like Officer Berger asks, is that down to our right? Sgt. Rowley says it's to our right. Sgt. Rowley says, so if it was to actually fire from this position it would hit the blue house behind you. Officer Berger asks, does he have his hand on it? Sgt. Rowley says his, uh, something is on it. Because whatever is on it is very, kind of square. It could be his hand. Officer Berger says I've seen him swallow a few times it looks like, it's kind of hard to tell from here. Sgt. Rowley says all right, I can't--he has not moved since I've been watching him. Officer Berger asks, any rise and fall of the chest? Sgt. Rowley says nothing at all. Officer Berger says that's what concerns me. Sgt. Rowley says let me look from this side a little bit more.

Sgt. Rowley moves over where Sgt. Negrete is. Sgt. Negrete asks, is it a revolver or a semi-automatic? Sgt. Rowley says it's a semi-auto. Sgt. Rowley says it's a two-tone semi auto. It looks like it's got a tannish lower and a chrome upper. Sgt. Negrete asks, is he--. Sgt. Rowley says he's not moving. I don't see his chest rising or anything like that, but it's kind of hard to tell. And, uh, yeah, it looks like his hand is right on the handle. And the revolver is pointed—Sgt. Negrete interjects that way—towards that blue house.

Unfortunately, there were important details to be elicited at the time of the initial interviews of the officers immediately following the incident, yet these topics were not thoroughly explored through questioning to the satisfaction of the CPRA Investigator. The officers should have been asked to describe in complete detail what they saw, how

Mr. Pawlik was holding the gun before and at the time of the shooting, the angle of his right arm at all times, the placement of Mr. Pawlik's right hand, the placement of his fingers, how many fingers they saw, if the placement of the gun changed from when Mr. Pawlik was sleeping with it to when he allegedly lifted it up, exactly how far he lifted it up, the angles of the gun as it moved in more detail, any problems seeing the gun, the movement of the gun as he was shot, and the location of the gun after the shooting. Discrepancies should have been questioned at the time. Any such information elicited now, over a year after the incident, would not be considered sufficiently reliable, and therefore the subject officers were not re-interviewed by the CPRA.

c) The position of the gun and Mr. Pawlik's right hand pre-shooting in order to determine if there was an immediate threat.

A detailed description of the gun in Mr. Pawlik's hand from officers who didn't use force prior to the time Mr. Pawlik fully sat up and the officers fired, was provided by Officer Julie Yu. She observed Mr. Pawlik with and without binoculars.

Officer Yu told IA in her interview that she could see the muzzle of the gun pointed to the ground, but in a southbound direction in the officers' direction. Mr. Pawlik had the gun, but as if he was limp-wristed. Officer Yu felt Mr. Pawlik could easily raise the weapon and have shot it. Having it in that direction, he could have easily anchored the muzzle in the ground to get a better grip the same as raising the gun six inches in the air to get a better grip. Officer Yu felt Mr. Pawlik could easily just drop the gun, but he never released the gun. It was still pointed to the ground anywhere from ninety to forty-five degrees to the ground. She clarified that, by saying when Mr. Pawlik was holding the gun just after waking up from the BearCat's PA (Public Address system), he was sitting up but in a crunch, sit-up position. She said even in that weird angle the muzzle was still pointed in a southbound direction, and if Pawlik pulled the trigger, it would have ricocheted in the direction of the officers.

Officer Yu said that when Mr. Pawlik sat up the first time, the gun was still in his right hand. The gun was not pointed towards her. It was canted in an angle, more towards the ground. It didn't look like initially when Mr. Pawlik sat up he was gripping the entire handle of the gun. He had the gun sitting on his hand, with his thumb securing it in his palm. But he wasn't angling it. Asked if it looked like he had control over the firearm, Officer Yu says yes. He definitely still had it in his hand, she said, because it didn't fall to the ground. He lifted the pistol, which caused it to cant downwards.

Officer Yu said that when Mr. Pawlik woke up, Mr. Pawlik appeared to be "half-heartedly hold the gun," or "half holding" it. Mr. Pawlik appeared to have been startled awake from a deep sleep, but "definitely" still had the gun in his hand. When he sat up, he was automatically facing us she said.

Pre-shooting, Officer Tanaka described the gun being in a low-ready. Sgt. Negrete said the gun was lying in Mr. Pawlik's hand, but then he grasped and raised it. Officer Hraiz said the gun was initially in almost a "laying position" in Mr. Pawlik's hand on the

ground. Officer Berger said that when he first got on scene, the gun was down on the ground in Mr. Pawlik's hand, laying down.

Again, more detail should have been elicited though in the interviews immediately following the shooting, as to how exactly the gun was being held and in what manner, and if that position ever changed, from all officers who observed the gun pre-shooting.

d) The testimony of the officers who used force regarding the direction and angle of the gun and positions of Mr. Pawlik's arm and hand at the time officers used lethal force.

Since there is no conclusive video evidence, and only the officers who used force witnessed Mr. Pawlik's actions with the gun at the time he was shot, the information we have of the position of the gun and the barrel of the gun in Mr. Pawlik's right hand comes solely from the statements of the officers who used force.

There were multiple other officers who were on scene during the incident, Officers Palomo, Hawkins, Julie Yu and Sgt. Webber, but they didn't see Mr. Pawlik's actions at the time the subject officers fired their lethal and non-lethal weapons. Officer Palomo is heard on PDRD saying he saw the whole thing at the time of the incident, but in his follow-up interview with Sgt. Vass, he said he could only see Mr. Pawlik awake and looking around but he could not see if he raised his hands or arms. Officer Julie Yu said she moved to utilize the PA system on a patrol vehicle, and was looking in the interior of the patrol car when the officers fired. Officer Hawkins said he was on the side of the BearCat and couldn't see. Sgt. Webber was in the BearCat trying to use the PA system.

The officers who fired lethal/less-lethal at Mr. Pawlik tell generally similar accountings when they were interviewed immediately following the shooting, though there is variation in how far the gun was off the ground. Important details were not properly elicited by the questioners and the details are not clearly established as to heights, the gun movement, Mr. Pawlik's right arm and hand movements, and the angle of the gun. This was critical information to focus on in questioning at the time of the initial interviews of the officers immediately following the incident, yet as described above, these topics were not thoroughly explored right after the shooting when obtaining such information was critical.

Officer Berger said he saw a minute or two after the BearCat arrived, that Mr. Pawlik began to sit up a bit and look around with an irritated look on his face. He slumped back down, and then sat up further. His hand hadn't moved from the ground, but his hand was still on the gun. As he was sitting up further, the gun came up, and the barrel was pointed straight at the officers.

Officer Hraiz said that while he was in the turret (the highest point of all the officers) Mr. Pawlik began to wake up. His hand was still grasping the gun, as he started to move forward. Officers gave commands, and Mr. Pawlik continued to sit up more and as he continued to sit up, the firearm came from a laying position on the ground as if he was going to point the barrel towards officers. He said that the weapon was a few

inches off the ground before he fired. He also said it was coming up, as if he were going to aim or point the barrel towards us. Once it was to the point, he said, I could almost see down the barrel, and it was up.

Officer Phillips stated Sgt. Negrete was giving announcements, and he saw the gun move a little bit. Mr. Pawlik lifted his head a little bit and looked around. Mr. Pawlik was not complying with the announcements. Mr. Pawlik put his head back down, and then his legs moved a little bit, and then his right hand appeared to be moving up a little bit, and his head was starting to come up, and that is when Officer Phillips fired. Officer Phillips said he saw the gun lift towards him and the other officers, and that is when he used his less-lethal force. In his IA interview, Officer Phillips said that Mr. Pawlik appeared to be waking up, and then he lifted his head again. This time, Mr. Pawlik's right hand holding the firearm also raised causing the firearm in his hand to point in their direction.

Officer Tanaka said that he could see Mr. Pawlik with his arm out with his hand looking limp with the gun in it, in low ready on the ground. Mr. Pawlik did a half-sit up, looked around for a few seconds, then went back down. Mr. Pawlik sat up again, scanned side to side, then raised his right arm with the pistol towards the officers about one to two feet off the ground.

Sgt. Negrete said that he recalled Mr. Pawlik sitting up and looking directly at them. He began to give commands. Sgt. Negrete said the gun was already pointed "this way." Mr. Pawlik looked to his right, and then back towards the officers. He said he could see the gun in Mr. Pawlik's open hand, and that Mr. Pawlik grasped it and raised it. Sgt. Negrete says Mr. Pawlik "starts" to bring it up when they used lethal force. In his Internal Affairs interview months after the incident, he said Mr. Pawlik raised his entire arm.

e) The position of the gun post-shooting.

Mr. Pawlik's head and shoulders appeared to be on a red walkway before he was shot. It appears the rest of his body was on the grass. It is not clear as to where his right arm, hand and the gun were, though it appears that the gun was likely on the grass or on the border of the grass and the walkway due to positioning. Mr. Pawlik's body was awkwardly twisted.

After Mr. Pawlik tried to sit up and was shot, he fell backwards. His head, and right arm and right hand palm side up were on the red walkway behind him (as seen in the Negrete PDRD/39:24). Officer Negrete is heard on his PDRD saying before the officers approach, "the gun is away from him, OK" (Negrete PDRD/38:58). Sgt. Webber stated that he kicked the gun out of the way, and that it was inches away from Pawlik, and not in his grasp. The gun can be heard on Sgt. Webber's PDRD sliding on the red walkway as it is kicked away. Officer Berger said in his interview following the incident, that the gun was in the area by the chimney after Mr. Pawlik was shot, before it was kicked away.

Where Mr. Pawlik's right hand was exactly at the time the officers approached and the location to the gun before it was kicked away were not clearly established by the initial questioners following the shooting and it cannot be seen on PDRD. The gun is not reported as having any damage from rifle shots. In a later interview conducted by the CPRA Investigator, Sgt. Webber said he couldn't remember whether the gun was seen before he kicked it away on the grass or the walkway or portions of both, but he remembered hearing the gun slide on the walkway after he kicked it. He estimated the gun was a foot from the tips of his fingers of his right hand.

If the gun was in a different location post-shooting from where it was originally held pre-shooting by Mr. Pawlik, as appears to be the case, this would also likely indicate that Mr. Pawlik had it in his hand at the time he was shot, as when he was shot, his right arm went behind his head, and there is nothing on video seen showing that Mr. Pawlik's body pushed the gun behind him as he fell backwards in any other manner.

f) Whether Mr. Pawlik's mental state was a part of the determination of reasonableness of the use of force.

The mental state of a subject on whom force is used, is a factor in the determination of reasonableness if the person is not a threat to anyone but himself or if he is not posing an immediate threat to anyone.

Officer Palomo stated in his interview with Sgt. Zhou and Ofc. Borocio that Mr. Pawlik looked like he was intoxicated or under the influence, and did not look lucid, saying the subject would lift his head and then put it back down, and then lift it again a second or two later. Officer Phillips said that when he was behind the BearCat he observed Mr. Pawlik lift his head off the ground and appeared to be trying to figure out what was going on. Officer Julie Yu said that Mr. Pawlik had a dazed look on his face when he first woke up. She said his eyes were open just a little as slits. He looked drowsy, as if he was waking up from who knows what. She said, Mr. Pawlik sat up, like a crunch sit-up, and was looking around and as if his eyes were adjusting to the sunlight.

In contrast, all the subject officers who fired lethal rounds said that Mr. Pawlik looked at them intently. Officer Berger said Mr. Pawlik looked at them, and looked irritated. Officer Hraiz said Mr. Pawlik looked angry and agitated, and that he appeared like he knew what was going on around him. Officer Hraiz stated Mr. Pawlik looked upset and that he appeared like he knew what was going on around him "as he glanced back and forth between the officers." Officer Tanaka said that when Mr. Pawlik began to move, he did a half sit-up, looked around for a few seconds, and then went back down. Mr. Pawlik then sat up again, and scanned side to side before raising his right arm. Sgt. Negrete said Mr. Pawlik looked to his right then back towards the officers before "purposefully" grasping the gun.

The ability to tell when someone is or could be drunk, drugged, or mentally confused, is important when formulating tactics.

However, whether intently staring at the officers or looking at them in confusion, if Mr. Pawlik raised his gun at them, he was still an immediate danger and the act of raising a gun directly at an officer when told to drop it can be construed as intent. A not fully lucid, drugged or confused person, can fire a gun in his hand.

g) Whether Mr. Pawlik could have physically harmed officers or the public.

The officers were behind a BearCat, which is an armored vehicle through which bullets cannot pass. However, the officers were somewhat exposed—their heads still had to look out at Mr. Pawlik, and in some cases, other parts of their upper bodies were exposed.

The house in the direct line of fire to the gun was evacuated, but there were still some neighbors in their homes.

Mr. Pawlik woke with the gun and would not drop it when commanded to do so, and then started to sit up. Mr. Pawlik still could have fired the gun at any moment.

The facts show the officers' fear of Mr. Pawlik existed before he woke up—officers took shelter behind vehicles and the BearCat because they knew that he had a gun and could wake at any moment and fire without warning. No one could approach Mr. Pawlik to remove the gun when he was asleep or unconscious, because they knew he could wake up and fire at any moment without warning. Officer Yu, who said the barrel of the gun was down when she last saw him prior to the time of Mr. Pawlik was shot, stated that she was fearful Mr. Pawlik could fire, and a bullet could ricochet and hurt someone.

h) Other possible factors in determining whether an immediate threat existed.

All of the five officers who fired lethal/non-lethal rounds at Mr. Pawlik appear to have fired close to the same time, which may indicate a mutual perception of danger of some kind. The timing of the firing is very quick--slightly over two seconds. Per DGO K-3, force must cease when there is no longer a threat. It does not appear that firing continued after Mr. Pawlik fell back on the ground with the gun out of his hand.

The firing of the officers' lethal and non-lethal weapons did not occur when Mr. Pawlik first started to sit up. Mr. Pawlik raised and lowered slightly three times prior to the fourth time when he appeared to try to rise in earnest. Thus, the officers were not firing based on body movement alone. It was only when Mr. Pawlik was making a full effort to get up that the officers fired. The firing also commenced as Sgt. Negrete was mid-sentence in giving commands to Mr. Pawlik. Sgt. Negrete in fact sped up his command to drop the gun as Mr. Pawlik was rising, indicating urgency. Sgt. Negrete's command was only half given at the time Sgt. Negrete fired. Afterwards, who sounded like Sgt. Negrete can be heard saying, "god damn it dude, why did—(Negrete PDRD/35:24). Officer Tanaka at 3:02 is heard saying, "why did he have to do that?"

i) Facts determined to be more likely true than not.

Looking at the facts of the case, the following facts were determined to be more likely true than not, the standard of proof for this case, as they pertain to all the subject officers who used lethal force:

1) That it was more likely to be true than not that Mr. Pawlik had a gun in his hand at the time he was shot.

Even though verifying that the gun was in Mr. Pawlik's hand cannot be independently verified by Sgt. Webber's PDRD, there are many facts that support it is more likely true than not that Mr. Pawlik had his gun in his hand at the time he was shot.

The fact that Mr. Pawlik had a gun in his hand was established from the first sighting of Mr. Pawlik. The gun was first seen by an independent citizen who called 911 and said, "I 'seen' something in the man's hand...it could be a pistol." Officer Phillips, the first police officer to arrive on scene, stood on a nearby porch and confirmed the gun in Mr. Pawlik's hand. From then on, various discussions can be heard on PDRD between officers about the gun in Mr. Pawlik's hand. Some sergeants and officers viewed the gun with binoculars and discussed how it looked and how Mr. Pawlik was holding it. Sgt. Rowley took a photo of the gun, and showed it to others.

There is no evidence from the time Mr. Pawlik was first seen until the time he was shot that Mr. Pawlik ever dropped the gun or had it out of his hand. When Mr. Pawlik woke up, officers kept yelling to drop the gun. As such, it is believed more likely true than not that Mr. Pawlik had the gun in his hand still as he was sitting up, and that he had not dropped it.

After Mr. Pawlik was shot, his right arm was flung in a backwards direction. After the shooting, Mr. Pawlik's right arm can be seen above his head on the walkway. The gun was reported a few inches away from his right hand by Sgt. Webber in his IA interview in August, 2018 and Sgt. Webber was the first officer in line to see Mr. Pawlik following the shooting. Officer Berger said in his interview following the incident, that the gun was in the area by the chimney after Mr. Pawlik was shot, before it was kicked away. The gun can be heard on PDRD sliding of the walkway as it was being kicked away by Sgt. Webber. This would mean the gun was in a different location from where it was originally seen when he was holding it prior to the shooting, having likely been flung backwards from his right hand after he was shot.

2) That it was more likely to be true than not that Mr. Pawlik raised the gun off the ground at the time he was shot.

Mr. Pawlik was making some movements in general prior to being shot. His head was raised and lowered somewhat three times before he raised his body the fourth time, appearing to be trying to get up in earnest on the fourth attempt. It appears his left arm moved one or two times before he was shot. It appeared a leg moved a bit before he was shot. Expert George Reis stated that some movement of the right arm is seen

just prior to the first shot. It is nearly impossible for any person to move from a position of lying flat on the ground to sitting up naturally without moving your right arm upwards as well. Therefore, if not intentionally lifting the gun, when Mr. Pawlik woke up and proceeded to fully attempt to sit up, it seems it is more likely to be true than not that at the very least, his upward movement would have raised the gun up. As Mr. Pawlik sat up, if he had a firm grip on the gun the likely result would have been an upwards movement fluid with the upwards raising arm—an experiment that can be recreated by anyone lying in a flat position rising to an upper position with an object in their hand.

3) That it was more likely true than not that Mr. Pawlik’s gun was facing in the general direction towards the officers when the officers shot Mr. Pawlik.

There had been discussions heard on PDRD that the gun was facing generally in the direction of the officers prior to the time Mr. Pawlik woke up. No one ever mentioned as heard on PDRD that the direction had changed. Whether the barrel was up, down or straight though at the time of the shooting, we are not able to independently verify. Officer Yu testified the barrel was downwards when she last looked at Mr. Pawlik. But that was also before the subject officers who used force testified that Mr. Pawlik tightened his grip on the gun, and raised it up while attempting to fully sit up.

4) That it is more likely true than not, that when Mr. Pawlik’s gun raised towards the officers it could be perceived as an objectively reasonable immediate threat under the law, which would allow officers to use deadly force.

The law in *Graham v. Connor* (1989) 490 U.S. 386, holds that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively” reasonable in light of the facts and circumstances surrounding them, without regard to their underlying intent or motivation.

Here, all the officers who used force stated that the gun was pointed at them and they were fearful for their lives.

The recent Supreme Court case *Kisela v. Hughes* (2018) 138 S.Ct. 1148, is also instructive. This was an excessive force case, in which an officer shot a woman who approached another woman who was standing nearby with a large kitchen knife. The woman with the knife ignored at least two commands to drop the knife. The Court of Appeals for the Ninth Circuit held that the officer who shot Ms. Hughes violated the Fourth Amendment. The Supreme Court decided it did not have to determine whether

or not the officer violated the Fourth Amendment, because “even assuming a Fourth Amendment violation occurred,” the Court decided the officer was entitled to “qualified immunity.” Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known. The focus of the Court was whether the officer had fair notice that his or her conduct was unlawful, judged against the law at the time of the conduct. The court said that existing precedence must have placed the statutory or constitutional questions beyond debate: “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it. Just as the court held in *Kisela* that, “this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment,” similarly in this case it is not an obvious case that any competent officer would have known that shooting Mr. Pawlik would violate OPD rules and the Fourth Amendment.

The act of Mr. Pawlik sitting up, even with the gun in hand pointed at the officers, can reasonably be interpreted by other people as harmless; that Mr. Pawlik was confused, and was doing nothing more than sitting up, and he was not “aiming” for the officers. However, it can equally be interpreted that Mr. Pawlik was raising the gun to fire. We have no facts to counter that the officers who used lethal force’s perceptions were so implausible, that it is objectively unreasonable. It is the perception of the officers who used lethal force that controls in this matter unless facts can disprove their testimony.

This is the case, even if the officers had perception issues as to where the gun was and how it was moving. *Krueger v. Fuhr* (8th Circuit 1993) 991 F.2d 435 held that an erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable. Reasonableness must be determined from the point of view of a reasonable officer in the situation rather than with the 20/20 vision of hindsight. Even an officer’s erroneous perception or belief does not alter the legitimacy of the use of force if the perception is objectively reasonable (*Krueger v. Fuhr* (8th Cir. 1993) 991 F.2d. 435). Law and OPD rules do not require a police officer risk his or her life if they are in perceived immediate danger.

The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists (*Elliott v. Leavitt* (4th Circuit 1996) 99 F.3d 640). “No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life...the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, or the nature of the threat or the suspect’s intent to cause them harm—the Constitution does not require that certitude precede the act of self protection” (Id.).

The situation Mr. Pawlik presented when initially reported was precarious from the very beginning. Mr. Pawlik had a gun in his hand pointed in the direction of the street where

the officers had to watch him since he was between two houses they did not have access to, in the process of attempting to detain him. The officers prior to firing their weapons recognized this predicament of the placement of the gun in Mr. Pawlik's hand. As heard on Sgt. Negrete's PDRD (one of two/21:01) someone says, "When the dude wakes man, it's going to be a problem. No bueno." Basically, unless Mr. Pawlik released his hold on the gun, any movement of the gun in an upward position by Mr. Pawlik could be interpreted by the officers as a threat.

Once Mr. Pawlik woke up, the threat intensified because Mr. Pawlik was an unpredictable, unknown person with a gun in his hand. Mr. Pawlik was told to drop the gun, and he did not. He started to sit up with the gun. Sitting up, the gun was perceived by the officers who fired as still being in Mr. Pawlik's hand, and still pointed generally in their direction. This continued raising of a gun when given orders to drop it had been made, meant to these officers that Mr. Pawlik intended to harm them. As each of the officers stated in their interviews, at this point they felt that the final four, of the four elements to determine if a person is an "Immediate Threat" as set forth in DGO K-3 were met. One, Mr. Pawlik had the means, as he had a gun, a lethal weapon, in his hand. Two, he had the opportunity as he was generally facing towards the officers who were in front of him, partially exposed, with a gun in his hand and he could have fired at any time. Three, he had the ability, as he was conscious and looking at them with the gun already in his hand. Fourth, his intent could be perceived, because he had been told multiple times by officers to drop the gun, but he did not. Mr. Pawlik continued to sit up with the gun in his hand, and the gun was being lifted upwards in their direction.

The officers who used force had stated the gun was raised from a few inches to up to two feet at the time they shot. Questioning may have helped understand the variations in the officers' testimony; whether it was based on varying perceptions or truthfulness. However, variation can also occur from perceptions based on the quickness of the event, and given the angle of the gun if it was in the process of moving upwards. Mr. Pawlik was in the process of sitting up, and as such the gun and arm would likely be in motion—whether intentionally, or unintentionally. Also, if the gun barrel was somewhat tilted up, there would be variation from the bottom of the gun to the barrel—especially in motion. For example, Officer Berger talked about Mr. Pawlik's hand being at 14 inches when the gun *left* Mr. Pawlik's hand. If the gun was in Mr. Pawlik's hand still as his arm went back, there could be a variation in what was perceived as the height of the gun.

Generally, the subject officers were sequestered prior to their initial interviews, however, it is felt that a sequestering of them in separate locations such as separate patrol vehicles would have been a better practice, rather than moving them off to one side in the general area of each other with Sgt. Jim. While there is no evidence of collusion in testimony, this is also not verifiable.

At least some of the officers would have known or assumed that the incident was being filmed. All of the subject officers had on PDRDs, as did the other officers in the vicinity acting as back-up. Sgt. Webber openly stated on scene that he put his PDRD on the

wide-bar of Officer Phillips' patrol vehicle (Negrete PDRD/22:15) as well as the BearCat, so any officer lying risked being caught on video doing so.

If the officers fired when the gun was actually raised no more than a few inches, the officers made a decision that Mr. Pawlik was a threat with that minimal movement. They did not wait to see if Mr. Pawlik's sitting up was just sitting up with the gun in hand or he was harmless. The decision to shoot here was a split-second decision unfolding quickly once Mr. Pawlik woke up and ignored the officers' warnings. In the few seconds to make a decision as to whether to fire or not, as the officers were faced with here, it would be difficult for the officers to determine if Mr. Pawlik was raising his gun to shoot, or raising his gun as he was merely getting into a better seating position. This was not a risk that officers are required by law or OPD rules to take.

The hardest part in analyzing this case is that decision as to whether Mr. Pawlik's lifting his gun in the general direction of the officers, perhaps minorly—as some have stated, a few inches—while trying to sit up at the time firing commenced was a reasonable threat when judged from the perspective of a reasonable officer on the scene, rather than 20/20 vision of hindsight as *Graham v. Connor* requires. This case has facts that lie close to dividing lines.

The court said that the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers...violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation...An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional" (*Graham, supra*).

In *Colongue v Hamilton* (1st Circuit, 2018) 906 F.3d 150, a recent fatal shooting case also decided on the basis of "qualified immunity," a suicidal man was brandishing a semi-automatic handgun and pointing it at himself and various times at a 45-degree angle over troopers' heads, and ignoring orders to put the gun down for hours. When the suicidal man extended his arm over the officers' heads at about 45 degrees and was told again to put the gun down, after waiting eleven seconds, a tactical police team officer shot and killed him. The court found the officer who fired had qualified immunity. The court found there was little comfort between a gun aimed directly at a person's head and a gun aimed at a forty-five-degree angle over the person's head. The court held that there was no controlling authority or a consensus of persuasive authority sufficient to put an officer on notice that his conduct fell short of the constitutional norm. The court held that the plaintiff in the case had to show than an objectively reasonable officer would have known his conduct violated the law.

In this case, there is no law or OPD rule such that the officers would have been on notice that a man in the process of raising a gun at them, even if minorly, is not an immediate threat or that they fell short of the constitutional norm.

It is recognized that those in charge of this incident, Sgt. Negrete and Incident Commander Lt. Yu, basically set up an extremely limited response scenario for Mr. Pawlik to escape deadly force: wake up, understand what was going on, release the weapon, and through it all, don't move the gun in any significant way that could be interpreted as more of a threat than it already is. The mood of so many officers facing Mr. Pawlik with his gun in hand, waiting to see him move with it, contributed to setting the response that took place. An alternate plan or any restraint was never discussed with the officers on scene who were facing Mr. Pawlik with their rifles despite the precariousness of the situation. Mr. Pawlik sitting up with the gun still in his hand was a very real possibility. Yet what would happen when he did was never discussed. Certainly, the plan choices made here by those in charge for OPD were not the only choices that could have been made.

However, the right to use deadly force when an immediate danger is perceived cannot be confused with other tactics that could have been taken in an attempt to prevent the loss of life here even if some risk by doing so was involved. "A better tactic," "best options," and "likely scenarios" can and should be discussed after the fact, and hopefully used in future scenarios. But they are not the law. In *Plakas v. Drinski* (7th Cir. 1994) 19 F.3d 1143, the court stated that there is no law that says the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.

VIII. ALLEGATIONS

1. Oakland Police Officer Brandon Hraiz improperly used lethal force when he shot and killed Mr. Joshua Pawlik.

MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT

Officer Hraiz stated in his interview after the incident on March 12, 2018 that when he arrived on scene he noticed the subject (Mr. Pawlik) had in his right hand a semi-automatic firearm. He stated, I could tell that it was a chrome slide, and that it was in his hand. When the BearCat arrived, he was instructed to be in the turret. After a couple of minutes in the turret, he stated that the suspect's upper body started coming off the ground and leaning forward. Officer Hraiz stated the subject had a facial expression that was "like, uh, upset or angry." He stated, "it was like disgruntled." Officer Hraiz said he saw Mr. Pawlik's hand still grasping the gun. He said that as Mr. Pawlik got up, as he started moving, "myself and all of the other officers I could hear started giving him multiple commands to don't move, drop the gun, which he was failing to obey." Officer Hraiz said that the individual then continued to sit up more. And as he continued to sit up more, he said he saw the firearm slowly coming from an almost laying position on the ground. Officer Hraiz said the firearm was coming up, as

if Mr. Pawlik was going to aim or point the barrel towards them. Once it was to the point, "I could almost see down the barrel." Officer Hraiz said it was up and he was looking directly at us. Officer Hraiz said, "I knew it was being pointed at myself," and all of the other officers on scene. Officer Hraiz said that just Mr. Pawlik's intent of coming up and pointing that firearm, "I was scared for my life" and everybody else that was on scene. Officer Hraiz said Mr. Pawlik's gun was pointed directly at us. Officer Hraiz said at that point the "safety on my firearm came off and I elected to use deadly force" due to the immediacy of his threat of death.

Officer Hraiz also stated the following, as more detail was elicited: Once he (Mr. Pawlik) initially started to come up, I noticed the gun was still in his hand on the ground laying to the side with the barrel pointing south. As he sat up even more, we were giving him commands don't move your hand, drop the gun which he failed to obey, I then slowly saw his right arm rotate and slightly lift off the ground and the barrel pointed directly towards us. He slowly started to like get up, and then I saw his hand start moving up. And he saw us and he like paused. And he had like an angry face, or he was clenching his jaw or something cause I was close enough to see his facial expressions and then at that point I saw his arm cant and the barrel align straight, and then at which point I used the deadly force.

In his interview with Internal Affairs, Officer Hraiz stated after the BearCat arrived, he took a spot in the turret which he stated gave him a better view of the subject. He also stated that when the subject began to sit up, his grip around the firearm became firmer. Officer Hraiz said that in the turret, his chest and head were exposed to potential gunfire from the subject.

Looking at the four factors found in DGO K-3 which must be established in order for force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in the statement that the subject was given commands by the police to drop the gun, don't move, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Hraiz' statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Officer Hraiz' statement that the subject was "coming up" and looking at the officers while holding a gun.
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Hraiz' statement that the barrel of the gun Mr. Pawlik was holding was pointed at him and all the officers on the scene. Officer Hraiz was in the turret, thus largely covered, but with his head and chest were somewhat exposed.

A member may use lethal force to protect themselves or others when the member objectively and reasonably believes that his/her life, or the life of another, is in

immediate danger of death or serious bodily injury, based upon the totality of the facts known to the member at the time.

Officer Hraiz' statements support a finding of a proper use of lethal force. As stated in the general analysis of the four officers who used deadly force, it is more likely to be true than not that the gun actually was raised in the officers' general direction before Mr. Pawlik was shot. If the gun were just a few inches off the ground when Officer Hraiz fired, or even if Officer Hraiz erroneously perceived the gun was being raised, there is no case law absent the barrel of Mr. Pawlik's gun being in a downward angle—which we have no evidence of--that can be found that would prohibit an officer from firing if he perceived Mr. Pawlik was raising the gun up at him, and felt Mr. Pawlik's raising of the gun was a threat.

In the few seconds to make a decision as to whether to fire or not, as Officer Hraiz was faced with here, it would be difficult for Officer Hraiz determine if Mr. Pawlik was raising his gun to shoot, or raising his gun to merely complete getting into a seating position. No law or rule required Officer Hraiz to wait if he reasonably felt threatened.

For the reasons set forth using the analysis section above, section VII, common to all four officers who used deadly force and the statements by Officer Hraiz, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

FINDING: EXONERATED

2. Oakland Police Officer Craig Tanaka improperly used lethal force when he shot and killed Mr. Joshua Pawlik.

MOR 370.27 USE OF PHYSICAL FORCE
FOURTH AMENDMENT

Officer Tanaka stated in his interview of March 12, 2018 following the incident that prior to the use of force, he saw the subject's right hand was "extended out towards us" but was limp; but he was holding a pistol in his hand. Officer Tanaka said that pistol was pointed towards us, where officers were. He described the subject's holding of the pistol as similar to "like a low-ready." Officer Tanaka stated I couldn't tell if he was faking being asleep. Officer Tanaka said the officers started providing more commands over the intercom. Officer Tanaka stated I remember multiple times hearing them in English, in Spanish. That's when the subject's body started moving. He did kind of like a half sit-up. Just his upper body moved. Officer Tanaka says Mr. Pawlik looked up kind of for a few seconds, and kind of went back down. And then he did it again, and "like looked at us. He looked irritated. He kind of scanned." Officer Tanaka says I can't remember if it was right to left, or left to right. I remember him distinctly looking at all of us. And then that's when he raised his arm with the silver pistol. He raised it at officers, maybe a foot, two feet, a foot off the ground, directly in our direction. Officer Tanaka says I thought he was going to shoot us. Or me or another officer. And then, I don't know if I was the first one, or if—it kind of felt like everyone analyzed this

deadly threat at similar times. I brought my sights from a low-ready up to a contact ready. I was using my red-dot sight. I put the red-dot sight on center mass on the subject with the gun pointed at us; went to the contact ready and squeezed the trigger, and then it was pretty quick. Officer Tanaka said that he had some cover on the BearCat rail, but parts of his body were exposed.

It is not credible when Officer Tanaka said that after Mr. Pawlik raised his gun up, Officer Tanaka only then brought his sights up to a low-ready, used his red dot sight, and fired. All the firing was over in 2.23 seconds from the time the officers began to shoot until the time shooting ceased. This sounds more like Officer Tanaka is repeating standard information about firing his gun.

It is also concerning that Officer Tanaka's testimony was so different than anyone else in saying the gun was raised a foot to two feet off the ground when he fired. There is a big difference between some of the officers saying the gun was a few inches off the ground when they fired, and Officer Tanaka saying the gun was a foot or two off the ground. There is also a big difference between him saying the gun was raised one foot or two feet.

Additionally, Sgt. Negrete may have tainted Officer Tanaka by after the shooting saying, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option."

Officer Tanaka needed to be asked about his perceptions and actions in his interviews. It could indicate he was being untruthful. However, despite these facts, it still does not mean that Officer Tanaka is being untruthful. If Mr. Pawlik's arm and the gun were in motion upward, he could well have perceived the scene differently in the split seconds he had of the events when the shooting began. Also, while Sgt. Negrete improperly told Officer Tanaka that "he pointed the gun right at us man," it doesn't mean Officer Tanaka didn't already know that.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in the statement by Officer Tanaka that the subject was being given commands by the police, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Tanaka's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in the statement by Officer Tanaka that the susubject was sitting up, and scanning the officers while raising a gun.
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Tanaka's statement that the barrel of the gun was pointed directly in the

officers' direction on the scene. Officer Tanaka was on the BearCat railing, but parts of his body were still exposed if the subject fired.

Officer Tanaka's statements if believed support a finding of a proper use of lethal force. However, even if his statements are doubted or discounted, as stated in the general analysis of the four officers who used deadly force, it is more likely to be true than not that the gun was raised somewhat before Mr. Pawlik was shot as he was sitting up, and that it was generally pointed in their direction. Even if Officer Tanaka improperly perceived the extent the gun was in movement, he cannot be held to have failed in his duty. There is no law or OPD rule that would prohibit an officer from firing if he perceived Mr. Pawlik was raising the gun up at him, and felt Mr. Pawlik's raising of the gun was a threat.

At the very least, Officer Tanaka's discrepancies could have resulted in a finding of not-sustained. But there was never enough evidence to sustain against him.

For the reasons set forth using the analysis section, section VII above, common to all four officers who used deadly force and these statements by Officer Tanaka, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

FINDING: EXONERATED

3. Oakland Police Sergeant Francisco Negrete improperly used lethal force when he shot and killed Mr. Joshua Pawlik.

MOR 370.27 USE OF PHYSICAL FORCE FOURTH AMENDMENT

Sgt. Negrete stated in his interview of March 12, 2018, taken following the shooting, that when he arrived on scene he saw the subject and said there appeared to be a semi-automatic pistol in his right hand. He stated we had a clear view of everything the subject had; the firearm. Sgt. Negrete stated that after the BearCat was parked, and the engine turned off, the subject woke up. His right arm was out, and his left arm behind him. He was laying on his right side. Sgt. Negrete stated the subject sat up; the gun is still in his hand. Sgt. Negrete stated that the subject sits up and looks at us. His arm extends out. He looks at us a couple times. He kind of looks to the right. Does this weird kind of leaning. Then grabs the gun. The gun is facing us. Then he grasps it in his hand and brings it up. At that point, I was afraid he was going to kill us.

In this Internal Affairs' interview taken later, Sgt. Negrete stated that just before the shooting, he was positioned behind the BearCat, forward of the door, partially exposed. He said that the officers gave the subject clear and loud instructions, which the subject failed to follow. He believed that if he did not shoot the subject that he would have lost his life.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in Sgt. Negrete's statement that the subject was being given clear and loud commands, which the subject failed to obey.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Sgt. Negrete's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Sgt. Negrete's statement that the subject was grasping the gun, and bringing it up.
4. Ability: The subject has the capability to carry out the action or threat as seen in Sgt. Negrete's statement that the gun is facing us. Then the subject grasps it in his hand and brings it up. Sgt. Negrete says, at that point, I was afraid he was going to kill us. In this Internal Affairs' interview, Sgt. Negrete stated that just before the shooting, he was positioned behind the BearCat, forward of the door, partially exposed.

Sgt. Negrete's statements support a finding of a proper use of force. And as stated in the analysis of the five officers who used force, it was found more like to be true than not that the gun actually was raised somewhat before Mr. Pawlik was shot as he was sitting up, and that it was generally pointed in their direction.

For the reasons set forth using the analysis section common to all four officers who used deadly force, section VII above, and these statements by Sgt. Negrete, by the standard of a preponderance of the evidence, a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

FINDING: EXONERATED

4. Oakland Police Officer William Berger improperly used lethal force when he shot and killed Mr. Joshua Pawlik.

MOR 370.27 USE OF PHYSICAL FORCE
FOURTH AMENDMENT

Officer Berger stated in his interview the day of the incident, that when he first got there, the gun was down on the ground in Mr. Pawlik's hand, laying down. Prior to the subject sitting up, the only movement he saw was maybe an inch or so. Officer Berger said he told everyone on scene on the radio hey the gun just moved. Officer Berger said he knows the gun came up and was pointed at us. Prior to Mr. Pawlik being struck by rounds, the gun was never out of his hand. After Mr. Pawlik was struck by rounds the subject dropped the gun. Officer Berger says the gun was 14" off the ground when it came out of his hand. Officer Berger says he shot Mr. Pawlik because I felt like that was my only option. Officer Berger said he was pointing a gun at me. I want to

go home every night. When Officer Berger saw Mr. Pawlik point a gun in his direction, he thought that "I was going to die."

Officer Berger stated the look on the subject's face wasn't that he just woke up and was confused. It was like we were bothering him. Officer Berger states as soon as the subject sat up, that's when we began to address him; giving him commands. Officer Berger says, so at that point you could tell he was annoyed that we were dealing with him. During the whole time that he sits up and sees us and then starts falling backwards, we were giving him commands. Someone said try Spanish. Officer Berger said, so we tried giving commands in Spanish. Officer Berger said the subject didn't seem to acknowledge that at all. And then we just continued commands all the way. That's when I saw his right hand with the gun in it come off the ground, and point it at me. Officer Berger doesn't think when the subject first sat up and looked at them, "there is no way that any reasonable person wouldn't know it's the police." Officer Berger says, "It's almost like he was dismissing us by sitting back." Officer Berger also said that once in position by the BearCat, he wasn't completely covered. His upper torso and head were fully exposed.

Looking at the four factors found in DGO K-3 which must be established in order for lethal force to be used in relationship to this testimony:

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions is seen in Officer Berger's statement that the subject was being given commands which the susubject wasn't obeying.
2. Means: The instrument, mechanical or physical, that may be used to cause injury, is seen in Officer Berger's statement that the subject was seen holding a gun.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury, is seen in Officer Berger's statement that the subject raised the gun, "pointed at us."
4. Ability: The subject has the capability to carry out the action or threat as seen in Officer Berger's statement that the gun was pointed at us. Officer Berger also stated that he was not completely covered by the BearCat, and his upper torso and head was fully exposed.

There is some concern about Officer Berger's ability to see the gun at times, certainly initially. However, it's location was pointed out to him. Later, Officer Berger also is heard saying on PDRD he saw it move. Additionally, it is one thing to see an object clearly, and another to see movement. Again, more thorough questioning at the time of the incident would have been of assistance in this analysis.

There is also a concern with Officer Berger, in that prior to the shooting, Officer Berger said to Officer Phillips, "If that gun moves, bag him." Officer Berger said in his Internal Affairs' interview on August 23, 2018 that the statement was made to tell Officer Phillips to "use" the less-lethal beanbag rounds. However, it could also reveal Officer Berger's own frame of mind--that if the gun moved, that he would fire. That would not

be lawful. The gun had to be a threat for his use of force to be proper, and it had to be facing in his direction or in the direction of someone else who could be threatened, not just “moved.”

However, there was no evidence in the investigation to refute that the gun in Mr. Pawlik’s hand was already pointed in the direction of the officers prior to Mr. Pawlik being awake, and that after he woke, Mr. Pawlik likely moved the gun upwards—either intentionally as Officer Berger stated, or when Mr. Pawlik was rising thereby creating the perception to Officer Berger of a lethal risk.

At the very least, Officer Berger’s statement could have resulted in a finding of not-sustained. But there was never enough evidence to sustain against him for his statement. Officer Berger’s statement can be interpreted different ways.

The fact that it was found Mr. Pawlik most likely did raise the gun somewhat when sitting up, and that the officers considered the movement of the gun upwards to be a threat.

Therefore, for the reasons set forth using the analysis section common to all four officers who used deadly force, section VII above, and the statements of Officer Berger by the standard of a preponderance of the evidence a finding of exonerated is made. Force was used, but it was justified under the Fourth Amendment and OPD rules.

FINDING: EXONERATED

5. Oakland Police Officer Josef Phillips improperly used force when he used less-lethal force on Mr. Joshua Pawlik.

MOR 370.27 USE OF PHYSICAL FORCE
FOURTH AMENDMENT

Per Departmental General Order K-3, officers are allowed to use a reasonable amount of force based on a totality of the circumstances.

In his interview of March 12, 2018, Officer Phillips stated he was the first on the scene, and saw the subject with the gun. While announcements were being given to the subject by Sgt. Negrete, he said he saw the gun move a little bit. He said he saw Mr. Pawlik lift his head a little bit, and look around. Officer Phillips said that he saw the subject’s gun lift towards him and the other officers, and at that point, he fired his less-lethal beanbag round towards Mr. Pawlik’s right shin one time.

In his Internal Affairs Interview, Officer Phillips said that Mr. Pawlik appeared to be waking up, and when Mr. Pawlik lifted his head again, his right hand holding the firearm also raised. He stated that Pawlik’s forearm and wrist were raised, causing the firearm in his hand to point in their direction. At this point, Mr. Pawlik was a lethal threat, and at any given moment Mr. Pawlik could have fired his gun.

If Mr. Pawlik was a lethal threat, Officer Phillips had a right to use lethal or less-lethal force against him when he fired a bean bag round at Mr. Pawlik.

There is a concern here in that prior to the shooting, Officer Berger said to Officer Phillips, "If that gun moves, bag him." Officer Berger said in his Internal Affairs interview on August 23, 2018 that the statement was made to tell Officer Phillips to "use" the less-lethal beanbag rounds. Officer Berger said that the term was slang, and it was common term throughout OPD. While there was testimony that the standard term is "thump," Officer Berger is also heard saying to Sgt. Negrete, "if he is not compliant, can we, let's bean bag him right away." Thus, it most likely Officer Berger meant he wanted Officer Phillips to use a beanbag when he said "If that gun moves, bag him." When Officer Phillips was asked in his Internal Affairs interview if he heard Officer Berger say, "If that gun moves, bag him" prior to the shooting, Officer Phillips said no. This is not credible as Officer Phillips was heard on PDRD acknowledging the statement. The concern with that statement is that Officer Phillips fired because Mr. Pawlik's gun merely moved, and not because of an actual threat. The gun would have to be pointed at someone as Mr. Pawlik was rising with it, for the gun to be a threat.

However, Officer Phillips fired at the same time frame as the other officers. There is nothing in the facts we have that can refute that the gun in Mr. Pawlik's hand was already pointed in the direction of the officers prior to Mr. Pawlik being awake, and was either moved upwards intentionally as the officers state, or likely moved upwards when Mr. Pawlik was rising thereby creating the perception of a lethal threat.

For the reasons set forth, a finding of exonerated is made. Less-lethal force was used by Officer Phillips, but was justified under the Fourth Amendment and OPD rules.

FINDING: EXONERATED

6. Oakland Police Sergeant Francisco Negrete failed to properly perform his duties as the DAT Supervisor.

285.00-2*—SUPERVISORS RESPONSIBILITIES

Incident Commander Lt. Alan Yu designated Sgt. Francisco Negrete as the DAT supervisor for this incident. As the supervisor, it was Sgt. Negrete's duty to formulate the plan for detaining Mr. Pawlik in a safe manner if possible; that the plan include possible contingencies if Mr. Pawlik did not follow commands; that he assign officers to carry out the tasks within the plan; that he follow OPD's policies and rules; and that per MOR 285.14, he closely supervise the activities of subordinates, making corrections where necessary.

Sgt. Negrete stated in a post-incident interview that for him the priority was setting up a Designated Arrest Team (DAT). Training Bulletin III-N (Police Contact with Mentally Ill Persons, 29 Sep 06) which discusses DAT plans, states that a DAT has singular roles communicated to the individual members, along with contingency plans. Officers shall avoid forcing a confrontation, but be prepared to respond to an exigent circumstance if

they or others are endangered by the actions of the subject. Informational Bulletin "Force Review Boards, Information Updates, Findings" (21 Aug 17) states that for the Designated Arrest Team, supervisors are reminded when supervising DATs to stay engaged continually throughout the search or arrest situation. Supervisors are reminded that they shall be physically present and continually assessing all needed resources, officer positioning and assignments, and the manner in which officers are going to make an arrest.

Per the most recent training history of Sgt. Negrete, he was trained in Critical Incident Management on October 26, 2017 and April 20, 2017, and Critical Incident Supervision on March 17, 2017, Supervisory Leadership and Squad Expectations on March 13, 2017. Additionally, OPD officers are required to know OPD's rules and regulations. Per MOR 314.39, all members and employees shall perform their assigned duties and responsibilities as required or directed by law, Departmental rule, policy or order by a competent authority. Sgt. Negrete stated in his interview with Internal Affairs on August 16, 2018 that he believed he had enough experience to properly handle this type of incident.

OPD's Subject Matter Expert on command and control, Lt. Christopher Shannon, stated that most command officers at OPD attend basic ICS (Incident Command Staff) courses. Within such a course, there is instruction on topics such as ways to manage critical incident scenes with patrol personnel, and concepts such as forming DATs and setting perimeters to contain dangerous subjects. At a minimum, the DAT will have a team leader, a talker/cuffer, a primary lethal cover, and a less-lethal officer. In a scenario with an armed and unconscious or unresponsive subject, ideally there would be at least one additional officer as a utility to fill in if necessary or if an unexpected job arises. In his Power Point training—"Handling Critical Incidents for Supervisors & Commanders" (Lt. Shannon/10 Apr 16), he also described contingency planning for the DAT as looking at "what if" the suspect surrenders; the suspect attempts to flee; the suspect attempts to drive away; there is an active shooter (diversions/breach).

OPD's Subject Matter Expert on DATs, Sgt. Steve Toribio, has trained OPD officers on the use of DAT teams. He stated that a DAT is a static component of an inner perimeter. There are three general contingencies that every DAT is to have, and that is taking the suspect into custody, preventing escape, and bridging the gap in case of some sort of emergency. The DAT is the "what if" squad; this means that if you were to ask, "what if the subject does this" the DAT will have formulated a plan.

Sgt. Negrete stated in his interview with Internal Affairs on August 16, 2018 that he was the one who formulated the plan for the DAT in this case, as well the supervisor who assigned the individual duties for each member, whom he believed to be mature, experienced and reliable.

Sgt. Negrete's plan, using his words, was to do some announcements, Code 3, siren, announcement, Code 3, siren. If there's no response Sgt. Negrete stated, we're going to thump him with the beanbag. If there's a response, we're going to challenge him. He said, we're going to bring him back to the BearCat, handcuff him, obviously unarmed. Once we thump him, then we're probably going to go to a Taser. We'll have

someone stand up there with a Taser, and come down and Tase him. If that doesn't work, then we'll finally come up with a shield or two. Later, Sgt. Negrete is heard saying that if the subject was not compliant, he is going to "get thumped right away."

The facts of this case show serious issues with this DAT plan and Sgt. Negrete's actions as a supervisor. First, Sgt. Negrete's plan was not clear overall. Secondly, critical contingencies and steps were missing. Third, the plan did not properly take into account the actual facts presented in this situation. Fourth, Sgt. Negrete failed to remain in a supervisory role, and properly supervise those under his command. Fifth, Sgt. Negrete failed to assist in the proper sequestration of officers and not discuss the shooting.

A. Sgt. Negrete did not have a clear and comprehensive plan

Sgt. Negrete never laid out a clear and comprehensive plan if Mr. Pawlik woke up, and didn't comply with their orders. On his PDRD Sgt. Negrete can be heard saying to Lt. Yu, if he wakes up now, "we'll deal with him" (Negrete PDRD 3:55). But how he would "deal with him" was not formulated and explained to anyone. This was critical to be formulated and discussed fully in advance. This error can be seen in Sgt. Negrete's own words, during his initial interview with Internal Affairs. Sgt. Negrete said, "He was not obeying my commands. At this point, I'm thinking of other options for less-lethal, but it evolved so quickly that that didn't happen." A supervisor cannot wait until a situation occurs to start formulating a plan, if they have time to plan in advance. Mr. Pawlik could have had comprehension issues, he had a gun, and the threat was already imminent. There would not reasonably be time to "deal" with Mr. Pawlik and set up a new plan if he woke up and was confused, uncooperative, or ran. If there were steps or orders that were possible to effectively and safely take Mr. Pawlik into custody, they had to be worked out in advance, and every officer had to be informed of the contingencies so that any misstep by Mr. Pawlik would not trigger a deadly reaction or place others in danger.

Sgt. Negrete said that he would "challenge" the subject and then "accept" his surrender. But how he would challenge Mr. Pawlik so that Mr. Pawlik would surrender other than to "thump" him fairly quickly was not laid out or discussed. Per Sgt. Toribio, officers are taught to look at a situation as a chess game and think several steps ahead. There was no discussion of any "what if's," let alone how any "what if's" would be responded to other than in the basic plan.

The facts show that Sgt. Negrete had time to make a plan with contingencies and place officers in roles to meet those contingencies, yet failed to do so. He was on scene with the subject asleep for approximately one half hour before Mr. Pawlik woke up.

Sgt. Negrete is heard saying to presumably Sgt. Webber, since at the time he had the less-lethal rifle, "once this is all set up, you're going to thump him" (Negrete PDRD 1:16). What "once this is all set up," is not clear. It also is not consistent with Sgt. Negrete's plan for verbal challenges and loud noises first to wake Mr. Pawlik.

Sgt. Negrete had asked presumably Officer Phillips if he had a Taser, and told him he was Taser, but later he assigned Officer Phillips to be less-lethal. No Taser person was

then put in place and given instructions. When and under what circumstances a Taser would or could be utilized were left unplanned and unsaid. Sgt. Negrete said in his interview following the shooting that Sgt. Webber was "Taser." But this is inconsistent with Sgt. Webber being "announcer" on the BearCat PA system, and no plan was heard discussed with Sgt. Webber as to being "Taser."

Sgt. Negrete called out to the officers on scene, hey guys if he goes alert, I'll be talking OK. But later Sgt. Negrete told Sgt. Webber that Sgt. Webber would make announcements. Sgt. Negrete is seen on PDRD patting Sgt. Webber on the shoulder and saying to him, if he wakes up, give announcements. Sgt. Negrete is heard on PDRD going over with Sgt. Webber that Sgt. Webber needs to tell the subject not to move if he wakes up, and then to tell the subject after he understands, to put his hands up. However, once Mr. Pawlik woke, Sgt. Negrete himself jumped in immediately (as do many officers) and started giving commands. Sgt. Negrete never delineated his "talker" role from the "announcements" role.

Sgt. Negrete referred to the handcuffing of the subject by saying "we," or "we'll cuff him." Sgt. Negrete and some of the other officers may have assumed since he designated himself talker, he would also be the talker/handcuffer since that is often a combined role in a DAT arrest. However, his role in this regard wasn't made clear at all times to those he spoke with. Sgt. Negrete also did not tell Lt. Yu that he was in the role as talker/handcuffer. And though Lt. Yu didn't ask for clarification either, Sgt. Negrete had a duty as part of his explaining the plan to tell Lt. Yu the roles of the officers on scene.

Sgt. Negrete said he was expecting "two more rifles." But he likewise never said why he needed "two more rifles," or discussed roles for them. Sgt. Negrete was initially expecting another officer with another armored vehicle. Sgt. Negrete never described how he would use the second armored vehicle.

B. Sgt. Negrete's plan was missing critical contingencies and steps

Sgt. Negrete's plan was missing critical contingencies and steps. Other than a complete surrender, nothing else was in place. Nothing was laid out, for example, if Mr. Pawlik woke up and stood up, ran or if he turned the gun away from the officers, but still had it in his hand.

Sgt. Negrete is heard saying if the subject was not compliant, he is going to get thumped right away. He also discussed with Officer Phillips where to shoot the beanbag rounds. But he never discussed with the officers what to do if Mr. Pawlik had any reaction to getting thumped other than giving up and surrendering.

Per DGO K-3, members shall consider the possibility of any language barriers, noise, other distractions, or disabilities which may impair or frustrate the member's efforts to courteously and clearly communicate with the person.

Sgt. Negrete did not make plans if Mr. Pawlik woke, and it became evident he had a mental illness. Sgt. Negrete stated in his Internal Affairs interview, that Officer Hawkins (on scene as a utility officer) was a CIT (Crisis Intervention Training) officer, but he didn't discuss any options with him because it was unknown if the subject suffered from a mental illness. Sgt. Negrete didn't know if Mr. Pawlik suffered from mental illness, but he could have suspected it to be a factor. Mr. Pawlik looked disheveled and homeless. People with a mental illness are more likely to be homeless. Sgt. Negrete should have made a plan with Officer Hawkins in advance, rather than wait until Mr. Pawlik woke to see if Mr. Pawlik had an issue, given he had time to do so. In serious situations such as this where mental health seems a possibility and a life is at stake, DGO-3 requires at least this consideration.

Sgt. Negrete also did not have a Spanish-speaker come to the scene, in case Mr. Pawlik didn't speak English. Officer Phillips had thought Mr. Pawlik was a male Hispanic, as did several other officers. However, Sgt. Negrete specifically rejected getting a Spanish-speaking officer on the scene. Sgt. Negrete said he "knew enough." Yet when it came time to call out to the subject, it was Officer Berger who used his imperfect Spanish to try to say drop the gun. If Mr. Pawlik had answered in Spanish, minimal Spanish would not have been sufficient. As it turned out, it was not an issue. However, Sgt. Negrete rejected the consideration of a language barrier without a good reason.

C. Sgt. Negrete's plan did not take into account the actual facts of the situation before him

Sgt. Negrete's plan did not take properly into account the factual situation before him. Sgt. Negrete stated in his interview following the incident, that in his opinion there was no need to rush. However, Sgt. Negrete made plans to wake and confront Mr. Pawlik in order to "challenge" him. Sgt. Negrete's plan to wake Mr. Pawlik before he woke on his own was potentially problematic because it increased the risk of startling Mr. Pawlik or awakening him when he was still disoriented, under the influence or confused. Mr. Pawlik had been passed out in between two houses for what officers knew was at least an hour, during the day time. Mr. Pawlik appeared asleep, drunk or drugged. Mr. Pawlik had not woken up to the noise of the original sirens of the first officers on scene. Mr. Pawlik looked "homeless," and had multiple assorted bags around him. As such, Mr. Pawlik should have been identified as someone likely under the influence of something, and possibly with a mental illness. There was also enough distance between Mr. Pawlik and the officers that keeping someone watching what was going on with the binoculars on scene or obtaining better ones would have been helpful. It is much easier to make a mistake when your perception might be off.

Sgt. Negrete knew Mr. Pawlik was alive, because Mr. Pawlik could be seen breathing and swallowing; no blood was seen. However, Sgt. Negrete's plan was to wake Mr. Pawlik, rather than let Mr. Pawlik sleep as long as possible. Mr. Pawlik waking on his own increased the chances that he would not be startled or disoriented, when the announcement and commands would be more effective. Sgt. Negrete rejected the use of a police dog because he thought it might startle Mr. Pawlik, but didn't seem to consider that a beanbag round would also startle Mr. Pawlik and could cause him to

shoot. There was no reason to formulate a plan that would rush this situation. The outcome may have been the same in this case ultimately had he chosen not to wake Mr. Pawlik. However, a plan that considered Mr. Pawlik's likely condition first was called for under these circumstances.

Sgt. Negrete's plan did not address the fact that Mr. Pawlik was in a precarious situation where he could easily be startled, confused, under the influence, or disoriented. As such, Mr. Pawlik had the increased potential to raise the gun off the ground, which would then likely be considered an immediate threat by the officers acting as lethal cover. Sgt. Negrete's plan without such a contingency had the potential to be deadly. The "elephant in the room" was the gun already pointed at officers, but Sgt. Negrete was never heard trying to consider or discussing any contingency that might be considered or formulated to avoid lethal force if his raising of the gun seemed accidental. Given a life was at stake, trying to think options through, such as better use of the BearCat, deserved some thought applicable to the circumstances, and not just the basic, talker/cuffer, lethal cover and non-lethal beanbag plan.

Sgt. Negrete's plan of basically giving Mr. Pawlik one option if he woke on his own was problematic. Sgt. Negrete expected Mr. Pawlik to comprehend orders, drop the gun and surrender. If he moved the gun upwards even if by accident, and even if trying to comply, it could have been considered to be a threat. Sgt. Negrete never talked about with the officers whether any level of raising or moving the gun in advance would be acceptable. It is one thing that the law allows officers legally to respond to a perceived threat. It is another to at least discuss a range of possible ideas for seeking a peaceful solution or using some restraint if it is still safe to do so. DGO K-3 states that the Oakland Police Department values the protection and sanctity of human life, and that the Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force.

Sgt. Negrete failed to maximize available resources. For example, Sgt. Negrete had a BearCat, yet using the BearCat as a way to provide cover while initiating a dialogue with Mr. Pawlik even if he wasn't immediately compliant wasn't a plan that was considered.

D. Sgt. Negrete failed to remain in a supervisor role and properly supervisor those under his command

Sgt. Negrete failed to remain in a supervisory role. Sgt. Negrete handled tasks already assigned to others. Per Sgt. Toribio, it is best for the team leader to step back and remove themselves from other roles; the team leader would just coordinate the other roles with the DAT. Sgt. Negrete assigned himself the role of talker as discussed above, even though he had assigned the role of "announcer" to Sgt. Webber. Sgt. Negrete assigned two officers as lethal cover, Hraiz and Berger. Yet on his PDRD at minute three, Sgt. Negrete is heard talking to himself about whether he can get a good angle, and he is seen in a reflection pointing his rifle in Mr. Pawlik's direction. On his PDRD at 24:35 Sgt. Negrete can be seen holding his rifle in the direction of Mr. Pawlik; a position he appears to have remained in until he directed the BearCat into place. He then appears to have resumed that role of holding his rifle on Mr. Pawlik after the

BearCat was in place. There was no reason Sgt. Negrete needed to be talker, or lethal cover. There were sufficient officers available to fill needed roles. His taking on of multiple roles diverted his attention away from the officers he was supervising. Given a man's life was at stake, his attention to what was happening, giving orders and guidance to the officers on scene, and responding to unfolding situations and the officers' roles in evolving plans was critically important.

Sgt. Negrete's failure to supervise is also evident in his failure to notice that after he arrived on scene, Officer Tanaka had his rifle pointed at Mr. Pawlik as lethal cover standing right next to him, so that now there were four officers acting as lethal cover on a man they wanted to detain. There is no typical number of designated lethal cover units per subject matter expert Sgt. Toribio. However, Sgt. Negrete had already assigned lethal cover, and presumably already taken into account the environment, the fact that there was one subject, and the other angles. Any extra cover would be unnecessary, and could look bad if lethal force had to be used. Meanwhile, again there was no designated officer with a Taser. Sgt. Negrete never knew Officer Tanaka was lethal until after the shooting because he himself was watching Mr. Pawlik as lethal cover with his own rifle in his hands.

Sgt. Toribio stated that ideally, the team leader provides the briefing to the newly arrived officer. Sgt. Negrete did not tell Officer Tanaka when he got on scene what his role was. He did not radio or have Officer Tanaka radioed to inform him as to his role once he got there. Other officers could fill Officer Tanaka in as well if the team leader couldn't, but Sgt. Negrete never discussed Officer Tanaka's role with other officers even though he knew Officer Tanaka was coming since he was driving the BearCat to the scene. After the fact Sgt. Negrete has said he had a plan as to what he wanted Officer Tanaka's role to be--but a supervisor properly conducting his or duties discusses it in advance with those who need to know.

Sgt. Negrete failed to control the instructions being given to Mr. Pawlik when he woke up. Sgt. Negrete gave commands, as did various officers when Mr. Pawlik woke up, which is consistently advised against in training. Conflicting commands can result in deadly consequences. Officer Hraiz gave commands to Mr. Pawlik, as he stated in his interview, and he said other officers did as well. Officer Berger said he gave a command in Spanish, and he said in his interview he also "had the right" to give commands. Sgt. Webber, who had been designated the announcer, tried to use the PA system but encountered a glitch; Officer Julie Yu then got on a patrol car PA system and said drop the gun. These multiple commands being shouted out demonstrate multiple failures on Sgt. Negrete's part: the failure to maintain control of all the officers giving commands; his prior failure to designate one speaker--himself or Sgt. Webber; his failure to address if a command was going to be given in Spanish; his failure to insure commands were not conflicting (hands up/don't move).

E. Sgt. Negrete failed to assist in the sequestration of officers post-shooting, and in not discussing the incident following an OIS

Sgt. Negrete also failed in his duties to assist in the sequestering of officers and in not discussing the incident following an OIS. Rather than assisting in the sequestering of Officer Tanaka, Sgt. Negrete improperly stated after the shooting to Officer Tanaka, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option." All officers are trained to not discuss an incident following an OIS. This is a very serious and troubling breach of protocol. Per Departmental General Order K-4—Reporting and Investigating the Use of Force (16 Oct 14), "Every member or employee who uses or is a witness to a Level 1 use of force shall not discuss the incident with others and limit any discussion of the incident to information required..." Further, per Informational Bulletin "Force Review Boards" (04 May 16), which was in effect at the time of the shooting, "Supervisors are reminded they should make every attempt to keep all involved parties separated."

Therefore, because Sgt. Negrete had been trained as a supervisor, and as a supervisor in critical incidents, yet failed to properly supervise for the reasons stated above, it is found that based on a standard of a preponderance of the evidence, Sgt. Negrete is sustained for failure to properly supervise.

FINDING: SUSTAINED

***Discussion re Classification of Allegation 6 as a Class II violation as to Sgt. Negrete:**

Per DGO M-3, complainants against Departmental Personnel shall be categorized as Class I or Class II offenses. Once the investigation was completed, the CPRA categorized the supervisory allegation for Sgt. Negrete (Allegation 6) as a Class II violation.

Class I and Class II violations per DGO M-3 are defined as follows: Class I violations against Departmental Personnel or Procedures, are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution. Class II offenses shall include all minor misconduct offenses.

Per DGO M-3, a Class I violation for a supervisor includes under subsection E., m. (pp. 5), the "failure of a supervisor/manager to properly supervise, and/or take corrective action for misconduct that he/she knew about or reasonably should have known about."

Looking at the Discipline Matrix found under Training Bulletin V-T "Discipline Policy Appendix," there are two types of MOR (Manual of Rules) classes for a supervisor, and two for commanding officers. The more serious offenses are those that involve gross dereliction of duty, which would be Class I violations, and the lesser violations that involve minor misconduct, would therefore be the Class II violations.

MOR 175.99 defines “Gross Dereliction of Duty” as the failure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by carelessness and a reckless disregard for the consequences of the member or employee’s conduct.

Looking at what would be gross derelictions of duty under the Discipline Matrix, there are terminations for conduct such as the following: workplace violence; harassment and discrimination; failure to assist a fellow officer; criminal conduct; intentional search and seizure; planting evidence; failure to obey laws; failure to obey a lawful order; failure to report misconduct; soliciting or accepting gratuities; sexual activity on duty; falsely reporting an illness or injury; consumption of intoxicants; collision with gross negligence; accessing inappropriate websites; illegal uses of force; conduct effecting the security of department business; conduct compromising criminal cases; assisting criminals; belonging to subversive organizations; refusing to testify; interfering with investigations; retaliation; truthfulness; and a refusal to accept or refer a complaint.

There are in these allegations conduct that causes harm to the public service; lack of integrity; conduct that effects the integrity of the department; conduct that is vital to effective law enforcement; conduct that has broken or diminished public trust and confidence; constitutional rights violations; criminal law violations; violence and gross indifference to duty; conduct that is willful and deliberate; or that shows a reckless disregard for consequences. Using this type of conduct as the standard, the CPRA categorized the supervisory allegation for Sgt. Negrete as a Class II violation.

Sgt. Negrete’s plan, as discussed in detail in the analysis of Allegation 6, above, was not clear overall. Critical contingencies and steps were missing. The plan failed to consider the facts unique to this situation. Sgt. Negrete for example, failed to envision that Mr. Pawlik might be incoherent, under the influence, or have a mental issue, and might try to get up without dropping the gun and prepare his officers for this—even though he knew before him was a homeless-looking man, who was asleep in the day on someone’s lawn. There are many facts demonstrating poor choices and decision making, and flaws in his plan. However, the plan as flawed as it was, cannot be shown to be “willful and deliberate” or made with a “reckless disregard” for consequences. Sgt. Negrete had a plan, and his plan showed many steps that are important considerations in these types of situations such as having lethal and less-lethal force available (beanbags, and initially a Taser); containment of the armed subject; and making sure there was adequate cover. Sgt. Negrete voiced a desire to slow things down, even if he failed to see that his plan if carried out wouldn’t have achieved that. He voiced not wanting to use a dog, so that it didn’t startled Mr. Pawlik. Sgt. Negrete expressed on scene a desire to resolve the matter peacefully.

The success of other plans that Sgt. Negrete could have put in place are still speculative, and there is no guarantee that they would have succeeded. A different set of plans may indeed have prevented this loss of life, and a supervisor should make such plans and take steps that can help to avoid a loss of life. The plan here was basic, and Sgt. Negrete failed to properly plan necessary contingencies that could have arisen. However, the law does not require a particular plan or that risks be taken. If a person

is a lethal threat, an officer has a right to use lethal force whether or not any plan was in place.

A difficult component in determining whether this should have been a Class I or Class II case as to Sgt. Negrete, was deciding how to deal with the inappropriate remarks Sgt. Negrete made to Officer Tanaka after the shooting. Sgt. Negrete said to Officer Tanaka after the shooting, "dude, you had to. He pointed a gun right at us man." He is also heard on his PDRD at 42:17 saying to Officer Tanaka, "Hey, we had no other option." This is a knowing violation of OPD rules not once, but twice. It could be considered as an attempt to taint the investigative process. Sgt. Negrete said he was trying to comfort Officer Tanaka, and indeed as seen on PDRD, Officer Tanaka was very distraught after the shooting. Sgt. Negrete did not make any statements to any other of the officers who used lethal force, and therefore the sentiment of wanting to comfort Officer Tanaka seems credible. However, there were other ways of handling Officer Tanaka's distress. Ultimately, while Sgt. Negrete's statements were completely unacceptable, and he knew or should have known they were inappropriate, because the intent element is not completely evident that he did it to compromise the criminal case or the IA investigation, it was decided to apply the Class II standard.

7. Oakland Police Commander Lt. Alan Yu failed to properly perform his duties as the Incident Commander.

MOR 234.00-2*--COMMANDING OFFICERS RESPONSIBILITIES

Lt. Alan Yu was the Incident Commander for this incident. MOR 285.00-2 states that an Incident Commander must notify radio that he or she is on the scene of an incident because this identifies and establishes them as the Incident Commander. The Incident Commander is obligated to formulate a plan during a high-risk incident, as time, resources and exigencies allow. At a certain level, it is important for the Commander to plan for exigencies. The Commander should delegate specific tasks to team leaders. The Commander should use the "trust but verify" approach. For example, the Incident Commander would meet with the leader of the DAT. The Commander would ask if they have specific plans for accepting a surrender, deal with an escape, and handle exigent circumstances. The Commander concentrates on the concept of the operation. The team leader would concentrate on the details. The Commander is obligated to evaluate a plan that has been devised by a sergeant/team leader prior to his arrival at the scene. When a sergeant's plan is deficient, the responsibility falls upon the Commander to understand the situation, so that they understand what they are taking over. If the supervisor or team leader failed to provide sufficient detail, the Commander is obligated to elicit sufficient detail from him or her. If the Incident Commander observes any personnel conducting counter-productive actions depending on the nature and severity, the Commander should take action to correct this when possible. The Commander should be ensuring that the ancillary duties (perimeter, evacuation, etc.) are being done. Commanders should know what resources he/she has on scene, and what resources need to be requested. Critical incident checklists are available to Commanders, to help them remember everything that is needed. The intent of

command on the highest level is to preserve life, apprehend the subject and to preserve the crime scene.

Per the Training History of Lt. Yu, looking at some of his most recent trainings, he received Critical Incident training on April 26, 2017 (#10342 Critical Incident RESP/SUP/MGR-16, 24, 32 HR). On October 25, 2016 it states "EFRB/FBR Commander Responsibilities." On July 14, 2016, he was trained in Critical Incident Management. On February 9, 2016, he had an 8-hour course on Use of Force and Litigation. On March 25, 2015, he had training on Firearms, Force Options. On March 23, 2015, he had training on Less Lethal Drag Stabilizer, and he was recertified in ECW. Thus, Lt. Yu had been trained on how to be a commander, what role he needed to play, the use of force and force options.

Critically, Lt. Yu also was an OIS investigator from 2011 to 2016. He had inside knowledge of various OIS incidents, tactics, policies, and failures. Lt. Yu also was involved he said with the investigation of the Oakland Police Department OIS of the sleeping man in the car "in 2013," which also dealt with an unconscious subject in possession of a gun, and which included if the Commander appropriately supervised and implemented proper tactics (Mr. Demouria Hogg, in an incident which occurred June 6, 2015).

Lt. Yu failed in his obligations though in this case, despite his training, in multiple respects.

A. Lt. Yu failed to understand the situation and the mission, and formulate a plan pertinent to the high-risk situation

Lt. Yu did not have a complete understanding of what plans were in place, and as such, he did not participate in an overall strategy, that was unique to the circumstances of this scenario. He left the planning almost entirely up to Sgt. Negrete.

In his interview of August 29, 2018 with Internal Affairs, Lt. Yu said that Sgt. Negrete came out to talk to him, "And based on our conversation, I knew we were on the same page what we wanted to do." Yet he admits, "we kind of talked about it slightly. It wasn't a formal sit down, 'Here is what we're going to do' set-up. But first thing out of his mouth was like, 'We're not going to do anything until the BearCat gets here.'" Lt. Yu also said, "...me and him was very much on the same page, he was doing everything that I would also if I was a sergeant at the time. So, that's why I didn't really need to go elaborate into what his plans were. And he was a veteran officer with tactical SWAT experience. He probably knew more than me...I trusted his judgment." Since Lt. Yu didn't solicit necessary details, and relied instead on trust, Lt. Yu failed to recognize the deficiencies in Sgt. Negrete's plan. It was Lt. Yu's obligation to elicit sufficient detail from him.

Lt. Yu did not elicit sufficient detail of the plan to make sure the plan was complete, that it had the necessary contingencies, and that he had sufficient information to evaluate it. Lt. Yu did not question if officers were assigned to cover the necessary roles. He did not question Sgt. Negrete as to contingency planning. Lt. Yu did not

discuss the potential that Mr. Pawlik could be startled awake by any of Sgt. Negrete's plan. They did not discuss what would happen if Mr. Pawlik awoke, and did not comply with the orders to surrender. They did not discuss the precariousness of the situation at hand, and if there was a way to facilitate dialogue none-the-less if possible if Mr. Pawlik didn't initially comply. They discussed the BearCat coming, but other than that, there was no discussion of how it was to be used in particular. Lt. Yu said he ensured that less-lethal was available, but didn't discuss with Sgt. Negrete how less-lethal could be employed.

In his interview with Internal Affairs, Lt. Yu was asked about other forms of active resistance other than if the guy wakes up and points a gun at the officers, like "the guy gets up and starts walking towards you, holding a gun or he starts running right at you? Anything like that?" Lt. Yu stated, "There are so many contingencies. That's not a detail that I would go through with the officers or even Sgt. Negrete. That's an assumption. That is something that the DAT is going to prepare themselves." Lt. Yu at another point in his IA interview stated he didn't want to "micromanage" that portion of the DAT. However, Lt. Yu failed to recognize that as the scene commander, there is a difference between micromanaging and making sure contingencies and plans are in place. Lt. Yu stated, "there are so many contingencies," but a commanding officer's duties include making sure those have been considered. A commander is required to have a "trust but verify" approach.

B. Lt. Yu failed to properly determine from Sgt. Negrete if specific plans had been formulated to accept a surrender, deal with an escape and handle exigent circumstances

Sgt. Negrete discussed his plan with Lt. Yu. The description he gave to Lt. Yu was that once the BearCat gets here, we'll make some announcements. Nothing, thump him, beanbag, nothing. Tase him, right, nothing, then we'll move the shields. I'm pretty confident though if he is going to be responsive, that beanbag is going to get his attention real quick. Lt. Yu says yeah. Lt. Yu says we'll do announcements, uh, holding up this thumb and pausing. Sgt. Negrete says sirens. Lt. Yu then brings up the suggestion of a dog (which Sgt. Negrete rejects).

Lt. Yu was asked in his IA interview, if there was any plan or discussion about if Mr. Pawlik woke and was not compliant; he wakes up, and "You say, 'put the gun down', and he says, 'No I'm not going to put it down'." Lt. Yu responded, "we're not going to talk about all the scenarios of what he's going to do with that gun because at that point that's a lethal situation that the DAT will be responding to. We know the DAT responded to it, and that's up to Sgt. Negrete at the DAT to make the decision based on where the gun is, how far he is." However, this shows that Lt. Yu failed to determine if Sgt. Negrete had a specific plan for surrender, deal with an escape, and handle exigent circumstances as he is required to do as he was required to do. Lt. Yu failed to understand that such planning helps to prevent a lethal situation. Thus, Sgt. Negrete's failures are also all Lt. Yu's, when it comes to the plan having with missing parts and contingencies.

C. Lt. Yu failed in his duty to observe personnel conducting counter-productive actions, and take action to correct this

The Incident Commander should observe the DAT sergeant in charge also, to make sure that the sergeant is acting in accordance with OPD's rules and training, and make corrections as necessary. If he observes any personnel conducting counter-productive actions depending on the nature and severity, the Commander should take action to correct this. Lt. Yu was situated on the street on the other side of the divider. He could have or should have seen what Sgt. Negrete and the officers were doing. Sgt. Negrete was holding his rifle up focused on Mr. Pawlik for at least ten minutes prior to the BearCat arriving. After it was in place, Sgt. Negrete held his rifle up again. Lt. Yu should have seen Sgt. Negrete holding up his rifle towards Mr. Pawlik, as well as Officer Berger, Officer Hraiz, and Officer Phillips, and questioned the role of Sgt. Negrete in it. He also does not appear to have seen Officer Tanaka with a rifle pointed at the subject.

D. Lt. Yu failed to ensure that ancillary duties were being done

There was a lapse in the relating of the plan to the perimeter. Sgt. Ann Pierce, who was at the perimeter, stated in her interview with IA that she wasn't there for any planning, nor was she later informed of what the plan was. Lt. Yu was asked in his Internal Affairs' interview of August 29, 2018 if he thought that Sgt. Pierce and the officers in the rear perimeter had a good idea what the plan was. Lt. Yu said "I don't know," even though it is his job to ensure that ancillary duties, such as the perimeter are done. If Mr. Pawlik got up and ran back behind the walkway though, Sgt. Pierce and the other officers present would not have been aware of any plans. Lt. Yu said, "I would say I wouldn't announce the DAT plans to officers in the rear, but if we ever got at that point to where we are going to use the less-lethal, it'll be announced." Lt. Yu stated that Sgt. Pierce was "new," yet his plan was to wait to announce plans to her.

E. Lt. Yu failed to know what resources he had on scene, and what resources needed to be requested

Lt. Yu relied on Sgt. Negrete's expertise with SWAT. But Sgt. Negrete is also a SWAT member, not a SWAT team leader. Lt. Yu should have had the superior knowledge and experience to recognize that more expertise was needed in this scenario, and helped Sgt. Negrete formulate the best plan possible under the circumstances. Sgt. Negrete is a first-line supervisor, and Lt. Yu is a superior commander to him. Lt. Yu foresaw that this could be an OIS; he called Sgt. Rowley back away from the scene where the officers were observing Mr. Pawlik for this reason. Yet he offered little help to Sgt. Negrete as far as tactics or call for assistance for other available resources within OPD in an effort to reduce the risk of injury or loss of life. Lt. Yu said that "life was the number one goal or concern here," but only the life of the officers seemed to be his concern, not that of Mr. Pawlik as well if possible.

Lt. Yu failed to maximize resources. A commander should know what resources he/she has on scene, and what resources need to be requested. Lt. Yu had the option of deploying or requesting the deployment of the Tactical Operations Team, or to include CIT (Crisis Intervention Training), which the facts show he did not consider (Yu interview with IA). As set forth in DGO K-5, during critical incidents the Tactical Operations Team can be called out as a resource for handling the appropriate critical incidents. It consists of tactical commanders, the entry team, the sniper team, and the hostage negotiation team in high-risk operations. This was a situation with a man with a gun in his hand in a high-risk situation but whom they wanted to detain for likely some type of firearm in public charge. The expertise of the Tactical Operations Team as a resource could have helped with the planning. A deeper level of expertise would have been advisable given the situation presented a person whom they wanted to detain, with a gun in his hand pointed towards officers; the possibility of the subject being drugged or drunk was high; the subject's life and the lives of others were at stake; and the situation was taking place in a heavily residential area. Lt. Yu was asked in his Internal Affairs interview of August 29, 2018 if he requested an HNT (Hostage Negotiation Team). He did not. Asked if this could have been of benefit to him, Lt. Yu said no, because "We can't even get him to wake up." Lt. Yu was asked, "What about later on? Let's say hypothetically of course he wakes up and then you're trying to have a dialogue with him. Would that have provided any help?" Lt. Yu's response was "Yeah, that would change the incident. It would change the factors. If we're able to communicate, HNT would be very useful." Thus, Lt. Yu himself after the fact acknowledged that HNT being on scene in advance in case Mr. Pawlik woke would be very useful, if the opportunity arose to talk to him, but failed to add it to the plan.

Similarly, Lt. Yu said in his Internal Affairs Interview that he knew a lot of his officers were CIT trained, but "I can't say which ones exactly." Again, his reasoning was "You can't get CIT anything without communication." He was asked hypothetically about having CIT officers there to consult with Mr. Pawlik if communication could be established. Lt. Yu admitted that "Similar to HNT, it would be helpful if you could establish communication." Lt. Yu failed to understand that establishing communication if possible in high-risk situations is not only "helpful," but critical when possible.

Lt. Yu said that he had not received formal or informal training as to the capabilities of the BearCat. Yet he stated, the "biggest thing is the cover and the tools that are inside." Nonetheless, despite this, there was no discussion of what the "tools" were with Sgt. Negrete, and to get Sgt. Negrete's or other OPD expert's thoughts as to whether any of those tools could have been used. If Sgt. Negrete did not have that expertise, he had the ability to call for assistance from others in the department who might.

Therefore, because Lt. Yu had been properly trained as a Commander in Critical Incident Management, yet failed to properly supervise for the reasons stated above, it is found that based on a standard of a preponderance of the evidence, Lt. Yu should be sustained for failure to properly supervise.

FINDING: SUSTAINED

***Discussion re Classification of Allegation 7 as a Class II violation as to Lt.**

Yu:

Per DGO M-3, complainants against Departmental Personnel shall be categorized as Class I or Class II offenses. Class I and Class II violations per DGO M-3 are defined as follows: Class I violations against Departmental Personnel or Procedures, are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including dismissal and may serve as the basis for criminal prosecution. Class II offenses shall include all minor misconduct offenses.

Per DGO M-3, a Class I violation for a supervisor includes under subsection E., m. (pp. 5), the "failure of a supervisor/manager to properly supervise, and/or take corrective action for misconduct that he/she knew about or reasonably should have known about."

Looking at the Discipline Matrix found under Training Bulletin V-T "Discipline Policy Appendix," there are two types of MOR classes for a supervisor, and two for commanding officers. The more serious offenses are those that involve gross dereliction of duty, which would be Class I violations, and the lesser violations that involve minor misconduct, would therefore be the Class II violations.

MOR 175.99 defines "Gross Dereliction of Duty" as the failure to use reasonable care to protect life and/or property and to safeguard the legal rights of individuals. Gross dereliction of duty is characterized by carelessness and a reckless disregard for the consequences of the member or employee's conduct.

Looking at what would be gross derelictions of duty under the Discipline Matrix, there are terminations for conduct such as the following: workplace violence; harassment and discrimination; failure to assist a fellow officer; criminal conduct; intentional search and seizure; planting evidence; failure to obey laws; failure to obey a lawful order; failure to report misconduct; soliciting or accepting gratuities; sexual activity on duty; falsely reporting an illness or injury; consumption of intoxicants; collision with gross negligence; accessing inappropriate websites; illegal uses of force; conduct effecting the security of department business; conduct compromising criminal cases; assisting criminals; belonging to subversive organizations; refusing to testify; interfering with investigations; retaliation; truthfulness; and a refusal to accept or refer a complaint.

There are in these allegations conduct that causes harm to the public service; lack of integrity; conduct that effects the integrity of the department; conduct that is vital to effective law enforcement; conduct that has broken or diminished public trust and confidence; constitutional rights violations; criminal law violations; violence and gross indifference to duty; conduct that is willful and deliberate; or that shows a reckless disregard for consequences. Using this type of conduct as the standard, the CPRA categorized the supervisory allegation for Lt. Yu as a Class II violation.

Lt. Yu failed to elicit sufficient information regarding Sgt. Negrete's plan. He did not question Sgt. Negrete regarding contingency planning, and ensure such planning in all necessary areas was in place. Lt. Yu did not help ensure a plan was in place unique to the circumstances. Lt. Yu did not call in special assistance that could have been utilized

to react to various circumstances that could have transpired. Lt. Yu should have seen Sgt. Negrete holding up his rifle in the direction of Mr. Pawlik multiple times. Lt. Yu relied too heavily on Sgt. Negrete based on their past relationship, trust and presumed level of expertise, rather than the facts before him. There was also a lapse relating to the plan for the perimeter security. Lt. Yu was a passive participant on many levels on scene, and failed to carry out many of the duties and responsibilities required of a Commander. All these are discussed in the analysis of Allegation 7, above.

However, Lt. Yu arrived on scene and had Sgt. Negrete take lead of the DAT since he had DAT experience. Lt. Yu discussed the plan with Sgt. Negrete that he had formulated, and thought it sounded good. He assigned Sgt. Pierce to be perimeter and traffic. He had Sgt. Rowley evacuate homes to the east of the subject.

The plan here was basic and missing contingencies. However, generally the law does not require a particular plan or that risks be taken. If a person is a lethal threat, an officer has a right to use lethal force whether or not any plan was in place. Therefore, for these reasons, Lt. Yu's misconduct was determined by the CPRA to be a Class II violation.

8. Oakland Police Officer Brian Tanaka failed to advise Communications of his rifle deployment.

MOR 314.39-2--PERFORMANCE OF DUTY

The allegation that Officer Brian Tanaka failed to advise Communications of his rifle deployment was an allegation discovered and raised initially by Internal Affairs, arising out of DGO K-6, which states when a PRO (Patrol Rifle Officer) deploys the patrol rifle, the officer shall, as soon as practical, advise the Communications Division. Upon deployment, if applicable and practical, the PRO shall advise the Communications Division of tactical considerations to include: 1) Safest route of approach; 2) Location of the PRO; 3) Location and description of the suspect; and 4) Containment, and crossfire concerns.

The purpose of the policy is so that a supervisor can make tactical decisions and properly allocate resources.

Officer Brian Tanaka did not advise Communications of his rifle deployment and tactical considerations. However, per the statement by subject matter expert Lt. Michael Beaver, the Department's Patrol Rifle Coordinator, there are exceptions. One is that the advisement must be made when it is practical. This is in line with DGO-K-6, which states if applicable and practical. Another exception per Lt. Beaver, is when the officer's sergeant calls him or her to the scene, which is the case here, which may encompass the exception of "applicable."

Officer Tanaka was called by Officer Hraiz, and ordered to bring the BearCat to the scene Code 3, acting on the orders of scene supervisor Sgt. Negrete. There was no talk that Officer Tanaka would be assigned to a particular role in advance. Sgt. Negrete knew Officer Tanaka was coming with a rifle, and in fact stated to someone he had "two more rifles coming," because he had ordered Officer Tanaka and Officer Remo to come with the BearCat and another OPD armored vehicle. That Officer Tanaka was coming with a rifle, the safest route to approach, location of the PROs, location and description of the suspect, containment, and crossfire concerns were all known to and being handled by Sgt. Negrete. Sgt. Negrete should have reported to Lt. Yu that he had "two more rifles coming" and described to Lt. Yu how he intended to use them.

All Officer Tanaka knew, was there was a "dude down with a gun." No other instructions had been given to him. Officer Tanaka brought his rifle to the scene because Patrol Rifle Officers are taught to sling their rifles to allow them to take on other roles, per Lt. Beaver. Officer Tanaka arrived on scene, and normally would have been briefed by the sergeant on scene and assigned a role. In this case, within three seconds of the BearCat engine being turned off, someone yelled "he's moving." There was no time for Officer Tanaka to speak to his supervisor or another officer about his deployment on scene, as he and the other officers around him were all responding to an emergency situation which involved an imminent threat. Sgt. Negrete also had not radioed Officer Tanaka giving him a role in advance.

Therefore, while Officer Tanaka did not call Communications prior to arriving on scene, it is not entirely clear that Officer Tanaka's failure to call into Communications did not meet the exception of "applicable and practical" given the circumstances of this case.

FINDING: NOT-SUSTAINED

IX. TRAINING AND POLICY AND PROCEDURES RECOMMENDATIONS AND COMMENDATION

TRAINING RECOMMENDATIONS:

This case, and other OPD cases in the past, officers have been heard giving conflicting signals at the time officers were calling out to the subject: "don't move;" "put your hands up;" and "drop your weapon." Training is recommended for OPD officers. These statements are not consistent, and could lead to deadly shootings by officers. One officer only should be giving commands, not various as occurred here, and that officer should direct the precise and clearly identifiable steps for a subject one at a time, that the directing officer deems necessary given the circumstances.

The CPRA investigator recommends training for Officer Berger. Officer Berger told Officer Phillips, who had a less-lethal rifle, as heard at 37:58 on his PDRD, if that gun moves, bag him. Someone (presumably Officer Phillips) says yep. Officer Berger is not supervising or giving commands to Officer Phillips. Keep in mind also that Mr. Pawlik at

the time was being told to drop his weapon, which would necessitate hand and gun movement. Movement alone would not justify a use of force.

Officer Berger also stated he had a "right" to give commands in this situation to the subject. In a situation like this where there is a plan in place and a talker is designated, and the talker is already talking, this could result in conflicting orders. While he did not say anything improper here, it is important to make sure that there is only one talker in critical cases such as this.

POLICY and PROCEDURES RECOMMENDATIONS:

The CPRA is not currently a part of the post-OIS officer interview process, or called to the scene. The CPRA director should be notified in the case of an OIS, and CPRA investigators given the option of attendance and participation in the questioning.

Lt. Yu was not interviewed immediately post-incident. Per DGO K-3 however, "Involved personnel" includes a member or employee who uses force or directs the use of force (DGO K-3). Lt. Yu was the Incident Commander and as such approves/directs any use of force, and should have been interviewed immediately post-interview.

CPRA recommends a better practice for sequestering multiple officers. In this case, Sgt. Jim had the officers who fired their weapons off to one side to talk to them. It is recommended that the officers be separated physically as soon as possible, and not be seen together following an OIS at all, such as was the case here.

Lt. Yu stated that he has never had formal or informal training as to the capabilities of the BearCat or how to use it. He has never been inside a BearCat, or received training from the department concerning the placement of a shooter inside the BearCat to shoot out. If OPD officers are in a position to be a commander at the scene of a critical incident in which a BearCat will be used, and it is something that could have tactical advantages, all OPD commanders should be trained and be aware of those capabilities in order to be able to provide critical considerations in evaluating a plan and formulating contingencies.

CPRA recommends that OPD issue PDRDs for commanders. A commander on a critical incident scene should also be required to be wearing a PDRD so that the orders given can be heard.

Lt. Yu should be retrained on the Use of Force Policy, as he confused an "immediate threat" justifying a use of force, with something he erroneously twice called an "immediate imminent threat." (His Crime Report and his Internal Affairs Interview)

COMMENDATION:

To Sgt. Webber, for the foresight of placing his PDRD on top of the BearCat.

Class Title: INSPECTOR GENERAL

Bargaining Unit: UM2 - Local 21 Management Employees (Civil Service)

Class Code: AP400

Salary:

--

[Print Job Information](#)

[Email me when jobs like this become available](#)

Definition

Benefits

The City of Oakland is seeking qualified candidates to fill the position of Inspector General, reporting to the Oakland Police Commission. Under the supervision and direction of the Oakland Police Commission, the Inspector General shall conduct any audit or review of the Department necessary to assess the Department's performance and adherence to constitutional policing practices, and shall also include conducting any audit or review of the Department's policies and procedures, including any pattern of non-compliance with the foregoing, as necessary or helpful for the Commission to fulfill its duties under City Charter section 604(b)(4), (5) and (6). The Inspector General shall be responsible for the day-to-day operations of the OIG, including but not limited to the supervision and direction of all OIG staff.

Distinguishing Characteristics:

Under the supervision of the Police Commission, the Inspector General is responsible for review, analysis, and reporting that addresses policies and practices adopted by OPD and CPRA. To exercise this audit authority, the Inspector General is authorized to observe Executive Force Review Boards, Force Review Boards, and *Skelly* hearings, and to access all files, including personnel records and confidential files, necessary to fulfill the duties of the position.

Within ninety (90) days of his or her appointment, the Inspector General shall, at a minimum, receive the training described in City Charter section 604(c)(9) and in section 2.45.190(A) through (F) of this Chapter 2.45. The Commission may propose any additional training it deems necessary for the Inspector General to perform the functions and duties of the OIG.

The Inspector General shall serve and report to the Commission full time and may only be appointed, disciplined or removed by the City Administrator according to the City's Civil Service Rules and any applicable memorandum of understanding between the City and a union., and after an affirmative vote of five (5) members of the Commission. The City Administrator shall not have the authority to independently remove the Inspector General.

Examples of Duties:

Duties include, but are not limited to the following:

- The Inspector General shall be responsible for the day-to-day operations of the OIG, including but not limited to the supervision and direction of all OIG staff.
- The Inspector General shall be permitted to attend, as an observer, Executive Force Review Board, Force Review Board, and, to the extent permitted by law, *Skelly* hearings if he or she chooses to do so. The Inspector General shall not have any decision-making authority regarding the specific cases being heard, and shall maintain the confidentiality of the hearings as required by law. The Inspector General shall not be permitted to attend any Executive Force Review Board, Force Review Board, or *Skelly* hearing until he or she has completed the training identified in section 2.45.190(C).
- Preparing an annual report, summarizing the results of the annual reviews of:
 - The Department's processes and procedures for investigating alleged Misconduct;
 - The Department's processes and procedures for determining the appropriate level of discipline for sustained findings of Misconduct;
 - The Agency's processes and procedures for investigating alleged Misconduct;
 - The Agency's processes and procedures for determining the appropriate level of discipline for sustained findings of Misconduct;
 - Trends and patterns regarding Department training and education, and the Department's use of any early warning system(s);
 - Training and/or policy issues that arise during the investigations of complaints; and
 - Trends and patterns regarding use of force and

Department sworn employee-involved shootings.

This annual report shall be presented to the Commission, the Mayor, the City Council's Public Safety Committee, the City Council and to the Chief and shall include, where appropriate, recommendations for changes in the processes and procedures that were reviewed.

- Monitoring and evaluating, on at least an annual basis, the number and percentage of sworn officers who have received in-service training on profiling and implicit bias, procedural justice, de-escalation, diplomacy, situational problem-solving, and work-related stress management, and make recommendations, as appropriate, to the Commission regarding changes to the Department's training programs.
- Developing and presenting a plan to the Commission to measure the performance of each element of the Department's discipline process for sworn Department employees.

At the discretion of the Police Commission, the Commission may direct the Inspector General to review and comment on all other policies, procedures, customs, and General Orders of the Department.

Minimum Qualifications:

The following qualifications are guidelines, as the appointing authority has discretion in filling positions in exempt classifications Any combination of education and experience that is equivalent to the following minimum qualifications is acceptable.

Education:

J.D. or Master's degree in public administration, public policy, criminal justice, or a related field from an accredited college or university.

Experience:

Three years of professional experience in investigative, auditing, and public policy work in a related field that includes experience with statistics and data collection in public sector entity. Legal experience and background in law enforcement policy and practice is desirable.

Knowledge and Abilities:

Knowledge of:

- Principles and practices of public policy formulation.
- Police Department administration and department organization.
- Data collection and statistical analysis methods.

- Public relations principles including public speaking and public presentations.
- Advanced personal computer applications particularly spreadsheet and database software.
- Policies and practices of civilian oversight of law enforcement agencies.
- Role of local Boards and Commissions.

Ability to:

- Maintain accurate records and files.
- Design, manage and troubleshoot databases.
- Interpret rules, laws and regulations pertaining to police conduct.
- Analyze and compile data.
- Prepare well-written analytical reports based on findings.
- Communicate effectively orally and in writing.
- Make oral presentation to both large and small groups.
- Maintain confidentiality and handle sensitive situations with tact and diplomacy.
- Work effectively with employees, elected officials, boards and commissions and the general public.
- Apply strong analytical skills to use data to identify patterns and trends.

License or Certificate / Other Requirements:

Individuals who are appointed to this position will be required to maintain a valid California Driver's License throughout the tenure of employment OR demonstrate the ability to travel to various locations in a timely manner as required in the performance of duties.

Class History:



**CITY OF OAKLAND
OAKLAND POLICE COMMISSION**

Meeting Minutes REVISED

Thursday, March 28, 2019

6:30 PM

City Hall, 1 Frank H. Ogawa Plaza, Council Chamber
Oakland, CA 94612

I. Called to Order
Chair Jackson

The meeting started at 6:32 p.m.

II. Roll Call and Determination of Quorum
Chair Jackson

Commissioners Present: Tara Anderson, José Dorado, Ginale Harris, Regina Jackson, Edwin Prather, and Thomas Smith. Quorum was met.

Absence (Planned): Mubarak Ahmad

Counsel for this meeting: Sergio Rudin

III. Welcome, Purpose and Open Forum (2 minutes per speaker)

Chair Jackson welcomed Alternate Commissioner Chris Brown and called public speakers. The purpose of the Oakland Police Commission is to oversee the Oakland Police Department's policies, practices, and customs to meet or exceed national standards of constitutional policing and to oversee the Community Police Review Agency which investigates police misconduct and recommends discipline.

Chair Jackson welcomed and introduced Alternate Commissioner Chris Brown. He was a former Chair of the CPRB and comes to us with wonderful experience. She asked him to speak. Commissioner Brown said thank you and is looking forward to this opportunity.

Comments were provided by the following public speakers:

Lorelei Bosserman
Oscar Fuentes
John Bey
Assata Olugbala
Gene Hazzard
Saleem Bey
Brightstar Ohlson

IV. Oakland Police Department (OPD) Budget for Managing Job-Related Stress

Chief Anne Kirkpatrick provided her proposed budget and timeline recommendations to the Commission for providing education and training to OPD sworn employees regarding the management of job-related stress, and regarding the signs and symptoms of post-traumatic stress disorder, drug and alcohol abuse, and other job-related mental and emotional health issues. *This was discussed at previous meetings.*

Comments were provided by the following public speakers:

Gene Hazzard
Saleem Bey
Assata Olugbala
John Bey

A motion was made by Vice Chair Harris, seconded by Commissioner Dorado, to write a letter to the City Council. The motion carried by the following vote:

Aye: Anderson, Dorado, Harris, Jackson, Prather, and Smith.

Chair Jackson will send a draft letter to Commissioners tomorrow.

V. R-02: Searches of Individuals on Probation and Parole

The Commission reviewed an amended version of R-02: Searches of Individuals on Probation and Parole, and may vote on approving that version. Members of communities directly impacted by the policy shared their experiences and views. *This has been discussed at previous meetings.*

Comments were provided by the following public speakers:

Brendon Woods, Chief Public Defender, Alameda County
Gene Hazzard
Lorelei Bosserman
Assata Olugbala
Elise Bernstein
Saleem Bey
Bruce Schmiechen
Anne Janks
Sam Johnson

A motion was made by Commissioner Prather, seconded by Commission Dorado, to table Item V on the Agenda to the next meeting and if there's input either from members of the public or the Commission itself, they can come to him and he will try to incorporate that into further edits into the document to make it better. The motion carried by the following vote:

Aye: Anderson, Dorado, Harris, Jackson, Prather, and Smith.

VI. Community Police Review Agency (CPRA) Pawlik Investigation Update

CPRA Interim Executive Director Karen Tom provided a verbal progress report on CPRA's Pawlik investigation. *This is a new item.*

Comments were provided by the following public speakers:

Assata Olugbala
Gene Hazzard
Jim Chanin
Saleem Bey
John Bey
Lorelei Bosserman
Bruce Schmiechen

No action taken.

VII. Review of Agency's Pending Cases and Completed Investigations

The CPRA provided to the Commission confidential investigation file summaries for 11 administratively closed complaints. The Commission voted to call a closed session

to review additional information in the investigation files and to reopen all those complaints for further investigation.

This is a recurring item.

Comments were provided by the following public speakers:

Assata Olugbala
Lorelei Bosserman
John Bey
Saleem Bey

A motion was made by Commissioner Dorado, seconded by Vice Chair Harris, to review all the cases (Attachment C) in Closed Session(s).

A substitute motion was made by Commissioner Anderson, seconded by Commissioner Dorado, to support what Commissioner Dorado originally stated in terms of opening the 11 Administrative Closed cases (Attachment C), for the Commissioners to have a Closed Session(s) to review, but such a time in the future whereas we are not compromising the integrity or the speed of the Pawlik investigation. The motion carried by the following vote:

Aye: Anderson, Dorado, Jackson, Prather, and Smith.
Oppose: Harris

VIII. Police Commission Annual Report

Commissioner Prather led a discussion on the Commission’s annual report which is due to be submitted to the Mayor, City Council, and the public on April 17, 2019. ***This is a new item.***

Comments were provided by the following public speaker:
Saleem Bey

No action taken.

IX. Chief’s Goals Ad Hoc Committee Update

The Chief’s Goals Ad Hoc Committee provided an update. ***This was continued from previous meetings and is a new item.***

Comments were provided by the following public speakers:

Henry Gage III
Assata Olugbala
Saleem Bey
John Bey
Lorelei Bosserman

No action taken.

X. Recess (8 minutes)

XI. Meeting Minutes Approval

The Commission voted to approve meeting minutes from March 14, 2019. ***This is a recurring item.***

Commissioner Prather referenced Page 11, Paragraph 2, Line 1 – Change: digression to discretion.

Commissioner Prather said the Minutes are inconsistent in listing names – sometimes it

is full name, commissioner and last name, first initial and last name. Individuals will be listed as Commissioner Smith, Chair Jackson, Vice Chair Harris.

Vice Chair Harris referenced Page 5, Item XI – Change Patrol to Parole.

Comments were provided by the following public speaker:
Saleem Bey

Counsel Rudin stated that you adjourn since it is a hair past 10:30 p.m. unless you vote to extend the meeting time. Chair Jackson asked for a motion to continue the meeting until 11:00 p.m.

MOTION to continue this meeting until 11:00 p.m. was made by Commissioner Dorado and seconded by Vice Chair Harris. The vote was Aye: 4 (Anderson, Dorado, Harris, and Jackson); Oppose: 2 (Prather, Smith). The motion passed.

A motion was made by Chair Jackson, seconded by Commissioner Dorado, to accept the March 14, 2019 minutes as amended. The motion carried by the following vote:

Aye: Anderson, Dorado, Harris, Jackson, Prather, and Smith.

XII. Vote to Support AB 392 Peace Officers: Deadly Force

Commissioner Anderson asked that the Commission vote to support AB 392 which will limit when police can use deadly force. *This is a new item.*

Comments were provided by the following public speakers:

- Bruce Schmiechen
- John Bey
- Lorelei Bosserman
- Anne Janks
- Saleem Bey

A motion was made by Commission Smith to support AB 392.

A friendly amendment was made by Commissioner Prather to add that the Commission send a letter authored by Commissioner Anderson, signed by the Chair, to the Assembly Public Safety Committee, including a cc communication to the introducer, Member Weber and Members of the State Senate, Skinner and Wicks. Commissioner Smith amended his motion to include what was just stated (the letter). It was seconded by Commissioner Prather. The motion carried by the following vote:

Aye: Anderson, Dorado, Jackson, Prather, and Smith.
Abstain: Harris

XIII. Creation of Ad Hoc Policy Committee (This Item was heard after Item XIV on the Agenda).

OPD requested a Policy Committee to work with the Department on policy development to address those situations where officers encounter people who are asleep or in various stages of unresponsiveness and are armed. *This is a new item.*

Comments were provided by the following public speakers:
No speakers were called.

No action taken.

XIV. Creation of Racial Equity Ad Hoc Committee (This Item was heard before Item XIII on the Agenda)

Commissioner Anderson discussed the creation of a Racial Equity Statement Ad Hoc Committee. *This is a new item.*

Comments were provided by the following public speakers:

John Bey
Assata Olugbala
Saleem Bey

Chair Jackson said an Ad Hoc Committee will be created on the creation of racial equity. She will appoint someone else to the Committee. Commissioner Anderson will come back when committee members are confirmed.

XV. Standing and Ad Hoc Committee Assignments

The Commission worked on assigning Commissioners to serve on at least one standing committee or ad hoc committee. *This was continued from previous meetings and is a new item.*

Chair Jackson reported that since the last time we met she accepted the request by Commissioner Anderson to be placed on the Personnel Committee. Are there other members who would like to be placed on standing or ad hoc committees?

Commissioner Smith raised a Point of Order citing a potential Brown Act violation by Vice Chair Harris.

Comments were provided by the following public speaker:
Saleem Bey

No action taken.

XVI. Agenda Setting and Prioritization of Upcoming Agenda Items

The Commission engaged in a working session to discuss and determine agenda items for the upcoming Commission meeting and to agree on a list of agenda items to be discussed on future agendas. *This is a recurring item.*

Comments were provided by the following public speakers:

Lorelei Bosserman
Saleem Bey
Assata Olugbala
John Bey

XVII. Adjournment

A motion was made by Commissioner Smith, seconded by Commissioner Anderson, to adjourn. The motion carried by the following vote:

Aye: Anderson, Dorado, Harris, Jackson, Prather, and Smith.

The Commission adjourned the meeting at 11:27 p.m.



**CITY OF OAKLAND
OAKLAND POLICE COMMISSION**

Meeting Minutes

Thursday, April 11, 2019

5:30 PM

City Hall, 1 Frank H. Ogawa Plaza, Council Chamber
Oakland, CA 94612

I. Called to Order
Chair Jackson

The meeting started at 5:31 p.m.

II. Roll Call and Determination of Quorum
Chair Jackson

Commissioners Present: Mubarak Ahmad, Tara Anderson, Ginale Harris, Regina Jackson, and Edwin Prather. Quorum was met.

Alternate Commissioner Present: Chris Brown

Commissioners Absent (Excused): José Dorado and Thomas Smith.

Counsel for this meeting: Sergio Rudin

THE OAKLAND POLICE COMMISSION ADJOURNED TO CLOSED SESSION IN CITY HALL BUILDING BRIDGES ROOM, 3RD FLOOR AND REPORTED ON FINAL DECISIONS IN THE CITY COUNCIL CHAMBER DURING THE POLICE COMMISSION'S OPEN SESSION MEETING AGENDA.

III. Closed Session
PUBLIC EMPLOYEE PERFORMANCE EVALUATION
Gov't Code § 54957(b) Title: Chief of Police

Action – Report out of Closed Session
Chair Jackson stated that it is now 6:34 p.m. and called the meeting to order.

There is a reportable item coming out of Closed Session. The Commission determined that we need the assistance of legal counsel to conduct an appropriate and valid assessment of the Police Chief's performance pursuant to the Commission's responsibilities. We have asked the firm of Garcia Hernández Sawhney, LLP to assist us and will be bringing their Retainer Agreement to the next Commission meeting for appointment.

Chair Jackson said that for clarification when they reported out at 9:37 p.m. from Closed Session, she neglected to report the votes. There were five affirmative votes (roll call not taken) to support hiring legal counsel to advise the Commission on developing a process for the Police Chief's performance.

Comments were provided by the following public speakers:
No speakers were called.

IV. Welcome, Purpose and Open Forum (2 minutes per speaker)

Chair Jackson welcomed and called public speakers. The purpose of the Oakland Police Commission is to oversee the Oakland Police Department's policies, practices, and customs to meet or exceed national standards of constitutional policing and to oversee the Community Police Review Agency which investigates police misconduct and recommends discipline.

Chair Jackson took a moment as a Point of Privilege to remark on the last meeting. Her statement was that upon reflection of the unprofessional atrocity that was our recent meeting, there are three words that come to mind – out of order. These are the words that escaped her while she was under the shock and utter disbelief of witnessing both the deplorable insulting engagement with Public Defender Brendon Woods. To quote our special guest, Sam Johnson, “I was triggered by the shouting match and would hope that we could show each other some respect.” This behavior, to say the least, is unbecoming to the positions we hold. Our Commission meetings should be where people come to share their stories, concerns, and traumas. Not to be triggered and certainly not to be disrespected. It is of the highest importance that these meetings be conducted with class. Anything less, then that is a detriment to the effectiveness of our collective goals. As Commissioners, we have the role and responsibility to listen, ask questions, make policy and other recommendations. As sworn individuals, our conduct should be professional always. We must remember that anyone Commissioner's behavior reflects on us all. We are a major City and we must hold ourselves to a higher standard.

Secondly, Chair Jackson said the Commissioner to Commissioner argument was also troublesome. In watching the tape, it seemed that Commissioner Smith was calling for a Point of Order because the conversation had gone off topic from Agenda Setting. However, the Rules on Points of Order allow for someone to interrupt and that she did not realize. However, the back and forth that ensued which led up to a threat of bodily harm, was the worst moment she had been party to since joining this Commission. As Chair, the role is to manage meetings and provide leadership in word and deed. She will be more accountable for keeping everyone on track and shutting down disrespectful conversations. While all Commissioners are leaders in their own right, and we come to this work from diverse paths, she expects that all Commissioners moving forward will display the kind of respectful decorum with the community, the staff, and each other that the City of Oakland deserves and that which we agreed to when we accepted this assignment.

Chair Jackson took an additional roll call in order to identify the additional Commissioners present: Mubarak Ahmad, Tara Anderson, Chris Brown (Alternate Commissioner), Ginale Harris, Regina Jackson, and Edwin Prather. Quorum was met.

Commissioners Absent (Excused): José Dorado (Commission received notice after the Agenda was let) and Thomas Smith.

Comments were provided by the following public speakers:

Mary Vail
 Rashidah Grinage
 Jesse Smith
 Gene Hazzard
 John Jones III
 Oscar Fuentes
 Nino Parker
 Assata Olugbala
 Saleem Bey
 John Bey

Anne Janks

- V. **Oakland Police Department (OPD) Budget for Managing Job-Related Stress**
 Chief Anne Kirkpatrick, or her designee, presented a detailed budget for providing education and training to OPD sworn employees regarding the management of job-related stress, and regarding the signs and symptoms of post-traumatic stress disorder, drug and alcohol abuse, and other job-related mental and emotional health issues. ***This was discussed on 3.28.19.***

Commissioner Brown requested to meet privately with Lt. Shavies regarding questions and he agreed. Lt. Shavies will return to answer Commissioners questions presented.

Comments were provided by the following public speakers:

- Gene Hazzard
- Elise Bernstein
- Cathy Leonard
- Mary Vail
- Jesse Smith
- Nino Parker
- John Bey
- Assata Olugbala
- Saleem Bey
- John Jones III

No action taken.

- VI. **OPD Response to Oakland Black Officers Association (OBOA) Letter**
 Chief Anne Kirkpatrick offered a response to OBOA’s open letter in the Oakland Post suggesting disparate and/or racist implications for OPD hiring and discipline practices. ***This is a new item.***

Comments were provided by the following public speakers:

- Gene Hazzard
- Mary Vail
- Lorelei Bosserman
- Cathy Leonard
- John Bey
- Saleem Bey
- Rashidah Grinage
- Assata Olugbala
- John Jones III
- Nino Parker
- Art Doug Blacksher

No action taken.

- VII. **R-02: Searches of Individuals on Probation and Parole**
 The Commission reviewed an amended version of R-02: Searches of individuals on Probation or Parole, and voted. Members of communities directly impacted by the policy shared their experiences and views. ***This was discussed on 1.24.19, 3.14.19, and 3.28.19.***

Comments were provided by the following public speakers:

- John Jones III
- Lorelei Bosserman
- Nino Parker

Michael Tigges
Mary Vail
Assata Olugbala
Saleem Bey

Commissioner Prather presented a report regarding the document. Commissioner Anderson provided several edits to the document which will be included.

A motion was made by Commissioner Prather that subject to these edits, add a Section A – 2; thereby making A – 2, A – 3 and A – 3, A – 4. The added Section A – 2 will be titled Violent Offense; the text will say: “A violent offense is as defined in California Penal Code section 667.5(c)”. Edit Section B – 3, Line 2, striking the word especially. Edit Section B – 3, Line 3, striking the words: can be viewed as and inserting the word is. Subject to those edits, move that we adopt this version of R-02: Searches of Individuals on Probation, Parole, Mandatory Supervision and PRCS (Post-Release Community Supervision) as our version of this policy. The motion was seconded by Chair Jackson. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

A second motion was made by Commissioner Prather, seconded by Chair Jackson, to have a deadline of May 10 for the Oakland Police Department to provide comment if any and that we submit this to the City Council for their approval on May 10 subject to comments by the Oakland Police Department. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

VIII. Recess (8 minutes) [This Item was X on the Agenda]

Chair Jackson called the meeting back to order at 9:36 p.m.

IX. Review of Community Police Review Agency (CPRA) Pending Cases and Completed Investigations [This Item was VIII on the Agenda]

To the extent permitted by state and local law, Acting Interim Executive Director Joan Saupe reported on the Agency’s pending cases and completed investigations. *This is a recurring item.*

Comments were provided by the following public speakers:

Gene Hazzard
Cathy Leonard
Lorelei Bosserman
Melody Davis
Michael Tigges
Oscar Fuentes
Assata Olugbala
Saleem Bey
Rashidah Grinage

No action taken.

X. Bey Case – Noticing the Federal Monitor [This Item was IX on the Agenda]

The Commission discussed, and voted on, a letter that will be submitted to the Federal Monitor regarding new evidence in the Bey case. *This was discussed on 3.14.19.*

Comments were provided by the following public speaker:
Saleem Bey.

A motion was made by Vice Chair Harris, seconded by Commissioner Ahmad, to request advice of outside counsel and the appellate process. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

Comments were continued by the following public speakers:
Saleem Bey
Assata Olugbala
Gene Hazzard

A motion was made by Commissioner Prather, seconded by Vice Chair Harris, that we approve the letter (Attachment 9) for distribution to Mr. Warshaw with a copy to Judge Orrick and the Oakland City Council with the following changes:
Make sure that Mr. Bey's name is in correct order reflecting Ali Saleem Bey and it should reference John Muhammad Bey. Paragraph two, sentence two should read – At its public meeting on February 28, 2019, Mr. Ali Saleem Bey and Mr. John Muhammad Bey provided documents to members ... It should also reference not only Case No. 07-0558 but also Case No. 13-1062 (should be inserted prior to the comma on the next to last line on paragraph two). The word testimony on that same line should be replaced with the word comments. Paragraph 3, Line 3, says complaint and to request - to should be replaced by the words Mr. Bey's. At the end of Line 3, replace the words Mr. Bey's with his. Line 5, replace the word testimony by comments.
An additional sentence added at the end of Paragraph 3 that says "It is my understanding that Mr. Bey will provide a packet of documents to you under separate cover." The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

MOTION to continue this meeting until 11:30 p.m. was made by Commissioner Prather and seconded by Chair Jackson. The vote was Aye: 4 (Anderson, Harris, Jackson, and Prather); Abstain: 1 (Ahmad). The motion passed.

XI. Police Commission Annual Report

Commissioner Prather presented the Commission's annual report which must be submitted to the Mayor, City Council, and the public on or before April 17, 2019.
This was discussed on 3.28.19.

Comments were provided by the following public speakers:
No public comment.

A motion was made by Chair Jackson, seconded by Commissioner Ahmad, to appropriately edit with comments that have been identified by Commissioner Prather and the typo Vice Chair Harris mentioned, in order that we can forward the Annual Report in a timely fashion. Friendly amendments (edits) were made by Commissioner Prather: Page 1 – Footer (Delete reference to Public Safety Committee). Page 2, Change the Term Ending to Oct. 2020 for Tara Anderson, Commissioner. Page 2, Change the Term Ending to October 2022 for Chris Brown, Alternate Commissioner. Page 10, Paragraph 1, Change the wording to - Additionally the Commission appointed Karen Tom to the position of CPRA Interim Director in December 2018 to fill the recently made vacant position. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

XII. Committee/Liaison/Other Commissioner Reports

This time is set aside to allow Commissioners to present a brief report on their own activities, including service on committees or as liaisons to other public bodies. No action may be taken as a result of a report under this section other than to place a matter for consideration at a future meeting. *This is a new item and will be recurring at future meetings.*

Comments were provided by the following public speakers:
No public comment.

XIII. Meeting Minutes Approval

The Commission will vote to approve meeting minutes from March 28, 2019. *This is a recurring item.*

Comments were provided by the following public speakers:
No public comment.

A motion was made by Commissioner Edwin Prather, seconded by Commissioner Anderson, to table the Item until the next meeting. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

XIV. Executive Director Interview Process

The Commission reviewed the CPRA Executive Director interview process and may approve the process as is, or make edits so that the process can begin as soon as possible. *This is a new item.*

Comments were provided by the following public speaker:
Rashidah Grinage

No action taken.

XV. Inspector General Position Status Update

The Commission will provide an update on the status of the Inspector General Position. *This has been discussed on multiple occasions.*

Comments were provided by the following public speakers:
No public comment.

A motion was made by Commissioner Prather, seconded by Commissioner Anderson, to table the Item until the next meeting. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

XVI. Receive Bids for Investigator Services

Commissioner Prather presented bids he received for Investigator Services. The Commission discussed the bids and voted on further actions. *This is a new item.*

MOTION to continue this meeting until 11:40 p.m. was made by Commissioner Edwin Prather and seconded by Vice Chair Ginale Harris. The vote was Aye: 5 (Ahmad, Anderson, Harris, Jackson, and Prather). The motion passed unanimously.

Comments were provided by the following public speakers:
No public comment.

A motion was made by Commissioner Prather, seconded by Chair Jackson, to hire Eric Mason for the Joshua Pawlik investigation and that we either hire him directly and/or direct Interim Executive Director Karen Tom to hire him through CPRA and assign him the file immediately. The motion carried by the following vote:

Aye: (4) Ahmad, Harris, Jackson, and Prather; Recusal: (1) Anderson.

Counsel Rudin for clarification of the motion on the record – The motion is to direct the Interim Executive Director of CPRA to enter in a contract with Eric Mason (Mason Investigative Group) and an alternative is that if that contract process cannot be completed, to authorize the Commission acting through the Chair to enter in a contract with the same group.

XVII. Agenda Setting and Prioritization of Upcoming Agenda Items

The Commission engaged in a working session to discuss and determine agenda items for the upcoming Commission meeting and agreed on a list of agenda items to be discussed on future agendas. *This is a recurring item.*

Comments were provided by the following public speaker:
Saleem Bey

XVIII. Adjournment

A motion was made by Commissioner Prather, seconded by Vice Chair Harris, to adjourn. The motion passed unanimously.

Aye: Ahmad, Anderson, Harris, Jackson, and Prather.

The Commission adjourned the meeting at 11:41 p.m.



DEPARTMENTAL GENERAL ORDER

**R-02: SEARCHES OF INDIVIDUALS ON PROBATION,
PAROLE, MANDATORY SUPERVISION AND PRCS (POST-
RELEASE COMMUNITY SUPERVISION)**

Effective Date: XX XX 19

Coordinator: Training Division

Individuals on probation with certain court-imposed search clauses and individuals on probation, parole, mandatory supervision and post-release community supervision (PRCS) may be subject to warrantless searches as a term and/or condition of their supervised release by law enforcement. While these searches are a legitimate law enforcement tool, the Department emphasizes that the mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

For the purpose of this Policy, probation, parole, mandatory supervision and PRCS are collectively referred to as “Supervised Release.”

COMMAND INTENT

The intent of this Policy is to enhance the effectiveness of Officers¹ when coming into contact with those individuals on Supervised Release and to provide clear guidelines for the use of Supervised Release searches. The Department values the abilities of officers to make sound judgments and decisions when using law enforcement tools available to them – such as Supervised Release searches – to ensure Officer, community and subject safety. At the same time, the Department recognizes that those on Supervised Release, as well as the community at large, consider warrantless searches to be overly intrusive. Accordingly, the Department seeks to build community trust through transparency of Department operations by requiring Officers to document articulable facts supporting a decision to affect a warrantless search.

A. DEFINITIONS

A - 1. Non-Violent Offenses

“Non-Violent Offenses” are defined as offenses in which violence or use of a weapon is not a factor. Examples include simple possession of controlled substances or property crimes such as petty theft.

A – 2. Violent Offenses

Offenses involving the use of force, the threat of force, the use or possession of a weapon, sexual violations against the person of another, human trafficking, and the use of force or threats to public safety (*e.g.* Battery on a Peace Officer (243(b) PC) or Reckless Evasion in a Vehicle (2800.2(a) VC)), fall into the categories of violent crimes, weapons offenses, sex crimes and/or crimes involving threats to public safety. These categories of crimes are collectively referred to as “Violent Offenses”.

¹ “Officer” or “Officers” refer(s) to sworn members of the Department of any rank.

A – 3. Cursory Search

A “Cursory Search”, also known as a pat search or search for weapons, is further defined as a limited search of the outer clothing in a manner designed to determine whether the person being searched is in possession of any weapons or items which may be used as such. Cursory searches typically require reasonable suspicion that the person being searched is armed and/or dangerous, and are governed by applicable case law and Department policy.²

A – 4. Full Search

A “Full Search” of a person is defined as a “relatively extensive exploration”³ of the person being searched, including their clothing, their pockets, and containers in their possession. A Full Search of a person is most typically conducted incident to that person’s arrest.

B. SUPERVISED RELEASE SEARCHES AND THE COMMUNITY**B - 1. Purpose of Supervised Release Searches**

Warrantless searches of individuals on Supervised Release shall⁴ further a legitimate law enforcement purpose. Such searches shall not be:

1. Arbitrary;
2. Capricious; or
3. Harassing

B - 2. Procedural Justice Considerations

Officer contact with individuals on Supervised Release provides Officers with an opportunity to practice the tenets of procedural justice: voice, neutrality, respect, and trustworthiness.

B - 3. Inquiring About Supervised Release Status

Inquiring about an individual’s Supervised Release status, at the beginning of an interaction without proper justification is unreasonable. Such an immediate inquiry is viewed as the community as an improper assumption by the Officer that the individual has a criminal history. To that end, Officers shall not immediately inquire whether an individual is on Supervised Release unless there is an Immediate Threat⁶ to Officer safety or the safety of others. Any subsequent inquiries about probation, parole, mandatory supervision and PRCs status shall be framed in a respectful manner.

² See for example *Terry v. Ohio*, 392 US 1 (1968) and OPD Training Bulletin I-O.02, *Legal Aspects of Searching Persons*.

³ *US v. Robinson*, 414 US 218, 236 (1973)

⁴ Manual of Rules 175.77: SHALL – Indicates that the action is mandatory.

⁶ An “Immediate Threat” is defined in Departmental General Order K-3 (I)(D).

C. REQUIREMENTS FOR SUPERVISED RELEASE SEARCHES

Supervised Release searches shall be conducted in consideration of the totality of the circumstances surrounding the encounter.

C - 1. Knowledge of Searchable Supervised Release Status

Officers shall have knowledge and confirm that knowledge that an individual is currently on Supervised Release, with a clause or condition which allows the Officer to conduct a warrantless search, prior to conducting any such warrantless search. Officers may learn of, and confirm, an individual's Supervised Release status: from a check of law enforcement databases such as AWS, CRIMS⁷, CLETS⁸, and CORPUS; by direct contact with the individual's Supervised Release officer/supervisor; or from direct contact with another Department Officer who fulfilled one of the two above methods of confirmation.

In situations where an Officer has prior knowledge of the individuals' searchable Supervised Release status, the Officer shall confirm the validity of the individual's Supervised Release status via a records check prior to effecting any warrantless search.

For purposes of this Section, confirmation within the prior 72 hours shall be deemed sufficient. Officers shall also document the basis of their knowledge and confirmation, in conformance with Section D-1.

In situations where an individual communicates to an Officer that the individual is on Supervised Release with a warrantless search condition, the Officer shall still confirm the validity of the individual's Supervised Release status via a records check. If the individual is mistaken concerning his or her Supervised Release status, the Officer shall provide the correct information and document the results in the appropriate report.

C – 2. Individuals on Supervised Release for Non-Violent Offenses

When considering conducting a warrantless search condition for an individual on Supervised Release for a Non-Violent Offense, Officers shall consider articulable facts which demonstrate that the individual is connected in some way to criminal activity or that the individual is an Imminent Threat to Officer or citizen safety. Absent a connection to criminal activity or a threat to the Officer or citizen safety, the warrantless search condition **shall not** be invoked.

The mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

⁷ CRIMS is the recommended database for confirming probation status.

⁸ CLETS is the recommended database for confirming parole status.

C – 3. Traffic Stops of Individuals on Supervised Release for Non-Violent Offenses

When officers contact an individual on Supervised Release for a Non-Violent Offense during a vehicle stop for any infraction and there are no articulable facts present which demonstrate that the individual is connected in some way to criminal activity, or that the individual is an Imminent Threat to Officer or citizen safety, Officers **shall not** search that individual or his/her vehicle pursuant to any Supervised Release search clauses or conditions.

C – 4. Individuals on Supervised Release for Violent Offenses

Individuals contacted or detained who are found to be on searchable Supervised Release for Violent Offenses may be searched pursuant to the terms of their Supervised Release conditions.

C – 5. Cursory and Full Searches

In those instances where a Cursory Search is justified and the individual to be searched is on Supervised Release and the terms and/or conditions of an individual's Supervised Release allow for a warrantless search, a Full Search may be conducted of the area which would be subject to a Cursory Search.

D. MEMORIALIZING FACTS OF THE SEARCH**D - 1. Required Documentation**

Officers conducting a Supervised Release search shall, at a minimum, document the following in the appropriate report:

1. The circumstances of the encounter/detention;
2. How and when it was determined that the individual was Supervised Release and, if the Officer made this determination based on prior knowledge, the basis for that knowledge;
3. How the Supervised Release status and warrantless search condition was verified including, if verified via a Mobile Data Terminal (MDT), a paste of this information from the MDT to the body of the report (if feasible);
4. Any articulable facts which informed the decision to search; and
5. The type(s) of search completed and disposition.

D - 2. Use of Portable Digital Recording Devices During the Encounter

Officers shall follow Department General Order I-15.1 (II)(A) regarding the activation of an Officer's portable digital recording device during encounters with individuals on Supervised Release.

By order of

Anne E. Kirkpatrick
Chief of Police

Date Signed: _____



DEPARTMENTAL GENERAL ORDER

R-02: SEARCHES OF INDIVIDUALS ON SUPERVISED RELEASE

Effective Date: XX XX 19

Coordinator: Training Division

Individuals on probation and mandatory supervision with certain search clauses, along with individuals on post-release community supervision (PRCS) and parole, may be subject to warrantless searches by law enforcement. For the purpose of this policy, these different forms of supervision are referred to generally as “Supervised Release.” One role of law enforcement is to act as an arm of the Supervised Release system by ensuring that supervised persons are conforming to the conditions of their release.

COMMAND INTENT

The intent of this policy is to enhance the effectiveness of officers¹ while also reminding them to use their best judgment on when to use Supervised Release searches. The Department values the abilities of members to make sound judgments and decisions when using law enforcement tools available to them – such as searches of individuals on Supervised Release – to ensure officer, community, and subject safety. At the same time, the Department recognizes that those on Supervised Release and other community members can view searches as overly intrusive. Accordingly, the Department seeks to build community trust through transparency of Department operations by requiring members to document articulable facts supporting a decision to search.

A. DEFINITIONS**A - 1. Non-Violent Offense**

An offense in which violence or use of a weapon is not a factor. Examples include simple possession of controlled substances or property crimes such as petty theft.

A - 2. Violent Crimes, Sex Crimes, and Crimes Threatening Public Safety

Any offense which includes the use of force, the threat of force, use or possession of a weapon, sexual violations against the person of another including human trafficking, residential burglary, and crimes against the justice system involving force or threats to public safety (e.g. Battery on a Peace Officer (243(b) PC) or Reckless Evasion in a Vehicle (2800.2(a) VC)).

A - 3. Cursory Search

A cursory search (also known as a pat search or search for weapons) is a limited search of the outer clothing in a manner designed to determine whether the person being searched is in possession of any weapons or items which may be used as such. Cursory searches typically require reasonable

¹ “Officer” refers to sworn members of the department of any rank.

suspicion that the person being searched is armed and/or dangerous, and are governed by applicable case law and OPD policy.²

A - 4. Full Search

A full search of a person is a “relatively extensive exploration”³ of the person being searched, including their clothing, their pockets, and containers in their possession. A full search of a person is most typically conducted incident to that person’s arrest.

B. SUPERVISED RELEASE SEARCHES AND THE COMMUNITY

B - 1. Purpose of Supervised Release Searches

Warrantless searches of individuals on Supervised Release shall⁴ further a legitimate law enforcement purpose. Such searches shall not be:

1. Arbitrary;
2. Capricious; or
3. Harassing.

B - 2. Procedural Justice Considerations

Law enforcement contact with individuals on Supervised Release provides an opportunity to practice the tenets of procedural justice: voice, neutrality, respect, and trustworthiness.

B - 3. Inquiring About Supervised Release Status

Inquiring about an individual’s Supervised Release status at the beginning of an interaction without proper justification is unreasonable and shall be avoided.

To that end, officers shall refrain from immediately asking whether a person is on Supervised Release unless there is an immediate threat to the safety of officers or others. Any subsequent inquiries about an individual’s Supervised Release status shall be framed in a respectful manner.

C. REQUIREMENTS FOR SUPERVISED RELEASE SEARCHES

Supervised Release searches shall be conducted in consideration of the totality of the circumstances surrounding the encounter.

C - 1. Knowledge of Searchable Supervised Release Status

Members must know that an individual is on searchable Supervised Release, with a clause or condition which allows the search the officer seeks to conduct, before the search. This information may be obtained/confirmed via:

² See for example *Terry v. Ohio*, 392 US 1 (1968) and OPD Training Bulletin I-O.02, *Legal Aspects of Searching Persons*.

³ *US v. Robinson*, 414 US 218, 236 (1973)

⁴ Manual of Rules 175.77: SHALL – Indicates that the action is mandatory.

1. Check of law enforcement databases such as AWS, CRIMS, CLETS, and CORPUS;⁵
2. Prior knowledge⁶ of the individual's searchable Supervised Release status; or
3. The individual's confirmation of his or her searchable Supervised Release status.⁷ In such cases, the officer shall confirm the status of the individual with a records check. In cases where the individual is mistaken concerning status, the officer shall provide the correct information to the individual and document the results in the appropriate report.

C – 2. Individuals on Supervised Release for Non-Violent Offenses

When invoking the search condition(s) of an individual on Supervised Release for **non-violent** crimes, officers shall consider articulable fact(s) which demonstrate that the individual is connected in some way to criminal activity or that the individual is a threat to officer or citizen safety.

The mere fact that a person is on Supervised Release is not in itself a connection to criminal activity.

C – 3. Traffic Stops of Individuals on Supervised Release for Non-Violent Offenses

When officers contact a person on Supervised Release for a non-violent offense during a vehicle stop for any infraction, and there are no articulable facts present which demonstrate that the supervised individual is connected in some way to criminal activity, or that the individual is a threat to officer or citizen safety, officers **shall not** search that person pursuant to any Supervised Release search clauses or conditions.

C – 4. Individuals on Supervised Release for Violent Crimes, Sex Crimes, Crimes Threatening Public Safety, or Weapons-Related Offenses

Individuals contacted or detained who are found to be on searchable Supervised Release for **violent crime, sex crimes, crimes threatening public safety** (as set forth in section A-2), or **weapons-related offenses** may be searched pursuant to the terms of their Supervised Release conditions.

C – 5. Cursory and Full Searches

In those instances where a cursory search is justified and the individual to be searched is on Supervised Release, a full search of the area which would be subject to the cursory search may be conducted if the individual's search terms allow it.

⁵ CRIMS is the recommended database for confirming probation status. CLETS is the recommended database for confirming parole status.

⁶ Officers shall document the basis of this knowledge pursuant to section D-1.

⁷ See *In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556 (officer reasonably relied on minor's statement that he was on probation or parole; "[t]he fact that the minor was in error is immaterial").

D. MEMORIALIZING FACTS OF THE SEARCH

D - 1. Required Documentation

Officers conducting a Supervised Release search shall at a minimum document the following in the appropriate report:

1. The circumstances of the encounter/detention;
2. How it was determined that the individual was on searchable Supervised Release and, if the officer made this determination based on prior knowledge, the basis for that knowledge;
3. How searchable Supervised Release status was verified including, if verified via a Mobile Data Terminal (MDT), a paste of this information from the MDT to the body of the report (if feasible);
4. Any articulable fact(s) which informed the decision to search; and
5. The type(s) of search completed and disposition.

By order of

Anne E. Kirkpatrick
Chief of Police

Date Signed: _____



DEPARTMENTAL GENERAL ORDER

**R-02: SEARCHES OF INDIVIDUALS ON PROBATION,
PAROLE, MANDATORY SUPERVISION AND PRCS (POST-
RELEASE COMMUNITY SUPERVISION)**

Effective Date: XX XX 19

Coordinator: Training Division

Individuals on probation with certain court-imposed search clauses and individuals on probation, parole, mandatory supervision and post-release community supervision (PRCS) may be subject to warrantless searches by law enforcement. However, the Department emphasizes that the mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

COMMAND INTENT

The intent of this policy is to enhance the effectiveness of officers when coming into contact with those individuals on probation, parole, mandatory supervision and PRCS and to provide clear guidelines for the use of probation, parole, mandatory supervision and PRCS searches. The Department values the abilities of officers to make sound decisions when using law enforcement tools available to them, such as probation, parole, mandatory supervision and PRCS searches, to ensure officer, community and subject safety. At the same time, the Department recognizes that those on probation, parole, mandatory supervision and PRCS, as well as the general public, can view these warrantless searches as overly intrusive. Accordingly, the Department seeks to build community trust through transparency of Department operations by requiring officers to document articulable facts supporting a decision to search.

A. DEFINITIONS

A - 1. Non-Violent Offense

An offense in which violence or use of a weapon is not a factor. Examples include simple possession of controlled substances or property crimes such as petty theft.

A - 2. Violent Offense

A violent offense is as defined in California Penal Code § 667.5(c).

A - 3. Cursory Search

A cursory search (also known as a pat search or search for weapons) is a limited search of the outer clothing in a manner designed to determine whether the person being searched is in possession of any weapons or items which may be used as such. Cursory searches typically require reasonable suspicion that the person being searched is armed and/or dangerous, and are governed by applicable case law and Oakland Police Department policy.¹

¹ See for example *Terry v. Ohio*, 392 US 1 (1968) and OPD Training Bulletin I-O.02, *Legal Aspects of Searching Persons*.

A – 4. Full Search

A full search of a person is a “relatively extensive exploration”² of the person being searched, including their clothing, their pockets, and containers in their possession. A full search of a person is most typically conducted incident to that person’s arrest.

B. PROBATION, PAROLE, MANDATORY SUPERVISION AND PRCS SEARCHES AND THE COMMUNITY**B - 1. Purpose of Probation, Parole, Mandatory Supervision and PRCS Searches**

Probation, parole, mandatory supervision and PRCS searches, as conducted by Oakland Police Department officers, shall further a legitimate law enforcement interest. Such searches shall³ not be:

1. Arbitrary;
2. Capricious; or
3. Harassing

B - 2. Procedural Justice Considerations

Officer contact with individuals on probation, parole, mandatory supervision and PRCS provides an opportunity for officers to demonstrate the tenets of procedural justice: voice, neutrality, respect, and trustworthiness.

B - 3. Inquiring About Probation, Parole, Mandatory Supervision and PRCS Status

Inquiring about an individual’s probation, parole, mandatory supervision and PRCS status, at the beginning of an interaction, or without an apparent basis for the inquiry, is unjust and an improper assumption that the individual has a criminal history. Officers shall refrain from immediately asking whether a person is on probation, parole, mandatory supervision and/or PRCS unless there is an immediate physical threat to the safety of officers or others. Any subsequent inquiries about probation, parole, mandatory supervision and PRCS status shall be framed in a respectful manner.

C. REQUIREMENTS FOR PROBATION, PAROLE, MANDATORY SUPERVISION AND PRCS SEARCHES

Probation, parole, mandatory supervision and PRCS searches shall be conducted in consideration of the totality of the circumstances surrounding the encounter.

C - 1. Knowledge of Searchable Probation, Parole, Mandatory Supervision or PRCS Status

Prior to the use of the warrantless search condition of an individuals’ probation, parole, mandatory supervision or PRCS, an officer shall confirm

² *US v. Robinson*, 414 US 218, 236 (1973)

³ Manual of Rules 175.77: SHALL – Indicates that the action is mandatory.

that the warrantless search condition of that individuals' probation, parole, mandatory supervision or PRCS is current, valid and otherwise in effect. The officer shall obtain or confirm this information via:

1. A check of law enforcement databases such as AWS, CRIMS, CLETS, and CORPUS;⁴
2. Prior knowledge of the individual's searchable probation, parole, mandatory supervision or PRCS status shall be concurrently confirmed by a check of a law enforcement database such as AWS, CRIMS, CLETS, and CORPUS;
3. The individual's statement that he or she is subject to a warrantless search condition of probation, parole, mandatory supervision or PRCS, shall also be concurrently confirmed by a check of a law enforcement database such as AWS, CRIMS, CLETS, and CORPUS. In cases where the individual is mistaken concerning his or her status,⁵ the officer shall provide the correct information to the individual and document the results in the appropriate report.

C – 2. Individuals on Probation, Parole, Mandatory Supervision or PRCS for Non-Violent Offenses

In coming into contact with an individual on probation, parole, mandatory supervision or PRCS for **non-violent** crimes, an officer shall consider articulable facts which demonstrate that the individual is connected in some way to criminal activity or that the individual is a physical threat to officer or citizen safety. The mere fact that an individual is on probation, parole, mandatory supervision or PRCS is not in itself a connection to criminal activity.

C – 3. Traffic Stops of Individuals on Probation, Parole, Mandatory Supervision and PRCS

When officers contact an individual on probation, parole, mandatory supervision or PRCS for a non-violent offense during a vehicle stop for any infraction or vehicle code violation, and there are no articulable facts present which demonstrate that the individual is connected in some way to criminal activity, or that the individual is a physical threat to officer or citizen safety, officers **shall not** search that individual or his/her vehicle pursuant to any on probation, parole, mandatory supervision or PRCS search clauses or conditions.

⁴ CRIMS is the recommended database for confirming probation status. CLETS is the recommended database for confirming parole status.

⁵ See *In re Jeremy G.* (1998) 65 Cal.App.4th 553, 556 (officer reasonably relied on minor's statement that he was on probation or parole; "[t]he fact that the minor was in error is immaterial").

C – 4. Individuals on Probation, Parole, Mandatory Supervision or PRCS for Violent or Weapons-Related Offenses

An individual contacted or detained who is determined to be on probation, parole, mandatory supervision or PRCS for a **violent or weapons-related offense**, and whose terms and conditions of probation, parole, mandatory supervision or PRCS include a warrantless search clause may be searched pursuant to that warrantless search clause.

C – 5. Cursory and Full Searches

In those instances where a cursory search is justified and the individual is on probation, parole, mandatory supervision or PRCS, a full search of the area which would be subject to the cursory search may be conducted if the terms and conditions of probation, parole, mandatory supervision or PRCS include a warrantless search clause and the individual’s search terms allow for a full search under the circumstances.

D. MEMORIALIZING FACTS OF THE SEARCH

D - 1. Required Documentation

Officers conducting a warrantless search pursuant to a term and condition of an individual’s probation, parole, mandatory supervision or PRCS shall, at a minimum, document the following in the appropriate report:

1. The circumstances of the encounter/detention;
2. How and when it was determined that the individual was on probation, parole, mandatory supervision or PRCS and how it was determined that the probation, parole, mandatory supervision or PRCS included a warrantless search condition;
3. How the warrantless search condition of probation, parole, mandatory supervision or PRCS was verified including, if verified via a Mobile Data Terminal (MDT), a paste of this information from the MDT to the body of the report (if feasible);
4. Any articulable facts which informed the decision to utilize the warrantless search condition; and
5. The type(s) of search completed and disposition.

D - 2. Use of Portable Digital Recording Devices During the Encounter

During the interaction in which it is determined that the individual was on probation, parole, mandatory supervision or PRCS, an officer shall record such interaction using the officer’s portable digital recording device (PDRD) in addition to following the Department’s General Order on PDRD use.

By order of

Anne E. Kirkpatrick
Chief of Police

Date Signed: _____

Oakland Black Officers challenge racist culture at OPD

By Sarah Carpenter
March 15, 2019

The following is an open letter to Oakland Police Department Chief Anne Kirkpatrick, Mayor Libby Schaaf, and City Administrator Sabrina Landreth.

The Oakland Black Officers Association (OBOA) is very concerned that a culture remains in place at Oakland Police Department (OPD) and in senior leadership that could be perceived as unfair, racist, inequitable and not in line with the Oakland Police Department's core values.

We believe the citizens of Oakland deserve a police department with strong senior leadership that acts quickly and decisively when faced with tough decisions and challenges around race and equity. We are even more concerned that our current leadership does not effectively meet these challenges.

The Oakland Black Officer's Association is the Oakland Police Department's first minority advocacy association and has been in existence for nearly 50 years. OBOA exists to advocate for the fair and equitable treatment of our members and the minority community.

Over the years, the OBOA has been made aware of instances of disparate treatment of our members, at all ranks, as well as from our professional/civilian staff members. Some of the disparate treatment includes:

- Unfair/biased treatment in personnel decisions
- Unfair and/or biased Internal Affairs Investigations and discipline
- Overlooking qualified Black officers/members for assignments and positions
- Biased/Unfair treatment of Black applicants during, hiring, the Academy, and Field Training Program

The most recent example of a lack of action by OPD leadership occurred in the mishandling of a Recruiting and Backgrounds Commander's conduct. The Recruiting and Backgrounds Unit works to attract candidates who are qualified, motivated and reflective of the diversity of the City of Oakland.

The unit's former commander threatened these efforts by engaging in the following conduct:

- Rejecting qualified minority candidates for very minor issues;
- Setting an internal, undocumented standard that favored applicants with a formal education over candidates without one. He also looked less favorably at online universities or trade schools like DeVry, Carrington College or the University of Phoenix— and would refer to these institutions as "fake schools;"
- Candidates who previously used Adderall, Cocaine, Mushrooms, Acid, LSD or drugs typically used by more affluent users were considered for employment while candidates who previously used Cocaine Base/Crack or Heroin were immediately rejected;
- Failing to grant extensions to two Black officers to remain in their positions but granting an extension to a similarly situated White Sergeant.

Despite OBOA's bringing these serious issues to the attention of Chief Kirkpatrick on Oct. 15, 2018, and Chief Kirkpatrick assurances that these issues would be addressed and the then Recruiting Backgrounds Commander would immediately be removed from his position; nearly 90 days lapsed before any action was taken.

It was only after the OBOA meet with the City Administrator and the Mayor that the former Unit Commander was removed from his position.

The Chief's inaction and unwillingness to address disparate treatment in the hiring and retention of officers is egregious and hurts our members and the public at large. It undermines the Department's ability to address one of the Community's top issues—secure candidates reflective of our community. And,

fosters inequity throughout the Department and our subsequent treatment of the community.

We cannot continue with this lack of leadership and ask that our concerns be addressed in a timely and transparent fashion.

This letter was submitted by the Executive Board of the Oakland Black Officers Association.

This was published in the *Oakland Post* on March 15, 2019

CITY OF OAKLAND FY 2019-21 PROPOSED BUDGET



**PRESENTATION TO:
THE OAKLAND POLICE COMMISSION
MAY 9TH 2019**

AGENDA

1	Overview of the Budget Process & Priorities
2	Proposed Budget Impacts
3	Commission & CPRA Specific Items
4	Questions

Oakland Budget Process



**Budget
Priorities
Public Poll**



**City
Council
Priorities**



**Five-Year
Forecast
Released**



**Mayor's
Proposed
Budget**



**Community
Budget
Forums**



**Council
President's
Budget**



**Deadline
for Budget
Adoption**

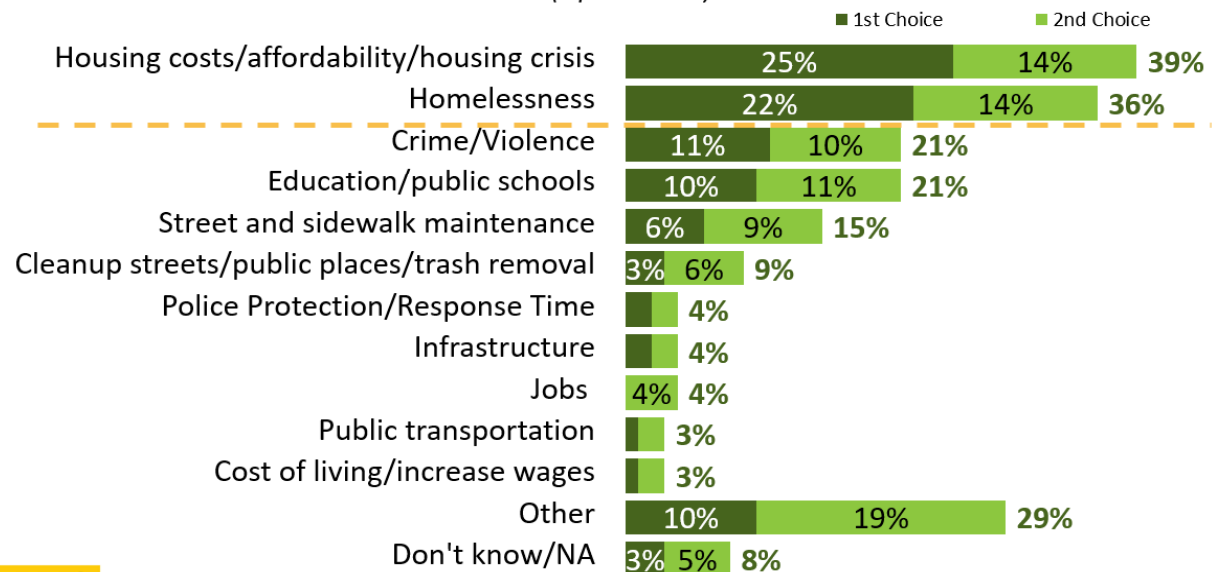


Community Priorities

- Homelessness and affordable housing are clearly the top issues residents want to see prioritized.

Homelessness and housing are clearly the top issues residents want to see prioritized.

In the upcoming two-year budget, what are the two most important issues facing Oakland residents that you would like to see prioritized in the City government budget?
(Open-Ended)



City of Oakland
**FY 2019-21 BUDGET
COMMUNITY FORUMS**

Next Steps

Community Forums

Council Presidents Budget & Amendments: **June 10th**

MORE INFORMATION

Visit www.oaklandca.gov/budget for information on upcoming Budget Forums, feedback and additional materials.

GET INVOLVED: COMMUNITY FORUMS

May 8
6:00pm-8:00pm
District 4, Councilmember Sheng Thao
Redwood Heights Rec Center
3883 Aliso Ave.

May 9
6:30pm-8:30pm
District 7, Councilmember Larry Reid
Oakland Zoo, Zimmer Auditorium
9777 Golf Links Rd

May 11
10:00am-12:00pm
District 6, Councilmember Loren Taylor
Rainbow Rec Center
5800 International Blvd.

May 11
2:00pm-4:00pm
District 5, Councilmember Noel Gallo
Fruitvale Senior Center
3301 E. 12th Street, Suite 201

May 15
6:00pm-8:00pm
District 3, Councilmember Lynette Gibson McElhaney
West Oakland Senior Center
1724 Adeline St.

May 16
6:00pm-8:00pm
District 2, Councilmember Nikki Fortunato Bas
Lincoln Rec Center
261 11th St.

May 18
10:00am-12:00pm
District 1, Councilmember Dan Kalb
North Oakland Senior Center
5714 MLK Jr. Way

Closing the Gap

- Started the Budget process with a **\$49 million** shortfall, with a **\$25 million** deficit in the General Purpose Fund alone.
- The budget proposal includes no major increases in service levels unless those service are cost recovering or project funded.
- Transferred costs from unhealthy funds to other eligible sources, and added personnel only to project funds or for cost-covered activities.

Proposed Budget Adjustments to Police Commission

- Enhanced Citizen Review And Oversight Of Police Policy, Discipline And Misconduct
 - Adds a 1.0 FTE Complaint Investigator II to the Community Police Review Agency - \$162,780 & \$168,658
 - Fully funds the resources requested by the Oakland Police Commission - \$103,000 in both Years
 - Add funding for Community Engagement Survey/Polling in FY2021 - \$100,000

FY 2017-18

Organizational Unit	Expense Character	Adjusted Budget	Year End Actuals	Budget - Actuals
Commission	Personnel	70,721	-	70,721
Commission	Travel and Education	-	3,570	(3,570)
CPRA	Personnel	1,644,332	1,850,455	(206,123)
CPRA	Internal Service	103,314	102,367	947
CPRA	Contract Service	333,755	164,378	169,377
CPRA	Service	93,664	12,470	81,194
CPRA	Supply and Material	39,200	15,602	23,154
CPRA	Travel and Education	68,590	24,881	43,709

FY 2018-19

Organizational Unit	Expense Character	Adjusted Budget	Yr. to Date (04/04)	Available	Projected	Budget - Projected
Commission	Personnel	139,732	44,917	94,815	58,392	81,340
Commission	Internal Service	5,267	3,572	1,695	5,267	-
Commission	Supply and Material	17,000	3,427	13,573	4,569	12,431
Commission	Contract Service	80,000	-	80,000	-	80,000
Commission	Travel and Education	29,000	8,772	20,228	11,696	17,304
CPRA	Personnel	2,042,281	1,337,199	705,082	1,738,359	303,922
CPRA	Internal Service	110,839	75,168	35,671	110,839	-
CPRA	Contract Service	365,862	-	365,862	-	365,862
CPRA	Service	37,500	3,292	34,208	4,389	33,111
CPRA	Supply and Material	40,163	6,308	31,561	8,411	31,752
CPRA	Travel and Education	123,800	14,425	109,375	19,233	104,567

FY 2019-21 Proposed Budget

Organizational Unit	Expense Character	FY 2019-20 Budget	FY 2020-21 Budget
Commission	Personnel	146,320	151,599
Commission	Internal Service	21,956	22,285
Commission	Contract Service	384,136	490,393
CPRA	Personnel	2,399,550	2,485,924
CPRA	Internal Service	121,421	123,237
CPRA	Contract Service	246,000	246,000
CPRA	Supply and Material	67,950	67,950
CPRA	Travel and Education	54,900	54,900
	Legal Fees	281,136	287,393
	Requested O&M	103,000	103,000
	Public Engagement	-	100,000
	Total	384,136	490,393

Budgeted Positions

Org & Job Class	FY 2017-18	FY 2018-19	FY 2019-20	FY 2020-21
Commission	1.00	1.00	1.00	1.00
Administrative Analyst II.AP106	0.50	1.00	1.00	1.00
Office Assistant II, PPT.SS154	0.50	-	-	-
CPRA	13.00	13.00	14.00	14.00
Complaint Investigator II.AP146	6.00	6.00	7.00	7.00
Complaint Investigator III.AP144	1.00	1.00	1.00	1.00
CPRB Policy Analyst.AP400	1.00	1.00	1.00	1.00
Executive Director CPRA.EM229	1.00	1.00	1.00	1.00
Intake Technician.AP434	3.00	3.00	3.00	3.00
Office Assistant II.SS153	1.00	1.00	1.00	1.00

Questions?

Retainer Agreement for Pro Bono Attorney Services

Identification of Parties

By this agreement, the Oakland Police Commission (OPC/Commission) retains Henry Gage III (Pro Bono Counsel) as Pro Bono Counsel and legal advisor to the Oakland Police Commission.

Affirmation of Pro Bono Representation

Pro Bono Counsel agrees to undertake this representation on a pro bono basis. Pro Bono Counsel will not charge the OPC for attorney or paralegal hours expended. Pro Bono Counsel will not seek attorneys' fees from the OPC for services provided pursuant to this agreement.

Agreements Concerning Representation

Pro Bono Counsel agrees to:

- (a) Provide legal opinions and legal services to the OPC as directed by the Chair, or by majority vote of the OPC.
- (b) Keep the OPC informed as to the status of assigned tasks, and to exercise due diligence in the performance of duties under this agreement.
- (c) Keep all sensitive information provided by the OPC confidential unless authorized by the Client to disclose it. Pro Bono Counsel may share information with other attorneys or staff working under the direction of Pro Bono Counsel or otherwise assisting with representation, provided that such individuals agree to maintain confidentiality.

Conflicts of Interest

Pro Bono Counsel agrees to notify the OPC immediately if Pro Bono Counsel becomes aware of an actual or potential conflict of interest. Pursuant to such notification, the OPC shall determine whether the actual or potential conflict shall be waived. Waivers of any such actual or potential conflicts shall be memorialized in writing.

Termination of Agreement

The OPC and Pro Bono Counsel may end this agreement at any time for any reason. Notice of Termination of this agreement shall be delivered in writing. Upon termination of this agreement, Pro Bono Counsel agrees to return all original documents furnished by the OPC.

Signatures & Further Affirmations

This writing represents the entire agreement between the parties and cannot be amended or modified except by a writing signed by the parties.

Oakland Police Commission

Date

Pro Bono Counsel

Date

Mobile – [REDACTED]

Email – [REDACTED]

Mail – [REDACTED]

EDUCATION:

Santa Clara University School of Law, Santa Clara, CA (Graduated – May 2015, CA Bar #306106)

Juris Doctor, with certified studies in High Tech Law, and Corporate Law

Witkin Award for Academic Excellence in Securities Regulation

President (2014-2015) Secretary (2013-2014) and Class Representative (2012-2013), Student Bar Association

Associate, *Santa Clara Law Review: Vol. 54*

Alumni Relations Chair (2014-2015), Black Law Students Association

Edwin A. Heafey Scholarship Recipient

Law Faculty Scholarship Recipient

Santa Clara University, Santa Clara, CA (Graduated – June 2011)

Bachelor of Arts, English, with an emphasis in Creative Writing

Related Coursework: Conflict Resolution, Technology & Communications, Argumentation, Public Speaking, and Business Ethics

Continuing Education:

Continuing legal education has included coursework in a wide variety of subjects, including:

- Employment Investigations & Interviewing
- Gender Identity, Sexual Orientation & The Creation of Inclusive Workplaces
- Advanced Litigation Skills
- Ethics for Criminal Law Attorneys
- Admission of Evidence & Evidentiary Foundations
- Prosecutorial Misconduct
- Social Media & Legal Ethics

EXPERIENCE:

Richard, Thorson, Graves & Royer LLP, Oakland, CA (November 2015 – Present)

Associate Attorney & Of Counsel

Manager, Summer Associate Program

Represents public agency clients in litigation set before Workers' Compensation Appeals Boards throughout California, with specific experience in the investigation and defense of claims filed by public safety officers. Duties involve overlapping work in the areas of Civil Subrogation, Disability & Employment Law, and Business & Government Tort Claims. Case file litigation experience includes a variety of litigation-related investigatory duties, such as taking and defending depositions, supervision of investigative staff, review and analysis of investigative reporting, and aggregate file reviews with client supervisors that are conducted to audit and analyze the effectiveness of internal controls and multi-matter litigation strategies. These reviews are often supplemented with statistical analysis regarding the effectiveness of comparative litigation strategies to help ensure that litigation reserves are used efficiently and effectively. Litigation experience includes extensive appearances before administrative law judges for oral arguments, motion practice, and trial. Supervisory and management experience has included involvement with Firm hiring and recruitment for associate attorneys, responsibility for the oversight of non-attorney staff, and the planning, creation, and supervision of the Firm's Summer Associate Program.

Coalition for Police Accountability, Oakland, CA (January 2016 – Present)

Member, Steering Committee

Chair, Policy Committee

The Coalition for Police Accountability is a community-driven, volunteer-based, non-profit advocacy group formed to address the persistent policy and political challenges of the Oakland Police Department. The Coalition advocates for progressive public safety policies and works in support of the Oakland City Council, the Council Public Safety Committee, the Community Police Advisory Board (CPAB), the Police Commission, and other related agencies. Members of the Coalition's Steering Committee provide executive direction for the work of the Coalition, and have been intimately involved in the creation of the Police Commission, the CPAB, and legacy oversight authorities. Steering Committee members regularly appear before policymakers to provide subject matter expertise and independent legal analysis of pressing public safety issues. In my role as Chair of the Coalition Policy Committee I am presently engaged in an ongoing review of all reports issued regarding the Negotiated Settlement Agreement. I possess a detailed understanding of related provisions of the Oakland City Charter, related City Ordinances, OPD Strategic Plans, OPD Department General Orders, OPD Training Bulletins, and OPD Organizational Structures.

Santa Clara University Board of Trustees, Santa Clara, CA (June 2016 – Present)

Young Alumnus Trustee

Member, Student Life & Athletics Committee

In accordance with the University Charter, granted by the State of California in 1855, the Board of Trustees holds full legal power and responsibility for the operation of the University, including the supervision of the ~2,000 members of the University's faculty and staff. The Student Life & Athletics Committee (SLAC) holds primary responsibility for the oversight of the Office of Student Life, which includes administrative units such as Campus Safety & Emergency Medical Services, Health & Counseling Services,

and the Office for Multicultural Learning, among others. The investigation and adjudication of discipline, including oversight of the University's Title IX Coordinator, falls under SLAC jurisdiction.

United States Attorney's Office, Civil Division, San Jose, CA (September 2014 – November 2014)

Law Clerk (Limited-Term Appointment)

Provided litigation support for three Assistant United States Attorneys by drafting briefs, motions, and memoranda for cases argued in the Northern District of California, and the Ninth Circuit Court of Appeals. Worked closely with supervising attorneys to assist in preparation for hearings and conferences.

Juniper Networks Inc., Sunnyvale, CA (May 2014-August 2014)

Legal Intern (Limited-Term Appointment)

Worked alongside attorneys reporting to the IP, Corporate, Compliance, Finance, and Operations business units on assignments that touched nearly every aspect of the business. Assignments included review and audit of vendor and supplier contracts, trade compliance agreements, and conflict minerals reporting, as well as various litigation and transactional projects.

Cypress Semiconductor Corporation, San Jose, CA (Jan 2014 – May 2014)

Legal Intern (Limited-Term Appointment)

Provided litigation support to the Patent Litigation Group by conducting antitrust law research in preparation for pending action, drafting motions and memoranda for the in-house litigation team, and conducting statistical analysis of the active docket as part of a targeted IP litigation strategy.

Altera Corporation, San Jose, CA (May 2013 – August 2013)

Legal Intern (Limited-Term Appointment)

Worked alongside attorneys from the Corporate and Patent litigation groups on a wide range of assignments, including contract review and audit, contract negotiation, internal strategic planning, and patent litigation management. Projects included assisting business units with conflict minerals reporting compliance and audits, training foreign distributors about FCPA liability, and research on international patent exhaustion issues affecting foreign product lines.

Fragomen, Del Rey, Bernsen & Loewy, Santa Clara, CA (February 2012 – August 2012)

Project Assistant

Tasked with ensuring that clients followed Department of Labor guidelines concerning employment eligibility, and worked with supervisors to create protocols for the hiring and vetting of foreign nationals. Responsible for organizing and managing a large-scale document review project designed to digitize, categorize, and proofread client documents.

ADDITIONAL EXPERIENCE & CREDENTIALS:

National Association for the Civilian Oversight of Law Enforcement

Associate Member

NACOLE is a non-profit organization that works to enhance accountability and transparency in policing, and build community trust through civilian oversight of police agencies. NACOLE members are afforded access to a variety of training materials, such as guidebooks for the implementation of new or revitalized police oversight, core competency analyses, recommended trainings, and webinars that address topics such as Predictive Policing, Crisis Intervention Programs, and Community Engagement Through Data, among others.

Oakland Police Department Community Police Academy

Graduate

The Community Police Academy is an intensive 14-week program that provides community members with a detailed overview of OPD functions, organizations, and capacity. The program provides attendees with the opportunity to learn from and engage with members of the department at all levels, from Patrol, to Specialized Units, to Academy staff and Command Officers. Attendees additionally participate in a ride-along, and graduates associated with the Community Police Academy Alumni Association meet regularly to assist with subsequent classes, and volunteer on behalf of the department.

California State Bar – Specialization Examination (Completed Prerequisite)

The State Bar certifies attorneys as specialists who have gone beyond the standard requirements for licensing as an attorney. A key prerequisite before an application for certification can be submitted requires candidates to sit for and pass a written examination in the legal specialty area. I sat for and passed the Legal Specialization Examination for Workers' Compensation Specialists in October 2017.

Celebrating NACOLE at 25 – Courage, Collaboration & Community

25th Annual NACOLE Conference | Detroit, Michigan | September 22 – 26, 2019

DAILY SCHEDULE

Sunday, September 22nd

12:30 p.m. – 1:30 p.m.	<i>Principles of Civilian Oversight and Effective Practices</i>
1:30 p.m. – 2:45 p.m.	<i>Hearing Multiple Voices: Town Hall Meetings in a Volatile Environment</i>
3:00 p.m. – 4:00 p.m.	<i>Conducting and Reviewing Investigations Workshop</i>
4:00 p.m. – 5:00 p.m.	<i>Creating a Trauma-Informed Culture Within Civilian Oversight</i>
5:15 p.m. – 6:15 p.m.	<i>Evening Forum: New and Emerging Oversight – A Roundtable Discussion</i>
6:30 p.m. – 8:30 p.m.	<i>Opening Reception: Join fellow attendees at the Detroit Marriott at Renaissance Center as we kick off the 25th Annual Conference and Celebration!</i>

Monday, September 23rd

8:30 a.m. – 9:30 a.m.	A Welcome to this year’s conference: <i>Celebrating NACOLE at 25 - Courage, Collaboration & Community</i>	
9:30 a.m. – 10:15 a.m.	Opening Keynote Speaker (TBA)	
	TRACK I Training	
10:30 a.m. – 11:45 a.m.	<i>Recalling the Origins of Oversight: Incidents, Tragedies, and Public Demands for Change</i>	
12:00 p.m. – 1:30 p.m.	Lunch on Your Own	
	TRACK I Training (Concurrent Session)	TRACK II Community Trust (Concurrent Session)
1:30 p.m. – 3:00 p.m.	<i>The Importance of Policy Recommendations: The Role of Civilian Oversight in Long Term Reform</i>	<i>Driving Change Forward: Vehicles for Reform in a Time of Declining Checks and Balances</i>
3:15 p.m. – 4:45 p.m.	<i>Unmasking the Truth Behind Video-Driven Investigations</i>	<i>Data-Driven Policing: How the Gathering of Data by Law Enforcement Impacts the Public</i>
5:00 p.m. – 6:00 p.m.	Evening Forum: <i>TBD</i>	
6:30 p.m. – 9:30 p.m.	<i>Annual Scholarship Fundraiser: Attendees will enjoy dinner and good times with friends and colleagues while supporting the current and future leaders in the field of civilian oversight of law enforcement.</i>	

Tuesday, September 24th

	TRACK I Training (Concurrent Session)	TRACK II Community Trust (Concurrent Session)	TRACK III Institutional Culture and Correctional Oversight (Concurrent Session)
8:30 a.m. – 10:00 a.m.	<i>The Detroit Evolution</i>		
10:15 a.m. – 11:45 a.m.	<i>Addressing Use-of-Force Reform in the New Orleans Police Department</i>	<i>Rethinking Oversight: Developing New Approaches to Fulfill Our Missions</i>	<i>Building Juvenile Correctional Oversight</i>
12:00 p.m. – 1:00 p.m.	Keynote Luncheon and Awards Ceremony		
1:00 p.m. – 2:15 p.m.	<i>The Next Frontier: Body Worn Cameras and Civilian Oversight</i>	<i>Challenging Stigmas: Policing and the Muslim Community</i>	<i>Beyond Collaboration: Making Impact with State Corrections Agencies Through Civilian Oversight</i>
2:30 p.m. – 3:45 p.m.	<i>The Role of Independent Counsel for Civilian Oversight</i>	<i>Youth and Law Enforcement</i>	<i>Improving Grievance Procedures in Correctional Settings</i>
4:00 p.m. – 5:15 p.m.	<i>Oversight and Correctional Leadership</i>		
5:30 p.m. – 6:30 p.m.	Evening Forum: <i>A Crisis in Confidence – When Trust Breaks Down in the Correctional System</i>		

Wednesday, September 25th

	TRACK I Training (Concurrent Session)	TRACK II Community Trust (Concurrent Session)	TRACK IV Collaboration (Concurrent Session)
8:30 a.m. – 10:00 a.m.	<i>Investigating Sexual Misconduct</i>	<i>Why Are They Always Calling the Cops on Me?</i>	<i>Chicago Oversight: Collaboration and Challenges in Practice</i>
10:15 a.m. – 11:45 a.m.	<i>Building Momentum in Use-of-Force Reform</i>	<i>Community-Police Mediation</i>	<i>Oversight from a Law Enforcement Perspective</i>
12:00 p.m. – 1:30 p.m.	Lunch on Your Own		
1:30 p.m. – 3:00 p.m.	<i>Auditing the Health and Safety Impacts of Officer Overtime</i>	<i>How to Analyze Awful but Lawful Police Shootings</i>	<i>Peril at the Top: Civilian Oversight's Role in Ensuring Command Staff Accountability</i>
3:15 p.m. – 5:00 p.m.	NACOLE Annual Membership Meeting and Elections		
6:30 p.m. – 8:30 p.m.	Sankofa Reception: A Celebration of 25 Years		

Thursday, September 26th

	TRACK IV Collaboration
8:30 a.m. – 10:00 a.m.	<i>Building Relationships with Law Enforcement While Maintaining Independence</i>
10:15 a.m. – 11:45 a.m.	<i>The Kerner Commission and Policing 50 Years Later</i>
11:45 a.m. – 12:00 p.m.	Closing Remarks

Please note this schedule is subject to change without notice



Color Legend:

- Training for Oversight
- Community Trust
- Institutional Culture and Correctional Oversight
- Collaboration



OAKLAND POLICE COMMISSION

Agenda Report

Subject:	Pending Agenda Matters List
Date:	May 6, 2019
Requested by:	Police Commission
Prepared by:	Chrissie Love, Administrative Analyst II
Reviewed by:	Richard Luna, Assistant to the City Administrator

Action Requested:

Review Pending Agenda Matters List and decide on which, if any, to include in upcoming agendas.

Background:

The following exhaustive list was begun in early 2018 and includes items submitted for consideration on future agendas. Community members may suggest agenda items by completing and submitting the Agenda Matter Submission Form found on the Commission's webpage.

Attachments (17a):

Pending Agenda Matters List (10 pages)

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Performance Audit and Financial Audit of Commission and CPRA	1/1/2018	City Auditor to conduct a performance audit and a financial audit of the Commission and the Agency	No later than two (2) years after the City Council has confirmed the first set of Commissioners and alternates, the City Auditor shall conduct a performance audit and a financial audit of the Commission and the Agency. Nothing herein shall limit the City Auditor's authority to conduct future performance and financial audits of the Commission and the Agency.	High	10/17/2019	5/9/2019	
Stop Data and Racial Profiling	1/1/2018		Need regular reporting on stop data and racial profiling directly from research, and coordinate from NSA team with IG for data and policy recommendations. Do a deep dive on racial profiling.	High		5/23/2019	Jackson
Commissioner Training, Part 1	1/1/2018	Complete the training described in section 2.45.190(A) through (H)	The training described in subsections (G) and (H) must be done in open session. The 1 year deadline only applies to the first group of Commissioners and alternates; all other Commissions must complete this training within six months of appointment.	High	10/17/2018		Ahmad, Dorado
Commissioner Training, Part 2	1/1/2018	Complete the training described in section 2.45.190(I) through (M)	The 18 month deadline only applies to first group of Commissioners and alternates; all other Commissioners must complete this training within 12 months of appointment.	High	4/17/2019		Ahmad, Dorado
Finalize hiring of CPRA full-time Executive Director			Decide on 2-3 candidates to submit to City Administrator.	High			Personnel Committee
Hire Inspector General (IG)	1/14/2019	Hire IG once the job is officially posted	HR staff is completing a compensation study for the position. Since this position is new to the City's Salary Ordinance, this step is required so the IG can be properly funded. Concurrently, HR staff has been conforming the IG job description approved by the Police Commission to fit a class specification for the position. HR staff anticipates this work to be completed in the coming weeks. The next two immediate steps are: 1) The Civil Service Board will need to approve the class specification, which staff anticipates will happen in February; and 2) The salary ordinance will then need to be approved by the City Council. The IG position will become open after these two steps are completed.	High			Personnel Committee

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Notification of OPD Chief Regarding Requirements of Annual Report	1/1/2018	Commission must notify the Chief regarding what information will be required in the Chief's annual report	<p>The Chief's report shall include, at a minimum, the following:</p> <ol style="list-style-type: none"> 1. The number of complaints submitted to the Department's Internal Affairs Division (IAD) together with a brief description of the nature of the complaints; 2. The number of pending investigations in IAD, and the types of Misconduct that are being investigated; 3. The number of investigations completed by IAD, and the results of the investigations; 4. The number of training sessions provided to Department sworn employees, and the subject matter of the training sessions; 5. Revisions made to Department policies; 6. The number and location of Department sworn employee-involved shootings; 7. The number of Executive Force Review Board or Force Review Board hearings and the results; 8. A summary of the Department's monthly Use of Force Reports; 9. The number of Department sworn employees disciplined and the level of discipline imposed; and 10. The number of closed investigations which did not result in discipline of the Subject Officer. <p>The Chief's annual report shall not disclose any information in violation of State and local law regarding the confidentiality of personnel records, including but not limited to California Penal Code section 832.7</p>	High	June 14, 2018 and June 14 of each subsequent year		Dorado
Performance Reviews of CPRA Director and OPD Chief	1/1/2018	Conduct performance reviews of the Agency Director and the Chief	<p>The Commission must determine the performance criteria for evaluating the Chief and the Agency Director, and communicate those criteria to the Chief and the Agency Director one full year before conducting the evaluation. The Commission may, in its discretion decide to solicit and consider, as part of its evaluation, comments and observations from the City Administrator and other City staff who are familiar with the Agency Director's or the Chiefs job performance. Responses to the Commission's requests for comments and observations shall be strictly voluntary.</p>	High	Annually; Criteria for evaluation due 1 year prior to review		

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Revise employment contracts with CPRA and Commission legal counsels	10/10/2018		The employment contract posted on the Commission's website does not comport with the specifications of the Ordinance. As it stands, the Commission counsel reports directly to the City Attorney's Office, not the Commission. The Commission has yet to see the CPRA attorney's contract, but it, too, may be problematic.	High			
Public Hearing on Use of Excessive Force	4/22/2019		Work with Coalition on Police Accountability on presenting a public hearing on use of excessive force.	Medium			
Public Hearing on OPD Budget	1/1/2018	Conduct at least one public hearing on the Police Department's budget	Tentative release date of Mayor's proposed budget is May 1, 2019.	Medium	Biennial, per budget cycle	5/9/2019	
Ad-Hoc Discipline Committees for Each Discipline or Termination Case	1/1/2018	Discipline Committees may not decide disputes until the following training is completed: * Department operations, policies and procedures, including but not limited to discipline procedures for Misconduct, and * Training described in section 2.45.190(A) through (F) of the enabling ordinance	Establish on an as-needed basis	Medium			
Brian Hoefler case: review video	10/11/2018		Response to allegation was officer was Just and Honorable, when allegations were the officer was untrue. All of the issues, despite what the officer said, was a deportation matter. Chief stated that people were charged with crimes, when they were not.	Medium			
Community Policing Task Force/Summit	1/24/2019			Medium			Dorado

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
CPAB Report			Oakland Municipal Code §2.45.070 (O) Receive any and all reports prepared by the Community Policing Advisory Board (hereinafter referred to as "CPAB") and consider acting upon any of the CPAB's recommendations for promoting community policing efforts and developing solutions for promoting and sustaining a relationship of trust and cooperation between the Department and the community.	Medium			
De-escalation Policy	1/1/2018		Review existing policy (if any) and take testimony/evidence from experts and community about best practices for de-escalation. Draft policy changes as needed.	Medium			
Finalize Bylaws and Rules	1/24/2019			Medium			Prather
Follow up on Najiri Smith Case	10/10/2018		Community members representing Najiri claim the officer lied re. the time of interaction, which makes the citation (loud music after 10pm) invalid. They claimed he was engaged by OPD around 9.10pm.	Medium			
Need for an easy to read process to determine if Commission can open or re-open an investigation	10/2/2018		We've been hearing a lot from community members about concerns about what the commission's power actually is. We've passed a few motions to ask for legal advice on whether we have the authority to open an investigation, but an easy to read flow chart or checklist format might be easier to digest by the community. We are suggesting a flow chart for what our parameters are and resources for where we can send people if we can't help them.	Medium			
Offsite Meetings	1/1/2018	Meet in locations other than City Hall	The offsite meetings must include an agenda item titled "Community Roundtable" or something similar, and the Commission must consider inviting individuals and groups familiar with the issues involved in building and maintaining trust between the community and the Department. (OMC § 2.45.090(B).)	Medium	Annually; at least twice each year		Ahmad, Dorado, Jackson
Proposal For Staff Positions for Commission and CPRA	1/1/2018	Provide the City Administrator with its proposal for staff positions needed for Commission and Agency to fulfill its functions and duties		Medium	June 14, 2018, and on an ongoing basis as appropriate		

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Report Regarding OPD Chief's Report	1/1/2018	Submit a report to the Mayor, City Council and the public regarding the Chief's report in addition to other matters relevant to the functions and duties of the Commission	The Chief's report needs to be completed first.	Medium	Annually; once per year		
Reports from OPD on such issues as response times, murder case closure rates, hiring and discipline status report (general number for public hearing), any comp stat data they are using, privacy issues, human trafficking work, use of force stats, homelessness issues, towing cars of people who sleep in their vehicles	10/6/2018			Medium			
Review budget and resources of IAD	10/10/2018		In our discipline training we learned that many "lower level" investigations are outsourced to direct supervisors and sergeants. We spoke with leaders in IAD ad they agreed that it would be helpful to	Medium			
Review Commission's Code of Conduct Policy	4/25/2019			Medium			Prather
Review Commission's Outreach Policy	4/25/2019			Medium			
Review Commission's Agenda Setting Policy	4/25/2019			Medium			
Crisis Intervention as Part of a Police Force	4/25/2019		Review materials produced by Crisis Assistance Helping Out on the Streets (CAHOOTS) of Oregon	Medium			

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Review taser policy per outcome of Marcellus Toney	10/10/2018		In the report we were given, we were told that officers have choice as to where to deploy a taser. Commission to review these policies and make recommendations and/or find if there is connection to NSA.	Medium			
Supervision policies	10/2/2018		Review existing policy (if any) and take testimony/evidence from experts and community about best practices for supervisory accountability. Draft policy changes as needed. In addition, IG should conduct study of supervisor discipline practices. In other words, how often are supervisors held accountable for the misconduct of their subordinates.	Medium			
What are the outstanding issues in meet and confer and what is the status of the M&C on the disciplinary reports?	10/6/2018		Need report from police chief and city attorney. Also need status report about collective bargaining process that is expected to begin soon.	Medium			
Amendment of DGO C-1 (Grooming & Appearance Policy)	10/10/2018		DGO C-1 is an OPD policy that outlines standards for personal appearance. This policy should be amended to use more inclusive language, and to avoid promoting appearance requirements that are merely aesthetic concerns, rather than defensible business needs of the police department.	Low			
Annual Report	1/1/2018	Submit Commission's first annual report to the Mayor, City Council and the public		Low	4/17/2020		Prather, Smith
Assessing responsiveness capabilities	10/6/2018		Review OPD policies or training regarding how to assess if an individual whom police encounter may have a disability that impairs the ability to respond to their commands.	Low			
Consider creating a list of ways to be engaged with OPD so that Commission can clearly state what issues should be addressed.	2/6/2019			Low			
CPRA report on app usage	10/10/2018		Report from staff on usage of app.	Low			

Police Commission
Pending Agenda Matters List

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Creation of Form Regarding Inspector General's Job Performance	1/1/2018	Create a form for Commissioners to use in providing annual comments, observations and assessments to the City Administrator regarding the Inspector General's job performance. Each Commissioner shall complete the form individually and submit his or her completed form to the City Administrator confidentially.	To be done once Inspector General position is filled.	Low			
Discipline: based on review of MOU	10/6/2018		How often is Civil Service used v. arbitration? How long does each process take? What are the contributing factors for the length of the process? How often are timelines not met at every level? How often is conflict resolution process used? How long is it taking to get through it? Is there a permanent arbitration list? What is contemplated if there's no permanent list? How often are settlement discussions held at step 5? How many cases settle? Is there a panel for Immediate dispute resolution? How many Caloca appeals? How many are granted? What happened to the recommendations in the Second Swanson report?	Low			
Discipline: Second Swanson Report recommendations – have these been implemented?	10/6/2018		Supervisor discipline Process for recommending improvements to policies, procedures and training, and to track and implement recommendations Tracking officer training and the content of training Comparable discipline imposed – database of discipline imposed, demonstrate following guidelines IAD civilian oversight for continuity in IAD Improved discovery processes Permanent arbitration panel implemented from MOU OPD internal counsel Two attorneys in OCA that support OPD disciplines and arbitration (why not use CPRA attorney who knows the detailed investigation and is already paid for?) Reports on how OCA is supporting OPD in discipline matters and reports on arbitration Public report on police discipline from mayor's office (Why not from CPRA? The history is that it was included in the annual CPRB report provided to City Council.) OIG audit includes key metrics on standards of discipline	Low			

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Do Not Call list issues – cops whose untruthfulness prevents them from testifying	10/6/2018		This is impacted by SB1421 and will require legal analysis.	Low			
Feedback from Youth on CPRA app	10/10/2018		We want to get some feedback from youth as to what ideas, concerns, questions they have about its usability. We've already cleared a process with CPRA, just wanted to get this on the list of items to calendar in the future (ideally early 2019)	Low			
Modify Code of Conduct from Ethics Commission for Police Commission	10/2/2018		On code of conduct for commissioners there is currently a code that was developed by the Ethics Commission. It is pretty solid, so perhaps we should use portions of it and add a process for engagement with city staff and community.	Low			
OPD Data and Reporting			Oakland Municipal Code §2.45.070(P) Review and comment on the Department's police and/or practice of publishing Department data sets and reports regarding various Department activities, submit its comments to the Chief, and request the Chief to consider its recommendations and respond to the comments in writing.	Low			
Outreach Committee: work with Mayor's Office and City Admin to publicize app	10/10/2018			Low			
Outreach Plan Discussion, including use of social media	10/6/2018			Low			
Overtime Usage by OPD (cost and impact on personnel health + moonlighting for AC Transit)	1/1/2018		Request Office of Inspector General conduct study of overtime usage and "moonlighting" practices.	Low			
Policy on Tasers			Policy on the discretion of tasers, review with Cunningham	Low			
Process to review allegations of misconduct by a commissioner	10/2/2018		Maureen Benson has named concerns/allegations about a sitting commissioner since early in the year,	Low			Jackson
Promotions of officers who have committed crimes	10/6/2018			Low			

**Police Commission
Pending Agenda Matters List**

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Proposed Budget re: OPD Training and Education for Sworn Employees on Management of Job-Related Stress	1/1/2018	Prepare for submission to the Mayor a proposed budget regarding training and education for Department sworn employees regarding management of job-related stress. (See Trauma Informed Policing Plan)	Review and comment on the education and training the Department provides its sworn employees regarding the management of job-related stress, and regarding the signs and symptoms of posttraumatic stress disorder, drug and alcohol abuse, and other job-related mental and emotional health issues. The Commission shall provide any recommendations for more or different education and training to the Chief who shall respond in writing consistent with section 604(b)(6) of the Oakland City Charter. Prepare and deliver to the Mayor, the City Administrator and the Chief by April 15 of each year, or such other date as set by the Mayor, a proposed budget for providing the education and training identified in subsection (C) above.	Low	4/15/2020		
Protocol on how OPC handles serious incidents	10/6/2018			Low			
Protocol on how to handle issues that are non-critical	10/6/2018			Low			
Public Hearings on OPD Policies, Rules, Practices, Customs, General Orders	1/1/2018	Conduct public hearings on Department policies, rules, practices, customs, and General Orders; CPRA suggests reviewing Body Camera Policy	Coalition for Police Accountability is helping with this.	Low	Annually; at least once per year		Dorado
Recommendations for increasing communication between CPRA and IAD (ensure prompt forwarding of complaints from IAD to CPRA and prompt data sharing)	10/6/2018		Review of existing communication practices and information sharing protocols between departments, need recommendations from stakeholders about whether a policy is needed.	Low			

Police Commission
Pending Agenda Matters List

Pending Agenda Matter	Date Placed on List	Duties/Deliverables	Additional Information/Details	Priority Level	Timeline/Deadline	Scheduled	Lead Commissioner(s), if any
Request City Attorney Reports	1/1/2018	Request the City Attorney submit semi-annual reports to the Commission and the City Council	<p>Oakland Municipal Code 2.45.070(I). Request the City Attorney submit semi-annual reports to the Commission and City Council which shall include a listing and summary of:</p> <ol style="list-style-type: none"> 1. To the extent permitted by applicable law, the discipline decisions that were appealed to arbitration; 2. Arbitration decisions or other related results; 3. The ways in which it has supported the police discipline process; and 4. Significant recent developments in police discipline. <p>The City Attorney's semi-annual reports shall not disclose any information in violation of State and local law regarding the confidentiality of personnel records, including but not limited to California Penal Code 832.7</p>	Low	Semi-annually		Smith
Select Topics and Facilitators for Retreat				Low			