

BOARD OF FIRE COMMISSIONERS  
FILE NO. BFC 10-027

Date: April 2, 2010  
To: Board of Fire Commissioners  
From: Stephen Miller, Independent Assessor  
Subject: *Assessment of the Department's Disciplinary Process and Professional Standards Division*

|               |                                   |   |                                    |
|---------------|-----------------------------------|---|------------------------------------|
| FINAL ACTION: | <input type="checkbox"/> Approved | <input type="checkbox"/> Approved w/Corrections | <input type="checkbox"/> Withdrawn |
|               | <input type="checkbox"/> Denied   | <input type="checkbox"/> Received & Filed       | <input type="checkbox"/> Other     |

**Recommendations:**

The following recommendations are made:

1. Receive the *Assessment of the Department's Disciplinary Process and Professional Standards Division*.
2. Direct the Fire Department to provide a written response to the *Assessment's* recommendations within 30 calendar days.
3. Direct the Board of Fire Commissioners' staff and the Fire Department to immediately cease seeking "investigative subpoenas" from the City Clerk's Office until the City Attorney's Office provides legal advice and direction concerning the Fire Department's legal authority to serve "investigative subpoenas."
4. Direct the Fire Department to provide the Independent Assessor immediate and unrestricted access to all Fire Department personnel and payroll records and files regardless of format unless the City Attorney's Office can provide written advice with citations to legal authority citing a valid legal basis for not providing access in no more than thirty (30) calendar days.

**Summary:**

On November 3, 2009, the Board of Fire Commissioners was advised an assessment of the Department's disciplinary process and Professional Standards Division was being initiated. That review results in the *Assessment of the Department's Disciplinary Process Professional Standards Division* provided under separate cover.

A draft of the *Assessment* was provided to the Fire Department on February 25, 2010, for the primary purpose of ensuring the Department had every opportunity to correct any factual errors. The Department completed its review on March 12, 2010. A draft of the *Assessment* was also provided to the City Attorney's Office on March 12, 2010, to ensure the facts set forth are accurate. Final comments were provided by the City Attorney's Office on March 26, 2010.

The *Assessment* sets forth many recommendations and the Fire Department should be invited to respond to them. However, two matters require immediate attention.

One of the sections of the *Assessment* involves allegations Department advocates engaged in misconduct when serving a subpoena seeking a confidential medical record. Since preparation of the *Assessment*, information has been received indicating; 1) the Department does not have a written policy and procedure for the service of subpoenas during an investigation, 2) the advocates were acting pursuant to an "accepted practice of the Department" of issuing and serving subpoenas that has been passed along institutionally via word-of-mouth or on-the-job training, and 3) the subpoena in question was issued by the City Clerk as the result of a January 21, 2009, request made on behalf of the Board of Fire Commissioners.

City Charter section 1060(i) provides a procedure whereby a subpoena may be used to compel the attendance of witnesses and the production of evidence at a Board of Rights hearing. There is a question whether this authority extends to permitting "investigative subpoenas." The City Attorney's Office has been requested to provide advice concerning a variety issues related to "investigative subpoenas" including whether the Fire Department has the lawful authority to subpoena documents, including those protected by the right of privacy, when preparing a case for a Board of Rights hearing.

As the *Assessment* points out, lawsuits may be brought against public entities on the theory a municipal custom, policy or practice is unconstitutional. This does not require a formally adopted policy, but can include practices so permanent and well settled they constitute a custom or usage with the force of law. Given the potential risk of liability if conduct executes an unconstitutional custom, policy or practice, it is strongly recommended the Board of Fire Commissioners provide emphatic direction "investigative subpoenas" not be authorized, sought, issued or served by or on behalf of the Board of Fire Commissioners, its staff or Fire Department personnel until the City Attorney's Office provides clear advice and direction.

A number of issues could not be resolved during the course of performing the review resulting in this *Assessment* because the Independent Assessor has not been granted access to personnel and payroll files. Therefore, it is requested access to these records be provided unless there is a valid legal basis for denying access.

# LOS ANGELES BOARD OF FIRE COMMISSIONERS



## ASSESSMENT OF THE DEPARTMENT'S DISCIPLINARY PROCESS AND PROFESSIONAL STANDARDS DIVISION



Conducted by

**OFFICE OF THE INDEPENDENT ASSESSOR**

STEPHEN MILLER  
Independent Assessor

March 27, 2010

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March 27, 2010

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

Dear President and Members of the Board of Fire Commissioners:

*An Assessment of the Department's Disciplinary Process and Professional Standards Division* is submitted to you.

This *Assessment* is presented four years after audits by the City Controller and Personnel Department resulted in the Board of Fire Commissioners' April 25, 2006 *Audit Action Plan* and addresses the specific goals related to adopting disciplinary guidelines and creating a permanent independent body to investigate a wide range of cases. It was found; 1) the Department has adopted disciplinary guidelines that are substantially different from the guidelines recommended by the Stakeholders and unanimously approved by the Board of Fire Commissioners in November 2006, 2) the Department has done a very good job building an organizational structure for the Professional Standards Division, and 3) while progress has been made toward creating an investigative staff with the necessary expertise, experience and training, that progress falls short of the goals set by the Board of Fire Commissioners.

In addition to assessing the Department's progress in meeting two of the Board's specific *Audit Action Plan* goals, this *Assessment* sets forth many recommendations. These recommendations are made in an attempt to ensure the broader goals of reducing the risk of liability, improving the disciplinary process, eliminating inappropriate and discriminatory behavior; improving diversity and improving the work environment are fully and effectively realized.

A draft of this report was provided to the Fire Department for review on February 25, 2010. Following a two week review, many of their comments are reflected in this final *Assessment*. In addition, the Department reports:

1. The Professional Standards Division has submitted proposed Charter amendments concerning the statute of limitations and the composition of the Board of Rights;
2. The Professional Standards Division is now taking steps to bring the pre-disciplinary "Skelly" hearing process into compliance with due process requirements;
3. The Professional Standards Division has begun to utilize non-sworn personnel to prosecute Boards of Rights cases and the Department is providing non-sworn investigators with the authority to order and admonish sworn personnel at their interviews;

4. Recordings of pre-disciplinary “*Skelly*” hearings are being uploaded to the disciplinary tracking system regularly;
5. The Professional Standards Division has established an automated statute of limitations notification system whereby investigators receive notification if a case ages to a point it is 150 days from the applicable statute of limitations, and every 30 days thereafter until completed;
6. The Professional Standards Division provided training on March 10, 2010, on an upgraded system involving the use of the complaint tracking system’s investigative log; and
7. The Professional Standards Division recently instituted a program of conducting investigative strategy meetings when new cases are assigned and has also adopted a program for improved pre-hearing preparation.

A draft of this report was also provided to the City Attorney’s Office for review on March 12, 2010. This final *Assessment* reflects some of their input and suggestions following a two week review period. The City Attorney’s Office has also taken steps to:

1. Provide me with access to new claims and lawsuits;
2. Provide me with information concerning the status of litigation matters;
3. Express a strong commitment to providing quality and timely legal services to the Fire Department and Board of Fire Commissioners in the future, and
4. Improve communications.

Reports of this type offer both positive and negative opportunities. The negative should be avoided. This *Assessment* is intended to assist the Department in moving forward and further build on the strong foundation that has been established. The Department has already expressed and demonstrated an intent to use this report in that manner.

In closing, I wish to thank and commend the courtesy and cooperation extended to me by the Fire Department’s staff, and particularly the Professional Standards Division, in the course of performing this assessment.

Sincerely,

Stephen Miller  
Independent Assessor

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## EXECUTIVE SUMMARY

On November 3, 2009, the Independent Assessor informed the Board of Fire Commissioners an assessment of the Fire Department's disciplinary system and the Professional Standards Division was being initiated. The assessment was conducted pursuant to the authority set forth in section 523 of the Los Angeles City Charter.

Broadly stated, this assessment examines the Department's response to prior audits and recommendations. In conducting this assessment, Department decisions, allegations of misconduct, Department investigations, and disciplinary actions were reviewed in some detail. An attempt was made to measure the Department's progress by looking at the way in which actual cases were investigated, decided and prosecuted.

The assessment began by considering two of the goals set forth in the Board of Fire Commissioners' April 25, 2006, *Audit Action Plan*. The two goals serving as a foundation for this assessment include:

1. The Department will adhere to disciplinary guidelines that are equitable, consistent, free of undue influence, and clearly understood by all levels of the Department; and that reflects the best practices with demonstrated success in achieving a self-disciplined workforce, and also reflect the Core Values and vision of the Department.
2. To create an independent body with permanently assigned civilian and sworn investigative staff who possess the necessary expertise, experience and training to conduct the wide range of investigations to ensure public accountability of the Fire Department, as well as prepare and maintain professionally documented investigative files.

### ***Key Findings***

#### **Disciplinary Guidelines:**

When the 2006 Controller and Personnel Department audits recommended the Fire Department adopt its own disciplinary guidelines, the Department was using the Civil Service disciplinary guidelines. In November 2006, Department Stakeholders recommended, and the Board of Fire Commissioners unanimously approved, disciplinary guidelines that set penalties higher than the penalties set forth in the Civil Service guidelines. Since this action was taken the Department has adopted at least four different versions of disciplinary guidelines.

The disciplinary guidelines for most sworn members currently in use by the Department were agreed to on October 28, 2008. They generally set penalty ranges lower than the penalty ranges called for by the guidelines recommended to and approved by the Board of Fire Commissioners. This includes such areas as alcohol abuse, dishonesty/theft, discrimination/harassment/sexual harassment and hazing, among others.

The Department agreed to a statute of limitations for most guideline offenses that was never discussed by the Stakeholders or the Board of Fire Commissioners. For example, a five year statute of limitations applies to hazing offenses that would prevent calculating a second offense penalty if a prior hazing offense occurred more than five years before the second offense. No

statute of limitations applies to any Civil Service guideline offense for non-sworn members of the Department. Many of the penalty ranges set forth in the Department guidelines are lower than the Civil Service guideline penalties.

To the extent disciplinary guidelines set standards of conduct, the Department's current guidelines set standards of conduct for sworn members of the Department that are now lower than the standards the Department was using at the time the City Controller and Personnel Department recommended the Fire Department adopt its own guidelines. No meeting minutes could be found indicating the Department formally advised or consulted with the Stakeholders or the Board of Fire Commissioners about the critical differences between what was recommended and approved in 2006 and what the Department actually adopted a year or two later.

### **Permanent Investigative Staff:**

The Department has done a very good job building an organizational structure for the Professional Standards Division. Complaint and disciplinary tracking systems have been developed and are in use. Substantial progress has been made in complying with the *Firefighter Procedural Bill of Rights Act*. The Professional Standards Division has taken initial steps to provide statistical information as a preliminary step to identifying problem issues and work locations, as well as to provide recommendations on policy issues confronting the Department.

One of the great challenges for the Professional Standards Division has been dealing with 538 complaints in 2008 and over 1,100 complaints in 2009 when staffing was based on projections of 100 complaints. The increased number of complaints has severely impacted and will continue to severely impact the ability to effectively conduct investigations, prosecute disciplinary hearings, target issues of concern and appropriately manage the disciplinary system without additional and qualified resources being provided.

While sworn members of the Department have contributed significantly to the audit reforms, and to the daily activities of the Professional Standards Division, there are problems. The failure to adopt disciplinary guidelines meeting the standards approved by the Board of Fire Commissioners, adoption of a rule allowing representatives 7 business days within which to schedule interviews, agreeing to set penalties at the bottom third of guideline ranges that are lower than the Civil Service guidelines, failing to bring the pre-disciplinary hearing process into full compliance with due process standards, approving penalties lowered after pre-disciplinary hearings, the failure to document all complaints of wrongdoing, the failure to fully investigate alleged misconduct including a claim of civil rights violations, inconsistent penalty application and significant problems related to the prosecution of Boards of Rights cases are all the responsibility of sworn members of the Department.

The 2006 audit by the City Controller noted formal investigations are conducted by inexperienced and untrained investigators who are fire captains on a two-year rotational special duty assignment. The City Controller recommended permanently assigned investigative staff possessing the necessary expertise, experience and training to conduct a wide range of investigations. The 2006 audit by the Personnel Department said the Fire Department's disciplinary system was not sufficiently progressive, marked by inadequate investigation, poorly trained advocacy and arbitrary penalties. The Personnel Department recommended substantial civilianization; that staff assigned to investigate and present discipline cases should be civilianized to bring human resource expertise to the critical function.

Two year special duty assignments for sworn staff continue. While some non-sworn staff has been hired, they lack the numbers, tools, and authority, to conduct a wide range of investigations independently and effectively, to supervise sworn staff, and to properly manage the disciplinary system. Too often, the advice of a more knowledgeable and qualified non-sworn manager was not sought or followed. In 2006 the Personnel Department noted the Fire Department had made progress but had fallen far short of the goals and objectives established by the City Council in 1995. A similar statement can be made four years later. Further significant progress could have been made with sufficient and effective civilianization recommended by the City Controller and the Personnel Department in 2006.

### ***Key Recommendations***

Some of the recommendations the Department should seriously consider include:

1. Adopt disciplinary guidelines that set standards of conduct for sworn members of the Department that are higher than the standards of conduct for non-sworn members of the Department.
2. Apply disciplinary guidelines in a consistent manner that maintains higher standards of conduct for non-sworn members of the Department.
3. Eliminate the rule that allows union representatives up to 7 business days to schedule interviews.
4. Amend the City Charter to mirror the *Firefighter Procedural Bill of Rights Act* on the one-year statute of limitations and its tolling provisions.
5. Amend the City Charter as it relates to the composition of the Board of Rights, to include one chief officer, one administrative law judge, and one non-sworn member.
6. Ensure the Professional Standards Division receives timely and quality legal service on a consistent basis.
7. Bring the informal pre-disciplinary hearing process known as the *Skelly* hearing process into full compliance with due process requirements.
8. Employ a sufficient number of non-sworn staff with the demonstrated expertise, experience, training and proficiency to conduct, supervise and manage investigations, prosecute disciplinary hearings, and manage the Department's disciplinary system.
9. Provide non-sworn Professional Standards Division staff the necessary tools and authority to effectively conduct, supervise and manage the Department's disciplinary system, including investigations and prosecutions.
10. Except for *Skelly* officers, Boards of Rights and the Fire Chief, the role of sworn members in investigations and the disciplinary process should be limited to support and subject matter expertise.

By fully adopting these recommendations, and others set forth in this report, the Department can effectively implement the audit recommendations and the Board of Fire Commissioners' broader

goals, which were to reduce the risk of liability, improve the disciplinary process, eliminate inappropriate and discriminatory behavior, improve diversity and improve the work environment.

## OFFICE OF THE INDEPENDENT ASSESSOR

On January 26, 2006, the Los Angeles City Controller published its *Review of the Los Angeles Fire Department Management Practices*. On January 31, 2006, the City of Los Angeles Personnel Department released its *Audit of Fire Department Selection and Employment Practices*. Both audits cited longstanding problems with leadership and communications, the complaint and disciplinary process, human relations issues, and the drill tower recruit training academy. Both audits made many recommendations for improvement in these four areas.

It was later proposed an Independent Assessor position be established to assist the Board of Fire Commissioners in providing strong civilian oversight over the Fire Department. In March 2009, the voters of Los Angeles approved Charter Amendment A, which created the position of Independent Assessor. Section 523 was added to the City Charter and said, among other things, the Independent Assessor shall have the power and duty to; a) audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees; b) conduct any audit or assessment requested by majority vote of the Board of Fire Commissioners; and c) initiate any assessment or audit of the Fire Department or any portion of the Fire Department.

The first Independent Assessor was appointed and began work on October 5, 2009. The Board of Fire Commissioners approved the *Policies and Authority of the Independent Assessor* on December 15, 2009.



## DISCIPLINARY GUIDELINES

An assessment was conducted to determine if the Department adopted disciplinary guidelines recommended by audits previously conducted by the Los Angeles City Controller and the Personnel Department.

The assessment included a review of audit findings, audit recommendations, the Board of Fire Commissioner's *Audit Action Plan*, Stakeholder meeting minutes, meeting minutes for the Board of Fire Commissioners (BOFC), BOFC reports, documents filed with the Board of Fire Commissioners, numerous versions of disciplinary guidelines, the Controller's *Follow-Up Audit* and working papers, limited interviews and meetings with Controller audit staff and the Personnel Department.

### *Development of Disciplinary Guidelines*

#### **Audit Recommendations:**

The January 26, 2006, Los Angeles City Controller *Review of the Los Angeles Fire Department Management Practices* recommended the Department develop, with input from the firefighters' and chiefs' unions, a set of standard disciplinary penalty guidelines for sworn firefighters that reflect the unique accountability resulting from their public safety responsibilities; and, once developed assure they are consistently applied and fairly administered. The City Controller also recommended standard disciplinary penalty guidelines should include specific penalties for specific offenses, repeat offenses and include criteria for progression through channels. The January 30, 2006, *Audit of Fire Department Selection and Employment Practices* by the Personnel Department recommended the Fire Department be directed to develop and implement its own guidelines to disciplinary standards to reflect the unique operating conditions of the Fire Department and model the new guidelines after Personnel Department Policy 33.2.<sup>1</sup>

In May 2008, the Office of Controller released its "*Follow-Up Audit of LAFD's Management Practices*" which said, "LAFD and its two labor unions, COA<sup>2</sup> and UFLAC,<sup>3</sup> agreed to a set of standard guidelines in January 2008.<sup>4</sup> The *Follow-Up Audit* said the guidelines had been developed in conjunction with the unions, with input from the Board of Fire Commissioners and employee groups.

#### **Stakeholder Process and Approval:**

On July 7, 2006, a group of Stakeholders began meeting to discuss a variety of issues in response to audits conducted by the Controller's Office and the Personnel Department. The Stakeholders initially included Fire Department executives, managers and support staff, representatives from various employee associations, as well as the unions representing both chief officers and firefighters.<sup>5</sup> Representatives from other city departments and commissions attended and provided input. As further meetings were held, representatives from the Mayor's Office and City

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<sup>1</sup> The Civil Service *Guide to Disciplinary Standards* for non-sworn employees of the City of Los Angeles.

<sup>2</sup> Chief Officers Association.

<sup>3</sup> United Firefighters of Los Angeles City.

<sup>4</sup> Pages 10 and 15 of May 30, 2008, *Follow-Up Audit of LAFD's Management Practices*.

<sup>5</sup> Representatives from the United Firefighters of Los Angeles City voluntarily withdrew from active participation in the Stakeholder's process from September 7, 2006 to November 20, 2006.

Council members attended, members of the Board of Fire Commissioners regularly provided input, as did subject matter experts and consultants. A mediator from the Federal Mediation and Conciliation Service facilitated the meetings.

At twelve meetings between October 6, 2006 and November 20, 2006, the Stakeholders discussed specific disciplinary guidelines and penalties. These discussions included a recommendation that supervisors be held to a higher standard,<sup>6</sup> and that once implemented the guidelines would set the bar higher and any member found guilty of an egregious violation would be terminated.<sup>7</sup>

The City Attorney's Office advised the penalty guidelines were subject to the "meet and confer" process and there should be a wider range of potential penalties to allow more latitude, rather than going to a Board of Rights or termination on so many cases.<sup>8</sup> The Stakeholder minutes do not indicate the City Attorney's Office provided advice concerning; 1) what the "meet and confer" process legally required, 2) whether the Stakeholder's process could be adapted to satisfy the "meet and confer" requirements, and 3) what criteria should be used to determine a specific penalty within a broad penalty range. The Stakeholders anticipated the guidelines would return to the Stakeholders for further discussion if "meet and confer" was requested.<sup>9</sup>

On November 17, 2006, the Stakeholders reached consensus on the revised disciplinary guidelines and respective penalties for each infraction. As a result, the Stakeholders indicated they would recommend the revised guidelines to the Board of Fire Commissioners.

Representatives from the firefighters union were present for the November 20, 2006, Stakeholders meeting and requested the proposed guidelines not be presented to the Board of Fire Commissioners at their next meeting. The Stakeholders decided the guidelines would be presented without the agreement of the union. The Stakeholders also agreed on the following statement for presentation to the Board of Fire Commissioners:

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

As a result, the Stakeholders respectfully submit for consideration to the Honorable Board of Fire Commissioners, disciplinary guidelines consistent with the direction of the Board through the Audit Action Plan. This is a major step in a comprehensive approach in effectively addressing all the recommendations contained in the City Controller's and Personnel Department's Audit. The Department and the Stakeholders have been addressing other issues identified in the audits, including the Vision Statement, Communication, Human Relations Training, Equal Employment Opportunity Unit, Tracking and Reporting System and the Recruit Training Academy. The Stakeholders

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<sup>6</sup> Stakeholder meeting of October 25, 2006.

<sup>7</sup> Stakeholder meeting of November 1, 2006.

<sup>8</sup> Stakeholder meeting of November 15 and 17, 2006.

<sup>9</sup> Stakeholder minutes of November 17, 2006.

believe that the complaint and disciplinary process is a critical component as this Organization continues to change and improve.

The Stakeholders committee is happy to inform the Fire Commission that UFLAC has rejoined us at the Stakeholder's table. We welcome UFLAC's participation and with the Fire Commission direction are willing to work towards full consensus on solutions that can be supported by all parties."

The Stakeholder's recommended guidelines were received by the Board of Fire Commissioners as BFC 06-107 and are attached to this report as Appendix "A." On November 21, 2006, the Board of Fire Commissioners unanimously adopted the guidelines subject to review by the City Attorney's Office, and indicated the City Attorney's concerns should be brought back for consideration at the Board's next meeting. The Board's meeting minutes do not indicate the City Attorney's Office provided the requested review at the next Board meeting, or at any later meeting in either public or closed session.

With UFLAC in attendance, the Stakeholders continued to discuss the guidelines after the Board of Fire Commissioners adopted them. On December 4, 2006, the Stakeholder's reached consensus that references to the Civil Service Guidelines in the revised guidelines be retained because they provided a foundation for the revised guidelines.

On December 8, 2006, UFLAC informed the Stakeholders they understood the effort and good intent behind the guidelines, that they were subject to "meet and confer," told the Stakeholders they would not sign off on the revised guidelines, and they wanted to add latitude to the document.

The Stakeholders discussed the disciplinary guidelines again on December 15, 2006, at which time UFLAC presented proposed adjustments to the disciplinary guidelines. The Stakeholders approved the proposed adjustments. UFLAC emphasized that it did not give up its "meet and confer" rights but spoke of conditional approval pending the "meet and confer" process, "knowing that members participating in the Stakeholders will have an influence in negotiations."

A document titled *LAFD Disciplinary Action Guidelines for Sworn Members, December 15, 2006*, was presented to the Board of Fire Commissioners at its meeting on December 19, 2006. The Board of Fire Commissioners meeting minutes do not clearly indicate these guidelines were approved and they were not assigned an official board report number.

A March 20, 2007, *Audit Action Plan Status Report* was filed with the Board of Fire Commissioners as BFC 07-025, and discussed at the April 5, 2007, Board meeting. The Department informed the Board:

"A comprehensive set of disciplinary guidelines has been approved by the Fire Commission and is currently being vetted through the meet and confer process with UFLAC."<sup>10</sup>

A February 12, 2009, *Quarterly Audit Implementation Plan Report* was filed with the Board of Fire Commissioners as BFC 09-027. The Board was informed:

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<sup>10</sup> Page 11 of March 20, 2007, status report.

“Disciplinary guidelines for sworn firefighters were developed and approved through a collaborative process with labor, employee organizations, and the Office of the City Attorney. The Fire Chief approved the disciplinary guidelines on September 21, 2007.”

### **2007 Disciplinary Guidelines:**

The Department entered into Letters of Agreement on January 12, 2008, with both the COA and UFLAC. The letters refer to a December 2007 set of disciplinary guidelines. However, the disciplinary guidelines in the possession of the Controller and referred to in the *Follow-Up Audit* are actually dated September 21, 2007. They set forth lower penalties for many of the offenses, eliminated at least one offense<sup>11</sup> when compared to the 2006 guidelines recommended by the Stakeholders and approved by the BOFC, and retained specific references to the corresponding Civil Service guidelines for non-sworn employees. The September 21, 2007, guidelines provided by the Controller’s Office are attached as Appendix B.

The disciplinary guidelines were the subject of discussion at the Board of Fire Commissioners meeting on October 2, 2007. The Department informed the Board of Fire Commissioners an agreement on the new disciplinary guidelines had been reached with both unions, “that set high standards of behavior and provide consistency and penalty.” Members of the Board discussed the Stakeholders process related to the guidelines and congratulated the Department and the unions on reaching an agreement. Representatives from the unions also commented on the disciplinary guidelines agreement.

The differences and similarities between the disciplinary guidelines approved by the Board of Fire Commissioners on November 21, 2006, and the September 21, 2007 disciplinary guidelines agreed to between the Department and the unions was not discussed. A transcript of the October 2, 2007, Board of Fire Commissioners meeting discussion of the guidelines is attached as Appendix C.

### **2008 Disciplinary Guidelines:**

The Department has two sets of disciplinary guidelines for sworn members dated January 1, 2008, which reflect a further reduction in penalties for a few offenses when compared to the September 21, 2007 guidelines provided to the Controller.

The January 1, 2008 set of guidelines providing a comparison to the Civil Service guidelines provides a penalty range for an at fault accident involving a Department vehicle/apparatus under aggravated circumstances (i.e. alcohol/drugs) of 16-days suspension to dismissal. The second version of the January 1, 2008, guidelines, that fails to reference the Civil Service guidelines, sets a range of verbal warning to a 15-day suspension for the same offense. The same offense in the Civil Service guidelines calls for a range of 20 days suspension to dismissal for this offense.

The version of the January 1, 2008, guidelines with a reference to the corresponding Civil Service guidelines makes no mention to a statute of limitations for any of the offenses. The version of the January 1, 2008, guidelines with no reference to the Civil Services guidelines adopts a 5-year statute of limitations for the majority of offenses. No statute of limitations applies to any of the Civil Service guideline offenses. This January 1, 2008, version of the guidelines also adds a

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<sup>11</sup> The offense of making false and/or misleading statements to a supervisor was included in the 2006 Stakeholder/BOFC guidelines and eliminated from the September 21, 2007, version of the guidelines.

reckless driving with alcohol involvement offense with a penalty lower than the penalty for driving while under the influence.

The Department and UFLAC signed an October 28, 2008, Letter of Agreement (LOA). The letter says the guidelines have been revised and are titled "*LAFD Penalty Guidelines for Sworn Members*". These are the current guidelines used by the Department when members of UFLAC are disciplined. The Chief Officers Association has not agreed to the January 1, 2008, or the October 28, 2008, versions of the guidelines.

### **Department/UFLAC Guidelines Compared to Stakeholder/BOFC Guidelines:**

There are substantial differences between the disciplinary guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in 2006 (Appendix A) and the guidelines agreed to between the Department and UFLAC on October 28, 2008, which are in current use, and are attached as Appendix D. A few of the critical differences are as follows:

1. Many of the penalty ranges set forth in the October 28, 2008 Department/UFLAC guidelines are substantially lower than the penalties called for by the guidelines recommended by the Stakeholders and approved by Board of Fire Commissioners in 2006. Most of the penalty reductions took place in 2007, before creation of the Professional Standards Division, with additional reductions since.
2. The reduced penalties set forth in the October 28, 2008 Department/UFLAC guidelines, when compared to the 2006 Stakeholder/Board of Fire Commissioners guidelines, include the four critical areas of; a) alcohol abuse, b) dishonesty/theft, c) EEO violations of discrimination/harassment/sexual harassment, and d) hazing.
3. The Department/UFLAC guidelines no longer reference the corresponding Civil Service guideline penalties, which the Stakeholder's agreed would serve as a foundation for the new disciplinary guidelines because the Stakeholders felt sworn members of the Department needed to be held to a higher standard of conduct.
4. The Department/UFLAC guidelines now specify a 5-year statute of limitations for most guideline offenses, a 10-year statute for reckless driving with alcohol involvement and public intoxication, and no statute for other alcohol, drug and all EEO cases. This includes a new 5-year statute of limitations for hazing misconduct guidelines.

In October 2008, the Department received a written request to provide information concerning the status of the "cover document for disciplinary guidelines" discussed by the Stakeholders in 2006. At its December 2, 2008, meeting the Board of Fire Commissioners was provided with a draft of the cover document and told it was being "reviewed by Labor," and upon completion of their review and input, would be forwarded to the Stakeholders for review and approval and then to the Fire Commission for final approval. No evidence could be located indicating the cover document has undergone final review or was approved by "Labor", the Stakeholders or the Board of Fire Commissioners since December 2008.

## ***Application of Disciplinary Guidelines***

As was correctly pointed out by the Controller's *Follow-Up Audit*, the 2008 guidelines provide no detailed guidance for selecting a specific penalty within an established range of discipline. A review of the guidelines will reveal many of the ranges are quite broad.

In practice, once the Department/UFLAC guidelines were adopted in 2008, the initial penalty was set by first starting at the mid-point of the range after which aggravating and mitigating factors were considered to move the penalty up or down the range. The mid-point was governed at the top end of the range by the maximum number of days of suspension, to a maximum of 30 days. Typically penalties calling for a Board of Rights (where the penalty is a suspension greater than 30 days to a maximum of 180 days or a dismissal) and reprimands were not considered in determining the mid-point.

It was indicated that when UFLAC complained starting at the mid-point was too harsh, the Department started using the bottom third of the range pursuant to an oral agreement with a former UFLAC president that has never been reduced to writing. The list of aggravating and mitigating factors used to move the penalty within a range has not been the subject of a formal agreement between the Department and its unions and has not been discussed by the Stakeholders or reviewed by the Board of Fire Commissioners.

The Controller's 2006 audit recommended that once the guidelines were developed steps should be taken to assure they are consistently applied and fairly administered and the Department eliminate the practice of proposing greater disciplinary punishment simply to create a bargaining position for negotiating a penalty. The Controller's *Follow-Up Audit* could not comment on the application of the guidelines because they would apply to cases with an incident date on or after January 1, 2008, and no investigations had been completed where the guidelines would apply before completion of the *Follow-Up Audit*.

There is substantial evidence in the following sections of this report that proposed penalties are set low in the ranges called for by the Department/UFLAC guidelines and in some cases the penalties for sworn members of the Department have been proposed lower than the penalty for non-sworn members of the Department. There is also substantial evidence that *Skelly* hearings<sup>12</sup> often result in recommendations for further penalty reduction that are later approved by the Fire Chief.

In the last six months the Department approved and signed two agreements with sworn members to hold suspension days in abeyance on the condition the affected member attend an education based discipline class. Such a program, while it may have merit in some cases, is not recognized in any Department policy, rule or regulation, has not been the subject of a written "meet and confer" agreement, has not been discussed with the Stakeholders or Board of Fire Commissioners, and is not mentioned in any version of disciplinary guidelines.

A non-sworn manager with substantial experience in setting disciplinary penalties for public safety agencies is not generally consulted in proposing or setting final penalties.

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<sup>12</sup> The Department provides employees with an informal pre-disciplinary hearing in compliance with *Skelly v. State Personnel Board* (1975) 15 C3d 194.

## *Assessment*

When the 2006 audits were conducted, the Department relied on the Civil Service guidelines when imposing discipline on both sworn and non-sworn members of the Department. Therefore, and despite the recommendations of the Stakeholders group in developing disciplinary guidelines in direct response to the City Controller and Personnel Department audits, and unanimous vote of the BOFC, the Department actually adopted disciplinary guidelines for sworn members of the Department that now set lower standards of conduct than the guidelines in effect at the time both audits found deficiencies and made recommendations.

The 2006 City Controller and Personal Department audits both addressed issues of leadership, accountability, harassment, hazing, and hostile work environment. Therefore, it should be of great concern the Department approved the adoption of disciplinary guidelines with penalties lower than what the Stakeholders recommended and the BOFC approved in such critical areas as alcohol abuse, dishonesty/theft, discrimination/harassment/sexual harassment, and hazing.

Table A sets forth a graphic example of the substantial differences between the Stakeholder/Board of Fire Commissioners guidelines and the Department guidelines involving hazing. The differences are particularly concerning given the Mayor’s *Executive Directive No. 8*, the zero tolerance policies prohibiting such conduct and the history of litigation involving the Department. What is not reflected in Table A is the Department’s adoption of a 5-year statute of limitations for hazing offenses, which means a sustained hazing offense may not be used as a prior offense if it is over 5 years old. This Department reports this statute of limitations applies retroactively.

Table A:

| <b>HAZING</b>   | <b>1st Offense Stakeholder/BOFC 2006</b> | <b>1st Offense Department/UFLAC 2008</b> |
|---|--|--|
| Participated in an act of hazing or horseplay             | 16 Days Suspension to Board of Rights    | Reprimand to 15 Days Suspension          |
| Participated in an act of hazing or horseplay with injury | Board of Rights                          | 11-30 Days Suspension                    |

The Stakeholder and Board of Fire Commissioners’ meeting minutes clearly evidence the expectation, recognition and fact the disciplinary guidelines were subject to the “meet and confer” process. That fact does not mean the Department is free to adopt disciplinary guidelines that are inconsistent with the unanimous action taken by the Board of Fire Commissioners.

The Board of Fire Commissioners is the head of the Fire Department and as such, the Fire Department is under the control and management of the Board of Fire Commissioners.<sup>13</sup> As head of the Fire Department, the Board of Fire Commissioners has the power to supervise, control, regulate and manage the Fire Department.<sup>14</sup> Despite this management and control the Department adopted guidelines that are substantially different than what the Stakeholder’s recommended and the Board of Fire Commissioners unanimously approved in 2006. While it may be true the Board of Fire Commissioners has not been deeply involved with personnel matters, or the “meet and confer” process, it is also true the Board of Fire Commissioners gave

<sup>13</sup> Los Angeles City Charter, section 500(a).

<sup>14</sup> Los Angeles City Charter, section 506(a).

clear direction by approving disciplinary guidelines that were developed in direct response to the April 25, 2006, *Audit Action Plan*.

Meeting minutes contain no references to the Department, 1) obtaining the Board's authority to alter the Board's 2006 clear direction, 2) consulting with the Board and Stakeholders at any time during the "meet and confer" process, or 3) formally advising the Board and Stakeholders the September 21, 2007, and three versions of the guidelines in 2008 were substantially different from the guidelines recommended by the Stakeholders and unanimously approved by the Board of Fire Commissioners in November 2006. The Department's adoption of guidelines in such a manner seriously undermines; 1) the Board's *Audit Action Plan*, 2) the Board's strong endorsement of and commitment to the Stakeholders process, 3) the Board's unanimous decision to adopt the Stakeholder's recommended guidelines, which were intended to remedy audit deficiencies, and 4) the Board's authority over the Department.

The manner in which the Department has been applying the guidelines is dependent on factors not discussed or adopted for use by the Stakeholders or Board of Fire Commissioners, is confusing, results in inconsistent penalties, and can result in lower penalties for sworn personnel than discipline received by non-sworn members of the Department.<sup>15</sup> The Department verbally agreed to set proposed penalties at the bottom third of a range of penalties, that is lower than what was recommended by the Stakeholders and approved by the Board of Fire Commissioners and can be lower than the guidelines used for non-sworn employees. The penalties are often reduced further, sometimes substantially, at *Skelly* hearings.

## ***Findings***

The Stakeholders recommended and the Board of Fire Commissioners approved disciplinary guidelines in November 2006.

The Department entered into Letters of Agreement with the Chief Officers Association and the United Firefighters of Los Angeles City on January 12, 2008, that failed to adopt disciplinary guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in November 2006.

The disciplinary guidelines currently in use for sworn members of the Department and UFLAC are the subject of an October 28, 2008, Letter of Agreement between UFLAC and the Department.

The disciplinary guidelines currently in use for sworn members of the Department and COA are the subject of a January 12, 2008, Letter of Agreement between COA and the Department.

To the extent disciplinary guidelines set standards of behavior, the standards of behavior adopted for sworn members of the Department are now generally lower than the standards for non-sworn members of the Department.

No evidence could be found indicating the Department formally advised the Stakeholders and Board of Fire Commissioners the guidelines adopted for use as a result of the "meet and confer"

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<sup>15</sup> One of the cases reviewed elsewhere in this report involves the dismissal of a non-sworn employee for theft from other employees. This report does not review cases of sworn members charged with theft from fellow employees where proposed penalties have been set at less than dismissal because the disciplinary proceedings have not been concluded. These cases will be reviewed in a future report.

process with its unions were not the same guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in November 2006.

In current practice, the proposed and final penalties for misconduct engaged in by sworn members of the Department are generally set on the low end of the current disciplinary standards for sworn members of the Department.

## ***Recommendations***

The following recommendations should be considered:

1. An effort should be made to determine why the Department agreed to disciplinary guidelines that are inconsistent with unanimous action taken by the Board of Fire Commissioners on November 21, 2006, why the Board of Fire Commissioners and the Stakeholders were not consulted about the guidelines during the meet and confer process that resulted in the adoption of the September 21, 2007, guidelines and three versions of guidelines in 2008, and why the Department failed to inform the Board of Fire Commissioners of the differences in the disciplinary guidelines it negotiated as compared to the guidelines approved by the Board in 2006.
2. The Board of Fire Commissioners should direct its general counsel to provide the Board of Fire Commissioners and the Department with written legal advice, with appropriate legal citations, describing the legal requirements that must be met to fully satisfy the obligation to “meet and confer;” the extent to which disciplinary guidelines, how proposed penalties are initially set within a range, and the factors used to move the penalty within a range, are negotiable; under what conditions, if any, the Stakeholder’s process may be used to satisfy the “meet and confer” requirements; and at what point the Department may adopt disciplinary guidelines if unions fail to agree with the Board of Fire Commissioners’ direction to the Department on what disciplinary guidelines should be adopted. The Department should direct its general counsel to provide the written advice in no more than 30 calendar days from the date it is requested.<sup>16</sup>
3. The Board of Fire Commissioners should direct the Department to take all steps necessary to adopt disciplinary guidelines consistent with the audit recommendations made by the City Controller and Personnel Department in 2006, with what the Stakeholder’s recommended in 2006, and with what the Board of Fire Commissioners approved in 2006.<sup>17</sup> The Board should set a deadline within which this task is to be accomplished.
4. The Board of Fire Commissioners should direct the Department to take all steps necessary to adopt a cover document for the disciplinary guidelines that is consistent with what the Stakeholders discussed and the Board of Fire Commissioners requested in October 2008.<sup>18</sup> The board should set a deadline within which this task is to be accomplished.

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<sup>16</sup> Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when requested to do so by any City officer or board. The City Attorney’s Office explains there is a difference between advice and opinions; the latter being more formal.

<sup>17</sup> The disciplinary guidelines may be subject to a meet and confer process.

<sup>18</sup> A cover sheet may be subject to the meet and confer process.

5. All Stakeholders should be formally advised and fully involved in the process undertaken to adopt appropriate disciplinary guidelines for all sworn members of the Department.
6. Any disciplinary guidelines adopted and applied for use by the Department must clearly hold sworn members of the Department, and their supervisors, managers and executives to a standard that is higher than the standards set forth in the Civil Service guidelines for non-sworn employees of the City.<sup>19</sup>
7. Except for the Fire Chief, and *Skelly* officers (whose role should be advisory only), the Department should rely on non-sworn personnel with demonstrated expertise, experience and training in setting disciplinary penalties for a public safety agency when proposing and setting penalties.
8. The Fire Chief should be held accountable, as a part of his or her annual evaluation, for the disciplinary system and process, including appropriate disciplinary guidelines.
9. Disciplinary action should take into consideration all mitigating and aggravating factors at the time the penalty is first proposed.
10. Disciplinary penalties should not be changed after initial service of the proposed penalty unless newly discovered information is provided. Expressing remorse, taking responsibility and apologies expressed for the first time at a *Skelly* hearing, when there was an opportunity to express and, more importantly, actually demonstrate remorse, regret and responsibility before the *Skelly* hearing, should not qualify as newly discovered information.
11. The Department should cease mitigating penalties on the basis the employee agrees to attend training and education based discipline should not be utilized until the Stakeholders and Board of Fire Commissioners approves a policy governing such disciplinary practices. If further training is needed it should be included as a part of the proposed penalty before the *Skelly* hearing takes place.
12. The Department and Stakeholders should establish base penalties for each offense guideline range to which mitigating and aggravating factors can be applied in moving the discipline up or down a range, instead of starting at a third or mid-point of a range.<sup>20</sup>
13. The Department and Stakeholders should adopt a set of standard mitigating and aggravating factors to be used in moving penalties within a range.<sup>21</sup>
14. In an effort to achieve consistency at every level of the process when setting disciplinary penalties, the Department should ensure those recommending penalties prior to *Skelly* hearings, *Skelly* officers, those approving final penalties after *Skelly* hearings, the Fire Chief, and the Boards of Rights consider and articulate the factors of; 1) harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of

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<sup>19</sup> This does not mean lowering the standards of the Civil Service guidelines.

<sup>20</sup> Setting base penalties may be subject to the meet and confer process.

<sup>21</sup> A set of factors may be subject to the meet and confer process.

recurrence, when applying the applicable disciplinary guidelines and the Department's set of mitigating and aggravating standards.<sup>22</sup>

15. When presenting cases at a Board of Rights or Civil Service hearing the Department should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is necessary in light of the "penalty setting factors" articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include; 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.
16. The Department should cease the use of "working" days when ordering a suspension without pay. Only calendar days should be used.
17. Any reference to a statute of limitations should be eliminated from the disciplinary guidelines.
18. The Department should be guided by the vision of the Stakeholders as articulated in their meeting minutes in formulating and managing the disciplinary system.
19. The Department should be required to advise, consult with and obtain direction from the Board of Fire Commissioners on how items subject to the "meet and confer" process will impact the specific goals of the April 25, 2006, *Audit Action Plan*, the Stakeholder recommendations and prior actions of the Board of Fire Commissioners.
20. The Department should not enter into oral agreements concerning matters subject to the "meet and confer" process.
21. The Department should provide the Board of Fire Commissioners with a report concerning all oral agreements currently in effect that impact how any part of the disciplinary process is to be applied or administered and the report should include the following information at a minimum:
  - a. The terms of the agreement;
  - b. The date the agreement was reached;
  - c. The effective dates of the agreement;
  - d. The parties bound by the agreement;
  - e. The identity of the persons who negotiated the agreements, and
  - f. A description of authority the Department's negotiators had to enter into such oral agreements.
22. The Department should direct the City Attorney's Office to provide written advice to the Department and to the Board of Fire Commissioners with legal analysis and citations to

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<sup>22</sup> These factors are used by the courts to determine if a public entity has abused its discretion in setting public employee discipline. Please see *Skelly v. State Personnel Board*, 15 C3d 194, 217-220.

legal authorities concerning the extent to which oral agreements identified in response to recommendation 21 are binding and enforceable.

## INCONSISTENT PENALTY APPLICATION

An assessment was conducted to determine if similar misconduct resulted in a similar penalty for sworn versus non-sworn members of the Department. The assessment was conducted in light of the Stakeholders agreeing; 1) the Civil Service disciplinary guidelines were to serve as the foundation for the disciplinary guidelines developed for sworn members,<sup>23</sup> 2) once implemented the guidelines for sworn members would set the bar higher,<sup>24</sup> and, 3) supervisors should be held to a higher level of conduct with appropriately higher penalties.<sup>25</sup> The cases reviewed were limited to those involving similar misconduct occurring close in time where disciplinary decisions were made in 2008 or 2009. Such cases are rare but two were found, both of which involve application of the Civil Service *Guide to Disciplinary Standards*.

### *A Chief Officer's Conduct and Penalty*

At approximately 2:30am on November 3, 2007, a chief officer's son was involved in a traffic accident when he struck two unoccupied parked cars near the family home. Fortunately he was not seriously injured. The chief officer and his wife went to the scene of the collision, took their son home, and both returned to the scene; all before police and fire units arrived. Two neighborhood residents and an on-duty fire captain reported the chief officer falsely told them his wife had been driving.

Later the same day, while on-duty, the chief officer's staff assistant drove him to meet police investigators. He falsely told the police he was home in bed when his wife called to tell him she had been in an accident. The chief officer signed a false summary of his statement to police that was included in the police report.

On November 8, 2007, five days after the accident, the chief officer sent an email to his bureau commander indicating a criminal investigation had been started because his wife tried to take the blame for their son's traffic accident. The chief officer falsely told his commander he was home asleep when his wife called from the accident scene.

On January 8, 2008, two months after the accident, after the Fire Department had begun an internal affairs investigation, the chief officer prepared a written report for the Department's operations commander. During his September 23, 2008, interview the chief officer told investigators: 1) the report "has some inaccuracies" and "there are some untruths as well;" 2) the Department asked him to write the report and he did so "after talking to my attorney;" and 3) he regretted, "my inaccuracies and untruthfulness" in the report.

The Department's administrative investigation concluded the chief officer; 1) obstructed a criminal investigation by providing false information to police officers who were investigating a traffic accident his son was involved in, 2) brought discredit to the Fire Department when he obstructed a criminal investigation by providing false information to police officers, and 3) provided false and misleading statements to his bureau commander and the operations commander.

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<sup>23</sup> Stakeholder meeting minutes for December 4, 2006.

<sup>24</sup> Stakeholder meeting minutes for November 1, 2006, state; "In developing guidelines we need to establish specific guidelines that once implemented will set the bar higher and any member that is found guilty of an egregious violation will be terminated. This will send the message to all members that we mean business."

<sup>25</sup> Stakeholder meeting minutes for October 25, 2006.

An October 7, 2008, penalty recommendation relied on the Civil Service *Guide to Disciplinary Standards* and two of its offenses, which were, 1) engaging in illegal behavior or conduct in conflict with job duties, on or off the job, and 2) a failure to provide information related to work to supervisors requiring the information. The first offense sets a penalty range from written reprimand to discharge and the second offense provided for up to a 10-days suspension. An administrative transfer to an alternative assignment and 30-calendar days suspension was recommended. The chief officer approving the proposed penalty was not assigned to the Professional Standards Division.

At his October 29, 2008, *Skelly* hearing,<sup>26</sup> the chief officer admitted there were “some untruths and some inaccurate statements that were provided in the documents” given to the Fire Department. The chief officer’s representative indicated the January 8, 2008 report was requested without the Department telling the chief officer he had a right to representation. The chief officer’s representative also said most of the statements in the report “were at the request of the chief officer’s attorney.”

At the conclusion of the *Skelly* hearing the Department agreed to revise the first two factual charges to reflect that instead of obstructing or bringing discredit to the Department in connection with a “criminal” investigation, the chief officer obstructed a “traffic” investigation. The chief officer’s representative also proposed reducing the penalty to a 21-days suspension and deleting the proposed administrative transfer.<sup>27</sup> At the end of the *Skelly* hearing and with the revisions, the chief officer concurred with the three charges and received a 30-calendar days suspension.<sup>28</sup>

On May 5, 2008, before the Department’s administrative investigation was completed, misdemeanor criminal charges were filed against the chief officer alleging obstruction of justice, providing false information to a police officer, as well as delaying and obstructing a peace officer. Court records show the chief officer entered a plea of nolo contendere to the obstruction of justice charge, and the other charges were dismissed, over three months after final disciplinary action was ordered.<sup>29</sup> On February 9, 2009, after conclusion of the Department’s administrative investigation, the chief officer was sentenced to 36 months summary probation and 240 hours of community service in the criminal case.

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<sup>26</sup> The Department offers an informal pre-disciplinary hearing as required by *Skelly v. State Personnel Board* (1975) 15 C3d 194.

<sup>27</sup> In seeking a reduction, the representative explained he was proposing a 21-days suspension for “political considerations,” because of the potential perception that a chief officer’s discipline resulted from a system administered by chief officers, and in the “only other like case in recent history” a firefighter received a 20-days suspension when charged with criminal conduct. The *Skelly* records and investigation files contain no evidence indicating the unions representing non-sworn employees were contacted to see if they objected to a 21-days suspension.

<sup>28</sup> Evidence of an administrative transfer was not included in the investigation files and a review of personnel files was not conducted to determine if an administrative transfer took place because personnel files have not been provided for review. After access to Department personnel files was requested in writing on October 29, 2009, a deputy city attorney told the Department to tell the Independent Assessor to tell the Board of Fire Commissioners to request a legal opinion from the City Attorney’s Office concerning the legal authority to review personnel files. This report is presented without that opinion.

<sup>29</sup> Even though the Department’s disciplinary action was concluded months before the criminal conviction was entered, it is noted a criminal conviction based on a plea of nolo contendere may not serve as a basis for disciplinary action as is indicated by *Penal Code*, section 1016 and *County of Los Angeles v. Civil Service Commission* (1995) 39 CA 4<sup>th</sup> 620.

## ***A Clerk-Typist's Conduct and Penalty***

On December 31, 2007, a clerk-typist called work to say he would be absent because he was sick. When he called in sick again on January 2, 2008, his supervisor told him a doctor's note would be required to verify his illness. The clerk-typist called in sick on January 3, and when he returned to work on January 7, 2008, presented his supervisor with a doctor's note.

The physician's office listed on the note said the doctor had not seen the clerk-typist, nor had he been to the doctor's office on the day indicated. It was determined the patient's identification number on the note was for another patient. When initially confronted, the clerk-typist denied submitting a false doctor's note. He later admitted falsifying the note, claimed he was actually sick and at one point said he fabricated the note because he could not afford the co-payment for a doctor's visit.

The Department charged the clerk-typist with a single count of fraud for providing his supervisor with a falsified doctor's note. The penalty recommendation relied on the Civil Service *Guide to Disciplinary Standards*, citing two offenses, which included, 1) falsifying work related documents, and 2) falsifying the reasons for an absence. Each of these guideline offenses calls for dismissal. The recommendation to dismiss the clerk typist was approved.

The clerk-typist expressed remorse at his *Skelly* hearing and said he did not think he could be fired for falsifying the note. This information was not deemed to constitute mitigation. On June 13, 2008, and after his *Skelly* hearing, the Department terminated the clerk-typist for having presented a false doctor's note. He appealed the dismissal.

At the Civil Service hearing on appeal the clerk-typist's supervisor testified the employee should not be discharged, that he was a good employee who deserved another chance, was not aware of the seriousness of his misconduct and had learned his lesson. The supervisor also wrote a letter indicating the employee had; always gone above and beyond the duties expected of him, been a pleasure to work with, always exhibited a positive attitude in the work environment, had a great rapport with his peers, always exhibited high ethical and moral behavior, and, in the opinion of the supervisor, acted out of character in falsifying the doctor's note.<sup>30</sup>

A chief officer testified at the Civil Service hearing the employee's misconduct was "very serious, premeditated" and the Department "found no reason . . . to deviate from civil service guidelines." In response to the clerk-typist's claim he did not know about the Department's Rules and Regulations or the *Guide to Disciplinary Standards*, the chief officer testified, "I believe it's not a defense for what he did." The chief officer testified lying is wrong and employees ought to know this; "Since childhood, you should know."

In recommending dismissal to the Civil Service Commission the hearing officer agreed with the chief officer and said:

"No employee needs to be told that dishonesty is a dischargeable offense. Falsifying documents, or knowingly submitting false documents, is a form of dishonesty.

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<sup>30</sup> The information provided suggests the supervisor did what the Department would expect a good supervisor to do. She communicated clear directions to the employee a doctor's note was required, appropriately questioned the authenticity of the note, exhibited good analytical skills in identifying subtle problems with the note, reported the misconduct to superiors and later provided her assessment of the employee's work record and conduct.

Dishonesty, along with fraud, theft, workplace violence, and similar intentional misconduct is a form of moral turpitude prohibited by commonly accepted norms of civil behavior.”

The Board of Civil Service Commissioners sustained the clerk-typist’s dismissal on October 9, 2008.

### ***Assessment***

The decision to dismiss the clerk-typist for dishonesty, although appropriate, stands in stark contrast with the failure to dismiss the chief officer. The Department’s disciplinary recommendations and decisions in the chief officer’s case were seriously flawed. The reasons cited by the Civil Service hearing officer to support a dismissal of the clerk-typist are the very same reasons that support a dismissal of the chief officer.

The clerk-typist was dismissed for a single act of providing a false doctor’s note. The chief officer was not dismissed after he was repeatedly dishonest with neighbors, subordinates, the police, and two superior officers, both orally and in writing, both on and off duty, over the course of two months. The clerk-typist was never prosecuted for any crimes but four criminal charges were filed against the chief officer, to one of which he pled nolo contendere.<sup>31</sup>

The chief officer’s interview did not take place until September 23, 2008. There is nothing in the written materials provided for review indicating the criminal prosecutor asked the interview be delayed because criminal charges were to be filed or were pending. The interview of the chief officer was not complete and thorough. The investigators failed to separately address each alleged act of dishonesty with detailed questions.

On May 2, 2008, a chief officer cited two penalty offenses including falsifying work related documents and falsifying the reasons for absence in recommending a penalty for the clerk-typist. The only penalty recommended by the Civil Service guidelines for these offenses is dismissal.<sup>32</sup>

On October 7, 2008, five months later, the same person prepared a written penalty recommendation in the chief officer’s case but failed to cite the guideline offense of falsifying a work related document he cited in the clerk-typist’s case, although the chief officer prepared both email containing false information and a false written report for superior officers.<sup>33</sup> This failure to cite the appropriate guideline offense is all the more serious because the same written penalty recommendation also said the chief officer “was untruthful and provided misleading statements in”... “two official internal LAFD documents” and should be charged with providing false and

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<sup>31</sup> A plea of nolo contendere in a misdemeanor case may not be used as a basis for taking disciplinary action. Please see *Penal Code*, section 1016 and *County of Los Angeles v. Civil Service Commission* (1995) 39 CA4th 620. The Department concluded its disciplinary action before the chief officer was convicted on a plea of nolo contendere.

<sup>32</sup> Although the Civil Service guidelines call for only a dismissal for both offenses, the 2007 guidelines for sworn members agreed to by the Chief Officers Association and UFLAC in January 2008, allow for substantially lower penalties for similar offenses.

<sup>33</sup> The chief officer preparing the penalty recommendations in these two cases also prepared a penalty recommendation in a case involving a firefighter who submitted a false report. Like these cases, the penalty guidelines used in the firefighter’s case were the Civil Service guidelines. The penalty recommendation in the firefighter’s case failed to cite the offense guideline of falsifying a work related document. Please see the first case reported in the section of this report related to sustained EEO cases.

misleading statements in documents provided to his bureau commander and the operations commander. The Civil Service guideline offenses cited in the written recommendation for the chief officer's discipline are not limited to dismissal and allowed for penalties lower than the penalties provided for in the offense guidelines used in the clerk-typist's case.

The October 7, 2008, penalty recommendation in the chief officer's case was prepared after the August 21, 2008, Civil Service hearing where a Department chief officer testified the clerk-typist's misconduct was very serious, premeditated, there was no reason to deviate from the guidelines, and that people knew from childhood that lying is wrong.

On September 10, 2008, or approximately one month before the date of the penalty recommendation in the chief officer's case, the Department was sent notice the Civil Service hearing officer was recommending the clerk-typist's dismissal be sustained because no employee needs to be told dishonesty is a dischargeable offense and knowingly submitting false documents is a form of dishonesty.

In 2006, the Stakeholders agreed supervisors should be held to a higher standard and the Civil Service guidelines were to serve as a foundation for the Fire Department's disciplinary guidelines for sworn personnel.<sup>34</sup> However, and despite similar, if not more egregious misconduct, the chief officer was not held to a higher standard than the clerk typist. The Civil Service *Guide to Disciplinary Standards*, the Department relied on in setting the penalties in both cases clearly state:

“Employees in supervisory positions and those performing safety/security functions are generally expected to demonstrate a higher level of conscientiousness and integrity with respect to their employment. Accordingly, these employees may be subject to more severe levels of discipline for violations of behavior and/or performance standards because they are held to a higher standard of conduct.”

The failure to hold the chief officer to a higher standard of conduct has at least two very predictable consequences the Department should want to avoid. First, it provides employees facing discipline with an argument the ceiling for dishonesty and other serious misconduct has now been set by the discipline received by the chief officer and they cannot be treated more harshly because chief officers are supposed to be held to a higher standard. Second, the chief officer's credibility is undermined, thus potentially impacting his ability to effectively supervise, conduct personnel investigations, administer discipline, testify if need be, sit as a member of a Department Board of Rights, and engage in other management responsibilities.<sup>35</sup>

Criminal charges were filed against the chief officer and he pled nolo contendere to a misdemeanor charge of obstructing justice after the Department imposed disciplinary action. In another case involving a sworn member appearing elsewhere in this report, the Los Angeles County District Attorney formally advised the Department the mere existence of criminal charges

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<sup>34</sup> The draft of the Department's proposed cover for the sworn disciplinary guidelines filed with the Board of Fire Commissioners as part of BFC 08-181 says: “Consistent with City policy, employees in supervisory positions and those performing safety/security functions are generally expected to demonstrate a higher level of conscientiousness and integrity with respect to their employment when compared to their civilian coworkers. Accordingly, sworn employees may be subject to more severe levels of discipline for violations of behavior and/or performance standards because they are held to a higher standard of conduct.”

<sup>35</sup> Other employees or their representatives in cases appearing elsewhere in this report have cited the chief officer's case in attempting to obtain lower penalties or as a basis for making other requests.

is *Brady*<sup>36</sup> material and must be disclosed to the defense in a criminal case in two instances: 1) in currently pending cases where the [employee] is a material witness on the issue of guilt or punishment; and 2) in closed cases in which he testified as a material witness at trial on the issue of guilt or punishment.

During the month the 30-calendar days suspension was in effect, the chief officer would have been expected to work ten 24-hour shifts. Since he was prohibited from working these shifts, and the Department requires the shifts be covered, the Department paid overtime to other chief officers to provide the necessary coverage. Therefore, the Department's budget was also penalized for the chief officer's misconduct. The disciplinary options of demotion or salary reduction are not available to the Department.

Since the misconduct occurred the chief officer enrolled in DROP.<sup>37</sup> This program is an enhancement to the chief officer's pension plan and allows him to work and receive pay and benefits, but not a further accrual of his service credit or contributions toward his service pension, as an active employee while also accumulating service pension payments in a DROP account. When the chief officer leaves DROP he will begin to receive his service pension benefits on a monthly basis in addition to his accumulated DROP account balance. The clerk-typist does not have any right to monthly pension benefits or an enhanced retirement plan from the City of Los Angeles but may be expected to contribute to the chief officer's continuing salary, benefits, service pension and DROP by paying taxes.

The chief officer's case took almost a full year to complete from the date of discovery to the date of the *Skelly* hearing. The witness interviews did not begin until early June 2008, one month after criminal charges were filed and over six months after the date of discovery. The chief officer's interview did not take place until September 23, 2008, over ten months after the Department was notified of the incident. There is no written confirmation in the materials provided for review the criminal prosecutor sought a delay in any of the interviews.

The Department's case against the clerk-typist took approximately five months from the date of discovery until the date of the *Skelly* hearing to complete. Other than reviewing timesheets and preparing a penalty recommendation it does not appear any investigative activity took place in the almost five months between January 23, 2008, and the June 12, 2008, *Skelly* hearing.

The Department later said the chief officer's offense was based initially on a "preponderance and only sustained when confirmed in [the] *Skelly*" hearing. Having established a preponderance of evidence actually means the case should go forward. Establishing a preponderance of evidence, instead of obtaining an admission is not a valid excuse for failing to go forward. More importantly, the chief officer actually admitted untruthfulness in his investigatory interview with Department investigators before the *Skelly* hearing was held. The Department's written investigative summary and penalty recommendation failed to note any evidentiary problems before the *Skelly* hearing was held. The Department had a very strong case against the chief officer.

The Department later said the January 8, 2008, report was "compelled from the chief officer," after enactment of the *Firefighter Procedural Bill of Rights Act*, and violated an oral agreement to not compel such reports. Even if the January 8, 2008 report was compelled, the false oral

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<sup>36</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny requires the disclosure of evidence bearing on the credibility of prosecution witnesses who testify on issues of guilt, innocence and penalty.

<sup>37</sup> Deferred Retirement Option Plan.

statements to police, neighbors and subordinates, the signature on a police report summarizing false information, and the November 8, 2007 email to the bureau commander were not compelled. The November 8, 2007, email was one of “two official internal LAFD documents” that were “false and misleading.” Even if the Department compelled the January 8, 2008 report, the chief officer said during his investigatory interview, and his representative said during the *Skelly* hearing, the report was prepared after consultation with his attorney.

The Department’s indication the report was compelled in violation of an oral agreement to not compel such reports is very troubling. First, it is an extremely poor idea to enter into oral agreements involving such matters. Second, the Department should not surrender the ability to order the preparation of written reports, keeping in mind the right to representation. Third, this alleged violation of an oral agreement was not noted in any of the written materials provided for review, including the October 7, 2008, written penalty recommendation.

The report was dated January 8, 2008, or eight days after the *Firefighter Procedural Bill of Rights Act* became effective. Although the chief officer’s representative said he had a copy of the email instructing the chief officer to prepare a chronology of what happened on the night of the incident, a copy of the email is not included in the file material provided for review. There is no indication when the chief officer was told to prepare the report or when the oral agreement was reached in relation to the chief officer being asked to prepare the report or in relation to the effective date of the *Act*. Since the chief officer is a member of the Chief Officer’s Association it should be determined if this is an oral agreement that applies to both the COA and UFLAC.

The Department later said “the intent in proposing the offense of, ‘engaging in illegal behavior, on or off the job’ was to propose a Board of Rights with the goal of termination, same as the non-sworn.” No where in the materials provided for review is that “intent” manifested. In fact, the penalty recommendation clearly indicates the intent was to impose a 30-calendar days suspension. The possibility of termination is not mentioned anywhere in that written recommendation or in the recording of the *Skelly* hearing.

The Department later said the Professional Standards Division monitored the criminal proceedings for the chief officer and the information received was the criminal charges would almost certainly be reduced or dropped. As is explained in a later section of this report, there are significant risks involved in “monitoring” criminal investigations, particularly after compelled testimony has been obtained. An indication criminal charges might be dismissed is irrelevant. Likewise, the actual dismissal of criminal charges does nothing to prevent taking appropriate and strong disciplinary action for a violation of the Department’s rules and regulations.

Disciplinary action should be, and in fact was, based on the conduct engaged in by the chief officer, not on the outcome, or even the filing, of the criminal case. Disciplinary action against the chief officer was concluded over three months before the chief officer was convicted of obstructing justice. As section 765 of the Department’s *Board of Rights Manual* correctly points out, evidence of criminal guilt is not required before a member may be disciplined.

The Department later said the administrative action was taken as a “result of a settlement reviewed and accepted by the Fire Chief.” The written materials provided for review, including the recording of the *Skelly* hearing, say nothing about resolving the case by way of a settlement. The files provided for review fail to set forth a written settlement agreement that should always be obtained if a settlement was negotiated. Instead of a written settlement agreement, the file contains a revised complaint that was prepared after the *Skelly* hearing setting forth three charges of wrongdoing. That revised complaint, except for a minor revision related to the investigation of

a traffic accident, as opposed to a criminal investigation, is exactly the same as the charges originally recommended. There was no reason to compromise the case or enter into a settlement. The evidence against the chief officer was strong and compelling.

## ***Findings***

The Department relied on the Civil Service *Guide to Disciplinary Standards* when proposing and setting the final discipline for both the sworn and non-sworn members of the Department.

Both the sworn and the non-sworn members submitted false work related documents to the Department.

When proposing and setting final disciplinary action for the non-sworn member, the Department relied on the offense guideline of falsifying work related documents in dismissing the non-sworn member for a single act of dishonesty.

When proposing and setting final disciplinary action for the sworn member, the Department relied on the offense guideline of engaging in illegal behavior or conduct in conflict with job duties, on or off the job, which calls for a penalty range of reprimand to dismissal.

When proposing and setting the final disciplinary action for the sworn member the Department also relied on the offense guideline of failing to provide information related to work to supervisors requiring the information that calls for a maximum 10 days suspension.

When proposing and setting the final disciplinary action for the sworn member the Department failed to rely on the offense guideline of falsifying work related documents, although the sworn member made false and misleading statements in two official internal LAFD documents.

When proposing and setting final disciplinary action for the sworn member the Department should have relied on the offense guideline of falsifying work related documents because the sworn member made false and misleading statements in two official internal LAFD documents which included both the November 8, 2007 email to his bureau commander and the January 8, 2008 report to the Department's operations commander.

Falsifying work related documents is a more serious offense than failing to provide information to work supervisors or engaging in illegal behavior or conduct in conflict with job duties because it only provides for a penalty of dismissal whereas the latter two offenses allow for lower penalties.

Instead of being dismissed for engaging in repeated acts of dishonesty, the sworn member received a 30-calendar days suspension without pay.

By receiving less severe discipline, the sworn member of the Department was not held to a higher standard of conduct than the non-sworn member as was intended by the Stakeholders and the Civil Service *Guide to Disciplinary Standards* which say supervisory and safety employees are generally expected to demonstrate a higher level of conscientiousness and integrity.

The Department presented the testimony of a chief officer at the time of the non-sworn member's Civil Service hearing to explain why the disciplinary action of dismissal was appropriate.

The cases took an excessive amount of time to conclude.

## ***Recommendations***

The following recommendations should be considered:

1. The Department should determine if there was an intentional failure to cite the guideline offense of falsifying work related documents when recommending and approving a penalty for the chief officer five months after the offense guideline of falsifying work related documents was cited in the clerk-typist's case.
2. Except for the Fire Chief, and *Skelly* officers, whose recommendations should be advisory only, the Department should rely on appropriately qualified non-sworn staff when proposing and setting penalties. The Department should place a non-sworn manager with demonstrated expertise, experience and training in public safety disciplinary systems in charge of the Department's Professional Standards Division, including setting proposed penalties.
3. The Department should ensure all appropriate guideline offenses are cited when preparing disciplinary recommendations for both sworn and non-sworn members of the Department.
4. The Department should take the steps necessary to ensure all employees are placed on actual notice of the Department's policies, procedures, rules, regulations and applicable disciplinary guidelines, and the Department should obtain written confirmation employees have received actual notice.
5. The Department should ensure penalty guidelines are adopted and applied in a way that hold sworn members of the Department to a standard that is higher than non-sworn employees and sworn managers and supervisors are held to a higher standard than other sworn members of the Department.<sup>38</sup>
6. When presenting cases at a Board of Rights or Civil Service hearing the Department should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is appropriate in light of the "penalty setting factors" articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include; 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.
7. The Department should take the action necessary to have the City Charter amended so that demotions and loss of pay are adopted as authorized methods of discipline.
8. The Department should consult with both the District Attorney's Office and prosecutors in the City Attorney's Office to determine if the Department should take any action in connection with potential *Brady* issues involving the chief officer.
9. The Fire Chief should be held accountable through his or her annual performance evaluation for proposed and final disciplinary decisions.

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<sup>38</sup> This does not mean lowering the standards for non-sworn employees.

10. The Department should establish timeframes within which investigations and each step of the disciplinary process is to be concluded. The Department should provide sufficient permanent non-sworn resources with the expertise, experience and training in conducting; supervising and managing a public safety agency's disciplinary system to ensure the timeframes are met.
11. The Department should not enter into oral agreements governing how misconduct allegations are to be investigated.
12. The Department should provide the Board of Fire Commissioners with a report concerning all oral agreements currently in effect that impact how investigations are to be conducted and the disciplinary process is to be administered, including but not limited to agreeing not to obtain compelled written reports, and the Department's report should include the following information at a minimum:
  - a. The terms of the agreement;
  - b. The date the agreement was reached;
  - c. The effective dates of the agreement;
  - d. The parties bound by the agreement;
  - e. The identity of the persons who negotiated the agreements; and
  - f. A description of authority the Department negotiators had to enter into oral agreements.
13. The Department should determine if members of the Department knowingly obtained the January 8, 2008, report from the chief officer in violation of an agreement to not ask for or compel written reports, and take appropriate action if they did so.
14. The Department should explain why it orally agreed to not ask for or compel written reports from its members.
15. The Department should not enter into agreements that would prevent the Department from asking for or compelling written reports, assuming the right to representation is protected when doing so.
16. The Department should direct the City Attorney's Office to provide written advice to the Department and to the Board of Fire Commissioners concerning the extent to which oral agreements identified in response to recommendation 12 are binding and enforceable.

## ALCOHOL AND SUBSTANCE ABUSE

Arrests and criminal convictions for alcohol related offenses represent a serious concern. All disciplinary actions appearing on the Board of Fire Commission (BOFC) meeting agendas during 2009 involving alcohol arrests were reviewed.<sup>39</sup> All alcohol and substance abuse employment contracts currently in force were also reviewed to determine if the Department is properly monitoring contract requirements.<sup>40</sup>

### *Employment Contracts*

The Department has employment contracts with eight currently employed sworn members of the Department who have been disciplined for driving while under the influence of alcohol (DUI), reporting to work while under the influence (RWUI), public intoxication (PI) and methamphetamine abuse. The current contracts were entered into between December 19, 1997 and October 7, 2009, and are summarized in Table A.

Table A:

| <b>Contract</b> | <b>Offense</b>  | <b>Effective Date</b> | <b>Proposed Discipline</b> | <b>Final Discipline</b>        |
|-----------------|-----------------|-----------------------|----------------------------|--------------------------------|
| 1               | Methamphetamine | 12-19-97              | Dismissal                  | 180 Calendar Days              |
| 2               | (Unknown)       | 6-18-99               |                            |                                |
| 3               | DUI             | 9-11-06               |                            | 30 Calendar Days               |
| 4               | RWUI            | 7-12-07               | 180 Calendar Day           | 120 Calendar Days              |
| 5               | DUI             | 9-1-07                |                            | 30 Calendar Days               |
| 6               | DUI             | 12-1-07               |                            | 30 Calendar Days <sup>41</sup> |
| 7               | DUI             | 9-19-08               |                            | 30 Calendar Days               |
| 8               | PI              | 10-7-09               |                            | 14 Calendar Days <sup>42</sup> |

<sup>39</sup> A regional division of a large private ambulance company says they would not hire a paramedic or emergency medical technician within 3 years of any DUI or related misdemeanor conviction and would dismiss those currently employed after a single conviction. A small ambulance company reports they will not hire such professionals with a single DUI conviction, regardless of age of the conviction, because they could not obtain liability coverage.

<sup>40</sup> The information provided by the Department indicates no non-sworn members are subject to such a contract.

<sup>41</sup> This firefighter received a 6-working days suspension when he previously reported for work while under the influence. The Court found no abuse of discretion when a San Francisco firefighter was dismissed in 2002 for intoxication while on duty; although it was contended there was a past practice of entering into “last chance agreements” with other firefighters in the unpublished opinion of *Childers v. Hayes-White* 2007 Cal App LEXIS 4591.

<sup>42</sup> The employment contract resulted from the firefighter’s third arrest for public intoxication. The firefighter received a four working days suspension for his first arrest for public intoxication, and a 16-calendar days suspension for his second arrest for public intoxication.

Four of the eight contracts are for driving while under the influence of alcohol and in each case the final penalty imposed was a 30-calendar days suspension. The information provided indicates none of the cases involved a second offense for driving while under the influence, although one case involved a sworn member previously disciplined for reporting to work while under the influence of alcohol. There is no record of the persons listed in Table A re-offending since the contracts became effective.

Each contract remains in effect for the rest of the employee's career and contains the following four key features:

1. Enrollment in a rehabilitation or employee assistance program;
2. Continuing enrollment in an approved dependency recovery program with each employee required to maintain on file certain information concerning the program and proof of continuing attendance provided on a quarterly basis;
3. A signed "Consent for Release of Medical Information" that may not be rescinded; and,
4. Random alcohol or drug testing.

None of the records provided demonstrated full compliance with all contract terms. While some of the records showed most quarterly reports had been provided, not all quarterly reports were accounted for and some files had no quarterly reports. Not all files showed evidence of enrollment in an employee assistance program. One of the files did not have a medical release. None of the files showed evidence of any random testing.

The Department initiated important steps to correct the deficiencies noted shortly before the contracts were requested for this review. This included certified letters notifying each member of their continued contractual obligations. This is a critical and very prudent step to take in anticipation of the arguments that may be raised as the Department seeks to enforce its rights under the contracts.

It was also noted the contract language for seven of the eight contracts was completely inadequate. However, and again the Department is to be commended for initiating steps to significantly improve the contract language used in its employment contracts, by:

1. More clearly describing the member's conduct;
2. More appropriately describing the settlement of disciplinary action;
3. More clearly defining the duties and responsibilities of the member under contract;
4. Including a waiver of appeal rights;
5. Including a release of all claims;
6. Acknowledging the agreement as evidence of progressive discipline;
7. Appropriately limiting the litigation of material breaches of the contract, and
8. Including other standard contract language.

### ***Alcohol Arrest Cases in 2009***

Eleven sworn members of the Department received discipline during 2009 for alcohol related arrests while off duty.<sup>43</sup> The arrests included driving while under the influence (DUI), operating a boat or watercraft while under the influence (BUI) and public intoxication (PI). All of the cases resulted in a criminal conviction and all involved males. The eleven in 2009 compare to eight in

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<sup>43</sup> No non-sworn members of the Department received discipline for similar offenses during 2009.

2008 and 12 in 2007. Table B provides a summary of basic information in these cases. The Department defines a “working” day as a 12-hour day for sworn members assigned to regular platoon duty. The sworn members listed in Table B were all assigned to a regular platoon schedule at the time disciplinary action was taken.

Table B:

| Sworn Member & Experience | Date of Arrest | Original Criminal Charge | Final Criminal Charge | Proposed Administrative Discipline | Final Discipline              | Number of Alcohol Arrests | Employment Contract              | BOFC Filing Date |
|---------------------------|----------------|--------------------------|-----------------------|------------------------------------|-------------------------------|---------------------------|----------------------------------|------------------|
| A<br>17 years             | April 24, 2008 | DUI                      | Wet Reckless          | 20 Calendar Days                   | 4 Working Days                | 1                         | Not Offered                      | March 26, 2009   |
| B<br>8 years              | Feb. 7, 2009   | DUI                      | DUI                   | 20 Calendar Days                   | 20 Calendar Days              | 1                         | Not Offered                      | Nov. 9, 2009     |
| C<br>Probation            | Jan. 17, 2009  | DUI                      |                       | Dismissed                          | Dismissed                     | 1                         | Not Offered                      | Aug. 26, 2009    |
| D<br>4 years              | Aug. 22, 2009  | DUI                      | Wet Reckless          | 6 Working Days                     | 6 Working Days                | 1                         | Not Offered                      | Nov. 25, 2009    |
| E<br>7 years              | Sept. 6, 2008  | BUI                      | BUI                   | 12 Working Days                    | 6 Working Days                | 2                         | Not Offered                      | Aug. 18, 2009    |
| F<br>7 years              | Sept. 2, 2008  | PI                       | PI                    | 16 Calendar Days                   | 16 Calendar Days              | 2                         | Not Offered                      | June 29, 2009    |
| G<br>7 years              | Sept. 2, 2008  | PI                       | PI                    | Board of Rights                    | 14 Calendar Days              | 3                         | Yes                              | Sept. 15, 2009   |
| H<br>25 years             | June 10, 2008  | DUI                      | Wet Reckless          | Board of Rights                    | Board of Rights <sup>44</sup> | 3                         | Offered but declined by employee | May 28, 2009     |
| I<br>21 years             | March 7, 2009  | DUI                      | DUI                   | 18 Calendar Days                   | 10 Working Days               | 1                         | Not Offered                      | July 23, 2009    |
| J<br>14 years             | Feb. 3, 2008   | DUI                      | Wet Reckless          | 20 Calendar Days                   | 6 Working Days                | 2                         | Not Offered                      | Feb. 13, 2009    |
| K<br>7 years              | April 14, 2009 | DUI                      | DUI                   | 26 Calendar Days                   | 26 Calendar Days              | 2                         | Not Offered                      | Oct. 16, 2009    |

<sup>44</sup> This disciplinary action was rescinded and the firefighter was served with a new disciplinary action in January 2010. The new action imposes a 16-calendar days suspension and the firefighter has appealed to a Board of Rights. A full report concerning this case will be provided when the disciplinary action has been concluded.

### **Penalty Consistency:**

There are inconsistencies in how the offense guidelines were applied in some of the 2009 alcohol arrest cases. In one case a sworn member was arrested for DUI and convicted on an amended charge of “wet reckless” and the Department used a DUI offense guideline in proposing a 20-calendar days suspension. In a more recent case, a sworn member was convicted of “wet reckless” after being arrested for DUI, a 6-working (3-calendar) days suspension was proposed using, not the DUI offense guideline, but a reckless driving (alcohol related) guideline.

A 20-calendar days suspension was proposed for both a firefighter with a single arrest for DUI and a firefighter with a second arrest for driving while under the influence of alcohol. The firefighter arrested a second time for DUI was later convicted of “wet reckless.” The firefighter convicted of “wet reckless,” with a prior DUI conviction received a 6-working (3-calendar) days suspension after his *Skelly* hearing whereas the firefighter convicted once for DUI received a 20 calendar days suspension when he waived his *Skelly* hearing.

The Department’s December 8, 2008, written penalty recommendation for the firefighter receiving a 6-working (3-calendar) days suspension when he was convicted for “wet reckless” says he has no prior record of discipline. The investigation file contains DMV records indicating he was convicted 11 years earlier for off duty drunk driving while employed by the Department. A review of the firefighter’s personal file was not conducted to determine if the penalty recommendation accurately states the firefighter has no record of prior discipline because the records have not been made available for review.<sup>45</sup>

A firefighter was arrested for BUI and the offense guideline used to propose a 12-working (6-calendar) days suspension was “discredit to the Department” without reference to any offense guidelines involving alcohol use. The investigation file contains a document indicating prior discipline for both a public intoxication arrest and for demonstrating disrespect to a peace officer. Prior disciplinary action was not confirmed because the personnel files were not produced as indicated in footnote 45.

Inconsistencies occur during the *Skelly* process.<sup>46</sup> In one DUI case the firefighter wrote a note shortly after his arrest stating he was deeply regretful and accepted full responsibility after being arrested. Although this note was in the file when the proposed penalty of 20-calendar days suspension was set, his penalty was reduced to a 4-working (2-calendar) days suspension when he again expressed remorse at his informal *Skelly* hearing. Three sworn members received no reduction from the proposed penalty when they waived their right to a *Skelly* hearing.

### **“Wet Reckless” Cases:**

Four of the 2009 alcohol convictions were for “wet reckless” following an arrest for DUI. California law does allow a plea of nolo contendere to a “wet reckless” charge in satisfaction of, or as a substitute for, an original charge of DUI.<sup>47</sup> The statute says such a conviction shall be

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<sup>45</sup> After access to Department personnel files was requested in writing on October 29, 2009, a deputy city attorney told the Department to tell the Independent Assessor to tell the Board of Fire Commissioners to request a legal opinion from the City Attorney’s Office concerning the legal authority to review personnel files. This report is presented without that opinion.

<sup>46</sup> In *Skelly v. State Personnel Board* (1975) 15 C3d 194, the Supreme Court said permanent civil service employees are entitled to certain safeguards before discipline may be imposed, including notice of the proposed disciplinary action and the right to respond to the charges in writing or at an informal hearing.

<sup>47</sup> *Vehicle Code*, section 23103.5(a).

considered a prior offense for purposes of setting the criminal penalty for a subsequent DUI conviction.<sup>48</sup>

The 2006 Stakeholder recommended and BOFC approved guidelines, as well one version of the January 1, 2008 Department/UFLAC guidelines only reference a DUI offense guideline. A “wet reckless” is not mentioned in those guidelines. A second version of the January 1, 2008, Department/UFLAC guidelines added both an offense guideline for reckless driving with alcohol involvement, with a lower penalty than for a DUI, and a 10-year statute of limitations for a “wet reckless.” There is no statute of limitations for a DUI in any version of the guidelines.<sup>49</sup>

There is evidence the Department imposes discipline on the basis of a criminal court plea resulting in a “wet reckless” conviction as opposed to basing its disciplinary action on the misconduct underlying the plea. Of the four alcohol cases based on a “wet reckless” conviction presented to the BOFC in 2009, one involved a firefighter with a blood alcohol level of .17 at the time of his arrest, a second involved a firefighter arrested twice before for DUI, at least one of which resulted in disciplinary action, and a third firefighter with a prior DUI conviction, and the investigative file says there was no prior disciplinary action. Prior disciplinary action or the failure to take prior disciplinary action, in these cases has not been assessed because the personnel files have not been provided for review as indicated in footnote 45.

#### **Related Offensive Conduct:**

Sometimes the arrest for alcohol abuse is aggravated by other offensive conduct. Two members of the Department were arrested for public intoxication when together on May 22, 2008, and when they were both together again on September 2, 2008. On both occasions officers from two separate law enforcement agencies recorded both Department members as they made belligerent, offensive and highly inappropriate comments, some of which included:

1. “Don’t you have something else to do? We fight fire. We fucking save lives.”
2. “I hope you get shot bro. I hope you don’t get shot.”
3. “You guys think you have that much power. I’ll find out where you’re at. I’ll find out who you are.”
4. “Are you fucking LA firefighter? Alright, white boy.”
5. “We’re LA City firefighters. Stop fucking with us.”
6. “No, I think you’re a piece of shit. You’re a little rookie ass motherfucker.”

The first of the firefighters was served a notice stating he was to be suspended for 7 working (3.5-calendar) days for the first arrest but the file material has a note indicating it was to be held in abeyance due to a “statute issue.”<sup>50</sup> This firefighter received a 16-calendar days suspension for the second arrest. The guidelines call for a penalty range of 6 to 15-days suspension for public intoxication.

The second firefighter who was arrested with him twice in less than four months received a 4-working (2-calendar) days suspension for his first public intoxication arrest in 2006 and a 16-calendar days suspension for his second arrest. On his third arrest for public intoxication, when he was again recorded making offensive, belligerent and inappropriate comments, the proposed

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<sup>48</sup> *Vehicle Code*, section 23103.5(c).

<sup>49</sup> The Department says the statute of limitations is applied both retroactively and prospectively.

<sup>50</sup> The personnel file was not been reviewed to determine if the disciplinary action was ever effectuated because personnel files have not been produced for review for the reasons stated in footnote 45.

penalty of sending him to a Board of Rights was mitigated to a 14-calendar days suspension and an employment contract.

### **Statute of Limitations:**

The statute of limitations, or the time within which disciplinary action must be brought against a sworn member of the Department is one year from the date of discovery.<sup>51</sup> In eight of the eleven cases the Department discovered the alcohol related arrest within four days. A probationary firefighter failed to notify the Department of his arrest and it was not discovered until about seven months later.<sup>52</sup> He was properly dismissed.

Three of the 2009 alcohol arrest cases were completed in 6 months or less. Of these cases, one took 3 months, one took four and a half months and one took 6 months. Five cases took at least 11 months to complete, a sixth took 10 months and a seventh took 9 months to complete. A sworn member of the Department arrested a third time for DUI was referred to a Board of Rights after he refused to sign an employment contract contended the one-year statute of limitations barred disciplinary action.<sup>53</sup>

The Department's disciplinary action was not taken in most cases until the criminal prosecutions were concluded with a conviction, but a criminal finding is not necessary before disciplinary action may be taken. While it may be acceptable to wait for a criminal conviction before taking disciplinary action, the Department must exercise great care because:

1. While the *Firefighter Procedural Bill of Rights Act* provides a tolling provision, or exception to the one-year statute of limitations for the time during which an allegation of misconduct is also the subject of a criminal investigation or prosecution,<sup>54</sup> such a tolling provision does not appear in the City Charter.
2. A plea of nolo contendere, and admissions required by the court during any inquiry it makes as to the voluntariness of, and the factual basis for a nolo contendere plea on a misdemeanor charge may not be used against the defendant in a subsequent disciplinary action.<sup>55</sup> Therefore, it is possible Department members can be convicted of a criminal misdemeanor charge after pleading nolo contendere but receive no disciplinary action if the Department relies exclusively on a nolo contendere based conviction in bringing disciplinary charges.

### **Guideline Compliance:**

An assessment was made to determine if the administrative discipline received by the eleven sworn members of the Department complied with the applicable 2008 Department/UFLAC disciplinary guidelines and whether the discipline received would have complied with the guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in 2006, as well as the Civil Service Guidelines for non-sworn City employees. The assessment appears in Table C.

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<sup>51</sup> *Government Code*, section 3254(d) and City Charter, section 1060(a).

<sup>52</sup> Notice was provided by the Department of Motor Vehicles.

<sup>53</sup> The original disciplinary action has been rescinded and a new action has been substituted. A separate report concerning this case will be published after the disciplinary proceedings have concluded.

<sup>54</sup> *Government Code*, section 3254(d)(2).

<sup>55</sup> *Penal Code*, section 1016 and *County of Los Angeles v. Civil Service Commission* (1995) 39 CA4th 620.

Table C:

| <b>Sworn Member</b> | <b>Arrest</b>         | <b>Conviction Offense</b> | <b>Final Discipline Received</b> | <b>Department &amp; UFLAC Guidelines</b> | <b>Stakeholder &amp; BOFC Approved Guidelines</b>     | <b>Non-Sworn Guidelines</b> |
|---------------------|-----------------------|---------------------------|----------------------------------|--|---|-----------------------------|
| A                   | DUI                   | Wet Reckless              | 4 Working Days                   | 11-30 Days                               | Board of Rights (for 31 Days to Dismissal)            | Reprimand To Dismissal      |
| B                   | DUI                   | DUI                       | 20 Calendar Days                 | 11-30 Days                               | Board of Rights (for 31 Days to Dismissal)            | Reprimand To Dismissal      |
| C                   | DUI                   |                           | Dismissal                        |  |   |                             |
| D                   | DUI                   | Wet Reckless              | 6 Working Days                   | 11-30 Days                               | Board of Rights (for 31 Days to Dismissal)            | Reprimand To Dismissal      |
| E                   | BUI (Prior PI Arrest) | BUI                       | 6 Working Days                   | 11-30 Days                               | Board of Rights (for 31 Days to Dismissal)            | Reprimand To Dismissal      |
| F                   | PI (Second )          |                           | 16 Calendar Days                 | 6-15 Days                                | 11-15 Days  | Reprimand To Dismissal      |
| G                   | PI (Third)            |                           | 14 Calendar Days                 | 16 Days to Board of Rights               | 16 Days to Board of Rights (for 31 Days to Dismissal) | Reprimand To Dismissal      |
| H                   | DUI (Third)           | Wet Reckless              | Board of Rights                  | Board of Rights                          | Board of Rights (for Dismissal)                       | Reprimand To Dismissal      |
| I                   | DUI                   | DUI                       | 10 Working Days                  | 11-30 Days                               | Board of Rights (for 31 Days to Dismissal)            | Reprimand To Dismissal      |
| J                   | DUI (Second)          | Wet Reckless              | 6 Working Days                   | 11-30 Days                               | Board of Rights (for Dismissal)                       | Reprimand To Dismissal      |
| K                   | DUI (Second)          | DUI                       | 26 Calendar Days                 | 11 Days to Board of Rights               | Board of Rights (for Dismissal)                       | Reprimand To Dismissal      |

Table C shows the final penalties in six of the cases fell below the guidelines used to set the penalty. The final penalty in one case exceeds the guidelines. One penalty exceeds the penalty set forth in the 2006 Stakeholder and BOFC approved guidelines. The penalties in eight other cases fall below the guidelines called for by the Board of Fire Commissioners and Stakeholders in 2006.

The penalties for those receiving discipline in 2009 for driving while under the influence of alcohol were significantly lower than the penalties imposed just a year or two earlier. Each of the sworn personnel arrested for DUI set forth in Table A is under an employment contract for the rest of their careers and also received a 30-calendar days suspension.

None of the sworn members receiving days off without pay in 2009 for a single DUI arrest received more than a 20-calendar days suspension. One of the firefighters who received a suspension for a second DUI arrest received a 6-working (3-calendar) days suspension because he was convicted of a wet reckless while another sworn member with a second arrest received no more than a 26-calendar days suspension for his second DUI conviction.

### **Employment Contracts in 2009:**

A firefighter was offered and the Department approved an October 7, 2009, employment contract with a firefighter who has been arrested three times for public intoxication in less than four years while employed by the Department. Two of the arrests occurred within four months of one another. At the time of his second and third arrests he was recorded making highly offensive and inappropriate comments to law enforcement officers. Such a contract does not serve the best interests of the City or the Department.

In October 2009, the Department approved, signed and offered an employment contract to a firefighter after he was arrested a third time for driving while under the influence of alcohol. Such a contract does not serve the best interests of the City or the Department. The firefighter refused to sign the agreement. This case will be the subject of a separate report once the disciplinary action has concluded.

During 2009 the Department did not offer or agree to employment contracts with first time offenders.

### ***Findings***

Until recently the Department was failing to properly monitor employment contracts in effect since 1997, and is now taking steps to monitor the contracts.

The Department has taken appropriate steps to improve the contract language it uses for employment contracts.

During 2009 the Department was not consistent in the penalties it approved for alcohol arrests, and in some cases repeat offenders received lower penalties than those arrested a single time. There was further inconsistency as a result of how the Department uses the *Skelly* hearing process.

In some cases the Department is imposing discipline on the basis of a nolo contendere plea in a misdemeanor case.

The Department has adopted an offense guideline for “wet reckless” with a lower penalty than the penalty for driving while under the influence of alcohol.

The penalties the Department is now approving for alcohol related arrests are lower than the penalties approved just a few years ago and on the low end of the applicable penalty range.

While the Department previously agreed to employment contracts with members of the Department as a result of a first offense, the Department is now waiting until a third offense before offering or requiring a contract.

### ***Recommendations***

The following recommendations should be considered:

1. The Department should develop written policies, procedures and guidelines governing who is placed on an employment contract for alcohol and substance abuse.
2. The Department should consider the best interests of the City and the Department when entering into an employment contract for alcohol and substance abuse.
3. The Department should consider only entering into alcohol and substance abuse contracts for first time offenders.
4. The Department should continue to monitor and require full compliance with employment contracts.
5. The Department should continue to carefully monitor the prosecution of criminal cases that may serve as a basis for disciplinary action and be prepared to proceed with its own investigation in the event the statute of limitations may expire before disciplinary action can be taken on the basis of a conviction.
6. Penalties should be applied consistently. Penalties should be based on the act of misconduct that can be proven by a preponderance of the evidence in an administrative proceeding, not necessarily on the plea in the criminal case.
7. The Department must not proceed with disciplinary action on the sole basis of a nolo contendere plea in a misdemeanor case.<sup>56</sup>
8. Boating or operating a watercraft under the influence should be treated as a DUI.
9. Proposed penalties should be based on all aggravating and mitigating factors known at the time of setting the proposed penalty, including conduct, actions and expressions of regret, remorse and responsibility.

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<sup>56</sup> There is a danger an employee arrested for a misdemeanor may be convicted on the basis of a nolo contendere plea in a criminal case but successfully defend against disciplinary action if the Department proceeds solely on the basis of a criminal conviction in such a case.

10. Expressions of remorse, regret and taking responsibility should be considered at the time the proposed penalty is set and expressions of regret, remorsefulness and responsibility made for the first time at a *Skelly* hearing, when there was an opportunity to express them before the *Skelly* hearing, should not count as mitigation.
11. The Department should place much greater emphasis on conduct and actions that demonstrate remorse, regret and taking responsibility than on verbal expressions.
12. Proposed penalties should not be changed as a result of a *Skelly* hearing unless new information is discovered after the proposed penalty has been set.
13. The City Charter should be amended to mirror the terms of the *Firefighter Procedural Bill of Rights Act*, including its statute of limitations and statute of limitations tolling provisions.
14. The Department should comply with disciplinary guidelines when imposing penalties for first, second and third offenses, so the penalty for a second offense exceeds the penalty for a first offense and the penalty for a third offense should exceed the discipline for a second offense.
15. Multiple acts of misconduct should be considered as aggravating circumstances when setting a penalty.
16. Belligerent, offensive, disrespectful behavior and similar misconduct toward public safety personnel, including EMS providers, when intoxicated should be considered as a basis for increasing the penalty. Later expressions of regret, remorsefulness, and taking responsibility for engaging in such misconduct should only be considered mitigating when proposing a penalty if there is evidence the member engaging in such misconduct took corrective actions with the public safety personnel involved.
17. The Department should cease imposing discipline on the basis of “working” days and should only use calendar days.
18. The Department should rely on non-sworn staff with the necessary training and experience, and expertise in recommending disciplinary penalties for public safety employees when setting proposed and final discipline.
19. A non-sworn manager with the demonstrated proficiency in conducting, supervising and managing a public safety disciplinary system should be placed in charge of the Professional Standards Division.
20. The Fire Chief should be held accountable, as a part of his or her annual performance evaluation, for proposed and final disciplinary actions, and whether they comply with the applicable disciplinary guidelines.
21. The Department should eliminate the “wet reckless” offense from the disciplinary guidelines and rely on driving while under the influence guidelines.
22. The Department should eliminate any statute of limitations connected with guideline offenses that prevents using prior offenses in calculating penalties.

## FALSE AND MISLEADING STATEMENTS

The public and the Department have a right to expect its employees, including sworn members, will be honest and truthful. In a 2008 Civil Service hearing the Department took the position everyone knows since childhood that lying is wrong when seeking the dismissal of a clerk-typist for presenting a false doctor's note. During 2009, the Department proposed to discipline sworn members for making false statements. Two such cases are reviewed here. Recommendations follow.

### *Adopting a Dog*

#### **Factual Background:**

On December 18, 2008, the Department received a complaint from the City's Department of Animal Services that a firefighter misused his position with the Fire Department in an attempt to adopt a dog.

The firefighter was interviewed on February 20, 2009. The investigative report says after the conclusion of the interview it was discovered captains at his fire station conducted an initial interview of the firefighter on January 9, 2009, at 0734 hours. The investigative report says the firefighter "stated that no union representation was offered or given" during the January interview. The report also said two advocates and the firefighter's union representative present for the February 20, interview heard this unrecorded statement.

The investigation provided substantial evidence to support a charge the firefighter used his position as a firefighter in an attempt to gain preferential treatment and he brought discredit to the Department. The firefighter was also charged with dishonesty based on his claim he was denied union representation at the January interview. A 13-working<sup>57</sup> (6.5-calendar) days suspension was recommended.

Handwritten notes for the May 12, 2009, *Skelly* hearing indicate the firefighter said he was apologetic, remorseful, made a mistake, and misunderstood the questions regarding his initial interview at the station. Based on the firefighter's explanation, the dishonesty charge was eliminated and the penalty reduced from a 13-working (6.5 calendar) to a 2-working (1-calendar) days suspension.

#### **Assessment:**

The investigation of the charges alleging a misuse of position and bringing discredit to the Department was thorough, complete and timely, having been concluded within approximately 60 days after receipt of the complaint. The investigation of the dishonesty charge was not complete because what the firefighter was asked and what he said after his second interview about representation at his first interview was not clearly evidenced or recorded. In fact, what was said was later heavily disputed.

The dishonesty charge should not have been dismissed at the *Skelly* hearing based *solely* on a claim at the *Skelly* hearing the firefighter misunderstood what was asked or said about being

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<sup>57</sup> The Department defines "working" day as a 12 hour day for firefighters assigned to a platoon schedule.

denied a union representative at his first interview. The recording of the firefighter's first interview indicates the following was said before questioning about the incident began:

**Question:** You are also made aware of your Firefighter Bill of Rights- you are allowed a representative. However, today you have opted to not bring a representative with you. Again, you have the right to representation regarding this investigation. Do you continue to wish not to have a representative present?

**Answer:** "Yes, that is fine."

**Question:** Okay, so you do not want to have a representative present. At anytime during this interview, you feel you would like to have one, please advise me and I will arrange- give you reasonable amount of time for you to have one arranged.

The Department says the dishonesty charge was not dismissed solely on the basis of what was said at the *Skelly* hearing. Shortly after the firefighter's interview with Department advocates was completed, the advocates and firefighter's union representative disagreed about what the firefighter had been asked off the record about being offered a union representative at his first interview. Over a month later, a supervisor reviewing the report saw the advocate's notation about the firefighter not having been offered a representative at his station house interview and sustained the dishonesty charge when it should not have been. These problems could have been avoided had the advocates returned to questioning the firefighter on tape or with more appropriate documentation about the disagreement between the union representative and advocates after the second interview.

There is nothing in the investigation files to explain where the recording of the first interview was or why the advocates did not know about the firefighter's prior interview before he was interviewed a second time. The fact the firefighter was interviewed by his station captains could have been discovered at the time of the February 20, 2009, interview by simply asking the firefighter who he previously discussed the matter with.

The investigation report says the prior interview took place on January 9, 2009, at 0734 hours and was included with the report as attachment #13. A recording is not attached as #13, but is attached as #14, to the report. Also, #14 is not a recording that took place as indicated by the report. It is an interview recording that took place on January 6, 2009, at 1934 hours. These problems with the accuracy of the report would have been magnified had the advocates been required to testify about what they reported the firefighter said off the record on February 20, 2009.

The current Department/UFLAC disciplinary guidelines call for a penalty range of 6 days suspension to a Board of Rights hearing and possible dismissal for making misleading statements during a Department investigation. Therefore, a proposed penalty of 13-working (6.5-calendar) days suspension was in compliance with the applicable guidelines, if a dishonesty charge could have been sustained. The guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in 2006 call for referral to a Board of Rights hearing for a suspension exceeding 30 days or dismissal for a first offense of dishonesty.

The current guidelines for sworn members call for a penalty of verbal warning to 15-days suspension for bringing discredit to the Department. The final penalty of 2-working (1-calendar) days suspension falls within the low end of this guideline range. The personnel files have not

been inspected to determine if the suspension has been served because the files have not been made available.<sup>58</sup>

## ***Body Armor and Acting Engineer***

### **Factual Background:**

A captain reported that on February 4, 2009, on a day the regularly assigned engineer was not available, a firefighter told him he was certified to act as an engineer. In a later formal investigative interview the firefighter said he told the captain he was certified to drive the fire engine but not certified to operate the pumps.

A few days later the captain learned the firefighter's body armor had been found at another station. With that information and knowing the firefighter had body armor in his possession, the captain asked the firefighter questions about his body armor and the body armor he had been using. In the formal investigative interview the firefighter admitted he lied to his captain about the body armor, he did not intend to lie, he should have told the truth, he made a mistake and he took responsibility for the lie.

The firefighter also denied knowing who cut the identifying tags out the body armor he had been using for a month. He had been told the body armor belonged to someone else who was off work due to an injury, whose name appeared on the firefighting hood the firefighter was also seen using.

Based on the investigation conducted by a chief officer in the field, the Department charged the firefighter with making false statements to his supervisor regarding the status of his Department issued body armor and failing to inform his supervisor about the body armor he had been using. It was recommended he receive a 6-working (3-calendar) days suspension.

At his October 28, 2009, *Skelly* hearing the firefighter took responsibility for his action, was remorseful and said he sought professional help for personal issues. The penalty was reduced to a 4-working (2-calendar) days suspension with 2 days held in abeyance. The firefighter agreed to attend an education based training class on decision-making and changed behavior.

### **Assessment:**

A supervisor who suspected the firefighter could not have been using his own body armor asked questions prompting an admitted lie. There is no indication the firefighter was told he had a right to representation before such questioning. A statement obtained in violation of the right to representation may not serve as a basis for taking disciplinary action.<sup>59</sup> The Department did not base its dishonesty charge on the testimony of the captain who was lied to. The Department proceeded on the basis of the firefighter's admission to the chief officer he lied.

During a formal investigative interview, the firefighter claimed he informed his captain he was certified to drive the fire engine but not certified to operate the pumps. Nothing indicates the investigator followed up with the captain to determine if the firefighter drew a distinction between being qualified as an engineer as opposed to being qualified to drive the engine but not

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<sup>58</sup> The personnel files have not been reviewed for the reasons set forth in footnote 45.

<sup>59</sup> *City of Los Angeles v. Superior Court* (1997) 57 CA4th 1506.

qualified to operate the pumps and whether there were other witnesses with personal knowledge of what the firefighter told the captain.<sup>60</sup>

The proposed 6-working days suspension is at the bottom end of the Department/UFLAC penalty guidelines, which specify a range of 6-days suspension to a Board of Rights hearing for suspensions greater than 30 days or dismissal for making false or misleading statements during a Department inquiry. The offense guideline of making false or misleading statements to a supervisor was eliminated from the 2006 Stakeholder/Board of Fire Commission guidelines when the September 21, 2007 Department/UFLAC guidelines were adopted. The Stakeholder/ Board guidelines called for referral to a Board of Rights hearing for a suspension greater than 30 days or dismissal for making false or misleading statements during a Department inquiry or to a supervisor.

The Department approved final penalty of 4-working (2-calendar) days suspension, with 2 days held in abeyance, falls below the minimum penalty of 6-days suspension called for by the 2008 Department/UFLAC guidelines. While education based discipline may have considerable merit, the program has never been discussed, recommended or approved by the Stakeholders or Board of Fire Commissioners. There has been no policy level discussion on how such a program would fit in the Department's disciplinary system. It has never been the subject of the "meet and confer" process with the unions. The Department's policies, rules and regulations do not recognize such a program. The Department reports this was one of two cases where education based discipline was imposed. The Department previously took the position a clerk-typist should be dismissed for dishonesty because lying is wrong.

The misconduct took place in February 2009, and the investigative report was submitted during the first week of April 2009. The investigation was reviewed and a penalty was recommended in about three weeks. The firefighter was served with the proposed disciplinary action on May 19, 2009, and the *Skelly* hearing did not take place for 5 months.

The personnel file has not been reviewed to determine if the suspension has been served or how the disciplinary action related to attending a training class in lieu of suspension days has been recorded because the files have not been made available for the reasons stated in footnote 45.

## ***Findings***

Although the investigation into bringing discredit to the Department was thorough and complete in the dog adoption case, the investigations of alleged false statements in both cases were not complete and thorough.

The final penalty for a firefighter who admitted making false statements fails to comply with the Department/UFLAC disciplinary guidelines and policies.

The Department has no policies governing the use of education based discipline, which has never been discussed, recommended or approved by the Stakeholders or Board of Fire Commissioners.

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<sup>60</sup> The information in the investigative file suggests the conversation between the captain and the firefighter was more in the nature of an informal conversation as opposed to an interrogation where the firefighter has a right to union representation. Therefore, what the firefighter told his captain about his qualifications to operate an engine might not be barred by *Government Code*, section 3253. Please see *Steinert v. City of Covina* (2006) 146 CA 4<sup>th</sup> 458.

The firefighter's statement to a captain about body armor was obtained in violation of the firefighter's right to representation.

Although the dog adoption investigation was very timely, there was an excessive delay in conducting the *Skelly* hearings in both cases.

## ***Recommendations***

The following recommendations should be considered:

1. The Department should conduct complete and thorough investigations of alleged dishonesty, including making false and misleading statements, involving both sworn and non-sworn members of the Department.
2. The Department should adopt and apply disciplinary guidelines that hold sworn members of the Department to a standard that is higher than the standard for non-sworn members of the Department in all cases, including honesty and integrity issues.
3. The Department should ensure all interview recordings, including interviews conducted in the field, are attached to the case in the complaint tracking system in a timely manner.
4. The Department's investigators should engage in pre-interview preparation, and conduct interviews in a fashion that results in investigators knowing about prior statements made by a witness or subject concerning the matter under investigation.
5. The Department should engage in rigorous reviews of investigative reports to ensure they accurately reflect the evidence obtained during an investigation. Insufficient investigations should be returned for further investigation.
6. The Department should continue to provide training to Department supervisors about the right to representation.
7. When the Department learns a supervisor questions a member suspected of misconduct that may lead to discipline without complying with the law concerning the right to representation, the Department should, at a minimum, provide the supervisor with remedial training on the issue.
8. The Department should take the steps necessary to add an offense guideline governing making false and/or misleading statements to a supervisor to the disciplinary guidelines as was recommended by the Stakeholders and approved by the Board of Fire Commissioners in 2006.
9. The Department should adopt policies and procedures governing education based discipline before implementing such a program. The Stakeholders and the Board of Fire Commissioners should be consulted on the adoption of such a policy that may also be subject to the "meet and confer" process.

10. When setting proposed penalties the Department should consider all aggravating and mitigating factors, including the need for additional training and whether the member has shown remorse or has taken responsibility before the proposed penalty has been set.
11. The Department should not consider apologies, taking responsibility, remorse and regret expressed for the first time at a *Skelly* hearing as mitigating factors when there was an opportunity for the affected employee to express, and more importantly, engage in conduct demonstrating such sentiments before the *Skelly* hearing.
12. The Department should place greater weight on conduct that demonstrates remorse, regret and responsibility than on oral expressions of the same, particularly if the corrective conduct is engaged in near the time of the misconduct and involves the victim of the misconduct.
13. The Department should not change proposed penalties unless new information is discovered after the proposed penalty has been set.
14. The Department's *Skelly* officers should not engage in settlement discussions at *Skelly* hearings.
15. The Department should adopt guidelines which set forth the time within which each step of the investigation and disciplinary process is to be completed in a timely manner, including *Skelly* hearings, and the Department should ensure adequate qualified staff is available to meet those timelines.
16. The Department should ensure recordings of *Skelly* hearings are attached to the case in either the complaint tracking system or the disciplinary tracking system.
17. The Department should ensure it provides the equipment, including software, necessary to fully support the Professional Standards Division.
18. The Department should adopt guidelines that address "off the record" statements concerning a matter under investigation.
19. The Department's disciplinary system, including the investigations, should be conducted, supervised and managed by non-sworn personnel who have demonstrated expertise, experience and training in the area of public safety personnel investigations and disciplinary systems.
20. The Department should ensure its investigators and supervisors prepare and approve accurate and complete investigations and investigative reports.

## SUSTAINED EEO CASES

An assessment of Equal Employment Opportunity (EEO) cases was made because such cases involve “zero tolerance” policies, the 2006 audits by the City Controller and Personnel Department cited such issues as major problems, the Professional Standards Division (PSD) was created in response to the 2006 audit recommendations, and the City has paid millions of dollars in connection with civil litigation involving such issues. The Department was requested to identify all EEO cases concluded in 2008 and 2009 where a sustained finding was made. Seven cases were identified as meeting this criterion and five are reviewed in this report.

In December 2009, investigations were completed in two cases resulting in sustained findings. One involves allegations a captain engaged in sexist, unprofessional and disrespectful treatment of a private citizen. The second involves allegations related to hazing. The cases do not appear in this report because the disciplinary decisions have not been finalized in either case.

### ***A Firefighter Asked: “What am I, Your Nigger, Your Slave, Your Boy”***

#### **Factual Background:**

On October 7, 2007, a firefighter/paramedic and an engineer, who had been friends for many years, worked overtime together. The firefighter/paramedic agreed to buy playing cards so the two could play cards later in the day. Hours later the engineer asked the firefighter/paramedic if he purchased the playing cards to which the firefighter/paramedic responded, “What am I, your nigger; what am I, your slave, your boy.”

The engineer reported the comments to a captain the same day they were made. The firefighter/paramedic initially admitted making the statements and offered an apology to the engineer, indicating he was not aware the comments were offensive. The firefighter/paramedic made no counter allegations of wrongdoing against the engineer when he initially spoke to the captain.

When the firefighter/paramedic was told he was being moved to another fire station for the rest of the shift he made verbal and written accusations the engineer referred to him as a “beaner, “wetback, lazy Mexican” and a “greaser.” A chief officer advised the firefighter/paramedic to carefully review his written report to assure it was truthful and accurate before submission. He said he had already done so.

The first and second level supervisors concluded the firefighter/paramedic violated Department policy by; 1) making offensive, racially insensitive, inflammatory and inappropriate comments, and 2) by making inaccurate and untruthful statements about what occurred when told to provide truthful information. The initial management review concluded the reprimand should be issued and the matter should be sent to PSD for a complete and thorough investigation. On further consideration, the reprimand was not issued and the case was forwarded to PSD.<sup>61</sup>

During his investigatory interview the firefighter/paramedic said he made the statement, “what do I look like, your Negro, your slave boy” and did not use the word, “Nigger.” He did so because

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<sup>61</sup> The Department has appropriately abandoned the practice of issuing reprimands before completion of formal investigations because *Government Code*, section 3251(c) now defines reprimands as punitive action.

he was lulled into feeling comfortable with the engineer. He also said he never told the captain he used the word, “Nigger.” At the conclusion of the investigation the Department charged the firefighter/paramedic with using a derogatory term in violation of EEO policies and with preparing an untruthful report regarding the use of inappropriate comments.

The Department relied on the Civil Service *Guide to Disciplinary Standards*<sup>62</sup> in proposing a penalty of a 6-working<sup>63</sup> (3-calendar) days suspension. The Department/UFLAC guidelines set a penalty range from oral warning to dismissal for the applicable offenses.

At his *Skelly* hearing<sup>64</sup> the firefighter/paramedic admitted making the offensive statement, admitted submitting an “inaccurate” report, was remorseful and said he would accept training. The employee’s good work history, remorsefulness and willingness to accept training were considered mitigating factors. The Department agreed to reduce the penalty to a 4-working (2-calendar) days suspension on the condition that the firefighter/paramedic attended EEO training.<sup>65</sup>

### **Assessment:**

The investigation provided sufficient evidence to support a finding the firefighter/paramedic used a derogatory term in violation of the Department’s “zero tolerance” policy and he was untruthful. It would have been inappropriate to handle the misconduct with a reprimand as was initially proposed. The Department has appropriately ceased the practice of issuing reprimands before initiating a full investigation.<sup>66</sup>

Although the Civil Service guidelines call for a dismissal for a first offense of falsifying work related documents, this offense guideline was not mentioned in the Department’s written penalty rationale. It should have been. It is not uncommon for a firefighter/paramedic to be called as a witness to testify in a criminal case. A firefighter/paramedic is required to prepare accurate written reports in the normal course of their business. Given the serious nature of the two sustained charges the proposed penalty of a 6-working days suspension was not adequate.

The chief officer failing to cite the offense guideline of falsifying work related documents when preparing the penalty recommendation in this case involving a firefighter did rely on the offense guideline when recommending the dismissal of a clerk typist for falsifying a doctor’s note in 2008, but not when he prepared a disciplinary recommendation to suspend a chief officer for 30-calendar days after repeated acts of dishonesty, including the preparation of two false writings, and falsely verifying the accuracy of a written police report.<sup>67</sup>

The penalty should not have been reduced at the *Skelly* hearing. The firefighter’s good work history, to the extent it should be considered as a factor in setting the penalty, should have been

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<sup>62</sup> The Department’s *Penalty Guidelines for Sworn Members* were adopted and became effective for misconduct occurring on and after January 1, 2008.

<sup>63</sup> A “working” day for the firefighter/paramedic is defined as a 12-hour day.

<sup>64</sup> The Department offers employees an informal pre-disciplinary hearing as is required by *Skelly v. State Personnel Board* (1975) 15 C3d 194.

<sup>65</sup> The investigation file does not confirm the training took place. The personnel/payroll files have not been reviewed to determine if training took place, and if the suspension days were actually served for the reasons set forth in footnote 45.

<sup>66</sup> Before the enactment of the *Firefighter Procedural Bill of Rights Act* the Department did not consider a reprimand punitive action.

<sup>67</sup> The cases involving the clerk-typist and the chief officer are set forth in the section of this report concerning inconsistent penalty application.

considered when the penalty was first set.<sup>68</sup> A belated manifestation of honesty and remorsefulness at a *Skelly* hearing should not have been credited. The public has every right to expect firefighter/paramedics to avoid misconduct of the type engaged in here, honesty in the preparation of their reports and remorsefulness at every step of the process, without waiting until a *Skelly* hearing.

Obtaining an agreement to attend training at a *Skelly* hearing, particularly when an employee has violated one of the Department's "no tolerance" policies, should not mitigate a violation of the policy or a failure to be honest. One of the factors the Department considers in sustaining charges and setting a proposed penalty is the clarity with which the employee was on notice of a rules violation.<sup>69</sup> Training on "no tolerance" policies should not be negotiable. If additional training is needed it should be required as a part of the proposed penalty.

The disciplinary proceedings were completed in a timely manner. The incident occurred on October 7, 2007. An investigation was completed by December 5, 2007; the penalty recommendation was approved on December 13, 2007, the firefighter/paramedic was served with a notice of the proposed discipline on January 31, 2008, the *Skelly* hearing took place on February 7, 2008, and the Fire Chief approved the final disciplinary decision on February 8, 2008.

### ***Jewish Firefighters Were Told: "I'll Stick You in the Oven"***

#### **Factual Background:**

On January 29, 2008, a firefighter/paramedic and firefighter were involved in a verbal exchange when the firefighter/paramedic claims he told the firefighter he was Jewish. Although denying the firefighter/paramedic told him he was Jewish, the firefighter later admitted he said, "Good. I'll stick you in the oven." Two days later the firefighter/paramedic asked his captain what he did about the incident. The captain said he had not heard the comment. The captain took no other action after receiving this information.

On February 3, 2008, the firefighter/paramedic spoke with an engineer who was Jewish who said that earlier on January 29, 2008; the firefighter walked to an oven in the station kitchen, opened the door and told the engineer to get in. The firefighter/paramedic said he previously heard the firefighter make reference to an African American firefighter when he saw a picture of a monkey or chimpanzee on television.

The firefighter/paramedic reported the January 29, 2008, incident to a second captain on February 5, 2008, who initiated the formal complaint process. An EEO investigator was assigned to conduct an investigation on February 7, 2008.

On February 10, 2008, the firefighter/paramedic reported while in the station locker room the firefighter walked behind him, bent down, and pushed a bench toward him forcefully which hit the edge of a locker instead of the firefighter/paramedic. The firefighter explained the incident by saying he had been walking out of the locker room with a large duffel bag that got caught between his leg and the bench the firefighter/paramedic was seated on. The firefighter said this barely nudged the bench, which touched the locker door; this occurred with the weight of the firefighter/paramedic sitting on the bench, and the bench moves very easily on a carpeted floor.

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<sup>68</sup> The Department does use a list of aggravating and mitigating factors when initially setting the penalty. Work record is the fourth factor on the Department's list.

<sup>69</sup> Notice of the rules violation is ninth on the Department's list of mitigating and aggravating factors.

During the investigation the firefighter admitted he said; “I’ll stick you in the oven,” but denied it was said in reference to the firefighter/paramedic being Jewish. He said he was extremely sorry for “making a stupid comment and that he was not a racist.” He also said he had been trained on the Department’s zero tolerance policies regarding harassment and while members at the station made jokes and bantered with one another they needed to keep the comments inside the station.

The firefighter could not recall the comments or incident involving the engineer. He could not recall the specific instance where it was alleged he made the racial comment but said he has an extremely close relationship with the African American firefighter where they go back and forth and he may have made a comment in reference to a monkey but only if the African American engineer was present.

The investigators concluded the firefighter made an anti-Semitic remark to the firefighter/paramedic, made a second anti-Semitic remark to the engineer, and pushed a bench toward the firefighter/paramedic in retaliation for filing a discrimination complaint. They concluded there was insufficient evidence to determine the firefighter made a racial comment on the particular day in question.

The Department decided there was sufficient evidence to say the anti-Semitic remarks had been made, insufficient evidence to indicate the racial remarks had been made on the day in question and insufficient evidence to determine pushing the bench was meant to be retaliatory because the accounts given were in conflict and there were no independent witnesses to the incident. A 24-calendar day suspension was proposed.

At his *Skelly* hearing the firefighter acknowledged making a comment about getting in an oven, denied knowing the firefighter/paramedic was Jewish, said he was sorry and was apologetic. He agreed to attend training on EEO issues and diversity in the workplace. Therefore, his suspension was reduced to 22-calendar days.<sup>70</sup>

It was also determined the first captain who failed to take action after being told about the derogatory comments should receive training to recognize and take proper action when presented with possible EEO violations.

During the investigation one witness indicated suspensions have little effect on members because overtime is readily available and members often say, “Just attach it to my vacation.”

### **Assessment:**

The investigation was sufficient to sustain charges the firefighter used a derogatory term in violation of EEO policies. The investigation was not sufficient on the retaliation claim. Further investigation should have been conducted to determine if the firefighter’s explanation about the bench was even plausible. It is difficult to understand how a bench could be moved with someone sitting on it, or could be moved easily over carpet. The investigative file contains photographs of the scene but there is nothing to suggest a careful inspection of the scene was conducted to assist in preparing questions for interviews or as a check on the firefighter’s claims.

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<sup>70</sup> The personnel and payroll files have not been viewed to verify the suspension was actually served for the reasons previously stated in footnote 45.

A proposed penalty of 24-calendar days suspension, and final penalty of 22-calendar days falls within the penalty range of reprimand to Board of Rights for making a derogatory comment to a member of the Department in violation of EEO policies. The penalty should not have been reduced because the firefighter agreed to attend training on a “zero tolerance” policy he violated, as previously explained.

The disciplinary action was timely, although there was a delay in assigning an advocate. The comments were made on January 29, 2008, and the retaliation is alleged to have occurred on February 10, 2008. An EEO investigator was assigned on February 7, before the alleged retaliation, but no investigative work was accomplished until an advocate was assigned. The investigation was completed on March 19, 2008. The *Skelly* hearing took place on May 7, and the firefighter was served with the final notice of suspension on May 9, 2008.

### ***On Duty Use of Term “Wetback”***

#### **Factual Background:**

A captain reported that on May 2, 2009, three firefighter/paramedics and he were in the office area of a fire station when the racial composition of a college football team was discussed in non-derogatory terms. The captain reported a Hispanic firefighter/paramedic made reference to his country of origin and one of the others present stated the word “Wetback.”

The captain reports he and one of the firefighter/paramedics informed the firefighter/paramedic who made the comment it was not appropriate. The firefighter/paramedic who used the term said his wife was Hispanic. Another firefighter/paramedic said his wife was Hispanic and he did not appreciate the comment. The captain reports he stopped the conversation, took the firefighter/paramedic who made the comment into a conference room and told him the comment was not appropriate. The firefighter/paramedic said he meant nothing by the comment, was remorseful, apologized to the captain and said it would not happen again.

Later the same day one of the firefighter/paramedics reported the person making the comment apologized to him. The firefighter/paramedic who initially said the comment was not appropriate did not receive an apology.

The captain made an entry to the complaint tracking system the same day the comment was made, providing information concerning what happened and what he had done. He also wrote, “I did not violate any of his firefighter rights, because there was no denial of his actions.”

One of the firefighter/paramedics reports being contacted on May 14, 2009, and asked if the Department needed to go “full boat” and conduct an investigation. He said yes, said he was offended by the comment because his wife was Latino, that the Department’s rules did not tolerate such comments, and said he appreciated the expeditious manner in which the matter was being handled.

During his interview, the firefighter/paramedic who said he did not appreciate the comment explained he had asked what the politically correct term for Latino was and the Hispanic firefighter responded by saying it depends on what part of Mexico you are from. He explained that while the Hispanic continued to provide advice another firefighter walked up and said do you mean, “spick or wetback?”

The firefighter/paramedic who made the comment received a reprimand.<sup>71</sup>

**Assessment:**

The investigation provided sufficient evidence to support the reprimand. Complaints alleging violations of the Department’s EEO policies should result in a prompt investigation conducted by the Department’s EEO unit.

The captain who wrote there was no violation of rights because “there was no denial of his actions,” was not correct. The right to representation is triggered whenever an interrogation focuses on matters that may result in punitive action.<sup>72</sup> The Department has properly trained its supervisors that punitive action may occur when a supervisor has reason to believe; 1) an act of misconduct has occurred, and 2) the firefighter may have been involved in the misconduct.<sup>73</sup>

Although there was a delay in conducting an interview of the victim, disciplinary action was taken in a timely manner. The incident occurred on May 2, 2009, and final notice was sent on June 16, 2009.

***While off Duty a Firefighter Says: “You’re Eating With a “Nigger”***

**Factual Background:**

On September 23, 2008,<sup>74</sup> a captain, two firefighters and a retired captain were having dinner at a public restaurant after playing golf at a tournament sponsored by the Department’s golf club. After finishing his meal at another table another firefighter got up to leave. As the firefighter was walking out, he stopped by the group, and four witnesses report he said something to the effect of, “You know you are having dinner with a nigger”, or, “I can’t believe you’re sitting here at this table with this nigger”, or “I can’t believe you guys are eating with a nigger”, or “Hey guys, you know you’re sitting with a Negro.” After making the comments, the firefighter walked away.

A few minutes later the firefighter who made the comments returned to the table. The African American captain says the firefighter leaned over and whispered in his ear, “You know I’m drunk [Cap]”

The comments were reported to a supervisor on October 1, 2008, and that day it was indicated the investigation would be assigned to a battalion office. It was assigned to the Professional Standards Division EEO unit the next day. The captain to whom the comment was made was interviewed on October 28, 2008.

On October 15, 2008, an effort was made to schedule the subject of the investigation for an interview on October 28, 2008. On October 20, 2008, his representative said she was not available and sought to reschedule the interview. The representative was told the firefighter could request another representative because the Department would like to move the investigation

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<sup>71</sup> The personnel files have not been inspected to verify the reprimand was actually received for the reasons previously stated in footnote 45.

<sup>72</sup> *Government Code*, section 3253(i) and *City of Los Angeles v. Superior Court* (1997) 57 CA4th 1506.

<sup>73</sup> The information has also been made available to supervisors on the PSD information page through the Department’s Information Portal.

<sup>74</sup> The investigation materials reference both September 23 and 24 as being the date of incident.

along. The subject also called to say his representative may not be available and was told the statute provides for a representative, but not for a specific representative. The subject's interview took place on November 19, 2008.

One of the firefighter-witnesses was sent notice 16 days before he was to be interviewed on October 31, 2008. He called on October 22, 2008, to say he had two representatives, one who might be available for the interview and one who would not be available until November 11, 2008. When told the interview could proceed as scheduled with the available representative, the firefighter said his only representative would be the one not available. The interview took place on November 18, 2008.

The investigation was completed on January 15, 2009, and the investigative report was approved on January 21, 2009. The firefighter was charged with using racially derogatory language.

A 12-working (6-calendar) days suspension was recommended and on February 5, 2009, the firefighter was served with an unsigned copy of the complaint and informed a *Skelly* hearing had been scheduled for March 25, 2009.

A *Skelly* hearing was not held until July 16, 2009. Notes in the disciplinary tracking system indicate the *Skelly* hearing was re-scheduled at least four, if not five times. At least one of the requests was made by the union representative. When finally held on July 16, 2009, and although the firefighter received more than 7 working days notice of the *Skelly* hearing, he failed to appear with a representative. Once present he insisted he be represented.

The Department had a director of the union who was on duty nearby attend the hearing. Although the recording of the hearing identifies the director, as being from the union, it is never indicated he was there to represent the firefighter and he did not make comments on behalf of the firefighter. There is nothing on the recording indicating the firefighter objected to the union director acting as his representative.

On July 22, 2009, the firefighter claimed his *Skelly* rights were violated because he had been denied the representative of his choice, the representative of his choice had been just as easily available as the union director, and he demanded he be accorded a *Skelly* hearing with a representative of his choice before discipline was effectuated. He also served notice appealing the 12-working (6-calendar) days suspension imposed after the *Skelly* hearing.

On August 14, 2009, the Department informed the firefighter the July 16, 2009, complaint was rescinded and revoked; he would be provided another *Skelly* hearing on September 3, 2009; and that according to the February 5, 2009, notice he was not entitled to a formal hearing but could have a representative of his choice assist in responding and presenting any additional information to rebut the charges made against him.

On September 3, 2009, the Department attempted to hold a second *Skelly* hearing. The firefighter, two chief officers,<sup>75</sup> the firefighter's representative, a union "MMB representative"<sup>76</sup> and a third person from the union, whose role was not entirely clear from the recording, were present. The firefighter's representative insisted a second *Skelly* hearing could not be held and

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<sup>75</sup> One of the chief officers present, who previously *decided* the penalty, acted as the *Skelly* officer, a practice that is criticized elsewhere in this report.

<sup>76</sup> *Meyers-Milias-Brown Act*, set forth in *Government Code* sections 3500, et seq., governs local government collective bargaining in California.

argued the charges had been revoked in their entirety by the Department's letter of August 14, the Department was forcing a second *Skelly* hearing on the firefighter which he had a right to waive, the firefighter had been involuntarily "ordered" to attend the proceeding, and the firefighter was being "interrogated" when asked if he received the *Skelly*" packet. Toward the end of the proceeding the firefighter was asked if he wanted a *Skelly* hearing and he said no.

Sometime after completion of the *Skelly* hearing, the Department decided the firefighter would only receive a written reprimand for bringing discredit to the Department when he used a derogatory racial term in violation of City and Department policies.<sup>77</sup> The firefighter was informed of his right to an administrative appeal but since the appeal process for written reprimands was still being negotiated, the firefighter's right to appeal could be requested after that process was finalized.

### **Assessment:**

This case was poorly handled by the Department. As a result, a firefighter who engaged in serious misconduct did not receive appropriate discipline.

The Department provided more than seven days notice when scheduling interviews and *Skelly* hearings because the Department and UFLAC entered into an October 28, 2008, Letter of Agreement (LOA) regarding *Disciplinary Guidelines and Investigative Procedures*. The LOA acknowledged the requirement to offer members the right to representation and said representatives shall be allowed reasonable time, defined as a maximum of seven (7) business days, to schedule interviews.

The LOA significantly alters the April 9, 2007 Memorandum of Understanding (MOU) between the City and the UFLAC which says members shall have a reasonable amount of time to obtain representation. The MOU also says if the member is unable to obtain representation within 90 minutes and management determines the matter is time sensitive, management has the right to detail an available representative of the member's choice to provide representation. Page 21 of the Department's October 2005 *Advocate Manual* says a member has a right to representation but not to the extent that it can be used as a "tool" to delay the investigation, and usually "one hour is an adequate amount of time unless there are extenuating circumstances" to arrange for a representative if the member is aware of their right to representation.

The Department's agreement allowing representatives the right to 7 days for scheduling interviews amounts to management surrendering its rights to schedule interviews in anything less than 7 business days in every case, including sensitive cases and investigations where there is an urgent need to proceed. Agreeing to alter the terms of the MOU so radically was a very poor management decision.

Investigators experienced in both criminal and administrative cases know the critical importance of obtaining and preserving evidence before it is lost, altered, or memories fade, before witnesses or subjects are able to talk with one another, and before witnesses and subjects are able to find out how much investigators know. No investigator assigned to the Department's arson section should or would think it was appropriate for the Department to agree representatives for victims, complainants, witnesses or suspects be given 7 business days to schedule interviews in the arson crimes they are investigating. Competent investigators would correctly believe such an

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<sup>77</sup> The personnel files have not been inspected to confirm the firefighter actually received the reprimand for the reasons stated in footnote 45.

agreement would unreasonably restrict the ability to conduct timely and thorough investigations. Yet, that is exactly what the Department agreed to do to its investigators in administrative cases involving employee misconduct allegations.

Even when the Department provided at least 14 days notice for interviews, a representative and witness called to say two of the interviews could not proceed as scheduled because a particular representative was not available. The Department correctly responded by saying there was a right to representation, but not the right to a specifically identified representative.<sup>78</sup>

Although initially scheduled for March 25, 2009, the firefighter's first *Skelly* hearing did not take place until almost four months later on July 16, 2009. This is an unreasonable delay. A memo sent to the firefighter on August 14, 2009, suggests the delay was due to his several requests for rescheduling. At least one of the requests was clearly documented as being at the request of the subject's union representative. Such requests should always be fully documented and delays should be limited.

The firefighter claimed his *Skelly* rights were violated because the Department did not have the representative of his choice attend the July 16, 2009, hearing. Although the Department may have acted with good intentions, it inappropriately became involved in choosing a representative for the firefighter's *Skelly* hearing. Assuming the firefighter had reasonable notice of the hearing and was advised of his right to be represented, the Department should have simply proceeded with the *Skelly* hearing without attempting to assist the firefighter. The Department has since adopted an appropriate policy concerning this issue.

The September 3, 2009, *Skelly* hearing was complicated by a union official claiming a right to attend as an "MMB representative"<sup>79</sup> and the firefighter's representative excessive insistence the hearing and charges could not proceed as announced. The Department needs to adopt and enforce a legally compliant policy to address obstreperous representatives. The Department should also adopt a practice of requesting representatives provide legal citations for their legal arguments.

It was originally proposed the firefighter receive a 12-working day suspension for using racially derogatory language in violation of the Department's EEO policies. This fell within the range of the penalty guidelines, which provided for a penalty range of reprimand to a Board of Rights hearing, which could have resulted in dismissal.

The file contains a September 9, 2009, draft written reprimand and a September 11, 2009, memo explaining the disciplinary action of a reprimand was appropriate and there would be no further action.<sup>80</sup> There is no written explanation indicating why a reprimand was appropriate. It was explained that when the process for an appeal of reprimands was negotiated, the firefighter could file an appeal. The documents fail to limit the amount of time the firefighter would have to bring such an appeal once an appeal process was negotiated.

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<sup>78</sup> *Upland Police Officers Association v. City of Upland* (2003) 111 CA4th 1294, interpreting language identical to the *Firefighters Procedural Bill of Rights Act* said an employee must select a representative who is reasonably available and may not unreasonably delay an interrogation because the first choice of representative is not available.

<sup>79</sup> Legal authority to support an "MMB representative" in addition to the member's representative in such circumstances has not been provided to the Department.

<sup>80</sup> An inspection of the personnel files has not been conducted to verify the reprimand was finalized and received for the reasons stated in footnote 45.

More importantly, a reprimand was not an appropriate penalty for the firefighter's misconduct. There is very strong evidence the firefighter made a racially offensive derogatory comment to a fellow employee in a public restaurant. In a written explanation to the Fire Chief on July 22, 2009, the firefighter said, "I hereby inform you that I am in no way guilty of any employment related misconduct in the matter now pending (inappropriately) before you." The Fire Department does in fact have a very strong interest in making sure its employees do not victimize and insult fellow employees with racially offensive comments both on and off duty.<sup>81</sup> The firefighter's claim he was drunk does not excuse his racially offensive comments.

The case was not concluded in a timely manner. While the Department discovered the misconduct on October 1, 2008, and the investigative report was approved on January 21, 2009, there were excessive and unreasonable delays. The case was not concluded until shortly before the expiration of the one-year statute of limitations.

### ***Sworn Member Kisses Non-Sworn Employee***

#### **Factual Background:**

On November 12, 2008, a sworn member placed his hand on a non-sworn employee's shoulder and kissed her on the side of her head. The victim also said the sworn member made a comment she later said was sick. She told some of her non-supervising co-workers shortly thereafter. The victim and a co-worker report a chief officer was placed on notice of the incident either that day or the next.

The victim made a comment to her non-sworn supervisor who concluded the comment referred to sexual harassment. The supervisor's impression was the victim did not want to file a formal complaint and mentioned it to a captain who said he would address the situation.

A captain reports he first learned of the victim's complaint about 3 or 5 days after the incident and called the sworn member. The captain asked the sworn member about his relationship with the victim, asked if he was aware the non-sworn was uncomfortable around him, told the sworn member he was to cease and desist all interaction with the victim and that she had made some strong allegations against him.

On November 19, 2008, the non-sworn employee made a written complaint about what happened a week earlier and said the sworn member previously made sexually suggestive comments to her. Direction was given to enter the complaint into the complaint tracking system and the victim's supervisor was told to issue the sworn member a direct order to not have contact or any communication with the non-sworn member.

The non-sworn employee was interviewed on December 1, 2008. Eight witnesses were interviewed by December 10, 2008, at which time the sworn member was also interviewed. An EEO investigator performed most of the questioning of the sworn member. An advocate read the admonitions and ordered the sworn employee to tell the truth at the start of the interview, and asked a few questions. A second EEO investigator said he had no questions when asked if he had any questions.

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<sup>81</sup> *Locurto v. Giuliani*, 447 F3d 159 (2<sup>nd</sup> Cir. 2005).

During his interview the sworn member was told his conduct could not lead to criminal prosecution. The sworn member admitted placing his hand on the non-sworn employee's shoulder and kissing her on the top of her head, and said he should not have placed his hand on her shoulder. The advocate asked, "after you actually kissed the side of the head, were you particularly trying to console her for a particular reason, I mean of course, I heard she mentioned you mentioned her voice?"

When asked about training, the sworn member said no formalized training on sexual harassment had taken place in the last year. When asked about Book 90,<sup>82</sup> he said the captains may have mentioned it by suggesting; "hey, you might want to pick this book up."

During his interview the sworn member said he had previously been told the non-sworn employee was not comfortable around him.

The investigative report was dated January 14, 2009, and approved a week later. A 12-working<sup>83</sup> day suspension, EEO training and an order the sworn member stay away from the victim was recommended. The penalty guidelines called for a suspension of 6 days to a dismissal.

On January 20, 2009, the victim was sent an email about the status of her complaint. A formal notice indicating there was sufficient evidence to support her complaint was prepared on January 29, 2009.

The sworn member indicated it was not his intent to create discomfort, expressed remorse, said he understood his conduct was wrong, indicated he would ensure the conduct did not happen again, and agreed to attend EEO training at the time of his March 4, 2009, *Skelly* hearing. With this information the suspension was reduced to a 10-working day suspension.

On March 10, 2009, the sworn member was served with a written direct order to have no contact with the victim. Sexual harassment prevention training was completed on April 30, 2009.

### **Assessment:**

A non-sworn supervisor, a captain and a chief officer either learned of the specific conduct complained of, or heard enough information to lead each to conclude sexual harassment took place and each failed to make formal reports or decided to only handle the matter informally until the victim wrote a memo and email concerning the matter. The Department's July 10, 2008, *Discrimination Prevention Policy Handbook*, published four months before the incident says officers, managers and supervisors are to report and forward all sexual harassment complaints even if the complainant does not want a formal complaint. There is no indication any action was taken against the supervisor, captain or chief officer for failing to report sexual harassment.<sup>84</sup>

A captain engaged in questioning of the sworn member after the captain learned the sworn member may have engaged in misconduct. The *Firefighter Procedural Bill of Rights Act*

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<sup>82</sup> Book 90 previously set forth the Department's discrimination prevention policies.

<sup>83</sup> The sworn member is not assigned to platoon duty where a "working" day is defined as a 12-hour day.

<sup>84</sup> The Department's complaint tracking system has no record of action. The personnel files have not been reviewed for the reasons set forth in footnote 45. The Department's *Penalty Guidelines for Sworn Members* call for a minimum 16-days suspension to dismissal for failure to take appropriate action to correct sexual harassment in the workplace. The Civil Service *Guide to Disciplinary Standards* call for a minimum 20-days suspension to dismissal for such failures.

provides sworn members of the Department with a right to representation whenever an interrogation focuses on matters that may result in punitive action.<sup>85</sup>

At the beginning of his interview Department personnel told the sworn member this case was not something that could result in criminal action. Technically the sworn member's conduct amounted to a battery and the decision to proceed with a criminal case or not belongs to law enforcement and criminal prosecutors. The better practice is to provide the member with an appropriate admonition at the start of the interview in the event criminal justice authorities decide to proceed.<sup>86</sup>

An advocate and two EEO investigators were present for the interview of the sworn member who was the subject of the investigation. Although the second EEO investigator said he had no questions, he was offered the opportunity to question the sworn member. The *Firefighters Procedural Bill of Rights Act* only permits questioning by, "no more than two interrogators at one time."<sup>87</sup>

Instead of simply asking the sworn member why he kissed the non-sworn employee, he was asked a leading question by an advocate suggesting the sworn member was trying to console the non-sworn employee. While the sworn member said he should not have put his hand on the shoulder of the non-sworn employee, he was not asked if it was appropriate to have kissed her. He should have been pressed on whether his conduct complied with his understanding of the Department's policy governing sexual harassment.

The applicable guidelines call for a penalty range of 6-days suspension to a Board of Rights for a dismissal. Therefore the proposed 12-working days suspension fell within the range. The reduction to 10-working days suspension was based on the sworn member's expressions of remorse and agreement to attend sexual harassment training at the time of his *Skelly* hearing. However, he expressed remorse at the end of his investigative interview, before the proposed penalty was recommended and the penalty should have not been mitigated on the basis he agreed to accept training after violating a "zero tolerance" policy as previously indicated.

The Department concluded the disciplinary proceedings in a timely manner. The misconduct occurred on November 12, 2008, was reported to the PSD on November 19, 2008, the investigative report was approved on January 21, 2009, and the final disciplinary action was approved on March 4, 2009.

### ***Disciplinary Action Tables***

The disciplinary action proposed and taken in each of the sustained EEO cases is set forth in Table A so that it can be compared to each of the other cases. The information provided indicates the penalties are not consistent with one another, particularly when the difference between "working" and calendar days is considered. While all of the penalties technically comply with the 2008 Department/UFLAC guidelines, none of the penalties would comply with the 2006 Stakeholder/Board of Fire Commission guidelines.

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<sup>85</sup> *Government Code*, section 3253 and *City of Los Angeles v. Superior Court* (1997) 57 CA4th 1506.

<sup>86</sup> *Lybarger v. City of Los Angeles* (1985) 40 C3d 822, allows the Department to obtain a compelled statement under certain conditions notwithstanding the facts may involve potential criminal conduct.

<sup>87</sup> *Government Code*, section 3253(b).

A firefighter who used racially offensive language and was dishonest received what amounts to a 2-calendar days suspension while a firefighter using anti-Semitic language, but was not charged with dishonesty, received a 22-calendar days suspension. A firefighter who wrote a letter to the Fire Chief claiming he engaged in no “employment related misconduct” after he offended a co-worker in a public restaurant with racially offensive language received a reprimand.

Table A

| <b>Offensive Conduct</b>             | <b>Date of Occurrence</b> | <b>Allegations Sustained</b>  | <b>Applicable Guideline Range</b> | <b>Stakeholder BOFC Guidelines</b> | <b>Proposed Disciplinary Penalty</b> | <b>Final Disciplinary Penalty</b> |
|--------------------------------------|---------------------------|-------------------------------|-----------------------------------|------------------------------------|--------------------------------------|-----------------------------------|
| “What am I, Your Nigger, Slave, Boy” | 10-7-07                   | Derogatory Term<br>Dishonesty | Reprimand to Dismissal            | 16 Days Suspension to Dismissal    | 6 Working Days<br>(3-calendar)       | 4 Working Days<br>(2-calendar)    |
| “I’ll Stick You in Oven”             | 1-29-08                   | Derogatory Term               | Reprimand to Dismissal            | 16 Days Suspension to Dismissal    | 24 Calendar Days                     | 22 Calendar Days                  |
| “Wetback”                            | 5-2-09                    | Derogatory Term               | Reprimand to Dismissal            | 16 Days Suspension to Dismissal    | Reprimand                            | Reprimand                         |
| “You’re Eating with a Nigger”        | 9-23-08                   | Derogatory Term               | Reprimand to Dismissal            | 16 Days Suspension to Dismissal    | 12 Working Days<br>(6-calendar)      | Reprimand                         |
| “Sworn Kissed Non-sworn”             | 11-12-08                  | Unwelcome Touching            | 6-Days Suspension To Dismissal    | Dismissal                          | 12 Working Days<br>(6-calendar)      | 10 Working Days<br>(5-calendar)   |

Civil litigation against the City and Fire Department resulting in the payment of millions of dollars and audits published by the City Controller and Personnel Department in 2006, prompted the Stakeholders to develop and recommend, and the Board of Fire Commissioners to unanimously approve, disciplinary guidelines in November 2006. However, the Department adopted a September 21, 2007, set of guidelines and three sets of disciplinary guidelines in 2008, that allow for a reduced range of penalties for EEO violations. The 2006 Stakeholder and BOFC guidelines are compared to the October 28, 2008, Department guidelines in Table B.

A referral to a Board of Rights hearing using the Department’s disciplinary guidelines means a potential penalty ranging from a suspension between 31 and 180 days to dismissal. The

November 2006 Stakeholder/Board of Fire Commissioners' guidelines proposed two types of referral to a Board of Rights hearing. Some offenses called for referral for either a suspension or dismissal and some offenses recommended only a referral for a dismissal without mention of a suspension.

Table B

| <b>EEO VIOLATIONS-DISCRIMINATION, HARRASSMENT AND SEXUAL HARRASSMENT</b>  | <b>1<sup>st</sup> Offense Stakeholder BOFC Guidelines</b> | <b>1<sup>st</sup> Offense Department UFLAC Guidelines</b> |
|---|---|---|
| Failure to take appropriate action to correct and eliminate sexual harassment from the workplace                                      | Board of Rights   | 16 Days to Board of Rights                                |
| Physical conduct or act of a sexual nature involving the use of force   | Board of Rights (For Dismissal)                           | Board of Rights   |
| Quid Pro Quo- implied or explicit coercive pressure for sexual favor  | Board of Rights (For Dismissal)                           | Board of Rights   |
| Retaliation against employee for filing a complaint of misconduct or participating in a sexual harassment or discrimination complaint | Board of Rights (For Dismissal)                           | 16 Days to Board of Rights                                |
| Unwelcome physical contact in sexual area of body   | Board of Rights   | Board of Rights   |
| Used derogatory term to department member in violation of EEO policies  | 16 Days to Board of Rights                                | Reprimand to Board of Rights                              |
| Used derogatory term to member of the public in violation of EEO policies   | 16 Days to Board of Rights                                | 6 Days to Board of Rights                                 |
| Unwelcome touching, rubbing, or any type of physical contact and/or conduct toward other employees, which is sexually suggestive      | Board of Rights   | 6 Days to Board of Rights                                 |
| Showed/hung cartoons, photos, etc of discriminatory nature in the workplace   | 16 Days to Board of Rights                                | 11 Days to Board of Rights                                |
| Displayed inappropriate photos/cartoons, books, magazines, etc., in the workplace   | 16 Days to Board of Rights                                | Reprimand to Board of Rights                              |
| Created a hostile work environment  | Board of Rights   | 16 Days to Board of Rights                                |
| Made improper sexual remark   | 16 Days to Board of Rights                                | Reprimand to 15 Day Suspension                            |

### ***Findings***

Some sworn members of the Department continued making offensive comments in violation of EEO policies falsely believing such conduct was acceptable if engaged in with friends, acquaintances, or in the privacy of the fire station.

The final disciplinary action taken against those with sustained EEO violations was inconsistent and at the low end of the applicable disciplinary guidelines.

The Department reduces the proposed disciplinary action at the *Skelly* hearing as a result of the sworn member verbally expressing remorse and agreeing to attend further training on “zero tolerance policies.

A sworn member who engaged in dishonesty in addition to an EEO violation received a proposed and final penalty that was lower than most of the other sustained EEO cases.

The Department made a poor management decision by agreeing to allow representatives for sworn members who are complainants, victims, witnesses and subjects to have 7 business days to schedule interviews.

The Department agreed to lower penalties for sworn members engaging in EEO violations than what the Stakeholders recommended and the Board of Fire Commissioners approved in November 2006.

Most interview questions are asked by non-sworn investigators after a sworn advocate provides an order to tell the truth and witness or subject admonitions.

### ***Recommendations***

The following recommendations should be considered:

1. The Department should take all action necessary to adopt the disciplinary guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners in November 2006.
2. While insuring the right to representation is protected, the Department should take all action necessary to eliminate the requirement to provide 7 business days to schedule an interview.
3. The Department should hold its sworn members to a standard of conduct that is higher than non-sworn members of the Department for all conduct, including honesty and EEO violations.
4. The Department should employ non-sworn personnel with the expertise, experience and training to conduct, supervise and manage the Department’s disciplinary system, including investigations, the setting of discipline and the prosecution of disciplinary actions.
5. The Department should provide non-sworn investigators with the authority to order and admonish sworn members during investigations.
6. The Department’s investigations should be conducted to determine if knowing violations of Department policy have occurred without reasonable excuse for non-compliance.
7. The Department should ensure it obtains evidence each of its members is on actual notice of its rules, regulations, policies and disciplinary guidelines.
8. The Department should ensure its investigators obtain all basic information, including document collection, scene visits or inspections, before conducting interviews.

9. The Department should ensure its investigators do not engage in obtaining evidence or interviews in a manner that would result in evidentiary objections.
10. The Department should ensure its investigations are conducted in a manner that prepares the case for any subsequent hearing or other legal proceeding.
11. The Department should establish benchmarks or timeframes for the completion of investigations and each step of the disciplinary process in a timely manner and should provide qualified personnel to ensure the timeframes are met.
12. The Department should adopt and enforce guidelines for how to handle obstreperous representatives.
13. The Department should adopt a guideline whereby representatives are asked to provide legal authority for their legal claims.
14. The Department should stop using “work” days when setting suspensions and should only use calendar days.
15. Proposed penalties should not be changed at *Skelly* hearings or elsewhere unless new information is discovered. Newly discovered information should not include statements of regret, remorsefulness or responsibility where there was a chance to communicate such expressions before the *Skelly* hearing.
16. The Department should place greater emphasis on conduct demonstrating remorse, regret and responsibility than oral expressions of the same.
17. Agreements to attend remedial training, particularly training on zero tolerance policies, should not be considered as mitigating and should not be the basis for negotiating a lower penalty. If training is needed it should be considered when setting the proposed penalty and should not be negotiated.
18. The Department should require advocates and investigators to use the complaint tracking system for making notes and keeping a record of the time spent on a case, instead of separate investigative files.
19. The Department should do what is necessary to adopt an appeal process for reprimands and when doing so the Department should specify the time within which an appeal of a reprimand may be taken.
20. The Department should adopt guidelines concerning what a member will be told about being charged with a crime.
21. The Department should not assist in providing or retaining representatives for those appearing at interviews, *Skelly* hearings, or other proceedings. If reasonable notice of the time, place and the right to representation has been provided, the interview, hearing or proceeding should go forward when a member appears without a representative. A clear and accurate record of what occurred in such circumstances should be maintained.

22. The Department should ensure EEO investigations are conducted by qualified EEO investigators assigned to the Professional Standards Division and should not assign such investigations to the field.
23. The Department should be required to advise, consult with and obtain the authority of the Board of Fire Commissioners on items subject to the “meet and confer” process that may impact the goals of the April 25, 2006 *Audit Action Plan*.



## NOT SUSTAINED EEO CASES

An assessment of Equal Employment Opportunity (EEO) cases where there were no sustained findings was conducted in an effort to determine if the investigations were timely, thorough and complete, and the findings were appropriately determined. The cases reviewed were limited to those where the investigation was concluded in 2008 or 2009. Although many cases were reviewed only two are reported here.

### *A Claim of Offensive Comments to Wife*

#### **Factual Background:**

On September 8, 2008, the Department received a complaint from a firefighter/paramedic alleging a chief officer made offensive comments to his wife when she was visiting his fire station while he was on a call on June 21, 2008, the chief officer had been harassing the firefighter/paramedic for a year, the chief officer had a history of such behavior, and the firefighter/paramedic's family and marriage had been affected.

When first interviewed on October 2, 2008, the wife said she was at the station having lunch, waiting for her husband to return, and while other firefighters were in the kitchen having lunch, a chief officer entered, looked at her and said, "Oh, you must have to have a pool guy because [your husband] is at work so often." Her interpretation was she had to have sex with the pool guy because her husband was gone so much. She felt humiliated and shocked and named a captain who she said reacted by making eye contact with her but said nothing. She reported knowing the chief because she met him before, had seen him 3 or 4 times, and had been introduced to him.

The captain who was reported to have made eye contact with the wife was interviewed on December 8, 2008, and said he had not heard the comment reported by the wife, or anything like it. Much of the interview dealt with work related issues, the general environment at the station, relationships of the people involved and background information.

The firefighter/paramedic's wife was interviewed a second time on December 18, 2008, after she contacted the Department to say she had been mistaken about the identity of the person who made the comment. She explained she had seen her husband in a friendly conversation with the man who made the comment and later asked her husband why he was so friendly with him. Her husband said he had been talking to a captain, not the chief officer. When her husband showed her pictures of the chief officer and captain, she said she had never seen the chief officer before. During this second interview the wife explained she and her husband did not want to pursue the matter because they no longer believed there was any malicious intent when they discovered it was a captain who made the comments.

The captain identified as having made the comments was made a subject of investigation and interviewed on January 21, 2009. The captain denied making the comments and said he was not in the kitchen at the time.

The captain identified by the wife as having reacted to the comment was re-interviewed on March 26, 2009, and said the engine crew typically, 95 percent of the time, goes out to lunch. He did not recall the newly identified captain as having made the comment.

The investigators believed there was sufficient evidence to indicate the captain made the comments alleged. The Department managers did not. The charges against the captain were not sustained. The case was closed in June 2009.

**Assessment:**

The Department properly concluded there was insufficient evidence upon which to sustain the allegations against both the chief officer and the captain. The investigation was not complete, thorough or timely.

An EEO investigator was assigned three days after receipt of the complaint which is timely. The initial interview of the wife took place almost a month after the complaint was received, and included a sworn Department advocate. It is not clear when the advocate was assigned or how long after the advocate's assignment to the case the interview took place.

While the wife said she was eating lunch at the station, and other firefighters were having lunch and visiting, she was never asked what time the comment was made. The investigators should not assume they can get the time of the incident from another source. They should make an attempt to find out what time the complaining witness or victim says the incident happened. It is important to determine if what a witness says can be confirmed by other evidence. In fact, the investigators did not have the wife establish a basic timeline of critical activities; from the time she arrived, to when her husband left on a run, when the comment was made, when her husband returned in relation to the comment being made, and when she left the station.

The wife prepared a diagram of where people were seated but was not asked how far people were seated from one another, and particularly how far she and the other firefighters were from the person she says made the comment. She was asked nothing about how loud it was in the room before, during and after the comment was made. She should have been asked to describe the other firefighters, or if she knew them. While she did identify a captain she said reacted to the comment, she was not asked how she identified him or how she knew him.

The complaint says the chief officer's conduct affected the family and the firefighter's marriage. However, the wife was asked nothing about these allegations.

The captain identified as having reacted to the comment was not interviewed until two months after the wife's interview, or three months after receipt of the complaint, which was almost six months after the date of incident. The captain was appropriately asked if he heard the comment, not just whether he heard the chief officer make the comment. Most of what was recorded during the captain's first interview was not summarized in the investigative report.

When the captain identified as a witness denied hearing the comments, and before the wife called to say she had been mistaken about the identity of the person making the comment, the Department did not interview the other firefighters she said were present at the time.

The investigation file contains a copy of the shift roster showing who was assigned to the fire station on the day of the incident. It appears the shift roster was obtained on November 3, 2008. The file also contains a copy of the unit history for the rescue ambulance the firefighter/paramedic was assigned to on the day of the incident. This document was printed on April 1, 2009, after completion of all the interviews. All such documents should be obtained at the start of the investigation, before interviews are started.

What the investigative file does not contain is a copy of the unit histories for the other units assigned to the fire station, and for the chief officer, as well as the station journal. The collection and thorough knowledge of such information at the start of the investigation is basic to conducting a complete and thorough investigation and in preparing for all interviews. Such information assists the investigators establish a timeline and identify the presence of potential witnesses and subjects at the time of the alleged wrongdoing before interviews ever begin. This in turn assists the investigator if the witness fails to testify in conformity with the records.

In this case, such information is especially important because one of the captains says the engine crew usually does not eat lunch at the station, when the wife says they were having lunch. Although the wife first said it was a chief officer who made the comment, she later said it was someone else. If the investigators had the wife specify a time or time frame for the comments, units histories would have assisted in determining if the chief officer, captain and firefighters could have been present at the time, or were on an assignment somewhere else.

During her second interview the wife said she told her firefighter/paramedic husband she had never seen the chief officer before when her husband showed her a picture of the chief officer. The investigators failed to ask the wife to reconcile this statement with saying, during her first recorded interview, she met the chief officer before, she had seen him 3 or 4 times, and had been introduced to him. The wife was not asked to describe the physical characteristics of the chief officer and the captain who she now said made the comment, such as race, age, height, weight, facial features and other characteristics to explore how she could have been confused. These are only some of the questions the wife would have been asked by the captain's defense representative or attorney had the case gone to hearing.

The September 8, 2008, complaint said the chief officer had been harassing the firefighter/paramedic for a year. The wife said she delayed even telling her husband about the comments because she did not want to cause problems at work. There is nothing in the file indicating other reasons for the delayed reporting were considered. There is nothing in the file or second interview suggesting the wife was asked anything to be sure her change in identification was not caused by harassment of or retaliation against her husband.

The interviews and investigative file contains no documentation of the date when the wife realized she made a mistake (she said it was at the station open house- but provided no date), when she first notified the Department, or what she said specifically when she told the Department she made a mistake.

Although the wife said during her interview she and her husband did not want to pursue the case any longer once she said it was a captain, and not the chief officer who made the comment, the Department continued to pursue the investigation against the captain. It is highly appropriate for the Department to have done so. However, the investigation did not attempt to reconcile the original complaint alleging the comment had an adverse impact on the firefighter/paramedic's family and marriage with the wife saying they wanted to drop the complaint because they did not consider the comment offensive since it was the captain who made the comment.

The investigative report contains a section titled, "credibility determination," which concludes the wife was believable because she provided plausible and consistent information. The credibility determination section says, "she admits to not knowing who [the chief officer] was until the day of the open house," "which implies" she did not know "what [the chief officer] looked like." "And although in her interview of December 18, 2008, [she] admits that she had never seen [the

chief officer] she consistently maintains her recollection of what was said to her”, and “there is no apparent reason for her to lie about the incident.”

The credibility determination section of the report fails to mention; 1) the wife previously told investigators in her first interview she knew who made the comments because she met the chief officer before, had seen him 3 or 4 times, and had been introduced to him, 2) the witness she identified as having reacted to the incident did not support her story, 3) the three month delay in reporting the incident was due to her husband’s frustration with what he claimed was a history of problems caused by the chief, and 4) the wife and husband were offended by the comment if made by the chief officer but not offended if made by the captain. These and other points would have been the subject of intense cross examination had the case gone to hearing.

Credibility determinations should be based on a complete investigation, should consider all of the evidence and should take into consideration all of the factors set forth in *Evidence Code*, section 780.<sup>88</sup>

The investigative report suggests and the recording of the interview confirms three investigators questioned the captain as a subject during his interview. This violates the *Firefighters Procedural Bill of Rights Act*, which permits no more than two interrogators at one time.<sup>89</sup> At the start of the interviews a sworn advocate ordered the witnesses to be truthful, provided the admonitions and asked some questions during the interviews. Most of the questions were asked by a non-sworn investigator. A second sworn advocate also asked questions.

The completion of the investigation was not timely. The case was completed on June 9, 2009, more than 9 months after the complaint was received, and a few weeks before the one-year anniversary date of the alleged incident. A month or two passed between interviews and the investigative report was not completed for two months after the last interview. There was a potential statute of limitations issue not addressed by the investigation.

It appears the Department assumed the September 8, 2008, complaint was the first notice the Department received of the alleged wrongdoing. The Department must exercise great care when the date of discovery does not match the date of the incident and should take affirmative steps to determine the *first* or earliest date of discovery when the date of discovery is not the same day as the date of incident. The one-year statute of limitations accrues when the Department first learns of alleged wrongdoing.<sup>90</sup>

In this case, there was a three-month delay in reporting the incident. During her first interview, the wife said her husband waited to make a report to the Department because he was waiting for

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<sup>88</sup> Section 780 says: Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: (a) his demeanor while testifying and the manner in which he testifies; (b) the character of his testimony; (c) the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; (d) the extent of his opportunity to perceive any matter about which he testifies; (e) his character for honesty, or veracity or their opposites; (f) the existence or nonexistence of a bias, interest, or other motive; (g) a statement previously made by him that is consistent with his testimony at the hearing; (h) a statement made by him that is inconsistent with any part of his testimony at the hearing; (i) the existence or nonexistence of any fact testified to by him; (j) his attitude toward the action in which he testifies or toward the giving of testimony; (k) his admission of untruthfulness.

<sup>89</sup> *Government Code*, section 3253(b).

<sup>90</sup> *Government Code*, section 3254(d) and City Charter 1060(a-d).

another captain to return to work. The investigation materials do not reveal an attempt was made to determine when, or if this captain was told of the incident, and if so, how long before the September 8, 2008, complaint the captain was told. The day this captain first learned of the complaint may trigger an earlier statute of limitations date. The investigative report is also silent on whether this captain learned of alleged sexual harassment and failed to report it as is required by the Department's policies.

### ***Pubic Hair on a Toothbrush Alleged***

#### **Factual Background:**

On March 17, a Department battalion office became aware of an allegation an engineer placed a pubic hair on a firefighter's toothbrush. The following day, a chief officer learned several members of a fire station were told the engineer had spoken of the incident. Before written explanations were received the battalion office was told to "stand down" and PSD would handle the investigation. The captains at the station were counseled to monitor the work environment and the engineer was given clear behavior expectations.

The investigation was assigned to the field on June 4, 2008. The firefighter reporting the incident was interviewed on August 14, 2008. He said on March 11, 2008, he was told by the engineer, in a joking manner, he placed a pubic hair on another firefighter's toothbrush the previous morning. He didn't see the engineer tampering with any of the toothbrushes or a pubic hair on any of them and had no evidence the engineer actually placed a pubic hair on the toothbrush. He did not believe it was his place to make a judgment whether the engineer was joking.

The firefighter who owned the toothbrush made reference to other immature conduct he believed the engineer engaged in so thought the engineer was capable of engaging in such conduct. He did not see something had been done to his toothbrush.

The engineer denied placing a hair on the toothbrush or otherwise tampering with it. He said he placed a hair from the sink in his mouth to win a \$10 bet on another occasion and, pointing to a toothbrush said, "There, no hair on there."

#### **Assessment:**

The Department properly concluded there was insufficient evidence to support a sustained finding based on the information contained in the written report. The interview recordings were not included in the complaint tracking system, so were not assessed, in addition to the report.

The investigation was not conducted or concluded in a timely manner. The report indicated the battalion office received notice of the incident on March 17, 2008, and the date of the incident was March 10, 2008. The investigation fails to indicate whether a station supervisor first learned of the incident before the battalion office did, or how the battalion office first learned of the claim.

Although the report says the battalion office was told to stand down because PSD would be conducting the investigation, there is nothing to indicate what, if anything, occurred from March 17, 2008, to June 4, 2008, when the investigation was reassigned to the field. The first witness was not interviewed until August 14, 2008, five months after the battalion office learned of the incident. An additional witness was interviewed two weeks later on September 1, 2008, and the

last witness two days later. The report was not prepared until February 19, 2009, or over five months after the last witness was interviewed. There is nothing in the investigation file explaining these excessive delays in completing this investigation.

## ***Findings***

The investigation of the firefighter/paramedic's complaint a chief officer made offensive comments to his wife was not thorough or complete and investigators violated the rule prohibiting more than one interrogator.

Neither investigation was conducted and concluded in a timely manner.

Neither case was well documented in the Department's complaint tracking system.

## ***Recommendations***

The following recommendations should be considered:

1. The Department should carefully analyze and note the statute of limitations at the start of an investigation and continue to analyze and collect information about the statute of limitations throughout the investigation, particularly when the date of discovery does not match the date of incident by:
  - a. Determining when and how the Department first learned of, or discovered the incident;
  - b. Take affirmative steps to investigate when and how an incident was first discovered when the date of discovery and the date of incident do not match;
  - c. Investigate possibilities the Department may have discovered alleged wrongdoing earlier than assumed; and
  - d. Treat the date of incident as the date of discovery whenever there is any doubt about the discovery date.
2. The Department should ensure all basic information such as policies, protocols, guidelines, dispatch records, unit histories station journals, training records, and all other materials of any type related to the date and time of the incident and the conduct under investigation is obtained at the start of the investigations, before interviews begin.
3. The Department's advocates, investigators and supervisors should adopt a case management process that involves early investigative reviews requiring identification of issues, allegations, policies and training requirements, evaluations of case and investigative conflicts, evaluating the statute of limitations, planning investigative strategy, determining the documents, scene visits and other work, including legal opinions, needed before interviews are conducted, the identification of witnesses and other evidence, and timelines for the completion of investigations.
4. The Department should ensure its investigations and disciplinary actions are conducted and concluded in a timely manner including:

- a. Interviewing complainants and victims within 10 days of discovering alleged misconduct;
  - b. Concluding most investigations in 90 days, and more complex investigations in 150 days, and
  - c. *Skelly* hearings should be concluded and final disciplinary action should be filed within 30 days after the member is served with a proposed penalty.
5. The Department should ensure adequate qualified staff is provided to complete thorough investigations and each step of the disciplinary process within the timeframes specified.
6. The Department should ensure investigators; investigative supervisors and investigative managers use the complaint tracking system to document case progress, communications related to the case, status reports, and similar activities.
7. The Department should ensure, investigative reports, recorded interviews, recordings of *Skelly* hearings, exhibits, and all other documents related to investigations is included in the complaint tracking system.
8. The Department should ensure investigators; investigative supervisors and investigative managers record timekeeping and a description of investigative activities in the complaint tracking system.
9. The Department should ensure investigators; investigative supervisors and investigative managers conduct investigations and prepare reports as if they were preparing a case for a legal proceeding such as a Board of Rights hearing, which includes, but is not limited to:
  - a. Collecting and analyzing all written, recorded and electronic information before interviews are conducted;
  - b. Conducting all necessary field inspections before interviews are conducted;
  - c. Asking about all allegations;
  - d. Thoroughly questioning witnesses to obtain their complete knowledge of the facts;
  - e. Resolving all discrepancies to the extent possible;
  - f. Having witnesses provide a complete timeline of activities;
  - g. Addressing anticipated defense questions and arguments; and
  - h. Obtaining admissible evidence.
10. The Department should ensure investigators fully comply with all due process requirements when conducting investigations including the *Firefighter Procedural Bill of Rights Act*, or the *Peace Officers Procedural Bill of Rights Act* if applicable.

11. The Department should ensure credibility determinations are based on complete and thorough investigations and take into consideration all of the factors set forth in *Evidence Code*, section 780.
12. The Department should ensure diagrams are properly prepared, marked and explained by witnesses when used during interviews. Diagrams should be prepared in a manner that ensures the investigator does not become a witness to what the diagram depicts or to establish a foundation for the diagram.
13. The Department should ensure interview summaries are accurate and complete.
14. The Department should provide civilian investigators with the authority to order sworn members of the Department to tell the truth and provide sworn members with the necessary admonitions when conducting interviews.
15. The Department should ensure investigators attempt to thoroughly determine all reasons for why victims and complainants delay reporting misconduct.
16. The Department should ensure investigators attempt to thoroughly determine why victims, complainants, witnesses or subjects change their prior statements or testimony, including, but not limited to whether the change was the result of hazing, harassment, retaliation or other reasons.
17. The Department should ensure investigations, and particularly EEO investigations, are conducted by appropriately qualified Professional Standards Division staff.
18. The Department's misconduct investigations should be conducted, supervised and managed by non-sworn persons with the demonstrated expertise, training and experience to conduct investigations of public safety personnel in compliance with the foregoing recommendations.

## REQUESTS FOR LEGAL ADVICE

An assessment was conducted to determine the extent to which the Professional Standards Division (PSD) sought and received timely and adequate legal advice, services, and support from the City Attorney's Office since its creation and as it continues its operations.

The assessment was conducted for a variety of reasons. PSD was created because the Department was found liable in too many employee-generated lawsuits and audits released in 2006 found the Department's disciplinary system seriously flawed. Also, those creating and managing the PSD for the first nine months to a year had no formal training or experience in the law related to employee discipline or disciplinary systems; the Department would need to construct and administer a disciplinary system that is very legalistic in nature; the employee's who become involved in the disciplinary process are often represented by union officials and attorneys who make a variety of legal claims; and the *Firefighter Procedural Bill of Rights Act*<sup>91</sup> (FBOR) setting forth an entirely new regulatory scheme governing the investigation and discipline of firefighters was enacted and became effective almost simultaneously with the creation of PSD in January 2008.

The assessment was conducted by; 1) asking for all written requests for legal service sent to the City Attorney's Office by the PSD in 2008 and 2009, 2) reviewing each written request from the Department, and 3) reviewing each response received from the City Attorney's Office. The assessment did not include a review of more informal requests for assistance. The documents provided for the assessment indicates written requests for legal service were first made in early November 2008, and continued through November 17, 2009. The Department did not provide a copy of any written requests made before November 2008.

What follows is a brief summary of the written requests for legal assistance made by the Professional Standards Division related to its work and responses by the City Attorney's Office. Recommendations to the Department appear at the end of this section.

### ***No Response From the City Attorney's Office***

The following are requests to which there has been no substantive response from the City Attorney's Office.

1. There was no response from the City Attorney's Office when the presence of an attorney was requested at interviews in an Equal Employment Opportunities (EEO) investigation on November 10, 2008.
2. A November 18, 2008, request for review of an investigative closure letter in an EEO case was sought. The case was closed when there was no response from the City Attorney's Office.
3. On January 30, 2009, the assistance of an attorney was requested in presenting the Department's case at a Board of Rights hearing where the member facing discipline was represented by an attorney. The City Attorney's Office did not respond to the request.

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<sup>91</sup> *Government Code*, section 3250 et. seq.

4. There was a February 10, 2009, request for advice concerning the release of information related to a member's termination, to which there was no response from the City Attorney's Office.
5. On November 4, 2009, the City Attorney's Office was asked to provide advice or an opinion concerning whether a sworn member of the Department could agree to a suspension in excess of 60 days as part of a settlement agreement. There has been no response.

### ***Requests Requiring Assistance from Mayor's Office***

The following are formal written requests where there was no response from the City Attorney's Office until the Mayor's Office was notified. Although the Mayor's Office intervened to request assistance, the City Attorney's Office has not provided legal advice in either case.

1. On November 12, 2008, the PSD requested an opinion concerning what constituted a Department sponsored social event as it relates to Executive Directive No. 12.<sup>92</sup> Nine months later the City Attorney's Office requested another copy of the request on July 23, 2009. Almost a week later, on July 29, 2009, the City Attorney's Office indicated the Department should request guidance from the Personnel Department, who provided a written response a week later on August 6, 2009.<sup>93</sup>
2. Subpoenas are an important investigative tool, some custodians of records have refused to produce records to the Department without a valid subpoena, and a complaint from an attorney alleging the Department engaged in violations of civil rights prompted the Department to request advice concerning the Department's power and authority to issue subpoenas on January 28, 2009. After the Mayor's Office became involved, the City Attorney's Office sought another copy of the request six months later on July 23, 2008, which was provided to the City Attorney the same day. On October 8, 2009, the City Attorney's Office said advice would be provided by early November. The Department continues to wait for the requested advice over a year after the request was made. The Department recently sent another written request for the advice.

### ***Responses from the City Attorney's Office***

The City Attorney's Office provided the following responses in reply to written requests.

1. In response to a December 9, 2008, request for advice concerning mismanagement of funds, the City Attorney's Office first met with and provided verbal and later provided written advice.
2. The City Attorney's Office immediately met with and advised the Department on a January 28, 2009, request concerning whether advocates could properly continue to represent the Department in a Board of Rights hearing.<sup>94</sup>

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<sup>92</sup> Executive Directive No. 12 sets forth the *Policy Against Discrimination in Employment Based on Sexual Orientation, Gender Identity or Gender Expression*.

<sup>93</sup> The City Attorney's Office indicates it is not uncommon for another City department to provide advice concerning the interpretation of such directives and the City Attorney's Office would normally review such directives before they were issued.

<sup>94</sup> This request is related to the facts appearing at pages 98 and 131 of this report.

3. On March 19, 2009, the City Attorney's Office was asked to respond to a subpoena seeking documents in a case under investigation. The City Attorney's Office provided a very timely response.
4. The City Attorney's Office provided immediate follow up in response to an April 14, 2009 request for advice on a First Amendment speech issue.
5. On May 20, 2009, assistance was requested in obtaining law enforcement investigative reports when a Department member was arrested in another state. The City Attorney's Office response was timely.
6. On May 29, 2009, the City Attorney's Office was requested to attend an interview where an attorney represented the subject. After two additional requests the City Attorney's Office responded shortly before the scheduled interview. The delay in responding caused cancellation of the June 10, interview and inconvenience.
7. There was another request for an attorney's attendance at an interview in a different case on June 4, 2009, and no response from the City Attorney's Office until the day of the June 17, interview.
8. On June 7, 2009, the Department sought clarification of prior oral advice indicating the filing of a signed complaint with the Fire Commission before the member was served could stop the statute of limitations. On July 16, 2009, the City Attorney's Office confirmed the prior advice but did not set forth any legal analysis or citations to legal authorities.<sup>95</sup>
9. Thirty days after a June 30, 2009, request to determine the extent to which sworn members of the Department could be investigated and disciplined in connection with a particular regulation the City Attorney's Office replied. The reply was a re-wording of the request with no further legal analysis or legal citations than what was provided in the request.
10. Within four days of an August 13, 2009, request for advice, when an outside law enforcement agency sought to interview an advocate concerning a Department investigation, the City Attorney's Office provided advice.
11. On August 18, 2009, the Department requested advice after a woman who filed a sexual harassment complaint sought to contact the engineer she claimed assaulted her to make a claim for medical bills after he had been ordered to have no contact with her. While there was a timely written response, it contained no legal analysis or citation to legal authorities. The Department sought repeated clarification of the advice given.

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<sup>95</sup> The City Attorney's advice does not provide the Department with the strongest legal position. The Department reports it relied on the advice in six cases and later had to reduce or modify the penalties in those cases because of the advice. The disciplinary action in one of those cases was recently rescinded and will be the subject of a future report.

12. The Department is confronted with numerous investigations where it is contended thousands of dollars have been stolen from employee “house funds”<sup>96</sup> and has made the following attempts to obtain assistance from the City Attorney’s Office:
- a. On August 18, 2009, the Department made a written request to the City Attorney’s Labor Section asking if the Department had the authority to develop policy and procedures related to house dues accounts. The Labor Section replied on August 27, indicating such inquiries should be directed to another section of the City Attorney’s Office, and if the answer was in the affirmative, the Department would need to meet and confer with the union before imposing such a policy.
  - b. On September 2, 2009, the Department sent an email to a deputy city attorney assigned to the other section asking if the Department can mandate policies and procedures concerning bookkeeping systems, fund expenditure guidelines and security procedures.
  - c. On September 22, 2009, the deputy city attorney was sent an email asking if she had time to review the request, to which she replied the same day, asking if the same request had been made to the Labor Section.
  - d. On September 22, 2009, the Department provided the deputy city attorney with a copy of the Labor Section’s response.
  - e. On October 1, 2009, the Department sent an email to the deputy city attorney asking if she had time to review the issue. The deputy city attorney asked the Department to place the request on a request for legal assistance form.
  - f. On October 1, 2009, the Department provided the completed form to the deputy city attorney with exactly the same information that was included in the email sent to the deputy city attorney on September 2, 2009.
  - g. On October 1, 2009, the deputy city attorney acknowledged receipt and review of the request and asked to be provided a copy of any bulletins, policies and procedures related to house dues.
  - h. October 1, 2009, the Department provided a reference to house dues in its rules and regulations, indicated it had no policies and procedures on the issue, and indicated the request to the deputy city attorney was the first step in attempting to develop such policies.
  - i. In January 2010, the deputy city attorney provided an opinion the Fire Department could not adopt a “house dues” policy. The opinion was not in writing, did not present legal analysis or citations to legal authority, and did not explain why the law permits the Police Department to adopt an extensive policy governing similar funds<sup>97</sup> and the Fire Department is not.
13. Less than two weeks after an August 20, 2009 request, the City Attorney’s Office met with the Department to discuss the Department’s potential liability for a defamatory statement made by an employee and obtain advice concerning what action, if any, the Department should take. A month later the City Attorney’s Office provided a written opinion and advice. The opinion presented legal analysis but no citations to legal authorities. The memo said, in part: an employer may be held liable for defamatory statements made in the course of employment; “California law requires a complainant to

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<sup>96</sup> “House funds” or “house dues” consist of assessments and contributions to pay the expense of such things as fire station meals, exercise equipment, office coffee and other drinks, snacks, sympathy cards, and a variety of other items.

<sup>97</sup> *Los Angeles Police Department Manual* (2008) Volume 3, Sections 340-350.

file an action for defamation within one year of publication of the allegedly defamatory statement;” and “however, the statute for filing claims for tort actions in general is two years.” The following are concerns:

- a. While recommending an investigation be conducted, the memo does not address what conduct is considered to have been undertaken in the course and scope of employment and thus attributable to the employer, which investigators should know before conducting interviews and collecting evidence; and
  - b. The discussion of the statute of limitations and claims filing requirements is confusing if not incomplete. While the statute of limitations for personal injury actions is two years pursuant to *Code of Civil Procedure*, section 335.1, and the statute of limitations for libel or slander is one year pursuant to *Code of Civil Procedure*, section 340(c); *Government Code*, section 911.2 requires the filing of a Government Tort Claim within 6 months if there is an attempt to hold the City liable for a defamatory statement made in the course and scope of employment.
14. On August 24, 2009, review of a performance contract was requested, and subsequently provided. The contract attempted to monitor a firefighter arrested three times for public intoxication in four years, including twice in four months, while employed by the Department. There is nothing in the materials provided to indicate whether the Department sought, or the City Attorney’s Office offered, an opinion concerning whether such a contract served the best legal interests of the City and Department.
  15. The City Attorney’s Office responded to a September 2, 2009, request for advice concerning who may attend interviews and *Skelly* hearings in a representative capacity with a written opinion that included legal analysis and citations.
  16. On September 3, 2009, the Department asked for advice concerning whether disciplinary actions could be based on law enforcement investigations. Initially the City Attorney’s Office said the charges could not be based solely on the results of a police investigation, but had to be based on the Fire Department’s separate investigation. A day later the City Attorney’s Office correctly advised it was appropriate to bring charges against a member based on statements contained in the police report and evidence obtained from the police investigation.
  17. On October 14, 2009, the Department requested an opinion concerning the order in which Board of Rights hearings may or should be presented.<sup>98</sup> On February 2, 2010, the City Attorney’s Office provided verbal advice indicating the Department would need criteria to prioritize the order of hearings; that the Department should wait for a further written response from the City Attorney’s Office and the City Attorney’s Office would provide the Fire Department with a copy of an exemplar policy from the Police Department. No further response has been provided to the Fire Department since February 2, 2010.
  18. On October 28, 2009, the Department requested advice in connection with a claim a member was told to obtain a restraining order. The advice was provided.

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<sup>98</sup> The Department has multiple Board of Rights cases pending that are months old. Excessive delays in bringing such cases to hearing may expose the Department to having to defend motions to dismiss for failure to prosecute. This report expresses no opinion about the merit of such motions.

19. A criminal defense attorney for a firefighter prosecuted for a crime attempted to obtain the Department's pending administrative investigation. On November 2, 2009, the Department requested assistance in evaluating whether the City had standing to object to an attempt to obtain the Department's open and pending investigation. The City Attorney's Office initial response was, "its not our fight until served with a subpoena."
20. On November 17, 2009, the Department requested advice after a subpoena was received from a criminal defense attorney attempting to obtain materials obtained during an administrative investigation. The City Attorney's Office initially advised producing all materials, although the attorney seeking the files acknowledged not being entitled to all of the materials in his written pleadings. When questioned by the Department, the City Attorney's Office agreed only those materials relied on in bringing charges should be produced. Later, the City Attorney's Office advised providing the District Attorney's Office with the Department's file materials without a subpoena. When questioned by the Department about this advice, the City Attorney's Office agreed the materials should not be released without a subpoena.
21. On November 17, 2009, the Department requested advice on whether a plea of nolo contendere in misdemeanor cases could serve as the sole basis for disciplining members. The City Attorney's Office provided a written response with citations to legal authorities.

### ***Findings***

The Professional Standards Division did not begin making written requests for legal advice to the City Attorney's Office until November 2008.

The Department does not receive timely and adequate legal services from the City Attorney's Office on a consistent basis.

While there has been a marked increase in the written responses with legal analysis and authorities since the new City Attorney took office, the Department continues to receive opinions and advice without legal analysis and citations to legal authorities.

Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when requested to do so by any City officer or board.

### ***Recommendations***

The Professional Standards Division and the Department require competent and timely legal services. Therefore, the following is recommended:

1. The Board of Fire Commissioners and Department should adopt and adhere to a client-attorney model and philosophy whereby the Board and Department are the clients who provide direction and make decisions and the City Attorney provides prompt legal services, advice and opinions without making decisions or providing supervisory or management direction.
2. The Department should insist on a single point of contact with the City Attorney's Office when seeking legal service so Department members are not required to find the person in the City Attorney's Office, or elsewhere, who can answer their questions.

3. The Department should adopt a policy of requiring the City Attorney's Office to provide written advice or formal opinions when appropriate, with legal analysis and citations to legal authorities, in response to its requests for legal advice and opinions.
4. The Department should quickly elevate poor service issues, the failure to provide timely legal services, and quality control issues to City Attorney managers and executives as they occur.
5. The Department should provide the Board of Fire Commissioners and the Independent Assessor with a report each month concerning any request for legal assistance, advice or opinion to which a timely, thorough, complete and adequate response has not been provided.
6. The Department should request the City Attorney's Office provide written advice with legal analysis and citations to legal authority explaining why the Fire Department may not adopt a "house dues" policy and should request the written advice be provided in 15 calendar days.



## ADMINISTRATIVE CASES INVOLVING CRIMINAL CONDUCT

Cases involving both administrative and potentially criminal misconduct were reviewed because they often present complicated conflict issues and other investigative challenges. The cases reviewed were limited to those where the alleged misconduct occurred since the *Firefighters Procedural Bill of Rights Act* became effective on January 1, 2008, and the disciplinary action has been concluded. Three cases are included in this review.

An employee may be ordered to give truthful testimony during an administrative investigation under the threat of being fired for failing to do so.<sup>99</sup> Such compelled testimony may not be used at any criminal proceeding.<sup>100</sup> The Fifth Amendment prohibits criminal investigations and prosecutions from being “tainted” by compelled testimony, either directly or indirectly.<sup>101</sup>

A firefighter interrogated by law enforcement from another agency on a criminal matter is not generally entitled to the protections of the *Firefighter Procedural Bill of Rights Act* (FBOR). However, the protections may apply when the Fire Department engages in significant active involvement or assistance in another agency’s criminal investigation, such as ordering its firefighters to talk with an outside law enforcement agency.<sup>102</sup>

Although the *Firefighters Procedural Bill of Rights Act* (FBOR) is very similar to the *Public Safety Officers Procedural Bill of Rights Act*, it contains a special requirement for firefighters not specified for peace officers. The FBOR provides that before a firefighter can be compelled to answer questions, the Department “shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation.”<sup>103</sup>

### *Soliciting Prostitution*

#### **Factual Background:**

At mid-day on October 13, 2008, a police officer watched a known prostitute and intravenous heroin user he previously arrested “wave” down a truck he then saw pull into a fast food restaurant’s public parking lot. The prostitute got in the cab. Shortly thereafter, the officer approached the truck, startled the two occupants and saw the prostitute sit back on the passenger side of the truck.

The officer saw the male driver, later identified as an off duty firefighter/paramedic, with his pants and underwear down around his ankles, with his t-shirt pulled down to cover his “private area.” The officer did not see an actual sex act or the firefighter/paramedic’s genitals exposed. After the prostitute was removed from the truck she was found with a needle.

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<sup>99</sup> *Lybarger v. City of Los Angeles* (1985) 40 C3d 822.

<sup>100</sup> *Lybarger*, 40 C3d at 827 citing *Lefkowitz v. Turley* (1973) 414 US 70, 77-79; *Garrity v. New Jersey* (1967) 385 US 493, 500

<sup>101</sup> Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U.L. Review 1309 (2001). The United States District Court for the District of Columbia issued its Memorandum Opinion concerning these very issues in Criminal Action No.: 08-0360 (RMU), the so called “Blackwater” case after this review was initiated.

<sup>102</sup> *California Correctional Peace Officers Association v. State of California* (2000) 82 CA4th 294.

<sup>103</sup> *Government Code*, section 3253(e)(1).

The police officer did not arrest or cite the firefighter with a crime at the time. His superiors later told the officer the firefighter/paramedic could be charged with lewd conduct. On January 12, 2009, the police department where this incident happened notified the Fire Department and provided a police report concerning the incident.

When interviewed on February 7, 2009, the police officer told Department investigators he did not know if criminal charges would be filed against the firefighter/paramedic. A Department investigator said he would check with the officer's lieutenant again later to see if charges had been or would be filed.

The firefighter/paramedic was interviewed on February 17, 2009, and ordered to provide information concerning the incident. He said he pulled into the parking lot intending to get lunch and was approached by the woman who asked for a ride. Once in the truck she solicited him for prostitution and he said yes. The firefighter/paramedic said the officer caught him with his pants and underwear down around his knees.

The firefighter/paramedic confirmed the accuracy of the police report indicating he was very cooperative and ashamed. At the end of the interview he said he was ashamed, sorry he brought discredit to the Department, that in his years on the job he had no prior record of discipline or of even a reprimand, had never been in trouble for something like this before, had satisfactory to excellent performance evaluations and had one prior specialty assignment.

The March 24, 2009, first draft of proposed disciplinary action noted two charges of misconduct including; 1) soliciting a prostitute and performing a lewd and lascivious act in public, and 2) bringing discredit to the Department when detained for solicitation of a prostitute and performing a lewd and lascivious act in public. The only penalty guideline offense cited was "bringing discredit to the Department" with a penalty range of verbal warning to 15-days suspension. A 5-working<sup>104</sup> (2.5-calendar) days suspension was proposed.

The proposed disciplinary action was revised on April 2, 2009, to cite a single penalty guideline offense of "committing an act of lewd conduct" with a penalty range of 6 to 30 days suspension. A 10-working (5-calendar) days suspension was recommended, which was approved on April 27, 2009. The memo said criminal charges had not been filed as of that date. The firefighter/paramedic was served with a memo notifying him of the 10-working (5-calendar) days suspension on May 14, 2009.

A memo dated July 15, 2009, and approved a day later, recommended a 6-working (3-calendar) days suspension. The firefighter/paramedic was served with a new notice. The investigative file contains no information explaining why the discipline was reduced from a 10-working (5-calendar) days suspension. The memo again said no criminal charges had been filed at that time.

A September 29, 2009, *Skelly* hearing was held which resulted in a penalty of a 6-working (3-calendar) days suspension with 3-working (1.5 calendar) days held in abeyance on condition the firefighter/paramedic attend an 8-hour training class on decision-making. This action was taken because the firefighter/paramedic told the *Skelly* officer he took responsibility for his actions, was extremely remorseful, and said his actions were wrong. These factors were considered as mitigation.

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<sup>104</sup> The Department defines a "working" day for a firefighter assigned to platoon duty as 12-hours.

During the *Skelly* hearing it was indicated the Department would again check with the criminal law authorities to see if criminal charges had been filed.

### **Assessment:**

Department field investigators, who obtained a compelled statement from the firefighter/paramedic, those reviewing the administrative investigation, including the compelled statement and those conducting the *Skelly* hearing, who should have reviewed the compelled statement in preparation for the hearing, all spoke of checking with police or prosecutors to determine the status of a criminal filing against the firefighter/paramedic. Those who have obtained or who have knowledge of compelled testimony should not communicate with police or prosecutors about the status of criminal charges involving the same conduct because such contacts may “taint” a criminal case.<sup>105</sup>

Those with knowledge of compelled testimony communicating with police and prosecutors create an unreasonable risk the criminal prosecutor may have to prove, at a pre-trial hearing, that all evidence used in deciding to file charges, and prosecute the case, has been derived from sources wholly independent of the compelled testimony.<sup>106</sup> This can be an extremely difficult burden to meet. Department personnel involved in the disciplinary process should not engage in any conduct that may result in an inability to file and prosecute criminal charges, or which may result in a pre-trial *Kastigar* hearing.

The Department’s records and investigative files provide no indication criminal charges were ever filed. No evidence was discovered indicating contacts by Department personnel with law enforcement or criminal prosecutors prevented the filing of criminal charges.<sup>107</sup>

Proving all of the Department’s charges against the firefighter/paramedic at a disciplinary hearing would be difficult because interviews were not thorough and complete. The Department’s investigators failed to obtain admissible evidence to prove what might be assumed from the police report. The police report itself is not admissible evidence to prove misconduct and even if it was, did not contain sufficient detailed information to support some of the Department’s allegations. Assuming the Department’s allegations were true, the penalty did not comply with the disciplinary guidelines for sworn personnel. There was an excessive delay in completing the case.

Department investigators in the field questioned the police officer about how far he was from the pick up truck when he made his observations and had him confirm other facts. However, they did not have the police officer indicate the time of day, establish a timeline of events he observed, or paint a verbal picture, or appropriately use a diagram, to show the pick up truck’s route of travel or where it was parked in relation to the fast food restaurant, other buildings, vehicles and pedestrians, or if children were in the area.

The interview of the firefighter/paramedic was less than 15 minutes long, completely inadequate and could not be characterized as an interrogation. There was no attempt to have him describe the area in which his contact with the prostitute took place, or what she looked like, although the

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<sup>105</sup> *Id.*

<sup>106</sup> *Kastigar v. United States*, 406 US 441 (1972).

<sup>107</sup> The police and prosecutors were not contacted to confirm no charges were filed or to determine if Department employees prevented the filing of criminal charges because to do so would result in a potential *Kastigar* violation given the compelled testimony was reviewed in the course of this assessment.

police officer provided important information in that regard. There was no detailed questioning about when, where and at what time the firefighter/paramedic first saw the prostitute. The investigators failed to have the firefighter/paramedic establish a timeline of his activities. No effort was made to determine where the firefighter lived in relation to where the contact with the prostitute took place or where the store the firefighter claims to have been driving to was located.

There was no attempt to reconcile differences between what the officer reported seeing and what the firefighter/paramedic said occurred in terms of how and why he was in the parking lot where this incident occurred. He was not asked to explain why he let the woman get in his truck given his claim he stopped to get lunch. Nothing was asked about the public nature of the incident.

Although the Department later charged the firefighter/paramedic with committing a lewd and lascivious act in public, the officer was not able to say he witnessed a sex act and the investigator's failed to ask the firefighter/paramedic any questions about or confirm the accuracy of the police report which said the officer asked him what he was doing in the truck, and his reported reply, "you know." There was no attempt to determine what he meant or was referring to by his statement, "you know." While it might be assumed and later argued what was meant by the answer "you know," an assumption is no substitute for direct evidence, or an admission, in legal proceedings such as a Board of Rights.

The firefighter/paramedic said he accepted a solicitation for prostitution. However, this admission still does not clearly establish the facts necessary to support all of the Department's charges. The firefighter was asked no detailed questions about the words spoken, what was paid, the form of payment, what was agreed to and what actual sex act occurred, if any. The firefighter was not asked to explain what was taking place in the truck as the police officer walked up.

There was no attempt to determine if a firefighter/paramedic with patient care responsibilities was engaging in unprotected sexual contact with a known prostitute and intravenous heroin user. While there may have been some circumstantial evidence to suggest sexual activity took place, the Department's investigation failed to obtain an admission, or establish direct evidence to support the Department's charge of committing a lewd and lascivious act in public.

With a leading question, the investigators asked the firefighter/paramedic to confirm his comments to the police officer about being depressed and making a stupid mistake, instead of just asking the firefighter/paramedic to simply recount what was said. The firefighter was asked more questions about facts that could support a mitigation of his conduct than about what actually happened.

The firefighter/paramedic's interview occurred on February 17, 2009, which appears to have concluded the investigative activity. The *Skelly* hearing did not take place for another seven months, which appears to be an excessively long delay.

Inaccurate and incomplete reviews of the investigation materials were prepared and penalty recommendations were revised, first up, then down. The investigative file fails to explain why one draft penalty recommendation was first proposed at five days suspension then ten days, and then lowered to 6 days. The penalty range for the guideline offense cited and approved before going to a *Skelly* hearing was a minimum 6 to a maximum 30-days suspension.<sup>108</sup> Thus, the Department proposed a penalty at the very bottom of the range.

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<sup>108</sup> The penalty guidelines for non-sworn employees of both the Fire Department and the Los Angeles Police Department call for a penalty range of written reprimand to dismissal for similar misconduct. The

While the Department considered the firefighter/paramedic's expression of shame and remorse as mitigating factors at his *Skelly* hearing, there were aggravating facts including accepting a solicitation for sex, being caught by police at mid-day, in a public parking lot with pants down around his knees or ankles, the potential the firefighter/paramedic with regular patient care responsibilities was having unprotected sex with a known intravenous heroin user, the offense was intentional, much discredit was brought to the Department, police said there was the potential for criminal prosecution, the subject of the discipline was facing multiple charges of misconduct, he should have known better, and there was no excuse for his behavior.

All of the mitigating information cited at the *Skelly* hearing to support holding 3 days of a 6 working days suspension in abeyance was known and should have been considered when setting the penalty before the *Skelly* hearing was held.

The firefighter/paramedic was the first member of the Department offered what is referred to as "education based discipline," which, as was explained at his *Skelly* hearing, requires attending an 8-hour class on decision-making without being paid by the Department. The Department offered, approved and signed an agreement permitting suspension days be held in abeyance and class attendance although such a program has never been reviewed or discussed by the Stakeholders or Board of Fire Commissioners, has not been the subject of the "meet and confer" process, and is not mentioned in the Department's disciplinary guidelines, or in any other Department policy.

While "education based discipline" may have merit, in appropriate circumstances, there are some very basic issues to be addressed before beginning such a program. A few of them include; 1) how would such a program fit in the Department's disciplinary system, 2) what conduct or offenses would be eligible and on what basis, 3) when is it most advantageous in a disciplinary process to offer such a disciplinary alternative, 4) what classes should be required in satisfaction of the disciplinary action, 5) what record keeping and documentation of the process should be required to effectuate the education and document the personnel file, 6) should other classes be required in addition to or as a substitute for a decision making class in light of the misconduct engaged in, and 7) what is the ratio of suspension days that can be substituted for education based discipline days.

The personnel file has not been examined to ensure the suspension was served and the requirements of the agreement to attend training on decision making has been met because personnel files have not been made available for review.<sup>109</sup>

Finally, the Department should give serious consideration to whether offering and approving a firefighter/paramedic with patient care responsibilities, who the police found in a public parking lot of a fast food restaurant in his truck at mid-day, with his pants down around his ankles, with a known prostitute and intravenous heroin user, a class in decision-making is appropriate.<sup>110</sup>

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guidelines for sworn employees of the LAPD call for a penalty range of 15 days suspension to a Board of Rights and dismissal for similar misconduct. Thus, the potential penalty for similar misconduct engaged in by non-sworn Fire Department employees and all employees of the LAPD are more severe than the penalties for the sworn members of the Fire Department.

<sup>109</sup> The personnel files have not been reviewed for the reasons set forth in footnote 45.

<sup>110</sup> The Los Angeles County Sheriff Department's June 9, 2009, *Guidelines for Discipline and Education Based Alternatives* require more than a decision making class for committing a lewd act in public. The Department reports education based discipline was only imposed in this and one other case.

## ***Theft of Employee Funds***

### **Factual Background:**

Between July and September 2007, the new treasurer of an employee benefit fund discovered several suspicious purchase transactions, cash withdrawals and checks written to the former treasurer of the fund for November 2006 to July 2007. The fund had been established to provide support to sick and injured employees and their families. The fund also sponsors the annual Christmas breakfast for employees. Annual employee dues, fundraisers and the sale of vending products support the fund. On July 2, 2008, the division where the suspicious activities took place requested an investigation.

After the fire chief approved proceeding with an administrative investigation on July 15, 2008, the case was referred to another bureau, rather than to the Professional Standards Division (PSD), for investigation. The PSD took over the case on December 15, 2008, when the bureau said it lacked the resources necessary to conduct an investigation. No investigative activity occurred during the time the case was assigned to the bureau.

On the day the systems analyst was notified she was the subject of an administrative investigation looking into her financial transactions between September 2006 and July 2007, her access to certain databases was limited to ensure the investigation was not compromised. A few days later the systems analyst received a direct order to provide fund documents in her possession and to identify anyone who controlled documents not in her possession. She provided limited information and indicated she had thrown certain documents away.

The systems analyst was offered the opportunity to provide a voluntary interview, was advised she was free not to answer any questions, her refusal to voluntarily participate in an administrative interview would not be used against her, she was free to leave at any time, and if she did submit to a voluntary interview, the interview would be submitted to law enforcement should a criminal referral be made. These statements were made to her in writing and recorded orally.

The voluntary interview and investigation provided substantial evidence the systems analyst engaged in many improper financial transactions for her personal benefit using benefit funds and had been dishonest in her statements to the Department. The total sum of 64 questionable loans and transactions was \$8,498.55. She received notice she was to be dismissed and resigned her position with the City before her *Skelly* hearing was held.

### **Assessment:**

There was an unreasonable delay of six months in getting the investigation started. However, once the investigation was assigned to the PSD it was completed in approximately three and a half months and is in fact quite excellent. This is particularly noteworthy given the large volume of documents that had to be reviewed in preparation for the interviews of 14 witnesses and the subject, as well as the additional investigation that was conducted.

The background preparation and investigation, the interviews of witnesses and the systems analyst were all thorough and detailed as to each suspected transaction. The investigation was

meticulously documented in a thorough, well-organized and comprehensive report, with clear references to the documentary evidence. Detailed information about the point of sale for the various transactions in relation to the analyst's home was provided.

Not only was there no evidence of investigative conflicts, there was substantial evidence the Department took affirmative and careful steps to ensure there were no conflicts. No compelled testimony was obtained that could taint a criminal investigation or prosecution because the Department went to great lengths to be sure the systems analyst provided a knowingly voluntary statement. The Fire Department carefully explained to the Police Department that it sought an independent review, evaluation and adjudication of the investigation by the Police Department, free of any input or influence by the Fire Department.<sup>111</sup> It also pointed out the limitations on investigative avenues available to the Fire Department and suggested additional areas that needed further investigation.

The non-sworn systems analyst was served notice she was to be dismissed in accordance with the Civil Service disciplinary guidelines. The thorough and detailed investigation left her no alternative but to resign before her *Skelly* hearing. Restitution has not been sought. Other cases indicate sworn members of the Department may not be dismissed for similar theft offenses given how the current disciplinary guidelines for sworn members are written and applied.<sup>112</sup>

On July 6, 2009, the City Attorney's Office rejected filing a criminal complaint against the former treasurer indicating the 2006-2007 allegations were reported to the Police Department on February 24, 2009, and "on these facts, we are unable to justify the pre-filing delay pursuant to *Peo. v. Ross* and *Peo. v. Rost*." Further legal citation was not provided to assist in locating these cases. Further explanation was not provided to assist in determining whether a "pre-filing delay" would result in prejudice against the defendant or the loss of exculpatory evidence. No further information was provided in the City Attorney's rejection which would assist in determining if it would have been appropriate to file the criminal charges and require the defendant to raise the issue as a defense.

## ***Bribery***

### **Factual Background:**

On November 21, 2008, the owner of a care facility went to her local fire station with information about conditions at her facility. The firefighter advised she should contact the fire inspector assigned to her facility and provided the name of the inspector. The owner became upset and said she had given money to the inspector for services at her facility that were never completed.

After the Professional Standards Division (PSD) confirmed the validity of the allegations by interviewing the owner, the case was referred to the Los Angeles Police Department (LAPD) for criminal investigation. On January 12, 2009, the LAPD set up surveillance and audio equipment

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<sup>111</sup> As a non-sworn member of the Department the systems analyst was not entitled to the protections of the *Firefighter Procedural Bill of Rights Act*.

<sup>112</sup> The 2006 disciplinary guidelines recommended by the Stakeholders and approved by the Board of Fire Commissioners call for a 16-days suspension to dismissal for taking the property of another although a deputy city attorney recommended on November 15, 2006, to widen the range of discipline or further clarify the offense. The October 28, 2008, Department/UFLAC guidelines call for a range of reprimand to dismissal for sworn members of the Department who take the property of another. Disciplinary cases involving sworn members accused of theft have not yet been concluded and will be reported in the future.

at the facility and the owner called the fire inspector to indicate she wanted to increase the capacity of her facility. The fire inspector agreed to meet the owner at her facility that day.

Once he arrived at the facility the fire inspector agreed to approve the increase in capacity for a \$1,000 charge. He accepted five \$100 bills that had been photocopied by the LAPD and agreed to accept the \$500 balance later. The fire inspector then provided the owner a Fire Clearance Verification Report. This transaction was recorded on the audio and video equipment.

As the fire inspector exited the front of the facility he was arrested and later booked for committing the crime of Commercial Bribery in violation of *Penal Code* section 641.3(a). The five \$100 bills were recovered and placed in evidence. The fire inspector waived his *Miranda* rights and provided a full confession. This interview was recorded.

It was recommended the fire inspector be referred to a Board of Rights. On March 4, 2009, the fire inspector, his attorney and union representative attended his *Skelly* hearing at which time they requested the Department conduct an administrative investigation.<sup>113</sup> The request was properly denied and later the same day the Department approved referring the fire inspector to a Board of Rights. There was an order to relieve him from duty without pay pending the decision of the Board of Rights. The investigation file contains a copy of a certification indicating that on March 4, 2009, the inspector was served with a notice indicating he was relieved from duty. There is also a memo indicating the personnel and accounting sections were to be notified of the inspector's relief from duty.

On July 21, 2009, the Public Integrity Division of the Los Angeles County District Attorney's Office filed a criminal complaint in Superior Court alleging eight felony crimes. On August 3, 2009, the District Attorney advised the Fire Department, "the mere existence of these pending charges is *Brady*<sup>114</sup> material" and:

"...must be disclosed to the defense in two instances: (1) in currently pending cases where [the fire inspector] is a material witness on the issue of guilt or punishment; and (2) in closed cases in which he testified as a material witness at trial on the issue of guilt or punishment."

The fire inspector's pension application was approved on September 12, 2009, and the Board of Rights concluded on October 26, 2009.

### **Assessment:**

Potential conflicts between criminal and administrative investigations were avoided by referring the case to the Police Department for a criminal investigation before proceeding with the disciplinary case. The Department held off obtaining a compelled statement while the criminal investigation was conducted. The manner in which the referral was made did not result in causing conflicts. This an excellent way to proceed so long as there are no extenuating circumstances, including the statute of limitations.

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<sup>113</sup> Initially the City Attorney's Office advised the Department disciplinary charges could not be based solely on the results of the police investigation, but had to be based on the results of the Department's independent investigation. This advice was later corrected to indicate it was appropriate to bring charges against a member based on statements contained in the police report and evidence obtained from the police investigation.

<sup>114</sup> *Brady v. Maryland*, 373 US 83 (1963).

The Department properly relied on the evidence cited in the criminal investigation report in proceeding with disciplinary action. The criminal investigation resulted in a substantial amount of evidence upon which disciplinary action could be based so no compelled statement was needed.

The misconduct occurred on November 21, 2008, the *Skelly* hearing took place on March 4, 2009, and the Board of Rights proceedings were concluded on October 26, 2009, almost a full year after the misconduct. There is a certification showing the fire inspector was served with a notice relieving him from duty on March 4, 2009. An independent assessment has not been conducted to confirm when relief from duty without pay became effective in the almost one year between the November 21, 2008, arrest and the fire inspector's September 2009 retirement or how his retirement was affected, if at all, by the relief from duty because the Department's personnel files and payroll records have not been made available.<sup>115</sup>

## ***Findings***

The prior Fire Chief took the strong, appropriate and commendable position that suspected criminal conduct was to be referred to an appropriate law enforcement agency for an investigation of the potential criminal conduct.

The Department has no written policies or procedures to provide guidance involving potential administrative and criminal law conflicts.

The City Attorney's Office has not performed a review or audit to determine if the Department has policies and procedures concerning, and has not provided recommendations for the adoption of basic policies and procedures related to, the Constitutional conflicts that exist between administrative disciplinary investigations involving criminal conduct when the Professional Standards Division was created over two years ago, or since.

The Department has been provided no legal advice, assistance or training by the City Attorney's Office involving administrative and criminal law investigative conflicts since the Professional Standards Division was created over two years ago.

The City Attorney's Office has not provided any advice to the Department or its Professional Standards Division on how to conduct investigations in compliance with the immunity language of *Government Code*, section 3253(e)(1) since the statute became effective on January 1, 2008.<sup>116</sup>

The primary reason the Department was able to avoid conflicts in two of the cases reviewed was due to the internal training and supervision provided by a knowledgeable non-sworn manager.

There were excessive delays in concluding investigations and disciplinary actions in the cases reviewed.

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<sup>115</sup> The personnel files have not been reviewed for the reasons set forth in footnote 45.

<sup>116</sup> In December 2009, two attorneys from the City Attorney's Office separately provided the Department with a copy of a news article concerning the immunity provision without providing advice on how the rule should be applied or asking if the Department needed assistance implementing the rule. On February 3, 2010, the Department requested the City Attorney's Office provide formal advice on how to comply with the statutory requirement.

The Department has demonstrated it can conduct excellent and timely investigations once a qualified investigator is assigned.

### ***Recommendations***

The following recommendations should be considered.

1. The Department should adopt and comply with written guidelines concerning how disciplinary cases involving criminal conduct are to be handled so conflicts are avoided.
2. The Department should ensure investigators, supervisors and managers are knowledgeable about criminal and administrative conflicts before assignment to an investigation.
3. The Department should ensure its investigators, supervisors and managers involved in the disciplinary process are trained in and comply with guidelines adopted in an attempt to avoid conflicts between administrative and criminal investigations.
4. The Department should ensure it has the ability to conduct administrative investigations and contemporaneously monitor criminal investigations without conflict between the two separate cases, when necessary.
5. The Department should not assign alleged misconduct that involves law enforcement action to the field for an administrative investigation.
6. The Department should ensure its non-sworn supervisors and managers have the authority to supervise and manage sworn staff.
7. The Department should insist the City Attorney's Office provide timely written advice with legal analysis and citations to legal authorities concerning how the Department should satisfy the immunity language of *Government Code*, section 3253(e)(1).<sup>117</sup>
8. The Department should seek a legislative solution that deletes the immunity language of section 3253(e)(1) of the *Government Code* so it mirrors the language of the *Public Safety Officers Procedural Bill of Rights Act*.
9. The Department should ensure those conducting and supervising investigations understand the admissibility of such things as police reports and the information such reports contain, as well as the ability to recognize the sufficiency and insufficiency of information contained in such reports to support disciplinary action.
10. The Department should place a greater emphasis on employing non-sworn personnel who have the demonstrated expertise, experience and training to conduct, supervise and manage a wide range of investigations, setting proposed disciplinary penalties and prosecuting disciplinary cases involving public safety personnel.

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<sup>117</sup> Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when requested to do so by any City officer or board. The City Attorney's Office explains there is a difference between advice and opinions; the latter being more formal.

11. The Department should ensure disciplinary action is actually supported by facts that can be established at a Board of Rights by a preponderance of the evidence.
12. The Department should reduce field investigations to the greatest extent possible.
13. The Department should adopt a rigorous review of completed investigations by investigation supervisors to ensure they are complete, thorough and legally sufficient to sustain disciplinary action if warranted. Incomplete investigations should be returned for further investigation.
14. The Department should adopt a practice of asking union representatives for legal authority to support their claims and assertions such as the claim disciplinary action cannot take place on the basis of the evidence set forth in a police report.
15. The Department should establish timeframes for the initial interviews of victims and complainants, completion of investigations and each step of the subsequent disciplinary process and the Department should provide qualified staff to ensure the timeframes are met.
16. Before offering, ordering or agreeing to education based discipline, the Department should adopt policies and procedures governing education based discipline, if approved by the Stakeholders and the Board of Fire Commissioners,<sup>118</sup> that address at least the following issues:
  - a. How would such a program fit in the Department's disciplinary system;
  - b. What conduct or offenses would be eligible and on what basis;
  - c. When is it most advantageous in a disciplinary process to offer such a disciplinary alternative;
  - d. What classes should be required in satisfaction of the misconduct and disciplinary action;
  - e. What record keeping and documentation of the process should be required to effectuate the education or training and document the personnel file;
  - f. Should other classes be required in addition to or as a substitute for a decision making class in light of the misconduct engaged in; and
  - g. What is the ratio of suspension days that can be substituted for education based discipline days.
17. The Department should continue to refer suspected criminal conduct to appropriate law enforcement agencies for investigation of potential criminal conduct.

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<sup>118</sup> The Department should determine if education based discipline is subject to the “meet and confer” process.”



## ***SKELLY PROCEDURAL DUE PROCESS***

In *Skelly*<sup>119</sup> the California Supreme Court held that to satisfy Constitutional due process standards an agency considering disciplinary action against a permanent civil service employee must provide the employee with certain pre-removal safeguards including; 1) notice of the proposed action, 2) the reasons therefore, 3) a copy of the charges and materials upon which the action is based, and 4) the right to respond, either orally or in writing, to the authority initially imposing discipline, all before the disciplinary action is effectuated. Therefore, the Department holds an informal pre-disciplinary *Skelly* hearing so employees who have passed probation may respond to the proposed discipline before any disciplinary action is taken.<sup>120</sup>

An assessment was conducted to determine if the Department appropriately complies with the *Skelly* due process requirement of providing a pre-disciplinary hearing. The assessment was conducted by reviewing *Skelly* materials from approximately 40 disciplinary files adjudicated during 2008 and 2009, reviewing written summaries of *Skelly* hearings held on October 21, 1999, October 24, 2000, and September 28, 2004, a review of responses to basic questions concerning the Department's *Skelly* process, and interviews.

### ***Factual Background***

During a Board of Rights hearing the chief officer who initially decided a firefighter should be dismissed, signed the charging document alleging a violation of Department rules and presided as the *Skelly* officer testified he was not aware he was supposed to be a neutral party as the *Skelly* officer.

In another case, a chief officer was charged with presenting a false written report to a superior officer. The same superior officer sustained the charges, decided the proposed penalty, signed the formal charging complaint, acted as the *Skelly* officer and decided to adopt the penalty he previously proposed, although he was the direct victim of the dishonesty.

In a third case, a chief officer serving as the *Skelly* officer at a fire captain's *Skelly* hearing later said he had no training on the duties and responsibilities of a *Skelly* officer. During the hearing the *Skelly* officer asked the fire captain charged with misconduct questions that should have been asked during the investigation including whether the captain felt as though he violated Department policy.

In an Equal Employment Opportunity case, the chief officer who decided to sustain charges and approved the penalty conducted the *Skelly* hearing at which time a firefighter questioned the sufficiency of the proof against him set forth by the investigation. After taking a break in the hearing the *Skelly* officer pointed out several areas of the report he believed supported a sustained finding. The *Skelly* officer also told the firefighter that as he read the charge the firefighter would need to say if he concurred or not. If he concurred, the days off would be implemented, if he did not concur the firefighter would go to a Board of Rights.

In another case, a firefighter was asked to either concur or not concur as each of the charges was read at the end of the *Skelly* hearing. When the firefighter said he did not concur with the third

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<sup>119</sup> *Skelly v. State Personnel Board* (1975) 15 C3d 194.

<sup>120</sup> Employees who have not passed probation do not have *Skelly* rights but may have a right to a "name clearing" or "liberty interest" hearing. *Lubey v. City and County of San Francisco* (1979) 98 CA3d 340.

and fourth charges he was asked if he could explain failing to concur with the third and fourth charges.

The *Skelly* hearing recordings and file materials in many additional cases, and conversations with members of the Department about the *Skelly* process, consistently reveal the following:

1. Both the chief officer who *recommends* disciplinary charges and the penalty as well as the chief officer who *decides* what charges should be sustained and the level of penalty regularly attend the *Skelly* hearing together and confer with one another during a break in the hearing about a disposition of the case as a result of the information presented at the hearing;
2. The chief officer who *decides* to sustain charges, *decides* the initial penalty and *signs* the charges usually presides as the *Skelly* officer;
3. There were occasions when the Department automatically scheduled a *Skelly* hearing as if it is a required step preceding the imposition of a penalty;
4. In addition to asking if the affected employee understands the charges, the *Skelly* officer regularly asks the employee to explain their conduct, if they concur with the charges, and if they do not concur are asked to explain why;
5. The *Skelly* officer often enters into settlement negotiations with the member accused of misconduct during the *Skelly* hearing;
6. An agreement by the sworn member to attend training for violating a “zero tolerance” policy is considered a mitigating factor and basis for reducing the proposed penalty at a *Skelly* hearing; and
7. Penalties are lowered at the *Skelly* hearing when a sworn member expresses regret and remorse even when the member’s expressions of regret and remorse are noted in the materials reviewed in setting the pre-*Skelly* penalty.

## ***Assessment***

The manner in which the Department currently conducts pre-disciplinary *Skelly* hearings is very similar to how *Skelly* hearings were held more than ten years ago. However, City Personnel Department policies clearly suggest the Fire Department’s *Skelly* safeguards are inadequate. The City of Los Angeles Personnel Department policies state in part:

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

“A reasonably impartial and uninvolved reviewer, who possesses the authority to recommend a final disposition of the matter, reviews both sides of the case and makes a

recommendation to the appointing authority. The reviewer should not be the same person who investigated the incident(s) which form the basis for the proposed discipline.”<sup>121</sup>

Courts have held a violation occurs when the same person who originally imposed the discipline also reviews that decision.<sup>122</sup> Impartiality means the decision maker cannot be embroiled in the controversy to be decided.<sup>123</sup> An employee who proves a *Skelly* violation is entitled to have the effective date of the action extended until the due process requirements have been satisfied and may be entitled to an award of back pay from the date of the *Skelly* violation until the violation is remedied.<sup>124</sup>

The manner in which the Department conducts *Skelly* hearings exposes the City to an unreasonable and unnecessary risk affected employees will allege due process violations, which may result in a financial liability. Given the questions asked of a chief officer during a Board of Rights hearing and statements volunteered by UFLAC representatives, the union believes the Department’s *Skelly* hearings fail to comply with the law. The Department should not wait until formal allegations of *Skelly* violations are made before bringing its *Skelly* procedures into full compliance with the law and sound personnel practices.

## ***Findings***

The Department is failing to do all that it can to insure it provides a pre-deprivation *Skelly* hearing to affected employees in full compliance with *Skelly* requirements.

The Department has no written policies or procedures to provide guidance on how to conduct *Skelly* hearings.

The City Attorney’s Office has not conducted a review or audit of the Department’s *Skelly* policies and practices and has not provided the Department with recommendations to ensure its *Skelly* policies and practices meet due process requirements at any time since the Professional Standards Division was created over two years ago.

A non-sworn Department manager began recommending corrective measures and improvements to the *Skelly* hearing process almost a year ago that should have been implemented but have not been.

## ***Recommendations***

It is strongly recommended the Department revise its *Skelly* procedures to ensure they fully comply with the law. In doing so, the Department should adopt a written *Skelly* policy that includes or considers the following among other things:

1. Continue to record *Skelly* hearings which allow for an independent assessment of what occurred at the hearing and upload such recordings to the complaint tracking system or disciplinary tracking system.

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<sup>121</sup> *Policies of the Personnel Department*, January 24, 2008, Section 33.1D.

<sup>122</sup> *Civil Service Assn. v. Redevelopment Agency* (1985) 166 CA3d 1222, 1227 and *Williams v. County of Los Angeles* (1978) 22 C3d 731, 736-37.

<sup>123</sup> *Mennig v. City Council* (1979) 86 CA3d 341, 351.

<sup>124</sup> *Barber v. State Personnel Board* (1977) 18 C3d 395.

2. Stop using the person who *decides* to sustain charges, whether a penalty should be imposed and what the penalty should be as the *Skelly* officer.
3. Do not permit the person who *decided* to sustain charges, whether a penalty should be assessed and the level of penalty to be present at the *Skelly* hearing or communicate with the *Skelly* officer about the case, except to receive the *Skelly* officer's recommendation.
4. Do not permit the persons who participated in or supervised the investigation or approved the investigative report to serve as the *Skelly* officer or communicate with the *Skelly* officer about the case.
5. Abandon the practice of requiring an affected employee to attend a *Skelly* hearing and adopt a uniform practice whereby the affected employee is offered and provided a *Skelly* hearing and automatically waives their right to a *Skelly* hearing if not requested within a set time.
6. Provide the affected employee with the identity of the *Skelly* officer at the time the employee is offered a *Skelly* hearing, or shortly after the offer is made, and in every case before the *Skelly* hearing, to ensure the affected employee has an opportunity to raise conflict issues.
7. Do permit an affected employee to waive the right to have an impartial and uninvolved *Skelly* officer and require all such waivers be in writing and recorded at the time of the *Skelly* hearing.
8. Do not permit the person who made recommendations concerning the charges or penalty to serve as the *Skelly* officer.
9. Adopt a training program for *Skelly* officers, limit the number of persons who serve as *Skelly* officers to ensure quality control and only use *Skelly* officers who are trained.
10. Only use individuals as *Skelly* officers, who have the authority necessary to make meaningful recommendations to the Department on whether the discipline should be imposed, modified or revoked.
11. Consider training a limited number of *Skelly* officers in each bureau and consider using a *Skelly* officer from the same bureau whose member is being considered for discipline.
12. Do not permit those who may be parties or witnesses in the same case to serve as *Skelly* officers.
13. Require *Skelly* officers to thoroughly review the formal charges the affected employee has been served with and all supporting materials prior to the *Skelly* hearing.
14. Develop a standardized script for use by all *Skelly* officers that accurately reflects the content of legally compliant policies and procedures.
15. Although *Skelly* officers may need to clarify or even resolve inconsistent information provided at the *Skelly* hearing, do not allow *Skelly* officers to question the subject of discipline at the *Skelly* hearing further than is necessary to obtain clarification.

16. Do not permit *Skelly* officers to engage in settlement discussions related to charges or penalty. This should not be construed to limit the affected employee from seeking and supporting a modification or dismissal of charges and/or penalty.
17. Continue the practice of ensuring the subject understands the charges at the beginning of the *Skelly* hearing but cease the practice of asking the subject if they concur or do not concur with the charges.
18. Do not permit *Skelly* officers to confront the subject of discipline with charge or penalty options or with ultimatums at the *Skelly* hearing.
19. Require that *Skelly* officers remain objective and independent in conducting *Skelly* hearings, when requesting information or further investigation and in making recommendations.
20. After the initial *Skelly* hearing, and before making a recommendation, allow the *Skelly* officer to ask the Department for one or both of the following: 1) a response from the Department with regard to any issue raised by the affected employee, and 2) that additional investigation be conducted.
21. Require the *Skelly* officer to make one of the following recommendations to the Department; 1) the action should proceed without modification, 2) the action should be amended, modified, or reduced, or 3) the action should be dismissed in its entirety.
22. Adopt a practice whereby *Skelly* officers inform the affected employee that the *Skelly* officer's recommendation will not be announced at the *Skelly* hearing, will forever remain confidential and will be conveyed in confidence to only the Department.
23. The *Skelly* officer shall not be subject to examination by either the affected employee or the employee's representative and is not required to provide any response to the information submitted at the *Skelly* hearing, except to acknowledge receipt.
24. In making their recommendations require *Skelly* officers to consider; 1) the timeliness of the proposed disciplinary action in terms of the statute of limitations, 2) whether the Department has reasonable grounds to proceed with the proposed discipline, 3) whether the proposed discipline is based on proper legal, policy or procedural grounds, 4) whether the disciplinary action is supported by the facts, 5) whether the employee was on adequate notice of the prohibited conduct before the alleged wrongdoing occurred, and 6) whether the penalty complies with the applicable penalty guidelines.
25. Require *Skelly* officers to make all recommendations in writing.
26. Require that the *Skelly* officers written recommendation include a summary of the charges, an identification of who was present, of what was said or provided in the way of explanation, of the recommendation, and the reasons therefore, after the *Skelly* hearing.
27. Adopt a rule that requires the *Skelly* officer to attach all materials presented by or on behalf of the affected employee to the *Skelly* officer's written recommendation.
28. Require *Skelly* officers to make their recommendations to the Department within three business days after conclusion of the *Skelly* hearing.

29. Require *Skelly* officer's written recommendations clearly state each mitigating or aggravating fact or factor that the *Skelly* officer considered relevant in making the recommendation.
30. Adopt a rule that prohibits the use of any *Skelly* officer requests, recordings, recommendations, or other materials in any future Board of Rights hearing involving the same case, or in any other case.
31. In the event the *Skelly* officer requests further information or investigation, the Department shall endeavor to provide the *Skelly* officer with the additional information or investigation within ten (10) business days. The *Skelly* hearing shall not be considered concluded until the Department provides the response to the *Skelly* officer, and affected employee. Only allow the Department to change the effective date of discipline if necessary to accommodate additional information and investigation requested by the *Skelly* officer.
32. Prohibit the *Skelly* officer from engaging in any settlement negotiations and require the *Skelly* officer to refer any and all settlement negotiations for private discussions between the affected employee and/or employee representative and an appropriate Department representative.
33. Permit the *Skelly* hearing to be suspended for settlement negotiations to take place if each side signs a written agreement to suspend the *Skelly* hearing. If settlement negotiations result in a settlement no further *Skelly* hearing is required and the *Skelly* officer's obligations are concluded without further resumption of the hearing. If no settlement is reached the *Skelly* hearing shall resume and the *Skelly* officer shall not be informed of what was said during negotiations.
34. Prohibit *Skelly* officers from engaging in their own independent investigations and fact finding, consultations with investigators, advocates, Department members or union representatives as they prepare for a *Skelly* hearing, hold a *Skelly* hearing or formulate and communicate their requests and recommendations.
35. Permit an impartial Department representative to attend the *Skelly* hearing as a silent observer.
36. Allow the impartial Department representative to conduct a debriefing with investigators and advocates following *Skelly* hearings as a training and feedback mechanism.
37. Require *Skelly* officers to comply with the applicable penalty guidelines in making penalty recommendations.

## BOARD OF RIGHTS HEARINGS

An assessment of the Board of Rights process was conducted. The Department refers sworn members to a Board of Rights (Board) when it seeks a disciplinary penalty greater than 30-days suspension or when a dismissal is sought. A sworn member requests a Board of Rights hearing when appealing a disciplinary decision. The Board of Rights process does not apply to non-sworn members of the Department.<sup>125</sup>

The assessment included a review of all cases where a Board of Rights hearing was both commenced and concluded in 2008 and 2009 because the PSD became operational in January 2008. Only, four cases met these criteria. Two cases were concluded when the sworn member resigned before testimony was taken and two cases were tried to a conclusion. One of those cases resulted in a not guilty finding and one ended in a guilty finding with the Board setting a penalty.

### *Out of District for Lunch*

On December 20, 2007, a chief officer ate lunch at a restaurant outside his district. He prepared a memorandum explaining his conduct and received a written reprimand.<sup>126</sup> At his *Skelly* hearing the chief officer acknowledged he is held to a higher standard, said he did not want to make excuses, took responsibility for his conduct but felt an 8-working<sup>127</sup> (4-calendar) days suspension was excessive.<sup>128</sup> His explanation was not considered mitigating and the penalty was not changed as a result of the *Skelly* hearing.

The chief officer requested a Board of Rights hearing that began on August 13, 2008, and concluded on August 18, 2008. The Department's advocate had the accused chief officer admit; 1) the existence of the rule governing his conduct, 2) the reason for the rule, 3) he had previously been told or directed to stay in district, and 4) he made the decision to violate the rule. The Department also pointed out inconsistencies when the chief officer was asked to explain his conduct.

The Department's opening statement provided an appropriate outline of what the Department would provide as evidence as opposed to an argument. The closing argument should have more clearly addressed what the California Supreme Court noted was critical when assessing whether a public entity has abused its discretion when imposing penalties in the context of public employee discipline which includes three factors; 1) the extent to which the chief officer's misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.<sup>129</sup> Harm to the public service is likely to result from being out of district because the chief officer's response time to emergencies is extended. The likelihood of recurrence is great given the number of times he had previously engaged in similar misconduct.

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<sup>125</sup> Non-sworn members have the right to appeal disciplinary action to the Civil Service Commission, which has its own hearing process.

<sup>126</sup> The reprimand was received before enactment of the *Firefighters Procedural Bill of Rights Act* stating that a reprimand constitutes disciplinary action. The Department has appropriately abandoned the practice of issuing written reprimands before concluding an investigation.

<sup>127</sup> The Department defines "working" day as 12 hours for a sworn member assigned to platoon duty.

<sup>128</sup> Civil Service guidelines were used to set the penalty because the conduct occurred before the adoption of guidelines for sworn members in January 2008. An 8-days suspension would comply with the guidelines for sworn members adopted for use in January 2008.

<sup>129</sup> *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18.

The testimony obtained from the chief officer and the Department's "nexus" (expert) witness was sufficient to support a finding of guilt. However, the Department's case could have been strengthened in two areas. First, and on the issue of establishing a knowing violation, or that the chief officer was on notice of the rule governing the specific conduct in question, the Department could have had the chief officer specifically acknowledge prior counseling and a reprimand for leaving his district on prior occasions. Second, the Department could have presented stronger evidence on the chief officer's failure to obtain his direct supervisor's approval to eat lunch out of district on the day in question.

The Board<sup>130</sup> found the chief officer guilty and concluded the chief officer was held to a higher standard, he failed to set a good example; he used poor judgment while maintaining a not available status while eating lunch outside his district; and selecting the eating establishment outside his district showed poor judgment. The Board imposed a suspension of 3-working (1.5-calendar days).<sup>131</sup>

The hearing transcript reflects the Board considered the chief officer's personnel file in determining the penalty.<sup>132</sup> While witnesses were called during the penalty phase of the hearing, the Department and defense advocates did not present argument concerning what the penalty should be. The record is silent on whether the Board considered the civil service guidelines in effect at the time of the misconduct in determining the penalty.<sup>133</sup>

The misconduct occurred on December 20, 2007, and the final notice of disciplinary action was filed six months later on May 29, 2008. The Board of Rights hearing was initiated and concluded less than three months later in August 2008. The Board of Rights hearing was initiated and concluded in a timely manner.

### ***Violating an Employment Agreement***

In 2000, a Board of Rights determined a firefighter should be dismissed for conduct related to substance abuse. The fire chief at the time reduced the penalty to a 180-calendar days suspension and entered into an employment contract with the firefighter. In early 2008 the Department contended the firefighter violated the terms of the contract and sought his dismissal.

A Board of Rights consisting of three chief officers was chosen in August 2008. As required by the City Charter, the accused firefighter first chose a pool of six names from a group of eligible chief officers without knowing who he was choosing. Once the six chief officers were identified the accused chose three chief officers he wanted to hear his case.

On August 27, 2008, the Professional Standards Division sent a letter to the three chief officers comprising the Board of Rights instructing them on their duties. A copy was not sent to the accused firefighter, his defense representatives or his attorney. Later, the accused firefighter's

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<sup>130</sup> The three Board members were all chief officers of equal rank to the chief officer who was disciplined.

<sup>131</sup> The Department defines a "working" day for the chief officer assigned to platoon duty as a 12-hour day.

<sup>132</sup> An independent assessment of the personnel file has not been conducted to verify the accuracy of the Board's conclusions in assessing a penalty for the reasons set forth in footnote 45.

<sup>133</sup> A 3-working (1.5-calendar) days suspension for a second offense of leaving one's district would not comply with the guidelines agreed to between the Department and Chief Officers Association in January 2008, which state a range of 6 to 10-days suspension.

attorney asked the Department advocate to stop sending emails, copies of which he was receiving, to members of the Board.

Before seeking the firefighter's 2008 dismissal, Department advocates went to the firefighter's home and obtained a urine sample, which tested positive for controlled substances. One of the advocates who went to the home and obtained the sample later conducted a detailed interview of the firefighter and engaged in other extensive investigative activities. The same advocate was assigned, with another advocate, to prosecute the Department's case at the Board of Rights. He did not seek relief from prosecuting the case at the Board of Rights hearing and the Department did not initially seek to replace him.

The accused firefighter's attorney indicated he would call the advocate as a witness in the hearing, contending the sample was obtained "forcefully," and requested the advocate remove himself from prosecuting the case as an advocate. The advocate refused to remove himself as an advocate. When the advocate and Department later received a written complaint alleging some of the investigative activities were improper, the City Attorney advised the advocate should not prosecute the case. He was removed as an advocate and the Department later added his name to its witness list for the hearing.

The Board of Rights involved many legal issues including; due process rights, discovery requests seeking the production of employment contracts for other sworn members of the Department, the repeat testing of urine samples, privacy, health care record confidentiality, judicial notice, and the enforcement of records subpoenas. The Department presented a written opposition to a defense request to have the sample retested.<sup>134</sup> The opposition contained many representations of fact. No evidence, such as a declaration or affidavit, was submitted in support of any of the factual representations.

In August 2008, the Department provided notice it intended to call a Los Angeles Police sergeant, certified as a drug recognition expert (DRE) to testify as an expert witness concerning "drug evaluations and the impact of drug use on human performance." The Department also planned to have the sergeant review the laboratory results/toxicology report and testify concerning test results, therapeutic dosages, and whether persons would appear impaired given the test results.

A Police Department overview of its own DRE program says a DRE is trained to determine whether a person is under the influence of drugs, the type of drug causing an observable impairment, and is able to rule in (or out) many medical conditions, such as illness or injury, that may be contributing to the impairment. The ability to make these determinations is based on "a standardized twelve step evaluation procedure." While the Fire Department's file materials contain a copy of this overview, it contains nothing to indicate this twelve-step evaluation procedure was ever performed on the accused firefighter, which the LAPD overview says provides the foundation for the DRE to express his opinions.<sup>135</sup>

The Department's file materials contain no information suggesting the DRE-police sergeant retained as an expert had any qualifications, training or experience in the interpretation of laboratory results, toxicology, or the prescriptive medications, and the therapeutic dosages,

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<sup>134</sup> The opposition was read verbatim in its entirety by the Department's advocate and during oral argument involving this motion the defense correctly pointed out that motions are not evidence.

<sup>135</sup> A review of the anticipated testimony of the advocate obtaining the urine sample does make reference to certain physical characteristics exhibited by the accused firefighter but fails to mention each of the twelve standardized DRE evaluation procedures having been performed.

actually involved in this case. Given the file material made available for review, the decision to select a DRE to testify as an expert was a poor one. The defense planned to call a pharmacist as an expert witness. A pharmacist typically spends years studying, and often obtains a doctorate in pharmacology, which is the science dealing with the preparation, uses, and especially the *effects* of drugs.

The firefighter was represented by an attorney. The Department sent a written request to the City Attorney's Office on January 30, 2009, requesting a deputy city attorney serve as the Department's assistant advocate in the Board of Rights hearing. The Department reports the City Attorney's Office did not respond to the request.

Three months later on April 29, 2009, the firefighter resigned before testimony was taken in the case. The Board of Rights hearing then formally convened to do nothing more than adjourn the proceedings and provide a report the case was closed without factual findings for the reason the accused was no longer within the jurisdiction of the Department.

The misconduct occurred on January 16, 2008, the members of the Board of Rights were selected in August 2008, and the first session of the Board of Rights hearing was held about two months later on November 6, 2008. The last session of the hearing took place six months later on April 29, 2009. The firefighter's personnel and payroll records were not examined to determine his employment and payroll status during these long delays for the reasons set forth in footnote 45.

### ***EMT Certificate Revoked***

After a hearing, the County of Los Angeles Emergency Medical Services Agency (the County) revoked a firefighter's emergency medical technician (EMT) certificate effective September 15, 2007, based on three October 2006 incidents and a May 2007 incident. The Department later served the firefighter with a complaint seeking his dismissal, alleging he no longer met the minimum requirements of a firefighter.

The Board of Rights hearing was called to order on May 12, 2008, and after ten sessions concluded on July 14, 2008, with a verdict of not guilty. In addition to taking testimony from many witnesses, the Board was confronted with numerous complicated legal issues by way of written motions, opposition and objections to testimony. A few of the legal issues involved double jeopardy, the statute of limitations and collateral estoppel.

At the conclusion of the Department's case in chief the defense made a motion arguing the Department failed to meet its burden of proof. The defense abandoned its motion when asked if the intent of the motion was to have the Board deliberate without "putting in an affirmative defense before the Board."

The Department's case was poorly prepared for and presented at the hearing:

1. There was a May 6, 2008, written recommendation the firefighter be referred to a Board of Rights for dismissal because he failed to meet the minimum requirements for the position of firefighter when his EMT certificate was revoked. The Memorandum of Understanding (MOU) between the City and UFLAC was one of three documents cited as support for the recommendation. Although cited as a basis for proceeding with a Board of Rights, the Department failed to present any evidence of the MOU during its case in chief. On cross-examination, the Department's expert witness said that according

to the MOU, failure to maintain an EMT certificate would mean loss of bonus pay, not discipline. None of the documents relied on in referring the matter to a hearing clearly articulated a policy requiring an EMT certificate as a condition of continued employment for tenured firefighters.

2. Well after charges were brought and before the hearing began the Department was unable to produce a copy of any policies, procedures, rules, regulations, orders, notices or other documents indicating failure to maintain an EMT certificate was a condition of employment or was a terminable offense in response to a defense discovery request. Such a requirement should have been identified before charges seeking a dismissal were ever filed.
3. On cross examination, the Department's expert witness on matters related to EMT certification admitted he did not know if the Department had a written policy specifically stating a member can or cannot work in the field with an expired certificate, admitted he was not aware of any policy to discipline members for failing to maintain their EMT certificate, and said he was not aware of any department policies or procedures subjecting a member to discipline for having their EMT certificate suspended or revoked. He was not aware of how or if the Department ever communicated the consequences for loss of an EMT certificate to its members.
4. While the Department maintained the firefighter could no longer be employed because his EMT certificate had been revoked, his defense advocates presented the testimony of current employees who continued to work in sworn positions without EMT certificates including: a firefighter who had not been certified as an EMT since 1979 and had not been licensed as a paramedic since 1994; an inspector whose EMT certificate expired 3 years earlier; and a firefighter who, although he had recently taken the test to obtain an EMT certificate, had not been certified for about 12 years.
5. Department advocates repeatedly asked for offers of proof as the defense called witnesses to testify. For example, a former chief officer was called to testify as an expert and when asked to provide an offer of proof, the defense said nothing more than the witness was "going to testify directly to the charges in this matter." Such an offer describes nothing and the Department requested nothing more. Repeated requests for offers of proof suggest the Department failed to interview the witnesses in preparation for the hearing.
6. When offered the opportunity to cross-examine a defense expert witness, the Department declined to do so and instead said the expert's opinions had been biased toward the defense. This simply is not a proper basis for responding to a witness's testimony.
7. During its closing statement the Department argued a defense witness exaggerated his testimony and to support the argument provided information about the number of cases the expert had actually handled while a chief officer with the Department. The problem was the advocate simply "testified" to the research he performed after hearing the expert's testimony and failing to cross-examine the expert.

There were tardy, incorrect or incomplete objections, or no objections at all, to the following highly improper defense evidence:

1. A fire captain who attended the County's hearing was asked if he was allowed to testify at the hearing, was asked if others who attended the hearing were allowed to speak and

asked if he felt the firefighter received a full, fair and impartial hearing at the County. His answer was no to all three questions. These were all highly improper questions and the objections were not adequate. In fact, there was no objection at all to the last highly inappropriate question.

2. Although the Department properly objected to the testimony of a fire captain who testified the firefighter had done the right thing and performed appropriately in performing an advanced life support medical procedure in May 2007, the Department failed to object to similar direct testimony from two other witnesses. Preserving the record with appropriate objections is critical.
3. A fire captain and union officer from another fire agency, who sat on a statewide EMS<sup>136</sup> committee, was called to testify about his hearsay conversations with the acting director of the County's EMS agency and whether the revocation was permanent. When asked to testify about the conversation, instead of objecting on hearsay grounds the Department objected on the grounds of relevance, indicating that unless the testimony related directly to the firefighter's revocation the testimony was irrelevant.<sup>137</sup> A belated hearsay objection was made after the witness recounted his conversation with the acting director about the revocation of the firefighter's EMT certificate. The Department did not object at all when the witness was asked whether, based on his conversations with the acting director, there would be anything to preclude reapplication, whether the revocation was permanent, and whether the firefighter could reapply for an EMT certificate in the future.
4. The defense called a former chief officer with 31 years of service, who retired about four years before the firefighter was even hired, and about ten years before the Department's disciplinary system had been changed and the charges were brought, to testify as an expert witness about the Fire Department's investigation and disciplinary process. Instead of asking to question the expert witness about his qualifications and the basis for his opinions before he expressed them, as is permitted,<sup>138</sup> or cross examining the expert after he testified on direct examination, the Department objected on the grounds the expert did not have any knowledge about the charges brought against the firefighter, which the defense was able to easily refute.
5. Although the defense represented the former chief officer would testify as an expert witness about the Department's investigative and disciplinary process, and the Board recognized his expertise in that specific area, when the witness expressed opinions about the County's "flawed" investigation and the exaggeration engaged in by the County, the Department failed to immediately and appropriately object to the expert's testimony about the County's process.

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<sup>136</sup> Emergency medical services.

<sup>137</sup> If a party objects and the hearsay does not fall under an exception, the hearsay cannot provide the sole basis to support a finding. Please see *Ashford v. Culver City Unified School District* (2005) 130 CA4th 344. Section 705 of the Department's *Board of Rights Manual* also correctly says, "where hearsay evidence is admitted without objection, it stands as evidence for all purposes and is sufficient to support a finding."

<sup>138</sup> *Evidence Code*, section 402.

The Board itself did a very good job encouraging both sides to proceed with the hearing expeditiously, controlling the proceedings, including Department and defense advocates<sup>139</sup> and witnesses. The Board's rulings and decisions were clearly stated and left no doubt as to their meaning. The Board went to the extraordinary step of calling a witness of its own to be sure it fully understood the issues.

Near the end of the hearing the Board revealed the Department engaged in private communications with the Board's chairperson concerning settlement negotiations and two allegations of misconduct. It is not appropriate to inform members of a Board of Rights about settlement discussions. The job of the Board is to decide disputed facts, not become involved in settlement issues. The Board correctly brought the matters to the attention of the defense on the record where they were further discussed.

A defense advocate said two issues detracted from his ability to present the defense case. He informed the Board, 1) he received an email from a non-sworn member of the Department calling him a traitor shortly after the Department was informed he would represent the firefighter at the hearing, and 2) the hearing's sergeant at arms called a witness who had testified at the hearing to interrogate him about his testimony and accused him of collusion with the defense. The defense advocate requested the Professional Standards Division be directed to investigate the matter.<sup>140</sup> The Board correctly advised the defense representative of the need to provide assurance he could proceed with hearing with all confidence, in light of the allegations.

It was very clear the Board was intent on providing each side a full and fair hearing and the opportunity to present their respective cases. This may explain the Board's failure to make proper evidentiary rulings when the Department did object to highly improper and inappropriate defense evidence. Claims the County hearing was flawed and not fair, evidence the firefighter filed an appeal of the County's decision, testimony the accused acted appropriately during a call in 2007, what a fire captain from another agency was told by the County's acting director and much, if not all of what a retired chief officer said should not have been admitted. However, there is nothing in the Board's written decision indicating any improper evidence influenced the final outcome.

The Board and hearing process would have been assisted greatly with appropriate and well organized pre-hearing motions citing the specific inappropriate defense evidence that was anticipated and the corresponding rule of law prohibiting its admission. The alternative is to make a complete record of all appropriate objections at the time improper evidence is offered. Both alternatives require careful and thorough pre-hearing preparation and legal assistance.

The Board's decision to find the firefighter not guilty was clearly supported by the evidence presented at the hearing. In fact, the evidence presented leaves one questioning why the Department proceeded with the case in the absence of a clearly stated requirement that firefighters are to maintain a valid EMT certificate as a condition of their continued employment after successful completion of probation. Proper preparation would have revealed, 1) the

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<sup>139</sup> There was an unfortunate amount of sniping and bickering back and forth between the advocates, as opposed to the professionalism demonstrated by the Department and defense advocates in another case reviewed in this section.

<sup>140</sup> No record of these allegations or an investigation of them could be found in the Department's complaint tracking system. The Department was using the new complaint tracking system at the time the complaint was made during the July 10, 2008, session of the hearing. Between April 2008 and July 9, 2008, 190 complaints were noted in the complaint tracking system.

Department's expert would concede there was no such requirement on cross-examination, and 2) the Department continued to employ sworn members who had not been EMT certified in many years, if not decades. The Department reports the City Attorney's Office advised them to proceed with the case.

The Board's job is to rule on the evidence presented at the hearing. It is not the job of the Board to "legislate" a rule that does not exist and was never presented, even if the rule would be highly appropriate. A year and a half after the conclusion of the hearing the Department still has no rule requiring sworn members of the Department to maintain a valid EMT certificate as a condition of continued employment once they pass probation. The result is sworn members without a valid EMT certificate are assigned to positions where they can have no intentional patient contact.<sup>141</sup> Such positions are limited, reduces management flexibility and not in the best interests of those who rely on the Department for emergency medical service.<sup>142</sup>

The firefighter's EMT certificate was revoked on September 15, 2007, and the complaint seeking his dismissal was dated December 13, 2007. The Board of Rights hearing did not commence until six months later on May 12, 2008. The hearing was not concluded until two months later on July 14, 2008.

### ***Bribery***

On January 12, 2009, the Los Angeles Police Department conducted a surveillance during which a fire inspector was recorded on video and audio accepting a bribe. The Department referred the inspector to a Board of Rights seeking his dismissal. The hearing consisted of three sessions, none of which involved the taking of testimony or the receiving of evidence.

The accused fire inspector was advised of the charges and of his rights after which he pled not guilty at the first session. The Board also swiftly and correctly ruled on various motions and objections. The ruling on one motion was too swift when the Board's ruling was made before the defense was provided an opportunity to respond to the motion. The Board correctly and quickly sustained objections to irrelevant defense arguments having no merit concerning the prior failure to place a chief officer accused of dishonesty and charged with crimes on leave, that no criminal charges had been filed against the fire inspector, that there had been no investigation conducted by the Fire Department, and that witness statements had not been verified.<sup>143</sup>

The proceedings in this case were concluded on October 26, 2009, after it was confirmed the fire inspector's application to retire had been approved by the Pension Commission. Before terminating the proceedings, the Board had to formally reconvene to adjourn.

The misconduct occurred on January 12, 2009, and the administrative charges seeking the fire inspector's dismissal was dated March 4, 2009. The first session of the Board of Rights hearing was held on March 12, 2009. The second session was six months later on September 14, 2009, and the final session was about six weeks later on October 26, 2009. The transcripts indicate the fire inspector was to be represented by an attorney had an evidentiary hearing taken place.

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<sup>141</sup> Department members may have a personal interest in being EMT certified given the partial immunity from liability provided by *Health and Safety Code*, section 1799.108.

<sup>142</sup> In excess of 80% of all Department emergency dispatches are for emergency medical calls.

<sup>143</sup> The City Attorney's Office initially advised the fire inspector could not be disciplined based solely on the results of the police investigation, and later correctly indicated the Department could bring disciplinary charges based on statements and evidence contained in the police report.

## ***Findings***

Department advocates may be able to prosecute a simple Board of Rights hearing but do not have sufficient expertise, experience and training to prepare and prosecute more difficult cases.

The City Attorney's Office did not provide accurate advice when the Department was deciding whether to take the EMT case to a Board of Rights and failed to respond to the Department's request for assistance involving the violation of an employment contract.

The Department has engaged in inappropriate ex parte communications with Board of Rights members.

With increasing frequency sworn members of the Department are represented by attorneys when preparing for and attending Board of Rights hearings.

Properly prepared and properly presented Board of Rights hearings are very time consuming and take away from other work that needs to be completed by the Professional Standards Division.

The City Attorney's Office has informed the Department that its internal rules would have to be changed to allow non-sworn advocates to represent the Department during Board of Rights hearings.

While Board of Rights members are capable of controlling the proceedings and deciding factual matters appropriately, they lack the training, expertise and experience to handle more complicated legal issues, objections, and evidentiary issues.

The City Attorney's Office does not have an attorney present to assist the Board of Rights with evidentiary and other legal issues. Delays result when a recess is taken and the Board of Rights has to locate a deputy city attorney to assist with advice.

The preparation of a successful Board of Rights case is dependent on the thoroughness of the investigation, the preparation of the case before hearing, and on the competency of the Department's advocate at the hearing.

There are long delays in conducting and concluding Boards of Rights hearings.

The Department has no policy requiring a Board of Rights to follow the Department's disciplinary guidelines in setting a penalty if a finding of guilty is made.

The *Firefighter Procedural Bill of Rights Act* requires the Department's Board of Rights process comply with the *Administrative Procedures Act*.<sup>144</sup>

The Department often assigns the advocate who investigated the facts as the advocate who will also prosecute the case at a Board of Rights hearing.

Although the Department spends a substantial amount of time and money training advocates to prosecute hearings, advocates may not actually prosecute a case at hearing, the training is not

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<sup>144</sup> *Government Code*, section 33254.5.

sufficient to handle a more complicated case, particularly when an attorney is assisting the defendant, and advocates routinely rotate out of PSD in approximately two years at the conclusion of their special duty assignment.

## ***Recommendations***

The Department should consider the following recommendations:

1. The Department needs to build the capacity to prepare and prosecute Board of Rights hearings with permanent non-sworn advocates who have demonstrated expertise, experience and training in the prosecution of misconduct cases involving public safety personnel.
2. The Department should adopt a rule that allows non-sworn persons, including attorneys, to prosecute Board of Rights cases against sworn members at hearing.
3. The Department should employ non-sworn members with the necessary expertise, experience and training to properly prepare and prosecute Board of Rights cases against sworn members at hearing, instead of relying on special assignment sworn advocates.
4. The Department should consider adopting a modified “vertical prosecution” approach to preparing and prosecuting disciplinary cases whereby the staff member assigned to prosecute cases at a Board of Rights hearing assists, advises and directs investigators in planning and conducting the investigation and the investigator assists the prosecutor in preparing and presenting the case at the Board of Rights hearing.
5. The Department should ensure appropriately qualified expert witnesses are designated and retained, and that advocates understand the difference between lay or percipient witnesses and expert witnesses in terms of preparation and testimony at hearing.
6. The Department should encourage its advocates to prepare appropriate pre-hearing motions, briefs or otherwise educate the Board of Rights about significant issues before testimony is taken.
7. The Department should ensure pre-hearing motions and opposition are properly prepared and that factual representations are properly supported.
8. The Department should streamline the way in which it presents pre-hearing motions and opposition. Serving motions and opposition before a hearing is set and brief oral arguments, if necessary, should be encouraged. Reading motions and opposition verbatim, including footnotes, is not necessary.
9. The Department should adopt timeframes within which timely pre-hearing preparation takes place, which should include but is not limited to the drafting, filing and serving of motions and opposition to defense motions, the preparation of hearing witnesses, including expert witnesses, determining what defense witnesses will say, and preparation of exhibits for the hearing. The Department should ensure qualified staff is available to complete the pre-hearing preparation and hearings in a timely manner.

10. The Department should adopt conflict rules that would prohibit an investigator who investigated a case, and is a potential witness, from also prosecuting the same case at a Board or Rights hearing.
11. The Department should take all necessary action to ensure the City Charter is amended as follows:
  - a. Change the composition of the Board of Rights from three chief officers to one chief officer, one civilian, and one administrative law judge who shall preside at the hearing, ruling on the admission of evidence, and providing advice to the Board on matters of law;
  - b. Define the role of the administrative law judge so the duties are consistent with the *Administrative Procedures Act*;
  - c. Select the administrative law judge in accordance with procedures established by the State of California's Office of Administrative Hearings;
  - d. Choose members of the Board of Rights by establishing a pool of chief officers who remain available to serve for two year terms and allow the Department and the defense to make a series of peremptory challenges that would result in a final selection;
  - e. Select the civilian member of the Board in a manner similar to how a civilian is chosen to sit on Boards of Rights at the Police Department;
  - f. The Board of Rights be required to determine discipline in accordance with the Department's penalty guidelines in effect at the time of the misconduct if a member is found guilty;
  - g. Add language similar to City Charter section 1070 that would prohibit ex parte communications with the Board of Rights;
  - h. Add language similar to City Charter section 1070 that would provide the Fire Department with pre-hearing internal investigation subpoena power, and specify the Board of Fire Commissioners have the power to compel compliance to a subpoena;
  - i. Add language similar to City Charter section 1070 requiring Board of Rights decisions be based solely on the evidence before the Board, including the Department's disciplinary guidelines in effect at the time of the misconduct;
  - j. Section 1060(a) of the City Charter concerning the statute of limitations should "mirror" the statute of limitations language of the *Firefighter Procedural Bill of Rights Act* by eliminating the two year statute of limitations referred to in the City Charter, and adding the tolling provisions of *Government Code*, section 3254 (d)(1-7);
  - k. Section 1060(d) of the City Charter concerning service of disciplinary action should reflect disciplinary action may be taken if the Department files the complaint with the Board of Fire Commissioners within one year of discovery;

- l. Section 1060(n) of the City Charter should be amended to add limitations on the access to medical records and stress the confidentiality of personnel records used in the penalty phase of a Board of Rights hearing;
  - m. Add subsections to section 1060 of the City Charter specifying the use of calendar days and specifying what are public records; and
  - n. Allow the Board of Rights to be adjourned without further hearing when the Board loses jurisdiction by resignation, retirement, or death.
12. The Department should adopt and enforce rules that prohibit ex parte communications with members of the Board of Rights.
13. The Department should adopt rules that prohibit the Board of Rights who has been appointed to hear and decide the facts of a case do not become involved in settlement discussions and issues.
14. The Department should ensure all misconduct complaints are entered in the Department's complaint tracking system, appropriately investigated and that appropriate action is taken if misconduct is proven by a preponderance of the evidence.
15. The Department should adopt guidelines, procedures and timeframes that expedite the timely prosecution of Boards of Rights cases, and should ensure that qualified staff is made available to complete prosecutions within those timeframes.
16. In deciding to prosecute a case at a Board of Rights hearing the Department needs to ensure it has the evidence to establish knowing violations of the Department's work rules and the defendant has no reasonable explanation for non-compliance.
17. The Department must ensure that each step of its investigations are conducted as if the case is being prepared for an evidentiary hearing, such as a Board of Rights.
18. The Department should adopt written rules that permit and set reasonable time limitations on pre-hearing discovery including but not limited to exchanging witness and exhibit lists, allowing for the interviews of hearing witnesses, the production of documents, and discovery requests.
19. When presenting cases at a Board of Rights or Civil Service hearing the Department should present the testimony of a Department representative or expert witness who can explain why disciplinary action and a particular penalty is necessary in light of the "penalty setting factors" articulated by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 C3d 194, 217-18, which include; 1) the extent to which the misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.
20. The Department should provide training to, and develop a "Benchbook" for chief officers who may be appointed to sit on a Board of Rights that addresses such issues as; their role and responsibilities, the role and responsibility of the City Attorney's Office, the difference between the "fair administrative hearing standard" of Boards of Rights and the "fair trial" requirements synonymous with constitutional due process, the order in which

- the parties present their cases, the manner in which evidence is received, basic rules of evidence, including the definition of basic terms, direct and cross-examination, recurring legal issues, commonly seen law and motion issues, criminal conflict issues, frequently asked questions, controlling difficult and obstreperous subjects, witnesses, representatives and attorneys, expert witness issues, legal issues related to compelling testimony from subject's at a Board of Rights hearing, the burden of proof, penalty setting issues, and the drafting of decisions, among others.
21. The Board of Rights should not hesitate in requiring a deputy city attorney legal advisor be more immediately available, if not physically present during hearings to provide legal advice, particularly when motions or other legal issues will be heard.
  22. When assessing the credibility of witnesses, the Board of Rights should be encouraged to consider the factors set forth in *Evidence Code*, section 780, which provides guidance on how to assess the believability and credibility of witnesses in legal proceedings.<sup>145</sup>
  23. The Department should adopt written rules that allow for both parties to present evidence and argument during the penalty phase of a Board of Rights hearing on what disciplinary action should be taken against a member who has been found guilty. That evidence and argument should include; 1) the extent to which the affected member's misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence.
  24. When determining an appropriate disciplinary penalty a Board of Rights should be required to consider and articulate in writing; 1) the extent to which the affected member's misconduct resulted in, or if repeated is likely to result in harm to the public service, 2) the circumstances surrounding the misconduct, and 3) the likelihood of recurrence<sup>146</sup> when applying the Department's disciplinary guidelines and set of

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<sup>145</sup> Section 780 says: Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: (a) his demeanor while testifying and the manner in which he testifies; (b) the character of his testimony; (c) the extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; (d) the extent of his opportunity to perceive any matter about which he testifies; (e) his character for honesty, or veracity or their opposites; (f) the existence or nonexistence of a bias, interest, or other motive; (g) a statement previously made by him that is consistent with his testimony at the hearing; (h) a statement made by him that is inconsistent with any part of his testimony at the hearing; (i) the existence or nonexistence of any fact testified to by him; (j) his attitude toward the action in which he testifies or toward the giving of testimony; (k) his admission of untruthfulness.

<sup>146</sup> While a Board of Rights may impose the penalties described in City Charter section 1060(m) and may not be limited by the penalty imposed by the Department after a *Skelly* hearing, it is clear a member does not "lay his or her badge on the table" and does not place their job on the line whenever opting to go to a Board of Rights hearing. In *Skelly v. State Personnel Board* (1975) 15 C3d at 217-218, the California Supreme Court said, "while the administrative body has broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." These "*Skelly* factors" have been cited and applied in cases involving the City of Los Angeles in the following published and unpublished cases: *Haney v. City of Los Angeles* (2003) 109 CA4th 1; *Alvarez v. City of Los Angeles* 2005 Cal App LEXIS 1250; *Soldo v. City of Los Angeles* 2003 Cal

mitigating and aggravating standards because these “*Skelly* factors” will be used to determine if the Department has abused its discretion in setting a disciplinary penalty.

25. Chief officers who may serve on Boards of Rights should receive training on how to appropriately set disciplinary penalties and how the term “harm to the public service” is defined in California law, particularly as it relates to the fire service.<sup>147</sup>
26. Eliminate the provision that allows a Board of Rights decision to be submitted to arbitration.<sup>148</sup>

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App LEXIS 7260; *Braun v. City of Los Angeles* 2002 Cal App LEXIS 9922; *Brien v. City of Los Angeles* 2008 Cal App LEXIS 4834; *Cohan v. City of Los Angeles* 2005 Cal App LEXIS 1524, and *Tindell v. City of Los Angeles* 2005 Cal App LEXIS 2339.

<sup>147</sup> The Board of Rights training provided between March 22 and March 25, 2010, did not address or did not adequately address the following penalty setting related issues; 1) how the Department’s list of mitigating and aggravating factors should be considered in conjunction with the Department’s disciplinary guidelines in setting penalties by a Board of Rights, 2) the “*Skelly* penalty setting factors” the courts will use in determining if the Department has abused its discretion in setting a penalty, 3) how the term “harm to the public service” is defined in California law, 4) the extent to which a Board of Rights is bound by the Department’s past practices in setting penalties, 5) under what circumstances the Board of Rights would or should be informed of the penalty set by the Department before the Board of Rights hearing, 6) whether a Board of Rights has the ability to impose a penalty in excess of the Department’s penalty guidelines, and 7) how the statutes of limitations that now appear in the Department’s disciplinary guidelines should be dealt with by a Board of Rights when there is a record of prior similar misconduct. The training did not adequately address setting penalties when there is record of prior similar misconduct as opposed to penalty setting where there is a record of prior but unrelated misconduct. How the term “harm to the public service” is defined in California is addressed in an article titled; “The Harm to Public Service Standard in Police Misconduct Cases” appearing at page 24 of the July-August 2005 issue of *Los Angeles Lawyer Magazine*. The court found no abuse of discretion using the “*Skelly* factors” in upholding the termination of a firefighter/paramedic where the dismissal was in excess of the penalties prescribed by the Los Angeles County Fire Department’s penalty guidelines in an unpublished opinion in *Gracia v. Civil Service Commission of Los Angeles* 2004 Cal App LEXIS 4033. In the unpublished opinion of *Childers v. Hayes-White*, 2007 Cal App LEXIS 4591, the court found no abuse of discretion when using the “*Skelly* penalty setting factors” and upheld the dismissal of a San Francisco firefighter when she was found intoxicated while on duty, although it was contended the dismissal violated a past practice of entering into “last chance agreements” with other firefighters. A firefighter’s 18-week suspension and salary reduction for nine pay periods was upheld when considering the “*Skelly* penalty setting factors” in an unpublished decision in *Bynoe v. City of San Jose* 2002 Cal App LEXIS 6972, where it was contended the firefighter engaged in discourteous treatment of other employees, a pattern of misbehavior, and discourteous treatment of members of the public.

<sup>148</sup> A Petition for Writ of Mandamus in the courts provides an adequate legal remedy.

## **DUE PROCESS REQUIRES NOTICE of WORK STANDARDS**

During a Civil Service hearing in August 2008, involving the dismissal of a non-sworn employee, a Fire Department chief officer told the hearing officer if ignorance were a defense, then few employees would ever be disciplined. This was an unfortunate statement. As the hearing officer's written decision emphasized in bold and italicized print:

***“That is not to say that the Department is free to establish standards of good conduct and then fail to notify employees about them. Good practice, if not due process, demands that the Department clearly notify all employees of the standards of conduct to which they will be held, whether or not those standards implicate commonly accepted norms of civil behavior. In this case, the record shows, and I find, that the Department did a poor job of documenting that it actually provided Appellant with copies of its Rules and Regulations and the City’s Guide to Disciplinary Standards. This should have been done by his date of hire, or before he passed probation. Contemporaneous evidence documenting that this was done should have been kept and, more importantly, produced at the hearing. In the future, the Department should take care to do this properly.”***

The hearing officer's statement has substantial support in the law. When taking disciplinary action and except in a few limited circumstances, the Department has the burden to establish the employee violated a known work standard without a reasonable justification for non-compliance.<sup>149</sup>

A large number of investigations, a Civil Service hearing and a lengthy Board of Rights hearing show the Department fails to consistently establish knowing violations of Department rules. A review found too many examples where the Department failed to clearly identify the specific rule or policy alleged to have been violated, the subject under investigation claimed they did not know the specific rule, or claimed they had never been adequately trained on the particular rule alleged to have been violated.

However, in a smaller number of cases, the Department does a good job obtaining evidence to establish knowing violations of work rules. The following case is a good example of investigators obtaining evidence to show a knowing violation of work standards.

### ***A Failure to Provide Patient Care***

#### **Factual Background:**

On October 27, 2008, the Department received a citizen's complaint alleging two paramedics, failed to assess her, were rude, told her to just come with them, turned away from her and began to walk away. The complaint went on to allege the patient asked the paramedics if they were going to check her out, and was told, “we’ll check your vitals downstairs. Displeased with the attitude and rude conduct, the patient reports she asked the paramedics to leave and called 911 for another rescue ambulance.

The formal investigation began with obtaining basic records concerning the incident including recordings of phone calls from the patient and her daughter, complete dispatch records for the

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<sup>149</sup> *Valenzuela v. State Personnel Board (CDCR)* (2007) 153 CA4th 1179.

incident, a record of all prior responses to the same location, the fire station journal, all patient care records, emails and memos regarding the incident, copies of rules and regulations governing member conduct, patient care protocols applicable to the patient contact, and training records.

The investigation revealed the paramedics were told the patient was “sick” and arrived on scene at 0257 hours on October 26, 2008. While the incident teletype reflected the patient had a cardiac history, both paramedics denied being aware of this information during their interviews. At 0303, six minutes after arrival on scene, and five minutes after the patient contact time, the patient called 911 and told the call taker the paramedics came to her door and said, are you the one, come on lets go. The paramedics left the scene shortly thereafter and returned to their station. Another rescue ambulance and an EMS<sup>150</sup> captain were dispatched to the same patient at 0311 hours. The patient was assessed and transported to the hospital.

The paramedics took no equipment with them when making patient contact on the second floor of the apartment complex. They did not assess the patient before leaving. The patient did not sign the “AMA” form,<sup>151</sup> was not provided a copy of the patient care record, and did not receive a copy of the after care instructions.

During the interview of the paramedic responsible for conducting a patient assessment the investigators did not just ask if he was familiar with the medical control guidelines or even the basic assessment guidelines in general. The investigators had the paramedic concede his actual knowledge of the specific guideline stating an accurate and thorough assessment requires a complete set of vitals be taken and documented. The investigators had the paramedic acknowledge he failed to obtain the vital signs as required by the protocol.

While blaming the patient’s lack of cooperation and hostility, the investigators had the paramedic agree he was familiar with the requirement members perform an assessment to determine orientation and level of consciousness and that inappropriate aggressiveness or hostility should alert members to the possibility the patient’s thinking process may be impaired. Having done so, the paramedic admitted he could not rule out a medical problem for the hostility, admitted he did not ask others on scene if the patient’s hostility was normal and admitted he could not rule out an altered mental status, all because he failed to perform an assessment.

During his interview the paramedic acknowledged a specific medical control guideline required asking, “person, place and event” to establish a patient’s level of alertness and orientation and he failed to comply with the policy. He admitted a review of the patient care record failed to allow for a determination of the patient’s mental status, in the manner required by the protocol.

When first asked if the patient care record was complete, the paramedic said it was. As the investigators went through the form point by point it soon became clear it was not.

During his interview, the paramedic said, “safety and security” and lighting suggested it would be best if the patient was assessed in the back of the ambulance. He was unable to articulate actual and specific safety or security concerns, or why turning on a light, using a flashlight, or calling for assistance could not take care of the problem.

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<sup>150</sup> Emergency medical services.

<sup>151</sup> Against medical advice or release of liability form.

During his interview the paramedic said things like, I didn't get "formal training," "I acted to the best of my training and knowledge at the time and didn't think of it," and it was a "BLS"<sup>152</sup> call.

The Department's medical director reviewed the completed investigation, including the Department's statement of allegations. On one of the allegations, the medical director opined the failure to take medical equipment to the patient was grossly negligent. The Department did not set forth an allegation that the medical care was grossly negligent.

The paramedic was charged by the Department with negligent failure to follow medical protocols. It was proposed he receive an 8-working<sup>153</sup> (4-calendar) days suspension. This proposed penalty is within the penalty range of reprimand to Board of Rights hearing set forth in the current Department/UFLAC guidelines.

The penalty was reduced to a 4-working (2-calendar) days suspension at the *Skelly* hearing when the paramedic said he took responsibility for his actions, was extremely remorseful, said he learned from his mistakes, and agreed to attend remedial training. The remedial training took place on July 29, 2009.

The nurse educator providing the remedial training reports at the beginning of the training, the paramedic told her he did not believe he violated any policy, he really did nothing wrong, but the call could have gone better and he blamed the patient. The nurse educator reviewed policies about taking equipment to the patient and walking patients. The paramedic responded by saying, "the equipment thing is a suggestion isn't it?" He was also quoted as saying, "the walking policy doesn't say have to, does it?"

### **Assessment:**

The investigation was thorough and complete. The investigation and report clearly identified specific policies and protocols the paramedic was on notice of and failed to comply with. Before beginning interviews, the investigators obtained necessary and basic background information. The investigation was handled in a manner indicating the case was being prepared for a Board of Rights hearing. The charges were properly sustained.

The June 30, 2009, *Skelly* hearing took place about eight months after the complaint was received. From the time the complaint was received on October 27, 2008, until December 17, 2008, there was an unexplained delay before advocates were requested and assigned.

The recorded interviews, investigative report and exhibits could not be located in the Department's complaint tracking system.

The paramedic said he received inadequate training, he did not have formal training, he needed more training and he was just acting to the best of his training and knowledge. Investigators should always be prepared for such claims, which have little, if any merit, if investigators can confront witnesses with actual training records and question them about specific guidelines and protocols governing their conduct during their interviews. The investigators were able, in many instances, to have the paramedic admit having knowledge of specific guidelines, that he received training, and he violated them.

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<sup>152</sup> Basic life support.

<sup>153</sup> The Department defines a "working day" for those assigned to platoon duty as 12-hours.

In this case, like many others, the investigators may have been able to obtain additional evidence training is provided, and certificates, licenses and accreditation cannot be obtained without demonstrating proficiency in certain skills by asking the second set of paramedics, who properly assessed and transported the patient, and the EMS captain, about their training, and knowledge of guidelines, and the requirements that must be met in order to obtain a paramedic license and accreditation.

The investigation did not just establish the paramedic violated specific patient care guidelines. Although the investigators did not have the paramedic concede he was grossly negligent, their investigation reveals that to be the case. A paramedic is grossly negligent when he fails to provide even scant care or when his actions or omissions are an extreme departure from the standard of care.<sup>154</sup> At one point during his interview, and in response to a question by his own union representative, the paramedic said he considered this a “BLS call.” At another point he said the drills he was provided as a rookie were at an EMT level. This is no excuse and, in fact, only makes the case against the paramedic much worse for him. Paramedics should know their advanced scope of practice includes the basic scope of practice of an EMT.

The evidence in this case reveals the paramedic failed to determine from the teletype the patient had a cardiac history, he failed to determine why, specifically, he had been called to the scene, failed to take basic assessment and medical equipment with him to the patient, failed to determine if there was a medical reason for the patient’s hostility, failed to obtain a medical history from the patient or her daughter, failed to determine what the patient’s medications were, and failed to obtain and record the patient’s blood pressure, pulse, respirations, skin moisture, skin temperature, or capillary refill. Every one of these failures falls within the *basic* scope of practice for an EMT. Therefore, the paramedic’s failure to perform a *basic* assessment called for by an emergency medical technician’s *basic* scope of practice leaves the paramedic with having to answer the question: “By failing to perform a *basic* assessment called for by the *basic* scope of practice did you fail to provide the patient with *basic* care, did you fail to provide even scant care?” It is exactly this kind of gross negligence that resulted in a multi-million dollar damages award against the City of Los Angeles and one of its paramedics in *Wright v. City of Los Angeles* (1990) 219 CA3d 318, 345-347.

The fact the paramedic left the patient and returned to his fire station without providing the basic assessment called for by the basic scope of practice, failed to call for assistance, failed to wait for the second paramedic ambulance and was a part of failing to provide the patient with after care instructions, failing to obtain a valid release of liability, and was a part of documentation that falsely stated the patient refused to sign the AMA and falsely stated the patient refused LAFD transport is all the more egregious.

The paramedic acknowledged hearing the patient calling for another ambulance. The fact he and his partner failed to call for assistance, failed to wait for the second ambulance, failed to call dispatch to determine if another ambulance was responding, failed to warn the EMS captain of any dangers when they returned to their station and failed to provide a warning to another responding unit about safety and security concerns speaks volumes about the significance of the safety and security concerns expressed by the paramedic four months after the incident, when he was questioned by investigators about his conduct.

Any claim a three or four hour formal training class is needed to document an assessment called for by the basic scope of practice is easily dealt with by asking the paramedic how long it should

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<sup>154</sup> *Wright v. City of Los Angeles* (1990) 219 CA3d 318.

take to know filling in the blanks and boxes on a pre-printed patient care record should be done accurately, honestly and completely.

The current Department/UFLAC disciplinary guidelines call for a range of reprimand to Board of Rights hearing for the negligent failure to follow medical protocols. Therefore, the proposed penalty of an 8-working days suspension falls at the low end of the range. The final penalty of 4-working days suspension the paramedic received after the *Skelly* hearing where he took responsibility, expressed remorse, said he learned from his mistakes, and would attend remedial training is lower than the minimum 5 days suspension mentioned in the guideline range.

In light of what the investigation revealed and what the paramedic said at his *Skelly* hearing it is troubling the nurse educator reports the paramedic told her he did not believe he violated policy, he did nothing wrong, blamed the patient and interpreted the very policies he violated and received remedial training on as suggestions. The paramedic's personnel file has not been reviewed to determine if his suspension has been served or his record of remedial training has been noted because the personnel files have not been made available.<sup>155</sup>

## ***Findings***

The investigation was thorough, complete and appropriately determined the paramedic engaged in a knowing violation of work rules without a reasonable excuse for his failures.

The investigation revealed the patient care was grossly negligent.<sup>156</sup>

## ***Recommendations***

The following recommendations should be considered:

1. The Department should ensure all basic information such as policies, protocols, guidelines, dispatch records, journals, patient care records, reports, memos, emails, training records, and all other materials of any type related to the incident and conduct under investigation is obtained and thoroughly reviewed at the start of the investigation, before interviews begin.
2. The Department should ensure its misconduct investigations determine if knowing violations of work rules occurred without reasonable explanations for noncompliance. To determine if knowing violations of policies, procedures and guidelines have occurred, Department should only employ investigators who demonstrate the ability to proficiently:
  - a. Obtain and thoroughly review the specific, as opposed to general policies, protocols, guidelines and other work rules governing the alleged misconduct at the start of the investigation;

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<sup>155</sup> The personnel files have not been reviewed for the reasons set forth in footnote 45.

<sup>156</sup> The Department's medical director did provide a written opinion stating the failure to take medical equipment to the patient was grossly negligent. The medical director was not asked and did offer an opinion on the issue of whether the patient care was grossly negligent as well.

- b. Obtain and thoroughly review all training records to determine if the employee accused of misconduct received actual or constructive notice of the specific work rule, policy, protocol or guideline at the start of the investigation;
  - c. Determine if those accused of violating work related rules will contend they were inadequately trained on the issues related to the matter under investigation, and the basis for such claims;
  - d. Thoroughly question witnesses, and particularly the employee accused of violating a work related rule about their training on the specific rule they are accused of violating, and attempt to obtain admissions they were trained on the specific rule they are accused of violating;
  - e. Thoroughly question witnesses, and particularly the employee accused of violating work related rules, about how their conduct did or did not conform to the specific work rule, and attempt to obtain admissions of the violations;
  - f. Thoroughly question witnesses, and particularly employees accused of violating work related rules about all reasons for failing to fully comply with the rule alleged to have been violated; and
  - g. Thoroughly question witnesses, and particularly the employees accused of violating work related rules, about the reasonableness of their explanations for violating work standards.
3. The Department investigators, investigative supervisors and investigative managers should ensure investigations obtain and investigative reports document, admissible evidence to establish knowing violations of work rules without reasonable explanations for noncompliance.
  4. The Department investigators, investigative supervisors and investigative managers should ensure investigations obtain and investigative reports document admissible evidence to establish every element of the misconduct violation.
  5. The Department should ensure its investigators obtain all relevant legal guidance at the start of an investigation to be sure all evidence is obtained and interviews are complete. For example, legal guidance on what conduct constitutes gross negligence should be obtained before interviews are conducted.
  6. The Department should ensure all potential allegations have been identified at the start of the investigation and should seek the assistance of a subject matter expert, as necessary, to assist in forming allegations and preparing a thorough and comprehensive investigative plan.
  7. The Department should ensure its investigators seek the assistance of subject matter experts, as necessary, to assist in identifying what evidence needs to be obtained and what witnesses should be asked during their interviews.
  8. Interview and *Skelly* recordings, the investigative report, investigative materials and exhibits should be included in the Department's complaint tracking system.

9. Records of remedial training provided as a part of disciplinary action should be placed in the employee's file to evidence the employee was placed on actual notice of work standards he or she violated.
10. The Department should not reduce proposed penalties based on statements of remorse, or taking responsibility and agreements to attend training expressed at *Skelly* hearings. Expressions of remorse and taking responsibility should be considered when setting the proposed penalty before the *Skelly* hearing is held and if further or remedial training is required it should be included as a part of the proposed penalty, not negotiated for a lower penalty.
11. The Department should place greater emphasis on conduct that demonstrates actual remorse and taking responsibility as opposed to oral expressions of the same.
12. The Department should develop a system to ensure it is able to provide evidence its employees are on notice of its work rules and the consequences for noncompliance. Actual notice is best evidenced by a signed acknowledgement.
13. The Department should develop and comply with a uniform policy of reporting emergency medical technicians and paramedics who have *potentially* engaged in grossly negligent patient care, incompetence and dishonesty that is substantially related to the qualifications, functions, and duties of pre-hospital personnel to the local emergency medical services agencies and to the State of California Emergency Medical Services Authority that certify, accredit and license them.<sup>157</sup>
14. The Department should refer the facts involving this section of this *Assessment* to the Department's medical director for an opinion concerning whether the patient care was grossly negligent as that term is defined in *Wright v. City of Los Angeles*(1990) 219 CA3d 318, 345-347.
15. If the Department's medical director determines the medical care in this case was grossly negligent or there was a *potential* violation of *Health and Safety Code*, section 1798.200, the matter should be referred to the County of Los Angeles Department of Health Services for their consideration.<sup>158</sup>
16. The Department's misconduct investigations should be conducted, supervised and managed by non-sworn persons with the demonstrated expertise, training and experience

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<sup>157</sup> *Health and Safety Code*, section 1798.200(c) identifies gross negligence, incompetence and dishonesty substantially related to the qualifications, functions, and duties of pre-hospital personnel, among others, as evidence of a threat to public health and safety which, if true, may result in probation, denial, suspension, or revocation of a certificate or license. County of Los Angeles Department of Health Services Reference No. 214 says pre-hospital provider agencies shall prepare and forward a written report regarding action which may *potentially* constitute a violation of section 1798.200. The Department should report *potential* violations and let the County of Los Angeles determine if actual violations have occurred.

<sup>158</sup> The County of Los Angeles Department of Health Services, as the local emergency medical services agency, is also required to comply with the *Firefighter Procedural Bill of Rights Act* pursuant to *Government Code*, sections 3251 and 3253. The Fire Department should not make assumptions about the statute of limitations that may apply to any investigation or other action the County of Los Angeles may wish to pursue because the Fire Department's date of discovery may not be the same date of discovery for the County of Los Angeles.

to conduct investigations of public safety personnel in compliance with the foregoing recommendations.

17. The Department should encourage subject matter experts, including its medical director, to review completed investigations to ensure the adequacy and completeness of the allegations made against those who have violated Department work rules, when appropriate, and encourage such experts to suggest additional allegations based on the information provided.
18. The Department should encourage subject matter experts, including its medical director, to review completed investigations to ensure they are sufficient, complete and thorough, when appropriate.

## FIELD INVESTIGATIONS

Given the large number of cases needing investigation and the limited resources of the Professional Standards Division (PSD) some investigations are conducted by captains and chief officers in the field. At the present time, about 700 captains and chief officers may be called on to conduct such investigations.

When completed, field investigations are sent to PSD for review and disposition. This includes reviewing the investigation, deciding if charges should be sustained, making an initial penalty determination, holding *Skelly* hearings, and taking subsequent disciplinary action. An assessment of field investigations was conducted to evaluate whether field investigations are complete, thorough, and timely and whether they are subjected to an appropriate review and disposition. The three following cases are representative of many field investigations.

### ***Lobster Fishing***

#### **Factual Background:**

On October 15, 2008, a chief officer learned two firefighter/divers had been diving for lobsters from a fireboat while on duty, each had been cited by a California Department of Fish and Game warden for possession of under size lobsters and one was cited for not having a license in possession. The chief officer conducted an investigation, which included recorded interviews of three fire personnel assigned to the fireboat.<sup>159</sup>

The fireboat mate said they went lobster diving about 300 yards off the Whites Beach/Pt Fermin area, there were floats marking lobster traps all around the area where they were and he was trying to keep the boat away from the traps, and not run them over while the divers were diving. He had been involved in two or three lobster dives in the same general area between September 27, 2008 and October 8, 2008, the date of the incident.

The mate said he was aware of a 2001 memo from battalion headquarters indicating on-duty fishing was not permitted. He did not think the memo applied anymore because the battalion chiefs had changed and chief officers were now giving a “wink” they wanted to come over for dinner. He said the chief officer conducting the investigation asked about coming over for a lobster dinner the first shift they met, but perhaps it was a joke.

The mate said the chief officer asked about a lobster dinner, was told by the mate, “we don’t do that anymore,” after which he heard the chief officer tell him when you go to the fish market we can have a lobster dinner. The chief officer expressed concern he was giving a wink and nod to lobster dinners and said “maybe they need to be looking at me” and was told by the union representative, “we don’t think so.” The mate acknowledged that on October 15, 2008, the chief officer asked the mate about being invited to dinner at which time the mate invited the chief to dinner and “penciled” him in for November 4.

One of the firefighter/divers said they had been actively diving for lobsters on duty as a recreational dive. They made two dives and were diving on a submerged barge that offered a lot of hiding spots. Although he found some lobsters he did not bag them because by measuring

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<sup>159</sup> The same union official represented all three sworn personnel during the investigation while two of the firefighter/divers had court cases pending at the time they were interviewed.

them underwater he found they were too small. His diving partner caught eight and gave him one because the limit was seven per person. While on the fireboat the game warden asked to see the lobsters, removed several from the game bags and found one from each bag that was too small. The firefighter/diver said he was aware of the 2001 memo but since the three chiefs who signed it left he thought it no longer applied. He was told by the other firefighter/diver that on the chief's first visit he said he wanted to be invited over to dinner. The chief officer indicated that if he said something about having a lobster dinner it was probably "*in jest*." The firefighter/diver was cited at 1:43pm on October 8, for an undersize lobster and fishing without a license in possession. He showed the chief officer a receipt showing he purchased a license the day before the incident.

The second firefighter/diver said they were diving up the coast in the morning, had returned to engage in a practice session with another fireboat and returned to diving in the afternoon. During the afternoon dive they went to an area that was a good 50 to 100 yards from lobster traps and about 25 yards from a buoy marking the high spot off Pt. Fermin. He said there were no lobster traps because it was a boating lane; there was a reef, a ledge- a shelf, no traps and a good spot.

The second firefighter/diver caught eight lobsters. He said at the very end he grabbed two from the same place-the same hole, and since he had two in his hands did not measure them. When he surfaced he threw them on board.

When asked about the written battalion directive, the second firefighter/diver said during all his years as a diver, except when the directive came out, this type of diving was encouraged because it was one of the best ways to drill for what they do because it is hard to control buoyancy in shallow water with the surge and sometimes you get lobster. He was under the impression that when the battalion chiefs who signed the directive left the battalion, the policy went with them.

The investigating chief officer asked if he was one of the chiefs asking for lobster dinner and the second firefighter/diver said yes, it was the first day they met, "and it might have been *a jest* for you." He went on to explain he never heard other chiefs ask for lobster, but they had been eating lobsters. The firefighter/diver said, "you notice that's why we put it on the calendar, you were coming over for lobster dinner- that's why I was out getting lobsters for that dinner, to make sure, we were going to have [another boat], that was why we were out two or three times to try to have lobsters."

The chief officer's report indicates the two firefighter/divers pled "no contest" in the criminal case to having undersized lobster in their possession and fined \$25 and assessed additional court costs. The charge for not having a license in possession was dismissed when proof of license was submitted.

The Department charged the mate with violating Department policy by allowing fishing while on duty and by doing so he brought discredit to the Department. It was proposed he receive a 5-working<sup>160</sup> (2.5 calendar) days suspension based on the penalty guideline offense he brought discredit to the Department. The range for the penalty guideline cited is a verbal warning to a 15-day suspension.

The Department's complaint tracking system (CTS) described the complaint type as misuse of Department equipment but the corresponding penalty guideline offense of using City resources for personal use was not cited in preparing the penalty recommendations. One of the firefighter/divers said they were engaged in a recreational dive. The penalty range for misusing

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<sup>160</sup> The Department defines a 'working' day for sworn members assigned to platoon duty as 12-hours.

City resources is reprimand to a Board of Rights for dismissal and is more severe than the offense guideline relied on.

The mate's *Skelly* hearing<sup>161</sup> took place on March 24, 2009, at which time he argued he and the firefighter/divers were only doing what they were expected to do, his supervisor, the chief officer who conducted the investigation was at fault and should be held responsible because they were fishing for his lobster dinner. He invoked the name of another chief officer previously disciplined for dishonesty in arguing for a lower penalty. After his *Skelly* hearing the mate received a suspension of 2-working (1-calendar) days. Although it was verbally reported the firefighter/divers received written reprimands, copies of the reprimands are not included in the investigation files.<sup>162</sup>

On March 24, 2009, the Department opened a separate investigation to determine what the current battalion chief officers knew about the "no fishing on duty directive," whether they had eaten seafood meals in the battalion, whether they had been told the policy was being violated and whether they were aware fire personnel were fishing while on duty. The chief officer previously disciplined for dishonesty was assigned with another chief officer to conduct this new investigation. Three current battalion level chief officers were each asked nine questions and each denied having any knowledge of fishing violations.

On July 1, 2009, the Department sent a letter to the mate confirming he was retracting his complaint alleging a Department supervisor encouraged him to catch lobster for a fire station lobster dinner. The letter said the Department would soon close the investigation based on information the mate provided to the chief officer who was previously disciplined for dishonesty. A recording or written summary of this conversation does not appear in CTS or the investigation files.

### **Assessment:**

At the end of October 2008, a Department spokesperson was quoted in a newspaper saying the lobster fishing incident would be investigated "thoroughly." However, the investigation was not thorough or complete. The investigation should not have been assigned to the field for completion. The Department failed to recognize glaring deficiencies and very significant conflict issues once the field investigation was forwarded for review.

There is no indication in the materials provided for this assessment the chief officer who the mate and firefighter/divers contend wanted a lobster dinner attempted to minimize or hide the contentions made against him. In fact, the interview recordings reveal he encouraged them to provide information he and other chief officers "winked" at the battalion "no fishing" directive and there is some information indicating he would not have sought a lobster dinner. However, he should not have continued with the investigation and it should have been reassigned as soon as he was placed on notice of the contentions made against him.

The interviews failed to confront the mate and the firefighter/divers with and have them explain numerous inconsistencies and much problematic testimony, some of which included:

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<sup>161</sup> The Department provides employees with an informal pre-disciplinary hearing as required by *Skelly v. State Personnel Board* (1975) 15 C3d 194.

<sup>162</sup> The personnel files have not been inspected to verify issuance of the reprimands or if the suspension has been served for the reasons set forth in footnote 45.

1. While the mate said there were lobster traps all around the area, he was trying to keep away from the traps, and not run them over while the divers were diving, one of the firefighter/divers said they were a good 50 to 100 yards from lobster traps, and there were no lobster traps in the area because it was a boating lane.
2. One of the firefighter/divers said they were diving on a submerged barge that offered a lot of hiding spots. The other firefighter/diver said nothing about a submerged barge and spoke of a reef, a ledge- a shelf, a good spot and pulling two lobsters from the same hole.
3. While the mate said he had been involved in two or three lobster dives in the same general area over a period of about 10 days, and one of the firefighter/divers implied both their dives on October 8, were at the same spot, the other firefighter/diver described two different areas of diving on the day in question.
4. While one firefighter/diver says he was measuring lobsters while underwater, the other firefighter/diver was asked nothing about whether he was measuring any lobsters below water, why he caught and surfaced with eight lobsters when the limit was seven, or why he failed to measure two undersized lobsters at any time before the warden found they were undersized.

The firefighter/divers and mate report they were fishing because the chief officer said at his first meeting with them he wanted a lobster dinner. The chief officer never attempted to pin down when, specifically this occurred or how much time passed between that first meeting and when the lobster diving occurred. This is critical because the chief had been assigned to supervise the area where the boat crew is located for a full year before the incident and:

1. The fishing incident occurred with the warden issuing citations on October 8, 2008.
2. The mate admitted it was during a phone conversation on October 15, 2008, the chief officer asked for a dinner invitation, at which time the mate invited him for dinner and penciled him in for November 4.
3. One of the firefighter/divers told the chief officer during his interview, “you notice that’s why we put it on the calendar, you were coming for a lobster dinner- that’s why I was out getting lobsters for that dinner ... that was why we were out two or three times to try have lobsters.” The firefighter/diver making this statement should have been asked to explain how he was fishing for a November 4 lobster dinner on October 8 that was not *requested* or *penciled in* until a week later on October 15.

The numerous breaks taken during the interviews raise a number of issues. The time a break starts should be announced before going off record and the time recording resumes should be recorded and was not. Unrecorded investigation related conversations should be discouraged, particularly when the investigator is accused of causing the misconduct, or may be accused of wrongdoing. The best practice is to record a post-break confirmation no “off the record” conversations concerning the investigation took place during unrecorded breaks in the interview.

During one interview the representative requested a break while a witness was answering a question and another break after a question was asked but before the question was answered. After the first break, the union representative said, “do you mind if he finishes his thought about...” after which the witness provided a further explanation. After the second break the

question that had been asked by the investigator before the break was not answered and a new question was asked. Complete answers should be recorded before breaks are taken.

The written investigative report was not entirely consistent with what was actually said on tape. The investigative report says, “he indicated that over a year ago, when I first visited their fire station after my assignment to battalion . . . , that I asked about a lobster dinner in some manner.” No such information is recorded. This written information also makes it clear the chief officer was a witness who should not have been conducting the investigation.

The interviews failed to pin each witness down to a detailed and specific timeline of activities. Although the report referred to the disposition reached in the criminal cases the file provided for review fails to contain a copy of the court records. Court records should always be obtained when a disciplinary investigation involves criminal charges.

The Department was not able to locate the recording of the *Skelly* hearing. Therefore, the assessment of what occurred at the *Skelly* hearing was limited to a review of the file notes and a conversation with a hearing participant.

The investigation was completed in approximately 30 days, but the report was not completed for another two months. The investigative review and penalty recommendation was completed in about a week. It took almost two months to conclude the *Skelly* hearing after preparation of the penalty recommendation.

The chief officer previously disciplined for dishonesty should not be assigned to conduct an investigation of potential integrity issues. The investigation of alleged chief officer misconduct was not thorough and complete and was limited to three chief officers currently assigned to the battalion who were each asked nine questions when the battalion directive was issued eight years earlier in 2001. The firefighter/diver who said chiefs had been eating lobster at the fire station was never asked to identify the chief officers, when they had been eating lobster, or if the lobster they were eating was obtained in violation of the “no fishing while on duty” directive.

## ***A Complaint of Hazing***

### **Factual Background:**

Allegations were made a firefighter was the victim of hazing in November and December 2008. Because of insufficient staffing, the investigation was referred to the field with an indication a PSD investigator would be made available to assist in the field investigation. The chief officer to whom the field investigation was assigned did not request assistance from the PSD investigator.

The chief officer’s investigation was completed and his report was submitted on January 17, 2009. After a review, the investigation was closed on March 20, 2009, with an indication no further action was recommended and the matter was considered closed. In April 2009, an advocate assigned to PSD was provided with information from the field indicating the investigation was inadequate.

A further review of the field investigation determined potential witnesses, including witnesses identified by the firefighter, had not been interviewed. The investigative report also failed to indicate steps had been taken to identify additional potential witnesses. Approval was granted to reopen the investigation on April 24, 2009. It was assigned to the PSD for a further investigation.

## **Assessment:**

The first review should have determined the field investigation was not complete. The advocate took very appropriate action to ensure a further review took place and expressed very appropriate concerns about the need to obtain a complete and thorough investigation.

It is commendable those in the field reported an inadequate field investigation had been conducted involving a claim of hazing. Hazing represents a critical area of concern to the Department and the Mayor's *Executive Directive No. 8*, issued on November 20, 2006, adopts a zero tolerance for hazing. That is one of the reasons the investigation was re-opened as a PSD investigation. Hazing investigations should not be conducted by field personnel.

## ***Fire Apparatus Used to Tow Personal Trailer***

### **Factual Background:**

On April 22, 2009, a division chief from the Los Angeles County Fire Department reported seeing a Fire Department truck with service body equipped with red lights towing a flat bed car trailer with a bright orange Ford Mustang on the freeway at approximately 1:30pm.

When interviewed, a captain said he received a call from his son about 1:00pm indicating the captain's personal truck his son had been using to tow the car trailer broke down on the side of the freeway on the way to the captain's home. The captain deemed it a family emergency, decided to leave work early and took a Department truck he was permitted to drive to and from home. The captain said the trailer was parked about a foot off the freeway, where it could be hit by passing traffic and his family member was in grave or imminent danger. He admitted he hooked up the personal trailer to the Department truck and towed it home.<sup>163</sup> The captain notified his supervisor of what happened when the supervisor called him the next morning.

The captain was charged with using Department apparatus to conduct personal business and bringing discredit to the Department. It was proposed he be given a 4-work<sup>164</sup> day suspension. Seven months before engaging in this conduct the captain received a 5-work day suspension when he allowed a subordinate to leave work to perform personal business.

At his *Skelly* hearing<sup>165</sup> the captain initially admitted he violated Department policy in connection with the charges and said given the same situation he would do it again because his son was in harms way. The captain said it took 1 to 1.5 hours to drive home from where he picked up the trailer. He was on call at the time and stated a belief his chief would approve his conduct had he known ahead of time.

During the *Skelly* hearing the union representative argued the captain had done nothing wrong because the Department had a history of taking care of its own by sending resources such as

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<sup>163</sup> Although not indicated by the investigation, the captain's work station is approximately 40 miles from where the trailer was on the shoulder of the freeway and it was approximately 60 miles to his home from the shoulder of the freeway.

<sup>164</sup> The Department reports the captain is not assigned to a normal platoon schedule and is assigned a 4/10 work schedule.

<sup>165</sup> A *Skelly* hearing offers the captain an opportunity to explain his conduct before discipline is imposed. *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

helicopters and ambulances outside the City to assist family members; other employees had been rewarded for using Department vehicles to assist members of the public; the conduct was justified because the public and captain's son were in danger; the "County civilian who had the title of chief" did not have all the facts; it was improper to consider the captain's prior record of discipline, and no record of discipline should be placed in the captain's file because he wanted to promote to chief officer.

The union representative also argued punitive discipline should not be taken just so it could be said, "Does that make you happy Mr. Civilian for the County?" When asked how it would look to have the incident in the newspaper, the *Skelly* officer was told: "Yeah, but you know what, that's where it's your duty to say who cares what this anonymous letter says. Who cares what this newspaper flash says. You know what, we take care of family, that's how we run our business, and I'm the decision maker and you know what, I'm not going to unfairly punish a member of mine who's been an outstanding employee."

At the conclusion of the *Skelly* hearing the Department agreed to dismiss the charge alleging the captain brought discredit to the Department; stipulated to amend the only remaining charge to allege the captain utilized a department apparatus to tow a private trailer and vehicle to his private residence to assist a family member in grave danger; issued a "Notice to Improve" to the captain instead of the 4-work day suspension; and, agreed nothing about the incident would be placed in the captain's personnel file.

### **Assessment:**

The Department's review of the field investigation should have determined it was not complete, thorough or timely.

The interview of the captain was not adequate. It failed to determine what the captain knew before he arrived to tow the trailer home. If he knew his son and/or the public was in grave and imminent danger it should have been of great concern that he, with more than 25 years of public safety experience, failed to call the California Highway Patrol to alert them to the danger and seek assistance. The captain was asked no questions about the time and distance traveled to get to his son who he claimed was in grave and imminent danger.

The captain's interview failed to address why the captain did not let his supervisor know he was leaving work early to take care of a family emergency before he did so since he was on call, why he failed to call his supervisor sometime during the approximate 45 minute drive to get to where his personal truck was disabled on the side of the freeway, or why he did not call his supervisor after pulling the trailer off the freeway.<sup>166</sup> The need to determine whether the captain intentionally failed to tell his supervisor about leaving work early with the intention of using a Department fire apparatus to tow a personal trailer home should have been obvious.

The investigation failed to properly question why the captain failed to pay the cost of having a professional tow company tow the trailer or why he failed to simply rent a truck at his own expense so his son could complete towing the personal car and trailer home. In fact, the Department accepted without asking any questions or conducting any further investigation, the

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<sup>166</sup> The investigation report mentions the captain had a cell phone conversation with his son and the Department truck he was driving was equipped with communications equipment.

statement “Triple A” would not tow the trailer.<sup>167</sup> The investigation failed to adequately draw a distinction between towing the trailer off the freeway and out of danger as opposed to driving another 60 miles to the captain’s home.

The report prepared by the supervisor failed to accurately summarize information recorded during the interview, omitted important information provided during the interview, and described information that was not recorded. For example, the interview summary says the captain received a cell phone call at approximately 1230. A cell phone is not mentioned on the interview recording and the time mentioned on the recording is 1:00pm, not 1230. The report says the captain ended the interview by taking full responsibility for his actions and acknowledging that due to the nature of the incident he wished he had some other way to handle it but he felt his back was against the wall. These comments are not included on the interview recording. While it is certainly possible the supervisor had investigative conversations with the captain off the record, such a practice should be avoided.

The interview summary fails to mention the captain’s recorded statement that he takes the Department truck home only 10 percent of the time and a hybrid 90 percent of the time. Although the investigative report says the captain’s time sheets reflect he used authorized leave to “mitigate his family emergency,” the report fails to mention he said nothing to his supervisor until called by the supervisor the next morning.<sup>168</sup>

Although not clearly established during the investigation, the captain lives about 115 miles from his normal work assignment. At one point, the captain said he stays many nights with his parents instead of going home. It was never determined how far his parents live from his work location. The captain was never asked if he would have ordinarily stayed the night at his parent’s house on the day of the incident since he was on call. The Department should have determined if the only reason the captain drove a fire apparatus, instead of a hybrid, 115 miles home that day was to tow his son’s car.

The report says the captain believed his son was in imminent danger and a dangerous situation existed for passing motorists so he felt he had no other recourse immediately available except to use his assigned vehicle to tow the trailer on his way home. The report fails to describe the specific danger, the imminence of the danger, when he first learned of it, what the captain tried to find out about the danger before arriving on scene, why he had to tow the personal trailer with a Department fire apparatus 60 miles to get it out of danger, and the other matters previously mentioned. The Department simply accepted the statement without conducting a reasonable inquiry concerning the claims being made.

The proposed penalty of a 4-work day suspension fell on the low end of the range of verbal warning to 15-days suspension for causing discredit to the Department on the 2008

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<sup>167</sup> It is not possible for the captain’s car trailer to be the first trailer that had to be towed from the side of a freeway and no one expects Department personnel will drive Department fire apparatus 40 miles to a location outside the City for the purpose of removing such trailers from the freeway and another 60 miles to a private residence.

<sup>168</sup> Section 12a of the Department’s rules and regulations says all members shall keep themselves in readiness for duty and not absent themselves from place of assignment without the specific permission of their commanding officers. Section 12b says members shall remain on duty until change of platoons unless properly relieved or otherwise directed by their commanding officers.

Department/UFLAC guidelines for a first offense. However, this was not the first time he had been disciplined as it relates to a misuse of City time.

The Department's written penalty rationale fails to mention other potential, appropriate and more severe penalties. Given the failure to tell his supervisor about leaving work early the captain changed his work assignment and took a fire apparatus out of service without prior approval. More seriously, the captain used City resources for personal use. The guidelines for sworn personnel call for a penalty of reprimand to dismissal for a first offense, which is substantially more severe than what was proposed he receive.

It is proper to consider the captain's record of prior discipline. While it is true the captain had never been charged with misusing fire apparatus for personal purposes and bringing discredit to the Department before, the factors the Department uses in setting a penalty do call for considering an employee's past disciplinary record.<sup>169</sup> That is especially appropriate where the captain was disciplined seven months earlier for allowing an employee to improperly leave work to take care of personal business.

The union's arguing a history of resource mismanagement; it was a civilian who reported the misconduct, "we are family," "that's how we do business," and the captain did not want disciplinary action in his file so he could promote to chief officer did not justify a penalty reduction. The charge alleging the captain brought discredit to the Department should not have been dismissed and the remaining charge should not have been amended. None of the information provided at the *Skelly* hearing supported a penalty reduction. Disciplinary action should have been included in the captain's personnel file for future consideration. This is especially true when the captain was essentially unrepentant at his *Skelly* hearing, said he would do it again under the same circumstances, argued he was entitled to use a Department fire apparatus in such a manner and previously allowed an employee to leave work to take care of personal business.

The investigation and disciplinary action was not timely. The only interview was of the captain accused of wrongdoing and that interview did not take place until over a month after receipt of the complaint. Another almost two months passed before the investigative report was prepared. While the investigative review and penalty recommendation was prepared in about three weeks, it took more than two months to conduct the *Skelly* hearing. The disciplinary process involving a case with only one interview took 6 months.

The captain lives about 115 miles from work. He says when he goes on vacation for a week or two; he drives the Department fire apparatus home. These facts raise some serious questions: who benefits most from an arrangement whereby a captain is permitted to drive a Department vehicle up to 230 miles round trip between home and work; how often does this occur; what does this benefit cost the City taxpayers; how many "commuter" miles are placed on the captain's assigned department vehicles as opposed to "work" miles; how often has the captain been required to respond directly to an emergency in a Department vehicle from home or when off duty; how far has the captain been required to travel when called for such emergencies, and, does a Department fire apparatus actually sit out of service at a captain's house over 100 miles away from his duty station when the captain is on vacation for up to a week or two? A review of personnel and payroll files has not been conducted to obtain answers to some of these questions for the reasons set forth in footnote 45.

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<sup>169</sup> The third factor on the list of factors the Department uses in setting penalties.

## ***Findings***

The field investigations were not complete, thorough or timely.

The investigative reviews failed to determine the field investigations were not complete, thorough; and in fact failed to determine glaring deficiencies and obvious defense arguments.

The failure to require complete and thorough investigations, and the failure to identify and correct deficient investigative deficiencies results in later reducing penalties and the inability to sustain findings at a Board of Rights hearing.

Investigative reports do not always accurately match the recorded interviews.

The Department is not always using the most appropriate offense guidelines in setting disciplinary action when there is sufficient evidence to sustain more serious offenses.

There were excessive delays in completing the disciplinary process from the date of initial discovery to finalizing the disciplinary action.

There is evidence Department equipment and resources are being misused for recreational and personal reasons.

## ***Recommendations***

The following recommendations should be considered:

1. The Department's disciplinary process, including investigations, should be conducted, supervised and managed by non-sworn staff with the expertise, experience and training to perform such work involving public safety agency employees.
2. The Department should limit assigning investigations to field personnel to the greatest extent possible.
3. Although field supervisors such as captains and chief officers should be held accountable for providing active and responsible supervision, the Department should limit the number of investigators permitted to conduct investigations in the field to a smaller pool that is more manageable.
4. The Department should develop written conflict policies that govern who may be assigned investigative responsibilities.
5. The Department should limit those conducting and supervising investigations to those who have demonstrated proficiency in ensuring investigations; are complete, thorough and detailed; clearly address knowing violations of policy; fully address all reasons for failing to comply with policies; fully address anticipated defenses; establish all elements of the applicable offenses; and in preparing investigative reports that accurately reflect the evidence obtained.
6. The Department should adopt a rigorous report review process that ensures investigations; are complete, thorough and detailed; clearly address knowing violations of

- policy; fully address all reasons for failing to comply with policies; address anticipated defenses; establish all elements of the applicable offenses; and investigative reports accurately reflect the evidence obtained. Incomplete investigations and inaccurate reports should not be accepted.
7. Investigators and supervisors should ensure investigations properly address inconsistent statements made in connection with a matter under investigation.
  8. Investigators should collect unit histories, dispatch records, station logs, training records and all other background information before conducting interviews as a part of preparing the investigation and before interviews take place.
  9. Those conducting investigations should obtain certified copies of court records when the alleged misconduct also results in the filing of criminal charges.
  10. Investigators should obtain documents offered by, referred to or relied on by witnesses and subjects during their interviews.
  11. Supervisors reviewing investigative reports should provide feedback to the investigator concerning the quality of the investigative work performed.
  12. The Department should adopt guidelines that address “off the record” conversations about matters under investigations and how interview breaks are to be handled “on the record.”
  13. When preparing penalty recommendations and setting penalties the Department should reference all the guideline offenses that appropriately match the misconduct engaged in by the employee.
  14. Until a more appropriate resolution is reached, the Department should initially set the penalty at the mid-range and then apply aggravating and mitigating factors to move the penalty within the range if appropriate.
  15. When initially setting penalties the Department should consider all appropriate aggravating and mitigating factors that apply and not depart from the penalty initially proposed unless new information unknown at the time the initial penalty was proposed is later discovered.
  16. The Department should only use calendar days when proposing and ordering suspensions and should eliminate the use of “work” days.
  17. The Department should upload recordings of *Skelly* hearings to either the complaint tracking system or the disciplinary tracking system.
  18. The Fire Chief should be held accountable in his or her annual performance evaluation for how the disciplinary process and system is working including how investigations are conducted, supervised and managed and for the disciplinary decisions made before and after *Skelly* hearings.
  19. It is strongly recommended the Department review how its resources are being used. To the extent the Department’s helicopters, ambulances, cars, trucks, fireboats and fire

apparatus, and other resources are being used improperly, the Department should take all appropriate steps to ensure that such unnecessary and unreasonable uses are stopped and employees are placed on notice.

20. The Department should review its policies and practices governing take home vehicles.
21. The Department should utilize non-sworn persons with expertise, experience and training in recommending penalties for public safety personnel when preparing proposed and final discipline.
22. The Department should establish timeframes for the timely completion of investigations and each step of the subsequent disciplinary process and ensure qualified staff is available to insure those timeframes are met.

## **FAILURE TO INVESTIGATE CIVIL RIGHTS CLAIM**

On January 23, 2009, the Department received a letter from an attorney alleging Department advocates and a sergeant from the Los Angeles Police Department abused their authority and violated state and federal constitutional rights when they went to a hospital to serve a subpoena. There was a delay in entering the complaint in the complaint tracking system (CTS). On July 16, 2009, the case status in CTS was changed from “Open” to Closed- Not Sustained” although no investigation was conducted. The case status was changed to “Open- PSD” in October 2009. The Department failed to conduct an investigation of allegations advocates abused their authority and violated state and federal civil rights within the one-year statute of limitations that has now expired.

### ***Repeated Attempts to Serve Subpoena***

In November 2008, Department advocates attempted to serve a subpoena at a hospital because they were seeking medical records for a sworn member facing a Board of Rights hearing and possible dismissal. An advocate received a November 12, 2008, letter from the member’s attorney contending the Fire Department did not have subpoena power. It also indicated the Department member whose records were sought took his right to privacy, “under HIPA, privacy laws and the Constitution, very seriously and will vigorously pursue any unwarranted release of his medical information.”

On November 13, 2008, the advocate received a letter from the hospital’s attorney indicating the member’s attorney objected to the subpoena and the hospital did not want to violate the member’s right of privacy by producing medical records once in receipt of the objections. The letter suggested having the City Attorney contact the hospital’s attorney so the matter could be discussed with the member’s attorney.

The advocate received a December 12, 2008, letter from the hospital’s attorney confirming the hospital received a subpoena for medical records. The hospital’s attorney characterized the subpoena as “exceptionally broad,” with many flaws. The letter questioned the legal basis and authority for the subpoena and said the hospital would object to the subpoena on the basis it was “overbroad, ambiguous, of unknown legal authority, and, most importantly, as seeking to violate the state, federal, HIPAA and constitutional privacy rights of a patient.” The letter also said the records were actually in the possession of a physician who was not employed by the hospital.

The Department’s file material indicates the advocates were advised to contact the City Attorney to establish, 1) the lawful basis for any subpoena power they have during the investigative stage, and 2) determine the manner in which compliance with a lawful subpoena could be enforced.

On January 22, 2009, the hospital’s attorney sent a letter to the advocate that was received on January 28, 2009. The letter confirmed the attorney’s understanding of a January 21, 2009 phone conversation. According to the hospital’s attorney, the advocate no longer sought all of the member’s medical records but only wanted a single document from the member’s physician, referencing a specific appointment. The letter also confirmed the attorney’s understanding the advocate was withdrawing the subpoena served on the hospital and the advocate would seek the document from the member’s doctor.

The January 22, 2009, letter informed the advocate the lack of legal authority would be raised once again if any future, similar subpoenas were served on the hospital for the member’s medical

records. The letter advised the advocate any future subpoenas must comply with all laws for the issuance of such documents, and must address and acknowledge the hospital has requirements placed upon it by the State of California, the State Department of Health Services, HIPAA, and other regulatory bodies concerning medical records and patient privacy. Finally, the letter said, absent a patently lawful subpoena, the hospital will object on behalf of the patient, and based on the January 21, 2009 discussions, the hospital would ignore the previously served subpoena. The attorney invited the advocate to reply if the contents of the letter misstated the discussions.

An attorney for the hospital sent a letter to a Department advocate on January 23, 2009, claiming two advocates went to a hospital the day before, demanded to see the practice manager, used a rough tone of voice in front of patients, told a hospital employee to get the practice manager or the LAPD would come to get her, handed her a subpoena that had been previously objected to, demanded the production of documents, and lied to a hospital employee.

The letter says the hospital's attorney spoke to the advocate on the phone while the advocate was at the hospital on January 22, 2009. The letter says the attorney informed the advocate: 1) the advocate had not been told by another hospital attorney to deliver the subpoena and demand production of a document, 2) the hospital would not produce documents on January 22, 2009, and 3) the advocates were to immediately leave the hospital.

The January 23, 2009, letter went on to claim the advocates returned 30 minutes later with a sergeant from the Los Angeles Police Department, at which time the sergeant demanded to see the member's doctor. When a hospital employee said the doctor was in consultation with a patient, the attorney alleges the sergeant responded by saying, "we can do this here or in the back." It is further claimed the advocate interfered with patient care by forcing the doctor out of a patient consultation and intimidated him into producing a document the subpoena did not demand the production of until January 26, 2009.

The January 23, 2009, letter says the advocates engaged in intimidation and bullying tactics to gain access to documents which the hospital previously denied providing pursuant to objections raised by the member's attorney, and rather than pursue the investigation through legal procedures, the advocate abused his authority, abused legal process,<sup>170</sup> and violated the patient's and the hospital employee's state<sup>171</sup> and federal constitutional rights.<sup>172</sup>

### ***Failure to Investigate***

The Department first discovered the alleged wrongdoing on January 23, 2009, when two sworn managers and a non-sworn manager of the Department saw the attorney's January 23, 2009, letter that was received by facsimile that day. On January 24, 2009, a chief officer met with the Department's general counsel and another deputy city attorney to discuss the allegations

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<sup>170</sup> Special notice and procedures may be required for the production of records maintained by a physician in order to protect a patient's right of privacy. The purpose is to give the patient the opportunity to seek a court order to quash or limit the subpoena. Please see *Code of Civil Procedure*, section 1985.3(e).

<sup>171</sup> California citizens are provided broader privacy protections than recognized under the federal Constitution, and this right of privacy extends to medical records. *Jeffrey H. v. Imai, Tablock & Keeney* (2000) 85 CA4th 345 and *Bearman v. Superior Court* (2004) 117 CA4th 463.

<sup>172</sup> The Fourth Amendment applies when a person has a reasonable expectation of privacy. *Sanchez v. County of San Diego*, 464 F3d 916 (9<sup>th</sup> Cir. 2006). At least one circuit court says a patient has a legitimate expectation of privacy in his medical records and is entitled to some measure of protection from unfettered access by government officials. *Doe v. County of Fairfax*, 225 F3d 440 (4<sup>th</sup> Cir. 2000).

contained in the January 23, 2009, letter, and obtain advice. On January 28, 2009, the Department's chief of staff, the Department's general counsel and the Labor Relations Division of the City Attorney's Office were sent a request for legal advice with, among other things, a copy of the attorney's January 23, 2009, letter of complaint.

When the January 23, 2009, letter was received, a non-sworn manager recommended the complaint be treated like all other complaints received by the Department and entered in the complaint tracking system (CTS). The non-sworn manager reports he was treated differently by some sworn members of the Department after making this recommendation. The complaint was not entered in CTS until February 26, 2009, which created a case number.

In a resignation letter dated April 29, 2009, the member whose records were sought said he was resigning "due to the continued violations of [his] state and federal constitutional rights by LAFD supervisors and the continued invasion of [his] personal privacy by LAFD supervisors." The Fire Chief at the time responded with a written acceptance of the resignation on the same day and also said, "Your stated reasons for your resignation will be considered as a complaint of potential misconduct against Department supervisors and will be investigated as such. The Department's investigators will be contacting you in the near future to obtain your statement."

On July 16, 2009, the case status in CTS was changed from "Open" to "Closed-Not Sustained," without an interview of the member who resigned and without an investigation having been conducted. On October 22, 2009, the case status in CTS was changed to "Open- PSD." At the end of October and through November the Department and its general counsel were repeatedly advised a thorough investigation was needed and the Police Department should be notified.

On November 23, 2009, the Department received a memorandum providing information, 1) a former member made allegations of continuing violations of constitutional and privacy rights by Department supervisors, and 2) the former Fire Chief said an investigation would be conducted. Another copy of the January 23, 2009, letter was provided, along with copies of the April 29, 2009 letter of complaint and the former Fire Chief's letter indicating the former member would be interviewed as part of an investigation of potential misconduct. The Department later said a private attorney had been retained to conduct the investigation.

On February 1, 2010, the Department said the investigation was not yet completed because the statute of limitations would not expire until February 26, 2010, or one year after the complaint was first *entered* in CTS

## ***Assessment***

The statute of limitations was erroneously determined to be February 26, 2010. If any of the allegations are true, the Department can take no disciplinary action against the advocates for the misconduct alleged to have occurred on January 22, 2009, because the one-year statute of limitations has now expired. When Department executives and general counsel were advised at the end of October and into November 2009, a thorough and timely investigation was required, there was enough time remaining on the statute of limitations within which to complete the investigation and take any necessary disciplinary action.

The statute of limitations is not triggered by *entering* a complaint in CTS. The statute of limitations is triggered by when the Department *discovers* allegations of misconduct. When read together, *Government Code*, section 3254(d) and City Charter, section 1060(a-d) clearly indicate

disciplinary action cannot be taken unless the investigation was completed and charges were filed within one year of the Department's discovery of the alleged misconduct.

The deadline for completing an investigation and taking disciplinary action could not have been more clear. The discovery rule has been in effect, and the Department has complied with the rule, for many years. There is considerable evidence supervisors, managers and executives of the Department, and at least two deputy city attorneys, repeatedly received copies of the letter providing clear notice the Department first discovered the allegations of misconduct on January 23, 2009. The private attorney retained to conduct the investigation should have made an accurate statute of limitations determination as a first step in planning an investigation in light of *Government Code*, section 3254(d) and City Charter section 1060(a-d). The failure to complete a timely investigation cannot be excused by saying the allegations are not serious.

The failure to investigate leaves the following very general questions unanswered:<sup>173</sup>

1. What happened at the hospital on January 22, 2009, and did anything else occur to cause the April 29, 2009 letter of complaint;
2. What were the advocates told by Department supervisors and managers, the City Attorney's Office, and the attorney's for the hospital and the member whose records were sought about the legal basis for and objections to serving a subpoena before they went to the hospital on January 22, 2009, and did they confirm the subpoena they served provided a valid legal basis for obtaining the medical record(s) they sought;
3. If Department advocates engaged in misconduct, did they do so on their own, or were they encouraged, directed or authorized to do so by Department supervisors and managers, or the City Attorney's Office;
4. Why was there a failure to enter the January 23, 2009, complaint in the Department's complaint tracking system any sooner than February 26, 2009, and if so, who was involved in failing to enter the complaint any sooner;
5. Was a non-sworn manager treated differently in anyway when recommending how to handle the complaint, and if so, how was the non-sworn manager treated differently and who engaged in such conduct;
6. Why was the case status changed to "Closed-Not Sustained" on July 16, 2009, and who was involved in making the change, when an investigation had not been conducted; and
7. Why did the Department fail to conduct the investigation the former Fire Chief said would be performed on April 29, 2009, and the Department said would be conducted in October and November, 2009, before expiration of the one-year statute of limitations?

The failure to investigate allegations of serious misconduct after repeated representations an investigation would be conducted, delayed entry of the complaint in the complaint tracking system, changing the case status to "Closed- Not Sustained" in July 2009, when no investigation

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<sup>173</sup> When this *Assessment* was submitted to the Department for comment on February 25, 2010, the Department said the investigation had been recently completed. That February 22, 2010, investigation will be the subject of a future report. A cursory review reveals the investigation is not timely, complete or thorough.

was conducted, and an inability to take appropriate disciplinary action if supported by a timely and thorough investigation is troubling enough.

Negative audit findings and costly litigation highlighting problems with the disciplinary system precede each of these current failures and resulted in the creation of the very division to which the advocates accused of misconduct were assigned. That division was charged with logging and investigating *all* misconduct complaints. This failure to timely record a complaint in the Department's complaint tracking system and conduct a complete, thorough and timely investigation of alleged misconduct is not the only failure involving allegations of misconduct engaged in by PSD staff.

About six months before advocates were accused of abusing their authority and causing civil rights violations in January 2009, one of them served as the sergeant at arms during a Board of Rights hearing. On July 10, 2008, and in connection with that hearing, the advocate was accused of; 1) contacting a witness who previously testified during the hearing for the defense, 2) interrogating the witness about his testimony, 3) accusing the defense witness of colluding with the defense, 4) accusing the witness of having been instructed on how to answer. The person making the allegations asked that an investigation be conducted. The complaint tracking system has no record these very serious allegations were entered in the system, investigated, or appropriate disciplinary action administered if warranted.<sup>174</sup>

The record for the very same Board of Rights hearing contains allegations a defense advocate received an email from a non-sworn member of the Department accusing him of being a traitor shortly after the Department was notified he would be defending the accused firefighter. The Department's complaint tracking system has no record of this complaint or that it was investigated. The personnel files have not been reviewed to see if there is a record of disciplinary action because the personnel files have not been made available as indicated in footnote 45.

While the *Government Code* and City Charter require disciplinary action be brought against sworn members of the Department within one-year after discovery of the alleged misconduct, the statute of limitations for a federal civil rights action is two years in California.<sup>175</sup> The six-month claims filing requirement of *Government Code* section 911.2 does not apply to such actions.<sup>176</sup> Therefore, the advocates, the Department, the City, and perhaps others, are left exposed to a federal civil rights lawsuit for almost another year.<sup>177</sup> The previously noted failures only add to the liability arguments that can be made in such a lawsuit.

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<sup>174</sup> The Department was using its complaint tracking system (CTS) at the time the complaint was made at the July 10, 2008, hearing. Between April 2008 and July 9, 2008, 190 complaints were logged in CTS. The personnel files have not been reviewed to determine if disciplinary action was taken without an entry in the complaint tracking system for the reasons set forth in footnote 45.

<sup>175</sup> A state's statute of limitations relating to personal injury is applicable to section 1983 litigation (*Wilson v. Garcia*, 471 US 261(1985)) and where a state has multiple statutes relating to personal injury, the applicable limitation is the one found in the general or residual statute applies (*Owens v. Okure*, 488 US 235, 249-50 (1989)). In California the personal injury statute of limitations is two years as set forth in *Code of Civil Procedure*, section 335.1.

<sup>176</sup> *Felder v. Casey*, 487 US 131 (1988), *May v. Enomoto*, 633 F2d 164 (9<sup>th</sup> Cir. 1980), and *Williams v. Horvath* (1976) 16 C3d 834.

<sup>177</sup> This report takes no position on whether a lawsuit has merit. A lawsuit may in fact have absolutely no merit whatsoever. However, even meritless lawsuits involve substantial time and expense to defend, and with few limitations, the City of Los Angeles pays to defend and indemnify employees pursuant to *Government Code*, section 825. This report is primarily concerned with whether misconduct occurred in violation of Department Rules and Regulations, whether a complaint of misconduct was properly handled,

Unlike state tort litigation, federal civil rights cases brought pursuant to 42 USC 1983, require plaintiffs to name and prove liability against individuals in their personal capacity because local governments may not be held responsible for the acts of its employees under a respondeat superior theory of liability.<sup>178</sup> Therefore, in order to establish federal civil rights liability for the conduct described in the January 23, 2009 letter, a plaintiff bringing a lawsuit must name and prove liability against the advocates in their individual or personal capacity. Such cases are brought against individual defendants on the basis an illegal search and seizure took place in violation of the Fourth Amendment.<sup>179</sup> It is critical to know if the advocates were advised to verify with the City Attorney's Office the subpoena provided a valid legal basis for obtaining confidential medical records, and if advised to do so, whether they did. It is critical to know if the advocates proceeded with an attempt to serve the subpoena on January 22, 2009, after being placed on notice there might not be a legal basis for serving an investigative subpoena.

The failure to investigate leaves unanswered the questions related to what the advocates were told by supervisors and managers, if anything, before the alleged misconduct of January 22, 2009. In federal civil rights litigation, supervisory liability may be imposed against supervisors in their individual capacity for their own culpable action or inaction in the training, supervision, or control of their subordinates.<sup>180</sup> A supervisory official may be liable even where not directly involved in the constitutional violation.<sup>181</sup> A supervisor can be held liable in his or her individual capacity if he or she participated in or directed the violations, or knew of the violations and failed to act to prevent them.<sup>182</sup>

The allegations and repeated failures previously cited, including the failure to conduct an investigation so appropriate disciplinary action could be taken in a timely manner, also leaves the City of Los Angeles exposed to defending a federal civil rights lawsuit based on a municipal liability theory.<sup>183</sup> Such cases are brought on the theory a public entity, and its policy makers, are deliberately indifferent to the need to train, supervise, or discipline.<sup>184</sup> That is one of the reasons the Department must ensure all complaints are entered in the CTS and appropriately investigated.

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whether members assigned to the Professional Standards Division received preferential treatment when a complaint of misconduct was received, whether alleged misconduct unnecessarily created a risk of a lawsuit, and whether the actions and inactions of the Department and City Attorney's Office in response to misconduct allegations protected or exacerbated the City's legal position. Only a timely, complete and thorough investigation can resolve these and other issues.

<sup>178</sup> *Board of County Comm'rs v. Brown*, 520 US 397, 403 (1997), *Collins v. City of Harker Heights*, 503 US 115, 121 (1992), *City of Canton, Ohio v. Harris*, 489 US 378, 385 (1989), *Monell v. Department of Social Services*, 436 US 658, 691 (1978), *Fogel v. Collins*, 531 F3d 824, 834 (9<sup>th</sup> Cir. 2008), *Webb v. Sloan*, 330 F3d 1158, 1163-64 (9<sup>th</sup> Cir. 2003), *Gibson v. County of Washoe*, 290 F3d 1175, 1185 (9<sup>th</sup> Cir. 2002), and *Hopper v. City of Pasco*, 241 F3d 1067, 1087 (9<sup>th</sup> Cir. 2001).

<sup>179</sup> A search and seizure of evidence which fails to conform to Fourth Amendment standards may give rise to a federal civil rights action. *Monroe v. Pape*, 365 US 167 (1961), *O'Connor v. Ortega*, 480 US 709 (1987) and *Ornelas v. U.S.*, 517 US 690.

<sup>180</sup> *Clay v. Conlee*, 815 F2d 1164, 1170 (8<sup>th</sup> Cir. 1987).

<sup>181</sup> *Wilks v. Young*, 897 F2d 896, 898 (7<sup>th</sup> Cir. 1990).

<sup>182</sup> *Taylor v. List*, 880 F2d 1040, 1045 (9<sup>th</sup> Cir. 1989).

<sup>183</sup> *Monell v. Department of Social Services*, 406 US 658 (1978).

<sup>184</sup> *City of Canton v. Harris*, 489 US 378 (1989), *Vineyard v. County of Murray, Georgia*, 990 F2d 1207 (11<sup>th</sup> Cir. 1993), *McRorie v. Shimoda*, 795 F2d 780 (9<sup>th</sup> Cir. 1986), *Henry v. The County of Shasta*, 132 F3d 512 (9<sup>th</sup> Cir. 1997), and *Lassiter v. City of Bremerton*, 556 F3d 1049 (9<sup>th</sup> Cir. 2009)

Cases are also brought against public entities on the theory a municipal custom, policy or practice is unconstitutional.<sup>185</sup> This does not require a formally adopted policy, but can include practices so permanent and well settled they constitute a “custom or usage” with the force of law.<sup>186</sup> Liability may be attributed to the municipality in “custom” type cases through actual or constructive knowledge of and acquiescence in the unconstitutional custom or practice.<sup>187</sup> Even if there is no explicit policy, an actionable “municipal policy” may be established on a showing there is a permanent and well settled practice by the municipality giving rise to the constitutional violation.<sup>188</sup> Acts of both omission and commission may serve as a basis for finding a policy or custom are unconstitutional.<sup>189</sup> These are some of the reasons the Department must ensure its policies, customs and practices do not violate the law, which is particularly true if the Department is placed on notice there is a need to verify the legal basis of an investigative subpoena in light of planned or anticipated conduct.

## ***Findings***

On January 23, 2009, the Department discovered a complaint alleging sworn members of the Department and a police sergeant engaged in serious misconduct the day before while attempting to serve a subpoena at a hospital.

The Department first delayed entering the complaint of alleged misconduct in the complaint tracking system and then closed the case with a “not sustained” finding when no investigation was conducted to support such a finding.

Department managers and executives, the Department’s general counsel, and a private attorney failed to ensure an investigation of misconduct allegations received on January 23, 2009, was completed before expiration of the statute of limitations on January 23, 2010.

If misconduct occurred on January 22, 2009, the Department is barred by the one-year statute of limitations from taking disciplinary action.

The City of Los Angeles, the Fire Department, the Police Department and its employees are exposed to the time and expense of defending a lawsuit, if a federal civil rights action is filed and paying damages, and attorney’s fees, if liability is established, as a result of what is alleged to have occurred on January 22, 2009.

## ***Recommendations***

The following recommendations should be considered:

1. The Department should ensure a thorough and complete investigation of all issues related to the misconduct allegations received on January 23, 2009, is conducted, including, but not necessarily limited to the following:

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<sup>185</sup> *Monell v. Department of Social Services*, 406 US 658 (1978).

<sup>186</sup> *Monell* at page 691 and also *Bouman v. Block*, 940 F2d 1211 (9<sup>th</sup> Cir 1991).

<sup>187</sup> *McNabola v. Chicago Transit Authority*, 10 3d 501 (7<sup>th</sup> Cir. 1993).

<sup>188</sup> *City of St. Louis v. Praprotnik*, 485 US 112, 127 (1988), *Navarro v. Block*, 72 F3d 712, 714-15 (9<sup>th</sup> Cir. 1996), and *Thompson v. City of Los Angeles*, 885 F2d 1439, 1444 (9<sup>th</sup> Cir. 1989).

<sup>189</sup> *Oviatt v. Pearce*, 954 F2d 1470 (9<sup>th</sup> Cir. 1992).

- a. What happened at the hospital on January 22, 2009, and did anything else occur to cause the April 29, 2009 letter of complaint;
  - b. What were the advocates told by Department supervisors and managers, the City Attorney's Office, and the attorney's for the hospital and the member whose records were sought about the legal basis for and objections to serving a subpoena before they went to the hospital on January 22, 2009, and did they confirm the subpoena they served provided a valid legal basis for obtaining the medical record(s) they sought;
  - c. If Department advocates engaged in the misconduct, did they do so on their own, or were they encouraged, directed or authorized to do so by Department supervisors and managers, or the City Attorney's Office;
  - d. Why was there a failure to enter the January 23, 2009, complaint in the Department's complaint tracking system any sooner than February 26, 2009, and if so, who was involved in causing the delay;
  - e. Was a non-sworn manager treated differently in anyway when recommending how to handle the complaint, and if so, how was the non-sworn manager treated differently and who engaged in such conduct;
  - f. Why was the case status changed to "Closed-Not Sustained" on July 16, 2009, and who was involved in making the change, when an investigation had not been conducted; and
  - g. Why has the Department failed to conduct the investigation the former fire chief said would be performed on April 29, 2009, and the Department said would be conducted in October and November, 2009, before expiration of the one-year statute of limitations?
2. The investigation of these issues should be completed so that any disciplinary action that is not barred by the statute of limitations may be taken, if supported by the investigation.
  3. The Department should provide assurance the Police Department has been notified of the allegations contained in the January 23, 2009, letter, and that assurance should specify the date and manner in which the notification was made.
  4. The City Attorney's Office should determine if the City of Los Angeles has a valid claim for malpractice against the private attorney retained to conduct the investigation that was not completed before expiration of the statute of limitations, and whether the private attorney should be requested to place the attorney's malpractice carrier on notice.
  5. The Department's disciplinary system and its investigations of misconduct allegations should be managed, supervised and staffed with non-sworn professionals with the demonstrated expertise, training and experience to conduct investigations and discipline of public safety employees.
  6. The Fire Chief should be held accountable in his or her annual evaluation for the performance of the Department's disciplinary system.

7. The Department should takes steps to ensure all complaints of misconduct are entered in the complaint tracking system in a timely manner and all such complaints are appropriately investigated in a timely manner.
8. The Department must receive timely and consistently competent legal services in support of its misconduct investigations and disciplinary system.



## PROFESSIONAL STANDARDS DIVISION

In its January 26, 2006 audit, the City Controller recommended the Department create a division with permanently assigned investigative staff who possess the necessary expertise, experience and training to conduct a wide range of investigations. In its January 31, 2006 audit executive summary, the Personnel Department said, to bring the Fire Department's disciplinary system into compliance with City policy, substantial civilianization of the process was recommended. The executive summary also said staff assigned to investigate and present discipline cases should be civilianized to bring human resource expertise to these critical functions.

The Board of Fire Commissioners' April 25, 2006, *Audit Action Plan* goal was to create an independent body with *permanently* assigned civilian and sworn investigative staff who possess the necessary expertise, experience, and training to conduct a wide range of investigations to ensure public accountability of the Fire Department, as well as prepare and maintain professionally documented investigative files.

On January 11, 2008, the Personnel Department provided the Public Safety and Audits & Governmental Efficiencies Committees of the City Council with a report on the development of a Professional Standards Division within the Los Angeles Fire Department. It concluded by stating the ultimate goal was to institute a successful and credible complaint, investigatory and disciplinary system that eventually reduces the number of employment related lawsuits and, above all, improves upon the work environment within the Fire Department.

What follows is a brief assessment of the Professional Standards Division in light of these goals and recommendations and in light of the preceding sections of this report.

### ***Foundation***

The new Professional Standards Division began its operations in January 2008, under the leadership of an assistant chief who reports directly to the Fire Chief. That assistant chief deserves special recognition for taking on the difficult and unenviable task of creating a new division that is subject to microscopic inspection and much debate. Much has been accomplished and there is much more to do. A solid foundation has been built for the future work that must follow.

The initial introduction and work of the PSD was complicated by the *Firefighter Procedural Bill of Rights Act* (FOBR), which also became effective on January 1, 2008. The FOBR mandates new rules for how investigations are to be conducted and disciplinary actions may be taken.<sup>190</sup> While there is still much left to do in making sure investigations and disciplinary actions comply with the FOBR, it is also clear the Department is much further down the road than most, if not all, other fire departments.

The Professional Standards Division deserves much credit and some criticism. That criticism, while deserved in some cases, is tempered by the fact PSD reports directly to and is supervised by the Fire Chief. While PSD may make some decisions and provides many recommendations, it is clear the Fire Chief always has the authority to accept or reject recommendations, set decision

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<sup>190</sup> The 2006 audits and the April 25, 2006, *Audit Action Plan* were prepared two years before the FOBR took effect and do not mention what might be necessary to create a disciplinary system compliant with the FOBR.

making parameters, and actually makes every final decision. The Fire Chief has ultimate authority and responsibility over all PSD related activities including compliance with the *Audit Action Plan*, the Stakeholder's vision and the Board of Fire Commissioners actions and directives. The Fire Chief is ultimately responsible for staffing PSD, approving disciplinary guidelines and union agreements, compliance with Department policies and regulations, as well as setting both proposed and final disciplinary action.

## ***Staffing***

PSD staffing was predicated on the assumption there would be 100 complaints the first year. In 2008, the first year of operation, there were 538 complaints. In 2009, the complaint tracking system documented 1,170 complaints. Even without an in-depth audit of workloads, it is clear there is insufficient staff to appropriately handle the increased number of complaints. The lack of PSD staff has had a number of undesirable consequences.

### **EEO Cases:**

Throughout much of 2009, there was a delay of three to five months, or more, in conducting the initial interviews of complainants and victims in Equal Employment Opportunity (EEO) cases because interviews could not be conducted without sworn advocates. In September 2009 advocates were assigned to all of the cases. It is critical initial interviews take place in a timely manner.

Even if PSD had the investigative staff to complete initial interviews in ten days or less, the rule that allows a representative to have 7 business days to schedule interviews slows the investigative process down. The supervisor in the EEO unit reports approximately 50% of complainants and victims seek to be represented at their interview and 75% of the witnesses are represented.

An assessment has not yet been made to determine if the initial interviews, as well as complete and thorough follow-up investigations, have now been conducted in a timely manner in those cases where there were delays in assigning a sworn member. The EEO supervisor reports it takes three to six months to complete an EEO investigation.

While sworn advocates do ask some of the questions in EEO interviews, most of the questioning is conducted by non-sworn investigators. Sworn advocates start the interview by ordering sworn members to tell the truth and providing witness or subject admonitions. Without the authority to order and admonish witnesses, non-sworn investigators are dependent on the assignment of sworn advocates. In some cases, the questions asked by sworn advocates have been improper, such as leading.

Much of the EEO investigative work has been performed by non-sworn persons, some of whom have retired from City service and have returned to perform work on 90 day contracts. An employee assigned to perform EEO investigations on a full time basis recently retired. The two who have worked on 90 day contracts provide subject matter expertise but overall staffing is not adequate.

While the Department can, and is, committing more sworn personnel to support EEO investigations, that is not the best solution. Complete and thorough EEO investigations require a good knowledge of the subject matter and, more importantly, the ability to investigate and prepare a case as if it was going to be litigated. That means evidence is collected in compliance

with basic rules of evidence, in compliance with due process requirements, in anticipation of defenses, while ensuring all facts are gathered. That kind of expertise is only developed over time. Future assessments will determine if redirecting sworn personnel from the field provides substantially more than a sworn member to order and admonish witnesses so non-sworn investigators can interview sworn witnesses and subjects of investigation.

### **Support Staffing:**

Support staffing levels remain the same as when PSD started, and are currently inadequate. This is especially true with the moderator position that is responsible for the complaint tracking system. There are delays in processing some complaint, investigation and disciplinary related documents and correspondence.

One of the unfulfilled goals for PSD is to target problems, issues and locations with special attention and training in an attempt to improve the work environment and prevent disciplinary problems and avoid expensive litigation. While PSD can provide some basic statistical information about numbers and types of cases, the time and in-depth analysis needed to fully develop the targeting of issues and locations is simply impossible with current support staffing levels.

At this point, even if the PSD had the ability to generate statistical targeting information, there is insufficient staff to develop and provide the preventative and mediation types of services required.

### **Investigations:**

The Professional Standards Division has shown that with time and the right expertise, experience and training, it is able to conduct good, if not excellent, investigations. However, those resources simply do not exist in sufficient supply so that all cases can be handled with the attention to detail they require. Too many investigations are not complete, thorough and timely, and fail to meet the standard required to sustain a finding at a Board of Rights hearing.

There are long delays in getting investigations completed and disciplinary actions concluded in a timely manner with the increase in the number of complaints. The PSD is beginning to assign single investigators to cases. However, this underscores the need for investigators and supervisors with the expertise, experience and training in conducting and supervising the investigation of public safety personnel.

Of particular concern are field investigations. Field investigations reviewed for this report show a failure to conduct complete, thorough, detailed and timely investigations. The supervisory review or quality control process for field investigations is not adequate.

Once investigations are completed, sustained findings result in proposed and final discipline that is usually on the low end of the range of the offense guideline.

There is substantial evidence in the cases reviewed for this report indicating sworn advocates are used to serve documents, notices and papers. This takes away from the time advocates could be spending on investigations or preparing and prosecuting cases at a Board of Rights proceeding.

## **Boards of Rights:**

Properly preparing for and prosecuting a Board of Rights case requires skill, experience and training that is not typically possessed by sworn advocates. A review of the Boards of Rights process shows sworn advocates may be able to handle very simple cases but experience much difficulty with more complex matters. A 72 hour training course, or even a few more weeks, is not enough, particularly when the defendant in a Board of Rights hearing is represented or supported in the background by an attorney with years of experience and training.

There is some evidence disciplinary recommendations and decisions are made with an eye toward avoiding the Board of Rights process because the Department does not have the resources available to commit to preparing and prosecuting such cases. Preparing for and prosecuting a case at an evidentiary hearing is not a simple task and this is an area that needs substantial attention. The most effective solution is to employ non-sworn staff with the expertise, experience and training to perform the work.

A recent Board of Rights hearing caused an advocate and investigator to spend the better part of two weeks preparing for the hearing. While such preparation time is absolutely essential it comes at the price of being unable to complete work on other cases. The Professional Standards Division recently engaged in a “mock trial” as part of preparing for that Board of Rights hearing for the first time since PSD was created. That, and other pre-hearing preparation, revealed there were holes in the case. The real preparation for a Board of Rights hearing starts with preparing, conducting and documenting a complete, thorough and detailed investigation.

## **Sworn and Non-Sworn Personnel:**

The 2006 audits by the City Controller and Personnel Department recommended an increased civilianization of the Professional Standards Division. One of the reasons cited for such a staffing pattern was the potential conflict problem of having sworn members of the Department returning to fire stations to live and work alongside those they have investigated. This is a continuing, if not increasing concern in light of the increasing number of complaints.

An assessment has not been conducted to determine whether advocates are working overtime assignments with those being investigated while assigned to PSD, or if advocates have worked overtime made available by disciplinary actions taken as a result of PSD investigations. Such an assessment would require the release of personnel and payroll records which the Department has not provided.<sup>191</sup>

As far as PSD is concerned, the primary goal of the 2006 *Audit Action Plan* was a permanently assigned civilian and sworn investigative staff with the necessary expertise, experience and training to conduct a wide range of investigations. This goal has not been met as the Department continues to rotate a significant number of sworn members through PSD on special duty assignments.

Sworn members of the Department have certainly contributed significantly to the good work and success of the PSD. But, the City Controller and Personnel Department audits both recommended civilianization of the PSD. The reasons they did so are fully supported by the assessment leading to this report. The best investigative work is performed by non-sworn

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<sup>191</sup> The personnel files have not been reviewed for the reasons set forth in footnote 45.

members of PSD. On the other hand, most of the problems cited in this report are more likely due to the work and decisions of sworn members.

The City Controller's Audit said formal investigations were conducted by inexperienced and untrained investigators, who are fire captains on a two-year rotational special duty assignment. The Personnel Department audit said the discipline system was marked by inadequate investigations and poorly trained advocacy. Although there have been improvements, this review finds these conditions continue. While a sworn member can be assigned to PSD with little or no expertise or experience, non-sworn members must have investigative experience before hiring and assignment to PSD. However, there are also examples of non-sworn staff not having sufficient expertise and experience to perform investigations of public safety personnel.

There is evidence sworn members of the Department do not accept the authority of non-sworn members, or do not consider non-sworn members as equals. Non-sworn investigators are not permitted to order and admonish sworn members at their interviews. The City Attorney's Office says a Department rule change is required so non-sworn members may prosecute a Board of Rights case. There is also evidence some sworn members have not taken direction from the non-sworn PSD manager. The non-sworn manager is not utilized in a manner that takes full advantage of his very substantial expertise, experience and training. In fact, much of what is recommended in this report has already been recommended by the non-sworn manager assigned to PSD.

On occasion "learning" occurs at the expense of a costly mistake. When those mistakes are made because the advice of someone more knowledgeable or with much greater expertise and experience was ignored, and ignored for no other reason than they are non-sworn or "that's the way we have always done it," there is little reason to find the mistake was reasonable. One of the reasons the PSD was created was to put a stop to the "that's the way we have always done it" attitude.

## ***Training***

Sworn members of the Department have relatively little, if any, training or in-depth expertise and experience in conducting investigations and prosecuting disciplinary cases when initially assigned to PSD as advocates. Initially, advocates are assigned to work with more experienced advocates or investigators as investigations are conducted. More formal training is provided later.

By the end of their two year special duty assignment, sworn advocates may have accumulated 20 or 25 days of formal training in a very complex area involving investigations, the law and disciplinary prosecutions requiring great expertise and experience, and then generally rotate out of the assignment. In some sense this is not much more than a "learn and leave" program.

Non-sworn special investigators are required to have investigative experience before being hired. Only one non-sworn manager had the expertise, experience and training necessary to conduct, supervise and manage a full range of public safety personnel investigations and disciplinary prosecutions when first assigned to PSD.

All of this means a substantial amount of time and money is invested in basic training for those rotating through PSD.

### **Department Training:**

PSD provided an Internal Investigation Course to Department captains and chief officers in 2008. It included an overview of PSD, an extensive presentation concerning the *Firefighter Procedural Bill of Rights Act*, and an EEO presentation. The purpose of the class was to provide training to those who may be assigned to conduct investigations in the field. The training provided a good overview for supervisors. It should not be relied on to provide what is necessary to conduct complete, thorough, detailed and timely investigations.

An Internal Investigations Course designed to mirror the Police Department's was developed and provided to some members of the Department. It consists of a 40 hour program designed for field advocates and future PSD officers.

### **External Training of PSD Personnel:**

Professional Standards Division staff attends a variety of training courses, seminars and conferences, covering EEO issues, supervision, internal investigations, discipline, substance abuse, and advocacy skills.

Some of the advocates attended the Police Department's 40 hour Internal Investigators Course after assignment to PSD.<sup>192</sup> Two advocates currently assigned to PSD have attended a 72 hour advocacy training program. A nine day training class does not provide adequate preparation for prosecuting serious disciplinary actions at evidentiary hearings. This is particularly true if the defendant at a hearing is represented by an attorney or representative with much more training and experience.

### **PSD Roundtable Training:**

The Professional Standards Division began providing monthly internal "roundtable" training to its members at the suggestion of one of the non-sworn special investigators in February 2009. Topics have included the statute of limitations, report writing, use of investigator notes, assessing and documenting witness credibility, requests for delay in scheduling interviews, demands for criminal interview admonitions, interview scenarios, the right to representation, *Kastigar* conflicts, investigative strategy, the right to representation in the Upland POA case, unpublished opinions involving City litigation, a comparison of PSD practices to industry standards, evidence and ethics issues, personality traits and interviews, statute of limitations reminder, and social media.

Subjects scheduled to be presented in the near future include statute of limitations issues, *Kastigar*, investigative strategy, evidence issues, crime scene photography, hearing advocacy, and Google computing applications.

The training appears to be excellent. However, good training is time consuming to prepare with some of the technical subjects taking days of preparation. The training has to be repeated to keep up with the influx of new people. More importantly, much of the training provides a baseline of information that should be known before conducting and supervising investigations and prosecuting disciplinary cases involving public safety employees.

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<sup>192</sup> The Police Department reserves seats for the Fire Department at each of its courses and should be commended for doing so.

## **Online Resources:**

The PSD has prepared or made a number of helpful references available to members through the Department's Information Portal. They include background information on PSD, a user's guide for the complaint tracking system, the penalty guidelines, the *Firefighter Procedural Bill of Rights Act*, admonition forms, the *Civil Service Guide to Disciplinary Standards*, and other materials related to investigations and the disciplinary process. Very good information concerning the criminal, driver's license, and financial consequences of driving while under the influence of alcohol is also provided.

## ***Policy Recommendations***

PSD has identified and communicated the need for Department policies, amendments to the City Charter and other corrective actions as a result of managing the disciplinary process. A few examples follow.

Investigations and a formal complaint revealed multiple examples of performance evaluations not having been completed in a timely manner. As PSD correctly pointed out in bringing this matter to the attention of the Fire Chief, one of the purposes of the performance evaluation is to improve performance and the failure to conduct performance evaluations may lead to punitive action against supervisors.

Investigations involving the loss or theft of thousands of dollars from "house dues"<sup>193</sup> accounts led the Department to request assistance from the City Attorney's Office in drafting a policy governing "house dues" or what are also called non-budget funds.

Enactment of the *Firefighter Procedural Bill of Rights Act* (FOBR), managing the disciplinary process, conducting investigations and Board of Rights hearings led the PSD to recommend revisions to section 1060 of the City Charter, which governs the discipline of sworn members of the Fire Department. The major areas involve the statute of limitations, the composition of the Board of Rights, providing the necessary authority to subpoena documents during investigations, and ex parte communications with the Board of Rights, among others.<sup>194</sup>

## ***Legal Services Support***

The success of the Professional Standards Division in conducting investigations and managing the disciplinary process in compliance with the law is heavily dependent on good and timely legal advice. A prior section of this report clearly indicates the PSD does not consistently receive the legal service it requires.

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<sup>193</sup> "House dues" consist of assessments and contributions to pay the expense of such things as fire station meals, exercise equipment, office coffee and other drinks, snacks, sympathy cards, and a variety of other items.

<sup>194</sup> The independent assessment resulting in this report concludes the recommendations have considerable merit.

It is very troubling the City Attorney's Office has failed to provide advice in response to a request concerning investigative subpoenas in more than a year.<sup>195</sup> This is particularly true given; 1) the request for advice was made after an attorney representing a hospital claimed Fire and Police Department employees engaged in civil rights violations when serving a subpoena in January 2009, 2) the issue is very basic to conducting investigations, and 3) the Mayor's Office requested the City Attorney's Office provide legal advice in July 2009. It is not uncommon to wait months before legal services are provided.

The FBOR became effective on January 1, 2008, and contains very ambiguous, if not troubling language about the granting of immunity from criminal prosecution. In December 2009, almost two years after the law became effective, a deputy city attorney provided the Department with a copy of a news article about the ambiguous language and indicated "it mirrors the problems we see in the written law, which probably needs to be clarified by the Legislature." Another deputy city attorney forwarded the same information with only an "FYI." The City Attorney's Office offered no advice on how to comply with this very technical area of law as PSD conducts investigations on a daily basis or even asked if the PSD needed or would like assistance with the issue. On February 3, 2010, the PSD sent a written request to the City Attorney's Office for legal advice on the issue.

### ***Complaint Tracking System***

An in-depth assessment of the complaint tracking system (CTS) has not yet been conducted. However, while conducting the assessment reflected in this report it appears CTS is a very robust system with excellent potential. The Department's Management Information Systems Division and the PSD moderator provide excellent support services for CTS.

It has been difficult to assess how close cases are to being lost to the statute of limitations, or are past statute. PSD recently completed an update to the CTS system that will assist in monitoring compliance with the statute of limitations. The complaint tracking system will automatically send reminders to investigators when cases are 120, 90, 60 and 30 days from the expiration of the statute of limitations. This, and other management reports, are strongly encouraged and should improve the investigative process.

Advocates and investigators are able to log case notes and the amount of time spent on case activities in CTS. Documents and recordings can be attached as well. The assessment reflected in this report reveals a failure to consistently take advantage of these excellent features. In fact, this assessment revealed investigators assigned to the same case may well keep their own separate files, notes and time keeping records. Timely updates in CTS will make important information immediately available to investigators working on the same case as well as supervisors and managers.

The Department has appropriately taken the position that all complaints will be logged or entered in CTS. There have been recent suggestions that some complaints be screened at the station level and not entered in CTS. The Department should continue to require all complaints be logged in CTS for review by the Professional Standards Division. Given the emphasis on documenting all

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<sup>195</sup> Section 1070(j) of the City Charter contains language governing investigative subpoenas in cases involving investigations conducted by the Police Department. Section 1060 of the City Charter governing disciplinary procedures for sworn members of the Fire Department has no equivalent language.

complaints it should be of great concern that complaints involving persons assigned to PSD may not have been entered in CTS or were prematurely closed without an investigation.

### ***Internal Guidelines***

PSD has begun to create internal procedures as reflected in witness admonitions, office access guidelines and a procedure concerning the right to representation. Such guidelines are needed to establish efficiency, consistency and compliance with the law. They are also very helpful to newly assigned PSD staff and field investigators.

The assessment resulting in this report reveals the need for internal guidelines in many areas. Some include criminal law conflict and immunity issues, document retention related to investigator notes and files, the circumstances or standards governing the settlement of cases, alcohol and substance agreements, investigative and case handling timelines and due dates, and investigator and PSD conflict issues. The Department is to be commended for the form and content of the settlement agreements it has drafted and used in a few of the cases reviewed.

This, again like everything else, requires a substantial investment of time and expertise. At this point only a single non-sworn manager has the expertise, experience and training to prepare such guidelines. Thus far, the City Attorney's Office has not offered to assist in this project.

### ***Facilities***

The confidentiality of investigative files and information is extremely important. The Professional Standards Division has adopted a visitor access policy in an attempt to protect confidentiality. However, anyone gaining access to the Administrative Operations suite of offices can easily access the PSD office suite whether there is anyone present in PSD or not. Oddly enough, a key card is not required to gain access to PSD from Administrative Operations but a key card is required to gain access to Administrative Operations from PSD.

During this assessment it was determined personal laptop computers have been used in connection with the disciplinary process, primarily due to inadequate technology provided by the Department. While the activities made known during this assessment involving the use of the personal laptop computers are quite legitimate, it is of concern that personal equipment is used to conduct work on confidential matters.

### ***Findings***

The Board of Fire Commissioners' *Audit Action Plan* goal of creating a division with permanently assigned civilian and sworn investigative staff who possess the necessary expertise, experience and training to conduct a wide range of investigations has not been fully met.

The Fire Department has failed to do all it can to meet the Personnel Department's recommendations of 1) "substantial civilianization" of its disciplinary system, and 2) "staff assigned to investigate and present discipline cases should be civilianized."

With the exception of one non-sworn manager, the Fire Department does not have staff who possess the necessary expertise, experience and training required to conduct, supervise and manage a full range of investigations or prepare and prosecute a full range of disciplinary cases, or supervise and manage such activities for a Board of Rights hearing.

While a solid foundation has been built for the Professional Standards Division, substantial further work is required to meet the recommendations of the 2006 City Controller and Personnel Department audits and the goals of the *Audit Action Plan*.

While training is provided to PSD staff, some of which is quite good, training does not provide experience and practiced competence in conducting, supervising and managing a public safety disciplinary system.

Non-sworn PSD staff lack the authority to conduct investigations and prosecute disciplinary actions independently and to supervise and manage sworn staff.

Investigations and disciplinary actions are not being completed in a timely fashion due to a lack of staff and the failure to provide non-sworn staff with sufficient authority.

Some sworn members have failed to accept direction given by a more experienced and much better trained non-sworn manager.

### ***Recommendations***

The following recommendations should be considered:

1. The Department should place much greater emphasis on hiring non-sworn investigators and investigative supervisors who have demonstrated expertise, experience and training in conducting and supervising a wide range of investigations involving public safety personnel and preparing those cases for hearing.
2. The Department should provide non-sworn investigators with the authority to order and admonish sworn members at the time of their interviews and while conducting all other investigative activities.
3. The Department should place a non-sworn manager in charge of the Professional Standards Division, with the full backing and authority of the Fire Chief.
4. Non-sworn supervisors and the manager assigned to the Professional Standards Division should be provided the full authority to direct, supervise and manage sworn staff.
5. Sworn advocates assigned to conduct investigative activities should not be assigned as “process servers” assigned to serve documents and to notices such as *Skelly* packages, complaints, and other papers. The Department should consider using light or modified duty personnel, emailing documents for service by station or battalion officers, or other alternatives.
6. The Department should adopt a rule that permits non-sworn personnel to present and prosecute disciplinary cases against sworn members.
7. The Department should employ non-sworn staff with the demonstrated expertise, experience and training to prepare, present and prosecute disciplinary cases against sworn members.

8. The Department should develop an initial case management process that results in investigators and supervisors conducting an initial complaint analysis, developing an investigative plan that identifies and addresses the statute of limitations, legal, evidentiary, conflict and procedural issues anticipated in the execution of an investigation, that identifies an investigative case strategy, that identifies the policy and work rules involved, that identifies the evidence and preparation required before beginning interviews, that identifies witnesses and the issues they are to be asked about, and timelines within which investigations are to be completed.
9. The Department should complete an analysis to determine the number of non-sworn investigators, prosecutors and supervisors it requires in executing its responsibility to conduct, supervise and manage the Department's disciplinary system, including investigations and Board of Rights prosecutions, in full compliance with the law and the *Audit Action Plan*.
10. When requesting legal advice the Department and the Professional Standards Division should request the City Attorney's Office provide the advice in writing with legal analysis and citations to legal authority.<sup>196</sup>
11. When the City Attorney's Office fails to provide timely and adequate legal services the Department should immediately elevate such failures to City Attorney managers and executives.
12. The Department should require advocates and investigators to document relevant case notes, time keeping and other work product in the complaint tracking system on a regular and timely basis.
13. The Department should require all written complaints, interviews, exhibits, reports photographs, diagrams and similar investigative materials be attached to the complaint tracking system.
14. The Department should continue to adhere to a policy of requiring all complaints of misconduct be logged in the complaint tracking system.
15. The Department should continue preparing a Professional Standards Division guidebook.
16. The Department should provide facilities and equipment necessary to fully support the investigative work conducted by the Professional Standards Division, ensure the confidentiality of the investigative work, and that access to the PSD facility is strictly limited.
17. The Department should use the complaint and/or the disciplinary tracking systems to provide management reports that will provide information concerning the statute of limitations, time keeping and other necessary case management information.

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<sup>196</sup> Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when requested to do so by any City officer or board. The City Attorney's Office explains there is a difference between advice and opinions; the latter being more formal.

18. The Department should adopt a policy or guideline governing the standards or factors that should be considered in settling disciplinary cases after the proposed penalty has been served on the affected member. Some of the factors that should be considered before settling a case include:
  - a. Flaws and risks in the case (such as evidentiary problems, witness unavailability, questions of law) that could not be reasonably considered or were not known at the time the charges were served on the affected member, or which have been significantly exacerbated since the service of charges;
  - b. Whether conditions can be obtained through settlement that cannot be obtained solely through continued prosecution of the charges;
  - c. The member's record of disciplinary action;
  - d. Whether in accordance with the principle of progressive discipline, the settlement continues to have the effect of preventing future misconduct;
  - e. Whether any court orders or corrective action plans have an impact on the decision to settle the disciplinary case;
  - f. The risk of harm to the public service if such misconduct reoccurs; and
  - g. The gravity of the conduct that brought about disciplinary action.
19. The Department should continue to ensure settlements are reduced to writing and include all essential settlement language, including but not limited to, a waiver of future appeals.
20. When the Department has previously informed the Board of Fire Commissioners of disciplinary action taken against a member pursuant to section 1060 of the City Charter and later settles, reduces or modifies the penalty in the same case, the Department should inform the Board of Fire Commissioners of the reasons requiring a settlement, reduction or modification being careful to advise the Board of Fire Commissioners it involves the same case.

## ASSESSMENT IMPEDIMENTS

The work of the Independent Assessor is dependent on timely and unrestricted access to original source information.<sup>197</sup> Unfortunately, access to information involving litigation and some personnel files has not been provided.

The City Attorney's Office previously advised the Independent Assessor could only provide information to the entire Board of Fire Commissioners in public session, could only perform work assigned by the full Board of Fire Commissioners in public session, could only seek direction from the full Board of Fire Commissioners in public session, and the Board of Fire Commissioners could only provide direction to the Department in public session.<sup>198</sup>

### *Litigation Status Reports*

Informal attempts have been made to obtain access to information related to litigation matters having a direct relationship to employee discipline and other areas. The City Attorney has not responded to the most recent informal attempt.

On October 15, 2009, the Independent Assessor met personally with a deputy city attorney to request, among other things, a process be established whereby the Independent Assessor was provided a monthly status report concerning litigation where the Fire Department or a Department employee was named as a defendant and notice of any Government Tort Claims, Fair Employment and Housing (FEHA)/Equal Employment Opportunity Commission (EEOC) complaints and any new lawsuits was provided.

On October 27, 2009, the Independent Assessor sent the deputy city attorney an email that said:

“I wanted to check in with you to see what the status is of developing a system whereby I am provided a monthly status report of litigation where the Fire Department or a department employee is named as a defendant and I am provided notice of any Tort Claims, FEHA/EEOC complaints and any new lawsuits.”

On October 28, 2009, the deputy city attorney replied by email that said:

“Sorry in the delay in responding to you, but I have contacted Arson to have copies of pleadings and claims forwarded to me on a weekly basis. As of today, I have not received any. Starting in Nov., I will be setting up a monthly meeting with the litigators in the city attorney's office and LAFD to review pending litigation. You will be included in the invite list.”

Almost two months later, when no further response was provided by the deputy city attorney, the Independent Assessor sent the City Attorney's Office a December 22, 2009, email that said;

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<sup>197</sup> On page 7 of a January 11, 2008, report to the Public Safety and Audits & Governmental Efficiencies Committees of the City Council, the Personnel Department said about the Independent Assessor position; “Unfettered access to complaint and disciplinary tracking systems, databases, files, members, investigations, management etc. is paramount because anything less would be an impediment.”

<sup>198</sup> The City Attorney's advice was given in November 2009 when the Independent Assessor urged the Department to conduct an investigation of alleged misconduct.

“I have not heard from you about the status of litigation since your email of October 28. In addition to wanting to be sure there is an early warning system in place whereby I receive information about new claims and lawsuits, I wanted to be sure I receive timely reports concerning pending matters. One of the pending matters is the Rueda/Miller lawsuit involving the Arson Section. At the end of October I was told a law and motion hearing in that case was to take place in early November. I have not received any information on what occurred at that hearing. In addition, have you set up monthly litigation meetings to review pending litigation? Thank you.”

The City Attorney’s Office did not respond to the December 22, 2009, email. The City Attorney’s Office has not provided the Independent Assessor further information concerning new claims and lawsuits, reports concerning pending matters, the status of the Rueda/Miller lawsuit or monthly litigation meetings. Invitations to monthly litigation meetings have not been received.<sup>199</sup>

### ***Personnel Files***

Four informal attempts have been made to obtain access to Department personnel files.

On October 29, 2009, and in connection with a current assessment of Department investigations and the Department’s disciplinary process, the Department received a written request to create a confidential process whereby the Independent Assessor could examine personnel records to determine whether employees have prior records of discipline, whether discipline has actually been effectuated and whether there are records showing attempts to impose discipline have been undermined.

The Independent Assessor personally discussed the need to access Department personnel files with two Department employees, one at the end of October and one in early November 2009.

On December 21, 2009, the Independent Assessor sent an email to the Department that said:

“We previously discussed my accessing personnel files in early November. I would like to begin to review paper and electronic personnel files in connection with my current assessment of PSD and the disciplinary system this week. Could you let me know if that process has been worked out please. Thank you.”

The Department promptly replied that afternoon by email saying:

“No, the process has not been worked out yet. Somehow a discussion regarding your access has been going on without my knowledge. I believe the City Attorney has been invited to make comment.”

The next day, and the morning thereafter, the Department informed the Independent Assessor a deputy city attorney told the Department to tell the Independent Assessor to tell the Board of Fire Commissioners to request a legal opinion from the City Attorney’s Office concerning the Independent Assessor’s legal authority to review personnel files. The President and the Vice President of the Board of Fire Commissioners were promptly informed.

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<sup>199</sup> The City Attorney’s Office has begun to provide litigation reports and access to related information since receiving a draft of this report.

The Independent Assessor currently has unrestricted access to the Professional Standards Division's personnel investigation files which contain highly confidential information without any claim there was a need to obtain a legal opinion.<sup>200</sup> Prior sections of this report cite repeated examples where assessments could not be completed because the Independent Assessor does not have access to the Department's personnel and payroll files. The Personnel Department previously advised the City Council anything less than unfettered access would be an impediment.

## *Assessment*

On December 15, 2009, the Board of Fire Commissioners unanimously approved the *Policies and Authority of the Independent Assessor* which granted complete, unrestricted and prompt access to inspect and/or copy all Department physical or electronic records accessible to the Board of Fire Commissioners. Despite that action, and an October 28, 2009, email acknowledging the Independent Assessor would receive litigation related status reports, the information has not been provided by the City Attorney's Office. A review of the Board of Fire Commissioners' meeting agendas show closed session reports concerning pending litigation matters involving the Department the Board of Fire Commissioners is appointed to oversee and manage were not scheduled for any of the meetings in the almost two full years between April 1, 2008 and March 16, 2010.<sup>201</sup>

Approximately a week after the *Policies and Authority of the Independent Assessor* were approved, the City Attorney's Office told the Department to tell the Independent Assessor to tell the Board of Fire Commissioners to request an opinion about the Independent Assessor's right to access to personnel files. This was after it was publicly announced an assessment of the disciplinary process and the Professional Standards Division was being conducted, about 45 days after a written request for personnel files had been made, and the Independent Assessor had already obtained unrestricted access to highly confidential PSD investigation files and records without objection. The need to obtain such an opinion was not expressed to the Board of Fire Commissioners when the Independent Assessor's work rules were approved on December 15, 2009.

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<sup>200</sup> In addition to the obviously confidential information obtained during investigations conducted by the PSD, most of the PSD investigative files reviewed contain copies of information from the Member Information Tracking System (MITS) which provides a portion of the member's social security number, their home address and telephone number, their date of birth, their badge number and employee identification number, a history of work assignments and promotions, bonus pay information, emergency contact information, among other information. A few of the investigative files contain information about prior disciplinary actions, confidential communications with attorneys employed by the City Attorney or the District Attorney, as well as criminal history information.

<sup>201</sup> The agenda for the April 1, 2008, Board of Fire Commissioners listed eight pending litigation matters for closed session. The March 16, 2010, agenda for the Board of Fire Commissioners listed twelve litigation cases pending against the City of Los Angeles. The February 18, 2010, Second District Court of Appeal decision in the appeal from the judgment in favor of Chris Burton and John Tohill, which directly involves the Fire Department was not included on the March 16, 2010 agenda of pending litigation matters for closed session. The \$1,644,046 judgment against the City of Los Angeles was affirmed. The Appellate Court's written opinion suggests one of the significant problems leading to a liability finding against the City was the failure to conduct an "advocate" investigation before Mr. Burton and Mr. Tohill were disciplined. Please see 2010 Cal. App. LEXIS 1125 or Second District Court of Appeal case number B208451.

## ***Recommendations***

It is respectfully requested the Board of Fire Commissioners take the following action:

1. Direct the Department to provide the Independent Assessor with copies of all Government Tort Claims, all Department of Fair Employment and Housing claims, all Equal Employment Opportunity Commission claims, and all other claims, pleadings or lawsuits of any kind asserting a legal claim against the Fire Department or its members within 72 hours of receipt by the Department.
2. Direct the City Attorney's Office to provide the Independent Assessor with reports and information concerning the current status of all claims, lawsuits and appeals pending against the Fire Department and any of its members every thirty (30) days.
3. Direct the City Attorney's Office to provide the Independent Assessor with complete reports and information concerning any ruling, order or decision involving all claims, lawsuits and appeals in matters where the Department or any of its employees are defendants or respondents within 72 hours of the ruling, order or decision being made known to the City Attorney's Office.
4. Direct the Department to provide the Independent Assessor immediate and unrestricted access to all Department personnel and payroll records and files regardless of format unless the City Attorney's Office can provide written advice<sup>202</sup> with citations to legal authority citing a valid legal basis for not providing access in no more than thirty (30) calendar days.<sup>203</sup>

It is respectfully suggested the Board of Fire Commissioners also adopt the following expectations:

1. If the City Attorney's Office is concerned about a legal issue, and believes the Board needs advice or an opinion on any issue, the City Attorney's Office is to inform the Board of Fire Commissioners or the Board's President, whichever is most expedient, directly and immediately, and shall not engage in the practice of sending or leaving messages through or with others indicating the Board should seek a legal opinion from the City Attorney's Office.
2. If the City Attorney's Office has an opinion about the Independent Assessor's right to access records, or any other legal issue, the City Attorney's Office is to take the initiative to provide it, instead of sending or leaving messages indicating the Board needs to ask for an opinion, and/or waiting for the Board to ask for an opinion.
3. If the City Attorney's Office has an opinion about the Independent Assessor's right to access records, or any other issue, the City Attorney's Office is to provide timely written advice or opinions with complete legal analysis and citations to legal authority supporting the opinion, once having been placed on notice of the issue.

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<sup>202</sup> Section 271(b) of the City Charter says the City Attorney shall give advice or opinions in writing when requested to do so by any City officer or board. The City Attorney's Office explains there is a difference between advice and opinions; the latter being more formal.

<sup>203</sup> Given the amount of time that has already passed, 30 calendar days should be sufficient.

4. If the City Attorney's Office believes the Independent Assessor does not have access to any Fire Department records or files, the City Attorney's Office is to provide a written memorandum, with complete legal analysis and citations to legal authority supporting the opinion within thirty (30) calendar days that fully explains every impediment to access.
5. If the City Attorney's Office believes the Independent Assessor does not have access to any Fire Department records or files, the City Attorney's Office is to provide within thirty (30) calendar days a written recommendation, with complete legal analysis and citations to legal authority, that identifies each such record or file and sets forth the action needing to be taken to remove all impediments to full access.
6. If the City Attorney's Office can articulate a valid written legal basis for denying the Independent Assessor access to any Fire Department records or files, the City Attorney's Office should not expose the City of Los Angeles, the Board of Fire Commissioners, the Independent Assessor, the Fire Department or their employees to an unreasonable risk of liability by advising the Board of Fire Commissioners the Independent Assessor has no legal right to access records, but then, and despite such advice, advise the Board to direct the Department to provide access.





\*\*\* DRAFT \*\*\* LAFD STAKEHOLDERS \*\*\* DRAFT \*\*\*  
 CORRECTIVE ACTION GUIDELINES – COMPARISON TO CIVIL SERVICE POLICY 33.2  
 NOVEMBER 20, 2006

| Act Of Misconduct | 1 <sup>st</sup> Offense | 2 <sup>nd</sup> Offense | 3 <sup>rd</sup> Offense | CS Policy 33.2 1 <sup>st</sup> Offense<br>W = written reprimand<br>V = verbal |
|-------------------|-------------------------|-------------------------|-------------------------|---|
|-------------------|-------------------------|-------------------------|-------------------------|---|

**ALCOHOL / NARCOTICS & DRUG USE**

|  |     |     |     |                     |
|--|-----|-----|-----|---------------------|
| 1. Consumed alcoholic beverages while on duty  | F   |     |     | 75.1 10 – Discharge |
| 2. On duty, under the influence of alcohol   | F   |     |     | 75.2 10 – Discharge |
| 3. Violation of Last Chance Contract for alcohol, drugs, narcotics   | F   |     |     |                     |
| 4. Ingestion, possession or commerce of any illegal drug, on or off duty                                   | F   |     |     | 75.4 10 – Discharge |
| 5. Purchased alcoholic beverage on duty  | E   | F   |     | 69.5 W – Discharge  |
| 6. Knowingly transported a person to buy/obtain illegal narcotics/drugs                                    | E   | F   |     | 69.5 W – Discharge  |
| 7. Knowingly present where illegal narcotics/drugs being used  | B-E | E   | F   | 69.5 W – Discharge  |
| 8. Illegal or improper use, possession or commerce of any controlled substance, including prescribed drugs | B-D | E   | F   | 69.5 W – Discharge  |
| 9. Allow minor to consume alcoholic beverage   | A-B | C   | D-E | 69.5 W – Discharge  |
| 10. Off duty, public drunkenness   | A-B | C   | D-E | 69.5 W – Discharge  |
| 11. On duty, possessed alcoholic beverage  | A-B | C-D | E   | 70.1 V – 5          |
| 12. Unfit for duty due to prior consumption of alcoholic beverage  | A-B | C-D | E   | 75.2 10 - Discharge |

**DRIVING / PARKING INFRACTIONS**

|  |     |     |   |                     |
|--|-----|-----|---|---------------------|
| 13. DUI while driving a City vehicle   | F   |     |   | 75.3 20 – Discharge |
| 14. DUI  | E   | F   |   | 69.5 W – Discharge  |
| 15. DUI with aggravated circumstances  | E   | F   |   | 69.5 W – Discharge  |
| 16. DUI with traffic collision   | E   | F   |   | 69.5 W – Discharge  |
| 17. DUI with traffic collision and injury  | E   | F   |   | 69.5 W – Discharge  |
| 18. At fault for accident involving Department vehicles/apparatus with aggravated circumstances (ie: alcohol/drugs)    | E   | F   |   | 75.3 20 – Discharge |
| 19. At fault for accident involving department vehicles/apparatus with aggravated circumstances (ie: injury, speeding) | D-E | D-E | E | 77.2 1 – Discharge  |

KEY:

- A Reprimand to 5 Day Suspension
- B 6–10 Day Suspension
- C 11–15 Day Suspension
- D 16–30 Day Suspension
- E Board Of Rights, 31 Day Suspension -Termination
- F Board of Rights, Recommended Termination

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| 20. At fault for accident involving Department vehicles/apparatus                  | A                       | B-C                     | C-E                     | 77.2 1 – Discharge  |
| 21. Failed to properly dispose of traffic citations issued against private vehicle | A-B                     | C-D                     | D-E                     | 69.5 W – Discharge  |
| 22. Operating a city vehicle without proper endorsements                           | A-B                     | C-D                     | D-E                     | 77.1 W – 5  |
| 23. Failing to maintain a valid driver's license with proper endorsements          | A-B                     | C-D                     | D-E                     | 70.1 V – 5  |
| 24. Failure to make notification of driver's license status change                 | A-B                     | B-D                     | D-E                     | 74.7 W – 10   |
| 25. Failure to wear seat belt  | A-B                     | C-D                     | D-E                     | 77.3 W – 20   |
| 26. Illegal parking of City vehicle (not business related)                         | A-B                     | C-D                     | D-E                     | 69.5 W – Discharge  |
| 27. On or off duty, improper use of a City vehicle                                 | A-B                     | B-D                     | D-E                     | 69.5 W – Discharge  |
| 28. Reckless driving (no DUI)  | D-E                     | E                       | F                       | 69.5 W – Discharge  |
| 29. Reckless driving with aggravated circumstances (no DUI)                        | D-E                     | E                       | F                       | 69.5 W – Discharge  |
| 30. Reckless driving with traffic collision & injury (no DUI)                      | E                       | F                       | F                       | 69.5 W – Discharge  |
| 31. Used unauthorized Code 3   | D-E                     | E                       | F                       | 77.3 W – 20   |

**DISHONESTY / THEFT**

|   |     |   |   |                     |
|---|-----|---|---|---------------------|
| 32. Accepted a bribe (An exchange of compensation in any form for preferred treatment in the performance of duties) | F   |   |   | 79.1 Discharge      |
| 33. Destroying City records/property without authorization  | D-E | E | F | 79.3 10 – Discharge |
| 34. Forged documents  | E   | F |   | 79.5 Discharge      |
| 35. Received benefits through fraudulent means  | E   | F |   | 79.6/7 Discharge    |
| 36. Fraudulent use of sick time   | E   | F |   | 79.6 Discharge      |
| 37. Knowingly submitted false timekeeping/overtime report   | E   | F |   | 79.5 Discharge      |
| 38. Knowingly submitted a false claim to receive Workers' Compensation insurance benefits                           | E   | F |   | 80.7 Discharge      |
| 39. Inappropriately accepted a gratuity/favor for services required on the job                                      | E   | F |   | 69.3 W – Discharge  |
| 40. Intentionally falsified a report  | E   | F |   | 79.5 Discharge      |
| 41. Made false and/or misleading statements during an official inquiry  | E   | F |   | 79.5 Discharge      |
| 42. Made false and/or misleading statements to supervisor   | E   | F |   | 79.5 Discharge      |

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| 43. Made false statement while under oath                          | E                       | F                       |                         | 79.5 Discharge  |
| 44. Theft of City property/converted City property to personal use | E                       | F                       |                         | 79.2 Discharge  |
| 45. Took property of another without permission                    | D-E                     | E                       | F                       | 69.5 W – Discharge  |
| 46. Used City resources for personal use                           | E                       | F                       |                         | 80.10 W – Discharge   |
| 47. Worked off duty while on IOD status without authorization      | E                       | F                       |                         | 80.7 Discharge  |

**EEO VIOLATIONS - DISCRIMINATION / HARRASSMENT / SEXUAL HARRASSMENT**

NOTES: Persons in supervisory positions will be subject to more severe levels of discipline within the following penalty ranges. Refer to Book 90 for definitions.

|   |     |   |   |                       |
|---|-----|---|---|-----------------------|
| 48. Failure to take appropriate action to correct and eliminate sexual harassment from the workplace                                      | E   | F |   | 87.7 20 - Discharge   |
| 49. Physical conduct or act of a sexual nature involving the use of force   | F   |   |   | 84.2.a Discharge      |
| 50. Quid Pro Quo – implied or explicit coercive pressure for sexual favor   | F   |   |   | 84.1 20 – Discharge   |
| 51. Retaliation against employee for filing a complaint of misconduct or participating in a sexual harassment or discrimination complaint | F   |   |   | 86.6 10 – Discharge   |
| 52. Unwelcome physical contact in sexual area of body   | E   | F |   | 84.2.b 20 – Discharge |
| 53. Used derogatory term to department member in violation of EEO policies  | D-E | E | F | 85.3 V – 20           |
| 54. Used derogatory term to member of public in violation of EEO policies   | D-E | E | F | 85.3 V – 20           |
| 55. Unwelcome touching, rubbing, or any type of physical contact and/or conduct toward other employees, which is sexually suggestive      | E   | F |   | 84.2.c 1 – Discharge  |
| 56. Showed/hung cartoons, photos, etc. of discriminatory nature in the workplace  | D-E | E | F | 85.4 V – Discharge    |
| 57. Displayed inappropriate photos/cartoons, books, magazines, etc., in the workplace   | D-E | E | F | 85.4 V – Discharge    |
| 58. Created a hostile work environment  | E   | F |   | 86.5 10 – Discharge   |
| 59. Made improper sexual remark   | D-E | E | F | 85.3 V - 20           |

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**FAILED TO APPEAR IN COURT**

|  |     |     |   |                  |
|--|-----|-----|---|------------------|
| 60. Excused from jury duty, failure to return to duty/work | A-C | D-E | E | 72.1 W-5         |
| 61. Failure to appear in court                             | A-B | C-D | E | 69.5 W-Discharge |
| 62. Failure to appear to jury duty                         | A-B | C-D | E | 69.5 W-Discharge |

**HAZING**

|   |     |   |   |           |
|---|-----|---|---|-----------|
| 63. Participated in an act of hazing or horseplay             | D-E | E | F | 77.4 W-10 |
| 64. Participated in an act of hazing or horseplay with injury | E   | F |   | 77.4 W-10 |

**IMPROPER REMARK OR GESTURE (NON-EE0)**

|   |     |     |     |          |
|---|-----|-----|-----|----------|
| 65. Improper remark/abusive language/gesture directed to fellow department member | A-C | B-D | C-E | 73.2 V-5 |
| 66. Improper remark/abusive language/gesture directed to member of the public     | B-D | C-E | D-E | 73.2 V-5 |
| 67. Improper remarks/abusive language/gesture directed at a supervisor            | A-C | B-D | C-E | 73.2 V-5 |
| 68. Malicious gossip  | A-C | B-D | C-E | 73.2 V-5 |
| 69. Involved in verbal altercation with Department member                         | C-D | E   | F   | 73.2 V-5 |
| 70. Involved in verbal altercation with member of the public                      | D-E | E   | F   | 73.2 V-5 |

**INSUBORDINATION**

|  |     |     |     |                  |
|--|-----|-----|-----|------------------|
| 71. Failed to follow instruction of supervisor   | A-E | B-E | D-E | 70.5 V-Discharge |
| 72. Refused to follow instructions of supervisor | B-E | C-E | D-E | 73.1 6-Discharge |
| 73. Refused to obey a proper and lawful order    | E   | F   |     | 73.1 6-Discharge |

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**LOST EQUIPMENT**

|  |     |     |     |          |
|--|-----|-----|-----|----------|
| 74. Negligent loss of Department cellular phone or pager | A   | A-B | B-C | 70.1 V-5 |
| 75. Negligent loss of Department radio                   | A-B | B-C | C-E | 70.1 V-5 |
| 76. Negligent loss of other Department equipment         | A-B | B-C | C-E | 70.1 V-5 |

**NEGLECT OF DUTY**

|  |     |     |     |                    |
|--|-----|-----|-----|--------------------|
| 77. Failed to report on or off duty misconduct as required   | D   | E   | F   | 74.7 W-10          |
| 78. Possession of weapon/ammunition in violation of Department policy  | B-E | C-E | E   | 73.5 5 - Discharge |
| 79. Changed work assignment without approval   | A-B | B-C | C-E | 72.3 W - Discharge |
| 80. Conducted personal business while on duty resulting in neglect of duty   | C-D | E   | F   | 70.5 V - Discharge |
| 81. Failed to care for another's property  | A-B | B-C | C-E | 70.1 V-5           |
| 82. Failed to care for Department equipment resulting in damage.   | A-B | B-C | C-E | 70.1 V-5           |
| 83. Failed to clear an incident in a prompt manner   | A-B | B-C | C-E | 70.5 W - Discharge |
| 84. Negligent failure to follow proper medical protocol  | A-E | B-E | C-E | 70.5 W - Discharge |
| 85. Failed to notify supervisor of accident/sickness/injury that occurred on duty  | A-B | C-D | E   | 74.7 W-10          |
| 86. Failed to notify supervisor of any limitation, condition or restriction that might compromise ability to perform required duties | B-E | D-E | F   | 74.7 W-10          |
| 87. Failed to notify supervisor and Operations when named as suspect or principle in crime report                                    | B-E | D-E | F   | 74.7 W-10          |
| 88. Improperly used vehicle P.A. system  | A   | B   | C   | 69.5 W - Discharge |
| 89. Negligent or intentional damage to city property   | B-E | D-E | E   | 74.6 W - Discharge |
| 90. Negligent failure to complete a required EMS or fire report  | A-E | B-E | C-E | 70.5 V - Discharge |
| 91. Left approved district without authorization   | B   | C   | D-E | 72.3 W - Discharge |
| 92. Left approved district without authorization with aggravated circumstances   | B-E | C-D | E   | 72.3 W - Discharge |
| 93. Left assigned district to conduct personal business  | D-E | E   | F   | 72.3 W - Discharge |
| 94. Left work assignment without securing proper relief  | B-E | C-E | D-E | 72.3 W - Discharge |

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| 95. Took a City vehicle without authorization                                 | B                       | B-C                     | C-E                     | 80.9 1 – Discharge  |
| 96. Off duty, failed to comply with home garaging procedures                  | A                       | B                       | C                       | 70.1 V-5  |
| 97. Negligent failure to monitor and/or care for a patient                    | C                       | D                       | F                       | 70.5 V – Discharge  |
| 98. Refused an assign hire  | A                       | A                       | A-B                     | 70.1 V-5  |
| 99. Represented personal opinion as that of the Department                    | A-C                     | C-D                     | D-E                     | 69.5 W – Discharge  |
| 100. Took resource out of service without approval                            | A-C                     | C-E                     | D-E                     | 70.5 V – Discharge  |
| 101. Transported an unauthorized person in City vehicle                       | A-B                     | B-C                     | C-D                     | 70.1 V-5  |
| 102. Transported an unauthorized person in City vehicle on emergency response | B-C                     | C-D                     | D-E                     | 77.3 W – 20   |
| 103. Negligent release of confidential reports/records/information            | A-E                     | B-E                     | C-E                     | 69.4 1 – Discharge  |
| 104. Intentional release of confidential reports/records/information          | C-E                     | D-E                     | E                       | 69.4 1 - Discharge  |

**OFF-DUTY EMPLOYMENT**

|  |     |     |   |           |
|--|-----|-----|---|-----------|
| 105. Conflict of interest involving off duty work activities | B-E | C-E | E | 69.2 W-30 |
| 106. Worked off duty without authorization                   | A   | B   | C | 70.1 V-5  |

**PUNCTUALITY / ABSENTEEISM**

|                                  |     |     |     |          |
|----------------------------------|-----|-----|-----|----------|
| 107. Absent without leave (AWOL) | B-E | C-E | E   | 72.1 W-5 |
| 108. Tardiness                   | A-B | B-C | C-D | 72.4 V-W |

**SAFETY**

|  |     |     |     |           |
|--|-----|-----|-----|-----------|
| 109. Violation of safe working practices during non-emergency activities | A-E | B-E | D-E | 77.3 W-20 |
| 110. Failure to follow department training protocols                     | A-E | B-E | D-E | 77.3 W-20 |
| 111. Failure to utilize appropriate safety equipment                     | A-E | B-E | D-E | 77.3 W-20 |

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- D 16-30 Day Suspension
- E Board Of Rights, 31 Day Suspension -Termination
- F Board of Rights, Recommended Termination

\*\*\* DRAFT \*\*\* LAFD STAKEHOLDERS \*\*\* DRAFT \*\*\*  
**CORRECTIVE ACTION GUIDELINES – COMPARISON TO CIVIL SERVICE POLICY 33.2**  
 NOVEMBER 20, 2006

| Act Of Misconduct | 1 <sup>st</sup> Offense | 2 <sup>nd</sup> Offense | 3 <sup>rd</sup> Offense | CS Policy 33.2 1 <sup>st</sup> Offense<br>W = written reprimand<br>V = verbal |
|-------------------|-------------------------|-------------------------|-------------------------|---|
|-------------------|-------------------------|-------------------------|-------------------------|---|

**SEXUAL MISCONDUCT (NON-EEO)**

|  |     |   |   |                    |
|--|-----|---|---|--------------------|
| 112. Inappropriately touched another person in sexual manner | C-E | E | F | 69.5 W – Discharge |
| 113. Involved in lewd conduct                                | E   | F |   | 69.5 W – Discharge |
| 114. Solicited illegal sex act (off duty)                    | E   | F |   | 69.5 W – Discharge |
| 115. Solicited illegal sex act (on duty)                     | F   |   |   | 69.5 W – Discharge |

**SPECIALIZED SECTION - ARSON**

Note: 1<sup>st</sup> offense violations of the following can be considered as the basis for removal from ACTS

|   |   |   |  |                     |
|---|---|---|--|---------------------|
| 116. Negligent discharge of firearm (with or without injury)    | E | F |  | 77.3 W - 20         |
| 117. Fired weapon in violation of Department policy             | E | F |  | 81.1 30 - Discharge |
| 118. Unnecessarily displayed/pointed a weapon at another person | E | F |  | 77.3 W - 20         |
| 119. Improperly left weapon unattended                          | E | F |  | 77.3 W - 20         |
| 120. Used unauthorized tactics or excessive force               | E | F |  | 81.1 30 - Discharge |

**SUPERVISORY MISCONDUCT – NON EEO**

|   |     |     |     |                    |
|---|-----|-----|-----|--------------------|
| 121. Failed to report misconduct as required                    | D-E | E   | F   | 70.6 1 – Discharge |
| 122. Failed to process a personnel complaint in a timely manner | D-E | E   | F   | 70.6 1 – Discharge |
| 123. Failure to carry out supervisory responsibilities          | A-C | B-E | C-E | 70.6 1 - Discharge |

**UNAUTHORIZED FORCE – DUTY CONNECTED**

|   |     |     |   |                    |
|---|-----|-----|---|--------------------|
| 124. Unnecessarily applied excessive force                  | A-C | C-E | E | 69.5 W – Discharge |
| 125. Used unapproved type of physical restraints to patient | A-C | C-E | E | 69.5 W – Discharge |

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**UNBECOMING (MISCELLANEOUS)**

|  |     |     |     |                     |
|--|-----|-----|-----|---------------------|
| 126. Abuse of authority  | C-E | D-E | F   | 81.4 15 - Discharge |
| 127. Brought discredit to the department   | A-E | B-E | C-E | 69.5 W - Discharge  |
| 128. Violation of Department or City work rule or policy   | A-E | B-E | C-E | 70.1 V - 5          |
| 129. Improper use of the MDT/Radio frequency   | A-C | B-D | E   | 70.1 V - 5          |
| 130. Improperly converted or attempted to convert an official on duty contact into a social relationship | B-E | C-E | E   | 69.1 W - Discharge  |
| 131. Used Department computer system for personal reasons in violation of City policy                    | A-B | B-C | C-E | 70.1 V - 5          |
| 132. Violated internet use policy to view pornography  | C-D | D-E | F   | 70.1 V - 5          |
| 133. Intentionally compromised an official Fire Department investigation                                 | C-E | D-E | E   | 74.7 W - 10         |
| 134. Misuse of Department prestige for personal gain   | A-C | B-D | C-E | 69.1 W - Discharge  |
| 135. Smoked tobacco product in violation of statute or Department policy                                 | C-D | D-E | E   | 69.5 W - Discharge  |
| 136. Violation of non-tobacco use affidavit  | C   | D   | E   | 69.5 W - Discharge  |

**UNBECOMING CONDUCT (CRIMINAL, NOT INCLUDED IN OTHER CATEGORIES)**

|  |     |     |     |                    |
|--|-----|-----|-----|--------------------|
| 137. Committed a felony                                  | F   |     |     | 69.5 W - Discharge |
| 138. Committed a misdemeanor in conflict with job duties | A-E | B-E | C-E | 69.5 W - Discharge |
| 139. Vandalism   | B-E | D-E | E   | 69.5 W - Discharge |

**VIOLENCE - WORKPLACE OR DOMESTIC**

|   |     |   |   |                    |
|---|-----|---|---|--------------------|
| 140. Involved in physical altercation with department member    | D-E | E | F | 73.4 6 - Discharge |
| 141. Involved in physical altercation with member of the public | E   | F |   | 73.4 6 - Discharge |
| 142. Threatened a member of the department                      | D-E | E | F | 73.4 6 - Discharge |
| 143. Threatened a member of the public                          | E   | F |   | 73.4 6 - Discharge |
| 144. Committed an act of domestic violence                      | E   | F |   | 69.5 W - Discharge |
| 145. Failed to comply with a court order                        | C-E | E | F | 69.5 W - Discharge |

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|                   |                            |                            |                            |  |
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|                   |                            |                            |                            |  |
|                   |                            |                            |                            |  |
|                   |                            |                            |                            |  |

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LAFD DISCIPLINARY ACTION GUIDELINES FOR SWORN MEMBERS - COMPARISON BETWEEN PROPOSED AND UFLAC'S RESPONSE  
 SEPTEMBER 21, 2007

| Act of Misconduct   | Mgmt And UFLAC Agree 1 <sup>st</sup> Offense | Mgmt And UFLAC Agree 2 <sup>nd</sup> Offense | Mgmt And UFLAC Agree 3 <sup>rd</sup> Offense | CS Policy 33.2 1 <sup>st</sup> Offense<br>W = written reprimand<br>V = verbal |
|---|--|--|--|---|
| <b>ALCOHOL / NARCOTICS &amp; DRUG USE</b>   |  |  |  |   |
| A1. Consumed alcoholic beverages while on duty *  | B-E  | D-E  | E  | 10 - Discharge  |
| A2. On duty, under the influence of alcohol *   | B-D  | E  | E  | 10 - Discharge  |
| A3. Violation of Last Chance Contract <b>Conditions of Continued Employment Contract</b> for alcohol, drugs, narcotics        | D-E  | E  | E  |   |
| A4. Ingestion, possession or commerce of any illegal drug, on or off duty   | E  | E  | E  | 10 - Discharge  |
| A5. Purchased alcoholic beverage on duty for personal use.  | E  | E  | E  | W - Discharge   |
| A6. Knowingly transported a person to buy/obtain illegal narcotics/drugs  | E  | E  | E  | W - Discharge   |
| A7. Knowingly present where illegal narcotics/drugs being used  | A-E  | A-E  | A-E  | W - Discharge   |
| A8. Knowingly allowed illegal or improper use, possession or commerce of any controlled substance, including prescribed drugs | A-E  | D-E  | E  | W - Discharge   |
| A9. Knowingly allow minor to consume alcoholic beverage   | A-E  | D  | E  | W - Discharge   |
| A10. Off duty, public drunkenness   | A-B  | B-C  | D-E  | W - Discharge   |
| A11. On duty, possessed alcoholic beverage  | A-B  | C-D  | E  | V - 5   |
| A12. Unfit for duty due to prior consumption of alcoholic beverage  | A-B  | C-D  | E  | 10 - Discharge  |
| <b>DRIVING / PARKING INFRACTIONS</b>  |  |  |  |   |
| B1. DUI while driving a City vehicle  | E  | E  | E  | 20 - Discharge  |
| B2. DUI *   | C-D  | C-E within 10 yrs.<br>D-E                    | E  | W - Discharge   |
| B3. DUI with aggravated circumstances   | C-E  |  | E  | W - Discharge   |

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|---|--|--|--|---|
| B4. DUI with traffic collision  | C-E  | D-E  | E  | W - Discharge   |
| B5. DUI with traffic collision and injury   | C-E  | D-E  | E  | W - Discharge   |
| B6. At fault for accident involving Department vehicles/apparatus with aggravated circumstances (i.e.: alcohol/drugs) | D-E  | D-E  | E  | 20 - Discharge  |
| B6A. At fault for accident involving department vehicles/apparatus - emergency  | A-D  | B-E  | C-E  |   |
| B7. At fault for accident involving Department vehicles/apparatus - non-emergency                                     | A-B  | A-C  | B-E  | 1 - Discharge   |
| B8. Knowingly Failed to properly dispose of traffic citations issued against private vehicle                          | A-B  | B-C  | C-E  | W - Discharge   |
| B9. Operating a city vehicle without proper endorsements  | A  | B-C  | C-E  | W - 5   |
| B10. Failing to maintain a valid driver's license with proper endorsements  | A  | B-C  | D-E  | V - 5   |
| B11. Failure to make notification of driver's license status change   | A  | B-C  | D-E  | W - 10  |
| B12. Failure to wear seat belt  | A  | A-C  | C-E  | W - 20  |
| B13. Illegal parking of City vehicle (not business related)   | A  | B  | C-E  | W - Discharge   |
| B14. On or off duty, improper use of a City vehicle   | A  | B  | C-E  | W - Discharge   |
| B15. Reckless driving (no DUI)  | A-E  | B-E  | E  | W - Discharge   |
| B16. Reckless driving with aggravated circumstances (no DUI)  | D-E  | E  | E  | W - Discharge   |
| B17. Reckless driving with traffic collision & injury (no DUI)  | E  | E  | E  | W - Discharge   |
| B18. Used unauthorized Code 3   | V-A  | B-C  | C-D  | W - 20  |
| DISHONESTY / THEFT  |  |  |  |   |

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SEPTEMBER 21, 2007

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|---|--|--|--|---|
| C1. Accepted a bribe (An exchange of compensation in any form for preferred treatment in the performance of duties) | D-E  | E  | E  | Discharge   |
| C2. Destroying City records/property without authorization  | C-E  | E  | E  | 10 - Discharge  |
| C3. Forged documents  | D-E  | E  | E  | Discharge   |
| C4. Received benefits through fraudulent means  | E  | E  | E  | Discharge   |
| C5. Fraudulent use of sick time   | A-C  | B-D  | E  | Discharge   |
| C6. Knowingly submitted false timekeeping/overtime report   | D-E  | E  | E  | Discharge   |
| C7. Knowingly submitted a false claim to receive Workers Compensation insurance benefits                            | E  | E  | E  | Discharge   |
| C8. Inappropriately accepted a gratuity/favor for services required on the job                                      | A-E  | B-E  | E  | W - Discharge   |
| C9. Intentionally falsified a report  | D-E  | E  | E  | Discharge   |
| C10. Made false and/or misleading statements during a Department inquiry  | B-E  | C-E  | E  | Discharge   |
| C11. Made false statement while under oath  | E  | E  | E  | Discharge   |
| C12. Theft of City property/converted City property to personal use   | E  | E  | E  | Discharge   |
| C14. Knowingly took property of another without permission  | A-E  | E  | E  | W - Discharge   |
| C15. Used City resources for personal use   | A-E  | B-E  | C-E  | W - Discharge   |
| C16. Worked off duty while on IOD status without authorization  | E  | E  | E  | Discharge   |

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|---|-------------------------------------|-------------------------------------|-------------------------------------|--|
| <b>EEO VIOLATIONS - DISCRIMINATION / HARRASSMENT / SEXUAL HARRASSMENT</b>   |                                     |                                     |                                     |  |
| <b>NOTE:</b> Persons in supervisory positions will be subject to more severe levels of discipline within the following penalty ranges. Refer to Book 90 for definitions |                                     |                                     |                                     |  |
| D1. Failure to take appropriate action to correct and eliminate sexual harassment from the workplace  | D-E                                 | E                                   | E                                   | 20 - Discharge   |
| D2. Physical conduct or act of a sexual nature involving the use of force   | E                                   | E                                   | E                                   | Discharge  |
| D3: Quid Pro Quo -- implied or explicit coercive pressure for sexual favor  | E                                   | E                                   | E                                   | 20 - Discharge   |
| D4. Retaliation against employee for filing a complaint of misconduct or participating in a sexual harassment or discrimination complaint                               | D-E                                 | E                                   | E                                   | 10 - Discharge   |
| D5. Unwelcome physical contact in sexual area of body   | E                                   | E                                   | E                                   | 20 - Discharge   |
| D6. Used derogatory term to department member in violation of EEO policies  | D-E                                 | E                                   | E                                   | V - 20   |
| D7. Used derogatory term to member of public in violation of EEO policies   | C-E                                 | E                                   | E                                   | V - 20   |
| D8. Unwelcome touching, rubbing, or any type of physical contact and/or conduct toward other employees, which is sexually suggestive                                    | B-E                                 | D-E                                 | E                                   | 1 - Discharge  |
| D9. Showed/hung cartoons, photos, etc. of discriminatory nature in the workplace  | D-E                                 | D-E                                 | E                                   | V - Discharge  |
| D10. Displayed inappropriate photos/cartoons, books, magazines, etc., in the workplace  | A-E                                 | B-E                                 | C-E                                 | V - Discharge  |
| D11. Created a hostile work environment   | D-E                                 | E                                   | E                                   | 10 - Discharge   |
| D12. Made improper sexual remark  | A-C                                 | C-D                                 | D-E                                 | V - 20   |

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|---|----------------------------------|----------------------------------|----------------------------------|---|
| <b>FAILED TO APPEAR IN COURT</b>  |                                  |                                  |                                  |   |
| E1. Excused from jury duty, failure to return to duty/work                        | A-B                              | B-C                              | E                                | W - 5   |
| E2. Failure to appear in court  | A                                | B                                | C-E                              | W - Discharge   |
| E3. Failure to appear to jury duty  | A                                | B                                | C-E                              | W - Discharge   |
| <b>HAZING</b>   |                                  |                                  |                                  |   |
| F1. Participated in an act of hazing or horseplay                                 | A-C                              | B-D                              | D-E                              | W - 10  |
| F2. Participated in an act of hazing or horseplay with injury                     | C-D                              | D-E                              | D-E                              | W - 10  |
| <b>IMPROPER REMARK OR GESTURE (NON-EE0)</b>                                       |                                  |                                  |                                  |   |
| G1. Improper remark/abusive language/gesture directed to fellow department member | A-B                              | C-D                              | D-E                              | V - 5   |
| G2. Improper remark/abusive language/gesture directed to member of the public     | B                                | C-D                              | D-E                              | V - 5   |
| G3. Improper remarks/abusive language/gesture directed at a supervisor            | B                                | C                                | D-E                              | V - 5   |
| G4. Malicious gossip  | B                                | C                                | D-E                              | V - 5   |
| G5. Involved in verbal altercation with Department member                         | A-B                              | C-D                              | D-E                              | V - 5   |
| G6. Involved in verbal altercation with member of the public                      | A-B                              | C-D                              | D-E                              | V - 5   |
| <b>INSUBORDINATION</b>  |                                  |                                  |                                  |   |
| H1. Failed to follow instruction of supervisor                                    | A-E                              | B-E                              | C-E                              | V - Discharge   |
| H2. Refused to follow instructions of supervisor                                  | C-E                              | C-E                              | D-E                              | 6 - Discharge   |
| H3. Refused to obey a proper and lawful order                                     | C-E                              | E                                | E                                | 6 - Discharge   |

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|---|--|--|--|---|
| <b>LOST EQUIPMENT</b>   |  |  |  |   |
| I1. Negligent loss of Department cellular phone or pager  | A  | B  | C  | V-5   |
| I2. Negligent loss of Department radio  | A  | B  | C-E  | V-5   |
| I3. Negligent loss of other Department equipment  | A  | B  | C-E  | V-5   |
| I4. UFLAC Proposed - Accidental loss of radio   | A  | A  | B  |   |
| <b>NEGLECT OF DUTY</b>  |  |  |  |   |
| J1. Failed to report to the Department if they have been named as a suspect or principle in a written crime report or complaint filed with any law enforcement agency as required | A-B  | B-C  | D-E  | W-10  |
| J2. Possession of weapon/ammunition in violation of Department policy   | A-E  | B-E  | C-E  | 5 - Discharge   |
| J3. Changed work assignment without approval  | A  | B  | C-E  | W - Discharge   |
| J4. Conducted personal business while on duty resulting in neglect of duty  | A-B  | B-D  | C-E  | V - Discharge   |
| J5. Failed to care for another's property   | A  | A-B  | A-C  | V - 5   |
| J6. Failed to care for Department equipment resulting in damage.  | A  | B-C  | C-D  | V - 5   |
| J7. Failed to clear an incident in a prompt manner  | A  | B  | C-E  | W - Discharge   |
| J8. Negligent failure to follow proper medical protocol   | A-E  | B-E  | C-E  | W - Discharge   |
| J9. Failed to notify supervisor of accident/sickness/injury that occurred on duty   | A  | B-C  | C-E  | W - 10  |
| J10. Failed to notify supervisor of any limitation, condition or restriction that might compromise ability to perform required duties   | A-E  | B-E  | C-E  | W - 10  |

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|--|--|--|--|---|
| J11. Failed to notify supervisor and Operations when named as suspect or principle in crime report | A-E  | B-E  | C-E  | W - 10  |
| J12. Improperly used vehicle P.A. system   | A  | B  | C  | W - Discharge   |
| J13. Negligent or intentional damage to city property  | B-E  | C-E  | C-E  | W - Discharge   |
| J14. Negligent failure to complete a required EMS or fire report                                   | A-E  | B-E  | C-E  | V - Discharge   |
| J15. Left approved district without authorization  | A  | B  | C-E  | W - Discharge   |
| J16. Left approved district without authorization with aggravated circumstances                    | B-D  | B-E  | C-E  | W - Discharge   |
| J17. Left assigned district to conduct personal business   | A-E  | B-E  | C-E  | W - Discharge   |
| J18. Left work assignment without securing proper relief   | A-E  | B-E  | C-E  | W - Discharge   |
| J19. Took a City vehicle without authorization   | A  | B-C  | C-E  | 1 - Discharge   |
| J20. Off duty, failed to comply with home garaging procedures                                      | A  | B  | C  | V - 5   |
| J21. Negligent failure to monitor and/or care for a patient  | A-C  | B-D  | C-E  | V - Discharge   |
| J22. Refused an assign hire  | A  | B  | C  | V - 5   |
| J23. Represented personal opinion as that of the Department  | A-B  | B-C  | D-E  | W - Discharge   |
| J24. Took resource out of service without approval   | A  | B  | C-E  | V - Discharge   |
| J25. Transported an unauthorized person in City vehicle.   | A-B  | B-C  | C-D  | V - 5   |
| J26. Transported an unauthorized person in City vehicle on emergency response                      | B  | C-D  | E  | W - 20  |
| J27. Negligent release of confidential reports/records/information                                 | A-E  | B-E  | D-E  | 1 - Discharge   |
| J28. Intentional release of confidential reports/records/information                               | B-E  | C-E  | D-E  | 1 - Discharge   |

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 \* UFLAC proposed addition Medical Model Evaluation and Contract

LAFD DISCIPLINARY ACTION GUIDELINES FOR SWORN MEMBERS - COMPARISON BETWEEN PROPOSED AND UFLAC'S RESPONSE  
 SEPTEMBER 21, 2007

| Act Of Misconduct   | Mgmt And UFLAC Agree 1 <sup>st</sup> Offense | Mgmt And UFLAC Agree 2 <sup>nd</sup> Offense | Mgmt And UFLAC Agree 3 <sup>rd</sup> Offense | CS Policy 33.2 1 <sup>st</sup> Offense<br>W = written reprimand<br>V = verbal |
|---|--|--|--|---|
| <b>OFF-DUTY EMPLOYMENT</b>  |  |  |  |   |
| K1. Conflict of interest involving off duty work activities. As defined by the City Ethics Rules. | B-D  | C-E  | E  | W - 30  |
| K2. Worked outside employment without having an approved F-1150 on file.                          | N-A  | B  | C  | V - 5   |
| <b>PUNCTUALITY / ABSENTEEISM</b>  |  |  |  |   |
| L1. Absent without leave (AWOL)   | A-B  | C-D  | D-E  | W - 5   |
| L2. Tardiness   | A  | A-B  | A-C  | V - W   |
| <b>SAFETY</b>   |  |  |  |   |
| M1. Violation of safe working practices during non-emergency activities                           | A-B  | B-C  | D-E  | W - 20  |
| M2. Failure to follow department training protocols   | A-B  | B-C  | D-E  | W - 20  |
| M3. Failure to utilize appropriate safety equipment   | A-B  | B-C  | D-E  | W - 20  |
| <b>SEXUAL MISCONDUCT (NON-EEO)</b>  |  |  |  |   |
| N1. Inappropriately touched another person in sexual manner.                                      | B-D  | C-E  | E  | W - Discharge   |
| N2. Committed an act of lewd conduct  | B-D  | C-E  | E  | W - Discharge   |
| N3. Solicited illegal sex act (off duty)  | B-D  | C-E  | E  | W - Discharge   |
| N4. Solicited illegal sex act (on duty)   | D-E  | E  | E  | W - Discharge   |
| <b>SUPERVISORY MISCONDUCT - NON EEO</b>   |  |  |  |   |
| P1. Failed to report misconduct as required   | A-B  | B-C  | C-E  | 1 - Discharge   |
| P2. Failed to process a personnel complaint in a timely manner                                    | A-B  | B-C  | C-E  | 1 - Discharge   |
| P3. Failure to carry out supervisory responsibilities   | A-E  | B-E  | D-E  | 1 - Discharge   |

KEY: UFLAC proposed addition N = Notice To Improve

A Reprimand to 5 Day Suspension  
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|---|--|--|--|---|
| <b>UNAUTHORIZED FORCE - DUTY CONNECTED</b>  |  |  |  |   |
| Q1. Unnecessarily applied excessive force   | A-E  | B-E  | C-E  | W - Discharge   |
| Q2. Used unapproved type of physical restraints to patient  | A  | B-C  | D-E  | W - Discharge   |
| <b>UNBECOMING (MISCELLANEOUS)</b>   |  |  |  |   |
| R1. Abuse of authority  | A-D  | B-E  | E  | 15 - Discharge  |
| R2. Brought discredit to the department   | A-C  | B-D  | D-E  | W - Discharge   |
| R3. Violation of Department or City work rule or policy   | A-B  | B-C  | C-E  | V - 5   |
| R4. Improper use of the MDT/Radio frequency   | A  | B  | C  | V - 5   |
| R5. Improperly converted or attempted to convert an official on duty contact into a social relationship | A-B  | B-C  | D-E  | W - Discharge   |
| R6. Used Department computer system for personal reasons in violation of City policy                    | A  | A-B  | B-C  | V - 5   |
| R7. Violated internet use policy to view pornography  | B  | C-D  | D  | V - 5   |
| R8. Intentionally compromised an official Fire Department investigation                                 | C-E  | D-E  | E  | W - 10  |
| R9. Misuse of Department prestige for personal gain   | A-B  | B-C  | C-E  | W - Discharge   |
| R10. Smoked tobacco product in violation of statute or Department policy                                | A  | B-C  | D-E  | W - Discharge   |
| R11. Violation of non-tobacco use affidavit   | C  | D  | E  | W - Discharge   |
| <b>UNBECOMING CONDUCT (CRIMINAL, NOT INCLUDED IN OTHER CATEGORIES)</b>                                  |  |  |  |   |
| S1. Committed a felony  | E  | E  | E  | W - Discharge   |
| S2. Committed a misdemeanor in conflict with job duties (I.E. SHOPLIFTING)                              | A-D  | D-E  | E  | W - Discharge   |
| S3. Vandalism   | A-E  | D-E  | E  | W - Discharge   |

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|--|--|--|--|---|
| <b>VIOLENCE - WORKPLACE OR DOMESTIC</b>  |  |  |  |   |
| T1. Involved in physical altercation with department member, or member of public.          | A-C  | C-D  | E  | 6 - Discharge   |
| T2. Threatened a member of the department, or member of the public.                        | A-C  | C-D  | B-E  | 6 - Discharge   |
| T3. Threatened a member of the department, or member of the public with great bodily harm. | B-E  | C-E  | E  | 6 - Discharge   |
| T4. Committed an act of domestic violence  | B-E  | E  | E  | 6 - Discharge   |
| T5. Failed to comply with a court order  | A-C  | D-E  | E  | W - Discharge   |

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BOARD OF FIRE COMMISSIONERS

GENETHIA HUDLEY-HAYES  
PRESIDENT

CASIMIRO U. TOLENTINO  
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ANDREW FRIEDMAN  
JILL FURILLO  
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BLANCA GOMEZ-REVELLES  
EXECUTIVE ASSISTANT II

CITY OF LOS ANGELES  
CALIFORNIA



ANTONIO R. VILLARAIGOSA  
MAYOR

FIRE DEPARTMENT

DOUGLAS L. BARRY  
FIRE CHIEF

200 NORTH MAIN STREET  
LOS ANGELES, CA 90012

(213) 978-3800  
FAX: (213) 978-3815

<http://www.lafd.org>

January 12, 2008

Mr. Steve Tufts, President  
United Firefighters of Los Angeles City  
1571 Beverly Boulevard, Suite 201  
Los Angeles, California, 90026-5704

Dear Mr. Tufts:

**LETTER OF AGREEMENT - DISCIPLINARY GUIDELINES**

Department Management and UFLAC representatives mutually agree to the following relative to the *LAFD's Disciplinary Guidelines* of December 2007:

1. The agreement on the guidelines was accomplished through the Meet and Confer process.
2. Implementation of the guidelines will be a part of a comprehensive disciplinary process which, as of this agreement, is still being negotiated.
3. The Department completed initial Disciplinary Guideline training for all Supervisors in December 2007.

For UFLAC

STEVEN TUFTS, President  
UFLAC

For the Department

DOUGLAS L. BARRY  
Fire Chief

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January 12, 2008

Mr. John P. Miller, President  
Chief Officers Association  
Los Angeles, California, 90026

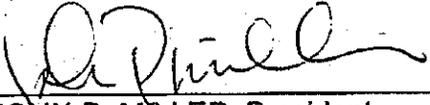
Dear Mr. Miller:

**LETTER OF AGREEMENT - DISCIPLINARY GUIDELINES**

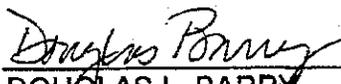
Department Management and COA representatives mutually agreed to the following relative to the *LAFD's Disciplinary Guidelines* of December 2007:

1. The agreement on the guidelines was accomplished through the Meet and Confer process.
2. Implementation of the guidelines will be a part of a comprehensive disciplinary process, which, as of this agreement, is still being negotiated.
3. The Department completed initial Disciplinary Guideline training for all supervisors in December 2007.

For COA

  
\_\_\_\_\_  
JOHN P. MILLER, President  
COA

For the Department

  
\_\_\_\_\_  
DOUGLAS L. BARRY  
Fire Chief



# Fire Commission

## Board Meeting 10/2/07

### General Managers Report:

**Chief Barry:** Thank you Madam President. I'd like to start from the beginning of my tenure if I might. Back in December of 2006 I accepted the acting Fire Chief's position and eventually interim Fire Chief's position with the understanding of the challenges before me and with a purpose to lead first by example and then by action. Tuesday, September 18, I accepted the permanent Fire Chief position and in doing so I rededicated my efforts to create a lasting reform within the fire department. From the beginning my goals and objectives have never wavered and I'm confident that the planned reforms will make a difference. I started my tenure, by providing three operating principals for the members of the department to be guided by. They are up on the screen there. First, was to operate through teamwork. Second, to operate ethically and with integrity. And the third was to operate, to position the department for the future. With these as a foundation for reform we've begun long lasting changes. I've established a personal vision for the department which is to establish the Los Angeles Fire Department as a model for other fire departments to emulate in the areas of emergency operations, prevention and preparedness as well as a work environment, in doing so I have set some goals, to provide an ever-improving service to the community. These goals are going to be included with the ongoing goal to provide ever improving services to the community. First goal there is to implement the audit action implementation plan. Second, strengthening the department's infrastructure. Third, to implement a fire fatality and hazard reduction program. Forth, to improve coordination of the department's home land security and disaster management efforts. And fifth, to maintain our leadership role in regents efforts to establish radio and data interoperability. All the while we're going to be doing this while improving the efficiency and effectiveness of the department's budget, which is in keeping with the Mayor's directives. I'd like to go through each of these very quickly, try to highlight them. Okay the first goal was to implement the audit implementation plan. As you recall the implementation plan had four categories. There were leadership and communications, complaint and disciplinary process, human relations in the work place, and originally it was the Drill Tower and recruit training academy, which was changed to recruitment/ retention of women. In regards to leadership and communications: In leadership we have researched has been completed of the best practices and currently a comprehensive leadership training plan and curriculum is in the development. Currently basic leadership principles are being taught in the Captain's preparatory class and our core in-service training and leadership has also been included in our promotional processes. On the communications several channels of direct communications to and from the administrative offices have been made as well as we have enhanced our web communications. In the area of complaint and disciplinary process, we have developed a automated complaint and discipline tracking system to ensure improved documentation and data collection of both complaints and disciplinary actions. **We've established and have an agreement with the unions on new disciplinary guidelines that set high standards of behavior and provide consistency and penalties.** We have increased the training of all participants in the disciplinary system and standardized processes for

# Fire Commission

## Board Meeting 10/2/07

consistency. Most importantly, we have submitted a plan for a Professional Standards Division that included elements that greatly improve our overall discipline and management. The budget packets for this new division have been submitted to the Mayor's office for approval and for funding. In the area of human relations in the work place, a comprehensive human relations plan has been developed and is beginning to implement and enhances our previous HR training efforts and addresses specific areas identified in the audits. This training is currently being presented in the training academy and during quarterly training and is also a component of the promotional process. Recruitment and retention of women is being addressed in our recruitment plan. That focuses on intense mentoring of entry-level candidates from the time they're recruited until they complete probation. We have already redirected staff from other area of the Fire Department to begin this important effort. Development and maintaining a strong LAFD infrastructure. We've increased our budget allocations to our infrastructure and we're in the process of completing installing T1 lines to all fire stations for efficient communications. That should be completed by the end of a this fiscal year. We've also developed a technology plan that is being implemented as well as improving our 911 dispatch operations by recommending additional staffing of dispatchers and supervision. And lastly our capitol improvement program of building new fire stations is moving along quickly. Homeland security we're reorganizing our homeland security efforts to achieve more effective intelligence information gathering, collaborative planning, comprehensive training, support, and analysis and to maintain liaisons with associated entities and to raise a community and private sector awareness of potential threats. Under fire fatalities reduction program we know what the common factors are in fire fatalities and injuries and so we are focusing on those. We're focusing on residential properties. We're targeting the elderly and the young and low-income area communities and we're increasing the public awareness of those hazards that create those fatalities. Lastly on interoperability goal five, as you probably remember interoperability key was an outcome of 9/11 when the police and fire could not communicate. We, it is a major regional project somewhere in the area of 800 million dollars, It's a multi agency project. LAFD is providing leadership and momentum with the guidance of Chief Keene and we're working hard to get that completed within a five-year time frame. In closing, I'm confident that these goals and priorities can and will achieve the desired result of making a model for other fire departments. However, it will require significant commitment, a commitment of time, a commitment of effort, and most importantly a commitment of financial resources. I have discussed these items with the Mayor's office and many of the city council members. We've discussed it with their understanding that the support and commitment will be needed to make these expectations become a reality. Madam President that completes my report.

**Commission Hudley-Hayes:** Commissioners are there, do you have any questions? Do you have any comments on that portion of... Commissioner Furillo?

# Fire Commission

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**Commissioner Furillo:** Thank you Chief Barry for your report. I would just like to get a copy of the slides that were presented. That would be helpful.

**Chief Barry:** Yes, we'll get that to you.

**Commissioner Furillo:** Great

**Commissioner Hudley-Hayes:** Umm other commissioners? Commissioner Tolentino?

**Commissioner Tolentino:** Chief Barry when you talked about the, I guess finally getting a disciplinary guidelines, does that include also a I guess a disciplinary process, a streamlining that so that the I guess all, or everyone knows exactly what transpires one's complaint or there's a problem that arises?

**Chief Barry:** Right, we have through the stakeholders process established the work flow for disciplinary complaints, or complaints of any type to as you said to streamline the process and give an understanding for everyone, so that has been done.

**Commissioner Tolentino:** I actually, I think you kind of minimized what I thought, getting the approval of the disciplinary guidelines, which is a tremendous achievement in actually getting all the stakeholders to buy off on these because I know that working with the stakeholders has been, was a very difficult task, so I appreciate all your efforts and completing that. Can you kind of, can you explain a little more about the recruitment and retention of women issue and what steps the department is taking to do that?

**Chief Barry:** What we've found through a analysis is that the best way or the most effective way to retain recruits is through mentoring and what we're focusing on is the mentoring as I stated from the time they first show an interest in becoming a firefighter and mentoring them through the testing process, through the academy process, and then through the probationary process as well. We find that's going to be the most effective way. Now to do so is going to take additional staffing and that's where the financial aspect comes in. We've discussed this both with the Mayor's office and with City Council members that it will require additional staffing and I'm confident that will take place.

**Commissioner Hudley-Hayes:** Commissioner Furillo?

**Commissioner Furillo:** On that issue of the a recruitment/ retention of women. Is, do we have a program in place or do we have a plan for a program in place that's looking at when you talk about mentoring I think that's a really good start for the department. With respect to the mentoring, are we looking towards promotional opportunities for women.

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**Chief Barry:** Yes I didn't go into whole program; ultimately we want to mentor people through their whole career. We think the first part of that is to mentor getting people on the job, and then once we're on the job mentoring them their whole career.

**Commission Hudley-Hayes:** How Chief Barry, will that look different from for example what the Los Angeles Fire Department has been doing in the past. My understanding is, your model is that you're imposing a much more a collaborative approach so that you have people that are working in the bureau of training and risk management with people who are working in the bureau of emergency services so that we are beginning to develop training components that get at the workplace issues because that's really the problem that we are addressing and trying to ameliorate in terms of retention of women is to make sure that the workplace is more inviting and that it is more a, more of a place where women and other underrepresented groups come into. So can you talk a little bit about this new approach that you have with your executive staff

**Chief Barry:** Sure, as you stated it's all interconnected. If we have a reputation as not having a healthier professional work environment it's going to discourage people who may be interested in joining the fire department, our fire department to even applying. So we first have to work both on the work environment and what the, the, the effects of the work environment has on recruitment. Through the recruitment process in the past we would recruit people and then we'd kind of left them on their own to get through the testing process and get through the probationary process and it hasn't been as successful as it could be. We found through members who have family members that get on the job they seem to be more successful because they are mentored all the way through the process. So we see that as a way to really get to the heart of the success rate of all people who get on the job, particularly we focus on women.

**Commissioner Friedman:** Chief, the problems we have had and the problems that have actually caught the attention of the public, I think they go back a number of years, I mean the source of the problem. I mean the complaints we're talking about the verdicts that have come out, the settlement that has been made. Have you seen a improvement within the last year, year and a half as oppose to what has occurred to us via four or five years ago?

**Chief Barry:** Yes, what I am noticing going to a different fire stations is a renewed optimism towards the department members, toward doing those things that put us in the more positive light and treating everyone the same, in a more professional manner, in treating everyone as they should be treated. I gauge that based on my going out the fire station, but also the feedback that I receive after I leave those fire stations. And I feel very confident that we are making progress to that end.

**Commission Hudley-Hayes:** And finally can you, first of all I'd like congratulate because I see that a Steve Tufts is in the room and I saw John Miller in

# Fire Commission

## Board Meeting 10/2/07

the room. I really want to congratulate both of our labor unions for the work that they've done on the new disciplinary guidelines. I think this kind of a first if you will in the workings of labor management. The tradition of having the labor management committee has been very helpful. And, I'm not sure that people are aware of the fact that the work that has been put in by both our a labor organizations, one representing chiefs and captains and one representing our rank and file members. It's really important, Chief Barry that you begin, that you talk about and help people understand that this is a shared commitment, that these guidelines, these disciplinary guidelines are actually one more step above what the personal department in City of Los Angeles has in terms of their expectations. I think what this department is saying with the partnering of it's labor organizations is that this department now intends to hold it's members to a higher standard of behavior, to there being more consistency in terms of how discipline is handed out and the commitment, thanks to Chief Keene, who is working on a tracking system that is not just going to be about negative data, but that we're going to begin to have a department that will begin to look at how you develop a progressive disciplinary system that has consistency, so that we can ameliorate the impression of nepotism, cronyism, capriciousness, and how discipline is meted out. This is one of the things I think that is the most important thing that you could talk about. Possibly with maybe with Steve Tufts making a comment, or John Miller, if you'd like to make a comment. This is an open forum about the work that was done and how this is going to impact us in a very different way. I think that's what people are looking for and I think that's what we need to a kid of unpack a little bit for the public.

**Chief Barry:** Well I will say that the cooperation of all the employee groups including of the labor organizations has been outstanding and I think that's helped the process and has expedited the process. You mention about the holding firefighters and members of the fire department to a higher standard. That is something that all groups have been in agreement with and therefore, that has not been an obstacle in our process of getting to the heart of the guidelines. I think as I said before the department members are motivated to move forward, to do the things necessary to bring back the reputation that we've had, and should still have and so I think that's playing into it as well.

**Commission Hudley-Hayes:** Commissioner Furillo?

**Commissioner Furillo:** Chief Barry I just also wanted to commend you for your leadership by going into the different firehouses. You know you've been out there in the field, you've visited so many firehouses and you've been able to have that interaction so that you're sharing the goals and the vision of the department leadership with the rank and file and that you're being able to solicit or to receive feedback from the rank and file members out in the firehouses and I want to commend you for that. I think that that is a way of continuing this process of moving forward with the department.

# Fire Commission

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**Chief Barry:** Thank You. I find it very helpful from the standpoint that I learn a lot as well. When you're in headquarters all the time and not out in the field there's a lot of things that change that you're not really aware of and sometimes things that look very, policies and procedures that look very good on paper when you put them into actual practice don't work out that well. So by me going out and get the benefit of getting that understanding.

**Commissioner Tolentino:** On a similar note I appreciate the fact that you lead by example, and by action, and I appreciate also that you're going to do it with ethically and with integrity and hopefully that will be a model that the rest of the department will follow. I think that's will they're all going to be following is to see what example you're going to be setting and what kinds of actions you'll be taking.

**Chief Barry:** I think that's important. I think the public has an expectation of firefighters and all ranks to be ethical and to do things with integrity and that's why we get a lot of the accolades we get and we get a lot of the labels of hero and so forth is because of their expectation. We have to live up to that expectation.

**Commission Hudley-Hayes:** One of things I think that um the Board of Fire Commissioners will be looking for to is that it is my belief, I'm not speaking for all Fire Commissioners, but it's my belief that the toughest bit of the work is yet ahead of us. Trying to change organizational culture and trying to begin to take a look at which traditions serve us well and which ones do not. While we, I think, are encouraged by the example that you set so far, there will be times when we will want to ask the tough questions, where we'll want to know where you are with the strategic implementation plan. Where you are with working with the Mayor and working with the City Council to make sure you get the fiscal resources that you need for the Division of Professional Standards, which is something that you've been working towards to put together that is, will allow for more consistency because as you stated it will be outside of the chain of command so to speak. So, while I am very encouraged about the direction of which you're taking the Department, the Board of Fire Commissioners will be looking for regular updates so that we can actually see the nuts and bolts of and the results of, which we know are not going to happen overnight. Those are the things that we need to be talking about and there needs to be a transparent process for us to talk about those things in public. So that the public will understand that you, in fact, are going to try to ameliorate. You're never going to be able to say with any assurances that you can stop, all of anybody having some complaints about their work environment, but what we're going to be looking for, is your strong leadership in ameliorating those instances that would lead us to the kinds of things that we're trying to arrest right know so I think, with hope and with heart felt support for you, and holding your hand, we are going to be holding you accountable to report those successes, those course corrections that need to be taken, and to be reporting that out to the public, along with all of the things that you're

# Fire Commission

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putting in place. The tracking system, the discipline, the progressive discipline, all of the those things. So I really want to thank you for sharing the report and doing in such a public way this morning. And once again thanks to Steve Tufts, who's in the back of the room, and John Miller, who's sitting kind of in the middle of the room, for your support and for your help in making sure that you're joining, joining us in that effort.

**Chief Barry:** Let me just say, as you stated there's still a lot of difficult times ahead as far as getting the implementation of some of the larger items like the Professional Standards Division, the recruitment plan and the training plan. So I don't, I have no illusion that it's going to be easy, but I think working together with all of the groups, with the support of the commission I'm sure we can be successful in that.

**Commission Hudley-Hayes:** Chief, Commissioner Friedman. I gave you a promotion. And, and money

**Commissioner Friedman:** Or demotion. Chief, perhaps as a last point. In your public relations effort in addition to stating the negative, which we all know. I would like you to emphasize the positive as well, which I'm sure you have been doing and you will be doing. To the best of my understanding the Fire Department has give or take 4000 employees, sworn and civilian, and you should emphasize that the great majority of those a brave firefighters and civilians, are very satisfied and have no complaints, and the complaints that we're reading about and hearing about are a minute, minute percentage. I think that should be emphasized.

**Chief Barry:** Absolutely. When I was first announced back in December to the acting position I made it a point to bring that up when I went to public safety committee to give them an update. I tried to remind everyone of that fact that the vast majority of the members of the fire department are proud professionals who treat themselves and the public well, who do a fantastic job as it's been demonstrated by many of the incidents you've already heard about. I think it's important for everyone to recognize that the vast majority of our members are true proud professionals.

**Commissioner Friedman:** Thank you sir.

**Commission Hudley-Hayes:** And actually, thank you Commissioner Friedman. Commissioner Friedman seemed, is always that commissioner who reminds us of the fact that while he, I've never heard him make an excuse for, or rationale, make a rationale for the behavior, but I, I really do want to say to you, that that you do point us in the right direction by saying that 4300, employees however many there are, I've never once heard you say, that whether it's minute or not that you are in favor of it, but I always hear you say that the vast majority of the people who work for the Los Angeles Fire Department actually are demonstrating the behavior that we're looking for. So, you the conscious of

# Fire Commission

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the Board of Fire Commissioners to remind us that while there's work to be done we have legions of people who are actually striving to do the things that need to be done so.

**Commissioner Friedman:** Thank you madam President.

**Commission Hudley-Hayes:** Having said that we kind of have the broad spectrum of what it is we're looking for this morning. Chief Barry if you can continue on with your general managers report.

### Item 4A

**Commission Hudley-Hayes:** That takes us down to item D. I'm sorry, to item 4A, and that's a verbal status report on the development of the disciplinary guidelines which I, you've given us a portion of that. Is there any other detail that you'd like to go into?

**Chief Barry:** The only other detail is as was stated in the stakeholders meeting. Now that they been approved in through the meet and confer process, is development of training for the officers so that everyone knows how they're to be utilized so it's not just done by a person's feeling, but be consistently applied throughout the Department

**Commission Hudley-Hayes:** So I think what's important to get on the record though is that one of the things that was worked hard on between the labor organizations and the management of the department, was that, these new disciplinary guidelines, and in some cases are more stringent for certain kinds of a breaches, but the most important part of that, is that there will be training before we enact, or as we begin to enact, the new disciplinary guidelines, and I think that that actually shows that there is a different attitude with in the LAFD. So what we're saying is not only are we going to begin to utilize new guidelines, and new methods and, and more consistencies across things. The other thing that I think is very good on your part is that what you're asking for is that members who are involved in and engaged in Board of Rights, or that are involved in being advocates, or that are involved in, in any way in the disciplinary process, get professional training and maybe you can, I mean do we know, are we working, Chief Miller or a with Mr. Tufts, with the labor organizations around issues of training, or is that also a collaborative effort so that everybody is engaged in the training piece of that?

# Fire Commission

## Board Meeting 10/2/07

**Chief Miller:** Madam President, Commissioners, Chief Barry, Counsel, Staff and members of the public, John Miller, president of the Chief Officers Association. As you said earlier that the adoption or the approval of disciplinary guidelines were one, truly a major step, although a small step, a major step in the change and transition of this Department and it's been through Chief Barry's leadership and the collaborative process. As you all know, the stakeholders process was more than just labor organizations and Department management. There were input from the various stakeholders groups, and it came to a consensus agreement on all the issues that were brought before the stakeholders. It wasn't one group versus another. It truly was a collaborative process in which we, we, there was a lot of compromise, there was a lot of education and there was a lot of give and take. I think what we have here is a start. That start is going to be now followed up through training, and I can't speak for Steve, but I know that from the Chief Officer's association, for management, that that training component is a huge part into the education of all our members. Into their duties, responsibilities and expectations of the Department and the public. So we look forward to continue working with the Department management with the other labor organizations, with the stakeholders, with the Commission in providing that professional education and training component that is necessary as part of it.

**Commission Hudley-Hayes:** Thank You. Did you want to make any comments at all this morning from your perspective as president of the United Firefighters of Los Angeles?

**Steve Tufts:** Yes I will. Good Morning.

**Commission Hudley-Hayes:** Good Morning.

**Steve Tufts:** We a finished up the guidelines a last week I believe. Anyways, for UFLAC discipline was as, is as important as the leadership training and the training for our people. Our captains really get, don't get formal training. They learn from a captain they used to work for before. So it's just hand-me-down information. So we've been pushing for leadership training. We've had speakers come over, we've paid for it, I think Chief Barry has the same thing in the works for our captains to through formal training. Discipline if you look at the last three or four years, there's only a 100 cases that come to Operations that are recommended time off. Out of those only 60 people get time off. So it's not a wide spread problem we have out there of people doing things wrong. What we have out there is people making decisions based on their experience and knowledge. We have a lot of young people out there. So they're out there doing the best they can, they make a bad decision and that's a training issue. So we're getting away from shooting them in the head when they make a bad decision to teaching them how to do it better the next time. That's

# Fire Commission

## Board Meeting 10/2/07

what our goal is. But a Chief Barry has been great working with us on that. So we expect to be done with most of this stuff in the next few months I believe.

**Commission Hudley-Hayes:** Okay. Good

**Chief Barry:** Madam President as you stated there will be a collaboration in developing the training. I think it's important for everyone to understand how the guidelines will be used. I think the key whether it's 60 people or whether it's 600 people. The key is consistency and how we apply our practices and procedures as well as the penalty portion of the discipline.

**Commission Hudley-Hayes:** Okay. Thank You. That actually concludes our old business. We're now down to item five, which is new business. There really isn't any new business before us on the agenda.



BOARD OF FIRE COMMISSIONERS

GENETHIA HUDLEY-HAYES  
PRESIDENT

CASIMIRO U. TOLENTINO  
VICE PRESIDENT

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CITY OF LOS ANGELES

CALIFORNIA



ANTONIO R. VILLARAIGOSA  
MAYOR

FIRE DEPARTMENT

DOUGLAS L. BARRY  
FIRE CHIEF

200 NORTH MAIN STREET  
LOS ANGELES, CA 90012

(213) 978-3800  
FAX: (213) 978-3815

<http://www.lafd.org>

October 28, 2008

Mr. Steve Tufts, President  
United Firefighters of Los Angeles City  
1571 Beverly Boulevard, Suite 201  
Los Angeles, California, 90026-5704

Dear Mr. Tufts,

LETTER OF AGREEMENT  
DISCIPLINARY GUIDELINES AND INVESTIGATIVE PROCEDURES

As per an agreement worked out between Department Management and UFLAC representatives, the attached addendums "A" and "B", the revised disciplinary guidelines and the investigative process, will be implemented for the Professional Standards Division. The guidelines and investigative process were mutually agreed upon and are to be implemented as part of the complete disciplinary process. The Department will train all supervisors on the revised guidelines and investigative process as part of this agreement by December of 2008.

For UFLAC

STEVEN TUFTS, President  
UFLAC

For the Department

  
DOUGLAS L. BARRY  
Fire Chief

LAFD PENALTY GUIDELINES FOR SWORN MEMBERS

OCTOBER 28, 2008

| Act of Misconduct | 1 <sup>st</sup><br>Offense | 2 <sup>nd</sup><br>Offense | 3 <sup>rd</sup><br>Offense |
|-------------------|----------------------------|----------------------------|----------------------------|
|-------------------|----------------------------|----------------------------|----------------------------|

| ALCOHOL / NARCOTICS & DRUG USE   |     |     |     |
|--|-----|-----|-----|
| A1 On duty, under the influence of alcohol *   | B-D | E   | E   |
| A2 Violation of <i>Conditions of Continued Employment Contract</i> for alcohol, drugs, narcotics *                           | D-E | E   | E   |
| A3 Ingestion, possession or commerce of any illegal drug, on or off duty   | E   | E   | E   |
| A4 Purchased alcoholic beverage on duty for personal use   | E   | E   | E   |
| A5 Knowingly transported a person to buy/obtain illegal narcotics/drugs *  | E   | E   | E   |
| A6 Knowingly present where illegal narcotics/drugs being used  | A-E | A-E | A-E |
| A7 Knowingly allowed illegal or improper use, possession or commerce of any controlled substance, including prescribed drugs | A-E | D-E | E   |
| A8 Knowingly allow minor to consume alcoholic beverage   | A-E | D   | E   |
| A9 Off duty, public drunkenness **   | A-B | B-C | D-E |
| A10 On duty, possessed alcoholic beverage  | A-B | C-D | E   |
| A11 Unfit for duty due to prior consumption of alcoholic beverage  | A-B | C-D | E   |

V - Verbal Warning      A - Reprimand to 5 Day Suspension      B - 6-10 Day Suspension  
 C - 11-15 Day Suspension      D - 16-30 Day Suspension      E - Board Of Rights (Suspension-Termination)

\* No Statute  
 \*\* 10 Years Statute

**NOTE: Unless indicated otherwise, misconduct violations have a 5-year statute**

## LAFD PENALTY GUIDELINES FOR SWORN MEMBERS

OCTOBER 28, 2008

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|-------------------|----------------------------|----------------------------|----------------------------|

| DRIVING / PARKING INFRACTIONS  |     |                      |     |
|--|-----|----------------------|-----|
| B1 DUI while driving a City vehicle *  | E   | E                    | E   |
| B2 DUI *   | C-D | C-E<br>within 10 yrs | E   |
| B3 DUI with aggravated circumstances *   | C-E | D-E                  | E   |
| B4 DUI with traffic collision *  | C-E | D-E                  | E   |
| B5 DUI with traffic collision and injury *   | C-E | D-E                  | E   |
| B6 At fault for accident involving Department vehicles/apparatus with aggravated circumstances (i.e.: alcohol/drugs) * | V-C | B-D                  | E   |
| B7 At fault for accident involving department vehicles/apparatus –emergency  | V-D | B-E                  | C-E |
| B8 At fault for accident involving Department vehicles/apparatus – non-emergency                                       | V-B | A-C                  | B-E |
| B9 Knowingly failed to properly dispose of traffic citations issued against private vehicle                            | A-B | B-C                  | C-E |
| B10 Operating a city vehicle without proper endorsements   | A   | B-C                  | C-E |
| B11 Failing to maintain a valid driver's license with proper endorsements  | A   | B-C                  | D-E |
| B12 Failure to make notification of driver's license status change   | A   | B-C                  | D-E |
| B13 Failure to wear seat belt  | A   | A-C                  | C-E |
| B14 Illegal parking of City vehicle (not business related)   | A   | B                    | C-E |
| B15 On or off duty, improper use of a City vehicle   | A   | B                    | C-E |
| B16 Reckless driving (no DUI)  | A-E | B-E                  | E   |
| B17 Reckless driving with aggravated circumstances (no DUI)  | D-E | E                    | E   |
| B18 Reckless driving with traffic collision & injury (no DUI)  | E   | E                    | E   |
| B19 Reckless driving (Alcohol Related) **  | A-E | B-E                  | E   |
| B20 Failed to report traffic accident while on duty  | A-B | B-C                  | C-E |
| B21 Used unauthorized Code 3   | V-A | B-C                  | C-D |

|                          |                                   |  |
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|-------------------|----------------------------|----------------------------|----------------------------|

| DISHONESTY / THEFT |   |     |     |
|--------------------|---|-----|-----|
| C1                 | Accepted a bribe (An exchange of compensation in any form for preferred treatment in the performance of duties) * | D-E | E   |
| C2                 | Destroying City records/property without authorization  | C-E | E   |
| C3                 | Forged documents  | D-E | E   |
| C4                 | Received benefits through fraudulent means  | E   | E   |
| C5                 | Fraudulent use of sick time   | A-B | B-D |
| C6                 | Knowingly submitted false timekeeping/overtime report   | D-E | E   |
| C7                 | Knowingly submitted a false claim to receive Workers' Compensation insurance benefits                             | E   | E   |
| C8                 | Inappropriately accepted a gratuity/favor for services required on the job  | V-E | B-E |
| C9                 | Intentionally falsified a report *  | B-E | C-E |
| C10                | Made false and/or misleading statements during a Department inquiry   | B-E | C-E |
| C11                | Made false statement while under oath *   | E   | E   |
| C12                | Theft of City property/converted City property to personal use  | E   | E   |
| C13                | Knowingly took property of another without permission   | A-E | E   |
| C14                | Used City resources for personal use  | A-E | B-E |
| C15                | Worked off duty while on IOD status without authorization *   | E   | E   |
| C16                | Cheating – City, County, and State exams *  | A-D | D-E |

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OCTOBER 28, 2008

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|-------------------|----------------------------|----------------------------|----------------------------|

| <b>EEO VIOLATIONS - DISCRIMINATION / HARRASSMENT / SEXUAL HARRASSMENT</b>  |     |     |     |
|--|-----|-----|-----|
| NOTE: Persons in supervisory positions will be subject to more severe levels of discipline within the following penalty ranges. Refer to Book 90 for definitions |     |     |     |
| D1 Failure to take appropriate action to correct and eliminate sexual harassment from the workplace *  | D-E | E   | E   |
| D2 Physical conduct or act of a sexual nature involving the use of force *   | E   | E   | E   |
| D3 Quid Pro Quo – implied or explicit coercive pressure for sexual favor *   | E   | E   | E   |
| D4 Retaliation against employee for filing a complaint of misconduct or participating in a sexual harassment or discrimination complaint *                       | D-E | E   | E   |
| D5 Unwelcome physical contact in sexual area of body *   | E   | E   | E   |
| D6 Used derogatory term to department member in violation of EEO policies *  | A-E | D-E | E   |
| D7 Used derogatory term to member of public in violation of EEO policies *   | B-E | D-E | E   |
| D8 Unwelcome touching, rubbing, or any type of physical contact and/or conduct toward other employees, which is sexually suggestive *                            | B-E | D-E | E   |
| D9 Showed/hung cartoons, photos, etc. of discriminatory nature in the workplace *  | C-E | D-E | E   |
| D10 Displayed inappropriate photos/cartoons, books, magazines, etc., in the workplace *  | A-E | B-E | C-E |
| D11 Created a hostile work environment *   | D-E | E   | E   |
| D12 Made improper sexual remark *  | A-C | C-D | D-E |
| <b>FAILED TO APPEAR IN COURT</b>   |     |     |     |
| E1 Excused from jury duty, failure to return to duty/work  | A-B | B-C | E   |
| E2 Failure to appear in court  | A   | B   | C-E |
| E3 Failure to appear to jury duty  | A   | B   | C-E |
| <b>HAZING</b>  |     |     |     |
| F1 Participated in an act of hazing or horseplay   | A-C | B-D | D-E |
| F2 Participated in an act of hazing or horseplay with injury   | C-D | D-E | D-E |

|  |                                   |  |
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| * No Statute   |                                   |  |
| ** 10 Years Statute  |                                   |  |
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## LAFD PENALTY GUIDELINES FOR SWORN MEMBERS

OCTOBER 28, 2008

| Act of Misconduct | 1 <sup>st</sup><br>Offense | 2 <sup>nd</sup><br>Offense | 3 <sup>rd</sup><br>Offense |
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|-------------------|----------------------------|----------------------------|----------------------------|

| IMPROPER REMARK OR GESTURE (NON-EEO)   |     |     |     |
|--|-----|-----|-----|
| G1 Improper remark/abusive language/gesture directed to fellow Department member | A-B | C-D | D-E |
| G2 Improper remark/abusive language/gesture directed to member of the public     | B   | C-D | D-E |
| G3 Improper remarks/abusive language/gesture directed at a supervisor            | B   | C-D | D-E |
| G4 Malicious gossip  | B   | C   | D-E |
| G5 Involved in verbal altercation with Department member                         | A-B | C-D | D-E |
| G6 Involved in verbal altercation with member of the public                      | A-B | C-D | D-E |
|  |     |     |     |
| INSUBORDINATION  |     |     |     |
| H1 Failed to follow instruction of supervisor                                    | V-E | B-E | C-E |
| H2 Refused to follow instructions of supervisor                                  | C-E | C-E | D-E |
| H3 Refused to obey a proper and lawful order                                     | C-E | E   | E   |
|  |     |     |     |
| LOST EQUIPMENT   |     |     |     |
| I1 Negligent loss of Department cellular phone or pager                          | V-A | A-B | C   |
| I2 Negligent loss of Department radio  | V-A | A-B | C-E |
| I3 Negligent loss of other Department equipment                                  | V-A | A-B | C-E |

|                                 |  |   |
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OCTOBER 28, 2008

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|-------------------|----------------------------|----------------------------|----------------------------|

| NEGLECT OF DUTY |   |     |     |     |
|-----------------|---|-----|-----|-----|
| J1              | Failed to report to the Department if they have been named as a suspect or principle in a written crime report or complaint filed with any law enforcement agency as required | A-B | B-C | D-E |
| J2              | Possession of weapon/ammunition in violation of Department policy *   | A-E | B-E | C-E |
| J3              | Changed work assignment without approval  | A   | B   | C-E |
| J4              | Conducted personal business while on duty resulting in neglect of duty  | A-B | B-D | C-E |
| J5              | Failed to care for another's property   | A   | A-B | A-C |
| J6              | Failed to care for Department equipment resulting in damage.  | A   | B-C | C-D |
| J7              | Failed to clear an incident in a prompt manner  | V-A | A-B | C-E |
| J8              | Negligent failure to follow proper medical protocol   | A-E | B-E | C-E |
| J9              | Failed to notify supervisor of accident/sickness/injury that occurred on duty   | A   | B-C | C-E |
| J10             | Failed to notify supervisor of any limitation, condition or restriction that might compromise ability to perform required duties  | A-E | B-E | C-E |
| J11             | Improperly used vehicle P.A. system   | V-A | A-B | C   |
| J12             | Negligent or intentional damage to city property  | B-E | C-E | C-E |
| J13             | Negligent failure to complete a required EMS or fire report   | A-E | B-E | C-E |
| J14             | Left approved district without authorization  | A   | B   | C-E |
| J15             | Left approved district without authorization with aggravated circumstances  | B-D | B-E | C-E |
| J16             | Left assigned district to conduct personal business   | A-E | B-E | C-E |
| J17             | Left work assignment without securing proper relief   | A-E | B-E | C-E |
| J18             | Took a City vehicle without authorization   | A   | B-C | C-E |
| J19             | Off duty, failed to comply with home garaging procedures  | A   | B   | C   |
| J20             | Negligent failure to monitor and/or care for a patient  | A-C | B-D | C-E |
| J21             | Refused an assign hire  | A   | B   | C   |
| J22             | Represented personal opinion as that of the Department  | A-B | B-C | D-E |
| J23             | Took resource out of service without approval   | A   | B   | C-E |
| J24             | Transported an unauthorized person in City vehicle.   | V-A | A-B | C-D |
| J25             | Transported an unauthorized person in City vehicle on emergency response  | A-B | B-C | C-D |
| J26             | Negligent release of confidential reports/records/information   | A-E | B-E | D-E |
| J27             | Intentional release of confidential reports/records/information   | B-E | C-E | D-E |
| J28             | Inappropriate self-dispatch to incident   | V-B | B-C | C-D |

|                          |                                   |  |
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|--|----------------------------|----------------------------|----------------------------|
| <b>OFF-DUTY EMPLOYMENT</b>   |                            |                            |                            |
| K1 Conflict of interest involving off duty work activities. As defined by the City Ethics Rules. | B-D                        | C-E                        | E                          |
| K2 Worked outside employment without having an approved F-1150 on file.                          | V-A                        | B                          | C                          |
| <b>PUNCTUALITY / ABSENTEEISM</b>   |                            |                            |                            |
| L1 Absent without leave (AWOL)   | A-B                        | C-D                        | D-E                        |
| L2 Tardiness   | V-A                        | A-B                        | B-C                        |
| <b>SAFETY</b>  |                            |                            |                            |
| M1 Violation of safe working practices during non-emergency activities                           | V-B                        | B-C                        | D-E                        |
| M2 Failure to follow department training protocols   | A-B                        | B-C                        | D-E                        |
| M3 Failure to utilize appropriate safety equipment   | A-B                        | B-C                        | D-E                        |
| <b>SEXUAL MISCONDUCT (NON-EEO)</b>   |                            |                            |                            |
| N1 Inappropriately touched another person in sexual manner.                                      | B-D                        | C-E                        | E                          |
| N2 Committed an act of lewd conduct  | B-D                        | C-E                        | E                          |
| N3 Solicited illegal sex act (off duty)  | B-D                        | C-E                        | E                          |
| N4 Solicited illegal sex act (on duty)   | D-E                        | E                          | E                          |
| <b>SUPERVISORY MISCONDUCT – NON EEO</b>  |                            |                            |                            |
| P1 Failed to report misconduct as required   | A-B                        | B-C                        | C-E                        |
| P2 Failed to process a personnel complaint in a timely manner                                    | A-B                        | B-C                        | C-E                        |
| P3 Failure to carry out supervisory responsibilities   | A-E                        | B-E                        | D-E                        |
| <b>UNAUTHORIZED FORCE – DUTY CONNECTED</b>   |                            |                            |                            |
| Q1 Unnecessarily applied excessive force   | A-E                        | B-E                        | C-E                        |
| Q2 Used unapproved type of physical restraints to patient  | V-A                        | A-B                        | C-D                        |

|                                 |  |   |
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|-------------------|----------------------------|----------------------------|----------------------------|

| UNBECOMING (MISCELLANEOUS)   |     |     |     |
|--|-----|-----|-----|
| R1 Abuse of authority  | A-D | B-E | E   |
| R2 Brought discredit to the Department   | V-C | B-D | D-E |
| R3 Violation of Department or City work rule or policy   | A-B | B-C | C-E |
| R4 Improper use of the MDT/Radio frequency   | V-A | B   | C   |
| R5 Improperly converted or attempted to convert an official on duty contact into a social relationship | V-B | B-C | D-E |
| R6 Used Department computer system for personal reasons in violation of City Policy                    | V-A | A-B | B-C |
| R7 Violated internet use policy to view pornography  | A-B | C-D | D   |
| R8 Intentionally compromised an official Fire Department investigation                                 | C-E | D-E | E   |
| R9 Misuse of Department prestige for personal gain   | A-B | B-C | C-E |
| R10 Smoked tobacco product in violation of statute or Department policy                                | A   | B-C | D-E |
| R11 Violation of non-tobacco use affidavit   | C   | D   | E   |
| UNBECOMING CONDUCT (CRIMINAL, NOT INCLUDED IN OTHER CATEGORIES)  |     |     |     |
| S1 Committed a felony *  | E   | E   | E   |
| S2 Committed a misdemeanor in conflict with job duties -(i.e. shoplifting)                             | A-D | D-E | E   |
| S3 Vandalism   | A-E | D-E | E   |
| VIOLENCE - WORKPLACE OR DOMESTIC   |     |     |     |
| T1 Involved in physical altercation with Department member, or member of public.                       | A-C | C-D | E   |
| T2 Threatened a member of the Department, or member of the public.                                     | A-C | C-D | B-E |
| T3 Threatened a member of the Department, or member of the public with great bodily harm.              | A-E | C-E | E   |
| T4 Committed an act of domestic violence   | B-E | E   | E   |
| T5 Failed to comply with a court order   | A-C | D-E | E   |

|                          |                                   |  |
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| C - 11-15 Day Suspension | D - 16-30 Day Suspension          | E - Board Of Rights (Suspension-Termination) |

\* No Statute

\*\* 10 Years Statute

**NOTE: Unless indicated otherwise, misconduct violations have a 5-year statute**



9/7-00.00

## REPORTS &amp; RECORDS/PROCEDURES

A 10-08

## PRELIMINARY INVESTIGATION REPORT

F-225P(TEMP)

INITIATED BY: Investigating Supervisor(s)

NUMBER OF COPIES: One

PERIOD RETAINED: 5 years in Professional Standards Division

FORWARD: No later than the 14<sup>th</sup> business day following the date on which the Department or Supervisor was first notified or became aware of an event requiring a Preliminary Investigation

REFERENCE: LAFD Professional Standards Division Manual

ROUTING: Electronically submitted via the Professional Standards Division Complaint Tracking System (CTS). Hard copy as part of the Preliminary Investigation Packet to PSD through channels.

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APPLICATION:

The Preliminary Investigation Report (F-225P) is used to conduct a preliminary investigation of any event relating to the possible misconduct of a member. The supervisor of the involved member shall initiate an F-225P as soon as practical, whenever the supervisor is assigned the case by PSD or when the supervisor becomes aware of a possible misconduct event involving a subordinate member under their command.

When a supervisor becomes aware of possible off duty misconduct by a Department member the supervisor shall notify the PSD direct, either by completing the online Complaint Form (located on the LAFD Portal) or through telephone contact. The PSD will investigate an off duty misconduct event.

A complaint is entered in the Professional Standards Complaint Tracking System (CTS) when the misconduct is entered through the online Complaint Form or through direct contact with PSD staff.

Upon completion of the preliminary investigation, the supervisor shall complete data entries in the CTS. The required CTS data entries are:

1. F-225P – Preliminary Investigation Report
2. F-225S – Member Statement Report
3. Involved Parties Entries
4. Submit Report Entry

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The F-225P is part of the Preliminary Investigation Packet that shall be forwarded through channels to the PSD, a maximum of **14 business days** following the date on which the Department or Supervisor was first notified or became aware of an event requiring a Preliminary Investigation. A request for a time extension to complete an investigation shall be directed to PSD through email contact at [LAFDComplaints@lacity.org](mailto:LAFDComplaints@lacity.org)

The Preliminary Investigation Packet consists of the following:

- Preliminary Investigation Report (F-225P)
- Member Statement Report (F-225S)
- Recorded interview
- Interview Admonition
- Employee Advisement Form (Lybarger)
- Any other pertinent information

The PSD will determine the need for further investigation by Internal Affairs Officers, delegate follow-up investigation by the involved Bureau, or make a disciplinary determination based upon the information contained in the Preliminary Investigation Packet.

#### CHAIN OF COMMAND NOTIFICATION PROCESS

When the Investigating Officer submits the findings of their investigation into the Complaint Tracking System, it is immediately sent to the Professional Standards Division for review.

The method of informing the Investigating Officer's chain of command is through the forwarding of the Preliminary Investigation Packet, as well as through telephonic means.

***The Preliminary Investigation Packet shall be forwarded through channels to PSD in a sealed grey mailer immediately after they have been completed, no later than 14 business days. Telephonic chain of command notification of forwarded complaint forms is required as well. Telephonic notification is for the purposes of "notification only."***

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INVESTIGATING OFFICER(S)

Normally, the Immediate Supervisor will assume the role of the Primary Investigating Officer for issues in their purview. The Investigating Officer has the discretion, if necessary, to select the most appropriate Officer to assume the role of Secondary Investigating Officer.

Internal Affairs Advocates will assume the Primary Investigating Officer role for cases involving off duty misconduct, criminal proceedings, EEO, or that are of an extremely serious nature. When in doubt as to the appropriate Investigating Officer, contact PSD for direction.

To provide consistent and objective investigations, it is essential to maintain a process to gather the facts of each case in the most appropriate manner. Investigation best practices demonstrate that interviews conducted with complainants, witnesses and subjects of investigations are most effectively completed by two investigators. Typically, one investigator takes the lead (primary investigator) on an interview and the other (secondary investigator) listens to the responses and may ask follow – up questions and/or provide subject matter expertise for the primary investigator as required.

In cases where the scope of the complaint includes multiple possible misconduct issues, one of which being a patient care issue, the Immediate Supervisor will assume the role of primary investigator and handle all issues which occur within the work location (interviews, telephone contacts, etc) and the EMS Battalion Captain will assume the role of the secondary investigator and handle all issues away from the work location (off site interviews, off site report gathering, etc.)

For cases which do not involve a patient care issue, the Immediate Supervisor shall assume the role of the Primary Investigating Officer and shall inform their immediate supervisor of the outcome of the investigation and the need, if any, for any training, counseling, recognition, etc. A Secondary Investigating Officer is not required in this investigation scenario, but may be designated as needed.

For cases which involve only a patient care issue, the EMS Battalion Captain shall assume the role of the Primary Investigating Officer and shall inform their immediate supervisor of the outcome of the investigation and the need, if any, for any training, counseling, recognition, etc. A Secondary Investigating Officer is not required in this investigation scenario, but may be designated as needed.

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INVESTIGATION AREAS OF RESPONSIBILITY

The Investigating Officer will normally be the Immediate Supervisor of the involved member(s) for issues that are normally in the purview of the immediate supervisor, such as:

- Performance
- Behavior
- Punctuality/Absenteeism
- Driving/Parking Violations
- Lost Equipment

RECOMMENDATION OF "NO FURTHER ACTION"

There are two methods for an Investigating Officer to recommend "No further action" on a complaint of misconduct:

**Method #1: Complaint Report (Prior to assignment of investigation by PSD)**

Prior to entry of a complaint into the Complaint Tracking System, the supervisor shall make contact with the complainant to determine the cause, severity and appropriateness of the complaint. Based upon this information, and information obtained from the subject(s) of the complaint, the Immediate Supervisor may make a recommendation of "No further action."

Per the FF Bill of Rights, supervisors are reminded that whenever an interrogation focuses on matters that may result in punitive action\* against a member, the interrogation shall stop and the member shall be advised that they have the right to be represented by a representative of their choice who may be present at all times during the interrogation.

\*Punitive action may occur when the supervisor has reason to believe that the following two conditions are met:

1. An act of misconduct as occurred.
2. The member being interrogated is involved in the misconduct.

All statements made in violation of the Firefighter Bill of Rights are inadmissible and shall not be included in nor relied upon to support the findings of discipline.

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The Supervisor shall then enter the complaint into the Complaint Tracking System and shall check the "Supervisor recommends no further action" button located on the online complaint form. If the complainant is another member, the Supervisor shall ascertain if that member is satisfied with the resolution of the complaint, and if so, check the "Member satisfied with resolution" button also located upon the Complaint Report. Thorough justification for this recommendation must be provided within the narrative box found on the online complaint form. PSD will review the recommendation to determine its appropriateness. If PSD concurs with the recommendation, the case will be closed. If PSD does not concur with the recommendation, the case will be returned to the Immediate Supervisor for a complete investigation.

**Method #2: F-225P (After assignment of investigation from PSD)**

Upon notification of the need to conduct a preliminary investigation, the supervisor shall make contact with the complainant to determine the cause, severity and appropriateness of the complaint. Based upon this information, and information obtained from the subject(s) of the complaint, the Investigating Officer may make a recommendation of "No further action."

Per the FF Bill of Rights, supervisors are reminded that whenever an interrogation focuses on matters that may result in punitive action\* against a member, the interrogation shall stop and the member shall be advised that they have the right to be represented by a representative of their choice who may be present at all times during the interrogation.

\*Punitive action may occur when the supervisor has reason to believe that the following two conditions are met:

1. An act of misconduct as occurred.
2. The member being interrogated is involved in the misconduct.

All statements made in violation of the Firefighter Bill of Rights are inadmissible and shall not be included in nor relied upon to support the findings of discipline.

This recommendation must be accompanied by thorough justification documented within the "Findings" section of the F-225P. PSD will review the recommendation to determine its appropriateness. If PSD concurs with the recommendation, the case will be closed. If PSD does not concur with the recommendation, the case will be returned to the Investigating Officer for a complete investigation.

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INVESTIGATION PROCEDURES**Method #1: Complaint Report (Prior to assignment of investigation by PSD)**

For all preliminary investigations where the Investigating Officer recommends "No further action," by checking the appropriate box within the Complaint Report, the following actions shall occur:

1. Immediate Supervisor shall assume the role of Primary Investigating Officer for the issues normally in their purview. As needed, the Immediate Supervisor may select a Secondary Investigating Officer to assist.
2. Members shall be offered the right to representation. The Primary Investigating Officer shall allow Representatives reasonable time to schedule the interview. Reasonable time is defined as a maximum of 7 business days.
3. The Immediate Supervisor shall make contact with the complainant ASAP to determine the cause, severity and appropriateness of the complaint. Based upon this information, and information obtained from the subject(s) of the complaint, the Immediate Supervisor may make a recommendation of "No further action."

Per the FF Bill of Rights, supervisors are reminded that whenever an interrogation focuses on matters that may result in punitive action\* against a member, the interrogation shall stop and the member shall be advised that they have the right to be represented by a representative of their choice who may be present at all times during the interrogation.

\*Punitive action may occur when the supervisor has reason to believe that the following two conditions are met:

1. An act of misconduct as occurred.
2. The member being interrogated is involved in the misconduct.

All statements made in violation of the Firefighter Bill of Rights are inadmissible and shall not be included in nor relied upon to support the findings of discipline.

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4. The Supervisor shall then enter the complaint into the Complaint Tracking System on the Complaint Report and check the "Supervisor recommends no further action" button. If the complainant is another member, the Supervisor shall ascertain if that member is satisfied with the resolution of the complaint, and if so, check the "Member satisfied with resolution" button also located upon the Complaint Report. Thorough justification for this recommendation must be provided within the narrative box found on the online complaint form. PSD will review the recommendation to determine its appropriateness. If PSD concurs with the recommendation, the case will be closed. If PSD does not concur with the recommendation, the case will be returned to the Immediate Supervisor for a complete investigation.

**Method #2: F-225P (After assignment of investigation by PSD)**Investigating Officer Recommends "No further action"

For all preliminary investigations where the Investigating Officer recommends "No further action," by checking the appropriate box within the Recommendation Section of the F-225P, the following actions shall occur:

1. Immediate Supervisor shall assume the role of Primary Investigating Officer for the issues normally in their purview. As needed, the Immediate Supervisor may select a Secondary Investigating Officer to assist.
2. Members shall be offered the right to representation. The Primary Investigating Officer shall allow Representatives reasonable time to schedule the interview. Reasonable time is defined as a maximum of 7 business days.
3. The Immediate Supervisor shall make contact with the complainant ASAP to determine the cause, severity and appropriateness of the complaint. Based upon this information, and information obtained from the subject(s) of the complaint, the Immediate Supervisor may make a recommendation of "No further action."

Per the FF Bill of Rights, supervisors are reminded that whenever an interrogation focuses on matters that may result in punitive action\* against a member, the interrogation shall stop and the member shall be advised that they have the right to be represented by a representative of their choice who may be present at all times during the interrogation.

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\*Punitive action may occur when the supervisor has reason to believe that the following two conditions are met:

1. An act of misconduct as occurred.
2. The member being interrogated is involved in the misconduct.

All statements made in violation of the Firefighter Bill of Rights are inadmissible and shall not be included in nor relied upon to support the findings of discipline.

4. This recommendation must be accompanied by thorough justification documented within the "Findings" section of the F-225P. PSD will review the recommendation to determine its appropriateness. If PSD concurs with the recommendation, the case will be closed. If PSD does not concur with the recommendation, the case will be returned to the Immediate Supervisor for a complete investigation.

#### Investigating Officer Recommends "PSD Review"

For all preliminary investigations where the Investigating Officer recommends PSD review within the Recommendation Section of the F-225P, the following actions shall occur:

1. Immediate Supervisor shall assume the role of Primary Investigating Officer for the issues normally in their purview. As needed, the Immediate Supervisor may select a Secondary Investigating Officer to assist.
2. Members shall be offered the right to representation. The Primary Investigating Officer shall allow Representatives reasonable time to schedule the interview. Reasonable time is defined as a maximum of 7 business days.

Per the FF Bill of Rights, supervisors are reminded that whenever an interrogation focuses on matters that may result in punitive action\* against a member, the interrogation shall stop and the member shall be advised that they have the right to be represented by a representative of their choice who may be present at all times during the interrogation.

\*Punitive action may occur when the supervisor has reason to believe that the following two conditions are met:

1. An act of misconduct as occurred.
  2. The member being interrogated is involved in the misconduct.
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All statements made in violation of the Firefighter Bill of Rights are inadmissible and shall not be included in nor relied upon to support the findings of discipline.

3. Interviews shall normally be conducted between the hours of 8 a.m. to 5 p.m. weekdays, unless the investigation is time-sensitive. Examples of time-sensitive issues include but are not limited to: Significant Traffic Accidents, In-Custody Deaths, Wrongful Deaths, Firefighter Fatalities/Serious Injuries, high potential for litigation etc.

If management determines that the matter is time-sensitive, and the member is unable to obtain representation within 90 minutes, management reserves the right to detail an available representative of the member's choice to provide representation to the member.

Prior to detailing an available representative, the Investigating Officer shall first obtain approval from the on call PSD Supervisor through OCD. If the request is approved, OCD shall then attempt to contact an off duty representative. If an off duty representative is not available, then detailing of an on duty representative is permissible.

4. The complete interrogation of a member may be recorded. If a recording is made of the interrogation, the member shall have access to the recording if further proceedings are contemplated or prior to any further proceedings at a subsequent time.

Investigations that are serious in nature shall be recorded. Investigations that are serious in nature are defined as: Per the Penalty Guidelines, whenever a 1<sup>st</sup> offense violation has the potential for a penalty of "B" or greater. A "B" penalty is a 6 to 10 day suspension. Contact PSD for guidance when the decision to record or not record is a concern.

5. Interview Admonition shall be given.
7. Employee Advisement Form – "Lybarger" shall be completed
8. Preliminary Investigation Report (F-225P) shall be completed.
9. Member Statement form(s) (F-225S) shall be completed.
10. CTS entries will be completed as needed. Involved Parties, F-225S, F-225P, and Submit report shall always be completed.
11. The Preliminary Investigation Packet shall be forwarded through channels to PSD within 14 calendar days.

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TRAFFIC ACCIDENT INVESTIGATIONS

The Accident Procedure outlined in Manual of Operation Volume 3, 7/1-12.14 is not affected by the implementation of the Preliminary Investigation process. ***However, when conducting an Accident Hearing, the Investigation Procedure described in this document (Steps 3 through 11, as cited on page 9) shall be followed.*** At the conclusion of an Accident Hearing, for which review by the PSD is requested, the Accident Hearing Packet (containing all pertinent documents i.e.: FG 88, F-150, F-80, Police Report, pictures, etc.) shall be forwarded through channels to the Professional Standards Division.

WITNESS STATEMENTS

Members who are witnesses to a misconduct event have the option of requesting representation. If a member requests representation, the same representation provisions apply as would a member who is alleged to have engaged in misconduct.

INTERVIEW KITS

All Battalion/Division/Bureau Offices have been assigned interview kits which include: digital recorders, and an Interview Manual. The Interview Manual contains all necessary instructions, forms and additional information needed to conduct a complete and legal interview.

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ENTRIES --**PRIMARY INVESTIGATING OFFICER:**

Name, rank and assignment of Investigating Officer, normally the immediate Supervisor within the involved member's chain of command. See Page 2 for specific categories of responsibility. Internal Affairs Advocates will be assume the Investigating Officer role for cases involving off duty misconduct, criminal proceedings, or are of an extremely serious nature. When in doubt as to the appropriate Investigating Officer, contact PSD for direction.

**SECONDARY INVESTIGATING OFFICER:**

Name, rank, and assignment of the Secondary Investigating Officer. (If applicable)

**ACCUSED MEMBER(S):** Full Civil Service name, rank and assignment

Duty Status, either "ON" or "OFF"

Member Arrested, either "YES" or "NO"

**INVOLVED PERSON(S):** May be classified as either "MW" = Member Witness, "CW"= Civilian Witness or "O" = Other

If Non-member, obtain name, gender, DOB, phone number(s), and California Driver License or Identification Number

**SUMMARY:**

F-225 format

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