Special review of SPD's disciplinary procedures

Judge Anne Levinson (ret.)
OPA Auditor

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Introduction

An important aspect of the work of the Office of Professional Accountability (OPA) Auditor is to ensure the integrity, objectivity and quality of the City of Seattle's ("the City") police accountability system. The OPA Auditor provides independent oversight, and does not report to the Mayor, City Council or Police Department.

This review of the disciplinary and post-disciplinary processes used by the Seattle Police Department ("SPD" or "the Department") was initiated upon recent release of information that there were several cases where a previous Chief of Police's misconduct determinations were challenged by the Seattle Police Officers' Guild ("the Guild") and then settled by the Interim Chief, removing both the findings of misconduct and the imposition of discipline. Based on the initial statements made by the Interim Chief and the Mayor's Office, and information they provided to the public, I initiated this review to help ascertain what had occurred, the implications for the public and SPD employees, and to make recommendations for any needed changes to processes, policies and systems.

The City has, over the years, recognized the unique importance of the police accountability system and, unlike some other jurisdictions, City policy-makers continue to be vigilant in ensuring that the system's independence and strengths are maintained and enhanced. However, disciplinary, appellate and grievance processes stemming from complaints of possible misconduct have by and large been thought of as separate and apart from the accountability system and OPA, and have not been concurrently re-shaped over the years to reflect or better align with the evolving values underlying the other aspects of the overall police accountability system. While the complaint processing and disciplinary systems need to result in effective employee management, and not violate labor laws or collective bargaining agreements, they must also each be consistent with public expectations for fairness and accountability. Public concern over the way in which modifications were made in these recent cases, and the awareness that several other cases were also being considered for similar changes, has helped highlight the importance of that principle.

The Process

As I initiated this review, the Mayor initiated another review, led on his behalf by the consultant he had hired to assist with the Police Chief search. SPD then asked for additional time to produce the information I had initially requested in order to begin my review. Before I received SPD's preliminary response, it was reviewed by the Mayor's Office and then publicly released in conjunction with the results of the Mayor's consultant's review and a letter from the Mayor summarizing the information and conclusions. Normally I would have ensured that any information provided by the Department was correct before it was publicly released, in part by giving the Department's staff a chance to correct any errors, a standard part of the audit process. Also prior to any public release, I would have reviewed original documentation and files and conducted any interviews necessary to verify the information and correctly assess its implications. Because that was no longer possible, I have included below some corrections and clarifications to various statements and documents where it may be helpful for policy-makers and public understanding.

I received the Department's initial response at close of business on March 19th, along with the Mayor's consultant's review and the Mayor's letter, and have made additional requests for clarification and taken other steps in this review as quickly as possible so that any findings and recommendations could be integrated into the time-sensitive reform work of the Community Police Commission, the federal court monitor and upcoming police labor contract negotiations. Despite the importance of moving quickly, because SPD's records are not kept in a fashion that allows for easy analysis or verification, and many of the records that do exist are inconsistent with each other, it was also necessary to take additional steps to try to ensure the accuracy of information, and not to rely on second-person accounts where there might be original source information. For that reason, in addition to document and file review, I also interviewed representatives from SPD, the City Attorney's Office, the Public Safety Civil Service Commission and the former Interim Chief of Police in order to help verify information.

Findings, Corrections and Clarifications to Information Provided Prior to this Review[1]

- Of the six cases settled in February, five were OPA cases; one was a workplace or Equal Employment Opportunity ("EEO") case. EEO cases do not have civilian oversight and the investigations are conducted by the SPD's Human Resources staff.
- With regard to who authorized the settlements, the former Interim Chief stated in an in-person interview with me and verified in writing that he did not authorize settlement of these cases.[2] My review was not focused on this issue, since it was what the Mayor had already directed his consultant to address, so I did not seek other information on this point.
- In one of the six cases, the sustained finding was rescinded based on the rationale that had to be rescinded in order for training to be directed. There is no prohibition against requiring training along with discipline as part of a sustained finding, and therefore no need to rescind a sustained finding in order for training to occur.
- The "training" conducted in that case was actually self-initiated and completed by the officer soon after the incident, which occurred in July, 2013, several months prior to the case being settled and the sustained finding rescinded. It consisted of visits to roll calls and preceded by several months the later settlement of the case which removed the previous Chief's finding of sustained.
- Although some argued that those who expressed concerns about these cases being settled were either ill-informed or wrongly motivated, there were legitimate public

[1] These corrections and clarifications are not intended to be a personal criticism of anyone, and as I noted above, would normally have been done during the audit process, but because of the public statements made and documents already provided, it is important to ensure there is an accurate understanding before policy-makers move forward with next steps.

[2] "*No, I did not approve nor give direction to anyone to approve a settlement on any of the cases. The 'September 15 meeting' was a scheduled meeting between the interested parties before a mediator. I was not at the meeting. I understand that a representative from the City Attorney/Employment Section, possibly the department legal advisor (Renni Bispham) and A/Chief Metz were present for our 'side'. At the end of the day, which was a 5 to 7 hour mediation as I recall, the SPOG was unwilling to 'give' on anything but still wanted some or all of the cases that concerned them reduced or otherwise mitigated. I instructed our 'side' to decline.*" – March 24, 2014 memo from Former Chief Jim Pugel in response to questions from the OPA Auditor.

policy concerns regarding whether the cases should have been settled, including the rationale for the settlement; the nature of the misconduct; whether the original discipline was initially sufficient; the degree of change in disposition and discipline; the ramifications of the changes for future disciplinary decisions for that employee and other employees; the lack of transparency; the impact on public confidence in the accountability system; whether the actions were consistent with SPD's stated values; and whether the process was well understood and viewed as having credibility by the public, policy-makers and participants.

- There were also legitimate public policy concerns about the Interim Chief then reinstating the findings and discipline for only one of the six cases, including diminishment in public trust and employee confidence in the fairness of the system[3]; the impression that disciplinary decisions were being influenced by political considerations; and the concern that case outcomes could be changed as a result of the race or gender of the complainant, media attention or other factors that should not be allowed to impact disciplinary decisions.
- It has been argued that the lens through which the question of settlements should be viewed is the percentage of cases which employees or their bargaining unit choose to appeal, meaning that if that percentage is low, there should not be a concern. More relevant questions to consider are whether: 1) there is a good public policy purpose for those settlements; 2) there will be ramifications for that employee or other employees with regard to future discipline; 3) there is a trend toward too many of those cases that are appealed or grieved being settled (it should go without saying that no settlement ever resulted in *greater* discipline being imposed); 4) there is a trend toward a greater number of cases being more frequently settled; 5) there is a trend toward more cases being settled with either a significant lessening in discipline or a removal of any discipline, rather than a minor reduction in discipline; 6) there is a trend toward cases being settled too early in the process rather than

[3] The principles of procedural justice are an important factor to consider in evaluating complaint and disciplinary processes, meaning the process through which decisions are made plays a significant role in the participants' perceptions of fairness regarding the result. How something happens is often as important as what the ultimate result is.

requiring the appellants to make their case; and 7) the nature and specific facts of the incident and performance history for the employee(s) at issue in each case.

- The statement that "the handling of these cases was unnecessarily delayed by the previous department leadership" suggests that the length of time cases remain unresolved after an appeal is filed is a measure of the appropriateness of settling them. However, because any discipline has already been implemented (discipline is not held in abeyance while a case is being challenged) the only public policy harm from not settling a case is lack of timeliness. In contrast, there may be significant harm in acceding to the settlement demands of the appellant. The fact that a Chief did not resolve a case through settlement may in fact be an indication that he judged the appellant's settlement demands to be inappropriate given the specifics of the incident and the employee's history. The reasoning that old cases are cases that should be settled leads to the result that there is no reason the appellant should move forward with the hearing process in a timely fashion because the longer the delay, the more justification will be provided for any settlement demands the appellant makes. The lack of timeliness should have been addressed by removing the obstacles to the cases proceeding to hearing, not by settling cases if they are otherwise inappropriate for settlement as demanded by the Guild.
- These cases are not "illustrative of a flawed complaint process" as has been described by some. Settlement of cases is entirely unrelated to the complaint process.
- Nor is it correct to say that these cases were settled in this way "because of the classification process". Settlement of cases is also entirely unrelated to the classification process. Classification refers to the decision made at the time of complaint intake as to whether the case warrants a full investigation or should be referred to a supervisor. When a settlement results in a change to a finding after the investigation has concluded and the Chief has made his disciplinary decision, the case is not *"reclassified"*. The *disposition of the case* is changed.
- The settlement agreements for these cases were not between the employee and the Department; they were between the Guild and the Department.

- The exact number of cases that have been challenged should be readily discernible by the number of notices of appeal/grievance received by the Chief's Office.
- The RCW 41.56 obligation to bargain in good faith does not require individual cases to be bargained. It requires the City and the Department to afford the employee his or her procedural rights, meaning good faith participation in each of the steps required for grievances or appeals.
- Of the cases that were certified during 2011, 2012 or 2013 (the date of certification was how SPD chose to establish the three-year window for cases to include in their March 19th response), there were 27 OPA cases, involving 33 appeals and 31 different sworn employees in which the disciplinary decision was challenged (two employees had each challenged two cases and four cases involved multiple employees). 13 of them were grieved, 18 were appealed to DRB and 2 to the PSCSC. Notably, 23 of the 33 appeals were settled (and 20 of these were settled pre-hearing). Also notable is that in 13 of the 23 that were settled, or 57%, the sustained finding was removed.[4]
- Among the cases included in SPD's chart were also three EEO cases involving sworn employees.
- Not included in the chart were two other cases involving civilian SPD employees.
- One case listed in the chart as involving a single sworn employee actually involved two sworn employees. In responding to my request for verification of that, the Department requested the case be removed from the list because it was certified in December, 2010. (The chart does not reflect cases appealed during the period that were certified prior to 2011 or cases now being appealed that were certified in 2014.)
- One additional case meeting SPD's criteria should have been included in the chart that was not.

[4] These totals are based on the information available in SPD records. See more below in the recommendations section about the quality of record-keeping. Additionally, I was not able to verify the 605 total "cases investigated" also referred to in the Mayor's letter for the three-year period. The number of cases classified for investigation in this period was 577, the number closed after investigation was 564 (some would not be closed until the following year depending on what month they were commenced) and the number of investigations I reviewed during that period was 597.

- Another case that was included in the chart was in process of being modified without having been challenged, a practice that should not occur. It is now being corrected to reflect the recommended findings of the OPA Director.
- None of the cases appealed were decided by the Public Safety Civil Service Commission during the three-year period. And only two of the cases appealed were decided by a Disciplinary Review Board during the three-year period.
- I had also requested SPD indicate which of the cases had been referred to the City Attorney's Office (CAO) for representation. The chart instead listed those cases that SPD believed had "involved" the CAO in "some level of discussion". SPD was not able to verify which cases were formally referred to the CAO for representation. CAO records indicated several of the cases listed were not referred and at least one was not referred for several months after notice of appeal.
- The Department and OPA published materials and internal records have always referred to disciplinary cases as "closed" after the employee is sent the Chief's final disciplinary decision at the conclusion of the OPA process.
- No SPD or OPA monthly, annual or other reports provide information to the public or policy-makers explaining that dispositions or discipline have been changed for any cases that were previously reported as closed.

Recommendations

- **Ensure that disciplinary and post-disciplinary processes and decision-making take into account the importance of public trust in, and employee respect for, the integrity of the police accountability system.**

  Business needs and liability concerns will always be considerations in any matter involving employee conduct. However, policy-makers and those involved in police disciplinary processes on behalf of the City must be mindful that police conduct cases do not simply involve the usual issues of employer/employee relations. These cases instead require that those usual concerns be balanced against the need for fairness, public trust, and a robust, independent, and transparent police accountability system which the City, to its credit, has worked hard to create. That

system is undermined if disciplinary and post-disciplinary processes and decision-making do not reflect the same values on which it was built.

- **Create a single appellate entity that reflects fairness to all parties, rather than continue to have two different bodies to which employees may appeal (in addition to filing grievances), both of which have police employees as members.** The Collective Bargaining Agreement (CBA) between the City and the Seattle Police Officers Guild (Guild) representing officers and sergeants has been re-negotiated over the years to provide SPD employees two different avenues to appeal disciplinary decisions. This is *in addition to* the option to file grievances for contractual violations and those cases where the only discipline imposed is a written reprimand. One path for appeals is through the City's Public Safety Civil Service Commission (PSCSC), an entity required by State law. It was created by City ordinance based on Chapter 41.12 RCW, which provides that each City and County must have "a civil service commission which shall be composed of three persons". The PSCSC also establishes rules for hiring and promotions. The PSCSC has three members with fixed terms, one appointed by the Mayor, one by the City Council, and one elected by a majority vote of police and fire appointees (this approach is solely a creature of the ordinance; it is not required by State law). If the Guild does not want to pay for representation before the PSCSC, the employee either represents him/herself or must pay for legal representation.

  The other avenue for appeals is the Disciplinary Review Board (DRB), which was created solely by the CBA and is not part of City ordinance or State law. The DRB also has three voting members. They are appointed as cases are appealed, and the CBA requires that two members are SPD employees, one of whom must hold the rank of Lieutenant or above, and one who must be a member of the Guild's bargaining unit. The third, the chair, is selected from among a pool of arbitrators by agreement of the parties. It is the Guild who files appeals to the DRB, provides the legal representation and proposes settlements.

Having active members of the Police Department hear disciplinary appeals and set the rules for hiring and promotions creates a real, and the perception of a conflict of interest, and does not reflect the values of fairness and public trust underlying the City's police accountability system. Therefore, the City should require police disciplinary appeals to go to the PSCSC and should change the membership of the PSCSC so that: 1) each member has the necessary expertise; and 2) there is not a sworn officer as a member, so that the public and complainants can have more faith in the fairness of the appellate process. The City should also consider making the chair of the PSCSC a City hearing examiner and giving her/him authority to conduct the hearings (the other members would be involved in the setting of rules or exams).

- **Create enforceable timelines (that cannot be mutually agreed to be waived absent exigent circumstances) for each aspect of the disciplinary process following a recommendation of a sustained finding by the OPA Director to the Chief.**

  There should be publicly-described, *enforceable*, time limits for all post-investigation steps, including command staff review, employee's initial notification, Loudermill hearing, Chief's decision, employee's final notification, agreement on an arbitrator, appellate hearing, appellate ruling, and notification to all relevant parties of results of appeal. To be meaningful, there should be consequences and reporting requirements for delay.

- **Eliminate "Training Referral" as a separate finding and add a management action requirement where management erred.**

  Despite statements to the contrary, training has been and remains an option that the Chief can require in addition to discipline once a finding has been sustained. A separate "training referral" finding is not required. For those cases in which either the employee was not at fault or there were other reasons for the policy violation, a determination of something along the lines of "Department Management, Policy or

Training Failure: Correction Required" should be made. The OPA Director would recommend the required follow-up by the Department, and the Chief would have 30 days to respond as to how the identified problem will be addressed. The OPA Director and the OPA Auditor would review the Chief's response for completeness and timeliness as already occurs in cases referred to supervisors for follow-up. This approach will address the concern raised, rather than taking no action because the employee was not responsible or only partially responsible for the policy violation.

- **For those cases in which it would provide an important balance of perspective and information, incorporate into the process the opportunity for the OPA Director to recommend that the Chief of Police hold a meeting with the complainant in the same timeframe that the Loudermill hearing is held for the employee.**

  While employees have important due process rights, the disciplinary process can appear to the public as unfair because the employee has contractual rights that the complainant is not afforded. For example, the employee is given the choice of having his or her bargaining unit representative with him or her during the investigation interview, the employee's chain of command provides their view to the Chief as to whether they agree or disagree with the OPA Director's recommended finding and provides their thoughts about appropriate discipline, and the employee is afforded the opportunity to have a meeting (known as a Loudermill hearing) with the Chief before the Chief makes his or her final decision. After all this, the employee also has the right to appeal the decision. The complainant is not afforded any of these rights and the Chief's interaction with the complainant is only based on the written investigative record. There are cases, especially those where credibility determinations are material, for which it would be valuable for the Chief to hear directly from the complainant, so that the Chief can weigh that perspective along with what he or she has heard from the employee, the union, the OPA Director and the employee's chain of command.

- **Require that any hearings for police disciplinary cases be open to the public.** Public Safety Civil Service Commission hearings are open to the public. The Disciplinary Review Board hearings are not.

- **Require the employee or bargaining unit representative to disclose during the investigative process any witness or evidence they believe to be material or be foreclosed from later raising it in the Loudermill hearing, grievance or appeal as a rationale for arguing the Chief did not have "just cause" for his or her decision.**

- **Consider using a hearing examiner in lieu of arbitrators for any non-PSCSC cases, and require both sides each to have at least two attorneys available to work on appeals. This would minimize the delays caused by the unavailability of arbitrators and counsel and address the incorrect incentives inherent in the selection of arbitrators.**

  While the contract requires the parties to reach agreement on a list of arbitrators for DRB appeals, it is silent as to how often the list must be refreshed to ensure those arbitrators are actually available. The current list has languished and cases have been unable to move forward because there are no available arbitrators. Additionally, arbitrators will only be chosen if the parties both agree, which means that essentially one party holds veto power. There is also a financial incentive for arbitrators to 'split' decisions so that they will continue to get selected by both parties in the future. Meeting disciplinary timelines when schedules are heavily reliant on the availability of arbitrators, counsel and witnesses may weaken the City's ability to defend the Chief's decisions and/or to negotiate a fair settlement, thereby undermining public trust. The practice of mutually selecting arbitrators provides little reason for any bargaining unit to proceed with the case in a timely fashion, and limits the pool of arbitrators to those not perceived as favoring either side, which affects both quality and quantity.

- **Amend SMC 3.28.812 so that it includes cases in which the Chief initially agreed with the finding and imposed discipline, but that finding was later modified through a grievance or an appeal. Also clarify that the OPA Director and OPA Auditor will be copied on any written statements sent to the Mayor and Council under this section.**

  SMC 3.28.812A codified a recommendation from past reviews of the City's police accountability system to require the Chief to provide a written explanation to the Mayor and City Council whenever he or she decided not to follow the OPA Director's recommended disposition (finding) of an OPA case. SPD does not perceive that SMC 3.28.812A includes cases in which the Chief initially agreed with the findings and imposed discipline but he or she agreed to later modify it as part of a grievance or appeal settlement. Amending the language will make that requirement clearer.

- **Require consultation with the OPA Director and City Attorney's Office by whoever is charged with making substantive decisions related to appellate strategy, settlements, or other resolutions for appeals or grievances related to police disciplinary decisions. Ensure as well that those tasked with decision-making understand that the usual business considerations must be only part of the equation, along with the importance of public trust in, and employee respect for, the police accountability system, as well as any potential ramifications for progressive discipline for future misconduct by that employee, and disciplinary decisions and appeals for other employees. Also make clear that if the Chief feels strongly that a case should not be settled, it should not be.**

- **Ensure all aspects of the disciplinary and post-disciplinary processes are entered into SPD's software database (currently AIM, soon to be IAPro), that each step is accurately reflected, that relevant documentation is included, and that roles and responsibilities to keep and maintain these records are clearly assigned.**

SPD does not record into *any* database any steps related to, or any documentation of, the employee disciplinary process after the OPA Director forwards his or her recommended disposition (findings) to the Chief and Chain of Command. The only electronic records consist of an excel spreadsheet created by OPA administrative staff who must rely on an informal practice of email communications from SPD legal counsel for any information, the completeness and accuracy of which varies from case to case. SPD's database should reflect when: 1) the initial command staff discipline meeting was held; 2) the notice of proposed disciplinary action was sent to the employee; 3) the Loudermill hearing was held (or if the employee declined); 4) the Chief's discipline decision was made; 5) the final disciplinary action report was sent to the employee; 6) a notice of appeal was filed (or if no appeal was filed by the required deadline); 7) a referral was made to the City Attorney's Office (CAO) for representation; 8) a notice of appearance by the CAO was then filed; 9) any discipline was implemented (it is to be implemented immediately and not delayed by any pending appeal); and 10) any other significant actions that occur in the grievance or appellate process. The relevant documentation reflecting each of these steps must be electronically included in a consistent and rigorous manner.

- **Enact protocols to ensure the accuracy of all documentation related to the disciplinary and post-disciplinary processes.**

  As noted above, record-keeping for disciplinary and post-disciplinary processes is inconsistent, varies from person to person and from case to case, and is often incomplete, without even the basic information included in case files. There should be clear protocols to ensure that necessary documentation is maintained by the Chief's Office or Human Resources (since they are lead for these aspects of the process) and distributed to OPA administrative staff so that every file has consistent and complete documentation.

- **To enhance the City's ability to have an arbitrator or other appellate body uphold a Chief's disciplinary decision, SPD should keep a meticulous discipline matrix that can be submitted as evidence to prove that the Department has made every effort to treat the employee comparably and has appropriately taken into consideration exacerbating or mitigating circumstances.**

  There are two types of discipline matrices which are often used by police departments to guide disciplinary decisions. The first includes pre-determined levels of discipline for various types of misconduct, takes into account employee history, and allows consideration of mitigating factors. Some argue that such a matrix is a mandatory subject of bargaining. The second type is used not to guide initial disciplinary decisions, but to keep track of those decisions and includes sufficient detail that the employer can offer it to prove on appeal that the discipline was consistent among employees in similar circumstances and that various mitigating circumstances were considered. At a minimum, SPD should be using the latter.

- **Require immediate referral to the City Attorney's Office once a bargaining unit or employee has filed a notice of appeal with the Chief's Office.**

  The employee is required to file notice of intent to appeal to the PSCSC within 10 days and the bargaining unit must file notice of intent to appeal to the DRB within 30 days. There have been cases in which there was then either no referral to the City Attorney's Office or it did not occur for several months after the Chief's Office received a notice of appeal.

- **Require that any settlement agreement, proposed court order or other resolution of a police disciplinary case must be drafted and/or finalized by the City Attorney's Office and may not be executed without the City Attorney's Office final review.**

- **All SPD and OPA materials describing the OPA process should include a description of the possible appellate process.**

- **All SPD and OPA reports describing results of investigations, including monthly, quarterly and annual case and statistical summaries, should include changes made to dispositions and/or discipline as the result of any appeals or grievances.**

- **The OPA Auditor should be notified when any appeal or grievance has been filed and have an opportunity to provide input to the OPA Director and the City Attorney's Office.**

  The OPA Auditor reviews every investigation and may have ordered additional investigation or otherwise have a unique perspective as to the nature of the incident, the quality of the investigation or other factors that are being weighed by those deciding whether to vigorously defend the Chief's decision upon appeal or to settle.

- **The OPA Auditor should receive a quarterly report of appeals and grievances filed, listing the cases challenged, the bases for the challenges, the status of the cases, any settlements or appellate rulings, and any other information requested.**