

# LOS ANGELES BOARD OF FIRE COMMISSIONERS



## ASSESSMENT OF FINAL DISPOSITIONS OF LOS ANGELES FIRE DEPARTMENT CASES PENDING A MEMBER-OPTED BOARD OF RIGHTS



### OFFICE OF THE INDEPENDENT ASSESSOR

SUE STENDEL  
Independent Assessor

April 7, 2017

## **TABLE OF CONTENTS**

I.	INTRODUCTION	1
II.	PURPOSE	1
III.	OBJECTIVES	1
IV.	SCOPE AND METHODOLOGY	1
V.	BACKGROUND	2
	1. Determining Discipline	2
	2. Criteria for Settling Cases Pending a BOR	3
VI.	CASE REVIEWS	4
	1. Cases in which the original penalty was reversed	4
	2. Cases that were settled	24
VII.	TRENDS	33
VIII.	RECOMMENDATIONS	36

## **I. INTRODUCTION**

The Office of the Independent Assessor (OIA) previously reported<sup>1</sup> on the increasing number of sustained complaints in which a member requested a Board of Rights (BOR), the decreasing number of BOR hearings conducted by the Department, and the subsequent increase in the length of time that members were waiting for their BOR hearings. In that report, the OIA found that 50 cases were awaiting a member-opted BOR, as of June 30, 2015. At the time of that audit, the Department was working to resolve many of those cases to avoid a BOR.

As of June 30, 2016 (one year later) the Department had eliminated the request/need for a BOR in 32 of the 50 cases either by reaching a mutually agreed upon settlement with the subject or reversing the original adjudication decision (resulting in no penalty/discipline).<sup>2</sup>

Nine of the 32 cases (those with a penalty of 10 or more suspension days) were selected for this audit. In six of the nine cases, the Department reversed the original adjudication and determined that no penalty should apply. The Department did not cite the discovery of additional evidence or information in its decision to reverse the original adjudication. Three of the nine cases were settled.

### *Prior Audits*

The OIA has not conducted prior audits on this topic.

### *Acknowledgments*

The OIA thanks the Department for cooperating with this assessment, especially current and former members of Professional Standards Division (PSD). The OIA also thanks former Student Professional Workers Maura Pennington and Sean Stratford Jones for their invaluable contributions to this report. The OIA is also grateful to lawyers in the City Attorney's office for their counsel.

## **II. PURPOSE**

The Department reversed the original penalty or settled 32 of the 50 cases pending member-opted BORs. The purpose of this report was to assess the Department's justification for the final disposition in a sample of the cases that have been completed.

## **III. OBJECTIVES**

- A. Determine if the Department followed the Penalty Guidelines for the original penalty.
- B. Assess the Department's justification for the final disposition of each case.

## **IV. SCOPE AND METHODOLOGY**

Of the 32 cases that were reversed or settled before June 30, 2016, the OIA reviewed all cases in which the original penalty was a suspension of 10 days or more; a total of nine cases. A matrix of 20 questions was developed to assess the objectives of this audit.

The OIA gave drafts of this report to the Department to ensure accuracy and address any other issues the Department wanted to discuss. In-depth conversations between the OIA and the Department took place about all of the cases before this report was published.

---

<sup>1</sup> BOFC No. 16-015, February 1, 2016

<sup>2</sup> In all these cases, the Department originally sustained the allegation(s).

## **V. BACKGROUND**

For BFC No. 16-015, the OIA considered all cases (complaints of misconduct) filed in the Complaint Tracking System (CTS) from January 1, 2009 to December 31, 2014, in which a member was served with a Notice of Discipline and charges were filed with the Board of Fire Commissioners (BOFC). In that report, the OIA found that from January 1, 2009 to December 31, 2014, the number of requests for a BOR had increased while the number of BORs conducted had decreased, resulting in 50 cases awaiting a member-opted BOR as of June 30, 2015.

By the time BFC No. 16-015 was considered by the BOFC, the Fire Chief had directed PSD to re-evaluate the 50 cases and determine if the case should be settled, reversed, or proceed to a BOR. As of June 30, 2016, 32 of the 50 cases had been completed. In this report, the OIA reviewed a sample (nine of the 32 cases) to assess the way the Department handled them.

### **1. Determining Discipline**

When the Department imposed discipline, it used two tools to determine the appropriate penalty; the *Penalty Guidelines for Sworn Members* and the *Penalty Factor Worksheet*.

#### *A. Penalty Guidelines for Sworn Members*

On October 28, 2008, the LAFD and United Firefighters of Los Angeles City (UFLAC) agreed on a set of penalty guidelines *LAFD Penalty Guidelines for Sworn Members* (Penalty Guidelines) that established a range of discipline for acts of misconduct, which are classified by type, and generally provided for escalating penalties for second and third offenses. Penalties range from a verbal warning to a Board of Rights.<sup>3</sup> The Department reported that when imposing a suspension on a UFLAC member, it begins at the one-third point of the penalty guideline range then adjusts the penalty in accordance with mitigating and aggravating circumstances (Penalty Factors discussed below).

The Chief Officers Association (COA) has not formally agreed to the October 28, 2008 guidelines; however, the Department reported that the same guidelines are followed for chief officers, with the exception that the Department begins the calculation at the midway point of the penalty guideline range rather than the one-third point.

For each case reviewed, the OIA determined if the Department adhered to the Penalty Guidelines when imposing the original discipline.

#### *B. Penalty Factor Worksheet*

PSD developed and uses a *Penalty Factor Worksheet* based on principles enumerated in *Douglas v. Veterans Administration* (1981).<sup>4</sup> The Merit Systems Protection Board created a non-exhaustive list of factors that federal government agencies are to consider when imposing discipline on employees. Among the factors considered are the nature and seriousness of the offense, if the employee was a supervisor, the employee's past discipline and past work record, if the penalty is consistent with that imposed on other employees, the impact of

---

<sup>3</sup> If the Fire Chief determines that an incident of misconduct warrants more than a 30-day suspension, Los Angeles City Charter Section 1060 requires the case be heard by a Board of Rights.

<sup>4</sup> Merit Systems Protection Board (MSPB), 313 (1981).

the offense on the reputation of the agency, the employee's potential for rehabilitation, and mitigating circumstances.

Using the *Penalty Factor Worksheet*, the LAFD assigns a positive or negative value to each factor consistent with the facts of the case. As mentioned above, the Department begins at either the mid-point for chief officers or one-third of a penalty range for UFLAC members and then totals the positive and negative values to increase or decrease the penalty. The ultimate purpose under *Douglas* was to ensure that the punishment fits the circumstances of the violation.

At the outset of this audit, the OIA intended to assess the Department's determination of the penalty in each case, however, in all but one case, the Department did not provide the *Penalty Factor Worksheet*. Therefore, the OIA was unable to determine if the Department applied the factors in accordance with the evidence in each case. The Department reported that because the worksheet was designed as a tool for the adjudicator, the worksheet is not a formal part of the file. No other instrument was included in the file for the OIA to use as a basis to assess the number of suspension days imposed in the remaining cases.

## 2. Criteria for Settling Cases Pending a BOR

At the request of the President and Vice President of the BOFC, the Department drafted criteria for determining whether a case should be settled. The commissioners wanted to ensure the Department was objectively and uniformly assessing the appropriateness of a case for settlement. They also believed that a written explanation for settling (or reversing) a case should be included in each case file. When the Department began reviewing the cases awaiting a BOR, the commissioners were still working with the Department to develop the criteria. A final product had not been presented to the commissioners nor agreed upon by them, yet the Department settled some of the cases awaiting a BOR.

Three of the cases reviewed by the OIA for this report were settled by agreement between the accused and the Department. Each file contained a document entitled, *Disciplinary Settlement Proposal Worksheet* (Settlement Worksheet). On the Settlement Worksheet, the Department (a rater) provided a list of reasons (in bullet point format) for changing the original disposition. Some of the bullet points were difficult for the OIA to understand without further explanation. The Department represented that the statements were a condensed version of a longer document which contained a handwritten evaluation of each case. Those evaluations were not provided to the OIA. Without the assistance of those documents, it was difficult for the Department to re-create their case evaluations during discussions with the OIA.

Additionally, although the Settlement Worksheet provided space for the chain of command to agree or disagree with the rater's position, the worksheets did not evidence review by the chain of command. Furthermore, there was no way to determine when the decisions were made because the Settlement Worksheets were not dated.

The absence of criteria for settlement made it impossible for the OIA to assess the Department's decision in the cases that were settled.

The Department also utilized the Settlement Worksheet in a similar fashion to provide justification for reversing the original adjudication decision in four of the cases reviewed for this report.

## VI. CASE REVIEWS

### **1. Cases in which the original penalty was reversed**

#### *Case A*

##### Case Summary

While off-duty, the subject was arrested for driving under the influence of alcohol (DUI). In the course of the encounter, the subject indicated to the police officer that he worked for the Los Angeles Fire Department.<sup>5</sup> The subject admitted he had two drinks, but said he was not drunk. According to the officer, the subject did not perform the field sobriety tests as demonstrated and refused to take a preliminary alcohol screening test. When asked to take a chemical test for blood alcohol, the subject indicated that he felt ill and requested medical assistance. The subject was transported by ambulance to a hospital where he submitted to a blood test. A second officer accompanied the subject to the hospital. The chemical test returned a blood alcohol level of 0.15%.<sup>6</sup> After the hospital, the subject was booked into a detention center and released later the same day. When the subject was released from custody, he was given a Notice to Appear citation.

According to the information in the investigative file, the subject did not notify his supervisor or Operations of the arrest in writing, as is required by Department policy.<sup>7</sup> LAFD Personnel Services Section received a Department of Justice notification from the City of Los Angeles Personnel Department regarding the arrest and subsequently notified PSD.<sup>8</sup>

A criminal case was filed against the subject for DUI. More than a year after his arrest and after the LAFD had completed its administrative investigation, the subject pleaded guilty to a charge of reckless driving, unrelated to alcohol.<sup>9</sup>

##### Original Disposition

The Department sustained charges of driving under the influence of alcohol, failing to notify the Department that he had been named as a subject in a written crime report, and attempting to use his position as an LAFD firefighter to avoid further investigation by law enforcement, in violation of the following sections of the Rules and Regulations:

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 11i. All members shall notify their supervisor immediately and Operations in writing, if they have knowledge that they have been named as a suspect or principle in a written crime report or complaint filed with any law enforcement agency.

---

<sup>5</sup> According to the firefighter, he handed the police officer his firefighter identification card with his driver's license to "defuse the situation." According to the police officer, the firefighter verbally told him he was a firefighter with the City of Los Angeles and did not show any Department identification.

<sup>6</sup> The legal limit is 0.08%.

<sup>7</sup> Section 11i of the Rules and Regulations states, "All members shall notify their supervisor immediately and Operations in writing, if they have knowledge that they have been named as a suspect or principle in a written crime report or complaint filed with any law enforcement agency."

<sup>8</sup> This document was not dated.

<sup>9</sup> Vehicle Code 23103(a).

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens.

Section 13h. All members shall not commit any act tending to bring discredit upon the Department or its members.

Section 14l. All members shall abstain from using the uniform, badge, Department identification, or prestige of the Department for personal gain.

The subject was served with an 18-calendar day suspension and requested a BOR.

The Penalty Guidelines provide a range of 11-30 day suspension for DUI. However, the Department did not provide an explanation of how they arrived at 18 days, so the OIA could not assess this decision.

#### Final Disposition

The original adjudication was reversed. The case was determined to be Not Sustained<sup>10</sup> and closed without further action.

#### Department's Justification

Two documents in the file appeared to address the reasons the Department overturned the original disposition. First, an undated Disciplinary Settlement Proposal Worksheet contained the following information:

- Wrong name of [sic] blood vial.
- Wrong license plate number on vehicle in police report.
- Chain of custody issue.
- Originally arrested for a DUI, plead to a reckless.
- Issues with investigation, report did not vet out section 11(l), member stated told his BC.
- Discredit section 13(h) was not vetted out with police officer.
- Section 14(i) prestige not vetted out with police officer in report.
- Recommendation: Close case.

Second, in a memo to the OIA dated June 28, 2016,<sup>11</sup> the Department explained the following:

- The subject did not report his arrest to the Department in writing, but orally notified his battalion chief.
- The subject was not convicted of driving under the influence, only "dry" reckless.
- It is unlikely without more that the subject's conviction (even of DUI) would be sufficient for a discredit charge.
- Since the member was not convicted of DUI the Department would have had to prove all the elements of the charge at a BOR.
- The allegation that the member used his badge<sup>12</sup> improperly was not established by the deputy's report or subsequent interview. It seems the version of the events provided by the member - that he used his badge for identification at the time of the traffic stop is likely to be accepted. That version is not contradicted by the deputy; rather it is basically what the deputy relayed.

---

<sup>10</sup> According to Department documents, an adjudication of Not Sustained indicated that there was insufficient evidence to either prove or disprove the allegations.

<sup>11</sup> Approximately four months after the case was completed.

<sup>12</sup> At issue was the subject's LAFD identification. There was no evidence in the case that the subject presented his badge to the officer(s). An identification card and a badge are two separate items.

## OIA Analysis

No new information was discovered between the time of the original adjudication and the final disposition (approximately one year and eight months).

The Department's last point above, was not supported by the evidence in the investigation. The subject said that he used his LAFD identification to "diffuse the situation" (not for identification). The subject reported that he had presented his driver's license along with his LAFD identification to the officer. The subject cited darkness, the hour of the day, and the fact that the motorcycle officer was by himself as the reason the subject wanted the officer to know that the subject was one of the "good guys." When asked whether the subject presented additional identification beyond his driver's license and registration, such as a "badge, or Department ID, or anything of that sort," the arresting officer answered "no" but said the subject stated "several times" that he was an LAFD firefighter. The officer believed the subject's motive was to avoid further investigation. The second officer also reported that the subject identified himself as an LAFD member three to five times while he was on scene but was not asked and did not address whether the subject showed him or the arresting officer his Fire Department badge or ID card during the incident.

### *Charges*

After the subject pleaded guilty to the vehicle code violation, reckless driving (a misdemeanor), the Department could have charged him (in a new case) with violating the appropriate section of the Rules and Regulations. The Penalty Guidelines provide for discipline when a member drives recklessly and alcohol is not involved.

### *Failing to notify the Department of the arrest*

The evidence in the investigative file showed that following the arrest, the subject asserted he notified a battalion chief (BC) who was not in his chain of command at the time (emphasis added). Section 111 of the Rules and Regulations requires members to "notify *their supervisor* immediately *and Operations in writing*, if they have knowledge that they have been named as a suspect or principle in a written crime report or complaint filed with any law enforcement agency (emphasis added)." Further, the investigation revealed that the subject did not notify Operations (in writing), in violation of Department policy. The subject explained in his interview that he told a BC who was a union representative, but because the subject believed he was not guilty he was going to wait to notify the Department until he either cleared his name or was found guilty, in "a couple months."

However, while this report was being written, the LAFD produced evidence demonstrating that the charge of failing to notify the Department should be reversed. More than two years after the subject was served with discipline and approximately nine months after the Department reversed its original decision and closed the case, the Department provided the OIA with a Daily Exception and Overtime Schedule (F11) for the night of the DUI. It showed that the battalion chief, whom the subject contacted, was on duty in the subject's battalion on that date. Nothing in the investigation demonstrated that the subject knew the battalion chief was the supervisor in his battalion that night. The subject was not on duty and the battalion chief was not working his regular assignment (according to the Member Information Tracking System). However, the Department did not interview the battalion chief to confirm that he was notified, nor did the battalion chief inform PSD of the arrest.<sup>13</sup>

---

<sup>13</sup> The battalion chief was not held accountable for failing to report the DUI to PSD.

When the subject was released from custody, he received a Notice to Appear, which resembled a ticket one would receive for speeding or other traffic infraction. A more comprehensive police report was completed, but the investigation did not reveal when the subject became aware of it. An LAFD member could argue that a Notice to Appear is not a written *crime report*, triggering the requirements of section 111. The Department and representatives of UFLAC and COA reported that a member is required to notify his/her supervisor when he/she is arrested. Written notifications to Operations are not expected if a supervisor is told. The information is ultimately supposed to be provided to PSD. It was also reported to the OIA that in the past, the Manual of Operations (MOP) set forth timelines and other requirements for reporting arrests, but this information is no longer in the MOP.

Based on these issues, the OIA recommends the Department amend current requirements to reflect the practice of the Department and the desired outcomes for reporting, as well as including language that requires an employee to notify the Department when he/she is arrested or detained by a law enforcement agency and/or transported to any jail or police facility (excluding traffic infractions) inside or outside the City. Further, the policy must include a procedure for ensuring that PSD is notified.

### ***Case B***

#### **Case Summary**

A complaint was filed alleging that when LAFD personnel responded to a reported medical emergency, they did not assess the patient's vital signs or get his personal information and that members made inappropriate and offensive comments on scene.

At approximately 1:30 a.m., an engine and a rescue ambulance were dispatched to an "altered level of consciousness" call. The patient's wife reported that she had called 9-1-1 because her husband woke up with leg pain and cramping. When he got out of bed he was dizzy and his eyes rolled back in his head and "he went down." She believed he lost consciousness. By the time Fire Department personnel arrived at the location, the patient was awake and standing but complaining of a leg cramp. A medical assessment of the patient was never completed and the patient refused transport to the hospital.

The investigation revealed that two members (the subject and Member A) were responsible for the inappropriate and offensive comments. Of the seven witnesses interviewed, three indicated that they heard an individual, who was not visible to the complainant or the patient; make an inappropriate remark such as, "you guys called us out for a cramp, really a cramp?" Two of those three witnesses, both of whom were LAFD members, identified the subject as the member who made this comment. One said he heard the subject make the remark, "[y]ou called us out for a cramp? Really, a cramp?" and the other said he heard the subject say, "[y]ou're a grown ass man and you called us out for a cramp?" or something similar. The complainant said she heard a member (whom she could not identify) say, "[y]ou called us for a cramp?"

Additionally, the complainant and patient both said that they heard an LAFD member say "we're not here for your blood pressure, we're here for a cramp," or something similar, after the patient was asked if he wanted his blood pressure taken. Neither the patient nor the complainant could identify who made the comment. Furthermore, they both claimed that after this comment, no member offered again to take the patient's blood pressure.

Member A admitted to asking the patient "Are we here for a cramp or blood pressure?" possibly in an "abrasive" tone. However, he stated that he was trying to determine what was wrong, and it appeared that the

comment was not investigated further. No charges were filed, and there is no record in the report indicating that Member A was counseled for this incident.

The subject denied making any inappropriate comments.

### Original Disposition

The Department sustained a charge against the subject, the supervisor on scene, for making an inappropriate remark to a member of the public in violation of the following sections of the Rules and Regulations:

Section 10f. All members shall familiarize them [sic] with and be obedient to the rules, regulations, practice and procedures of the Department.

Section 13b. All members shall be courteous and respectful in their contacts with the public.

The subject was served with a 10-working day suspension. He requested a BOR.

The Department Penalty Guidelines allow a 6-10 day suspension for an inappropriate remark directed at a member of the public. The Department did not provide a justification for its decision to impose the maximum number of suspension days, so the OIA could not assess the decision.

### Final Disposition

The original adjudication was reversed. The case was determined to be Not Sustained and closed without further action.

### Department's Rationale

Included in the case file was a Disciplinary Settlement Proposal Worksheet. The following information was listed under the heading "Recommendation."

- Complaint from civilian was about non-transport.
- Actions of the subordinates were the issue.
- Civilian [complainant] concern about the liability of members not taking vitals.
- Member stated did not make an inappropriate comment.
- Problem with other members making comments, citizen could not verify that it was the [subject].
- Actual complaint was about the members not taking blood pressure or treating patient, wrong charges.
- Member from the rescue stated he made comment, but not charged.
- Poor investigation by the field.
- Recommendation - close case.

### OIA Analysis

No new evidence was discovered between the time the subject was served with suspension papers and the time of the final adjudication, approximately two years and one month.

First, the Department stated "[c]omplaint from the civilian was about non-transport." However, the evidence does not support this position. Rather, the investigation revealed that the original complaint was about inappropriate comments and failure to assess the patient. The complainant indicated in her interview that she

hoped the members would convince her husband to go to the hospital, but she did not express this in the context of dissatisfaction with the actions of the members. She never complained about non-transport.

Second, the Department stated that “actions of the subordinates were the issue.” The Department explained that this referred to the investigation’s focus on the subject while ignoring the apparent misconduct of other members present at the scene such as insufficient ePCR entries, lack of patient assessment, lack of a signature for the non-transport, and inappropriate comments made by Member A. This was supported by the evidence; however, the subject was also identified as making inappropriate comments and was appropriately charged for that.

Third, the Settlement Worksheet said “member stated [he] did not make an inappropriate comment.” This is true; however, as stated above, two witnesses identified the subject as the person who made the inappropriate comment. Also, even though the complainant could not identify the subject as the person who made the inappropriate comment(s), her account of the comment(s) was consistent with the two who identified the subject.

Fourth, the Department identified a “problem with other members making comments, citizen could not verify it was the [subject].” The OIA agreed with the Department that the investigation failed to include allegations against other members, however this should not preclude charges against the subject.

Finally, the Department stated, “actual complaint was about the members not taking blood pressure or treating patient, wrong charges.” This appeared to contradict the statement above that the complaint was about non-transport.

#### Other Related Issues

##### *Missing Interviews*

The investigative file contained an F11 which showed that an engineer was working that day. He was not interviewed.

Further, the patient was not interviewed as part of the initial investigation. It was not until after the subject raised the issue at his *Skelly* hearing that the Department interviewed the patient. The OIA commends the Department for recognizing the importance of obtaining a statement from the patient and for doing so, albeit after the *Skelly* hearing.

Also, the interview of the member who offered to take the patient’s blood pressure was lost before it was uploaded into CTS. Because of unforeseen difficulties with the usual recording equipment, the interview was recorded on a mobile device that was later wiped clean and repurposed.

##### *Identification of the Subject*

During the complainant’s interview, the investigator told her, “[s]omebody heard who it was. Somebody knows who it was and I already kinda have an idea.” The complainant could not identify the people who made the remarks in question. She was the second person interviewed out of seven.<sup>14</sup> It was the third person interviewed who first identified the subject. In a memo from PSD to the OIA dated January 11, 2017, the Department

---

<sup>14</sup> The first person interviewed did not identify the subject.

reported that the chief officer who entered the complaint into CTS “checked the staffing on the [apparatus] and identified the [rank of the subject] who was on the incident as the sole subject.” It is unclear why the chief officer named the subject in the CTS entry. There was no evidence in the file supporting this finding.

If either the chief officer (who entered the complaint in CTS) or the investigator had gathered evidence related to the identification of the subject before the third witness was interviewed, this should have been reflected in the file.

### *Case C*

#### Case Summary

It was alleged the subject (a supervisor) breached confidentiality when he was serving as a rater for the oral interview portion of the firefighter recruit examination. During a break, the subject was overheard talking on the telephone by an exam analyst (from the Personnel Department) and was recorded by the automatic microphones in the exam room.<sup>15,16</sup> The exam analyst thought the subject was discussing issues related to the exam, in violation of the Personnel Department’s rules. The Personnel Department initiated an investigation to determine if the subject should remain in his capacity as a rater for the exam.<sup>17</sup>

Based on their investigation, the Personnel Department determined the subject had a conversation with LAFD Member A in violation of the Interview Rater Agreement, which stated that the rater is charged with “the maintenance of strict confidentiality as it relates to [the rater’s] participation, scores, candidate performances, and subsequent knowledge gained, in the civil service selection process.” The Personnel Department also found that the subject failed to fulfill his duty to notify the Personnel Department that someone had contacted him with questions about the interviews. The Interview Rater Agreement stated the rater is “bound to report to the Examination Analyst any incidents wherein individuals may contact [the rater] seeking information which may provide them or any other candidate with a special advantage in the examination; or contact [the rater] in an attempt to obtain information regarding their performance in an examination. . .” The Personnel Department concluded that it could no longer use the subject as a rater for the firefighter recruit examination. The Fire Department was notified that the subject was dismissed as a rater at the time the Personnel Department made its decision.

The Personnel Department believed the subject violated the Interview Rater Agreement he signed because the phone call consisted of the subject providing an example of an interview question to Member A, describing how current candidates were answering it, and how he believed it should be answered. The subject told the Personnel Department that Member A mentored and coached candidates preparing for the job of firefighter and called to ask why one of the candidates did not pass the interview portion of the exam. The subject indicated he did not interview and did not know the candidate about whom Member A inquired. He also said that he did not know if Member A knew he was a rater. Further, the subject stated that Member A wanted to understand why a particular question was asked. The subject said he told Member A that candidates should listen to the question and answer just the question and nothing else. The subject also reported that everything he told Member A was common knowledge and not confidential.

---

<sup>15</sup> Firefighter applicant interviews were recorded.

<sup>16</sup> The recording was of the subject’s one-sided portion of the telephone conversation.

<sup>17</sup> The City Personnel Department oversees the administration of the firefighter applicant examination.

During his interview with the Fire Department, the investigator read the transcript of the subject's conversation as transcribed by the Personnel Department and asked whether it sparked his memory regarding the substance of his conversation with Member A, the subject stated, "I don't recall." He then went on to say, "Our conversation, if I recall, was about someone who had taken an interview and did not get selected. [Member A] was upset about why that person didn't, so it wasn't divulging any information about the interview. I didn't tell anybody or give her a question." He then expressed his belief that the allegedly confidential information in the recording transcript was common knowledge that anyone who had gone through the interview process would have already known.

When interviewed by the Fire Department, Member A did not recall the conversation at issue. Member A was not interviewed by the Personnel Department.

### Original Disposition

The Department sustained charges against the subject for violating the Personnel Department's Interview Rater Agreement, when, acting as a rater, the subject disclosed information about the firefighter interview process to Member A, and failing to report the conversation with Member A about the interview process to the Personnel Department, in violation of the following sections of the Rules and Regulations:

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens.<sup>18</sup>

Section 13d. All members shall conduct themselves in a manner which will not tend to impair the good order and discipline of the Department.

Section 15f. No member shall furnish information relative to the Department policy, practices, or business affairs, to persons not connected therewith, except as provided in these Rules and Regulations or as authorized by the Board or Chief or as required by the City Charter or ordinances.

The Fire Department considered its own investigation as well as the Personnel Department's investigation.

The subject was served with notice of a 10-day suspension for negligent release of confidential information. He requested a BOR.

This was the one case reviewed for this audit in which the Department included the Penalty Factor Worksheet. The Department charged the subject with negligent release of confidential reports/records/information which, according to the Penalty Guidelines, had a penalty range of a Reprimand to a Board of Rights. The Department may have also considered that the subject violated a Department or City work rule or policy. This was listed on the Penalty Factor Worksheet, but not in the adjudication memo. The penalty range for that offense is a

---

<sup>18</sup> In the Notice of Discharge, Suspension or Probationary Termination which the Department served on the subject, Section 13a. incorrectly included the phrase "and no member shall commit any act tending to bring discredit upon the department or its members." This phrase is contained in a separate section (section 13h) which was not a charge in this case.

Reprimand to a 10-day suspension. The aggravating and mitigating circumstances recorded by the Department on the Penalty Factor Worksheet were supported by the evidence in the file.

The sections of the Rules and Regulations were recorded incorrectly in the Complaint Against Member and the Notice of Discharge, Suspension or Probationary Termination, so it is unclear if the Department intended to charge the subject with a violation of section 13h of the Rules and Regulations (an act tending to bring discredit). According to the Penalty Guidelines, the penalty would be a verbal warning to a 15-day suspension. It appeared from the adjudication memo from the PSD Commander to the Fire Chief that “discredit” was not at the heart of the charges against the subject.

### Final Disposition

The original adjudication was reversed. The case was determined to be Not Sustained and closed without further action.

### Department’s Rationale

The file contained two documents which appeared to justify reversing the original adjudication.

The Department listed the following on the Disciplinary Settlement Proposal Worksheet<sup>19</sup> without further explanation:

- Tape no longer exists with possible evidence of violation
- Possible violation of FFBOR (Firefighter Bill of Rights)
- No longer conducting interviews with Personnel
- Did not recall what he had signed with Personnel
- Personnel interview on [date] and subject on [date - almost ten months later].
- 13(a) and 13(d) not proven or supported, Drop Charge 2.
- [Other firefighter] not charged—statute<sup>20</sup>
- Legalities of tape<sup>21</sup>
- Complainant was also the investigator from Personnel
- Prior discipline—2005
- Recommendation - close

Additionally, in a memo to the OIA (written approximately 11 months after the case was closed), the Department indicated that there was a “patent” violation of the Firefighters Bill of Rights (FFBOR) resulting from the Personnel Department’s interview of the subject.<sup>22</sup> The Department did not elaborate on the issue.

---

<sup>19</sup> The Settlement Worksheet was signed and dated by the Commanding Officer of PSD and the Fire Chief.

<sup>20</sup> When the allegations were initially entered into CTS, a second subject was named for reportedly violating the confidentiality agreement in a separate incident. The charges against the second subject were sustained, however the case was determined to be out of statute.

<sup>21</sup> In a memo to the OIA, the Department also stated, “[w]hile there appears to be some question as to whether the eavesdropping on [the subject’s] private conversation constituted a violation of his right to privacy, this issue was not the basis for the decision to close the matter (since there were a myriad of other fatal problems with the investigation).” Memo from Chief Special Investigator to the Independent Assessor, Response to Random Questions re Files Being Audited, July 6, 2016

<sup>22</sup> Memo from the Chief Special Investigator to the Independent Assessor, Response to Random Questions re Files Being Audited, July 6, 2016.

## OIA Analysis

No new evidence was presented between the time the original suspension was served on the subject and the time of the final disposition (approximately 15 months).

### *Firefighter Bill of Rights/MOU applicability*

The applicable provisions in the FFBOR are: 1) a firefighter is under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency; *and* 2) the investigation could lead to punitive action (emphasis added).<sup>23</sup> When both are satisfied, the firefighter is entitled to the rights provided in the law. Furthermore, according to the Memorandum of Understanding relevant to the subject's bargaining unit at the time of the investigation in this case, the right to representation applied in interrogations with "management representatives."<sup>24</sup> Interviews conducted by people from the Personnel Department are not interrogations with representatives of the Fire Department's management.

The investigation was not conducted by the Personnel Department at the request of or behest of the Fire Department, interrogations were not done by management representatives, nor could the investigation lead to punitive action by the Personnel Department. The Personnel Department's goal was to determine if the subject could remain in his position as a rater.<sup>25</sup>

---

<sup>23</sup> California Government Code Section 3250 et.seq.

<sup>24</sup> Memorandum of Understanding made and entered into October 13, 2011 By and Between the City of Los Angeles and the United Firefighters of Los Angeles City Local 112, IAFF, AFL-CIO-CLC, Section II—Right to Representation: Management representatives, prior to conducting any investigatory interview with any employee covered by this MOU, shall inform the member of the nature of the interview. The management representatives shall also inform the member of his/her right to representation and shall grant the member a reasonable amount of time to obtain representation.

<sup>25</sup> According to Government Code Section 3251(c), "Punitive action" means any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. Also, the PSD investigator told the subject in an email in March 2014 that "Personnel's inquiry was necessary to determine whether you could continue serving as a rater; the Department's inquiry is necessary to determine whether there has been any misconduct which may necessitate discipline."

Furthermore, the Fire Department did not threaten the subject with disciplinary action if he did not comply with the Personnel Department investigation, nor was the Personnel Department acting as an agent of the Fire Department when it conducted its investigation.<sup>26</sup> When the Fire Department conducted its own investigation, the subject was afforded his rights.

In a meeting with the OIA, the Department argued that the Personnel Department gave the Fire Department their investigation so the Fire Department would impose discipline. However, there is no evidence of this in the investigative file. The Department pointed to an email sent by the Personnel Department to the Fire Department which stated, “[h]ere’s the write-up regarding [subject] who we can’t use as a rater anymore as discussed. Will you be sharing this with [the commanding officer of Training and Support Bureau]? We usually like to keep him in the loop on things like this. Thanks.” There is nothing in that e-mail that states or implies that the Personnel Department expected the subject to be disciplined. Also, the Fire Department did not initially investigate the allegations upon receipt of the e-mail/write-up. The Fire Department waited another five months to enter the allegations into CTS. Further, the Fire Department did not include the Personnel Department’s e-mail/write-up in the CTS entry. Ultimately, the Department did not actually begin to investigate the allegations until a second CTS entry was made, more than nine months after the Personnel Department’s inquiry and shortly after the OIA brought the allegations to the Department’s attention.

Under the specific circumstances of this investigation, the OIA believed the FFBOR did not apply.

---

<sup>26</sup> In California Correctional Peace Officers Association v. State of California, the Department of Justice questioned correctional officers without advising them of any rights and without allowing the officers to consult counsel. Cal. Correctional Peace Officers Assn. v. State of California, 82 Cal. App. 4th 294 (2000). The court held that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code Sec. 3303) applied to the investigation because the employing agency, the Department of Corrections (CDC), was acting in concert with the DOJ. Id. at 307. The CDC delivered interviewees to DOJ investigators and threatened them with arrest and/or discipline if they asserted their rights during interrogation by DOJ agents. Id. Furthermore, the interviews took place during work hours on work premises. Id. The CDC and DOJ were “inextricably entwined, each acting as agents of the other.” Id. at 306. In People v. Velez, a police officer convicted of involuntary manslaughter appealed on the grounds that he was interrogated without being informed of his constitutional rights. People v. Velez, 144 Cal. App. 3rd 558 (1983). The court held that Gov. Code Sec. 3303 is applicable when an officer is subjected to interrogation by his commanding officer or any other member of the public safety department which employs him. Id. at 564. The police officer in this case was interrogated by a member of a law enforcement department other than that in which he was employed, therefore Gov. Code Sec. 3303 did not apply. Id. In Berkeley Police Association v. City of Berkeley, the city police review commission investigations failed to provide officers with rights and protections of the Public Safety Officers Procedural Bill of Rights even though the commission is independent of the police department. Berkeley Police Assn. v. City of Berkeley, 167 Cal. App. 4th 385 (2008). The court held that when officers are made to appear for interrogation or a fact-finding hearing by the order of their employer and under penalty of disciplinary sanction up to and including dismissal for failing to comply, it is tantamount to being subjected to interrogation by the officer’s employer. Id. at 410. Furthermore, Gov. Code Sec. 3303 applies to investigations that could lead to punitive action and the police chief or city manager could take disciplinary action against an officer based in whole or in part on police review commission findings. Id. Here, when the subject’s conduct initially came to light, Personnel Department members met with an assistant chief and the Fire Department liaison to discuss the situation. The Personnel Department and the Fire Department determined that, although the subject was a Fire Department employee, the Firefighter examination was the responsibility of the Personnel Department and like all Civil Service examinations would be investigated by the Personnel Department, who would notify the Fire Department of its findings and conclusions.

## Other Related Issue

### *Confidentiality*

In the OIA's *Review of the Recruitment, Selection and Hiring Process for Training Academy Class 13-1*,<sup>27</sup> the OIA recommended that the Department implement a policy prohibiting members from contacting raters about individual candidates. A policy was drafted and approved by the Board of Fire Commissioners on November 18, 2014 (after this incident occurred).<sup>28</sup> In the future, members who contact raters should be held accountable pursuant to this policy. Confidentiality in the hiring process is critical to eliminating impropriety (or the appearance of impropriety) and maintaining public confidence.

### *Case D*

#### Case Summary

The complaint alleged that the subject, a station commander, instructed members to participate in a rap song containing the words sh\*t and f\*ck. The incident occurred during a morning line-up (briefing) in the captain's office. This was one of the first line-ups for the subject at the station, as the subject had recently transferred there. All of the members interviewed, including the subject himself, stated that the rap song was brought up in the context of the subject explaining the circumstances under which he had been served with a notice of discipline in a different case.<sup>29</sup>

The members' recollections of the subject's intent behind re-creating the earlier rap song incident are not consistent. Some said he was merely describing the past incident, others indicated that he was using the song as a way of describing his personality and philosophy, one said the subject did it to demonstrate lessons learned. The subject himself claimed his intention was to share lessons learned and use his prior experience to show the crew how profanity in the workplace might be perceived as hostile or intimidating even if not meant that way.<sup>30</sup>

It appears that the subject first asked the crew whether anyone would be offended or uncomfortable with cursing. None of the witnesses recalled any of the members saying they would be offended beforehand, although it is not clear whether any of the members affirmatively said they would not be offended or if the crew simply remained silent. The subject then began to recite the rap song and had one member say "sh\*t" and another say "f\*ck" when prompted by the subject: "Don't start no sh\*t, won't be no sh\*t. Don't f\*ck with me, I won't f\*ck with you." The subject said that he asked two of the members to say the curse words because a member of the crew had asked what exactly he had said at the previous station, and he would not repeat the curse words himself. When he got to the curse words in the song, the subject pointed or looked in the direction of the two members who he said volunteered to say the words for him, and they said the curse words. No witness corroborated the subject's statement that the decision to have two members say the curse words was prompted by one of them asking him to repeat the song. Rather, all of the witnesses who were present during the incident indicated that those two members were chosen to participate by the subject, who prompted them to

---

<sup>27</sup> BFC No. 14-078.

<sup>28</sup> BFC No. 14-124R.

<sup>29</sup> The subject had been served with discipline in the previous case more than a year before this incident and had requested a BOR which was pending at the time of the incident discussed in this report.

<sup>30</sup> The interviews did not shed light on individual understanding/perception of the difference between talking about a disciplinary case (with an emphasis on the inequity of the discipline) versus fully exploring and discussing the facts of a disciplinary case, the reasons it resulted in discipline, and actions that one might avoid or employ to prevent a similar outcome (lessons learned).

say sh\*t and f\*ck each time he gave them a signal. The statements revealed that the subject's actions were a re-creation of the incident for which an earlier complaint had been sustained.

### Original Disposition

The Department sustained charges of using uncivil and inappropriate language during line-up and bringing discredit to the Department in violation of the following sections of the Rules and Regulations:

Section 6a. All Officers shall be responsible for the enforcement of discipline and the promotion and maintenance of efficiency of their commands and shall consider it their duty to set especially good examples and require their commands to measure up to the high standard of Department requirements.

Section 6p. All officers shall be just, dignified, and firm in their relations with subordinates; see that good order and proper discipline is maintained, and abstain from use of violent or abusive language.

Section 10f. All members shall familiarize them [sic] with and be obedient to the rules, regulations, practice and procedures of the Department.

Section 12g. All members shall, while on duty, not indulge in: obscene or uncivil language; altercations or conduct, which might cause adverse public reaction or injury to any person.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self respecting citizens, and no member shall commit any act tending to bring discredit upon the Department or its members.

The subject was served with a 26-calendar day suspension.

26 days is within the range in the Penalty Guidelines (16-days to a Board of Rights); however, the Department did not provide an explanation of how they arrived at 26 days so the OIA could not assess this decision.

### Final Disposition

The original adjudication was reversed. The case was determined to be Not Sustained and closed without further action.

### Department's Rationale

In a Closure Report from the Chief Special Investigator to the Commander of PSD, the following information was written:

- All of the witness interviews support the explanation provided by the member (the subject), that he used the rap song as an object lesson regarding the necessary sensitivity for the workplace; a way to demonstrate lessons learned based on his prior discipline. This insight was missed by the earlier adjudication.
- None of the charges are supported by the record.

- The rap song was used by the subject in an effort to proactively ensure good order and proper discipline and to demonstrate the problems that caused his discipline in the first matter.
- The subject was trying to set a good example and require his command to measure up to the high standard of department requirements. The facts do not support a finding that the subject violated Sections 6a or p.
- The facts do not show that the subject indulged in obscene or uncivil language in violation of Section 12g. Instead, the subject used the rap song to show how the use of obscene or uncivil language poses a problem in the workplace. His conduct also did not fall outside the reasonable rules of behavior so he did not violate Section 13a.

Additionally, in a letter to the subject from the Department, it was stated that “[a]fter further review and investigation, PSD concluded that the reports involving your inappropriate action during lineup with your crew on November 2, 2011, were misunderstood by the crew. You used inappropriate language during a rap song to demonstrate the problems you encountered which caused your first discipline.”

#### OIA Analysis

No new evidence was presented from the time of the original adjudication until the time of the final disposition, approximately three years and seven months.

The Department previously disciplined the subject for the same behavior.<sup>31</sup> The Department offered no explanation as to why the same behavior warranted discipline in the first case, but not in the second.

Some of the statements in the Department's closure memo were not supported by the evidence in the case. For example, “[a]ll of the witness interviews support the explanation provided by the member, that he used the ‘rap’ song with curse words spoken by two members of his crew, as an object lesson regarding the necessary sensitivity for the workplace. This was a way for [the subject] to demonstrate “lessons learned” based on his prior discipline, which he was sharing with his crew. . .” Only two (of seven) witnesses recalled hearing from the subject that the purpose of the rap song was to convey “lessons learned.” One of them stated that the subject only told him this after the incident had occurred and the investigation had begun; the other recalled hearing this at the lineup itself.

Also, only the subject said that his actions were to ensure good order and proper discipline. This was not corroborated by other witnesses. Nor was the Department’s representation that the subject was trying to set a good example and require his command to measure up to the high standards of the Department. None of the witnesses provided support for the subject’s claim that the lineup was conducted in response to his observations of members using profanity and making inappropriate comments in the workplace.

---

<sup>31</sup> In the previous case, the subject was charged with using uncivil, inappropriate language during a station line-up when he directed members to participate in a rap song using the words sh\*t and f\*ck, and bringing discredit to the Department when he engaged in uncivil language during line-up, with his subordinates. The original penalty was a 14-day suspension. The subject requested a BOR and was found guilty. Ultimately he was suspended for four days. The final disposition in that case was served more than four years before the final disposition in the case at hand.

## Other Related Issues

### *Quality of the Investigation – Witness not interviewed*

A civilian paramedic intern may have been present during the line-up, but was not interviewed. A note in the file indicated that “Advocates were not able to locate non Fire Department Paramedic Intern,” but no record of their efforts to locate him was included in the report. A witness said that another member had just received an email from the civilian and that the member probably had the civilian’s email and phone number.

## *Case E*

### Case Summary

The subject allegedly physically and verbally harassed other members by inappropriately touching them and making inappropriate comments.

Member A reported that the subject walked past him while he was putting on his pants in the locker room and the subject grabbed his buttocks. Member A called the subject’s name and the subject immediately said, “I’m sorry. I shouldn’t have touched you.”

Later that day, Member A overheard Member B yell at the subject. Afterwards, Member B said that the subject had grabbed his buttocks.<sup>32</sup>

That same evening, Member A got into bed while the lights were still on in the dormitory. With everyone’s concurrence, the subject turned the lights off as he walked toward the locker room door. As the subject passed Member A’s bed; he massaged/scratched Member A’s head and asked, “Do you need someone to kiss and tuck you in?” Member A yelled the subject’s name. The subject stepped back and raised both hands and said, “That’s right. I’m not supposed to touch you” as he walked out of the dorm and into the locker room. Member C was also present in the dormitory and said that the lights were out but he recognized Member A’s voice stating, “[Subject]! Stop touching me.” Member C said he saw the silhouette of the subject leaning over the head of Member A’s bed.

During his interview, Member D indicated that on an unknown date, the subject “touched me on the rump. I’ll be honest. I took it as just... playing around. You know – a smack on the ass.” He later added, “I took it like a football thing. I didn’t take offense to it. I thought it was kind of weird because nobody has ever done that to me before.” Member D never discussed the incident nor confronted the subject. Ultimately, the Department determined that the allegation that the subject touched Member D on the buttocks was not corroborated and even though the touching was not entirely welcome, Member D did not find it offensive.<sup>33</sup>

During his interview, Member A recounted a similar occurrence from a couple of years prior when Member A was in the locker room talking to Member E. Member A had his right foot up on the bench and his left leg extended with his left foot on the ground and was leaning on his right knee when the subject approached him, reached under Member A’s right leg and grabbed his left inner thigh near Member A’s crotch area. At that time, Member A yelled at subject, “What the hell do you think you’re doing?” The subject apologized and indicated that he did not mean to offend Member A. Member A told the subject not to do that again. Member

---

<sup>32</sup> Member B also said to the Department investigator that this had been happening for “a little while.” He mentioned that the subject would come by and “slap my butt” and “he would also grab the inside of my thigh close to my groin.”

<sup>33</sup> Memo from Battalion Chief Investigations Section Professional Standards Division to Assistant Chief Professional Standards Division regarding Proposed Disciplinary Action [Subject], October 28, 2014.

E recalled the incident and described his own recollection (similar to Member A's) of the events when he was interviewed.

The subject admitted that he inadvertently touched Member A on the buttocks (one time) when both he and Member A were in the kitchen and the subject was trying to pass behind Member A. The subject observed that Member A was very upset and the subject apologized. Other than that incident, the subject said he did not recall touching Member B or Member D on the buttocks. The subject also said he did not recall massaging or scratching Member A's head or offering to kiss or tuck in Member A.

#### Original Disposition

The Department sustained charges that the subject physically and verbally harassed fellow members by inappropriately touching them and making inappropriate comments to them. These charges related to the incidents described by Members A and B that occurred within a day or two of each other. The prior alleged incidents were not included in the charges. The Department sustained violations of the following sections of the Rules and Regulations:

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 10h. All members shall be courteous and respectful in their relations with other members.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens.<sup>34</sup>

Section 13d. All members shall conduct themselves in a manner which will not tend to impair the good order and discipline of the Department.

The subject was served with notice of a 15-calendar day suspension and requested a BOR. The Penalty Guidelines provide for a range of a six day suspension to a Board of Rights. The Department did not provide an explanation of how they arrived at 15 days, so the OIA could not assess that decision.

#### Final Disposition

The case was sustained, but closed without further action because of a due process violation.

#### Department's Rationale

On April 7, 2016, the following entry was made in the Discipline Tracking System: "Based on further review, since member not provided meaningful opportunity for *Skelly* hearing, prior to suspension papers being issued, the discipline is rescinded."

Additionally, the Department provided a memo to the OIA dated June 28, 2016 which indicated that the case was closed because the subject was not afforded due process. The Department said it did not comply with City

---

<sup>34</sup> In the Notice of Discharge, Suspension or Probationary Termination which the Department served on the subject, Section 13a incorrectly included the phrase "and no member shall commit any act tending to bring discredit upon the department or its members. This phrase is contained in a separate section (section 13h) and it is unclear whether the Department intended to file the charge in this case.

Charter Section 1060 by providing adequate notice for the rescheduled *Skelly* hearing prior to the issuance of the suspension papers within the statute of limitations, and because the Department did not provide the member or his representative sufficient opportunity to participate in the *Skelly* hearing process.<sup>35</sup>

Also, in a memo dated July 6, 2016, the Department represented to the OIA that “[. . .] there had been a due process violation. As you will recall, the suspension papers issued prior to the date of the rescheduled *Skelly* hearing.”<sup>36</sup>

An undated Disciplinary Settlement Proposal Worksheet listed the factors below which apparently were considered before closing the case. However, the Department reported that once they determined there was a *Skelly* violation, it became the overriding reason for closing the case.

- Member apologized to the members.
- Penalty likely to be lowered by interaction prior.
- Past discipline:
  - 1/2010 – Reprimand, personal business while on duty;
  - 02/2008 – Four working days, Inappropriate and disrespectful comments to a supervisor;
  - 05/2000 – Three working days, Inappropriate and disrespectful comments to a supervisor;
  - 05/2000 – Reprimand, Battery on wife;
  - 12/1989 – Two working days, Physical altercation.

#### OIA Analysis

The Department knew at the time of the original adjudication (15 day suspension) that the subject had not had a *Skelly* hearing. However, the final disposition (Sustained and closed without further action) was not served until approximately one year and two months later.

#### *Pre-Disciplinary Hearing (Skelly)*

Before a non-probationary employee can be disciplined, he/she must be given due process which consists of, at a minimum, “notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.”<sup>37</sup> This is otherwise known as a *Skelly* package and a *Skelly* hearing.

In *Barber v. State Personnel Board*, the court ruled that the remedy for denial of due process for a *Skelly* violation is back pay for the period in which the discipline was improperly imposed. The court stated, “[t]hus, damages consist only of back pay for the period discipline was improperly imposed, i.e., from the date of actual discipline to the time discipline was validated by the hearing.”<sup>38</sup> Dismissal is not the usual remedy for a *Skelly* violation.

In this case, the subject had not been disciplined, merely served with notice of discipline. Therefore, even if the member did not receive adequate pre-determination due process, the member did not suffer any damages. In

---

<sup>35</sup> Memo from LAFD Chief Special Investigator to the Independent Assessor, [subject] DTS Case No. [number], June 28, 2016.

<sup>36</sup> Memo from Chief Special Investigator to the Independent Assessor, Response to Random Questions re Files Being Audited, July 6, 2016.

<sup>37</sup> *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.

<sup>38</sup> *Barber v. State Personnel Board* (1976) 18 Cal.3d 395, 402

most LAFD cases in which the subject opts for a BOR, discipline is not imposed until *after* a full evidentiary hearing (Board of Rights). Therefore, the subject was not suspended and was not penalized.<sup>39</sup>

The Department subsequently told the OIA that there was a misunderstanding/miscommunication regarding the final disposition of this case and that it should not have been closed.

#### Other Related Issues

##### *Complete Investigative File*

The subject was interviewed for the investigation and his statement was summarized in the investigative report, however, the recorded interview has since been misplaced. The Department has a mechanism for maintaining recorded interviews and should ensure that all recordings are stored properly and can be made available for future review.

#### ***Case F***

##### Case Summary

The subject admitted he took fuel from a Department [bull]dozer tender (DT)<sup>40</sup> for use in his personal vehicle.

In addition to the subject's statement, the only other interview included in the investigation was of Member A who indicated that a captain told him he saw the subject's vehicle hooked up to the DT, but Member A later said he did not know who saw the subject take the fuel. Member A also indicated that when he learned of the incident he informed his immediate supervisors.

The captain was interviewed, but due to technical difficulties, the interview was neither retained, nor included in the investigation.

##### Original Disposition

The Department sustained the charge that the subject took City resources for his personal use, in or around May to December 2012, in violation of the following Rules and Regulations:

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens.

Section 14b. All members shall neither lend, sell, give away, nor appropriate to their own use any public property, nor pilfer or be guilty of theft at fires or elsewhere.

The subject was served with an 18-calendar day suspension on January 10, 2014. He requested a Board of Rights.

---

<sup>39</sup> The OIA is not suggesting the Department can or should routinely forego *Skelly* hearings. The OIA believed that in the rare case where the subject may not have been afforded a *Skelly* hearing, dismissal should not be the usual remedy.

<sup>40</sup> A Bulldozer Tender is defined in the *Brush Fire Operations Manual, Glossary of ICS Terms* as [a]ny ground vehicle, with personnel, capable of maintenance, minor repairs and limited fueling of bulldozers.

The Penalty Guideline range is from a Reprimand to a Board of Rights. The Department did not provide a justification for 18 suspension days, so the OIA could not assess that decision.

### Final Disposition

The case was determined to be out of statute and closed without further action.

### Department's Rationale

The charges were not filed within the one year statute of limitations.

In a memo to the Fire Chief, PSD indicated that:

1. The subject informed the entire crew, including the captain, on the same date he took the fuel and there is no evidence contradicting this statement.
2. It is undisputed that:
  - Sometime during 2012 the subject took fuel for his personal use without permission.
  - The subject does not remember which captain he told.
  - Member A said the captain saw the subject's vehicle looked [sic] up to the DT.
  - The captain's interview was not available.
  - It was well known on all three platoons that the subject took fuel for his personal use without permission.
  - That the charges were filed with the Fire Commission on January 10, 2014.<sup>41</sup>
  - That any event which occurred in 2012 was more than a year old on January 10, 2014.

### OIA Analysis

No new evidence was discovered between the time of the original adjudication and the time of the final disposition, approximately one year and five months.

According to the Los Angeles City Charter (Charter), when the LAFD seeks to discipline a sworn member for misconduct, charges against that member must be filed with the BOFC within one year of discovery of the misconduct, and no more than two years from the date of the incident.<sup>42</sup> If the statute of limitations expires before charges are filed, discipline is barred. The one-year statute begins when an uninvolved supervisor has knowledge of the facts and has reason to know the act (or omission) is misconduct.<sup>43</sup>

The subject's statement was unclear regarding the date of the incident<sup>44</sup> and no other witness identified the incident date. The CTS entry suggested the incident occurred sometime between approximately December 1, 2012 and January 16, 2013, but this information was not substantiated in any of the interviews.

Further, the subject claimed he told the crew that he had taken the fuel immediately after he did it. However, he never established whether a captain or other supervisor was present at the time. He said that he was not sure

---

<sup>41</sup> Filing charges with the BOFC stops the statute of limitations from running.

<sup>42</sup> Los Angeles City Charter Section 1060(a).

<sup>43</sup> *Haney v. City of Los Angeles*, 109 Cal. App.4th 1 at 11.

<sup>44</sup> During his interview in May 2013, the subject admitted that he took Department fuel for his personal use once "within the last year." The subject said multiple times that he did not believe the incident took place in 2013; however, he repeatedly expressed that he was unsure and said, "I have no idea if it was last year or this year."

whether he told “one or two of them (the crew), or everybody [that he had taken the fuel].” When asked specifically, “Was a captain there?” the subject responded, “I don’t remember.”<sup>45</sup>

Also, Member A first said the captain told him he saw the subject’s personal vehicle hooked up to the DT, but later Member A said “I really don’t know who saw him (the subject).” Neither the date of the incident nor the date the captain may have learned about the incident was established. The captain’s interview was not included in the investigative package.

Additionally, Member A said it was well known on all three platoons that the subject took the fuel (implying that other supervisors knew about the incident). However, Member A only heard other members at the station discussing the incident *after* he had already heard about it from the captain. Therefore, this statement does not lend assistance in determining the date of the incident or the date of discovery.

Finally, according to PSD “any event occurring in calendar year 2012 was more than a year old on January 10, 2014.” While true, the one-year statute does not begin to run until the date of discovery and the two year statute of limitations runs from the date of the incident. Neither was established by the investigation.

### Other Related Issues

#### *Quality of the investigation*

The only available evidence was the subject’s recorded interrogation and Member A’s statement, who learned of the fueling incident from a captain after it occurred. Member A did not know how or when the captain originally learned of the incident. The captain was also interviewed, but the recording was lost due to technical difficulties. As a result, the investigation did not establish who witnessed the subject taking Department fuel, or when.

The captain’s interview was neither transcribed, nor summarized, nor re-done. No notes from the interview were included as part of the investigative file. Neither *Skelly v. State Personnel Board* nor the Firefighters Bill of Rights<sup>46</sup> requires that a witness interview be recorded. The Department provided no rationale for not re-interviewing the captain or failing to include a summary of the captain’s interview in the investigative file.

The OIA identified at least five people who should have been interviewed because they may have had information relevant to the case and could have potentially assisted the Department in establishing the date of the incident and the date of discovery. They include the battalion chief who entered the complaint into CTS and who supposedly spoke directly to the subject about the incident the day before entering it into CTS, two officers who Member A said he told about the misconduct and who may have informed a different battalion chief of the incident, and the battalion chief who was allegedly informed through the chain of command. The subject’s relief, who the subject claimed to have told that he took the fuel the next day, was not interviewed either. Further, the subject claimed to have informed several crew members at the fire station that he had taken fuel for his personal use immediately after doing so; however, only Member A was interviewed, and he did not hear the subject make any such announcement. Finally, there was no record showing that the Department attempted to identify the other members who had worked with the subject during the relevant time period.

---

<sup>45</sup> Only the subject’s representative stated that the subject told his captain that he had taken fuel, but the representative’s statements cannot be treated as the subject’s testimony.

<sup>46</sup> *Skelly v. State Pers. Bd.*, 15 Cal. 3d 194, 215 (1975) and California Government Code § 3253(g).

## 2. Cases that were settled

### *Case G*

#### Case Summary

Several allegations were filed against two supervisors. The complaints were bifurcated. In this case it was alleged that one of the subjects smoked cigars and chewed tobacco regularly at work.<sup>47</sup> The subject reportedly spit “chew” (chewing tobacco) at the scene of incidents and dipped his chewing tobacco in alcohol. It was also alleged that the subject brought a gun to work everyday and kept it “hidden in his center console.”

Seven witnesses said they saw the subject smoke a cigar.<sup>48</sup> Nine witnesses said they saw the subject using chewing tobacco and three said they saw the subject offer it to other members. Two witnesses said they saw the gun in the subject’s car while on duty in the parking lot of the fire station. Four witnesses were told about the gun by someone who supposedly saw it and two witnesses said the subject told them he had a gun in his car. The remaining witnesses did not offer conflicting reports.

The subject admitted a 20 year nicotine addiction, and stated he relapsed and smoked on duty. He also said he chewed mint and smoked e-cigars. He said he never chewed tobacco on scene nor offered chewing tobacco to other members. The subject stated he owned several firearms but denied possessing a gun in his car at work. He also said he did not know why the witnesses would say he had the gun.

#### Original Disposition

The Department sustained charges against the subject for:

- Using tobacco products (this was the subject’s second offense).
- Setting a poor example for subordinates when he violated the non-tobacco use policy.
- Offering tobacco products to members.

The charges were in violation of the following Rules and Regulations:

Section 6a. All officers shall be responsible for the enforcement of discipline and the promotion and maintenance of efficiency of their commands and shall consider it their duty to set especially good examples and require their commands to measure up to the high standard of Department requirements.

Section 6b. All officers shall put into effect the authorized policies, regulations, practices and procedures of the Department.

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

This was the subject’s second violation of the non-tobacco use policy. The subject was served with a 24 calendar day suspension and requested a Board of Rights.

---

<sup>47</sup> As part of the Memorandum of Understanding between UFLAC and the Department, all members hired after July 1, 1987 are prohibited from smoking or using any tobacco products whether on or off duty while employed by the Fire Department. Members are required to sign an affidavit attesting to their understanding of this condition of employment. The subject signed this affidavit in 1995.

<sup>48</sup> Some of the witnesses reported that the other supervisor and other members also smoked cigars on duty but they were never charged with misconduct.

The Department Penalty Guidelines allow a 16-30 day suspension for a second offense for violation of the non-tobacco use affidavit and a range of Reprimand through Board of Rights for a first offense of failure to carry out supervisory responsibilities. The Department did not provide a justification for its decision to impose 24 suspension days, so the OIA could not assess that decision.

There is no evidence in the file to indicate why the allegation related to the gun was ignored in the adjudication process (although pursued by the investigator).

### Final Adjudication

The subject and the Department entered into a settlement agreement. Under the terms of the agreement, the Department held a 24-day suspension in abeyance until the subject completed two courses: Decision Making (eight hours) and Team Management (24 hours).<sup>49</sup> After completing the courses, the Department withdrew the 24-day suspension and imposed an eight-day suspension, as part of the agreement.

### Department's Rationale

Two places in the file appear to address the reasons the case was settled; the Disciplinary Settlement Proposal Worksheet and a memo to the OIA.

The Settlement Worksheet contained the following under the heading "Recommendation:"

- Member has already completed nicotine addiction treatment - need to verify.
- Past discipline for tobacco use - second violation.
- Recommendation: Courses with days attached.

On page two of the Settlement Worksheet, a box is checked which says "Settlement Recommended." The OIA noted that the Settlement Worksheet did not include any justification for settling the case. Proof of completion of nicotine addiction treatment was not in the file.

In a memo to the OIA dated three months after the settlement agreement was executed, the Department offered the following as explanation for settling the case:

First, the interviews of the witnesses were not sufficient to establish that the subject offered cigars or other tobacco products to his crew. "Several claimed to have been offered what they thought was chewing tobacco, but there was no way to establish that whatever was offered was not the ground mint [the subject] was using to curb his craving for nicotine."

Second, the Department said "the proposed penalty of 24 days for the only sustainable charge, which was the use of tobacco (reduced from 26 days by the *Skelly* officer<sup>50</sup>) appears to be excessive on its face."

Third, the Department stated "the charge that [the subject] failed to carry out supervisory responsibilities was based on the claim that the subject offered tobacco to his crew, which was not sustainable on the evidence in the file."

---

<sup>49</sup> The subject was required to complete the courses within one year, which he did.

<sup>50</sup> This statement is not supported by the evidence in the file. The pre-*Skelly* memo from the Department to the subject indicated that the proposed penalty was a 24-day suspension.

## OIA Analysis

No new evidence was discovered between the time of the original adjudication and the final disposition, approximately two years and three months.

At his *Skelly* hearing, the subject made seemingly contradictory statements. He said the information in the investigation was accurate, while at the same time he denied he offered chewing tobacco to his crew. The subject also asked the *Skelly* officer and the Department to consider reducing the number of suspension days. The evidence showed at least three witnesses said the subject offered them tobacco products.

Furthermore, the Department could have re-interviewed the witnesses to try to determine if the product the subject was chewing and smoking was real tobacco, but the witnesses were not re-interviewed.

The subject also made the argument that he was chewing mint leaves and smoking an e-cigar to the *Skelly* officer who still sustained the charges and did not recommend a reduction in penalty.

The OIA noted that 24 days is within the Penalty Guidelines for a second offense for a violation of the non-tobacco use affidavit and the Department acknowledged this, but still maintained the penalty was excessive. No explanation was provided.

Without objective criteria for determining which cases are appropriate to settle, the OIA could not assess whether settling this case was an appropriate outcome. Furthermore, the Department lacks criteria and protocol for allowing education/courses in lieu of or in addition to suspension days. Without standards for determining which offenses are eligible to be settled with courses, which courses are available to members, which courses are available for which offenses, and whether a member's discipline history contributes to his/her eligibility to engage in coursework rather than serve a suspension, the OIA was unable to assess the appropriateness of the settlement in this case. However, the OIA noted that the Department overlooked the subject's claimed and previously documented long term addiction in the education-based settlement requirement.

## Other Related Issues

### *Quality of the Investigation*

First, when the subject's supervisor learned of the allegation that the subject possessed a firearm, he went to the station and searched the fire truck. The subject's personal vehicle (a pickup truck) was never searched. The complaint entered in CTS said the firearm was "kept hidden in his (the subject's) center console." The supervisor said that he went to the station to search the truck. When he did so, he told the subject it was alleged that he kept a gun "in the cab." The supervisor searched the cab of the fire truck and the area around where the subject sits on the fire truck, and did not find a gun. It is unclear from the investigation why the supervisor thought the gun was in the cab of the fire truck and not the center console of the subject's pickup truck.

Months later, when the witnesses were interviewed, those who said that they either saw a gun or heard about the gun, reported that it was in the subject's personal vehicle. None of the witnesses said the firearm was in the fire truck. The Department still did not attempt to search the subject's personal vehicle.<sup>51</sup>

---

<sup>51</sup> The Department could have contacted law enforcement for assistance in conducting a lawful search of the subject's vehicle.

While writing this report, the Department represented that, at the time the complaint was made,<sup>52</sup> discussions took place related to the gun allegation and the scope of the search. However, the substance of the conversations was not documented in the investigative file.

Second, this case was assigned to PSD for investigation. However, the subject's BC was assigned as a "field advocate"<sup>53</sup> to assist PSD with the investigation. During the first witness interview, it was evident that eight days after the complaint was filed, the BC went to the station with the assistant chief to address some of the issues included in the complaint. The BC participated in handling the problems that were the basis for the CTS complaint and this was confirmed by the witnesses. It appeared that because of his involvement in the broader incident, the BC was removed as a field advocate from the investigation, but only after he helped with 10 witness interviews. Furthermore, he was interviewed as a witness in the related case. PSD did not engage in a conversation about his participation until all of those interviews were completed.

Third, in his interview, the subject indicated that he had a nicotine addiction and may have slipped on occasion and smoked at work. He said he had the mint chew in his locker as well as the e-cigar, but the investigator never asked to see it.

Fourth, witnesses identified other members who had smoked at the fire station, but none of them were named as a subject in this or other cases, nor was there evidence they were counseled or that the chain of command addressed this issue in some other way.

Finally, as mentioned above, the witnesses who said the subject offered chewing tobacco to his crew were not re-interviewed in the wake of the subject's representation that it was not a tobacco product.

## *Case H*

### Case Summary

A complaint was filed alleging that, while on duty, the subject and another member (Member A) were involved in a horseplay incident in the fire station kitchen which resulted in Member A accidentally stabbing the subject in the buttocks with a pocket knife.<sup>54</sup> The individuals who were interviewed gave varying accounts of what happened.<sup>55</sup>

The supervisor who entered the incident into CTS (but did not witness the incident) said he was told by another member (who did not witness the incident but was told by the subject) that the subject and Member A were bantering in the kitchen about each other's cooking when the subject pretended to choke Member A. As the Subject and Member A wrestled around, Member A was pulled off the kitchen table bench, and he inadvertently cut the subject with the knife.

The member who reported the incident to the supervisor (as referenced above) did not actually witness the incident either, but said "they were screwing around" and that the subject told him that he (the subject) had put

---

<sup>52</sup> The complaint was filed four years before this report was written.

<sup>53</sup> The Department explained that a field advocate was someone assigned to the field who had experience conducting investigations, who was asked to assist PSD with investigations when PSD needed more resources because of large caseloads.

<sup>54</sup> Member A reported that he was sitting at the kitchen table cleaning blue glue off his fingernails with a small pocket knife.

<sup>55</sup> The investigator did not attempt to reconcile the witnesses' statements.

Member A in some kind of “hold or headlock,” Member A lost his balance and fell, and the knife got him [the subject].

The subject said that he did not see the pocket knife in Member A’s hand as he approached Member A from behind and put his arm around him (Member A) “over his shoulder.” The subject stated that he “pulled him (Member A) down a bit.” Member A then lost his balance, and the subject “got poked” with the knife.

Member A reported that the subject “kind of came around and gave a little bit of a... almost kind of a little tap from behind.” He said that the subject’s arm was around him and it “threw [him] off a little.” Member A fell over, and as Member A went to the ground he poked the subject with the knife that was in his hand. The knife caused a minor injury to the subject that he was able to treat himself with the help of another member on duty.

Although one other member was in the kitchen at the time of the incident, neither he nor any of the other members on duty saw the events leading up to the injury.

All the parties agreed the injury was an accident and that there was no malicious intent.

One of the members reported the incident to the station commander five days after it happened<sup>56</sup> and the station commander reported the incident to PSD more than two months after it occurred.

#### Original Disposition

The Department sustained a charge that the subject participated in an act of hazing or horseplay with injury in violation of Rules and Regulations sections:

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 12g. All members shall while on duty, not indulge in: obscene or uncivil language; altercations or conduct, which might cause adverse public reaction or injury to any person.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self respecting citizens.

The subject was served with a 12-day suspension and requested a Board of Rights.

The Penalty Guidelines showed the appropriate discipline is 11-30 day suspension. The Department did not provide an explanation of how they arrived at 12 days, so the OIA could not assess this decision.

#### Final Disposition

The subject and Department entered into a settlement agreement. The Department is holding the original 12-working day suspension in abeyance while the subject attends 40 hours of classes: a 24-hour Team Management class, an eight-hour Decision Making class, and an eight-hour Ethics class. The subject has one year to complete the courses.

---

<sup>56</sup> The station commander was off duty the day of the incident. Another member was working in his place and was not made aware of the incident until more than two months after the incident

## Department's Rationale

The Disciplinary Settlement Proposal Worksheet stated the following under "Recommendation:"

- Other member involved in horseplay was not charged.
- Would prevail in a BOR but penalty would most likely be decreased.
- During *Skelly* Hearing - member (subject) owned up to his actions but he did not offer any remediating circumstances beyond that he felt his grabbing the other FF was a common expression of emotion among members in the fire station environment. He felt his actions failed to rise to the level of horseplay.
- [Subject] put his arms around another FF causing him to loose [sic] his balance and stuck FF [subject] in the buttocks with a pocket knife, puncturing his skin.
- Recommendation: Drop suspension days from 12WD [Working Day suspension] to 6, attend APD<sup>57</sup> courses:
- Decision making class, Independent study on Horseplay within the Fire Service.

Further, in a July 5, 2016 memo to the OIA,<sup>58</sup> PSD attributed the Department's decision to settle the case and the penalty to "weaknesses in the case,"<sup>59</sup> including the fact charges were only considered in one of the members involved in the apparent horseplay." Additionally, the Department explained that "it is difficult to see how [the subject's] actions (in this instance, the comment defending his cooking prowess, and then his playful tug on [the other member] which unfortunately brought him in contact with the pocket knife) could be considered 'hazing.'"

## OIA Analysis

No new evidence was discovered between the time of the original adjudication and the final disposition, approximately two years.

The investigation did not prove by a preponderance of the evidence that Member A committed misconduct and should have been designated as a subject in this case.

Also, the Department gave no justification for its assumption that the penalty would likely be decreased in a Board of Rights. The person who reported the incident, as well as the supervisor who reported the incident to PSD, recognized this as an act of horseplay, which is a category of hazing under the Discrimination Prevention Policy Handbook (DPPH).

If the Department determined the subject's actions did not fall within the definition of hazing (or horseplay), thus not a violation of the Department's rules and policies, then the Department should have reversed the original adjudication rather than settle this case.

---

<sup>57</sup> The Department represented that APD was an acronym for Alternative Plan to Discipline.

<sup>58</sup> The memo was written five months after the case was settled and these issues do not appear on the Discipline Settlement Proposal Worksheet as having been considered at the time the case was settled.

<sup>59</sup> This appears to contradict what the Department wrote in the Settlement Worksheet, that the Department "would prevail in a BOR. . ."

Without criteria for determining which cases are appropriate to settle, the types of cases in which subjects may be eligible to take courses in lieu of suspension days, the type of courses available, and whether the subject's discipline history is relevant, the OIA is unable to assess the appropriateness of the settlement in this case.

### Other Related Issues

#### *Allegations that were not investigated*

The supervisors both may have violated Department policy by failing to report the incident in a timely manner.

This case was identified by the complainant and the station commander to whom it was reported as a hazing/horseplay incident. According to the DPPH, officers who become aware of hazing or other discriminatory conduct are required to immediately report the harassment in accordance with the procedures described in [the DPPH], even if the complainant does not want the conduct investigated.<sup>60</sup> The DPPH explains that officers who do not take immediate and appropriate corrective action, including its proper reporting and recording will be held accountable. "Failure to adhere to the above responsibilities will result in appropriate corrective disciplinary action, up to and including termination, regardless of job level or classification."<sup>61</sup>

The station commander first became aware of the incident five days after it occurred, when he returned to duty and was informed by a member of his crew, yet he did not report the incident until more than two months later when he told his supervisor. Further, he did not record a complaint in CTS until the next day after that.

Although the other supervisor at the station did not learn of the incident until a couple days before it was entered into CTS, he also failed to immediately report the incident as required by the DPPH once he became aware of it.

No charges were filed against either of the supervisors for failing to promptly report the incident. The fact that no charges were filed for these violations is concerning given the serious nature of the allegations and the length of time between the incident date and the date on which the incident was properly reported. The DPPH requires officers, managers and supervisors to immediately report violations of the related policies and the Rules and Regulations require all members to promptly report any violation of rules, policies or procedures.<sup>62</sup>

### *Case I*

#### Case Summary

The subject (a supervisor) approached the complainant (a member) from behind and touched the back of the complainant's neck with a hot metal meat thermometer which the subject had previously placed in boiling water. The complainant sustained a minor (visible) burn, but he did not seek medical treatment.

Member A and Member B witnessed the incident. Member A assessed the injury, applied cold water, and photographed the mark left by the hot thermometer.

The subject explained that in preparation for a fire station annual inspection, the subject put three meat thermometers into boiling water to test them. One of the thermometers was not working. The subject set the broken thermometer on the countertop for several minutes before picking it up to throw it away. On his way to

---

<sup>60</sup> Section II, Discrimination Prevention Policy Handbook

<sup>61</sup> Id.

<sup>62</sup> Section II, Discrimination Prevention Policy Handbook. Section 11m, Rules and Regulations.

the garbage can, the subject walked past the complainant and, according to the subject, “flicked” the thermometer at the back of the complainant’s neck.

The complainant flinched and asked, “What was that?” The subject had already thrown the thermometer into the garbage can, so he retrieved it and held it up for the complainant to see.

When interviewed by PSD, the subject claimed he had apologized to the complainant (apparently for startling him) but was unaware of the burn on the complainant’s neck on the day of the incident.<sup>63</sup>

The complainant did not report the incident until more than two months after it occurred.

### Original Disposition

The Department sustained charges against the subject for participating in an act of hazing/horseplay resulting in an injury and setting a poor example for his subordinates in violation of Rules and Regulations sections:

Section 6a. All officers shall be responsible for the enforcement of discipline and the promotion and maintenance of efficiency of their commands and shall consider it their duty to set especially good examples and require their commands to measure up to the high standard of Department requirements.

Section 6b. All officers shall put into effect the authorized policies, regulations, practices and procedures of the Department.

Section 10f. All members shall familiarize themselves with and be obedient to the rules, regulations, practices and procedures of the Department.

Section 10h. All members shall be courteous and respectful in their relations with other members.<sup>64</sup>

Section 12g. All members shall, while on duty, not indulge in: obscene or uncivil language; altercations or conduct, which might cause adverse public reaction or injury to any person.

Section 13a. All members shall be governed by the ordinary and reasonable rules of behavior observed by law-abiding and self-respecting citizens.

The subject was served with a 20-calendar day suspension and requested a BOR. The 20-day suspension was within the Penalty Guideline range of 11-30 day suspension; however the Department did not provide justification for the number of suspension days, therefore the OIA could not assess the decision.

### Final Disposition

The Department and the subject entered into a settlement agreement. The subject was suspended for four days. The Department is holding an additional 16-day suspension in abeyance until the subject shows proof he

---

<sup>63</sup> In response to being asked, “Did you have an opportunity to look at the part of [the complainant’s] body where the thermometer came in contact with him?” the subject answered, “No, I’ve never seen that.” To the question, “Did it come to your understanding at any point that he had in fact been burned?” he answered, “No, I was not aware of that until I received the CTS complaint.”

<sup>64</sup> The Department wrote the incorrect section number of the Rules and Regulations in the Notice of Discharge, Suspension, or Probation Termination. The correct section number is 10h. The Department wrote 10g.

attended a decision making (eight hour) class and a team management (24 hour) class. He has one year to complete the classes.

### Department's Rationale

The Department provided a rationale for the settlement agreement in three separate documents.

First, on an undated Disciplinary Settlement Proposal Worksheet, the Department listed the following:

- The subject said he apologized to the complainant.
- The Department would likely obtain the same or like penalty [at a BOR] as originally proposed.
- The cost and resources of the formal disciplinary process (Board of Rights Hearing) are outweighed by the benefits of settling.
- Settlement brings finality to the discipline process.
- There are relevant and effective training courses that would assist in better decision making from the member.
- Recommendation - hybrid - course and suspension, 24-hour team management class and eight-hour decision making class with four working day suspension.

Second, in a memo to the Fire Chief dated April 18, 2016, the Commander of PSD said, “[b]y his actions [the subject] violated [the listed sections] of the Rules and Regulations.” The recommendation for disciplinary action was a four day suspension, which the Fire Chief approved.

Finally, in a memo to the Independent Assessor, dated July 18, 2016,<sup>65</sup> PSD indicated that the factors considered in determining the settlement were as follows:

- The subject immediately apologized to the complainant and did not seem to intend to harm him;
- The Department would likely obtain the same or similar result if the matter proceeded to a BOR;
- The cost and resources of the formal disciplinary process are outweighed by the benefits of settlement;
- Settlement brings finality to the disciplinary process; and
- There are effective relevant training courses which would assist the subject in better decision making.

Also in the memo, the Department noted that a subject in a different hazing incident (which occurred earlier that day) received a four-day suspension. The Department said, “[i]t is hard to see how the less serious horseplay of the [subject in the case at hand] would warrant five times the level of suspension.” The Department’s memo also acknowledged that an officer’s misconduct would require a more substantial penalty than a subordinate’s similar misconduct. However, the Department opined that this still did not account for the disparity between the two penalties.

### OIA Analysis

No new evidence was presented between the time of the original adjudication and the final disposition, approximately two years and two months.

As to the last comment by the Department, the OIA determined that no injury was sustained in the earlier incident and the Penalty Guidelines suggest a more serious penalty for an act of hazing *with* an injury. The penalty range for participating in an act of hazing or horseplay without injury is Reprimand to a 15-day

---

<sup>65</sup> This memo was written more than nine months after the settlement agreement was executed.

suspension. The penalty for participating in an act of hazing or horseplay with injury is 11-30 days suspension. Furthermore, the original penalty of a 20-day suspension was within the range of the Penalty Guidelines, which seemed to suggest a justification for the “disparate penalty.”

The OIA noted that the memo from PSD to the Fire Chief with the recommended disciplinary action (settlement) was written and approved *after* the settlement agreement had already been signed by the parties.

Without criteria for determining the types of cases in which subjects may be eligible to take courses in lieu of suspension days, the type of courses available, and whether the subject’s discipline history is relevant, the OIA is unable to assess the appropriateness of the settlement in this case.

#### Other Related Issues

The Department investigator advised the subject that the allegation included criminal elements and pursuant to Government Code 3253(h) (Firefighters Procedural Bill of Rights Act), advised the subject of his constitutional rights. However the report does not include any information about submitting the facts to law enforcement or prosecutors for their consideration.

### **VII. TRENDS**

#### 1. *Lack of thorough and complete investigations*

##### a. Not all witnesses were interviewed

In Case A, the battalion chief to whom the subject supposedly reported his arrest, was not interviewed. In Cases F and D, witnesses necessary to prove or disprove the charges were not interviewed. In Case F individuals who may have witnessed the incident or who may have been able to narrow the date of the incident (for purposes of the statute of limitations) were not interviewed.

In other cases, witnesses present during the alleged misconduct may have given the Department additional information which could have assisted with the adjudication. In Case B, the engineer listed on the F11 for that day was not interviewed. In Case G, one witness reported that there was another crew member who may have seen the subject with a gun, but that person was not interviewed. In Case C, a person from the Personnel Department was reportedly present in the room when the subject was on the phone, but that witness was never interviewed.

##### b. Documents and Recordings were not included in the investigative file

In the following cases, documents were produced during the investigation but were not included in the case file.

During his interview, the subject in Case A presented the investigator with several pieces of evidence which the subject believed supported his version of the case; five photos related to the area where the subject drove and was stopped by the officer, a list of officers from the arresting agency who had the most DUI arrests for a three-year period, and a press release which supposedly indicated that the arresting officer was among those with the most DUI arrests in the county. Those items were not maintained. Furthermore, the F11 pertaining to the battalion chief, whom the subject supposedly notified about his arrest, was not in the original investigation.

In Case G, there were a number of documents presented to witnesses and referenced during interviews that were not included in the case file. Examples of some of these were notes related to dates on which events occurred and F11s. Additionally, the subject spoke about written deliverables that were required to be presented to the subject's supervisors, but they were not in the file. During one witness interview, the investigator took a break to copy notes the witness provided, however those were not in the file. One witness was shown a copy of the receipt he signed evidencing that he had read the Discrimination Prevention Policy Handbook, but this was not in the file.

Almost every witness in Case D was shown an F11 by the investigator and most were asked to sign it. None of them were in the file. There were other cases in which an investigator showed a witness or subject an F11 but did not include the F11 in the investigative file.

During his interview, the subject in Case I drew a diagram of the location where the incident took place at the fire station. This diagram was not included in the file. Similarly, in Case C, a diagram drawn by a witness was not included in the file.

Also in Case I, F11s were shown to witnesses but not included in the file. Also, Member Information Tracking System documents used during interviews were not included in the case file.

The subject's interview in Case E was recorded but not preserved. Likewise, in Case B a witness interview was recorded but not preserved.

c. Investigative efforts were not documented in files

In Case B, the subject was allegedly identified before any information in the investigation revealed the subject's identity. If either the chief officer who filed the complaint or the investigator had knowledge of the identity of the subject, this should have been documented in the file. In Case D, the Department did not document efforts to locate the paramedic intern. In Case G, the Department explained that conversations took place related to the search for the gun, however, these conversations and decisions were not documented in the file. In Case H, the Department reported that information existed to support the notion that Member A should have been named as a subject in the case. Documentation of this evidence was never included in the investigation.

“A prompt, fair and thorough investigation is not only legally required, it is critical to instill confidence that the process was fair and trustworthy and it may give grounds for defending against certain claims that could be asserted if the employee challenges the adjudication of the misconduct in arbitration or the courts. Conversely, a failure to investigate or a poorly executed investigation can expose the City to risk and potential claims as well as seriously damage a City's credibility and public trust, both internally and among the public at-large.”<sup>66</sup>

Every audit and report written by the OIA assessing investigations cited cases in which investigations were neither complete nor thorough.<sup>67</sup> In each report at least one recommendation was made related to this issue. In some reports, several recommendations were made in an effort to enhance the quality of investigations. Although the LAFD has presented strategies to the BOFC for improving investigations, this remains a concern.

---

<sup>66</sup> WORKPLACE INVESTIGATIONS A Practical Guideline for City Attorneys, Presented to the League of California Cities® July 29, 2015 By Daphne M. Anneet Burke, Williams & Sorensen, LLP.

<sup>67</sup> BFC No. 10-027, BFC No. 13-109, BFC No. 13-039, BFC No. 16-049.

The OIA recommends that the Department present to the BOFC, a plan to ensure investigations are thorough and complete, including, but not limited to, establishing incident dates and dates of discovery, determining if all witnesses were interviewed, all documentary evidence collected and that all evidence is included in the investigative file. The strategy should include internal evaluations and frequent reports to the BOFC demonstrating tangible improvements.

### *2. Lack of criteria for settling cases*

As noted above, the Commission president and vice president had asked the Department to establish uniform and objective criteria to be used by the Department when deciding whether a case of misconduct is appropriate for settlement. However, the Department had not provided the commissioners with a final product. This issue was discussed again in the recent past; however criteria have not been presented to the full commission for adoption. Therefore, the cases reviewed for this audit did not evidence standardized criteria for determining if settlement was warranted. The OIA recommends that criteria be formulated and presented to the full commission for a public hearing and adoption of a formal process.

### *3. Education in discipline settlements*

In three cases above, the Department entered into an agreement with the accused which included a requirement to attend classes which, upon completion, would either replace or reduce the number of suspension days the subject was to serve.

However, the Department has not developed criteria for doing this. Protocol should be developed to determine, among other issues, which offenses are eligible to be settled with courses, which courses are available to members, and which courses are available for which offenses. Furthermore, the Department should consider whether a member's discipline history contributes to his/her eligibility to engage in coursework rather than serve a suspension. Additionally, as of now, the Department gives most members one year to complete all courses. A review of this practice at a later date may reveal that this should be changed.

The OIA recommends the Department develop criteria for allowing members to complete courses, whether in lieu of or in addition to suspension days. This should be presented to the BOFC for consideration and approval.

### *4. Written rationales for settling or reversing the original adjudication were not comprehensive and, in some cases, were not supported by the evidence*

Cases reviewed by the OIA for this audit contained a list of reasons (in bullet point format) why the Department believed the case should be settled or reversed. Some of these were difficult to understand without an explanation and some of the information was not consistent with the evidence in the case (Cases A, B, D and H). Furthermore, only one Settlement Worksheet was signed and dated by the chain of command.

When cases are settled or reversed after a subject is served with a Notice of Discipline, the Department should document the reasons for changing the disposition at the time this decision is made. The rationale should be comprehensive, supported by the evidence, and understandable on its face. Additionally, each rationale should be dated and indicate, with a signature, that the chain of command agreed with the decision (or not). Evidence of the Fire Chief's agreement should be included in every case.

#### 5. *Number of Suspension Days Not Justified*

In the Background section, the Penalty Guidelines and Penalty Factor Worksheet were discussed. The Department included its analysis pursuant to the Penalty Factor Worksheet in only one case the OIA reviewed for this report. None of the other cases contained information indicating how the Department arrived at the number of suspension days imposed on the subject. Therefore, the OIA was unable to assess whether aggravating and mitigating circumstances were supported by evidence in the investigation and properly considered, and whether the number of suspension days imposed within the Penalty Guideline range was appropriate.

The OIA recommends the Department include in all cases an explanation of how the Department arrived at the number of suspension days imposed.

#### 6. *No new evidence was discovered between the original adjudication and the final disposition*

With the exception of Case A, the Department did not produce new or additional evidence in any of the cases to support a change in the original adjudication. Dispositions were changed from Sustained to Not Sustained, or cases were settled because someone other than the first adjudicator reviewed the case anew. In at least two cases (Cases C and E), the original decision was reversed based on a legal issue that was present at the time the case was originally adjudicated.

### **VIII. RECOMMENDATIONS**

The OIA recommends that the Board of Fire Commissioners adopt the following recommendations and require the Department to coordinate with the OIA and provide progress reports to the BOFC at regular intervals on the implementation of the adopted recommendations.

1. Develop a plan to ensure a complete and thorough investigation is conducted in every case, including, but not limited to, interviewing all witnesses, gathering all evidence, and placing all evidence in the case file. The strategy should include internal evaluations and frequent reports to the BOFC demonstrating tangible improvements.
2. Draft criteria and procedures for evaluating whether a case is appropriate for settlement consideration. Present the draft to the BOFC for formal adoption.
3. Develop protocol for when education/coursework can be required in lieu of or in addition to suspension days. Present this to the BOFC for formal adoption.
4. Ensure that cases which are reversed or settled after discipline was served, contain documentation<sup>68</sup> of the reasons for the reconsidered disposition.
5. Include in every sustained case an explanation of how the Department determined the penalty (e.g. number of suspension days) within the Penalty Guidelines.
6. Amend Department policies to reflect the current practices of the Department and the desired outcomes when a member is arrested or named in a crime report. Include language that requires an employee to notify

---

<sup>68</sup> Documentation should be accurate and consistent with the evidence in the case.

the Department when he/she is arrested or detained by a law enforcement agency and/or transported to any jail or police facility (excluding traffic infractions) inside or outside the City. The policy must also include a procedure for ensuring that PSD is notified. Develop a method to disseminate the new policy to all employees and ensure every employee receives and understands the new policy.