

## **Los Angeles Fire Department Board of Rights**

### **I. INTRODUCTION**

According to the Los Angeles City Charter (“Charter”), a sworn member of the Los Angeles City Fire Department (“LAFD” or “Department”) cannot be suspended or have his/her employment terminated for misconduct without a finding of guilt of the charges at a hearing before a Board of Rights (“BOR”).<sup>1,2</sup> As defined by the Charter, a BOR is a tribunal composed of three Chief Officers.<sup>3</sup> The proceedings resemble a trial wherein the Department must prove, by a preponderance of the evidence, that the member is guilty of the charge(s).<sup>4</sup> Upon a finding of guilt, the BOR prescribes its penalty and submits it to the Fire Chief who has final authority for imposition of discipline.<sup>5</sup>

There are two kinds of BORs: an “opted” BOR and a “directed” BOR. An “opted” BOR is when the Fire Chief suspends a sworn employee for 30 days or less, and the employee chooses (opts) to have the Chief’s decision to discipline reviewed by a BOR.<sup>6,7</sup> The Fire Chief may direct a member to a BOR if the Fire Chief believes a member’s employment should be terminated, believes a member should receive more than a 30 day suspension, or if for other reasons, the Fire Chief would like the matter heard by a BOR.<sup>8,9</sup>

For this audit, the OIA reviewed discipline resulting from complaints that were filed from January 1, 2009 to December 31, 2014.

Since 2009, the number of requests for a BOR has risen while the number of BORs conducted by the Department has decreased.

For cases filed in 2009, 26.09 percent of disciplined members requested a BOR. For cases filed in 2014, 61.8 percent of those disciplined requested a BOR. Except for a 2.6 percent decline in 2010, the percentage rose every year in cases filed from 2009 to 2014.

Further, the number of BORs conducted by the Department has decreased. For cases filed between 2009 and 2011,<sup>10</sup> the Department held 16 BORs. For cases filed between 2012 and 2014, one BOR was conducted.

As of June 30, 2015, 56 cases<sup>11</sup> were awaiting a hearing before a BOR; six cases were directed to a BOR and in 50 cases, the member opted for a BOR.

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<sup>1</sup> Charter Section 1060(a).

<sup>2</sup> Exceptions to Charter Section 1060(a) are suspension penalties of 30 days or less where the member elects not to, or fails to appropriately, request a BOR. Charter Section 1060(b) and 1060(h).

<sup>3</sup> Charter Section 1060(g).

<sup>4</sup> Charter Section 1060(k).

<sup>5</sup> Charter Section 1060(m-o).

<sup>6</sup> Charter Section 1060(b)(2).

<sup>7</sup> In addition, California Government Code Section 3254(b) states, “[P]unitive action or denial of promotion on grounds other than merit shall not be undertaken by any employing department or licensing or certifying agency against any firefighter who has successfully completed the probationary period without providing the firefighter with an opportunity for administrative appeal.”

<sup>8</sup> Charter Section 1060(b)(2).

<sup>9</sup> The Fire Chief cannot impose a suspension of more than 30 days or terminate employment unilaterally.

<sup>10</sup> Seven cases from 2011 were awaiting a BOR on June 30, 2015.

<sup>11</sup> This does not reflect the number of members awaiting a BOR. Some members have more than one case pending.

Additionally, more cases are taking longer to resolve than in the past. For cases filed in 2009 and 2010, the majority of cases pending a BOR were resolved within 24 months. In contrast, more than half the cases filed in 2011 were awaiting resolution after more than 30 months. Also, of the 45 cases filed from 2012 to 2014 in which a BOR was requested, only two were resolved.<sup>12</sup>

Provisions in the City Charter seem to give procedural guidance to the Department when a member is suspended and subsequently requests a BOR:

- 1) when a member is suspended, the Fire Chief has the authority to require the member to serve the suspension at the time it is imposed;
- 2) upon the filing of the request for a hearing before a BOR,<sup>13</sup> the accused shall select the Chief Officers who will comprise the BOR;<sup>14</sup>
- 3) upon the selection of the BOR [members], the Fire Chief shall set the time and location of the BOR, no less than five days and no more than 10 days thereafter;<sup>15</sup> and
- 4) in the event a member files an application for a hearing before a BOR, the suspension shall automatically become a temporary relief from duty pending the hearing and decision by the BOR. The Chief also has the option to cancel the temporary relief from duty, or following the relief from duty, restore the member to duty pending the hearing before the BOR.<sup>16</sup>

However, the Department does not appear to be following these provisions. Items two and three suggest a timeline for convening a BOR, which if followed, may address the issue of the increasing length of time elapsing before cases are resolved.

The Fire Chief is aware of and committed to addressing the 56 cases that were awaiting a BOR on June 30, 2015.<sup>17</sup> Throughout the research and writing of this review, the Fire Chief has worked and continues to work to resolve these cases.

The 56 cases pending a BOR included cases in which discipline was imposed through June 30, 2015. The Fire Chief has since resolved most of the cases and provided current information to the OIA on January 27, 2016, which is reflected in Section VIII below.

#### *Prior Audits*

The OIA has not conducted prior audits on this topic.

#### *Acknowledgements*

The OIA would like to thank members of the Department, especially members of the Professional Standards Division, for their cooperation and assistance in writing this report. Further, the OIA would like to acknowledge and thank former Student Professional Worker J. Andre Castellanos who was instrumental in producing this audit. Also, the OIA would like to thank Former Student Professional Worker Matthew Seipel and individuals in the Office of the City Attorney and at the Los Angeles Police Department who provided assistance.

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<sup>12</sup> This statistic reflects the number of case as of June 30, 2015. The two cases were resolved because one member chose to rescind his request for a BOR and take his discipline and the other member's request for a BOR was denied as untimely.

<sup>13</sup> In the Charter, the term "Board of Rights" is used to describe both the hearing as well as the panel of Chief Officers who preside over the hearing.

<sup>14</sup> Charter Section 1060(g).

<sup>15</sup> Charter Section 1060(f).

<sup>16</sup> Charter Section 1060(b)(2) and (3).

<sup>17</sup> From January 1, 2009 to June 30, 2015, three permanent and one interim Fire Chief led the LAFD.

*Audit Contents*

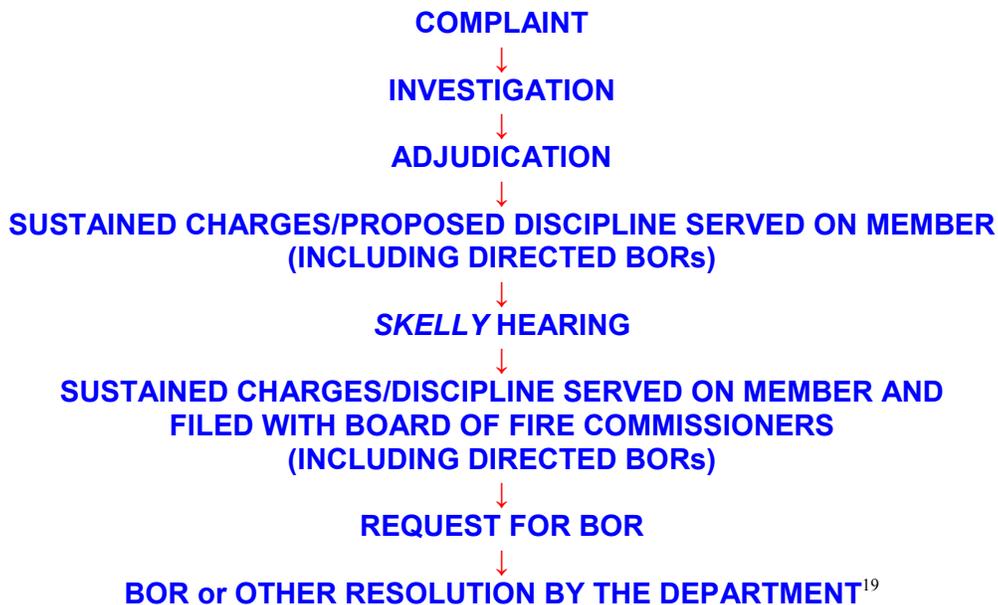
Section II articulates the purpose of this audit and Section III provides the background. This audit’s objectives are presented in Section IV. The scope and methodology of the audit are in Section V and the findings are in Section VI. A discussion of the issues is in Section VII and the status of cases since June 30, 2015 is in Section VIII. The OIA’s recommendation is in Section IX and Section X is the conclusion.

**II. PURPOSE**

The purpose of this review is to provide a statistical overview of discipline in the Fire Department for the last 5 ½ years, specifically, the cases awaiting a BOR. The OIA conducted this assessment in order to present the Fire Commission, Department, and the public, a quantitative analysis of the current discipline landscape, a year-to-year comparison related to discipline cases, and the time it took to complete BORs or resolve cases by another means.

**III. BACKGROUND**

**COMPLAINT INVESTIGATION/DISCIPLINE PROCESS<sup>18</sup>**



The LAFD discipline process begins with the filing of a complaint – an allegation of misconduct – against an LAFD employee. Anyone can make a complaint, LAFD employees or the public. The Department investigates a complaint when the allegations, if true, violate a rule, policy or regulation that can result in discipline. The Department investigates all allegations of

<sup>18</sup> The process related to investigating and adjudicating a complaint is complicated. Only the steps relevant to the topic of this audit are presented here.

<sup>19</sup> A member can choose to arbitrate a case beyond the BOR. However, this report tracked cases through the internal process only.

misconduct “thoroughly, regardless of severity.”<sup>20</sup> All complaints are entered into the Department’s Complaint Tracking System (CTS).

Next, in cases where the Department sustains the allegation(s) of misconduct and proposes discipline, the Department gives the subject (accused employee) an opportunity to respond to the charges and proposed discipline. Before a non-probationary employee can be disciplined, he/she must be given due process. This due process consists of, at a minimum, “notice of the proposed action, the reasons therefor, 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>21</sup> This is otherwise known as a *Skelly* hearing. The hearing does not have to

definitively resolve the propriety of the [discipline]. It should be an initial check against mistaken decisions – essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.<sup>22</sup>

After the *Skelly* hearing, the Fire Chief imposes the discipline, serves the imposed discipline on the employee, and files it with the Los Angeles Board of Fire Commissioners (BOFC). The Department must file the charge(s) with the BOFC within one year of the Department’s discovery of the misconduct and no later than two years from the date of the incident.<sup>23</sup>

The Fire Chief may direct a member to a BOR if the Fire Chief believes a member’s employment should be terminated, believes a member should receive more than a 30 day suspension, or if for other reasons, the Fire Chief would like the matter heard by a Board of Rights. Cases in which the Fire Chief directs a member to a BOR are generally the most serious offenses.<sup>24</sup>

Alternatively, if the Fire Chief imposes discipline of a 30-day suspension or less, a member has the right to appeal the discipline and request to have a BOR hear the case.

Upon a finding of guilt, the BOR prescribes its penalty, and then submits it to the Fire Chief.<sup>25</sup> The BOR penalty can be a suspension of six months or less, reprimand, or removal from “office or position.”<sup>26</sup> The Fire Chief may impose a lesser penalty than the BOR, but may not impose a greater penalty than the BOR.<sup>27</sup>

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<sup>20</sup> Complaint Record Form and Professional Standards Division OCEP 2008 “PSD 101” PowerPoint Presentation, CTS Help Section. <http://psd.fd.ci.la.ca.us/CTS/Help.cfm>. Accessed April 8, 2015.

<sup>21</sup> ***Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215.***

<sup>22</sup> *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 545-546.

<sup>23</sup> Charter Section 1060(a).

<sup>24</sup> Examples of first offenses which merit an automatic BOR pursuant to the Department’s Disciplinary Guidelines are: ingesting, possessing or “commerce” of any illegal drug, on or off duty; knowingly submitting a false claim to receive Workers’ Compensation insurance benefits; physical conduct or act of a sexual nature involving the use of force; or committing a felony.

<sup>25</sup> Charter Section 1060(m).

<sup>26</sup> Charter Section 1060(m)(1-3).

<sup>27</sup> Charter Section 1060(o).

#### **IV. OBJECTIVES**

For cases (complaints) filed between January 1, 2009 and December 31, 2014, for each year:

1. Determine the number and percentage of discipline cases compared to the number of cases filed in CTS.
2. Determine the number of cases that the Fire Chief directed to a BOR.
3. Determine the number of cases in which the discipline was accepted.
4. Determine the number of cases in which a BOR was requested.
5. Determine the disposition of all cases in which the Fire Chief imposed discipline.
6. Determine the number of cases that remained unresolved as of June 30, 2015.
7. Determine the length of time (number of months) from service of discipline until final resolution.

#### **V. SCOPE AND METHODOLOGY**

The OIA considered all cases (complaints of misconduct) filed in the Complaint Tracking System from January 1, 2009 to December 31, 2014, in which charges were filed with the BOFC and either a suspension was imposed or a member was directed to or opted for a BOR. Not all cases filed in 2014 were completed at the time this report was drafted.<sup>28</sup> Cases in which discipline was imposed before June 30, 2015 were included in this review. 247 cases, in which discipline was imposed, were part of the statistical analysis for this audit. The OIA reviewed all documents filed with the BOFC related to these cases.

When amassing statistics related to the total number of cases filed each year in CTS, the OIA excluded cases labeled as “closed – duplicate” or “closed – entry error.”

Although considered punitive action pursuant to the Firefighter’s Procedural Bill of Rights Act,<sup>29</sup> written reprimands are not filed with the BOFC and therefore were not considered for this report.

The OIA gave drafts of this report to the LAFD and met with the Department to discuss the contents prior to publication.

#### **VI. FINDINGS**

##### **Objective No. 1**

Determine the number and percentage of discipline cases compared to the number of cases filed in CTS, per year, 2009 to 2014.

##### *2009 Cases*

- 1101 entries were made into CTS.
- 69 resulted in discipline (6.27%).

##### *2010 cases*

- 980 entries were made into CTS.
- 51 cases resulted discipline (5.20%).

##### *2011 Cases*

- 674 entries were made into CTS.

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<sup>28</sup> As noted above, the Charter provides for a statute of limitations of one year from the date of discovery and no later than two years from the date of the incident. Therefore, cases filed less than one year before the start of this review and that were not completed and were not considered.

<sup>29</sup> California Government Code Section 3251(c).

- 38 cases resulted in discipline (5.64%).

*2012 cases*

- 656 entries were made in CTS.
- 25 cases resulted in discipline (3.81%).

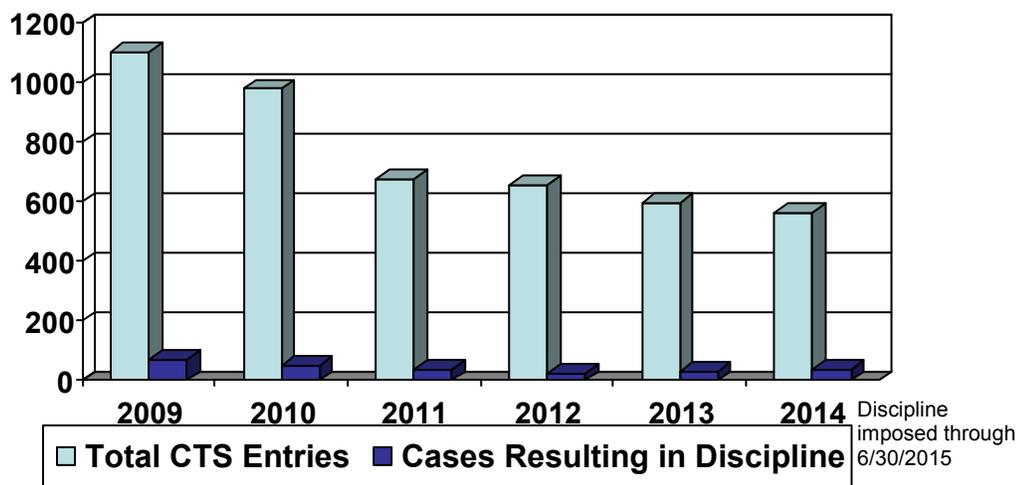
*2013 cases*

- 599 entries were made in CTS.
- 30 cases resulted in discipline (5.0%).

*2014 cases*

- 563 entries were made in CTS.
- As of June 30, 2015, 34 cases resulted in discipline.<sup>30</sup>

Chart 1: Total CTS Entries,  
No. of Cases Resulting in Discipline



**Objective No. 2**

Determine the number of cases that the Fire Chief directed to a BOR.

**Objective No. 3**

Determine the number of cases in which the discipline was accepted.

**Objective No. 4**

Determine the number of cases in which a BOR was requested.

**Objective No. 5**

Determine the disposition of all cases in which the Fire Chief imposed discipline as of June 30, 2015.

**Objective No. 6**

Determine the number of cases that remained unresolved as of June 30, 2015.

*2009 (69 Discipline Cases)*

<sup>30</sup> The OIA researched several different statistics resulting from the number of CTS entries made in 2014. From this research, the OIA determined that presenting statistics to calculate the percentage of cases filed in 2014 that resulted in discipline is difficult because, as mentioned above, not all cases from 2014 were completed at the time this report was drafted.

- In 41 cases, discipline was accepted (59.4%).
- In three cases, the member was dismissed from the Department while on probation (4.35%).<sup>31</sup>
- 25 of 69 (36.2%) cases were awaiting a BOR hearing.
  - Seven cases were directed to a BOR (10.1%). Of the seven, three BORs were convened and the remaining four cases were resolved in other ways.<sup>32</sup>
  - 18 cases opted for a BOR (26.09%). Of the 18, six BORs were convened and the remaining 12 were resolved in other ways.<sup>33</sup>

As of June 30, 2015, all cases had been resolved.

#### *2010 (51 Discipline Cases)*

- In 26 cases, discipline was accepted (50.98%).
- In one case, the member was terminated while on probation (1.96%).
- 24 of 51 (47.06%) cases were awaiting a BOR hearing.
  - 12 were directed to a BOR (23.53%). Of the 12, two BORs were convened and the remaining 10 cases were resolved in other ways.<sup>34</sup>
  - 12 requested a BOR (23.53%). Of the 12, four BORs were convened and the remaining eight cases were resolved in other ways.<sup>35</sup>

As of June 30, 2015, all cases had been resolved.

#### *2011 (38 Discipline Cases)*

- In 15 cases, discipline was accepted (39.47%).
- One member retired during the investigation, before adjudication.
- 22 of 38 (57.89%) cases were awaiting a BOR hearing.
  - Nine cases were directed to a BOR (23.68%). No BORs were convened, but all nine cases were resolved.<sup>36</sup>
  - 13 requested a BOR (34.21%). Of the 13, one BOR was convened and five cases were resolved in other ways.<sup>37</sup> The remaining seven cases were still awaiting a BOR.

As of June 30, 2015, seven cases initiated in 2011 were awaiting final resolution.

#### *2012 (25 Discipline Cases)*

- In 15 cases, discipline was accepted (60%).
- In 10 cases, a BOR was requested (40%).
  - Nine cases were awaiting a BOR and one case was resolved in another way.<sup>38</sup>

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<sup>31</sup> A sworn member is on probation for one year. If the Department wishes to dismiss the person from employment during probation, the person is not entitled to appeal to a BOR, but rather can have a "Liberty Interest" hearing.

<sup>32</sup> Three members retired and one case settled.

<sup>33</sup> Discipline was rescinded in two cases (33 and 43 months after discipline was imposed). In six cases, the request for a BOR was later rescinded and the member accepted his suspension. Three cases were settled. In one case, the member did not show up to select the BOR panel; discipline was imposed.

<sup>34</sup> One member retired. Nine cases were settled.

<sup>35</sup> Two cases settled before the BOR was convened. In one case, the request for a BOR was denied as untimely. In two cases, the request for a BOR was rescinded and the members served their suspension. In one case, the discipline was reduced before the BOR was convened. In two cases, discipline was rescinded (12 and 13 months after it was first imposed).

<sup>36</sup> In five cases, the member resigned (one member had two cases). In two cases the member retired. Two cases were settled before the BOR was convened.

<sup>37</sup> One request was denied as untimely. One member retired and three cases were settled.

As of June 30, 2015, nine cases initiated in 2012 were still awaiting final resolution.

*2013 (30 Discipline Cases)*

- In nine cases, discipline was accepted (30%).
- 21 of 30 cases were awaiting a BOR (70%).
  - Seven cases were directed to a BOR (23.33%). Of the seven, one BOR was convened and two were still pending a BOR. The remaining four were resolved in other ways.<sup>39</sup>
  - In 14 cases, a BOR was requested (46.67%).
    - All 14 cases were awaiting a BOR.

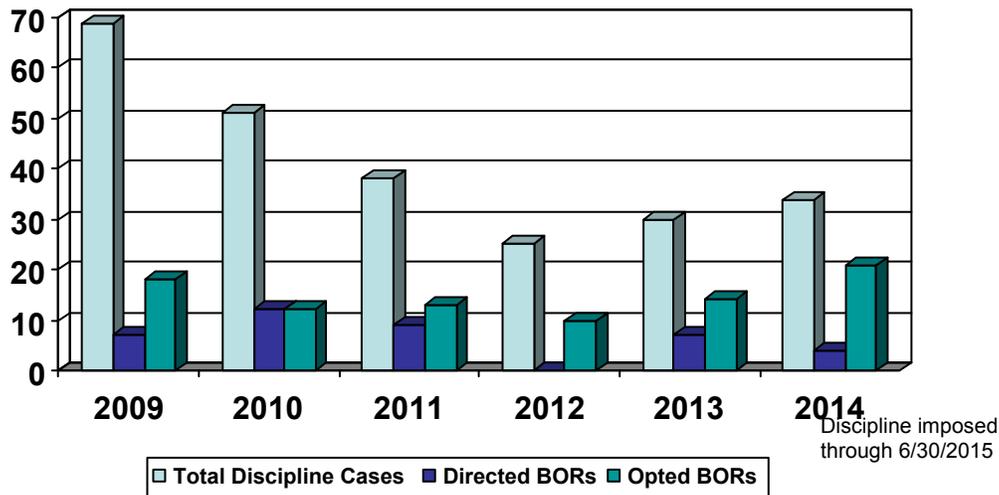
As of June 30, 2015, 16 cases initiated in 2013 were awaiting final resolution.

*2014 (34 Discipline Cases)*

- In nine cases, discipline was accepted (26.47%).
- 25 of 34 cases were awaiting a BOR (73.5%)
  - Four cases were directed to a BOR (11.76%). All four cases were awaiting a BOR.<sup>40</sup>
  - In 21 cases, a BOR was requested (61.76%). Of the 21, 20 cases were awaiting a BOR and one case was resolved in another way.<sup>41</sup>

As of June 30, 2015, 24 cases initiated in 2014 were awaiting final resolution.

Chart 2: Total Discipline Cases, Directed BORs, Opted BORs



<sup>38</sup> One person rescinded his request for a BOR and accepted his discipline.

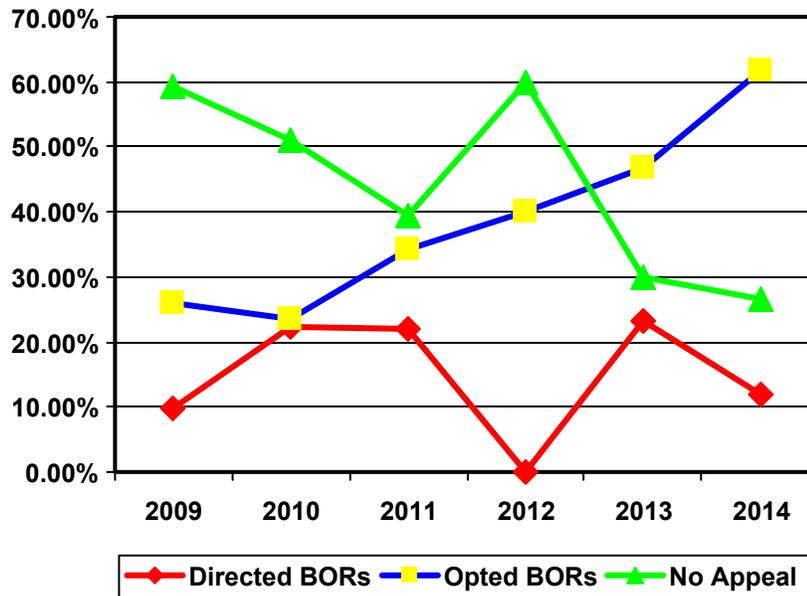
<sup>39</sup> Two cases settled and in two other cases, the members resigned.

<sup>40</sup> The reasons some of these cases are pending are beyond the control of the Department.

<sup>41</sup> One request for a BOR was denied as untimely.

The percentage of cases in which a BOR was requested rose every year from 2009 to 2014, except for a 2.6 percent decline in 2010. In 2009, 26.09 percent of members who were disciplined requested a BOR, while in 2014, 61.76 percent of those disciplined requested a BOR.

Chart 3: Percentage Directed BORs, Opted BORs, Cases In Which Discipline Was Accepted



The number of BORs conducted by the Department for cases filed between 2009 and 2014 has decreased. In cases filed between 2009 and 2011,<sup>42</sup> the Department conducted 16 BORs. For cases filed between 2012 and 2014, one BOR was conducted.

As of June 30, 2015, 56 cases were awaiting final resolution; six directed and 50 opted BORs.

**Objective No. 7**

Determine the length of time (number of months) from service of discipline until final resolution.

In addition to the increase in the percentage of cases in which a member opted for a Board of Rights, there was also an increase in the length of time from service of discipline until final resolution. Further, although served with a suspension, members were not required to take the suspension while awaiting a BOR.<sup>43</sup>

Opted BOR cases are taking longer to resolve than in the past. For example, in cases filed in 2009 and 2010, a majority of opted BOR cases were resolved within 24 months, while in 2011,

<sup>42</sup> Seven cases from 2011 are still awaiting a BOR.

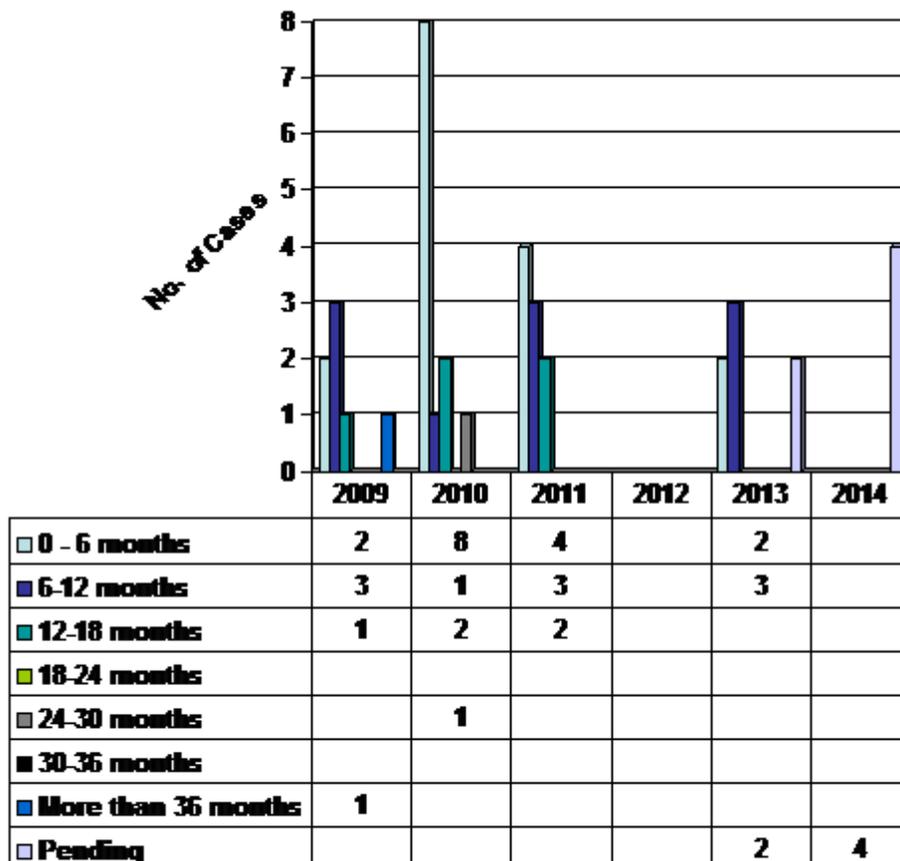
<sup>43</sup> Charter section 1060(b)(2) provides that “[i]n the event the member files an application for a hearing before a Board of Rights as provided in this section, the suspension shall automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. However, Charter section 1060(b)(3) gives the Fire Chief the authority to,” cancel such temporary relief from duty, or following such relief from duty, restore the member to duty with or without restrictions pending a hearing before a Board of Rights.”

more than half the cases were awaiting resolution for more than 30 months. Also, of the 45 cases filed from 2012-2014 in which a BOR was requested, only two were resolved.<sup>44</sup>

The charts below show the length of time from when a subject was served with discipline until the time of final resolution of the case – completion of a Board of Rights, settlement,<sup>45</sup> resignation or retirement. Most directed BORs were conducted within 18 months or less from the time the subject was served. Directed BOR cases were taking less time to resolve than opted BOR cases.

Finally, since 2012, the Department has almost completely stopped conducting BORs (both directed and opted).

Chart 4: Length of Time to Resolve Cases Directed to BOR<sup>46</sup>

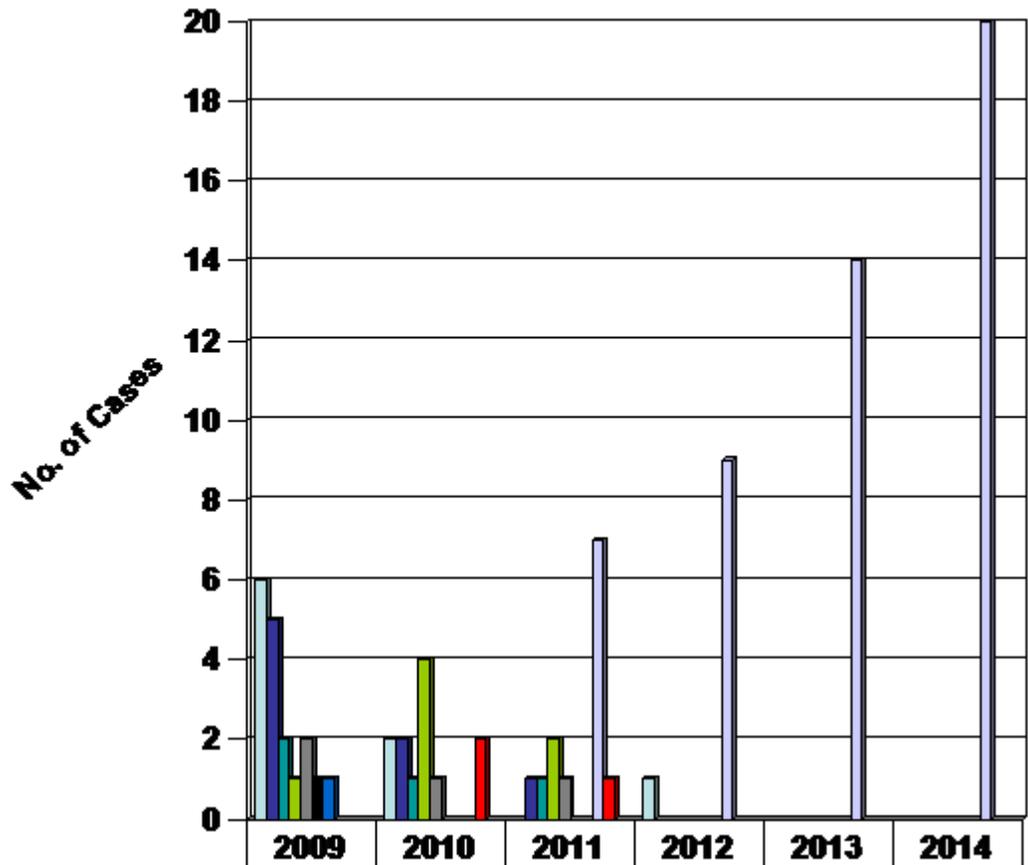


<sup>44</sup> As of June 30, 2015.

<sup>45</sup> Generally, a settlement is an agreement between the Department and the member to resolve the discipline case in a way that is different from the originally imposed discipline.

<sup>46</sup> In most cases, the OIA measured the time from the date the subject was served with the discipline until the date the case reached final resolution. In some cases, the date the subject was served was not available to the OIA. In these cases, the time was estimated from the last day of the statute of limitations until the date the case reached final resolution.

Chart 5: Length of Time to Resolve Opted BOR Cases<sup>47</sup>



	2009	2010	2011	2012	2013	2014
0 - 6 months	6	2		1		
6-12 months	5	2	1			
12-18 months	2	1	1			
18-24 months	1	4	2			
24-30 months	2	1	1			
30-36 months	1					
More than 36 months	1					
Pending			7	9	14	20
Other+		2	1			
+Case information was unavailable or request for BOR was denied as						

<sup>47</sup> Id.

Chart 6: No. of BORs Convened

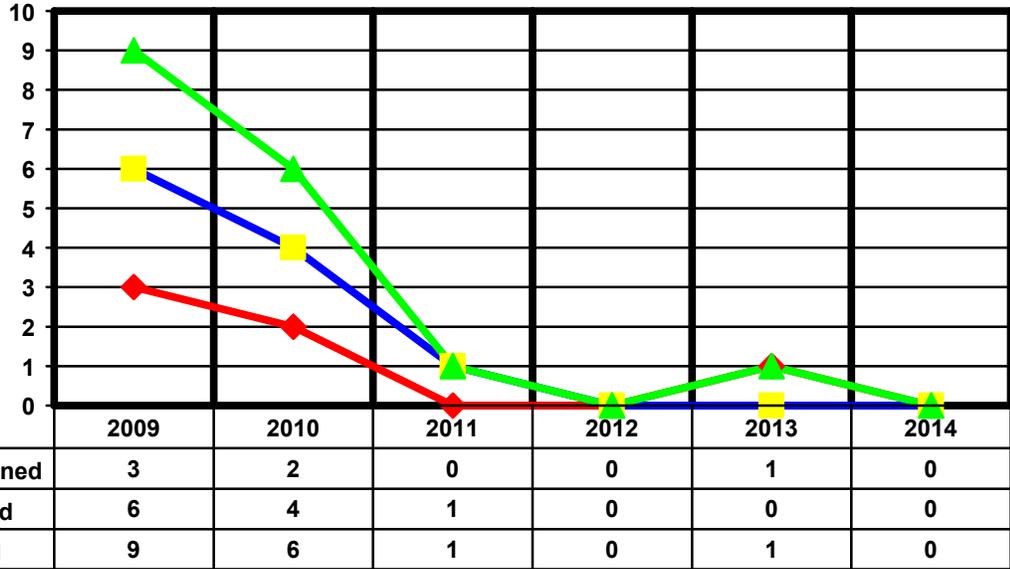


Chart 7: No. Directed BORs, Opted BORs, Cases Resolved, Cases Pending

	2009	2010	2011	2012	2013	2014
<b>DIRECTED BORs</b>						
No. of Cases Directed to BOR	7	12	9	0	7	4
No. of Cases Resolved	7	12	9	N/A	5	0
No. of Cases Pending	0	0	0	N/A	2	4
<b>OPTED BORs</b>						
No. of Cases with Opted BOR	18	12*	13*	10	14	21*
No. of Cases Resolved	18	12	6	1	0	0
No. of Cases Pending	0	0	7	9	14	20
<b>TOTAL</b>						
Total No. of Cases Pending as of June 30, 2015	0	0	7	9	16	24

\*One request for a BOR was denied as untimely.

## **VII. DISCUSSION**

The number of unresolved cases and the length of time between discipline and resolution impact the interests of both employees and the Department. A member who has been suspended for 30 days or less has the right to a hearing before a BOR,<sup>48</sup> yet in some cases, hearings were not held (nor other final resolution reached) for months or years after the discipline paperwork was served on the member.

The Charter states, “upon the filing of the request for hearing before a Board of Rights,” the accused shall select the three chief officers who will be the members of the BOR.<sup>49</sup>

Then, after selecting the members of the BOR, the Fire Chief shall set the time and place where the hearing is to be held not less than five nor more than ten days after the BOR is selected.<sup>50,51</sup> Additionally, the Charter states, “[i]n the event the member files an application for a hearing before a Board of Rights as provided in this section, the suspension shall automatically become a temporary relief from duty pending hearing and decision by the Board of Rights.”<sup>52,53</sup> Although not explicitly stated, the Charter seems to imply that the temporary relief from duty is without pay. Even though these sections suggest a process for the Department to use when a member opts for a Board, it appears that these procedures were not followed in the 50 cases in which a member requested a BOR.

Additionally, even though the Charter gives the Fire Chief the authority to require a member to serve a suspension at the time it is imposed, when a member opts for a BOR, the suspension does not take effect until after the BOR hears the case. Generally, once a member requests a BOR, the Fire Chief sends a letter to that member indicating that the “dates of [the member’s] suspension . . . are rescinded.” The letter then states, “[A]s such, the Board of Rights will hear the evidence, render a verdict and impose disciplinary action as they deem appropriate.”<sup>54</sup>

Discipline serves important interests in a Fire Department.

Discipline is used to maintain appropriate conduct in the work environment. . . .  
When a firefighter is not disciplined for an infraction of the rules, he or she quickly learns that this rule, and possibly others, are not important: there is no consequence for disobeying. This leads to flaunting authority and freelancing.

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<sup>48</sup> Charter Section 1060(b)(2).

<sup>49</sup> Charter Section 1060(g).

<sup>50</sup> Charter Section 1060(f).

<sup>51</sup> If the parties require more time to prepare for the hearing, Charter Section 1060(f) provides “[a]fter the Board of Rights has first convened, the board may continue the hearing of the matter to a specific date.” Further, the Department’s Board of Rights Manual, Board of Rights Procedures states, “[b]ecause of this narrow window [to begin the BOR after the BOR is selected], continuances are normally granted to allow the Advocate and the Defense adequate time to prepare their cases. If both parties have agreed to a continuance prior to the opening of the Board of Rights, the Board can open with a majority of members present (two members) as long as no evidence is presented by either party. . . Requests for additional continuances may be made to and granted by the Board if they feel the request is made in good faith and the absence of evidence or witnesses was without fault on the part of the requester.”

<sup>52</sup> Charter Section 1060(b)(2).

<sup>53</sup> Charter section 1060(b)(2) provides that “[i]n the event the member files an application for a hearing before a Board of Rights as provided in this section, the suspension shall automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. However, Charter section 1060(b)(3) gives the Fire Chief the authority to,” cancel such temporary relief from duty, or following such relief from duty, restore the member to duty with or without restrictions pending a hearing before a Board of Rights.”

<sup>54</sup> February 25, 2015 memo from the Fire Chief to a member who requested his case be heard by a BOR.

Other firefighters who have continued to obey the rules begin to feel discriminated against, questioning whether they would have been disciplined in the same situation. In addition, they have been shown that following the rules doesn't matter, and their motivation to continue to do so has been greatly decreased. Respect for rules – and for officers – begins to diminish. These departments develop low morale and low performance standards.<sup>55</sup>

Further, Justice Powell, in his concurring decision in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974), said, “Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.”

While the Department is not ignoring misconduct committed by LAFD employees – the Department is investigating and adjudicating cases – the length of time it takes to bring final resolution to cases may give the appearance that individuals who engage in misconduct are not being held accountable.

At the BOR, the Department has the burden of proving the charges by a preponderance of the evidence.<sup>56</sup> The longer it takes the Department to conduct a BOR, the more there is the potential for the integrity of the Department's case to become compromised. As noted above, the Charter provides “[u]pon selection of a Board of Rights, the Fire Chief shall set the time (not less than five nor more than ten days thereafter) and designate a place where the hearing is to be held. . .”<sup>57</sup> Waiting months, or even years, might make it difficult for the Department to prove its case at a BOR hearing for reasons that originally did not affect the reliability of the evidence, the case investigation, or the discipline. Courts have recognized that time limits are necessary because as cases grow older, memories fade, witnesses disappear, and evidence is lost.<sup>58</sup> As cases pending a BOR grow older, these same principles may become relevant.

Another issue identified by the OIA involved cases in which the Department ultimately rescinded the discipline, sometimes years after discipline was first imposed. For this report, the OIA did not assess the substance of the Department's discipline or final case resolutions (this is a subject for a future audit). However, this situation raises possible questions about the propriety of the originally imposed discipline and the potential negative impact on the subject whose discipline was hanging over his/her head, only to be revoked years later.

Procedures related to a member's request for a BOR and the timing of the BOR appear to be set forth in the Charter. Implementing these procedures could create a more efficient and fair process for resolving cases. First, it may reduce the amount of time from service of discipline until final resolution. Second, it will preserve an employee's right to a hearing. Third, the sooner cases are heard (or resolved in another manner) the less chance there is that the passage of time may compromise the integrity of the case. Fourth, it will reduce the appearance of lack of accountability.

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<sup>55</sup> Grant, Nancy, Ph.D and Hoover, David, Ph.D, *Fire Service Administration*, National Fire Protection Service (1994) 179-181.

<sup>56</sup> Charter Section 1060(k).

<sup>57</sup> Charter Section 1060(f).

<sup>58</sup> The Supreme Court of the United States has spoken on the reasoning of why statutes of limitation exist. The Court in *Order of Railroad Telegraphers v. Railway Express Agency* ruled that “[s]tatutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” 321 U.S. 342, 348-49 (1944).

## **VIII. STATUS OF CASES SINCE JUNE 30, 2015**

The Department reported that some members requested a BOR as a means to delay suspensions and/or gain a more favorable outcome in their case in a future settlement. This “strategy,” the Department reported, caused a strain on resources and resulted in the number of cases that were unresolved.

Also, at the BOFC meeting on September 15, 2015 (BFC#15-097), the Department presented an outline of a plan to modify the discipline process from a discipline model to a public service model. The plan includes an Alternative Plan for Discipline, which will include education and corrective action. The Department is confident that if the BOFC approves this plan, the number of opted BORs will decrease.

The Fire Chief has been aware of the pending BORs and is committed to addressing those cases. The Department is re-evaluating each of the pending cases and has been working to resolve them. On January 27, 2016, the Department gave the OIA an update on all cases that were pending a BOR as of June 30, 2015. The current status of the 56 cases is as follows:

### *Directed BORs:*

- In one case the member resigned.
- Five cases are still pending (related to two members)

### *Opted BORs:*

- In 25 cases, the Department and member have agreed to a settlement. However, settlement agreements have not been executed.
- In nine cases, the member was sent to training and the case was closed. The members did not serve their discipline.
- Eight cases were closed with no further action. The members did not serve their discipline.
- A member with two cases retired before his Board of Rights and before he served his suspension.
- 6 cases remain without resolution.

The OIA will evaluate the final resolution of some of these cases in future audits.

## **IX. RECOMMENDATION**

The OIA recommends that the Department, with the assistance of the City Attorney’s office, follow the procedures suggested by the City Charter related to suspensions and opted Boards of Rights.

## **X. CONCLUSION**

The combination of a growing percentage of members who requested a BOR in the wake of being disciplined, the increasing length of time accused officers were waiting for the Department to convene their BOR, and the decreasing number of BOR hearings conducted, resulted in 56 cases awaiting a BOR as of June 30, 2015. This situation served neither the interests of employees nor the Department. An employee’s right to an appeal and the Department’s interest in maintaining a disciplined workforce are potentially negatively affected.

The Charter provides a framework for discipline and for conducting BORs in an efficient manner. However, it does not appear that the Department was following the provisions which pertain to opted BORs. Implementing the provisions suggested in the Charter related to

suspensions and opted BORs can assist the Department in resolving cases in a more reasonable time period and alleviate the continued build-up of cases awaiting final resolution. Furthermore, exercising the authority given to the Department will preserve an employee's right to a hearing, lessen the chance that the integrity of the case will be compromised, and reduce the appearance of lack of accountability.

The OIA commends the Fire Chief for his commitment to addressing the pending cases and for resolving most of the cases awaiting a BOR as of June 30, 2015. However, the Department should have systems in place to avoid finding itself in the same situation in the future and for ensuring all cases are resolved quickly.