

CITY OF SEATTLE



**Office of Professional
Accountability**

**Civilian Oversight of Criminal
Investigations
Of Seattle Police Department
Employees**

Report by OPA Auditor, Director, and Review Board

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Seattle Police
Department
Office of Professional
Accountability

Office of Professional
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Review Board

Office of Professional
Accountability
Auditor

Civilian Oversight of Criminal Investigations
Of Seattle Police Department Employees

The purpose of this report is to describe civilian oversight of the investigations of the most egregious allegations of police misconduct, those involving criminal violations of law. In preparing this report, the Office of Professional Accountability (OPA) Review Board, the OPA Auditor, and the OPA Director relied on monthly summaries of closed OPA investigations, an interview with the Assistant Chief of the Criminal Investigations Bureau, an informal survey of civilians providing oversight of law enforcement agencies across the country, and the individual law enforcement and criminal law experience of the authors. This report focuses on criminal investigations by the Seattle Police Department and other law enforcement agencies beyond the scope of the duties of OPA. We conclude that Seattle has a sound system for conducting criminal investigations of police employees and that the civilian oversight of the process is good.

Background

Seattle's system of law enforcement accountability includes civilian oversight to ensure the fair and unbiased investigation of allegations of misconduct by Seattle PD employees. The Office of Professional Accountability (OPA) and its Investigations Section are part of the police department. OPA is headed by a civilian appointed by the Mayor and confirmed by the City Council, who reports to the Chief of Police. The OPA Auditor is an independent civilian appointed by the mayor and confirmed by the City Council. The OPA Review Board is comprised of seven civilians appointed by the City Council. Labor contracts with the Department's bargaining units stipulate that the OPA Investigations Section (OPA-IS) – made up of police sergeants and two police lieutenants – does not conduct criminal investigations. OPA-IS examines only violations of Departmental policies and procedures, including those violations that may be

related to criminal acts.

Separating criminal and administrative investigations is the general practice nationwide. The subject of a criminal investigation has a Fifth Amendment right not to speak to criminal investigators. But a Departmental employee is required, as a condition of employment, to cooperate truthfully in any administrative investigation and has no right to remain silent in the administrative investigation.¹ A compelled statement from an employee in an administrative investigation normally is not admissible in a prosecution and could compromise and even preclude a criminal prosecution.² Criminal and administrative inquiries of law enforcement personnel around the nation are typically conducted by separate units, even separate agencies, to preserve the integrity of each process, and to minimize potential problems that could be caused by statements compelled in the administrative investigation.

In a few jurisdictions separate agencies conduct parallel investigations; that is, the criminal and civilian investigators proceed simultaneously, but have no contact with one another. They arrive at their conclusions independently and present their findings to the appropriate authority, prosecutor or chief of police. But parallel investigations can be problematic. Investigators from both efforts usually approach the same witnesses, which can produce inconsistent statements. An employee's statement that is compelled under departmental rules and witness statements collected by the internal investigators can still be subpoenaed by a prosecutor, even if ultimately is not admissible. Witnesses who are interviewed by administrative investigators may have their recollections and testimony tainted by the questions asked by the investigators, whose questions likely will reflect their knowledge of the contents of the employee's compelled

¹ An employee who exercises his or her constitutional right to remain silent in an OPA inquiry faces the possibility of termination of employment.

² In *Garrity v. New Jersey*, the U.S. Supreme Court held that police officers are not required to sacrifice their right against self incrimination in order to retain their jobs. 385 U.S. 493 (1967). An officer cannot be compelled, by the threat of serious discipline, to make statements that may be used in a subsequent criminal proceeding.

statement. Compelled statements can create Fifth Amendment problems for a criminal prosecution.³

If there are criminal allegations against an employee, OPA generally will not pursue an internal investigation until the criminal investigation is complete and criminal charges have been declined, or filed and adjudicated. In some cases an OPA investigation discovers conduct that may be criminal. At that point, OPA may refer the case to criminal investigators while putting its investigation on hold, or OPA may seek advice from a prosecutor on whether there should be a criminal investigation.

We conclude that Seattle's choice to conduct the criminal investigation and any prosecution separately from and before the OPA investigation and any discipline is the best choice under most circumstances, and we do not recommend any changes to this practice.

Overt or Open Criminal Investigations

Criminal allegations against Seattle Police employees come to SPD in a variety of ways. The first and most obvious is the very infrequent instance⁴ where an employee is arrested for a violation of law. By Department policy, employees have an affirmative duty to report arrests, whether or not they are charged. The most common allegations are for driving while under the influence and domestic violence. When SPD learns that an employee has been arrested, OPA is notified, the Director notifies the auditor as part of the weekly review process, and OPA begins to track the matter, but takes no further investigative action. SPD management may reassign or even suspend the employee, based on the seriousness of the allegation, until the criminal and administrative matters are

³ Recently a federal trial judge in Washington DC dismissed criminal charges against six civilian contractors charged with murder because of this problem. ("Judge tosses Blackwater case, Iraqis angry." *The Seattle Times*, January 1, 2010, page A-1, <http://seattletimes.nwsourc.com> accessed on January 22, 2010).

⁴ Per the Appendix, covering fourteen months, there were six sustained complaints involving criminal conduct, and only three cases where the employee was arrested.

resolved.

If OPA receives a complaint that includes allegations of a violation of the criminal law, the OPA Director refers the matter directly to the Assistant Chief in charge of the Criminal Investigations Bureau and the Auditor is notified in his regular review of intake. If the violation took place in the city of Seattle the Assistant Chief generally will direct that a police sergeant in one of the bureau's specialty units (e.g., homicide, domestic violence) handle the case. If the case requires additional investigative expertise, e.g., financial fraud, computer forensics, surveillance, a detective specialist or another unit will assist, but the originally-assigned sergeant is responsible for pursuing the case.⁵ Every month, the Assistant Chief of Criminal Investigations personally reviews the progress of every SPD criminal investigation involving a departmental employee to insure that the matter is being pursued expeditiously. Before a completed SPD investigation is sent to the prosecutor, the senior staff of the Criminal Investigations Bureau reviews and discusses the investigation. The Assistant Chief and OPA communicate regularly on the status of open criminal investigations. The OPA Director reviews the status of all open criminal investigations (including those outside SPD and known to OPA) twice a month with the Chief of Police. Every quarter the OPA Auditor receives a list of all open criminal investigations from the OPA Director.

If the allegations involve a violation outside Seattle, the Assistant Chief contacts a command-level officer in the affected jurisdiction and refers the matter there for investigation. Approximately sixty percent of SPD employees reside outside the

⁵ Art. 3, section 3.7 of the SPOG contract gives the Chief of Police discretion to request that an outside law enforcement agency conduct the criminal investigation. It is unusual for the Chief to make such a request for which there are no written guidelines. The Post Alley shooting involving an off-duty officer was referred to an outside agency. In a more recent example the investigation was referred to another agency when members of the Homicide Unit were involved in a deadly force incident which the Homicide Unit normally would investigate. In these cases the Chief perceived a conflict of interest or an appearance of a conflict of interest. The Chief, in consultation with the OPA Director, also has referred cases, usually to federal investigators, where specialized investigation is required.

city so criminal allegations very often involve outside jurisdictions.

Criminal investigations by other law enforcement agencies work the same way as those by SPD except that SPD management has very little if any influence or control for the progress or other oversight of the investigation. Normally, once an agency is aware it is investigating an SPD employee, it will notify the Assistant Chief of the Criminal Investigations Bureau and/or OPA.⁶ OPA then begins tracking and checking regularly on the status of the criminal investigation and any subsequent prosecution. This monitoring becomes part of the OPA Director's regular semi-monthly report to the Chief of Police. SPD command staff is sensitive to the frequency and content of questions asked about any outside-agency investigation and works to avoid the perception of 'rushing' or otherwise influencing the quality and the outcome of the investigation.

Neither the OPA Director nor the OPA Auditor has authority to review the open criminal investigations at SPD or at other agencies.

When the criminal investigation is complete the law enforcement agency may present the case to the appropriate prosecutor for a prosecutorial decision. SPD presents all completed investigations of departmental employees to the prosecutor. Other jurisdictions may present only those cases they think the prosecutor may charge. If charges are filed, the case goes forward until a conviction, dismissal, or acquittal. There is no automatic disciplinary action by the Chief of Police upon conviction of an SPD employee; OPA will conduct an administrative investigation whatever the outcome of the criminal process, with a recommendation to the Chief as to a finding.

Once the criminal case is concluded, OPA opens or re-opens its own investigation with the benefit of the criminal investigative and court files.⁷ If the criminal proceeding occurred outside Seattle, OPA requests a copy of the

⁶ If the employee has been arrested, OPA should already be aware of the matter because of the employee's duty to report the arrest.

⁷ Even when criminal charges are not filed or the employee is not convicted, the case may involve violations of departmental policy and procedure for which discipline is appropriate.

criminal file and pursues its investigation. Although there is no guarantee that the other agency provides the complete file, the OPA Director is confident that she receives all pertinent information. OPA-IS investigators, the Director, and the OPA Auditor all have access to the criminal evidence and OPA-IS is able to interview the employee, who is obligated to be truthful. The Auditor can look at the open OPA file including the criminal investigation and can require additional investigative steps on the administrative issues. The OPA Director reports that criminal investigations handled by SPD specialty units are generally processed in a thorough and expeditious manner.⁸ Sustained findings are referred to the Chief of Police who decides any disciplinary action.

Confidential Criminal Investigations

When SPD receives any allegation of criminal behavior by an employee, and the employee is unaware of the complaint/allegation, the matter is confidentially investigated by the appropriate SPD follow-up unit. These investigations may include interviews of witnesses, the review of available evidence, physical surveillance, electronic surveillance, undercover activities, and cooperation with other agencies. The OPA Director is usually informed of the existence of these investigations. At the conclusion of an investigation and any prosecution, the available evidence is forwarded to OPA as described above. The investigation may not reveal a prosecutable violation of criminal law, but might develop some violations of departmental policy and procedure for which discipline is appropriate.

Other agencies investigating such allegations may notify SPD of confidential criminal investigations, but there is no requirement to do so. The Assistant Chief of Criminal Investigations may decide to join the investigation or simply monitor it. As noted above, the OPA Director and the OPA Auditor are aware of the existence of investigations if SPD has been notified, but get no details until the

⁸ One investigation took an unusually long time and this was traced to an individual performance issue. This has not been repeated.

matter is resolved to ensure the integrity and confidentiality of the investigation.

SPD's system has important features aimed at fair and expeditious investigations of allegations of criminal conduct:

- Assignment of experienced investigators to criminal investigations involving police employees;
- Immediate referral of allegations in other jurisdictions to command-level officers in those jurisdictions;
- Regular and frequent review of the progress of investigations by the Assistant Chief of Police for the Criminal Investigations Bureau;
- Review of completed investigations by senior members of the Criminal Investigations Bureau;
- Referral of all completed investigations to the prosecuting attorney for a decision regardless whether the investigators believe there is a prosecutable case; and
- Monitoring and tracking by the Chief of Police and the OPA Director, plus notice to the OPA Auditor.

We conclude Seattle has an excellent system for conducting, managing, and tracking criminal investigations of police department employees.

180-Day Rule

Under the current contract with the Seattle Police Officers Guild (SPOG), once OPA opens an investigation, it has 180 days to complete the inquiry and refer its findings to the Chief of Police if discipline is to be imposed. Where criminal allegations are initially investigated by a specialty unit within the Department or are handled by an external agency, the 180 days is generally tolled until those investigations are complete and any prosecution is concluded and OPA begins its administrative review. However, the most recent SPOG contract contains some provisions that are imprecise or unclear concerning the interplay of the 180-day rule and criminal investigations and prosecution. Though it does not

appear that any specific OPA case has been negatively impacted by what can be confusing terms, a review of contract language is underway to determine whether changes should be suggested for the upcoming contract negotiations. A more comprehensive discussion of the 180-day rule in cases involving criminal investigations and prosecutions may be the subject of a separate study.

National Practices

Civilian oversight of law enforcement in the U.S. continues to evolve. The models for structure are almost as numerous as the communities involved. The National Association for Civilian Oversight of Law Enforcement (NACOLE) provides a forum for professionals to exchange information and technologies.

At the 2009 NACOLE annual conference in Austin, a Review Board member conducted an unscientific survey of perhaps twenty-five civilian oversight agencies⁹ regarding their approach to criminal investigations. All reported informally that criminal investigations are the province of the law enforcement agency and the administrative review of allegations waits for the conclusion of the criminal case.¹⁰ A local prosecutor, who usually is an elected civilian, will often be closely involved in a public integrity investigation, but the law enforcement agency controls the quality and extent of the investigation. In none of the localities surveyed do the civilian oversight programs ever have an opportunity to review the criminal cases for sufficiency and fairness. This is particularly the case where there is a separate complaint-driven civilian agency investigating misconduct. Their major concerns are use of force, abuse of authority, and discourtesy. Use of force issues are usually addressed by the civilian bodies only as to conformance to departmental policy and not with a view to a criminal prosecution. If the civilian complaint body or review body receives a criminal allegation it forwards the information and “IA does its thing.” There

⁹ Civilian oversight and complaint authorities surveyed included Los Angeles, New York City, San Francisco, Tucson, San Diego, Denver, Salem, OR, Richmond, CA, Akron, and Austin.

¹⁰ In deadly force cases, Austin PD and Los Angeles PD launch parallel and separate administrative investigations to isolate compelled officer statements from the criminal investigators.

usually is no feedback on the results unless someone is charged and there appears generally to be no civilian review of the quality or fairness of the criminal investigation or prosecution. A comprehensive survey of nationwide practices is beyond the scope of this report, though it is anticipated that issues related to criminal investigations of law enforcement personnel will be addressed at the 2010 NACOLE Conference.

Most cities and counties are still in their first iterations of civilian oversight often after or amid much controversy and naturally are focused on issues of force and fairness. The Oakland, Los Angeles, and Cincinnati systems were imposed in consent decrees in federal court. Many communities are still struggling with the details of legislation and labor contracts just to gain access to officers and administrative investigations. Seattle is in its third version of oversight since a civilian auditor was first appointed in 1992.

With respect to civilian oversight of criminal investigations Seattle appears to be somewhat unique in allowing the civilian oversight bodies – OPA Director, OPA Auditor, and OPA Review Board – the opportunity to review these investigations for fairness and completeness. This is done in Seattle after the conclusion of the criminal investigations and adjudication of any charges and does not infringe on the independence or prerogatives of criminal investigators and prosecutors. Further, Seattle is in conformance with the common practice of having separate units conduct the criminal and administrative investigations independently and in succession. Separating investigations protects the integrity of the criminal investigations and the rights of employees under investigation, and still preserves the department's ability to obtain full and truthful cooperation from employees in the internal investigations. We believe that the community can feel confident that this part of the process of law enforcement accountability is sound.

Respectfully Submitted,

Kathryn Olson, Director
Office of Professional
Accountability

Patrick Sainsbury, Chair
Office of Professional
Accountability Review
Board

Michael Spearman,
Auditor
Office of Professional
Accountability

Date:

Date:

Date:

Appendix

Extracts of disciplinary cases involving potential criminal allegations from Office of Professional Accountability reports to the Mayor August 2008 to September 2009.

Over a fourteen month period of time there were fourteen disciplinary cases involving criminal allegations. Violations of department policy were sustained in six OPA cases out of the fourteen. The fourteen potential criminal cases were part of several hundred disciplinary cases investigated by OPA during that time. These cases are presented only to illustrate what kinds of criminal allegations can result in an OPA investigation.

Synopsis	Action Taken
Complainant alleged named employee, who was associated with complainant's business and had had access to funds belonging to the business (business unrelated to named employee's employment), misappropriated funds for personal use.	Criminal investigation, and review by prosecutor, determined any alleged misconduct was likely a "misguided attempt to raise money for the (business)" and complicated by a lack of business experience and poor record keeping by complainant and named employee. Investigation found insufficient evidence to support a criminal charge. Evidence also found that named employee may also have actually contributed some of her own money to the benefit of the business. ADMINISTRATIVELY UNFOUNDED:
The complaint states that the employee, while off duty, was observed driving his personal vehicle and smoking from a device commonly used to smoke marijuana and other illegal substances.	The investigation determined that the employee has a medical condition that occasionally requires him to use an assisted breathing device. The investigation determined that the device appears to have been mistaken for a marijuana pipe. There was no evidence that the employee was unlawfully using controlled substances. Finding—ADMINISTRATIVELY UNFOUNDED
The complaint alleged that the named employee had unwanted physical contact with her while both were on-duty.	Insufficient evidence existed to establish a crime and/or that misconduct had occurred. The evidence available could neither prove nor disprove the allegation. Finding—NOT SUSTAINED
A former spouse alleged that the named employee violated multiple conditions of a parenting plan.	The investigation determined that the employee had acted lawfully and that there was no nexus between the officer's employment and the alleged misconduct. The dispute would best be settled as a civil matter, which is being pursued. Finding—ADMINISTRATIVELY UNFOUNDED
The employee was arrested and charged with driving while intoxicated.	The employee plead guilty to the charge of negligent driving. Finding—SUSTAINED
The complaint alleged that a counterfeit watch scheduled for destruction had been removed from the evidence warehouse.	The investigation was unable to identify any possible subjects or investigative leads. Finding—ADMINISTRATIVELY INACTIVATED
The complainant stated that he had	The complainant subsequently denied making any

Synopsis	Action Taken
<p>purchased narcotics from the named employee.</p>	<p>allegations and stated that he must have been drunk or high to make such an assertion. No corroborating evidence could be developed. Finding—ADMINISTRATIVELY UNFOUNDED</p> <p>The complainant upon being arrested for an illegal drug transaction, alleged that two unknown officers know as “Starsky & Hutch” have engaged in a pattern of theft of cash from low-level street drug dealers and “crackheads.” Interviews were conducted to include confidential informants and no evidence to corroborate the complainant’s assertions could be developed. The case has been inactivated pending the discovery of material evidence that would warrant further investigation. Finding—ADMINISTRATIVELY INACTIVATED</p>
<p>It was alleged that the named employee provided money and illegal narcotics to a suspected drug dealer.</p>	<p>The allegation consisted of unsubstantiated assertions based on hearsay and exaggerated opinion. Not a scintilla of evidence existed to show that the named employee was involved in any illegal activity. Finding— ADMINISTRATIVELY UNFOUNDED</p>
<p>The allegation advised that the employee had engaged and paid a known prostitute for services while out of state. It further alleged that he had attempted to look for prostitutes in Seattle in a Department vehicle.</p>	<p>The evidence and the employee’s candid admission established that the employee had engaged in the misconduct as alleged. Finding—SUSTAINED</p> <p>The evidence in the second allegation established that the employee was involved in a work related assignment and had not engaged in any misconduct. Finding—UNFOUNDED</p>
<p>The complaint alleged that the named employee inappropriately touched the complainant while she was being taken into custody.</p>	<p>The evidence convincingly established that the named employee followed department policy and training standards. The evidence showed that the conduct did not occur as alleged. Finding—UNFOUNDED</p>
<p>It was alleged that the named employee committed a DV related violation and also violated an existing no contact order. It is further alleged that the named employee made statements during the investigation that were not accurate.</p>	<p>The preponderance of the evidence indicated that the assault had occurred as reported. Finding—Violation of Law—SUSTAINED</p> <p>Further, the employee was aware of the existence and terms of the no contact order and violated the conditions. Finding—Violation of Law—SUSTAINED</p> <p>The investigation determined that the employee had not provided complete, truthful and accurate answers to questions while being interviewed. Finding— Professionalism—Honesty--SUSTAINED</p>
<p>The allegation stated that an SPD Dispatcher, while off-duty, contacted a 16-year-old male at a grocery store, took him home where she provided alcohol and</p>	<p>The investigation determined that the named employee engaged in the misconduct as alleged. Further, the employee had knowledge that the juvenile was a runaway and failed to promptly</p>

Synopsis	Action Taken
engaged in consensual sex.	notify authorities. Finding – SUSTAINED
Named officer, while off-duty and driving his personal vehicle, was arrested and found guilty of DUI.	Violation of Law (DUI) – SUSTAINED The evidence established named officer, while off-duty and driving a private vehicle, committed the crime of DUI. Such conduct also constitutes a violation of Departmental policy, resulting in an administrative finding of sustained misconduct. Named officer received a 3-day suspension without pay for the administrative violation.
Named employee, a probationary officer at the time of the alleged misconduct, was arrested for investigation of assault for an incident in which she was involved while off-duty and out of state.	Violation of Law (Assault)/Administrative – SUSTAINED The evidence established named officer, while off-duty and out of state, became involved in a taxi fare dispute, in which named officer assaulted the cab driver, using her Department badge as a cutting instrument, and identifying herself as a Seattle Police Officer. She also was uncooperative with the local police agency that responded. The equivalent conduct in Washington State would constitute the crime of aggravated assault. The named officer was terminated from employment.