

# EXHIBIT A TO COWART DECLARATION

**Accountability Assessment  
21CP Solutions LLC**

# An Assessment of the City of Seattle's Police Accountability System

December 2019

21CP Solutions



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## Executive Summary

In July 2019, the City of Seattle hired 21CP Solutions, LLC (21CP) to work with the City of Seattle and the United States Department of Justice, with the assistance of stakeholders and accountability partners, to develop a methodology to assess the Seattle Police Department's accountability system as it relates to officer discipline and appeals process. The City of Seattle further engaged with 21CP to conduct the assessment. This report follows that assessment.

During the 2011 *Investigation of the Seattle Police Department*, the Department of Justice found that the police department engaged in a pattern or practice of unnecessary or excessive force and that SPD officers used force unconstitutionally “nearly 20% of the time.”<sup>1</sup>

As a result of the findings, the City of Seattle entered into a negotiated settlement agreement in July of 2012. The agreement had “the goal of ensuring that police services are delivered to the people of Seattle in a manner that fully complies with the Constitution and laws of the United States, effectively ensures public and officer safety, and promotes public confidence in the Seattle Police Department (“SPD”) and its officers.”<sup>2</sup> The parties agreed that “a fundamental goal of the revised use of force policy will be to account for, and review or investigate, every reportable use of force and, where necessary, to reduce any improper uses of force while serving to direct resources to the most serious uses of force.”<sup>3</sup>

The court-appointed monitor published a systematic assessment of SPD use of force in April of 2017 and found that SPD officers use force less often than before the consent decree and when they do use force, it is less serious force.<sup>4</sup> In addition, the monitor concluded that “officers used force that was consistent with SPD policy more than 99 percent of the time.”<sup>5</sup> Moreover, in every instance where the monitoring team found that an officer had used force out of policy, SPD’s Force Review Board had already identified the force as being out of policy.

In 2017, the city council passed an ordinance that further reformed the city’s accountability system (hereinafter, the “accountability ordinance”). The ordinance was included several substantive

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<sup>1</sup> Investigation of the Seattle Police Department, Findings Letter, December 16, 2011. [https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/5436d96ee4b087e24b9d38a1/1412880750546/spd\\_findletter\\_12-16-11.pdf](https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/5436d96ee4b087e24b9d38a1/1412880750546/spd_findletter_12-16-11.pdf).

<sup>2</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Settlement Agreement and Stipulated [Proposed] Order of Resolution, at p. 5.

<sup>3</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Settlement Agreement and Stipulated [Proposed] Order of Resolution, at p. 17.

<sup>4</sup> The monitor found a “60 percent reduction in the number of moderate- to high-level uses of force” in the 2014-2016 period the monitor studied and that these improvements occurred without officer injuries or crime increasing.

<sup>5</sup> Seattle Police Monitor, *Ninth Systemic Assessment: Use of Force*, April 2017, at p. 8.

changes to the discipline appeals process for instances when an officer is disciplined for misconduct. The ordinance's passage occurred while the city was negotiating a new labor agreement with the Seattle Police Officers Guild (SPOG); and the ordinance provided that provisions "subject to the Public Employees Collective Bargaining Act, chapter 41.56 RCW, shall not be effective until the City completes its collective bargaining obligations."<sup>6</sup> The federal court found the City of Seattle had reached substantial compliance with the consent decree requirements in January of 2018. In November of 2018, the city council approved a new labor agreement with SPOG. The city council also approved a resolution asking the federal court to review parts of the agreement that appeared inconsistent with the what is known as the "accountability ordinance."

On May 21, 2019 the court found that the City of Seattle had fallen partially out of full and effective compliance with the Consent Decree due to concerns about the disciplinary appeals process and its impact on accountability. The Court ordered the City to develop a methodology (1) to assess the present accountability regime, and (2) for how the City proposes to achieve compliance. The purpose of this report addresses the first part of the court's order.

This assessment had three broad objectives. The first was to gain an understanding of the current state of use of force by SPD officers as well as the accountability system that is intended to oversee and regulate use of force. The second was to learn of accountability systems and disciplinary appeals processes in other cities to develop a broader context before assessing where Seattle's current system lies. The third was to determine whether the use of force investigation and discipline appeals procedures are working as intended and whether there is any room for improvement.

The City of Seattle has one of the most multi-layered and sophisticated oversight systems in the United States. Up to four civilian-led agencies can at some point have a role in reviewing or evaluating a use of force incident or a finding that an officer acted out of policy when using force. These agencies operate independent of and in addition to the units within SPD who investigate and evaluate force incidents (the Force Investigation Team, Force Review Unit and Force Review Board). The civilian-led agencies not only serve as a check on the SPD but on each other as well. The current state of accountability appears to be quite effective in no small part due to the commitment of city leaders, police officers, other city employees, and the public.

That does not mean that the current accountability system, though generally working as intended, could not see improvement in a few areas which this report identifies. The findings summarized below are based on 21CP's site visits, interviews and review of records and are presented in greater detail throughout this report.

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<sup>6</sup> Accountability Ordinance, Section 3.29.510(A).

## Summary of Findings

**Finding 1: Use of Force** – SPD officers continue to use force infrequently and when force is used, findings of out of policy force are rare.

**Finding 2: 180-Day Extension of Time Requests** – While OPA has not formally sought an extension under the current contract because of an ongoing criminal investigation, the requirements for an investigation extension request by OPA to the Guild due to a criminal investigation lack precise definitions that could create a risk that serious misconduct could be held unaccountable.

**Finding 3: The 180-Day Investigation Time Limit** – The prosecution review process creates a risk that when an administrative investigation is paused by OPA during a prosecutor's review of the same matter for consideration of criminal prosecution, time could restart without OPA being aware of the change in status.

**Finding 4: Subpoena authority** – There is uncertainty about the tools available to OPA and OIG to obtain evidence. The breadth of subpoena authority of OPA and OIG, including regarding officers, their family members, and personal records of officers and family members is unclear. There are comparable West Coast cities that also have investigative civilian oversight agencies, similar to the OPA, but with enunciated powers to issue subpoenas for witnesses and records. OPA may have other means, though, to obtain information accessible to an officer involved in an investigation. The assessment team understands that open questions remain regarding whether judicial oversight or other protections are needed, and whether subpoenas (vs. search warrants) can be used for certain classes of evidence.

**Finding 5: Arbitrator selection** – The City and SPOG agreed to an efficient arbitration selection process that is consistent with the terms of the labor agreement. It is too soon to establish whether concerns raised about the impartiality of arbitrators have been satisfied.

**Finding 6: Arbitrator diversity** – The current selection process creates a pool of eligible arbitrators drawn from American Arbitrator Association members on the Pacific Northwest panels. While the process does appear to have been a fair one, the pool drawn from, and the ultimate panel, lacks racial and ethnic diversity and the depth of experience that could be provided by additional requirements.

**Finding 7: Quantum of Proof** – Of the benchmark labor agreements the assessment reviewed, Seattle is unique in that its labor agreement includes specific language regarding the quantum of proof used during arbitration, however there have been no use of force arbitration cases heard in the current discipline appeals process to draw any conclusion that an elevated standard will be used when an allegation of Force-Use is sustained and the officer is discharged.

**Finding 8: Transparency** – It is difficult for the public to track the status of sustained discipline cases through the grievance and appeals process and have access to information about the outcomes of grievances and appeals.

## Introduction

Seattle is by population the 18<sup>th</sup> largest city in the United States, the largest city in King County and the largest city in the State of Washington. The City had a population of approximately 745,000 people in 2018. Seattle is a majority white city (68.6% white, 7.1% Black or African American, Asian 14.5%, Hispanic or Latino 6.5%, American Indian and Alaska Native 0.6%, two or more races 6.6%).<sup>7</sup>

The City of Seattle is a charter city led by a mayor-city council form of government. The current mayor is Jenny Durkan who was elected to office in 2017.<sup>8</sup> The city council has nine members, seven are elected in district elections and two members hold at-large seats.<sup>9</sup> The Seattle City Attorney is elected and the office has been held by Pete Holmes since 2010.<sup>10</sup>

The Seattle Police Department (SPD) is led by Chief of Police Carmen Best who was appointed by the Mayor in 2018.<sup>11</sup> She leads a force of 1,419 sworn officers and 580 civilian employees.<sup>12</sup> Geographically, the department is organized into five precincts (North, East, South, West and Southwest). Precincts are further subdivided into sectors and each of the seventeen sectors has three beats.<sup>13</sup> The Professional Standards Bureau is led by an Assistant Chief and contains a number of units responsible for internal accountability: Force Investigation Team (“FIT”), Force Review Unit (“FRU”), Force Review Board (“FRB), Audit, Policy & Research Section and the Training Section.<sup>14</sup>

In 2011, the United States Department of Justice (DOJ) – the Civil Rights Division and the United States Attorney’s Office for the Western District of Washington issued a report after a nine-month investigation that found that the SPD was engaged in a pattern and practice of unconstitutional policing and that needed reform in use of force, biased policing and supervision. The DOJ attributed their findings to inadequate policies and training and that the chain of command at the time did not “properly investigate, analyze, or demand accountability from its subordinate officers for their uses of force.” The DOJ also found that the Office of Professional Accountability (OPA)<sup>15</sup> investigations were thorough, well-

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<sup>7</sup> <https://www.census.gov/quickfacts/fact/table/seattlecitywashington,US/PST045218>

<sup>8</sup> <https://www.seattle.gov/mayor/newsroom/about-the-mayor>

<sup>9</sup> <https://www.seattle.gov/council/meet-the-council>

<sup>10</sup> <https://www.seattle.gov/cityattorney/about-us/about-pete-holmes>

<sup>11</sup> <http://www.seattle.gov/police/about-us/about-the-department/command-staff>

<sup>12</sup> <http://www.seattle.gov/police/about-us/about-the-department/department-fact-sheet>

<sup>13</sup> <http://www.seattle.gov/police/about-us/about-policing/precinct-and-patrol-boundaries>

<sup>14</sup> <http://www.seattle.gov/police/about-us/professional-standards-bureau>

<sup>15</sup> In 2017, the Accountability Ordinance changed OPA’s name from the Office of Professional Accountability to the Office of Police Accountability. Accountability Ordinance, Sections 3.29.010, 3.29.105-150.



organized, well-documented, and thoughtful.”<sup>16</sup> However, the DOJ also reported that the OPA disposed of too many civilian complaints by sending them to precincts for investigation or by “consistently” overusing the “Supervisory Intervention” finding to dispose of excessive force allegations “to avoid the ‘stigma’ of a formal finding.” The DOJ concluded that the way complaints were disposed of contributed to the pattern or practice of excessive force.<sup>17</sup>

In July 2012 the City of Seattle and the DOJ entered a Settlement Agreement in which the City made commitments to reforms in Use of Force, Crisis Intervention, Stops and Detentions, Bias-Free Policing and Supervision.<sup>18</sup> The settlement also included a Memorandum of Understanding where the City agreed to establish the Community Police Commission and a Crisis Intervention Committee. While not immediately enforceable, as the Consent Decree is, the United States reserved the right to seek enforcement of the MOU if the City and SPD failed to comply with any of its provisions.<sup>19</sup>

Seattle’s accountability system is largely civilian-led with a significant amount of community input. The City of Seattle created the Office of Police Accountability (OPA) in 2002. The OPA is led by a civilian director and has a staff of about 25 civilian and sworn staff members.<sup>20</sup> The Office is primarily responsible for “establishing and managing processes to initiate, receive, classify, and investigate” allegations of misconduct against employees of the Police Department.<sup>21</sup> The role of the OPA in investigating allegations of police misconduct was further clarified in Ordinance 125315 passed by the City Council on May 22, 2017, which is known as the “Accountability Ordinance.”<sup>22</sup>

The Office of Inspector General for Public Safety (OIG) was created in that same Accountability Ordinance. The role of the OIG is “to help ensure the fairness and the integrity of the police system as a whole in its delivery of law enforcement services by providing civilian auditing of the management, practices, and policies of SPD and OPA.”<sup>23</sup> The OIG office opened in May 2018 and currently has a staff of ten civilian employees.

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<sup>16</sup> *United States of America v. City of Seattle*, C12-1282-LJR, Settlement Agreement and Stipulated [Proposed] Order of Resolution, at p. 50.

<sup>17</sup> Findings Letter, at p. 5.

<sup>18</sup> [http://www.seattle.gov/Documents/Departments/Police/Compliance/Consent\\_Decree.pdf](http://www.seattle.gov/Documents/Departments/Police/Compliance/Consent_Decree.pdf)

<sup>19</sup> [https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/542d82c4e4b05b55f138dd67/1412268740152/spd\\_mou\\_7-27-12\\_copy.pdf](https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/542d82c4e4b05b55f138dd67/1412268740152/spd_mou_7-27-12_copy.pdf)

<sup>20</sup> <http://www.seattle.gov/opa/about-us/meet-our-staff>

<sup>21</sup> <http://www.seattle.gov/opa/about-us/what-we-do>

<sup>22</sup> <https://seattle.legistar.com/LegislationDetail.aspx?ID=3041612&GUID=189886AB-6C46-438A-AB56-DA45AE4FCD7B&Options=&Search=&FullText=1>

<sup>23</sup> Accountability Ordinance, Section 3.29.010.

The third piece of Seattle's civilian accountability is the Community Police Commission (CPC). The purpose of the CPC is to develop recommendations on the police accountability system and provide a community-based perspective on law enforcement-related policies, practices, and services affecting public trust."<sup>24</sup> The CPC, which consists of 21 Commissioners, was formed in 2013 as a mandate of the settlement agreement and was made permanent in the Accountability Ordinance.<sup>25</sup>

In addition to the civilian-led organizations described, the City of Seattle also has a Public Safety Civil Service Commission (PSCSC). The PSCSC consists of three members and its powers and duties includes making sure that police officers and firefighters are only disciplined when appropriate through hearing the appeals of employees subject to discipline. Currently, one member is appointed by the Mayor, one by the City Council and one is employee elected. The current chair is the employee-elected member who has served in that capacity since 2003. He has been a police officer with SPD since 1986.<sup>26</sup> The City is in the process of changing the composition of the PSCSC to replace the employee-elected seat with a second Mayoral appointment.

The Accountability Ordinance of 2017, provides that all appeals related to SPD employee discipline were required to be heard by the PSCSC.<sup>27</sup> The Ordinance also mandated that PSCSC Commissioners shall not be current City employees or have been "employed by SPD within the past ten years." However, the Accountability Ordinance also states that implementation of its provisions are "subject to the Public Employees' Collective Bargaining Act (PECBA), chapter 41.56 RCS, shall not be effective until the City completes its collective bargaining obligations."<sup>28</sup> At the time of the ordinance's passage, the City was engaged in collective bargaining with the two sworn employee bargaining units within SPD, the Seattle Police Officers Guild (SPOG)<sup>29</sup> and the Seattle Police Management Association (SPMA).<sup>30</sup>

On January 10, 2018, the Honorable James L. Robart, United States District Judge for the Western District of Washington found that the City was in "full and effective compliance with the Consent Decree" and ordered the commencement of a sustainment period, known as Phase II.<sup>31</sup> The Court noted

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<sup>24</sup> Accountability Ordinance, Section 3.29.010.

<sup>25</sup> <https://www.seattle.gov/community-police-commission/about-us>

<sup>26</sup> <https://www.seattle.gov/public-safety-civil-service-commission/members-and-staff>

<sup>27</sup> Accountability Ordinance, Section 3.29.420.

<sup>28</sup> City of Seattle Ordinance 125315 (Accountability Ordinance), section 3.29.510(C).

<sup>29</sup> The City reached a new agreement with the Guild on November 14, 2018.

<sup>30</sup> The City reached a new agreement with the SPMA on November 17, 2017.

<sup>31</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Order Finding Initial Compliance with the Consent Decree, Dkt. # 439.

the City had not yet reached a new labor agreement with the Seattle Police Officers Guild (“SPOG”) and reiterated that it reserved granting “final approval to the City’s new accountability ordinance until after collective bargaining is complete.”<sup>32</sup>

The City Council approved the City’s agreement with SPOG on November 13, 2018 (Ordinance Number 125693).<sup>33</sup> The Council also passed Resolution 31855 requesting “that the City Attorney’s Office petition the Court to review those contract terms that fall within the scope of the Court’s judicial oversight role pursuant to the Consent Decree.” The Resolution asked specifically for review of the following terms of the SPOG agreement:

- Article 3.1 (page 6) – the standard of review and burden of proof in labor arbitration (Seattle Municipal Code (SMC) 3.29.135.F);
- Article 3.6.B-D (pages 9-12) – the calculation, extension and/or re-calculation of the 180-day timeline for the Office of Police Accountability to investigate complaints of misconduct by the Seattle Police Department (SMC 3.29.130); and
- Appendix E.12 (page 84) – Narrowing of legislated subpoena powers of the Office of Police Accountability and the Office of Inspector General.

The SPOG agreement substantively differs from certain aspects of the accountability ordinance. All but one of those differences are the subject of this assessment.<sup>34</sup> According to the City, those included:

- Maintaining arbitration as a method for resolving disciplinary appeals. While the accountability ordinance eliminated the Disciplinary Review Board (DRB) for appeals of SPD discipline decisions and provided for the PSCSC as the only avenue for appeal, both SPOG and SPMA negotiated for the retention of arbitration over disciplinary appeals but agreed to eliminate the DRB.
- Maintaining a presumption of termination in cases involving dishonesty while modifying the description of the quantum of proof needed to sustain termination cases involving stigmatizing conduct in arbitration.<sup>35</sup>

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<sup>32</sup> *Id.*, at p. 15, referring to Court’s Order of September 7, 2017 (Dkt. #413) where the Court conditionally approved the selection and appointment of the OPA Director and the Inspector General.

<sup>33</sup> The SPOG Agreement provides that City ordinances, such as the Accountability Ordinance, “are paramount except where they conflict with the express provisions of this Agreement.” SPOG CBA Art. 18.2.

<sup>34</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, City’s Response to Order to Show Cause, pp. 12-14.

<sup>35</sup> “In accordance with the goal expressed in the Ordinance, the City and SPOG agreed to treat dishonesty in the same manner as other cases of misconduct. See SPOG CBA Art. 3.1. SPOG did not agree, however, to abandon a broader, long-

- Restriction on subpoena power for OPA and OIG.<sup>36</sup>
- Reducing the limitations period for the City to take disciplinary action from five years to four.

On May 21, 2019 the Honorable Judge Robart found “that the City has fallen partially out of full and effective compliance with the Consent Decree” in “one of its additional areas of responsibility – accountability.”<sup>37</sup> The Court’s expressed concern about accountability is “that any provision that implicates officer discipline related to use-of-force inherently implicates all three of the Consent Decree’s purposes, and thus, must be consistent with them.” Thus the Court directed:

“[T]he City and the United States, with the assistance of the Monitor and the CPC, to formulate a methodology (1) for assessing the present accountability regime, and (2) for how the City proposes to achieve compliance.” (Court’s 5/21/2019 Order at 13-14 (Dkt. #562).)

In July 2019, the City of Seattle hired 21CP Solutions, LLC (21CP) to work with the parties to the Consent Decree, (the City and the Department of Justice), and with the assistance of stakeholders and accountability partners to develop a methodology to assess the Seattle Police Department’s accountability regime as it relates to officer discipline and appeals process.

On August 15, 2019, the City of Seattle filed a stipulated motion seeking the approval of its proposed methodology to conduct a survey and accountability assessment. (Mot. (Dkt. #576)). The proposal sought to “present objective, evidence-based observations to inform the decisions of the City’s elected leaders, appointees and community... including an analysis of these four features of City’s accountability system: (1) 180-day timeline for disciplinary investigations; (2) burden of proof and standard of review in disciplinary appeals; (3) subpoena authority of OPA and OIG; and (4) features of arbitration to promote public confidence.”<sup>38</sup>

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standing arbitration principle that generally allows an arbitrator to apply a higher evidentiary standard in well-accepted circumstances, such as discipline of an employee with long tenure, a good record, or facing career-damaging allegations. The new SPOG CBA thus requires arbitrators to apply a burden of proof ‘consistent with established principles of labor law.’ See *id.* Article 3.1 further provides an example of such established principles: the arbitrator may use an ‘elevated standard of review ... for termination cases where the alleged offense is stigmatizing to a law enforcement officer.’” *United States of America v. City of City Seattle*, C12-1282-LJR, City’s Response to Order to Show Cause, pp. 13.

<sup>36</sup> “3.29.125 E and 3.29.240 K – The City agrees that these sections of the Ordinance will not be implemented at this time with regard to bargaining unit employees and their family members, and third party subpoenas seeking personal records of such employees and their family members. After the City further reviews questions raised concerning the authority and potential need for OPA and the OIG to issue such subpoenas, the City may re-open the Agreement for the purpose of bargaining over these sections of the Ordinance and the parties will complete bargaining prior to the OIG or OPA issuing subpoenas to bargaining unit employees and their family members, or a third party subpoena seeking the personal records of such employees and their family members.” (SPOG Appendix E.12)

<sup>37</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Order Finding City of Seattle Partially Out of Compliance, May 21, 2019, p.2 (Dkt. #562).

<sup>38</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Declaration of Walter Katz (Dkt. #577), at pp. 5-6.

The Court authorized the City of Seattle to proceed with the proposed assessment on October 15, 2019.<sup>39</sup> This interim report is an assessment of the current accountability regime of the City of Seattle. This assessment explores those three areas as well as “features of discipline grievance arbitration that affect public confidence, such as degree of transparency and the selection process for arbitrators.”<sup>40</sup>

The City further engaged with 21CP to conduct the assessment and produce this report. 21CP Solutions, LLC (21CP) is a global consulting group that assists police and law enforcement organizations to meet the challenges of policing in the 21st Century. 21CP’s mission is to assist law enforcement agencies in employing best practices for effective, integrity-driven policing that is grounded in the principles of procedural justice and focused on building trust, improving relationships, and increasing safety in collaboration with every community. 21CP’s experts have significant experience working together on major assessment, monitoring, and consulting projects, and are dedicated to providing high quality professional service to our clients and the people they serve.<sup>41</sup>

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<sup>39</sup> *United States of America v. City of City Seattle*, C12-1282-LJR, Order Regarding the City’s Motion to Approve It’s Accountability Methodology (Dkt. #585).

<sup>40</sup> *Id.* at pp. 4-5.

<sup>41</sup> The project managers and experts from the 21CP team include Ronald L. Davis, 21CP Partner, Sean Smoot, 21CP Partner, Darrel W. Stephens, Senior Advisor to 21CP and Walter Katz, Director of Professional Services, Benchmark Analytics (a subcontractor to this project).



## Methodology

Prior to developing the methodology for this assessment, members of the assessment team conducted two multi-day site visits to Seattle in June and July 2019 that included meetings and interviews with key stakeholders.<sup>42</sup> including:

This assessment examines both the current accountability and discipline appeals environment in Seattle learned through the review of documents, data and interviews with stakeholders. 21CP also distributed a survey of police accountability systems to the next ten larger and next ten smaller cities than Seattle nationally. Other cities, including those in the group of traditionally comparable West Coast cities, were also included in the survey.

The assessment team conducted a second site visit in October and again met with and interviewed key stakeholders.<sup>43</sup> All agencies within the City were very cooperative in providing information and data and making their key personnel available for interviews and follow-up questions.<sup>44</sup> Section I of the assessment is a summary of the current use of force accountability system and describes how a range of City entities interrelate from the time a use of force investigation commences through the appeals process.

Section II presents data about use of force and use of force accountability for the year of 2018 as well as the first six months of 2019. This was a period of time when the Accountability Ordinance and the

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<sup>42</sup> Key stakeholders that the site team met with included:

- A public meeting of the CPC;
- Michelle Chen, Legal Counsel to the Office of the Mayor;
- Pete Holmes, City Attorney and City Attorney staff;
- Carmen Best, Chief of Police, the Deputy Chief, Chief Strategy Officer and Policy Advisor;
- Merrick Bobb, Consent Decree Monitor;
- The Rev. Harriet Walden, Emma Catague, and Isaac Ruiz, CPC co-Chairs, CPC Interim Executive Director Bessie Scott, and other CPC staffers advisors.
- Andrew Myerberg, OPA Director;
- Lisa Judge, Inspector General;
- Attorneys from the U.S. Department of Justice.

<sup>43</sup> Stakeholders in the October site visit included the co-chairs and executive director of the CPC, city council members and staff, the OPA Director and staff, the Inspector General and staff and the City Attorney and staff.

<sup>44</sup> Officers and Departments included the City Attorney, the Police Department, the Office of Police Accountability, the Office of Inspector General, the Community Police Commission, the Public Safety Civil Service Commission. Valuable information was also provided by the Office of the Mayor as well as City Council members and staff.

labor agreements were taking affect and will summarize the state of use of force by Seattle Police Department officers. It will also describe ongoing efforts to determine whether officers are in compliance with the Department's use of force policies and procedures and being held accountable in instances where the force used was not within Department policy.

Section III describes the survey process of the accountability systems and discipline appeals processes in other American cities. Seventy-nine police departments received surveys and 39 departments responded. From those surveys, which had a particular focus on the appeal of discipline decisions, we learned about the rich variety of approaches to accountability.

Section IV assesses the City of Seattle's disciplinary investigation process with a focus on two particular areas of inquiry that have been raised by the City Council, the Court, as well as stakeholders during our three site visits: (1) management of the 180-day investigation time limit for disciplinary investigations and (2) clarity over the subpoena authority of the Office of Police Accountability (OPA) and the Office of Inspector General (OIG).

Section V assesses the discipline appeals process for police officers in Seattle, which currently has two available paths: the Public Safety Civil Service Commission (PSCSC) and binding arbitration. In addition to the survey of police agencies, the assessment team also reviewed open source materials such as city charters, labor agreements, municipal codes, and civil service rules of other cities on the West Coast with a particular focus on arbitrator selection, quantum of proof and transparency.

## I. Overview of Seattle's Use of Force Accountability System

The Seattle Police Department regulates use of force through Title 8 of the Department Manual in process that can involve more than a half dozen City of Seattle entities as well as the King County Prosecutor. The SPD records force at the incident level with a computer-aided dispatch (CAD) event. "At the individual officer level, force is documented and recorded as the combination of a force incident, a unique officer, and a unique subject; accordingly, depending on how many officers used force during an incident, a single use of force incident may be associated with multiple uses of force reports."<sup>45</sup> An officer who uses force is obligated to "clearly and reliably report and thoroughly document" each application of force." Officers who witness force are also required to verbally notify a supervisor following any reportable use of force. Supervisors are further required to "clearly and reliably" document each step he or she has taken to investigate and review the actions of an officer who uses force.<sup>46</sup>

Pursuant to SPD policy supervisors are obligated to classify uses of force as Type I, Type II or Type III. Type I uses of force are screened by a Sergeant and documented by the involved officers.<sup>47</sup> Type II uses of force are investigated by a Sergeant. Such investigations are intended to be completed within 30 days. Upon completion of the force investigation, the Sergeant's investigation is reviewed by the officer's chain of command. If at any time during the investigation, the Sergeant or a reviewer "believes there may have been criminal conduct or a serious policy violation," OPA is notified and can initiate an independent investigation.

If the force used appears to be of Type III, the supervisor will call a Force Investigation Team (FIT) supervisor who may initiate an investigation or give other direction. SPD policy requires the Force Investigation Team (FIT) to investigate all Type III uses of force. Within 90 days of shootings and 60 days for other incidents, FIT "will present the completed investigation to the Assistant Chief of the Professional Standards Bureau for review and referral" to the Force Review Board (FRB). SPD policy requires a specific protocol in the event information is obtained or developed during a FIT investigation that criminal conduct or a serious policy violation occurred during the use of force that includes referring the investigation to OPA for determination if a criminal investigation is appropriate. If so, OPA will "will refer the investigation to the Homicide Unit or another investigative body for assignment."

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<sup>45</sup> Annual Use of Force Report, Seattle Police, January 31, 2019, p.3.

<sup>46</sup> SPD Policy Manual 8.400-POL-1 Use of Force Reporting and Investigation.

<sup>47</sup> SPD Policy Manual 8.400-POL-3.

If the investigation reveals a policy violation, the FIT captain will advise the OPA director and refer the policy violation investigation to the OPA, when required by 5.002.<sup>48</sup>

When a use of force investigation is completed it is delivered to the FRB. The FRB, which consists of seven members, is required to “conduct timely, comprehensive, and reliable reviews of Type II cases referred by the FRU, and all Type III cases, and will determine whether: (1) the investigation is thorough and complete; (2) the force was consistent or inconsistent with SPD policy, training, and core principles; and (3) with the goal of continual improvement, there are considerations that need to be addressed.”<sup>49</sup> The FRB Chair is also obligated to refer all serious policy violations to the OPA. The Chair can reach such a conclusion at his or her own discretion or by majority vote of the FRB.

Once OPA receives an internal referral or an external complaint, the Director has approximately 180 days to investigate the misconduct allegation. Investigations are conducted by sworn SPD staff assigned to OPA. The 180-day time limit is a negotiated term of both the SPMA and SPOG labor agreements. There are a number of situations where the time limit can be paused or tolled. There are also number of circumstances where OPA could request the respective union for an extension of time. Those will be discussed in greater detail later in this assessment.

Once OPA completes its investigation, the OIG reviews the case to determine whether to certify the investigation as thorough, objective and timely. If the OPA Director’s recommendation is to sustain one or more allegations, the completed case with a Director Certification Memo (DCM) is sent to the SPD chain of command for review and scheduling of a discipline meeting. The Discipline Committee, which consists of the OPA Director or Designee, Employee’s Chain of Command, the SPD HR Executive Director and the City Attorney is then convened to review the OPA’s proposed finding. If the discipline committee agrees with proposed findings, it recommends a range of discipline that goes to the Chief of Police for consideration.

If the recommended discipline is suspension, demotion, discharge or transfer, the employee is entitled to *Loudermill* hearing. This is a proceeding with the Chief of Police where the employee has the right to offer his or her version of the circumstances prior to the imposition of discipline. (The employee can, of course, forgo the hearing, accept the proposed discipline and the case would be closed at this stage.) After the *Loudermill* hearing, the Chief considers all the information in front of her, including historical discipline data, an employee’s tenure, and prior disciplinary record, and issues a Disciplinary Action Report (DAR) informing the employee of the Chief’s final decision.

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<sup>48</sup> SPD 5.002-POL-1 Requires that all allegations of serious policy violations are referred to OPA for investigation. Serious policy violations that must be referred to OPA include “Unnecessary, unreasonable, or disproportionate use of force.”

<sup>49</sup> 8.500-POL-4 Use of Force – Force Review Board

The officer can either accept the discipline or challenge whether the City had just cause to discipline with a written reprimand, suspension, termination, demotion or transfer. Either the employee or their union can file a grievance with Department's Human Resources Director and the City Director of Labor Relations.<sup>50</sup>

If the matter is not resolved at the grievance stage, that is, the employee does not agree with the Chief's written decision, the officer may seek to appeal the findings or imposed discipline by going "through arbitration pursuant to the collective bargaining agreement or to the PSCSC."<sup>51</sup> According to interviews conducted by the assessment team, the officer often files for a PSCSC appeal and arbitration at this stage and then drop the PSCSC appeal and proceed with arbitration.

There is 30-day time limit from the completion of preliminary grievance steps for SPOG or SPMA to request to advance the grievance to arbitration. However, there is no time limit for how soon after arbitration has been requested an actual hearing must be scheduled. Nevertheless, both the union and the City can initiate the arbitrator selection process and scheduling (the selection process will be explained in greater detail later in this report). Once the selected arbitrator holds a hearing, and reviews evidence and testimony, he or she will determine if the Chief's disciplinary decision was for just cause. The arbitrator then issues an award with remedies for the grievance. The arbitrator can uphold the Chief's findings and discipline, overturn them completely, or modify them in accordance with the contract.

The current SPOG agreement contains specific language on burden of proof and the quantum of proof required to uphold a Chief's decision:

- 3.I.I . . . Disciplinary action shall be for just cause. The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration. For example, and without limitation on other examples or applications, *the parties agree that these principles include an elevated standard of review* (i.e. – more than preponderance of the evidence) for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment.

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<sup>50</sup> Either the Director of Labor Relations, or the Guild may request a meeting between the appropriate parties to discuss the facts of the grievance and such a meeting shall occur within fifteen (15) calendar days from receipt of the Step 3 grievance. The Director of Labor Relations shall thereafter make a recommendation to the Chief of Police. The Chief of Police shall, within fifteen (15) calendar days after receipt of the written grievance or the meeting between the parties, whichever is later, provide the Guild with his/her written decision on the grievance with a copy to the Director of Human Resources. (SPOG Agreement, Art. 14.2)

<sup>51</sup> SPOG Agreement, Appendix E – Accountability Legislation, at p. 91.



In the case of an officer receiving a sustained complaint involving dishonesty in the course of the officer's official duties or relating to the administration of justice, a presumption of termination shall apply. Dishonesty is defined as intentionally providing false information, which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding facts that are material to the investigation.

The SPOG agreement does not define alleged offenses that are stigmatizing to a law enforcement officer that would make it difficult for the employee to get other law enforcement employment.

## II. Use of Force and Accountability from January 2018 to July 2019

Part of this assessment is understanding the extent to which force is used, the outcomes of evaluations and complaints about force, as well as the ultimate outcomes of sustained allegations of use of force that may go through grievance or an appeal. An evaluation of use of force trends is outside the scope of this assessment and the court-appointed monitor published an assessment in April 2017 concluding “that officers, in an overwhelming majority of instances, are affirmatively and actively implementing the requirements of, and principles embodied in, the Consent Decree and SPD’s revised force policy.”<sup>52</sup> The monitor found that “overall use of force by the SPD is down – both across time under the Consent Decree and compared to the time period studied by the original DOJ investigation.”<sup>53</sup>

The assessment team reviewed data from the SPD as well as the OPA and the City Attorney. The SPD published its *Use of Force Annual Report* on January 31, 2019. That report covered use of force incidents that occurred in 2018. The report compares use of force data from 2018 to that of previous years as well as the Monitor’s Ninth Assessment. More recently, the City of Seattle followed the annual report up with a *Comprehensive Use of Force Report* that “evaluated whether force was reasonable, necessary, and proportional, and whether the force conformed to other Use of Force policy requirements.”

“Between January 1 and December 31, 2018, officers were dispatched (either responsive to a 911 call for service or an on-viewed incident) 868,381 times in response to 400,804 unique CAD events.” *Annual Use of Force Report*, Seattle Police, January 31, 2019, p.4. During 2018, “officers reported using force at some level (Type I, II, or III) 2,252 times over 1,385 unique CAD events.”<sup>54</sup> *Comprehensive Use of Force*

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<sup>52</sup> Seattle Police Monitor, Ninth Systemic Assessment: Use of Force, at p. 74.

<sup>53</sup> Seattle Police Monitor, Ninth Systemic Assessment: Use of Force, at p. 2.

<sup>54</sup> SPD categorizes its use of force by Type I through III:

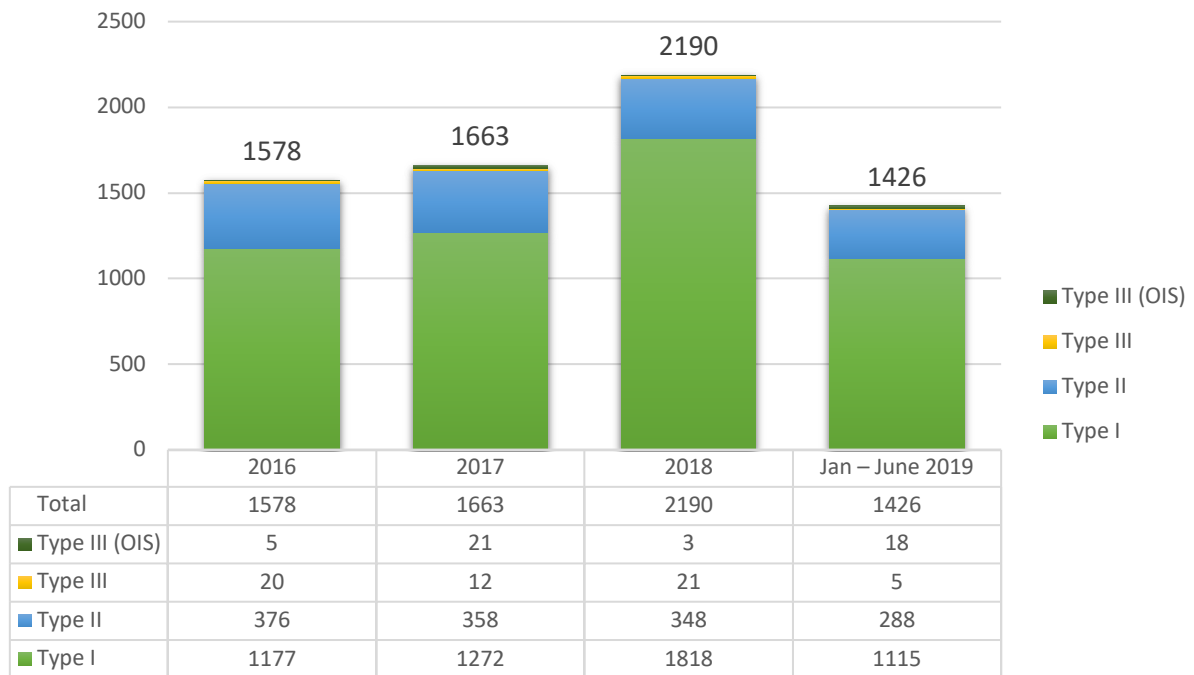
Type I – Actions which “causes transitory pain, the complaint of transitory pain, disorientation, or intentionally pointing a firearm or bean bag shotgun.” This is the most frequently reported level of force. Examples of Type I force, generally used to control a person who is resisting an officer’s lawful commands, include “soft takedowns” (controlled placement), strike with sufficient force to cause pain or complaint of pain, or an open hand technique with sufficient force to cause complaint of pain. Type I uses of force are screened by a sergeant and reviewed by the Chain of Command; the Force Review Unit (FRU) provides quality assurance.

Type II – Force that causes or is reasonably expected to cause physical injury greater than transitory pain but less than great or substantial bodily harm. Examples include a hard take-down and/or the use of any of the following weapons or instruments: conducted electrical weapons (CEWs, or Tasers), OC spray, impact weapon, beanbag shotgun, deployment of K-9 with injury or complaint of injury causing less than Type III injury, vehicle, and hobble restraint. An on-scene (where feasible) sergeant collects available video evidence and witness statements; the evidence packet and analysis of the force is reviewed by the Chain of Command and the FRU. Cases flagged by the FRU for further inquiry, in accordance with policy criteria, plus an additional random 10% of Type II cases are also analyzed by the Force Review Board (FRB).

*Review*, Seattle Police, October 31, 2019, p.7. Officers used Type I force 1,860 times, Type II force 367 times and Type III force 25 times including 3 officer involved shootings.

According to data provided by the City, from January 1 through June 30, 2019, officers reported using force 711 times. That source reported 12 times when officers used Type III force, including 9 officer involved shootings in 4 incidents.

### Force Used by Incident Type



**Force Investigation Team (FIT) response, Force Review Unit (FRU) review.** “In 2018, a total of 753 officers were involved in the 229 cases reviewed by FRU and/or FRB.” *Comprehensive Use of Force Review*, Seattle Police, October 31, 2019, p.15. The FRU reviewed 42 cases and “the involved officers’ use of force was approved in all instances.”

**FRB findings and referrals.** FRB reviewed 188 cases involving use of force and made a determination in 340 uses of force. The FRB approved the use of force in 334 of the 340 instances and disapproved the force used in six instances. In an additional 173 uses of force, FRB deferred a decision as those cases had already been referred to the OPA for investigation.

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Type III – Force that causes or is reasonably expected to cause great bodily harm, substantial bodily harm, loss of consciousness, or death, and/or the use of neck and carotid holds, stop sticks for motorcycles, and impact weapon strikes to the head. Type III force is screened on-scene by a sergeant, investigated by the Force Investigation Team (FIT), and analyzed by the FRB.

“The FRU and FRB have an obligation to refer to OPA any serious policy violation, including any violation around use of force, unless already referred by the chain of command. In addition, the OPA Director sits on the FRB, and can independently take any case for further investigation. While OPA will separately report out on its intakes, investigations, and determinations for 2018, a breakdown of FRU/FRB OPA referrals is presented in Table 16. It should be noted that the numbers reported below refer only to referrals made by the FRB or FRU – they do not include OPA referrals from the reviewing chain of command, subjects, or by third-party complainants.”  
*Annual Use of Force Report*, Seattle Police, January 31, 2019, p.41.

The FRB made a total of 25 referrals to OPA, eight of which were related to potential violations of the use of force policy (which includes de-escalation). Two related to a violation of the in-car video policy; an additional 15 related to other, non-force-related policies. Again, because FRU is required to refer to the FRB any Type II cases that involve a potential policy issue or misconduct, the absence of any referrals from FRU to OPA is to be expected.” *Annual Use of Force Report*, Seattle Police, January 31, 2019, p.41.

Overall in 2018, OPA received 1172 complaints (510 internal and 662 external).<sup>55</sup> According to data provided by OPA to the assessment team, in the first six months of 2019, OPA received 445 complaints (130 internal and 315 external).

Complaints Received	2016	2017	2018	Jan-Jun 2019
Internal	429	430	510	130
External	1,095	883	662	315
Total	1,524	1,313	1,172	445

Of the 1,172 complaints received in 2018, 168 (14.33%) were for use of force (144 internal and 24 external). Internally generated complaints saw an increase over 2016 (86 total – 66 internal and 20 external – 5.6% of 1,524 total complaints) and 2017 (122 total - 88 and 34, 9.3% of 1313 total complaints). According to data provided by OPA to the assessment team, in the first six months of 2019, OPA received 21 internal and 11 external complaints for use of force. The 32 complaints for force represent 7.19% of the 442 complaints received.

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<sup>55</sup> OPA defines an “external complaints” as those received by OPA outside of SPD. “Internal complaints” are forwarded by or initiated from within SPD. A complaint made by a civilian to SPD about the conduct of an officer which is forwarded to OPA would be considered an “internal complaint.”

The 168 Force - Use complaints received by OPA in 2018 represented 448 allegations that were classified for investigation.<sup>56</sup> In contrast to the 2011 findings by the DOJ of an overuse of supervisory intervention, no use of force allegations were classified for either supervisor action or contact log entry in 2018.

### Force – Use Allegations

Classification	2016	2017	2018	Jan-June 2019
Investigation	216	307	448	68
Supervisor Action	1	2	0	0
Contact Log	2	6	0	0

In the first six months of 2019, OPA received 32 complaints that involved Force-Use allegations that resulted in 68 allegations for Force – Use. It should be noted that in 2019, OPA began to separately track (Force – De-escalation) when an officer is alleged to have properly used de-escalation techniques. Formerly, such allegations of failure to appropriately de-escalate were categorized within Force – Use allegations. In the first six months of 2019, OPA classified seven Force – De-escalation allegations for investigation.

### Force Use – Internal vs. External Complaint Source

	2016	2017	2018	Jan-June 2019
Internal	66	88	144	21
External	20	34	24	11
Distinct Cases	86	122	168	32

**OIG certification.** OIG became fully operational in 2019. OIG has since certified 55 OPA cases containing allegations of Force - Use or Force – Reporting (Policies 8.000, 8.100, 8.200, 8.300 & 8.400). Of these 55, 54 were certified as thorough, objective and timely. One case out of the 55 was certified as objective and timely, but not thorough. Of the 55 cases certified by OIG in 2019, 11 involved requests by OIG for further information or investigation.

**OPA Force-Use Investigation Findings.** The assessment team requested data on the outcomes of investigated Force-Use allegations for 2016 through the first half of 2019:

<sup>56</sup> An individual complaint could include multiple allegations against one or more officers.



**Force – Use Allegation Findings (Source, OPA)**

Finding	2016	2017	2018	Jan-June 2019
Not Sustained Lawful and Proper	77	124	266	123
Not Sustained Unfounded	54	59	134	28
Not Sustained Inconclusive	10	18	16	1
Not Sustained Training Referral	11	2	10	11
Not Sustained Management Action	2	6	3	10
Not Sustained Timeliness	2	0	0	0
Sustained	15	6	16	13

The year a sustained finding is issued (i.e. the date of the Proposed DAR for sustained findings, or the completed date of the “OPA 180 Expiration” task in IAPro) will often differ from when the complaint was received by OPA as any incident occurring after June 30<sup>th</sup> will have a completion due date in the following year. In 2018, OPA sustained 16 allegations for Force – Use against six distinct officers and stemming from five complaint investigations. In the first six months of 2019, OPA sustained 13 Force – Use allegations in six cases involving and seven officers.

The assessment team requested additional information on the disciplinary outcomes for the sustained use of force allegations for January 2018 through June 2019. The OPA Director submits a proposed Disciplinary Action Report (DAR) to the Chief, who is the decision maker on findings and discipline.

We requested data from the City Attorney on the status of the 29 sustained force allegations that have occurred in 2018 and 2019. An officer can either accept the discipline or their union can file a grievance. The following table of Force-Use investigations lists the cases that were sustained in 2018 and the first six months of 2019, the discipline action taken, the days the officer was suspended and the status of the case as of early December 2019 when we received the data:

**STATUS OF FORCE-USE SUSTAINED CASES 2018-2019**

Source: OPA and Seattle City Attorney's Office

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File number	Officer	No. of Force Allegations	Action taken	Days Suspended	Current status
2017OPA-0909	Officer A	6	Written Reprimand	N/A	No appeal/grievance filed
2017OPA-1059	Officer B	5	Termination	N/A	Grievance pending; Arbitrator selected
2017OPA-1059	Officer C	4	Termination	N/A	Grievance pending; Arbitrator selected
2018OPA-0238	Officer D	3	Suspension Without Pay	15	No appeal/grievance filed
2018OPA-0316	Officer E	2	Suspension Without Pay	4	Grievance pending; Arbitrator selected
2018OPA-0488	Officer F	1	Resigned Prior to Proposed DAR	N/A	Resigned. No filed appeal/grievance
2018OPA-0245	Officer G	5	Suspension Without Pay	30	Grievance pending; Arbitrator selected
2018OPA-0341	Officer H	1	Suspension Without Pay	2	No appeal/grievance filed
2018OPA-0740	Officer I	1	Suspension Without Pay	2	PSCSC appeal filed and later withdrawn
2018OPA-0783	Officer J	2	Suspension Without Pay	2	Grievance pending;

					Arbitrator selected
2018OPA-0834	Officer K	1	Suspension Without Pay	15	No appeal/grievance filed
2018OPA-0834	Officer L	2	Suspension Without Pay	3	No appeal/grievance filed
2019OPA-0105	Officer M	1	Suspension Without Pay & Disciplinary Transfer	5	No appeal/grievance filed

The assessment team also requested information on the status of *any* sustained Force-Use allegations that currently are pending appeal. Currently, there are 11 force-use related appeals pending per the City Attorney's Office, including the sustained allegations from 2018 and early 2019 listed in the table above.

### STATUS OF FORCE-USE DISCIPLINE APPEALS

Source: Seattle City Attorney's Office

OPA No.	Date of Complaint	Date - Disciplinary Action	Disciplinary Decision	Status
2015OPA-0655	5/8/2015	7/28/2016	10-day susp.	Grievance pending; arbitrator selected
2015OPA-1859	10/29/2015	8/5/2016	1-day susp.	Grievance pending; arbitrator selected
2016OPA-0400	4/14/2016	10/10/2016	Oral rep. Re- training	Grievance pending; arbitrator selected
2017OPA-0112	2/4/2017	11/1/2017	1-day susp.	Grievance pending; arbitrator selected
2017OPA-0113	2/10/2017	11/3/2017	2-day susp.	Grievance pending; arbitrator selected
2017OPA-0550	6/2/2017	4/3/2018	10-day susp.	Grievance pending; arbitrator selected

2017OPA-1059	10/10/2017	7/18/2018	Termination	Grievance pending; arbitrator selected
2017OPA-1230	11/19/2017	4/24/2018	Oral rep.	Grievance pending; arbitrator selected
2018OPA-0238	3/16/2018	10/8/2018	Written rep.	Grievance pending; arbitrator selected
2018OPA-0316	4/11/2018	3/1/2019	4-day susp.	Grievance pending; arbitrator selected
2018OPA-0783	8/13/2018	5/2/2019	2-day susp.	Grievance pending; arbitrator selected

In summary, in 2018, SPD officers rarely used force and serious force was used even more rarely. In 2018, 86% of all uses of force involved Type I, the lowest level, of force. Overall force numbers for 2018 are as follows:

- 400,804 CAD events
- 1,385 CAD events where force was used (1.26% of CAD events)
- 2,252 times force used in CAD events
- 230 force cases reviewed by FRU/FRB
- 614 uses of force in cases reviewed by FRU/FRB
- 435 times FRB approved force
- 6 times FRB disapproved force
- 8 force cases FRB referred to OPA
- 168 force complaints received by OPA (24 external, 144 internal)
- 448 allegations of force OPA classified for investigation
- 445 Force-Use findings issued by OPA
- 16 Force-Use allegations with sustained recommendation by OPA
- 0 Force-Use allegations not sustained due to untimely investigation
- 1 Force-Use sustained recommendation reversed by Chief of Police
- 3 sustained 2018 Force-Use cases (4 allegations) pending arbitration

**Finding 1: Use of Force – SPD officers continue to use force infrequently and when force is used, findings of out of policy force are rare.**

### III. Seattle Discipline Appeals Process Survey

An important part of the scope of work for the accountability system assessment report was to develop and conduct a survey of the systems used in comparable sized jurisdictions. The initial proposal contemplated developing a survey instrument that included questions on a wide range of topics within the accountability system. However, the scope of the work was narrowed to four specific areas of focus based on Judge Robart's October 15, 2019 order addressing the proposed accountability system assessment methodology.

#### Survey Methodology

A draft survey was developed by 21CP and shared with staff from the Mayor's and City Attorney's Offices. Based on the feedback, changes were made and resulted in a final survey of 14 questions including contact information for the respondent.

The initial plan was to survey the ten agencies above and below Seattle in population based on 2017 US Census estimates. In addition, seven cities that Seattle routinely benchmarks against were to be included in the target group.<sup>57</sup> Because of the deadline established for the interim report the survey was sent to all Major Cities Chiefs Association (MCCA) member agencies to ensure an acceptable response in the event the cities initially targeted failed to respond. MCCA has 79 member agencies in the United States and Canada.

The survey request was emailed to all of the agencies on Monday October 28, 2019 with a response deadline of Tuesday November 5, 2019. A reminder was sent to all of the agencies that had not responded on November 4, 2019. In addition, phone calls and personal emails were sent to the target agencies to ensure as many responded as possible.

The survey was closed on November 6, 2019 with a response from 39 agencies – 49% of the MCCA member list. Fourteen (70%) of the 10 cities with populations immediately above and below Seattle responded and all of the seven benchmark cities.

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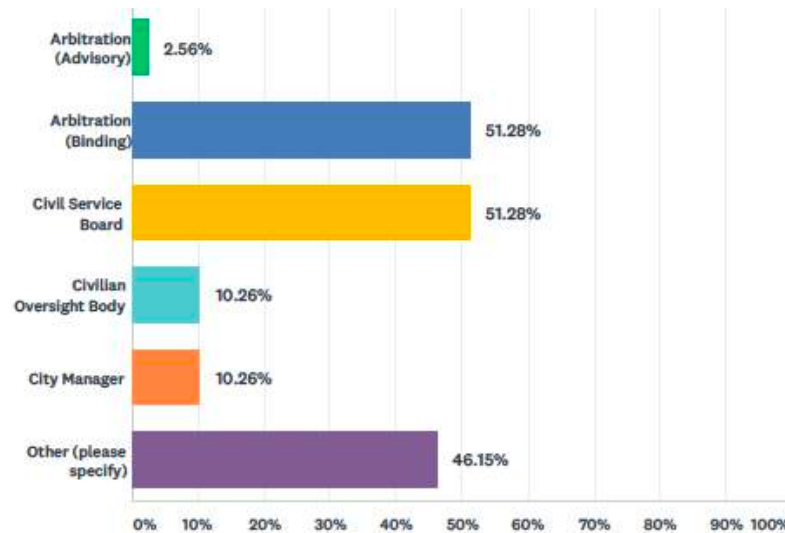
<sup>57</sup> The seven benchmark cities include: Long Beach, Oakland, Portland, Sacramento, San Diego, San Francisco, and San Jose. Seattle is the 18<sup>th</sup> largest city in the United States and has an estimated population of 745,000. Among this group, San Diego (1,425,000) is the largest and Long Beach (467,000) is the smallest in population.



## Survey Analysis

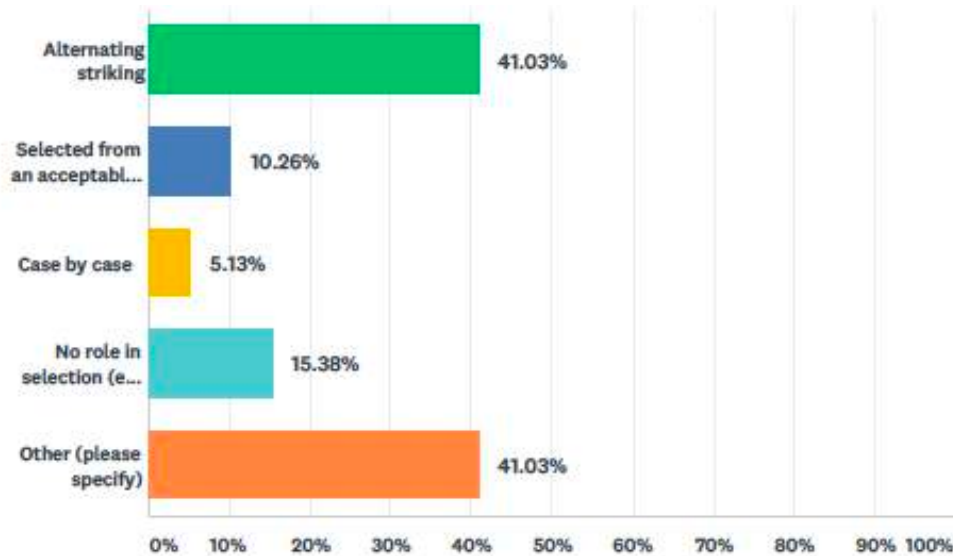
## Appeal Options

The majority of respondents indicate that officers can select binding arbitration or civil service boards to appeal a disciplinary decision. In ten agencies (26%) officers have both binding arbitration and civil service boards to file an appeal. Only one department reported advisory arbitration for disciplinary appeals – that option was available in a city manager form of government. Four agencies indicated disciplinary appeals were heard by the city manager. Other options included the chief of police, state court, a hearing board, retired judge and administrative law judge.



## Selection Procedure

The most common procedure for selecting an arbitrator or hearing officer is the alternate striking method (41%) followed by the use of a standing panel. Six respondents (15%) indicated they have no role in the selection of the hearing officer and other agencies indicated the panels were selected by the civil service commission, mayor or police chief.



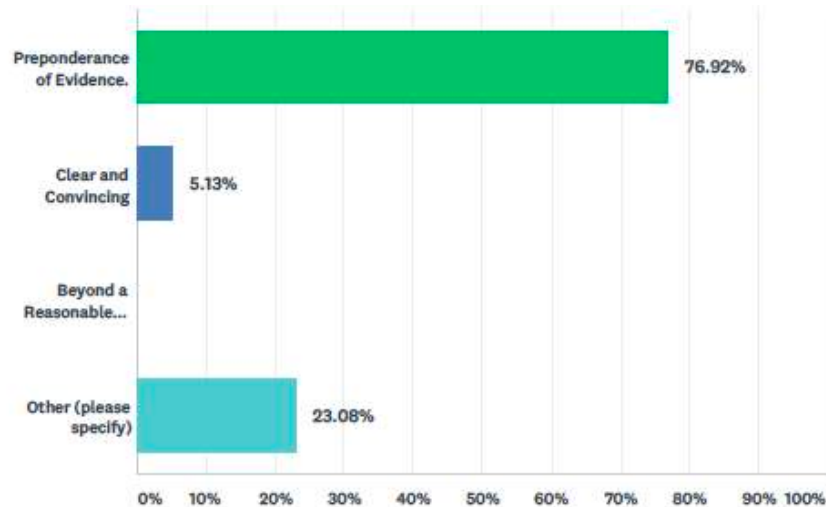
### Required Minimum Qualification

The survey sought information on the minimum qualifications of the arbitrator or hearing officer. There were a wide range of responses but they did not mention any specific qualifications like experience in hearing police cases or training/education on policing. The most frequent response was that qualifications were unknown or not applicable. Five of the agencies of the 35 that responded to the question indicated the hearing officer must be an attorney or retired judge:

- American Arbitration Association (AAA) Approval - 3
- Federal Mediation and Conciliation Service (FMCS) Approval -1
- State List - 3
- Attorney/Retired Judge – 5
- None -2
- As Accepted by Parties – 2
- Mayor – 1
- Other – 8
- NA/Unknown - 10

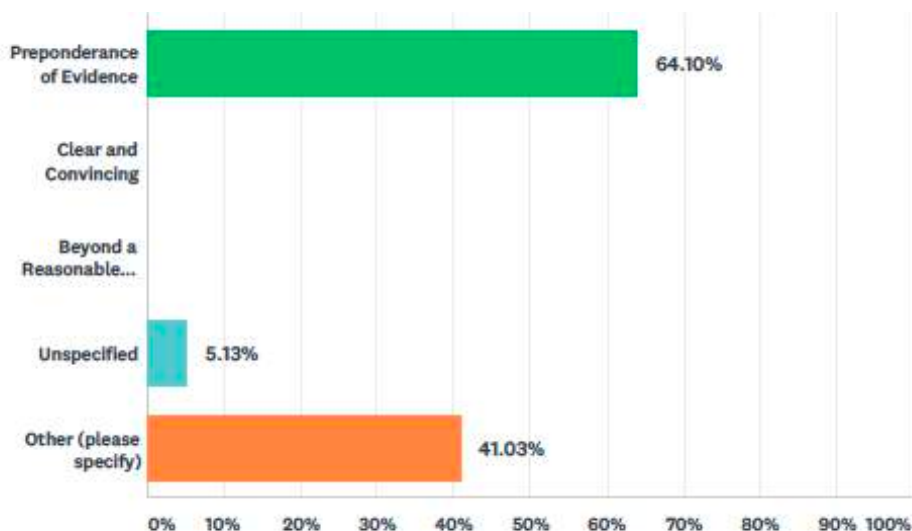
### Quantum of Proof for Chief to Impose Discipline

The quantum of proof required for the chief of sheriff to impose discipline was “preponderance of evidence” for 77% of the agencies that responded to the survey. Two agencies indicated they use “clear and convincing” as the quantum of proof. Also two Canadian agencies indicate they use their civil court quantum of proof “balance of probabilities”.



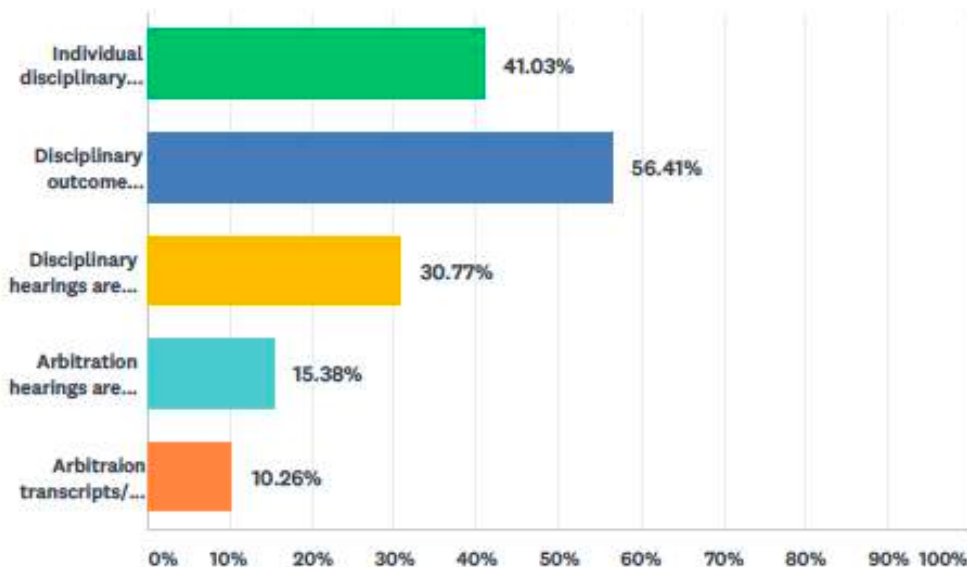
### Quantum of Proof for Arbitrator/Hearing Officer in Appeal

The quantum of proof applied by the arbitrator or hearing officer is “preponderance of evidence” in 25 (64%) of the law enforcement agencies responding to the question. Two agencies indicated the quantum of proof was “just cause” and one reported it was “clear and convincing” for termination and demotion cases.



### Disciplinary Appeals Process Transparency

Twenty-two of the responding agencies (56%) routinely provide periodic statistical reports to the public on disciplinary outcomes. In many cases the agency prepares an annual report that provides information on both internal and external complaints, the investigative outcome and any discipline that has been imposed. Some agencies provide this data more frequently on their websites. In twelve agencies disciplinary hearings are open to the public and in six agencies the arbitration hearings are open.

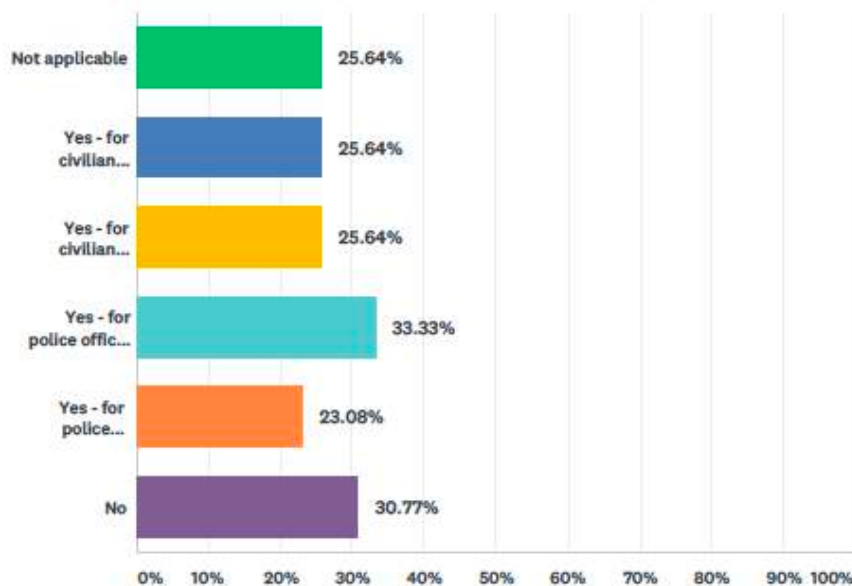


**Appeals Transparency Answer Choices**                      **Agencies**

Individual Outcomes are Made Public	16 – 41%
Statistical Reports Public	22 – 56%
Disciplinary Hearings Open	12 – 31%
Arbitration Hearings Open	6 – 15%
Arbitration Transcripts Public	4 – 10%

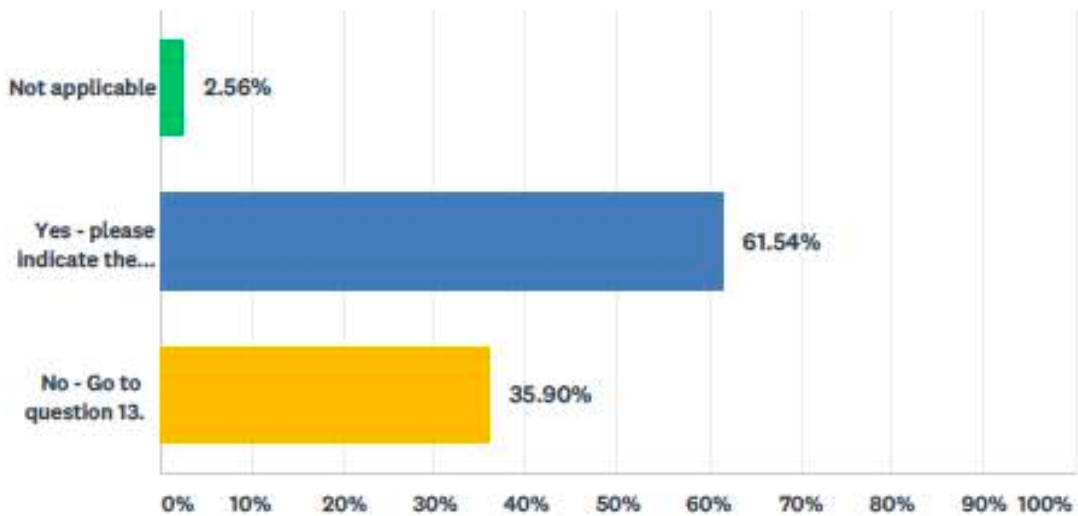
**Civilian Oversight Agency Subpoena Power**

Ten agencies (26%) indicate they do not have a civilian oversight agency and twelve (31%) indicate their civilian oversight agency does not have subpoena power. Ten agencies (26%) indicate their oversight agency has subpoena power for both civilian witness testimony, documents and other materials. One-third of the civilian oversight agencies have subpoena power for officer testimony and documents. Twenty-three percent have subpoena power for police department records and files.



### Time Limits for Completing Internal Affairs Investigations

Twenty-four (62%) report they have a time limit for completing internal affairs investigations that is specified in state law, local ordinance or their collective bargaining agreement. The majority of the agencies (46%) indicate the time limit is 180 days and 33% have a one-year time limit. Twenty-one percent report having time limits of less than 180 days. Most agencies report the time limit begins from the day of discovery of an incident although some indicate the it begins from the date of the incident.

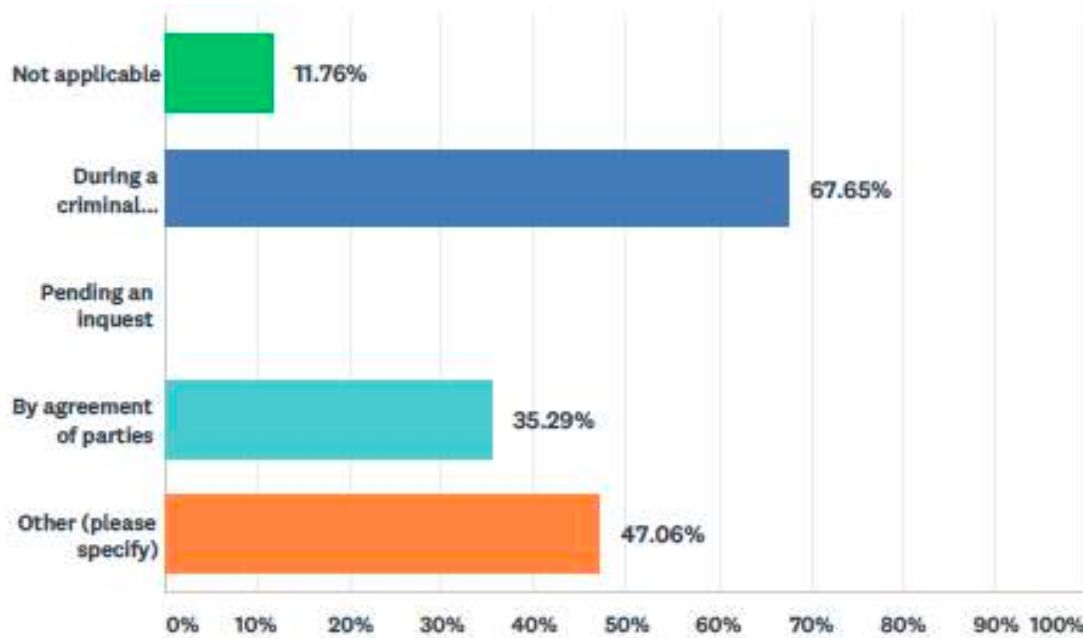


Investigation Time Limit	Agencies
1 Year	8 (33%)
180 Days	11 (46%)
120 Days	1 (4%)
90 Days	3 (13%)
75 Days	1 (4%)

### Internal Affairs Investigation Time Limit Extension Circumstances

Of the 34 agencies that responded to the question, 23 (68%) indicated the administrative or internal investigation time limit could be extended during a criminal investigation. Most agencies defer to the criminal investigation and delay the internal investigation. Thirty-five percent of the respondents indicate the time limit can also be extended by agreement of the parties. Five respondents indicate the

time limit can be extended because of the officer or witness is not available for medical or other reasons. Fifty percent of the responsive agencies indicated that they may not impose discipline if there is a failure to meet the investigative time limit.





## IV. Assessment of Disciplinary Investigation Process

This section assesses the City of Seattle's robust disciplinary investigation process with a focus on two particular areas of inquiry that have been raised by the City Council, the Court, as well as stakeholders during our three site visits: (1) management of the 180-day investigation time limit for disciplinary investigations and (2) clarity over the subpoena authority of the Office of Police Accountability (OPA) and the Office of Inspector General (OIG).

### 180-Day Time Limit

As described in the prior section, Article 3.6B of the Guild labor agreement requires that OPA generally has to complete an investigation within 180 days:

Except in cases where the employee is physically or medically unavailable to participate in the internal investigation, no discipline may result from the investigation if the investigation of the complaint is not completed within one-hundred eighty (180) days after the 180 day start date (the 180 Start Date), or (if submitted to the prosecutor within one hundred eighty (180) days) thirty (30) days after receipt of a decline notice from a prosecuting authority or a verdict in criminal trial, whichever is later.<sup>58</sup>

The Guild agreement allows for the time limit to be paused during a criminal investigation for very specific circumstances.

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<sup>58</sup> The SPOG agreement states further in Article 3.6B: "The 180 Start Date begins on the earliest of the following:

- i. Receipt/initiation of a complaint by the OPA;
- ii. Receipt/initiation of a formal complaint by a sworn supervisor alleging facts that, if true, could without more constitute a serious act of misconduct violation, as long as the supervisor forward the matter to OPA within forty-eight (48) hours of receipt. For cases of less than serious acts of misconduct, the 180 Start Date will begin with the receipt of information where the supervisor takes documented action to handle the complaint (for example a documentation in the performance appraisal system);
- iii. For incidents submitted to the Chain of Command in Blue Team (or its successor), fourteen (14) days after the date on which the initial supervisor submits the incident for review to the Chain of Command;
- iv. OPA personnel present at the scene of an incident; or
- v. If the Office of the Inspector General (OIG) is present at the scene of an incident at which OPA is not present, and if OIG subsequently files a complaint growing out of the incident, the date of the incident.

Provided, however, in the case of a criminal conviction, nothing shall prevent the Department from taking appropriate disciplinary action within forty-five (45) days, and on the basis of the judicial acceptance of a guilty plea (or judicial equivalent such as nolo contendere) or sentencing for a criminal conviction.

In addition to those circumstances defined in subsection B.I, above, the 180 day time period will be suspended when a complaint involving alleged criminal conduct is being reviewed by a prosecuting authority or is being prosecuted at the city, state, county, or federal level or if the alleged conduct occurred in another jurisdiction and is being criminally investigated or prosecuted in that jurisdiction.<sup>59</sup>

What this provision appears to say is that the 180-day time limit *continues* to run if an officer is under criminal investigation and the investigation is for alleged conduct that occurred *within* the City of Seattle regardless of what agency is conducting the investigation. If the alleged criminal conduct occurred *outside* of Seattle, the 180-day time limit is *paused*. Once a prosecuting agency (the City Attorney, a county prosecutor, the U.S. Attorney, etc.) begins to review a criminal investigation, the time limit is also paused until either the prosecuting agency declines to file charges or files charges and the criminal case comes to an end.

The SPMA labor agreement differs from the Guild agreement in a significant way in determining what factors start and stop the 180 Day time limit in the event of a criminal investigation of an officer's conduct. In the SPMA agreement, a criminal investigation conducted by the SPD stops the 180-day calendar if the OPA decides to pause the discipline investigation to see how the criminal investigation develops.<sup>60</sup>

### OPA Extension of Time Requests to SPOG

The SPOG agreement requires that OPA submit a written request to SPOG if it seeks to seek an extension of time to complete an investigation. Article 3.6C of the Guild agreement describes the circumstances when the OPA can request an extension of time from SPOG. The Guild "will not unreasonably deny an extension of... the one-hundred eighty (180) day time restriction if the OPA has made the request before the one-hundred eighty (180) day time period has expired; has exercised due diligence in conducting the investigation of the complaint; and is unable to complete the investigation" for one of the following reasons:

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<sup>59</sup> SPOG CBA Art. 3.6(B)(2).

<sup>60</sup> The one-hundred eighty (180) day time period will be suspended when a complaint involving alleged criminal conduct 1) is being reviewed by a prosecuting authority or is being prosecuted at the city, county, state, or federal level; 2) occurred in another jurisdiction and is being criminally investigated or prosecuted in another jurisdiction; or 3) is being criminally investigated by the Seattle Police Department. The suspension of the one-hundred eighty (180) day time period only applies so long as the OPA is not engaged in an administrative investigation. The one hundred eighty (180) day time period will be tolled until the date OPA re-commences the investigation, or after OPA receipt of either a decline notice from a prosecuting authority, notification regarding the judicial acceptance of a guilty plea (or equivalent, such as a nolo contendere), or notification regarding a verdict in a criminal trial. SPMA Agreement. Article 16.4(C)(1)

1. the unavailability of witnesses/named employee;
2. the unavailability of a Guild representative;
3. the OPA Director position becomes vacant due to unforeseen exigent circumstances;
4. when a complex criminal investigation conducted by the City takes an unusually long period of time to complete, and the City has exercised due diligence during the investigation; or
5. other reasons beyond the control of the Department.

“The Guild will respond to the request in writing, providing the basis for denial, and recognizing that the determination will be based on the information provided to it.”<sup>61</sup>

The assessment team heard from stakeholders about their uncertainty about the criminal investigation provisions in the Guild agreement when the OPA seeks an extension because of the “complex criminal investigation” provision. This will be explained in greater detail below.

**Finding 2: 180-Day Extension of Time Requests – While OPA has not formally sought an extension under the current contract because of an ongoing criminal investigation, the requirements for an investigation extension request by OPA to the Guild due to a criminal investigation lack precise definitions that could create a risk that serious misconduct could be held unaccountable.**

The assessment team reviewed materials from the seven benchmark cities on the West Coast (Long Beach, Portland, Oakland, Sacramento, San Diego, San Francisco, San Jose) including labor agreements, police department policy, civil service policies, city charters and state law. The calculation of time and extension request process appears to be a practice that is exclusive to Seattle.

Seattle’s labor agreements are the only ones reviewed by the assessment that team that require the investigative agency (be it a police department or a civilian agency) to seek permission from a police

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<sup>61</sup> SPOG Agreement Art. 3.6C continues:

1. ...A request for an extension due to the unavailability of witnesses must be supported by a showing by the Department that the witnesses are expected to become available within a reasonable period of time. The City’s request for an extension will be in writing. The Guild will respond to the request in writing, providing the basis for denial, and recognizing that the determination will be based on the information provided to it.

2. The OPA may request an extension for reasons other than the reasons listed above; however, any denial shall not be subject to subsection C1 above. Any approval or denial of a request for an extension other than the reasons listed in C1 shall be non-precedential.

3. Nothing in this section prohibits the OPA from requesting more than one extension during the course of an investigation.

4. In determining whether an extension request under C1 was appropriately denied, the factors to be considered are the good faith of the parties, the facts and circumstances surrounding the request, and the information provided to the Guild by the City.

union in order to go beyond a regulatory investigative time limit. Six of the seven comparison cities are in California where the timing of a misconduct complaint investigation is regulated by state law. As a result, in those six cities—unlike in Seattle and Portland—investigative time limits are set by state law and are not subject to bargaining. California administrative investigation rules are found in Government Code sections 3300 through 3313, the Public Safety Officers Procedural Bill of Rights, and Penal Code sections 832.5 to 832.7. Departments have to serve a peace officer with a notice of intent to discipline within one year of the becoming aware of potential misconduct.<sup>62</sup> Investigations can be tolled, or paused, for a number of specific reasons:

- (A) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.
- (B) If the public safety officer waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.
- (C) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.
- (D) If the investigation involves more than one employee and requires a reasonable extension.
- (E) If the investigation involves an employee who is incapacitated or otherwise unavailable.
- (F) If the investigation involves a matter in civil litigation where the public safety officer is named as a party defendant, the one-year time period shall be tolled while that civil action is pending.
- (G) If the investigation involves a matter in criminal litigation where the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.
- (H) If the investigation involves an allegation of workers' compensation fraud on the part of the public safety officer.<sup>63</sup>

Other than these circumstances, should a year pass without the employing agency notifying the subject officer of an intent to discipline, discipline cannot be imposed. Moreover, the officer's bargaining agent has no role in determining or giving consent to tolling or extending an investigation other than if

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<sup>62</sup> The one-year limitation starts to run once a person authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered the act, omission, or other allegation of misconduct. *Pedro v. City of Los Angeles*, 229 Cal.App.4th 87, 106, 176 Cal.Rptr.3d 777 (2014).

<sup>63</sup> California Govt. Code § 3304(d)(2).

a waiver is sought for a specified time period above in (B). A complaint is sustained if evidence supports the allegation of misconduct by a preponderance of the evidence. (Cal. Govt. Code § 3304(d)(2).)

In Seattle, the process is not as straightforward. The assessment team learned that prior to the current Guild agreement, both the City and the CPC raised concerns that the complexity and length of an SPD criminal investigation had on one occasion caused OPA to miss the 180-day disciplinary deadline, through no fault of OPA. This raised a concern that the current system could allow for some of the particularly serious misconduct to go unpunished. The City sought to address that concern as shown in the below redline comparing the prior Guild contract to what is in the current agreement:

The ~~Department~~OPA may request and the Guild will not unreasonably deny an extension of. . . the one-hundred eighty (180) day time restriction if the ~~Department~~OPA has made the request before the one-hundred eighty (180) day time period has expired; has exercised due diligence in conducting the investigation of the complaint; and is unable to complete the investigation due to one of the following reasons: i) the unavailability of witnesses/named employee; ii) the unavailability of a Guild representative; iii) the OPA Director position becomes vacant due to unforeseen exigent circumstances; iv) when a complex criminal investigation conducted by the City takes an unusually long period of time to complete, and the City has exercised due diligence during the investigation; or to the unavailability of witnesses/named employee or other reasons beyond the control of the Department. . . . The City's request for an extension will be in writing. The Guild will respond to the request in writing, providing the basis for denial, and recognizing that the determination will be based on the information provided to it.

Under the current agreement, the OPA's request for an extension during a criminal investigation by SPD, generally would require that (1) it is an investigation conducted by the City (rather than one by another jurisdiction); (2) it is a "complex" criminal investigation; (3) that the investigation is taking "an unusually long time to complete," and (4) the City has exercised due diligence during the investigation.<sup>64</sup>

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<sup>64</sup> SPOG Agreement, Article 3.6.C.1.

What distinguishes a *complex* criminal investigation from one that is not complex is not defined. What is considered “an unusually long time” is also not defined.<sup>65</sup>

OPA has not sought an extension under the “complex criminal investigation” provision of the contract that was approved in November of 2018; and OPA staff indicated to the assessment team that the need had not arisen so far.<sup>66</sup> The ambiguity in the provision, however, is apparent. Some stakeholders expressed concern that the agreement language could allow for the denial of an extension which meets the undefined requirements of the agreement. Other stakeholders were more optimistic and opined that the Guild cannot deny reasonable requests, and if they did so, OPA could continue with the investigation and the City could proceed to discipline the subject officer. The view was expressed, that if there is a disagreement between the City and the Guild as to the reasonableness of the denial, the question ultimately would be resolved by an arbitrator. As noted above, the ambiguity in the agreement’s language could make the outcome of the arbitrator’s ruling far from certain. It also raises questions whether the expressed goals of certainty, timeliness, and fairness can be met in a scenario where a dispute over the denial of an extension will not be resolved for a significant time after the investigation and the grievance phase are completed.

**Finding 3: The 180-Day Investigation Time Limit process creates a risk that when a case is paused during consideration of criminal prosecution, time could restart without OPA being aware of the change in status.**

Under the SPOG agreement, “The Chief, after consultation with OPA will determine the appropriate investigative unit with expertise in the type of criminal conduct alleged to conduct the criminal investigation and the associated interviews of the named employee(s), witness employee(s) and other witnesses.”<sup>67</sup> During the assessment team’s site visit, the team discussed criminal investigations of officers with both SPD command staff and OPA staff. OPA staff described their process when a criminal investigation referral is made that SPD investigates. The 180 Day time limit starts running from the date of incident and does not stop running until SPD refers the case to the prosecuting agency. SPD

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<sup>65</sup> The complexity of whether the particular circumstances of a criminal investigation support tolling is not found in California where the calculus is comparatively clear. “The reason for this tolling exception is straightforward: Criminal investigations are more nuanced, more complex, and more time consuming, and should not be placed on the same “fast track” as purely administrative investigations.” *Bacilio v. City of Los Angeles*, 28 Cal. App. 5th 717, 724 (2018).

<sup>66</sup> The assessment team was unable to obtain historical extension request data. Until recently, OPA did not track data of extension requests and approvals or denials. Earlier this year, OPA created a new task in its investigation software, IAPro, each time an extension is sought so that extension request outcomes can now be analyzed.

<sup>67</sup> SPOG Agreement, Art. 3.7.



does not have a unit which is tasked with conducting internal criminal investigations, so assignments are made by SPD leadership in consultation with OPA depending on the nature of the incident.

The team observed that SPD does not have a protocol in place that formalizes internal criminal investigations. In some cases a completed investigation is sent by the investigative unit to headquarters that, in turn, transmits the case to the prosecuting agency, such as the King County Prosecutor's Office (KCPO). In other instances, the unit sends the case directly to the KCPO and waits for a decision whether charges will be filed. If charges are not filed, the KCPO will send a declination letter to SPD. In other instances, especially where it appears that charges are unlikely to be filed, an SPD investigator will have a telephonic conversation with the prosecutor and initially receive verbal notification that the KCPO will decline to file charges. SPD then transmits the prosecuting agency decision to the OPA. The OPA Internal Operations and Training Manual states:

Though there is some argument to the contrary, SPOG takes the position that the 180- day timeline continues to run if the Department itself is criminally investigating an officer, even if OPA has not begun an administrative investigation. Once SPD refers the matter for review to the King County Prosecutor's Office (KCPO) or City Law Department, the 180-day clock stops, and does not resume until there is a decline notice or verdict in a criminal trial, whichever is later. However, as noted above, if OPA initiates an administrative investigation while the matter is pending with the prosecuting authority, the 180-day timeline continues to run.<sup>68</sup>

By the terms of the Guild agreement, no discipline may result from a disciplinary investigation if the investigation of the complaint is not completed within 180 days after the start date (the 180 Start Date), or (if submitted to the prosecutor within 180 days) 30 days after receipt of a decline notice from a prosecuting authority or a verdict in criminal trial, whichever is later. Thus it is important that OPA receives prompt notification of the prosecuting agencies decision to not file charges. SPD does not have an internal procedure or a protocol with OPA in place to assure that OPA is immediately notified. OPA staff indicated to the assessment team that SPD notified OPA of a prosecutorial declination but that a few days had elapsed. In such instances, OPA then had to backtrack to discover the exact date that SPD was informed of the declination. Though the situation has not occurred yet, there is a risk that if the disciplinary investigation is tolled at the time the related criminal investigation is sent to the prosecutor, that time starts running again 30 days after the prosecutor declines to follow charges without the OPA receiving prompt notification of the change in status. If time continues to run during the criminal investigation, which apparently is the case for conduct that allegedly occurred within the Seattle city limits, before it is sent to the prosecutor, there is a risk that a case may only have a few days left before the 180-Day time limit expires which would prevent OPA from taking any action.

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<sup>68</sup> Office of Police Accountability, Internal Operations and Training Manual, at p. 43.



So far, no disciplinary investigation has been untimely because of the outlined concerns. That does not mean, however, that a formal notification process for the end of a criminal investigation and prosecutorial action should not be formalized. The assessment team was encouraged that both the OPA and SPD saw value in developing a process to address this issue so that the OPA has up-to-date awareness of the status of a criminal referral.

### OPA and OIG Subpoena Authority

**Finding 4: There is uncertainty about the tools available to OPA and OIG to obtain evidence. The breadth of subpoena authority of OPA and OIG, including regarding officers, their family members, and personal records of officers and family members is unclear. There are comparable West Coast cities that also have investigative civilian oversight agencies, similar to the OPA, but with enunciated powers to issue subpoenas for witnesses and records. OPA may have other means, though, to obtain information accessible to an officer involved in an investigation. The assessment team understands that open questions remain regarding whether judicial oversight or other protections are needed, and whether subpoenas (vs. search warrants) can be used for certain classes of evidence.**

The Accountability Ordinance provides both the OPA and OIG with clear authority to issue subpoenas. The OPA's authority is found in section 3.29.125(E):

When necessary, the OPA Director may issue a subpoena at any stage in an investigation if evidence or testimony material to the investigation is not provided to OPA voluntarily, in order to compel witnesses to produce such evidence or testimony. If the subpoenaed individual or entity does not respond to the request in a timely manner, the OPA Director may ask for the assistance of the City Attorney to pursue enforcement of the subpoena through a court of competent jurisdiction.

The OIG's authority to issue a subpoena is found in section 3.29.240(K):

Issue a subpoena if evidence or testimony necessary to perform the duties of OIG set forth in this Chapter 3.29 is not provided voluntarily, in order to compel witnesses to produce such evidence or testimony. If the subpoenaed individual or entity does not respond to the request in a timely manner, the Inspector General may ask for the assistance of the City Attorney to pursue enforcement of the subpoena through a court of competent jurisdiction.

The assessment team's understanding is that the accountability ordinance was intended to allow the two civilian-led agencies to issue subpoenas to third parties as witnesses or holders of relevant records or materials. Following the adoption of the accountability ordinance in November 2017, the City and SPOG entered into a new labor agreement that was ratified by the City Council.

The new labor agreement limited the subpoena authority of OPA and OIG in Appendix E:

3.29.125 E and 3.29.240 K – The City agrees that these sections of the Ordinance will not be implemented at this time with regard to bargaining unit employees and their family members, and third party subpoenas seeking personal records of such employees and their family members. After the City further reviews questions raised concerning the authority and potential need for OPA and the OIG to issue such subpoenas, the City may re-open the Agreement for the purpose of bargaining over these sections of the Ordinance and the parties will complete bargaining prior to the OIG or OPA issuing subpoenas to bargaining unit employees and their family members, or a third party subpoena seeking the personal records of such employees and their family members.

Along with approving the SPOG agreement, the City Council also passed Resolution 125693 that asked the court to review the “narrowing of legislated subpoena powers of the Office of Police Accountability and the Office of Inspector General.”

The current Guild agreement appears to retain the authority of OPA and OIG to issue a subpoena in the course of carrying out their respective missions. However, that authority in the ordinance is now limited by the current labor agreement. Neither OPA or OIG can issue subpoenas to bargaining unit employees, their families or to third parties that are in possession of personal records of such employees or family members.

OPA staff could not point to instances in the thirteen months since the Guild labor agreement was approved where they would have needed to issue a subpoena to obtain records or secure testimony. However, OPA staff did say that OPA may at times “self-limit” investigations knowing it can't obtain certain records.

OIG staff indicated that they have not yet had a need to issue a subpoena to the City or to a third party. Staff did point out that the OIG is working with a Chief of Police who is “cooperative, collaborative and a partner.” It was emphasized, though, that a “system has to be built for the worst case, not the best case,” and that it is a problem to have a function like the OIG bargain over its authority in labor agreements every few years.

The OPA and OIG may have means other than subpoena authority to attempt to obtain testimony and records available to an officer who is related to an investigation. For OPA investigations,

SPD policy requires an officer's cooperation regardless of a subpoena. Section 5.002 of the SPD policy manual states that "[e]mployees will truthfully answer all questions, render complete, comprehensive statements, and promptly provide all available material related to investigations of alleged policy violations."<sup>69</sup> OPA noted that officers are under a standing order from the Chief of Police to cooperate with OPA interviews and reported no instances of officers refusing to sit for interviews. However, OPA's ability to secure personal records of officers is untested. The assessment team did not learn of instances where the OPA attempted to enlist this provision of the policy manual to prompt a subject officer to disclose personal records either in his or her possession or in the possession of a third party yet ostensibly accessible to an officer, such as photographs archived on a cloud server or bank statements in possession of a bank.

The 21CP survey asked cities to disclose whether their jurisdiction had civilian oversight. Of the 39 respondents, ten of the agencies did not have civilian oversight in their jurisdiction and in twelve jurisdictions, there is a civilian oversight agency but without subpoena authority. The fifteen remaining agencies were able to give multiple responses:

<b>Civilian Oversight Subpoena Answer Choices</b>	<b>Agency</b>
<b>Not Applicable</b>	10 – 26%
<b>Yes – Civilian Witnesses Testimony</b>	10 – 26%
<b>Yes – Civilian Documents/Materials</b>	10 – 26%
<b>Yes – Officer Testimony/Documents</b>	13 – 33%
<b>Yes – Police Department Records/Files</b>	9 – 23%
<b>No</b>	12 – 31%

Ten civilian agencies could issue subpoenas for civilian witness testimony and ten are authorized to issue subpoenas for civilian documents and other materials. Thirteen civilian agencies can subpoena an officer for testimony as well as personal documents and other materials. Nine agencies allow subpoenas for police department internal files and records. One respondent commented that the police department and its staff are required by law to cooperate and provide information and that failure to do so constitutes actionable conduct.

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<sup>69</sup> Policy manual section 5.002, subsection 11 states: Employees will truthfully answer all questions, render complete, comprehensive statements, and promptly provide all available material related to investigations of alleged policy violations. The statements will include all material facts and circumstances surrounding the subject matter of the investigation, which are known by the employee. Omissions of material facts known by the employee will be a failure to cooperate in an internal investigation.

The assessment team next turned its focus on civilian oversight agencies that have investigative powers.<sup>70</sup> According to data provided by the National Association for Civilian Oversight of Law Enforcement (NACOLE) there are about 30 agencies in the United States that, like OPA, have the authority to investigate misconduct, civilian complaints or certain use of force.

The Long Beach Civil Service Commission investigates police misconduct, with emphasis on excessive force, false arrest, and complaints with racial or sexual overtones and has the authority by City Charter “to subpoena and require the attendance of witnesses, and the production of books and papers pertinent to the investigation and to administer oaths to such witnesses to the extent permissible by law.”<sup>71</sup>

In San Francisco, the Department of Police Accountability has similar powers to the OPA to “investigate all complaints regarding police use of force, misconduct.” The DPA has the authority to subpoena witnesses under the City and County of San Francisco Municipal Code section 96.6 and it has the authority to issue subpoenas for third party records.

In 2017, Oakland voters approved Measure LL, which created a Police Commission that has the authority to review and propose changes to Department policies and procedures, requiring the Mayor to appoint any new Chief of Police from a list of candidates provided by the Commission, and having the authority to terminate the Chief of Police for cause. Measure LL also created the Community Police Review Agency (CPRA) to investigate complaints of police misconduct and recommend discipline. The CPRA is required to investigate complaints involving use of force, in-custody deaths, profiling and public assemblies. The Commission can also direct the CPRA to investigate other possible police misconduct. After completing its investigation of a complaint, the CPRA submits its findings and proposed discipline to the Commission and the Chief.

Per Measure LL, the Commission has the powers and duties to organize and oversee the CPRA. Those powers include the authority to issue subpoenas:

Consistent with state law and in accordance with Section 1207<sup>72</sup> of the City Charter, entitled Oaths and Subpoenas, issue subpoenas to compel the production of books, papers and documents and

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<sup>70</sup>For an overview of civilian oversight models, see Stephens, Darrel W., Ellen Scrivner, and Josie F. Cambareri. 2018. *Civilian Oversight of the Police in Major Cities*. Washington, DC: Office of Community Oriented Policing Services.

<sup>71</sup>Long Beach, California City Charter Section 1153. POWERS AND DUTIES OF THE COMMISSION.

<sup>72</sup>Section 1207. Oaths and Subpoenas. Every officer and every member of any Board provided for in this Charter shall, in all matters relevant to his office, have the power to administer oaths and affirmations and to issue subpoenas to compel the production of books, papers and documents and to take testimony on any matter pending before him. If any person subpoenaed fails or refuses to appear or to produce required documents or to testify, said officer or the majority of the members of the board or commission may find him in contempt, and shall have power to take the proceedings in that behalf provided by the general law of the State. (Amended by: Stats. November 1988.)

take testimony on any matter pending before it. If any person subpoenaed fails or refuses to appear or to produce required documents or to testify, the majority of the members of the Commission may find him in contempt, and shall have power to take proceedings in that behalf provided by the general law of the State.<sup>73</sup>

The Portland Independent Police Review has the authority to review internal investigations as well as investigate complaints on its own accord. The ordinance enables the IPR by providing the power to issue subpoenas with certain restrictions on officers who are, nevertheless, required to comply with any direction to cooperate with administrative investigations.

3.21.210 Subpoenas. (Added by Ordinance No. 183657; Amended by Ordinance No. 186416, effective February 7, 2014.) IPR shall have the authority to issue subpoenas for the purpose of compelling witness testimony or the production of documents, photographs, or any other evidence necessary for IPR to fully and thoroughly investigate a complaint or conduct a review. IPR personnel will not subpoena a sworn Bureau member employed by the Portland Police Bureau, but is authorized to direct Bureau members to cooperate with administrative investigations as described in Sections 3.21.120 and 3.21.220. Any person who fails to comply with a subpoena will be subject to contempt proceedings as prescribed by State law; provided that such persons shall not be required to answer any question or act in violation of rights under the constitutions of the State or of the United States.

The City of Sacramento, California created the Office of Public Safety Accountability (OPSA) to “monitor or independently investigate any other matter as directed by the city council pursuant to section 34 of the charter.” Its authority to investigate is not as independent as in other cities in this review, but the OPSA may “as needed, request the city council, or any duly appointed committee of the council, to issue subpoenas as provided in section 34 of the charter. The city council may, by resolution, establish the procedures for the request, issuance, and service of those subpoenas.”<sup>74</sup>

San Diego’s Civilian Review Board does not have investigative authority and does not have subpoena power. San Jose has an Independent Police Auditor. This agency reviews and audits misconduct complaint investigations conducted by the police department. It does not have subpoena authority.

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<sup>73</sup> <https://cao-94612.s3.amazonaws.com/documents/oak062931.pdf>

<sup>74</sup> Sacramento Municipal Ordinance 2016-0054, subsection L.

In summary, all seven benchmark cities on the West Coast have some form of civilian oversight. Five of the seven cities have agencies with investigative authority. Four of the five, Long Beach, Oakland, Portland and San Francisco have agencies that investigate misconduct complaints in a fashion similar to the OPA. These agencies have the authority to issue subpoenas to third parties to secure the appearance of witnesses or to produce records. None of the five cities with investigative civilian agencies have restrictions on issuing subpoenas to family members and one, Portland, requires officers to cooperate with IPR investigations. The assessment team examined the police officer labor agreements for each of the seven cities and found no language that restricted the authority of civilian agencies to issue subpoenas.

Considering the language in the current labor agreements, it is difficult to ascertain the extent of subpoena authority that OPA or OIG have under local Seattle law but it is clearly more restrictive as to officers, their families and records in the possession of officers or their families than found in the five benchmark cities that also have civilian-led oversight agencies with the authority to investigate alleged misconduct. The assessment team did hear frustration from one stakeholder that the way the labor agreement addresses aspects of the investigations such as subpoena authority means that the OPA and OIG have to bargain over their authority every few years. However, until the OPA has the occasion to attempt to seek the records ostensibly available to an officer under Policy Manual section 5.002 or to seek the testimony of family or their records by subpoena, the authority of the OPA or OIG during an investigation will be uncertain.

## V. Assessment of Seattle's Discipline Appeals Process

### Discipline Appeals Process Contemplated by the Accountability Ordinance

Once the Chief imposes discipline on an officer, he or she has the ability to appeal on the grounds that the decision lacked just cause. The accountability ordinance limited appeals of discipline decisions involving SPD employees to the Public Service Civil Service Commission (PSCSC), thus ending the role of the Disciplinary Review Board. The ordinance mandated that all appeals of SPD employees “shall be open to the public and shall be heard by the PSCSC.”<sup>75</sup> The ordinance further limited appeals to instances of “formal discipline,” meaning that grievances of oral and written reprimands were no longer appealable to arbitration or the PSCSC.

The accountability ordinance states that police officer could only be “removed, suspended, demoted or discharged in good faith for cause.” An officer can file an appeal with the PSCSC within ten days of the date of service of the Chief’s final disciplinary decision. The hearing can be heard by a hearing officer who has appropriate expertise and objectivity regarding police disciplinary decisions. Within 30 days of the hearing, the hearing officer shall issue a recommended decision and the parties have 20 day to file written objections to the recommended decision, or it becomes final. If a party does object, oral argument will occur in a public meeting of the Commission and it will issue final decision “whether the disciplinary decision was in good faith for cause, giving deference to the factual findings of the Hearing Officer. Both the recommended decision and the final decision should affirm the disciplinary decision unless the Commission specifically finds that the disciplinary decision was not in good faith for cause, in which case the Commission may reverse or modify the discipline to the minimum extent necessary to achieve this standard.”<sup>76</sup> The ordinance does not describe the quantum of proof necessary to establish that the disciplinary decision was not in good faith for cause. The ordinance did, however, eliminate the higher “clear and convincing evidence” standard for finding “material dishonesty.”<sup>77</sup>

### Current State of the Disciplinary Appeals Process

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<sup>75</sup> Seattle Muni. Code, Ch. 3.29.420.

<sup>76</sup> Seattle Muni. Code, Ch. 4.08.105.

<sup>77</sup> Seattle Muni. Code, Ch. 3.29.135.



The Guild labor agreement has terms that are inconsistent with what was contemplated in the accountability ordinance. In the State of Washington, where local law or regulation is inconsistent with terms of a collective bargaining agreement, the agreement supersedes. The SPOG and SPMA agreements have several provisions that cover the discipline appeals process. The agreements maintained arbitration as a means to resolve disciplinary appeals but eliminated the Discipline Review Board. The agreements eliminated the requirement in the accountability ordinance that disciplinary appeals be open to the public. The agreements also postponed the changes to the selection process for the PSCSC until bargaining with other affected bargaining units occurs.<sup>78</sup>

The agreement modified Article 3.1 by eliminating the requirement that dishonesty be proved by clear and convincing evidence and adding the language depicted below in the red text that the standard of review and burden of proof will be consistent with the known principles of labor arbitration and provides for “an elevated standard of review” for certain cases:

3.1 The parties agree that discipline is a command function, and that the Department may institute a disciplinary procedure. So much of said procedure that relates to the right of an employee to a hearing and the mechanics thereof are outlined in this Article; provided, however, that it is understood that if deemed appropriate by the Chief of the **Police** Department, discipline or discharge may be implemented immediately consistent with the employee’s constitutional rights. Disciplinary action shall be for just cause. **The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration. For example, and without limitation on other examples or applications, the parties agree that these principles include an elevated standard of review (i.e. – more than preponderance of the evidence) for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment.**

In the case of an officer receiving a sustained complaint involving dishonesty in the course of the officer’s official duties or relating to the administration of justice, a presumption of termination shall apply. ~~For purposes of this presumption of termination the Department must prove dishonesty by clear and convincing evidence.~~ Dishonesty is defined as intentionally providing false information, which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding facts that are material to the investigation. Specific questions do not include general or ‘catch-all’ questions. For purposes of this Section dishonesty means more than mere inaccuracy or faulty memory.

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<sup>78</sup> Uniformed, public safety employees who belong to the following four labor organizations have the right to appeal to the PSCSC: SPOG, SPMA, and IAFF Locals 27 and 298, which represent firefighters.

These new terms were not in place in the Seattle Municipal Code at the time of the Adley Shepherd appeal to the now-eliminated DRB.

### Comparison to West Coast Benchmark Cities

The cities along the West Coast that the assessment team reviewed in addition to the surveys, showed a variety of discipline appeals processes.

Officers in Long Beach can appeal the chief's final decision to the City Manager or opt for arbitration. If they are unable to make a joint selection for an arbitrator, either party may request a panel of five arbitrators from the American Arbitration Association. Upon receipt of the panel from the AAA, the parties shall determine the arbitrator by the alternate strike method. A coin flip will determine the party to strike first; Any arbitrator appointed must be familiar with employee/management relations in public employment. The rules of conduct of proceedings shall be according to those procedures utilized by the American Arbitration Association and the findings of the arbitrator shall be transmitted only to the parties to the dispute

Officers in Oakland have the option to go to arbitration or to seek relief before the Civil Services Board. All arbitration meetings are private and confidential; however, if the officer goes the Civil Service Board route, those hearings are public unless the officer requests that they be closed.

San Diego relies on its Civil Service Commission for discipline appeals and does not use arbitration. The rules state that "proceedings shall be as informal as is compatible with the requirements of justice, and the Commission need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the matter through oral testimony and records presented at the hearing, which is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit and provisions of the Charter." Hearings of police officers are not open to the public.

San Francisco's process is quite different from the other cities the assessment team examined. An officer who disagrees with the discipline decision can appeal to the Police Commission and is entitled to a hearing. Hearings, or trials, about officer conduct are heard before the Police Commission and those trials are public. Witnesses can be subpoenaed to appear. The Department or the DPA has the burden of proving by a preponderance of the evidence that the accused Member has committed a breach of duty or engaged in misconduct.

**Finding 5: Arbitrator selection – The City and SPOG agreed to an efficient arbitration selection process that is consistent with the terms of the labor agreement. It is too soon to establish whether concerns raised about the impartiality of arbitrators have been satisfied.**

The selection process is found in Article 14.2 of the agreement:

The arbitrator shall be selected from a permanent panel of arbitrators created in the following manner. The parties will each submit a list of ten (10) acceptable arbitrators. The arbitrators submitted by each party shall be on either the AAA and/or the Federal Mediation and Conciliation Service (FMCS) panels of Pacific Northwest Arbitrators and will charge for travel only within Washington/Oregon. Any name on both the Guild and City lists is automatically on the panel. Each party will then have the opportunity to strike two names from the remaining names on the list of the other party. The parties will then randomize the list through an agreed upon methodology. Absent agreement on a methodology, names shall be randomized by the PERC (the "List"). The List will be used by the parties for arbitrator selection for the duration of the Agreement.

The City and SPOG recently went through the process of developing its list of arbitrators and assigning them to pending arbitrations. Of the 16 arbitrators on the recently agreed to panel, no arbitrator has more than five or less than two cases assigned to him or her. The assessment team conduct a limited open source search for information about the arbitrators and found that majority of the sixteen do arbitration work in the Pacific Northwest. All the arbitrators appeared experienced with a variety of issued arbitration awards. With the limited number of cases that each arbitrator is anticipated to hear, the assessment team cannot draw a conclusion that any particular arbitrator will be beholden to either party to assure continued arbitration engagements.

**Finding 6: Arbitrator diversity – The current selection process creates a pool of eligible arbitrators drawn from American Arbitrator Association members on the Pacific Northwest panels. While the process does appear to have been a fair one, the pool drawn from, and the ultimate panel, lacks racial and ethnic diversity and the depth of experience that could be provided by additional requirements.**

Recent reporting suggests that the lack of diversity of arbitrators is not unique to the State of Washington, but as labor arbitration is more common nationally, arbitration organizations and the parties that engage arbitrators should become more mindful of diversifying the pool of available

arbitrators.<sup>79</sup> The AAA is engaged in an initiative to develop ideas to increase the diversity of the pool of arbitrators.<sup>80</sup> JAMS recently added an inclusion clause to its model mediation and arbitration clause workbook:

“The parties agree that wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation) and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”<sup>81</sup>

There is a growing recognition that arbitrators need to “develop critical cross-cultural competency skills.”<sup>82</sup> Simultaneously, there is a tension with assuring that arbitrators have experience appropriate to the appeal at hand. For example, while not currently a requirement under Seattle’s arbitration system, National Academy of Arbitrators (NAA) membership requires a high level of demonstrated arbitrator experience:

The Board of Governors considers the standard of “substantial and current experience so as to reflect general acceptability” in the Statement of Membership Policy to mean that, as a threshold requirement for consideration of the application, the applicant must demonstrate at least five years of arbitration experience and a minimum of 60 written decisions in a time period not to exceed six years, at least 40 of which must be “countable labor-management arbitration awards.” Up to 20 decisions in the field of workplace disputes resolution (including, for example, advisory arbitration, fact-finding, and teacher tenure and civil service cases under statutes or rules closely analogous to traditional arbitration) shall be countable in accordance with the standards established by the Board of Governors. No more than 10 countable workplace disputes resolution decisions shall involve employment arbitration pursuant to an individual contract, handbook, or other agreement between an employer and an employee who is not represented by a labor organization.<sup>83</sup>

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<sup>79</sup> Paige Smith, Bloomberg Law, “Lack of Arbitrator Diversity Is an Issue of Supply and Demand.” May 15, 2019. <https://biglawbusiness.com/lack-of-arbitrator-diversity-is-an-issue-of-supply-and-demand>

<sup>80</sup> <https://www.adr.org/DiversityInitiatives>

<sup>81</sup> <https://ccbjournal.com/articles/model-arbitration-rider-encourages-diversity-selection-neutrals>

<sup>82</sup> Theodore K. Cheng, Dispute Resolution Journal, “Developing Skills to Address Cultural Issues in Arbitration and Mediation.” 2017. [https://theocheng.com/documents/Developing-Skills-to-Address-Cultural-Issues-in-Arb-and-Med-\(DRJ\).pdf](https://theocheng.com/documents/Developing-Skills-to-Address-Cultural-Issues-in-Arb-and-Med-(DRJ).pdf)

<sup>83</sup> <https://naarb.org/membership-guidelines/>

The City of Seattle will have to work to resolve the tensions of maintaining a list of arbitrators with meaningful experience but that also \ has cultural competency and reflects the diversity of the Seattle community and workforce.

**Finding 7: Quantum of Proof – Of the benchmark labor agreements the assessment reviewed, Seattle is unique in that its labor agreement includes specific language regarding the quantum of proof used during arbitration, however there have been no use of force arbitration cases heard in the current accountability system to draw a conclusion that an elevated standard will be used when an allegation of Force-Use is sustained and the officer is discharged.**

According to materials supplied to the assessment team by the City Attorney, in 2008 the Mayor's Police Accountability Review Panel recommended that SPD adopt a policy that presumes termination as the discipline for a sustained allegation involving dishonesty:

To help ensure professional conduct, the Seattle Police Department should adopt a policy that presumes an officer will be terminated for sustained complaints involving dishonesty that either relate to or occur within the scope of the officer's official duties, or that relate to the administration of justice. If the Police Chief chooses to impose a disciplinary sanction other than termination, he should be required to state his reasons in writing. This written statement shall be provided to the OPA Director and, upon request, to the Mayor and City Council.<sup>84</sup>

The subsequent SPOG Agreement covering 2008 to 2010 did contain a provision of a presumption of termination for dishonesty but added a requirement that the Department must prove dishonesty, defined as intentionally providing false information, which the officer knows to be false regarding facts that are material to the investigation, by clear and convincing evidence:

In the case of an officer receiving a sustained complaint involving dishonesty in the course of the officer's official duties or relating to the administration of justice, a presumption of termination shall apply. For purposes of this presumption of termination the Department must prove dishonesty by clear and convincing evidence. Dishonesty is defined as intentionally providing false information, which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding facts that are material to the investigation. Specific questions do not include general or 'catch-all' questions. For purposes of this Section dishonesty means more than mere inaccuracy or faulty memory. The next SPOG Agreement, covering 2010 to 2014, contained the same provision.

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<sup>84</sup> SPOG Agreement of 2008, Art. 3.1.

The majority of police departments who responded to the survey reported using the "preponderance of evidence" standard during appeals processes.<sup>85</sup> Seattle's current labor agreement eliminated the clear and convincing standard for allegations involving dishonesty but contains a clause that provides for an elevated (arguably "clear and convincing") quantum of proof for termination cases which include "stigmatizing" allegations that "mak[e] it difficult for the employee to get other law enforcement employment." Community members are concerned that the quantum of proof is not certain or predictable and dependent on the norms of the individual arbitrator. However, since the accountability ordinance took effect, only one termination case has gone to arbitration. While that one case, heard by the now defunct DRB, was a reversal of the Chief's imposed discipline, the DRB did uphold the finding of policy violations using a preponderance of evidence quantum of proof. The Chief's finding was ultimately upheld and the discipline was reinstated by judicial ruling when the city appealed.

Generally, in the public safety employment context, the concept of just cause reflects that an employee may not be discharged on a whim and includes those acts for which an employee has traditionally been fired.<sup>86</sup> Just cause requires proof that an employee has committed a disciplinary violation and that the penalty imposed is justified in light of the gravity of the offense and the surrounding circumstances.<sup>87</sup>

The well-accepted assignment of the burden of proof in collective bargaining grievance arbitrations is that an employer has the burden in a matter involving discipline or discharge, and the quantum of proof necessary is generally "a preponderance of the evidence"<sup>88</sup> A "preponderance of the evidence" means that the existence of a fact is more likely than its non-existence.

In serious disciplinary cases, employee representatives may argue that the level of proof required of an employer should be a "clear and convincing evidence" standard, even in the absence of a specific contractual provision regarding that standard. It is not unusual for arbitrators to apply an enhanced burden of proof in cases involving criminal conduct or acts of moral turpitude. The rationale behind the use of this higher standard of proof is that in addition to the potential loss of employment, a finding that the employee committed the offense charged will stigmatize the employee, branding her as a criminal or person of poor morals, and perhaps having serious consequences for future employability.

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<sup>85</sup> Loyola University Professor of Law Stephen Rushin filed a declaration with this court earlier in 2019. Professor Rushin compiled a database of over 650 collective bargaining agreements. Based on his analysis, he concluded that it is "common for CBAs to not provide any specific guidance on the appropriate burden of proof other than including a requirement of 'cause,' 'just cause,' or 'good cause.'" *United States of America v. City of City Seattle*, C12-1282-LJR, Declaration of Stephen Rushin, Dkt. # 530, filed 2/13/2019.

<sup>86</sup> See *Elkouri and Elkouri, How Arbitration Works*, pg. 932 (6th Ed. 2003).

<sup>87</sup> *Ashland Petroleum Co.*, 90 LA 681 (Volz, 1988); see generally Koven and Smith, *Just Cause: The Seven Tests* pp. 25-28 (3d Ed. 2006).

<sup>88</sup> See, e.g., Koven and Smith, *supra* n.87; Elkouri and Elkouri, *supra* at 949 - 50.

Arbitration awards which support the proposition that an arbitrator should apply a "clear and convincing" burden of proof often involve allegations of illegal drug use, theft, untruthfulness and perjury, or other conduct that in each case could constitute a crime or implicate moral turpitude. However, application of the higher burden does not always survive judicial scrutiny.<sup>89</sup>

**Finding 8: Transparency – It is difficult for the public to track the status of discipline cases through the grievance and appeals process and have access to information about the outcomes of grievances and appeals.**

During the site visits, the assessment team asked stakeholders about their impressions of the discipline appeals process. The team heard from one community member who described the process like a "black box." Another stakeholder said, "from the community we hear, 'transparency.'" The team heard complaints of there being no formal process for releasing arbitration decisions. "It seems ad hoc. Like there is no hard process in place."

Another stakeholder said, "make it (the appeals process) transparent. If community is kept in the dark it is harder for it to be seen as transparent." That person went on, however, to say that such a view was not a call for public discipline appeals hearings and that discipline should not be tried in the court of public opinion. Outcomes, though, should be made public, the person said.

However, another stakeholder did believe that appeals hearings should be public and that some form of reporting results out to the public would be a way to build trust in the system.

The status of a filed complaint can be tracked on the OPA's web page. It is difficult, however, to track discipline cases after the Chief has made a final decision based on the OPA Director's recommended findings. After the Chief's finding and imposition of discipline, an employee can file a grievance. If the grievance does not resolve her concerns, she can ask the union to file for arbitration.

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<sup>89</sup> A police officer employed by a city was terminated after he committed an act of domestic battery and then lied about doing so. The union representing police officers filed a grievance asserting that the discharge was not for just cause. An arbitrator agreed, and applying the "clear and convincing" burden, ordered that he be reinstated. A trial court found that the arbitration decision was void and in violation of public policy. An appeals court upheld that ruling. "We are aware of no case, and no statute, that requires an allegation of misconduct in this context to be proved by clear and convincing evidence because the misconduct may also be criminal and because the City seeks to discharge the officer. There is well-defined and dominant public policy against acts of domestic violence. Acts of domestic violence are even more disturbing when committed by a police officer – whether on or off duty. It is a violation of public policy to require the continued employment of an officer who has been found to be abusive and untruthful. We find the standard of proof is preponderance of the evidence. The Arbitrator concluded the act was proved by a preponderance and the lie was proved by a preponderance. It would be repugnant to public policy to retain [him] as a police officer in these circumstances." *Decatur Police Benevolent and Protective Ass'n Labor Committee v. City of Decatur*, #4-11-0764. 968 N.E.2d 749 (Ill. App. 2012).



Instead of or in parallel with grievance-arbitration route, the employee can pursue an appeal to the Public Safety Civil Service Commission. While the OPA updates complaint entries when a closed investigation case is appealed, members of the public cannot easily find information about complaint investigations that are in either the grievance, appeal, or arbitration process. Additionally, there is no mechanism in place that formalizes the public posting of arbitration awards or grievance outcomes.

## Conclusion

The assessment team was impressed with the overall quality of the accountability system in Seattle. It is abundantly clear that its residents, law enforcement and the city's leaders care a great deal about fair and constitutional policing. During the site visits the assessment team met with a variety of stakeholders who ranged from community activists to law enforcement to other actors in the accountability system. The team asked each group what they believed should be the goal and values of the discipline appeals process. What the team heard was remarkably consistent:

- Transparent
- Fair to officers
- Fair to community members
- Certainty of standards
- Equitable outcomes
- Officers feeling heard and they have a fair shot
- Procedurally fair to the community at large and to officers
- A fair and independent review
- That officers are held accountable
- Culturally competent (specifically in reference to arbitrators)

Fairness. Transparency. Just outcomes. The team heard those values expressed in different ways time and again. What the findings in this assessment demonstrate is that the City of Seattle has made remarkable progress towards those values. These findings represent not the need for wholesale change but for additional fine-tuning and refinement.