OFFICE OF PROFESSIONAL ACCOUNTABILITY
REVIEW BOARD
2007 MID-YEAR REPORT[1]

July 2, 2007

The OPA Review Board was established by Seattle City Council "to review and report on the implementation of the Office of Professional Accountability."[2] This report addresses our concerns about the integrity of OPA investigations into alleged police misconduct given the Chief's failure to respect the separation of his disciplinary authority from the civilian OPA Director's investigatory/adjudicative authority.[3]

The OPA Ordinance (SMC Ch 3.28) spells out the distinct roles played by the Chief and the OPA Director in Seattle's unique police accountability system. City Council mandated that the OPA Director shall:

> Direct the OPA investigative process, classify all complaints, certify completion and findings of all OPA cases, and make recommendations regarding disposition to the Chief of Police. The Chief of Police remains the final decision maker in disciplinary actions.[4]

Although City Council insisted that the Director and the Chief work together "to promote consistency of discipline",[5] the OPA Ordinance does not spell out what should happen when the Chief and the Director disagree on the final disposition of a complaint. Under the prior Mayor and Chief, this apparently was not a concern, because they adopted in full the recommendations of the August 19, 1999 Citizens' Review Panel Final Report, which provides that the Chief "may *for good cause and in writing*, modify the adjudicative findings of the Director."[6]

As shown in two parts below, the principle of modifying the OPA Director's certified disposition only for cause and in writing has apparently been abandoned by the present Chief, with predictable consequences. Part One confirms this trend to undermine the civilian Director's role in police accountability, first criticized by the Board in its 2003 YE Final Report. Part Two discusses a recent case in which the Chief intervened before a final proposed disposition could be certified by the Acting OPA Director, apparently

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[1] Our last substantive report was dated April 30, 2004. We also issued a Status Report on December 5, 2006. Between May 2004 and November 2006 the Board prepared three other reports on specially-requested cases as well as our ongoing blind sampling of 10% of all closed OPA cases. With this report the OPA Review Board resumes its normal semiannual report schedule as contemplated by Seattle Municipal Code (SMC) § 9.28.310.
[2] SMC § 3.28.910 A.
[3] SMC § 3.28.910 B.10 & 12. The Board may summarize "issues, problems and trends noted...as a result of their review;" and make "[a]ny recommendations the Department consider policy or procedural changes."
[4] SMC § 3.28.810 F.
[5] SMC § 3.28.810 G.
[6] The Hon. Charles V. Johnson, Chair, Citizens Review Panel Final Report at p. 5, adopted in the SPD Accountability Action Plan (September 21, 1999) at pp. 12-13 (emphasis supplied).

departing from proper accountability procedures under the pressure of intense media attention and the police union. The Board recommends remedial legislation aimed at helping to restore the integrity of OPA investigations, civilian oversight, and the public's confidence in the Seattle Police Department itself.

PART ONE:
OPA-SUSTAINED COMPLAINTS REVERSED BY THE CHIEF OF POLICE[7]

I. Summary

The OPA Review Board does not endorse either OPA's or the Chief's disposition with respect to any of the twelve closed cases reviewed in this report. Three troubling facts must be reported, however:

A. Production of these specially-requested cases for the Board's review was apparently delayed by the Chief for at least a year.

B. When production of these cases was finally permitted to proceed, the Board's ongoing 10% case sampling was suspended, disrupting the Board's statutory reporting schedule; and

C. None of these cases contains the Chief's explanation for reversing OPA's determination.

The Board is aware of only one relatively recent instance in which an OPA determination in favor of a named officer was reversed by the Chief.[8] In light of waning public confidence in Seattle's police accountability model—in which our police continue to enjoy the privilege of policing themselves—it is critically important to correct this impediment to the civilian OPA Director's authority and independence.

II. Background

OPARB issued its last substantive report on April 30, 2004, covering OPA cases that were closed during calendar year 2003. One of the cases reviewed in that report[9] involved an OPA-sustained complaint which had been subsequently reversed by the Chief Kerlikowske. In that case, OPARB did not question either OPA's determination or

[7] Originally dated April 26, 2006.
[8] See OPARB's December 5, 2006, YE Status report at p. 3, fn 9. Ironically, this matter also involved video surveillance footage.
[9] OPA-IS Case #02-0016. See OPARB YE 2003 Report at pp 16-17. In this case, the Chief apparently accepted OPA's determination that the named officer had in fact taunted a homosexual suspect in custody, "At what point in time did you know that you were gay, so that I can tell my son what to look for?" Although the Chief directed counseling for the officer in lieu of sterner measures recommended by OPA, the complainant himself provided wise counsel when he replied to the officer, "Tell him that you love him no matter what he is."

the Chief's decision to reverse it. Instead, OPARB noted that the Chief's reasons for reversing OPA should have been stated in writing:

- ***OPARB recommends that the Chief of Police state his reasons in writing for overruling any proposed OPA finding or disposition.***[10]

As we explained over three years ago, this is not an original OPARB idea; the notion was first enunciated by Judge Charles Johnson's 1999 blue ribbon panel.[11] Recommending that the Chief retain ultimate authority to determine officer discipline, the Citizen's Panel nonetheless admonished that the Chief might only "*…for good cause and in writing,* modify the adjudicative findings of the Director."[12] It remains obvious to us that the Chief's views on misconduct and Department policy should be made known to civilians and law enforcement alike through his written decisions whenever he overrules the OPA Director; after all, the OPA Director must disclose in writing the reasons supporting the certified disposition.

As noted above, then-Mayor Paul Schell and Police Chief Norm Stamper adopted these recommendations in the September 21, 1999, SPD Accountability Action Plan ("Plan"): " *'The Chief shall be responsible for making the final determination as to discipline and may,* ***for good cause and in writing,*** *modify the adjudicative findings of the Director'…The Seattle Police Department will implement this recommendation and create an Office of Professional Accountability, headed by a civilian director with the equivalent status of Assistant Chief who will report directly to the Chief of Police….."*[13]

After release of the Board's April 2004 report—covering cases reviewed by the Board in CY 2003—we learned that there were eleven cases in 2003 in which OPA's determination was reversed by the police. On June 30, 2004, the Board requested these and other cases also closed by OPA in 2003.[14] Because OPARB is plainly entitled to review *all* closed OPA cases by municipal ordinance, then-Director Pailca initially agreed in writing on July 20 to produce all the 2003 cases OPARB had requested.

At a subsequent meeting, however, Director Pailca informed the Board that her written promise to produce the closed cases had been rescinded by the Chief, citing "resource issues".[15] Although the Chief eventually relented, many of the 2003 cases requested in the Board's June 2004 letter were not finally produced until as late as August 2005. The special case production, moreover, came at the expense of our normal 10% sampling, which was completely suspended for a sustained period of time. As a result of the interruption in closed OPA cases for Board review, our work plans to produce both semiannual and special-focus reports had to be abandoned and revised several times. Although we had also determined to suspend the *release* of reports until

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[10] OPARB YE 2003 Report at p. 17.
[11] Chaired by Judge Johnson, the Citizens Review Panel also included members Jenny A. Durkan, Michael D. McKay, and Burdena G. Pasenelli.
[12] Citizens Review Panel, Final Report (August 19, 1999), p. 23.
[13] Plan at 12-13 (emphasis supplied).
[14] See letter dated August 5, 2004, from Peter Holmes to Sam Pailca, attached as Exhibit A.
[15] Id.

our concerns about personal legal liability under the Confidentiality Agreement had been resolved,[16] we never ceased reviewing cases and preparing reports. However, even the production of our retained reports was frustrated by the Chief's refusal to provide the Board with requested closed cases as well as our normal blind case sampling.

III. Closed OPA Cases Reversed by Chief Kerlikowske[17]

These cases run the gamut from run-of-the-mill Failure to Identify Self cases to a salacious example in which an officer apparently acted under color of authority of the Seattle Police Department to recover nude photographs of his sister-in-law allegedly taken in the course of an extramarital affair.[18] Several files are relatively small, to over 500 pp. of investigative materials; some were generated internally by other officers as opposed to civilian complainants. It should also be noted that in addition to the eleven 2003 cases reviewed by the OPA Review Board, the former OPA Director also cited at least six specific cases in 2004 and another six in 2005 where the Chief has "declined to accept an OPA sustained recommendation" following a complete investigation and certified disposition by the OPA.[19]

Officers can also file OPA complaints. A female who had previously complained of workplace harassment filed an OPA complaint when her male harasser (who had been warned not to retaliate) proceeded to request complainant's personnel and training files, then published an article in the police union newspaper, ridiculing her underlying workplace harassment action. Although OPA recommended sustained findings for both the named officer's public documents request (Violation of Rules/Regulations/Law) and the newspaper article (Harassment in the Workplace), the Chief sustained only the count involving the PDR. No explanation was provided.[20]

A particularly "ugly" case (according to the OPA-IS Commander) was brought by the Harborview Medical Center Director alleging Unnecessary Force, which OPA escalated to include the Failure to Report Use of Force. Harborview security had detained an intoxicated man and requested Seattle Police to transport him to jail. Even though the man was under control and in handcuffs, the named officer was observed by four Harborview security officers, two SPD officers and a surveillance video camera striking the suspect with his baton and closed fists. The hospital director felt "compelled morally and ethically" to bring the complaint, and the OPA-IS line officers and the OPA Director all unanimously recommended sustained findings. Particularly egregious to the OPA Director was the fact that the named officer was a Field Training Officer who had a student officer with him at the time of the brutal incident. After the Chief instead exonerated the officer on all charges without written explanation, the Section

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[16] See October 10, 2005 OPARB letter to Councilmember Nick Licata, attached as Exhibit B.
[17] OPARB Case Review Volume 13a, OPA-IS #02-0016, LI #02-0035, OPA-IS #02-0062, OPA-IS 02-0063; OPARB Case Review Volume 13b, OPA-IS #02-0085, OPA-IS #02-0112; OPARB Case Review Volume 13c, OPA-IS #02-0125, OPA-IS #02-0135; and OPARB Case Review Volume 13d, OPA-IS #02-0232, OPA-IS #02-0280.
[18] OPA-IS Case No. 02-0232.
[19] See OPA Complaint Statistics 2004/2005 Report, Spring 2006, at pp 25-27.
[20] OPA-IS 02-0062.

Commander emailed the Director stating simply that he was "interested in seeing what the reasoning was behind the decision."[21]

Another violent case alleging Excessive Force earned a sustained recommendation from the OPA Director when the complainant, who initially ran from the named officer, gave up and lay prone on his stomach to surrender. The named officer nonetheless jumped on the subject "with all his weight", popping the complainant's lungs and breaking several ribs. Medical attention was not sought for the complainant. Even though the 180-day period to impose discipline had passed, the Chief nonetheless refused to sustain the allegation as recommended by the OPA Director.[22]

An officer who administered serial spankings to a juvenile, apparently with the parent's and his sergeant's acquiescence, was charged by an Assistant Chief with Misuse of Authority. The sergeant was charged with Failure to Take Appropriate Action. Command staff concurred in a 300+ pp investigation, but the Chief apparently reduced sustained recommendations to mere supervisory referrals, with no written explanation.[23] Still another case exceeding 500 pages of investigatory support, involving many witnesses and officers, appeared to turn on the appropriate amount of force to use on handcuffed subjects. Turning down sustained recommendations on the Use of Force allegations, the Chief instead apparently requested an examination of available training on the subject.[24] Similarly, a traffic stop which had escalated into Unnecessary Force and CUBO (Conduct Unbecoming an Officer) allegations were sustained by the OPA Director, but were Not Sustained and Exonerated, respectively, by the Chief, without any written explanation.[25]

In a case with a rare email comment from the original OPA Auditor, the named officer apparently used his official authority repeatedly to gain entrance into a private residence in order to further personal family interests. Specifically, the named officer attempted to recover nude photos of his sister-in-law and to thwart an apparent extramarital affair. The complainant even obtained an anti-harassment order against the named officer, but the Misuse of Authority and Violation of Rules/Regulations/Laws charges recommended by the OPA Director were instead reduced to CUBO by the Chief, with no written explanation.[26]

Officers involuntarily transported a complainant who was uninjured initially from the International District a few blocks away, emerging with a bloody, injured nose. Despite witnesses and an OPA certified disposition recommending sustained findings of Unnecessary Force, Failure to Report Use of Force, and Misuse of Authority, the Chief sustained only the Misuse of Authority count. Although the Chief did not state his

[21] OPA-IS 02-0063.
[22] OPA-IS 02-0085.
[23] OPA-IS 02-0112.
[24] OPA-IS 02-0125.
[25] OPA-IS 02-0135.
[26] OPA-IS 02-0232.

reasons in writing, the named officer's precinct commander had also challenged the OPA Director's determinations.[27]

Finally, an investigation totaling over 400 pages dealt with a heavily damaged patrol car, which the officer asserted was the result of a hit-and-run driver. Although the complaint was initiated by the named officer's line officer, and command staff unanimously concluded that the officer had lied about the damage to his patrol car, the Chief apparently refused to sustain a count of Violation of Rules/Regulations/Laws. No written explanation was provided by the Chief.[28]

IV. Conclusion

The traditional argument *against* permitting the police to police themselves is the plausible concern that officers investigating their fellow officers will inevitably "look out for their own"—at a minimum, giving cops the benefit of the doubt in credibility contests or by covering up police misconduct altogether. On the other hand, holding law enforcement accountable solely to outside civilian agencies deprives government managers the investigative expertise of trained officers. Seattle City Council chose to allow the Seattle Police Department to retain the privilege of policing itself by incorporating a civilian OPA Director to ensure that complaints of police misconduct would be thoroughly and impartially investigated, while leaving the final word on discipline to the Chief of Police.[29] This hybrid police accountability model is a work in progress, however, requiring city leaders to periodically reassess its performance.

Seattle's unique police accountability scheme only works when OPA's investigative/adjudicative function is kept separate from the imposition of discipline by the Chief. Unless the OPA Director's certified, written disposition is countered by the Chief's own contrary, written analysis, it is all too easy for the Chief to simply ignore—and thus undermine—the civilian OPA Director's check on the internal investigation process. The current Chief of Police has in fact never to our knowledge ever reversed the OPA Director in writing. Absent these written explanations, of course, we cannot determine his reasons for the reversals, leaving the civilian OPA Director effectively overruled in these cases by simple fiat.

There are at least two other ways in which the Chief can circumvent the civilian OPA Director's critical role in police accountability. First, the Chief may simply wait: under the City's collective bargaining agreement with SPOG, discipline must be imposed within 180 days of a complaint or it is absolutely barred. At least one case reviewed in this report failed to meet this deadline, and the past OPA Director has reported to City

[27] OPA-IS 02-0280.
[28] OPA-IS 02-0251.
[29] In reality, the Chief only has the final word on whether or not discipline will be *initially* imposed. All disciplinary actions imposed by the Chief may be appealed by the employee to either the Disciplinary Review Board or the Public Safety Civil Service Commission, which decision may then be appealed to the Superior Court.

Council that lapsed cases are a growing problem.[30] The OPA Review Board intends to take a closer look at this problem in future reports.

The second way in which the Chief can circumvent the OPA Director is to intervene in an open investigation, perhaps ensuring that a final OPA disposition meets his approval before it reaches his desk, thus avoiding the need for a written reversal. That would be most easily accomplished during a vacancy in the OPA Director's office, and may explain the result of the case examined in Part Two of this report.

PART TWO:
AN OPA INVESTIGATION WITH AN ACTING OPA DIRECTOR[31]

I. Summary

In late March local news media launched a series of investigative reports into the nighttime drug arrest of a wheelchair-bound paraplegic by two Seattle police officers, on January 2, 2007. The suspect posted bail bond for his release the following day, and personally filed a complaint two days later against both officers with the Office of Professional Accountability (OPA) in the Seattle Police Department (SPD). At the suspect's urging, the OPA Sergeant assigned to investigate his complaint recovered video footage of the encounter from a Walgreens store security camera. Discrepancies between the officers' sworn arrest statements and the video prompted the King County Prosecutor to move to dismiss the criminal case by early March, and so-called "Brady" notices were subsequently issued to defense counsel in numerous other municipal, state, and federal criminal proceedings involving the same two officers.

OPA had apparently just completed its investigation on April 9 when the Chief of Police issued a Press Statement that minimized the officers' conduct while imposing unspecified discipline for failing to follow arrest procedures, simultaneously refusing to "…apologize for making arrests and seizing narcotics and illegal firearms."[32] The OPA Review Board[33] requested OPA's closed investigative files on May 10 and again on May 16, seeking to reconcile the Chief's and prosecutors' apparently conflicting views of the officers' conduct. Subsequently, concerns about the officers' conduct from OPA Auditor Katrina Pflaumer and King County Superior Court Judge Catherine Shaffer were reported, and the FBI commenced its own investigation into the matter.

On May 23, after nearly two-week's delay, the Board received OPA's closed, unredacted files on this arrest. Board member Bradley Moericke and Board chair Peter Holmes independently reviewed OPA's closed files before collaborating to prepare this

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[30] OPA Complaint Statistics 2004/2005 at 30.
[31] OPA-IS Case No. 07-0013 ("Case"). All references are to the hand-numbered pages of the closed, unredacted OPA case file as provided to the Board on May 23, 2007 (e.g., "Case at 1").
[32] SPD Press Statement dated April 9, 2007 ("Press Statement"), at 2. The Press Statement is attached as Exhibit C.
[33] For background information on the Board, its mission, and its current members, please see Appendix A, "About the OPA Review Board".

report. Board member Sheley Secrest previously recused herself from substantive deliberations in this matter due to a potential conflict of interest.

We reach the following central conclusions in this matter:

A. Excellent investigative work by OPA from the outset of this case led to (1) dismissal of the original criminal charges and (2) issuance of Brady notices in other proceedings involving the named officers, simultaneously (3) exposing inadequate supervision of West Precinct bicycle patrol squads.

B. The Chief of Police subsequently intervened in OPA's open investigation, directing extraordinary measures to obtain the testimony of a previously uncooperative, unreliable witness to (1) bolster part of the officers' inconsistent testimony and (2) discredit the complainant and another independent witness. We have never reviewed a sustained OPA complaint which relied upon such questionable evidence to resolve credibility issues.

C. The Chief's April 9, 2007, Press Statement, apparently issued in lieu of a final proposed disposition certified by the Acting OPA Director, is not fully supported by the facts uncovered in OPA's investigation.

A serious conflict implicating Seattle's public safety remains unresolved: The same allegations of police misconduct that compelled prosecutors to dismiss the original criminal charges and issue Brady notices in related matters have been publicly sanctioned by the Chief of Police. The Chief further appears to ignore evidence uncovered by OPA indicating broader, at best perfunctory compliance with arrest screening procedures. Unless and until current SPD leadership addresses the very real problems revealed by this investigation, recurring misconduct is likely, leading to a decline of public confidence in the Department.

II. OPA's Investigation

Single arrest incidents not involving shootings, vehicle pursuits or other dramatic storylines seldom generate the level of media attention that has followed this case. The fact that a video camera caught most if not all of the important details of the arrest is rare even in this post-Patriot Act age of increasing video surveillance. This case is unusual, too, in that much of OPA's investigation took place during a vacancy in the office of the civilian OPA Director. It is also among the first cases reviewed by the OPA Review Board unencumbered by the confusing and burdensome redaction of witness identities. And the very public disconnect between the Chief of Police and prosecutors makes this matter ripe for review by the Board.[34]

Once we had obtained OPA's closed case file, another important fact quickly emerged which further distinguishes this matter: Unlike the hundreds of other closed

[34] The Board published its reasons and authority for requesting this case in a document attached to the May 25, 2007, press release, attached in turn to Appendix A.

OPA cases reviewed by the Board since its inception, OPA-IS Case No. 07-0013 lacks a final proposed disposition certified by any command staff or the Acting OPA Director. The next closest documents we found are the Acting OPA Captain's draft, unsigned disposition memorandum and the Chief's Press Statement—both dated April 9, 2007. We believe that the key to understanding this investigation lies in comparing these two documents in light of the evidence gathered by OPA. We start with the five underlying misconduct allegations, and examine how events during the investigation itself unfolded to transform this case into an exceptionally revealing snapshot of civilian oversight and police accountability in the SPD today.

A. Complainant's Allegations

One day into the New Year, on **January 2, 2007**, at around 10:15 pm, the complainant was arrested on the corner of Third and Pike and charged with a violation of the Uniform Controlled Substances Act (VUCSA)[35] by two Seattle police officers. The Complainant posted $7,500 bail bond the following day, and was released. Two days later, on **January 5,** complainant appeared in person at OPA offices in SPD Headquarters and filed a complaint against both officers, alleging that they (1) used Unnecessary Force both in effecting his arrest and again at the West Precinct, and (2) lied about recovering drugs. When interviewed by telephone on **January 18**, the complainant urged the assigned OPA Sergeant to seek out Walgreens' outside security surveillance video, believing it had captured the encounter.[36]

B. OPA's Additional Allegations

The OPA Sergeant promptly requested the Walgreens video. When he finally obtained the recording on **January 29**, the OPA Sergeant discovered that the two named officers had already detained and handcuffed another male individual (the "First Witness") prior to contacting the complainant—a fact not disclosed in the officers' arrest reports. The video further reveals a female (the "Second Witness") who later engaged the complainant and the officers in conversation, often at very close quarters. After reviewing the video and subsequent witness statements, OPA eventually added new allegations, including (3) Failure to Follow Arrest Procedures (as to both the First Witness and the complainant);[37] (4) Mishandling Property or Evidence (against one of the named officers, for allegedly pocketing a dime bag of marijuana confiscated from the First Witness), and (5) Failure to Cooperate with OPA Investigation, by rendering incomplete or inaccurate statements.[38]

C. OPA Notifies the King County Prosecutor

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[35] Chapter 69.50 Revised Code of Washington.
[36] Case at 252.
[37] OPA's interest in both subjects' screening procedures is important: Although OPA wanted to determine why no attempt was made to document or screen the First Witness's detention (even though he had been handcuffed), the complainant's cursory screening by an unofficial "acting" sergeant indicated that squad members were effectively "screening" each other's arrests, without the supervision of "hard stripe" sergeants. See, e.g., Case at 306; 319-321; 372.
[38] Case at 122.

OPA provided the King County Prosecutor with a copy of the video on **January 31**. The Deputy Prosecutor thereafter moved the King County Superior Court on **March 6** to dismiss the criminal case "in the interest of justice."[39] City and federal prosecutors also subsequently decided to issue "Brady notices"[40] in other pending criminal matters where the two named officers were potential witnesses. And though OPA was not the source, stories about the prosecutors' actions first appeared in the *Seattle Times* and *Seattle Post-Intelligencer* newspapers on **March 29**.

That OPA effectively spotted additional issues during its investigation is reassuring; and as discussed in the next section, OPA is also to be commended for promptly notifying the King County Prosecutor about its early findings.[41] Unfortunately, due to the Chief's apparent reaction to the ensuing media attention and public exoneration of the officers, we cannot know with certainty how OPA might have ultimately resolved each allegation if the disposition had been properly certified to the Chief prior to his decision.[42]

III. The Chief Intervenes in OPA's Investigation

As noted above, newspaper accounts of the OPA investigation, dismissal of criminal charges, and the related Brady notices first appeared on **Thursday, March 29**. The following **Monday, April 2**, Chief Kerlikowske viewed the Walgreens video and toured the arrest scene for himself.[43] Also on **April 2**, the assigned OPA Sergeant submitted his case file to the OPA Lieutenant/Acting Captain for review. Although OPA files are not readily available for review by the general public, the Chief's **April 9** Press Statement referenced the Department's "extensive investigation"[44] into the matter and focused on specific evidence that, in the Chief's view, largely exonerated his officers:

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[39] Case at 161.

[40] In *Maryland v. Brady*, 373 U.S. 83 (1963), the U.S. Supreme Court ruled that prosecutors, in criminal cases, have an affirmative duty to disclose potentially exculpatory evidence—including evidence weighing on the credibility of the prosecutions' witnesses.

[41] This action was approved by the OPA-IS Lieutenant, with concurrences by the OPA-IS Commander, the Department's legal advisor, and the previous OPA Director—apparently her last official act with respect to this case. Case at 115.

[42] Notably absent from the Acting Captain's draft disposition memorandum are any concurrences by the named officers' command staff. More notable is the fact that the Acting OPA Director had not made a formal disposition on the investigation until over a month after the Chief had already announced his determination. In a May 31 letter from Capt Neil Low to City Council President Nick Licata, however, the former OPA-IS Commander/Acting OPA Director refers to a final OPA disposition certified on May 14. This document was *not* included in the close case file provided to OPARB on May 23, however, and was not in fact provided to the Board until June 27.

[43] Case at 124.

[44] The Press Statement reports that the Department has "reviewed every individual case that [the named officers] have been involved in since the beginning of the year, including cases pending prosecution…[and] have found nothing in our review that would lead to further investigation." Assuming this is true, *none* of these other case reviews were included (or even mentioned) in the closed investigative file we reviewed for OPA-IS 07-0013. Because the SPD Manual provides for automatic administrative reviews for any officer receiving three or more investigated complaints in a year, or four or more investigated complaints over two

> An independent witness describing [the complainant] as her "dope dealer," observed the arrest and stated that officers were restrained in the way they handled [the complainant]. The witness also states that she observed [the complainant] with the narcotics that the officers recovered. The witness also told investigators that [the complainant] had left her with a message asking her to accuse the officers of planting the narcotics.[45]

This "independent witness" is the Second Witness captured by the Walgreen video. As discussed below, however, her testimony does not appear to be especially reliable.

A. Chief directs extraordinary measures to obtain Second Witness's statement

The complainant had already tried to identify the Second Witness at the outset, and thereafter attempted to contact her—as instructed by the assigned OPA Sergeant—to assist in OPA's investigation. The file also reflects many efforts by the assigned OPA Sergeant to contact the Second Witness. Finally—on **April 4—**the Second Witness was herself arrested on VUCSA charges, and the assigned OPA Sergeant and a second investigator promptly contacted her in a West Precinct holding cell. This is how the assigned OPA Sergeant describes the exchange:

> … [Second Witness] told me that she was at the Walgreens on 1-2-07 and she witnessed the interaction between the Officers and [Complainant]. I confirmed her identity from the still video photos taken during the incident. [Second Witness] also confirmed that she received multiple phone messages from me but that she did not want to call me back as she did not want to become involved in this incident or an altercation. *[Second Witness] indicated that she would only give me a statement tonight if we could release her on the drug arrest…she indicated that she did not want to go to jail.*
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> *I advised [Second Witness] that we could not drop the charges as a trade for her statement and asked if she would give a voluntary statement. She said she would not.* I advised her that she would be booked on the original drug charge but that I would make contact with her at the King County jail the next day and she said she would see me then. I paged [the Acting Captain] to advise him of this development but when I could not make contact I notified [the Acting OPA Director]. *[The Acting OPA Director] agreed with me that we should not trade her release for a statement.*[46]

Following this unsuccessful attempt to obtain a voluntary statement from the Second Witness, the Acting OPA Director called the assigned OPA Sergeant at home later that same night. He asked for the Second Witness's full name, explaining that he was the

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years (§1.117.VIII.A), the Board's May 16 letter also requested a list of all OPA cases involving the named officers for the past 24 months, which the new OPA Director hand delivered to OPARB on May 31.

[45] Press Statement at 1.

[46] Case at 125 (emphasis supplied).

night's Duty Captain, and planned to ask another OPA sergeant to make a second interview attempt.[47] Contrary to the Acting OPA Director's prior resolve, the Second Witness was in fact released that very night from the King County Jail in exchange for her statement in OPA's investigation:

> [OPA sergeant]: Now, Ms. [Second Witness], before we get started, you're here giving this statement tonight and myself and [Acting OPA Director] had visited you at King County Jail and had you released from that facility, is that correct?
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> [Second Witness]: That is correct.
>
> [OPA sergeant]: And what is your understanding of what your obligation was for us to release you?
>
> [Second Witness]: I have no obligation.
>
> [OPA sergeant]: Other than to provide this statement, is that correct?
>
> [Second Witness]: Other than to provide this statement, that is correct.[48]

An email from the Acting Captain to Chief Kerlikowske the following morning confirms that these extraordinary measures were implemented at the Chief's direction. His **April 5** "CASE UPDATE" to Chief Kerlikowske recounts that the acting OPA Director

> has already briefed you about the developments of locating [the Second Witness], who was seen in the video. *At your direction*, an OPA-IS investigator was sent to the King County Jail and obtained an interview.[49]

Just four days later—a date handwritten to coincide with the Chief's April 9 Press Statement—the acting OPA Captain would further state that the "*pendulum swings* in the officer's [sic] direction with the introduction of yet a *second* witness to the events."[50]

B. Questionable Probity of the Second Witness's Statement[51]

As noted above, the Second Witness was arrested, released from jail (without having to post bond)[52] and interviewed by OPA sergeants all on **Wednesday, April 4**. By the

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[47] Case at 124-5.
[48] Case at 280.
[49] Case at 90 (emphasis supplied).
[50] Case at 9 (emphasis in original).
[51] While most of the pertinent facts in this matter are widely disseminated in the press, we have had the advantage for the first time in the Board's history of reviewing complete and unredacted copies of OPA's closed files in this matter. This has enabled us to determine how critical this witness's "testimony" was to the Chief's conclusions. That City Council thus helped make the OPA process more transparent in the OPA Ordinance amendments it adopted last year is underscored by this case.

following **Monday, April 9**, her statement had apparently caused the "pendulum to swing" in the officers' favor, bringing OPA's investigation to a close—at least according to the Acting OPA Captain's draft proposed disposition memorandum. The Chief places even greater weight on the Second Witness's statement—calling her "independent" and using her to cast the complainant as a "dope dealer" whom the officers handled with "restraint"—and that the complainant had even "left [the Second Witness] a message asking her to accuse the officers of planting the narcotics."[53] An examination of her full statement and her activities in the video, however, together with the circumstances under which her statement was obtained, call into question the Second Witness's veracity and motivation, not to mention her ability to perceive, recall, and relate accurate facts—even for the limited purpose her testimony served in clearing the officers of the unnecessary force and dishonesty allegations.

According to the Chief, the Second Witness "told investigators that she observed [the complainant] with the narcotics that the officers recovered." The Second Witness actually testified as follows:

> [Second Witness]: I seen [the complainant] throw something out of his mouth but I don't know what it was. I mean when he was down like this, I seen something come out of his mouth, but I don't know what it was.
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> [OPA sergeant]: Okay.
>
> {Second Witness]: 'Cause I'm busy looking at all the action, the lights and everything of that nature, but when the officer reached down and he came back up and he said oh, what is this, Mr. [Complainant], it looks like a cocaine rock and it was in a plastic bag. That's what I seen.[54]

The officers, however, stated that crumbs of crack cocaine were immediately recovered from the complainant's clothing—and that none was recovered from his mouth or in a plastic bag—before the Second Witness had even arrived on the scene.[55] None of these inconsistencies are reported in the Press Statement, leaving instead the inaccurate impression that the Second Witness corroborated the officers' stories.

The Second Witness's unreliable perception and memory is perhaps best demonstrated by the fact that she has no recollection of the First Witness—the 6'5", 340 pound African-American man who stood in handcuffs next to her throughout the entire incident.[56] Any lingering doubts about the unreliability of the Second Witness's testimony should have been put to rest by her own disclaimer:

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[52] By contrast, the complainant spent a night in jail before obtaining a $7,500 bail bond to gain his release on an identical "VUCSA" booking charge.
[53] Press Statement at 1.
[54] Case at 286.
[55] Case at 352; 413.
[56] Id. at 286-287 (Second Witness statement at 7-8).

> …At this time I'm intoxicated to a point and I'm asking [the complainant] where is the car, where is the car, because he had purchased my car. Give me the keys to your keys to your car and give me your money and I'll show up to court with you and I'll advocate for you. But that was a way for me to obviously drive around in my car again and spend [the complainant]'s money.[57]

In the hundreds of cases reviewed by this Board, this much is clear: No complaint against any Seattle police officer has ever been sustained on the basis of such unreliable testimony.

C. Resolving Credibility Issues: The "He Said, She Said" Dilemma[58]

1. The First Witness

In contrast with his treatment of the Second Witness's testimony, the Chief points only briefly to "another suspect"—the First Witness—who figures prominently in the Walgreens video. Out of all the allegations raised by the complainant and OPA, the Chief chose to impose discipline only for the officers' obvious failure to screen the First Witness's detention. In doing so, the Chief effectively sidesteps the fact that OPA charged the named officers with *two* counts of Failing to Follow Arrest Procedures: the First Witness's wholly unreported detention *and* the complainant's improperly "screened" arrest.

In much the same manner as the officers failed to notify their supervisors about the First Witness, the Chief omits mention of the testimony the First Witness provided to the OPA investigators—which largely corroborates the complainant's testimony. Unlike the officers' or the Second Witness's testimony, the First Witness's testimony is consistent with the video. For instance, the First Witness estimated that officers removed his handcuffs approximately 20 minutes after the complainant's initial detention; the video confirms that this took place after 18 minutes.[59] The First Witness did not file an OPA complaint, did not know the complainant or the Second Witness,[60] presumably did not see the Walgreens video, and was not defending against criminal prosecution himself. He simply responded to the OPA Sergeant's questions with apparently nothing to gain, and

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[57] Case at 282. The complainant acknowledged in his recorded statement that the Second Witness attempted to obtain his vehicle keys and money and told her (and the arresting officers) that "I aint got my car, 'cuz my car had been stolen for like three weeks before that, this incident." Case at 238. Apparently testing every aspect of his credibility at the end of its investigation, OPA confirmed by Department records that the complainant had indeed reported a stolen vehicle just two weeks earlier. SPD Incident #06-534832, dated December 18, 2006.

[58] OPARB has previously recommended that OPA develop guidelines for objectively weighing civilian-officer credibility contests. See OPARB Final YE 2003 Report at 14-16. Moreover, as suggested by academics in the field of police accountability, the ability to hear actual recordings of witness interviews rather than having to rely solely on interview transcripts can facilitate the oversight function. We intend to explore access to these recordings with OPA for future reports.

[59] Case at 265.

[60] The First Witness even corroborates the Second Witness's admission that she was trying to get the complainant's car and money ("I guess she want to take his stuff off him and get high."), Case at 260; by contrast, the Second Witness had no recollection that the First Witness was even present.

even credibly described (despite the natural instinct against self-incrimination) the confiscation of a "dime bag" of marijuana which was never reported by the officers.[61]

The video plainly shows a "counter-joint" pain compliance technique—i.e., bending the fingers and thumb backwards—being applied by one of the officers to the complainant's left arm, which neither officer mentions in the arrest reports;[62] deny during their first OPA interviews; and stumble over during their follow-up interviews—after viewing the video.[63] The Second Witness never saw any force applied to the complainant's left arm at all. In contrast with these three witnesses, and consistently with both the video and the complainant, the First Witness testified in regard to the Unnecessary Force allegation that:

> I think one of them, I think the guy had like gloves on, the cop, and he started like messing with [the complainant's] fingers like, you know, bending his fingers ways they couldn't be bent. And I'm just looking there like, wow, they really doing this guy dirty. Like if I get done like this, it's over, my God, you know, and they's just like a shame.[64]

We do not challenge the ultimate determination of Exonerated with respect to the complainant's Unnecessary Force allegation—or, for that matter, any other determination against the officers. We do not, however, understand the Chief's reliance upon the Second Witness's opinion that the "officers were restrained in the way that they handled [the complainant]." It is indeed a shame that the Department apparently has not yet developed common sense guidelines as previously recommended by OPARB to assist in the evaluation of conflicting testimony.[65] The result in this matter provides fodder for those who argue that internal police accountability systems inevitably give police officers the benefit of the doubt in credibility contests.

2. The Complainant

"Dope dealer"[66] or not, the complainant behaved throughout this investigation like an innocent man—at least at the time of his arrest on January 2. He secured a bail bond and

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[61] Case at 259.

[62] Even if this force was appropriate, use of the pain compliance technique probably should have been reported in the officers' arrest reports and in a separate Use of Force Statement—as provided in the SPD Manual (§1.145) and previously recommended by the Board. See OPARB's YE 2003 Final Report at 3-8.

[63] The OPA Lt/Acting Captain was not impressed by the officers' testimony:

> [Officer II]'s denial of using a gooseneck type hold on Subject [Complainant] comes across as a minimization of what can be seen on the video. [Officer II] would have us believe he was merely holding onto the subject, not applying any force. Subject [Complainant] states his hand was in pain, as he was being held there for over 4 minutes before he was handcuffed. In any case, it appears the subject was seated in a wheelchair in a very compromising position. One officer was holding his left arm back, while the other ([Officer I]) was controlling him, pushing him forward by leveraging his head/face. The video speaks for itself.

Case at 10.

[64] Case at 265.

[65] OPARB YE 2003 Final Report at 14-16.

[66] Press Statement at 1.

promptly filed a complaint, in person, after his arrest. He cooperated fully with OPA investigators, following up even to help obtain the Second Witness's testimony as instructed by the assigned OPA Sergeant. And while the complainant must also be credited with pointing out to investigators the existence of Walgreens' video camera, we think that this same act also highlights his own credibility.

On January 5, the date he complained to OPA, the complainant probably did not know that the officers had failed to mention the First Witness in their arrest reports, the most obvious flaw revealed by the video. The complainant presumably also hadn't seen the video for himself. In urging investigators to secure the unseen video, the complainant thus behaves as a man who *knows* he is innocent. At a minimum, the complainant's insistence that OPA investigators review the video reflects his confidence that it would not substantiate the officers' VUCSA claims, even if the video failed to prove his innocence conclusively.

Rather than weighing the complainant's testimony in this light, the Chief instead accuses the complainant of witness tampering.[67] Keep in mind that the assigned OPA Sergeant *had asked the complainant to contact the Second Witness*, and that she, in turn, admitted telling the complainant that she would show up to court and "advocate" for him if he gave her his money and car keys—which the complainant refused to do. The Second Witness's actual statements thus do not support the Chief's accusation that the complainant attempted to obtain false testimony from her:

> [OPA]: Now *since* this incident has occurred… [Emphasis in original]
>
> [SECOND WITNESS]: Um hmm.
>
> [OPA]: …have you talked to [the complainant]?
>
> [SECOND WITNESS]: No, sir. Oh! One time.
>
> [OPA]: Did he tell you anything about what had happened that night?
>
> [SECOND WITNESS]: *No, sir. He said that he needed me to show up in court on his behalf and I let him speak to my significant other and we tried to explain to him that he was out of pocket, number one) for even giving SPD my telephone number without my permission, and number two) that there was legal resources that could help him work this situation out, but we didn't think it was appropriate for him to be calling, asking me to work it out, more specifically, giving {assigned OPA sergeant} my telephone number. We, we considered that to be very inappropriate. And disrespectful.*
>
> [OPA]: Did he ever make any allegations to you that the officers planted dope on him?

[67] Id. ("The [Second W]itness also told investigators that the complainant had left her a message asking her to accuse the officers of planting the narcotics.")

> [SECOND WITNESS]: Yes, sir, he did.
>
> [OPA]: And when was that?
>
> [SECOND WITNESS]: On that telephone call that he…he actually left a voicemail message indicating that the Seattle Police Department planted dope on him *and that I seen them plant dope on, on him and that I needed to show up to court to testify against the officers for planting dope on him.* And then he called back and expressed that same temperament to myself and I was so overwhelmed by his conversation and so afraid that I allowed my significant other to speak to him on the phone, which he reprimanded him and admonished him not to call us again…[68]

That the interviewer kept asking until he got the answer he wanted is plain from a review of the transcript. Moreover, the day after the Second Witness gave this late night statement, the (original) assigned OPA Sergeant was apparently directed to go to the Second Witness' residence, only to discover that she had not saved the voicemail message referenced in her statement.[69]

The Chief thus appears to make more of the Second Witness's solicited testimony than is warranted. He implicitly assumes, moreover, that the officers did *not* plant drugs on the complainant. Yet this is the very crux of the complainant's complaint, as well as his defense to VUCSA charges: He didn't have any drugs when detained by the officers, so the complainant concludes without necessarily witnessing the act that the officers must have planted the drugs. His shorthand for the incident itself becomes "the cops planted dope on me"—an apposition, in other words, rather than suggested testimony to be adopted by another. Asserting that the complainant tried to persuade the Second Witness to file false charges against the officers—especially since the OPA Sergeant had asked him to contact her—comes off to us as a strained reach to vindicate the officers rather than an objective sifting of facts. Public confidence in the OPA accountability system suffers as a result.

From an April 10 email by the Acting OPA Captain to the Chief summarizing the complainant's criminal history, moreover, it appears that a criminal background check was also performed on the complainant late in the investigation, using the Washington Criminal Information Center (WACIC).[70] No similar inquiries or emphasis was placed on the Second Witness' criminal history, despite the fact that she had been arrested for the very same offense (VUCSA) as the complainant, on the very day she provided her statement. When one witness is subjected to more scrutiny than another, the fact finder's objectivity is compromised, along with the appearance of fairness and impartiality.

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[68] Id. at 288 (emphasis supplied).
[69] Case at 126.
[70] OPARB has previously criticized criminal background checks on complainants by OPA. See OPARB's YE 2003 Final Report at 9-10. The OPA Director subsequently determined that requesting criminal histories for purposes of an administrative investigation (as opposed to a criminal investigation or prosecution) is illegal.

IV. Conclusions & Recommendations

A. The civilian OPA Director's investigative/adjudicative/administrative function must be kept separate from the Chief's final disciplinary decision making.

Once again, the 1999 Final Report of the blue ribbon panel that led to OPA's creation was clear: In exchange for the continued privilege of policing themselves—cops investigating cops; the Top Cop having the final word—Seattle police would be directed in the investigations of civilian complaints of misconduct by a qualified civilian. According to the Citizens Review Panel,

> The [OPA] Director would oversee and be responsible for the investigative, adjudicative and administrative functions of the disciplinary process, and would recommend disciplinary actions to the Chief of Police. The Chief would be solely responsible for the final determinations as to discipline, and *may for good cause and in writing*[71]*, modify the adjudicative findings of the Director.*

The Panel also admonished the Chief to set the standard:

> The message of integrity and personal responsibility must start with the Chief of Police and be expected at every level below.[72]

Until the Second Witness's April 4 interview—at the Chief's direction—OPA appeared to be on a path to sustaining the more serious allegation regarding the named officers' truthfulness in the OPA investigation.[73] Even as late as April 6, the Acting Director (with input from the Auditor, Kate Pflaumer)[74] apparently intended to "argue for an upgrade to a Sustained finding on the failure to cooperate with OPA".[75] Because there was no peer review and no certified disposition *prior* to the Chief reaching his conclusions on the outcome, we can only speculate what OPA's final proposed disposition might have been had the Chief not gotten so deeply involved, simultaneously diminishing his own objectivity and chilling the investigators' independent judgment.

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[71] As noted above, we have previously urged Chief Kerlikowske to honor this written requirement, see OPARB FY 2003 Final Report at 17.

[72] OPARB YE 2003 Final Report at 5.

[73] While OPA's investigation was generally excellent, with the benefit of hindsight, lessons can be learned from gaps—especially in interviews—for even better investigative results. We have attempted to list examples of investigative gaps in this matter in Appendix B.

[74] Our copy of OPA's files initially did not include any written input from the OPA Auditor. Some of the previously lost emails between the OPA Auditor and the Chief regarding this matter have been recovered, and the Board has just received copies these emails from the new OPA Director (on Thursday, June 14, 2007). This resurrects an issue the OPA Director had previously tried to remedy in order to make certain that all closed cases included email and other input from the Auditor prior to the Board's review. See OPARB YE 2003 Final Report at 12. Indeed, we must rely on OPA to provide us with complete, closed case files, and have no independent means for verifying whether all documents and records have been included in any given case. Specific concerns we have for the completeness of OPA-IS 07-0013 are listed in Appendix C.

[75] April 6, 2007, memorandum from OPA Acting Captain to Chief Kerlikowske.

The Chief perhaps unwittingly sacrificed the integrity of OPA's fact-finding mission for the sake of a desired outcome.

That this case was largely investigated after Director Pailca left office, and before Director Olson's appointment, underscores the need for an independent, tough-minded Civilian Director who will insist that the line between investigating citizen complaints and imposing discipline is respected by the Chief. Indeed, as long as the Chief continues to resist our calls to explain his reasons in writing when reversing a final OPA determination, it may be too tempting for him to attempt to sway future OPA determinations *before* they reach his desk.

This case thus demonstrates the wisdom of the blue ribbon panel. City Council should enforce the panel's vision by insisting through appropriate legislation that the Chief shall both stay out of OPA investigations/adjudications in the future *and* reverse final OPA determinations only "for cause and in writing". In addition, Council should consider a change in the OPA Director's reporting requirements to promote transparency. Although the Chief must continue to receive certified proposed dispositions directly from the Director, we believe it is time for the Director to make her semiannual reports directly to City Council, without prior Department review.[76] Finally, in order to undo potential damage done to police accountability and civilian oversight, the Chief should publicly reassert his commitment to integrity and personal responsibility, insist on an open and transparent process of accountability, and demand those values at every level below.

B. OPA or an independent commission should continue to investigate the apparent lack of supervision uncovered at the West Precinct during the course of this investigation, free of interference from the Chief.

OPA investigators discovered that a fellow bike patrol officer "screened" the Complainant's arrest, even though Department regulations require screening by a sergeant. This officer was not formally designated as an acting sergeant or paid out of grade; moreover, he failed to take the minimum steps spelled out in the SPD Manual for screening arrests. OPA further discovered that this apparently constitutes standard operating procedure among the West Precinct bicycle squads.

It should be remembered that OPA raised *two* counts of Failure to Follow Arrest Procedures: One for wholly failing to inform supervisors about detaining and handcuffing the First Witness, the second for improperly screening the Complainant's arrest. The OPA Lieutenant/Acting Captain recommended Sustained findings on *both* counts, but the Chief's Press Statement expressly provides only that unspecified discipline would be imposed on the first count.[77] Although the second count targets the potentially broader

[76] City Council should also correct an ambiguity in the OPA Ordinance to clearly identify the successor Acting OPA Director during any vacancy in the office, and make it clear that the Acting Director has the same power and responsibility as the permanent Director.

[77] "In the course of the internal investigation it was shown that [the officers] temporarily detained another suspect on a warrant in a completely unrelated stop. The detained suspect was then released. *This detention* was not documented as required by the Seattle Police Department's Policies and Procedures. Both officers

supervisory problem, the Press Statement makes it appear that the Department has abandoned this allegation altogether. We are not concerned about the named officers' actions in this particular matter and do not seek a reopening or reconsideration of their discipline. We are concerned about the broader implications—lack of supervision allowing police power to operate unchecked.

The Chief thus appears to have tacitly approved a supervisory screening process at the West Precinct that is perfunctory at best. Unless meaningful screening procedures are insisted upon from the "top down", misconduct such as that uncovered by OPA in this case will likely reoccur. Although OPA appeared to be ferreting out the problem before news reports began to eclipse the investigative process, an independent commission may be necessary to truly assess the extent of the problem and look into policy recommendations.

VII. Epilogue

We must stress what went right in this most recent matter: OPA promptly uncovered important facts and properly alerted the King County Prosecutor about serious inconsistencies in the officers' sworn reports. The assigned OPA Sergeant in particular is to be commended for the thoroughness of his investigation, the care taken and expertise exhibited in his interviews, and his dogged determination to get at the facts.

An important lesson can also be taken away at the end: That the Chief was apparently able to intervene during a vacancy in the office of the OPA Director actually speaks to us about the wisdom of Seattle's police accountability model. Our own ability to review this matter, moreover, speaks to the wisdom of City Council's amendments last year, which enabled us to request unredacted cases for more timely review. With active, qualified civilian oversight, we continue to believe that Seattle police remain the best resource for investigating complaints against their own.

We owe it to the ***majority*** of the Seattle police officers who have received no complaints whatsoever in the course of carrying out their duties, to make certain that OPA is permitted to do a thorough and independent fact-finding job with the complaints that are filed. This Board remains committed to three key components of an effective police accountability system in Seattle. The first of these are that (1) allegations of police misconduct are best investigated by trained police officers; and (2) the Chief should retain final authority to render discipline. This case, however, underscores the need for the third and final component: effective civilian oversight of the investigation process. Unless and until top leadership—the Chief of Police, especially—fully embrace this third component of civilian oversight, Seattle police may very well lose the privilege of policing themselves.

Ultimately, unless Seattle City Government requires police officers to use proper law

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have accepted full responsibility for this administrative violation and I will impose disciplinary action." Press Statement at 1 (emphasis supplied).

enforcement procedures, Seattle City Government will be responsible when those officers begin to take the place of prosecutors, judges and juries. Instead of faithfully gathering and recording evidence of criminal behavior to be evaluated by the criminal justice system, cynical cops might be tempted to take shortcuts. It would become all to easy for them to simply decide who's a criminal and report "facts" sufficient for a prosecutor to shepherd defendants, in good faith, before triers of fact who—like most of us—would like to believe the testimony of their sworn officers. Unless the Department embraces both professional police practices and transparent accountability, we will end up having neither.