

# INDEPENDENT POLICE AUDITORS' REPORT

[Review of Investigations Completed as of November 30, 2023]

Presented to the Honorable City Council

City of Palo Alto

2024

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Independent Police Auditors for  
the City of Palo Alto



## Introduction

This semi-annual report addresses cases that were completed by the Palo Alto Police Department ("PAPD") in the second half of 2023, as reviewed by OIR Group – the City's Independent Police Auditor.<sup>1</sup> Consistent with the expanded scope of work developed by the City, the report covers internal investigations into allegations of officer misconduct, certain qualifying use of force incidents, complaints raised internally by employees alleging misconduct by fellow employees, and supervisory evaluations of instances in which PAPD officers pointed a firearm while engaging with a member of the public.

Much of this report is devoted to a lengthy discussion of an excessive force incident that eventually resulted in both administrative and criminal investigations and ultimate charges. It involved the circumstances of a particular arrest and use of force that had criminal, civil, and administrative facets. The incident dated back several years but was slow to work its way through the various judicial and administrative proceedings. The last of its components was only finalized near the end of 2023, when a supervisor – who had retired during the pendency of the Internal Affairs review of his conduct – ended up pleading guilty to a pair of misdemeanors. Meanwhile, the discipline processes for some of the other involved officers had also just reached their resolution.

As we describe, several factors contributed to the protracted nature of the process, including the civil litigation, the criminal investigation and prosecution, and the post-disciplinary arbitration procedures. One of these, unfortunately, was a disappointing delay in PAPD's *internal* recognition of the incident's severity after the involved sergeant and other on-scene officers failed to report the sergeant's use of unreasonable force or the contemporary allegations of such made by the detainee. As explained in detail below, even though the involved and witness personnel had a responsibility to report the force and the detainee's complaint and did not, PAPD's review protocols that should have identified serious concerns with the underlying arrest also did not do so; it was only after a private surveillance video

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<sup>1</sup> OIR Group is a team of police practices experts that operates out of southern California and has been involved in the independent oversight of law enforcement for more than 20 years. It is led by Michael Gennaco, who is a former federal prosecutor and a nationally recognized authority in the field of police oversight. [www.oirgroup.com](http://www.oirgroup.com)

was provided to the City by the detainee's lawyer that the officers' actions became the focus of a formal Internal Affairs investigation. And even then, the Department held its decision-making on potential administrative charges for months after its internal investigation had been completed.

Between the excessive force at the outset of the incident, the failure of the involved and on-scene officers to fully report the incident and the slowness of the Department's recognition and resolution of it, the case reflected poorly on PAPD – despite the ultimate firmness with which it imposed (or sought to impose) accountability on involved personnel. Our lengthy discussion of the case features recommendations that hopefully will contribute to improved future responses should the Department be faced with a similar circumstance.

The report also includes the discussion of a matter that had become the subject of civil litigation. We review the Department's administrative investigation into different aspects of this arrest, which raised procedural questions and prompted both accountability and changes in agency protocol.

The other misconduct allegation from within this reporting period was not supported by the evidence. At the same time, we found it to be worthy of further, non-disciplinary attention – which PAPD creditably provided. It was a good reminder that these cases are ideally a forum not only for the redress of policy violations but an opportunity for constructive enhancements to future performance.

This report also includes two cases from a new category within our scope. When the City Council re-evaluated the role of the IPA as part of the post-Floyd police reform movement in 2020, it pushed for an expansion in the types of PAPD internal reviews that were to be subject to independent scrutiny. One significant addition was the inclusion of what are commonly referred to as "HR complaints" – allegations of workplace-related misconduct or mistreatment that are generated by employees against other members of an organization.

The prior thinking was that such investigations, while clearly significant, fell outside the realm of matters that the public considered most salient when it came to concerns about police misconduct. The counterargument, though, is these kinds of intra-agency conflicts can provide a meaningful window into leadership, culture, and accountability – all of which have implications for broader operational effectiveness.

Accordingly, these cases are now part of our review mandate. Both completed investigations that we cover here were coordinated through the City's Human Resources management and were handled by an outside investigator to promote the objectivity of the process. Both resulted in findings that relevant policies had not, in fact, been violated. But the inquiries were also an occasion for a constructive consideration of the dynamics underlying the original complaints.

We remain cognizant of the extra responsibility that our expanded scope of work has added to the duties of our liaisons within the agency. We appreciate PAPD's cooperation and patience in providing us with the materials we need and responding to our inquiries. More

importantly, we are grateful for the willingness of PAPD management to go beyond the letter of its obligations and engage candidly with us regarding individual cases and larger agency trends.

## External Complaint Investigations

### *Case 1: Allegations of Excessive Force, Failure to Report, and Additional Misconduct*

#### Factual Overview:

On the date of the incident, a PAPD Officer (Officer 1) followed Mr. Gustavo Alvarez<sup>2</sup> while he was driving a vehicle. Mr. Alvarez drove to his residence and parked his car in his carport. Officer 1 called out to Mr. Alvarez that he was being detained but Mr. Alvarez did not heed the officer's instruction and entered his residence. Officer 1 requested assistance and was soon joined by several other officers (Sergeant Wayne Benitez<sup>3</sup>, Agent Thomas DeStefano<sup>4</sup>, Officer 2, and Officer 3). Eventually Sergeant Benitez kicked in the front door of the residence, removed Mr. Alvarez, and arrested him.<sup>5</sup>

#### *PAPD Police Reports*

In the police report prepared by Officer 1 on the date of the incident, he describes observing a vehicle that he recognized from a prior contact. According to the report, Officer 1 was aware that Mr. Alvarez had a suspended license, but he was not able to see whether the owner was driving. Officer 1 followed the vehicle, and it soon parked outside a residence that he knew to be Mr. Alvarez's residence.

The report indicated that Officer 1 saw Mr. Alvarez exit the parked vehicle, at which time the officer called out to him and told him he was being detained. According to the report, Mr. Alvarez was non-compliant with the officer's instruction and walked inside of his residence. Officer 1 then returned to his car and called for assistance.

Agent DeStefano, Officers 2 and 3, and Sergeant Benitez responded. The report indicated that they attempted to convince Mr. Alvarez to come outside, but that these efforts were met by Mr. Alvarez's "verbal taunts" from the threshold. According to the report, at this point

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<sup>2</sup> Ordinarily, the IPA does not identify complainants in its reports. However, because the identity of Mr. Alvarez, the victim in this matter, has been widely and publicly disseminated by government entities, including the City of Palo Alto, we have chosen to include his name for purposes of clarity.

<sup>3</sup> Ordinarily, the IPA does not identify subject officers in its reports. However, because the identity of former Sergeant Benitez has been widely and publicly disseminated by government entities, including the City of Palo Alto, we have chosen to include his name for purposes of clarity.

<sup>4</sup> Ordinarily, the IPA does not identify subject officers in its reports. However, because the City of Palo Alto has publicly identified former Agent DeStefano, we have included his identity for purposes of clarity.

<sup>5</sup> As detailed below, all criminal charges lodged against Mr. Alvarez were eventually dismissed.

responding officers approached the residence, Sergeant Benitez kicked the door open, and Mr. Alvarez was taken into custody. The report does not contain any description of the arrest itself. The report indicated that after Mr. Alvarez was taken into custody, an automated inquiry indicated that Mr. Alvarez's license was indeed suspended.

The police report describes locating drug paraphernalia on Mr. Alvarez's person and transporting him to PAPD, where Officer 1 conducted a Drug Abuse Recognition examination. The report indicates that, after receiving the Miranda advisement, Mr. Alvarez acknowledged ownership of the drug paraphernalia but refused to consent to a blood test.

Sergeant Benitez's supplemental report indicates that he responded to aid Officer 1 once Mr. Alvarez had gone into his residence. The report indicates that Sergeant Benitez observed Mr. Alvarez standing in the open doorway of his residence while "acting like a juvenile" and repeatedly calling "come and get me".

According to Sergeant Benitez's report, he and Agent DeStefano approached the door and Mr. Alvarez "suddenly stepped back inside and shut the door." Sergeant Benitez wrote that he tried to open the door and found it locked. Sergeant Benitez reported that he then told Agent DeStefano he was going to kick the door open.

The supplemental report indicated that Sergeant Benitez then kicked the door twice, with the second kick causing the door to open. Sergeant Benitez wrote that once the door was open, he saw Mr. Alvarez in the doorway, and he grabbed him at the front of his shirt and physically pulled him outside. Sergeant Benitez's report indicated that he and Officer 1 put Mr. Alvarez on the hood of his car where he was handcuffed. Sergeant Benitez's supplemental report concludes by noting that "no other force was used."<sup>6</sup>

### *Civil Litigation*

Mr. Alvarez filed a claim approximately 5 ½ months after the incident. It alleged that officers had unlawfully detained him, used excessive force during his arrest resulting in injury, and prepared false police reports. Approximately 8 ½ months after the incident, the City sent a letter to Mr. Alvarez rejecting his claim. The PAPD criminal investigator was informed that approximately 10 months after the incident, a PAPD command staff member mentioned having reviewed the officers' in-car video recordings<sup>7</sup> but without being able to see any use

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<sup>6</sup> Officer 3 prepared a supplemental report indicating that he was assigned to take a perimeter position with no involvement in or view of the arrest. Neither Agent DeStefano nor Officer 2 prepared a report setting out their involvement.

<sup>7</sup> This incident preceded the Department's adoption of body-worn cameras for patrol officers. The Department's vehicle-mounted cameras had, however, been in use for several years. That "Mobile Audio Video" system is referred to below as "MAV."

of force from that footage. As detailed below, it is unclear whether that review was spurred by the civil litigation.

Approximately 14 months after the incident, the attorney representing Mr. Alvarez provided the City Attorney's Office with excerpts of a private surveillance video which depicted aspects of the arrest, including an unreported use of force by Sergeant Benitez that aligned with Mr. Alvarez's allegations.

Shortly after PAPD's review of the video, Sergeant Benitez was placed on administrative leave pending the completion of an Internal Affairs investigation into the incident.

Approximately three weeks after providing the video to PAPD, Mr. Alvarez filed a federal lawsuit against the City. It tracked the allegations set out in his original claim and further alleged that threatening and discriminatory remarks were made toward him.

Several weeks later, the attorney provided to the media the excerpts from the home surveillance video that he had provided to PAPD. This generated significant local coverage and ensuing civic concern.

Twenty-one months after the incident, the City settled the law suit. The settlement required a payment of \$572,500 to Mr. Alvarez and his attorneys, a public apology from Sergeant Benitez, and sworn police officer training on dealing with the LGBTQ community.

### *Home Surveillance Footage*

As noted above, Mr. Alvarez's attorney had provided five segments of video and audio captured from a surveillance camera outside the residence. At the time of the initial segment, Mr. Alvarez's vehicle is already parked in the carport adjacent to the residence and is occupied only by an unidentified male<sup>8</sup> seated in its front passenger seat. Officer 1 is depicted standing on the driver's side of the vehicle, while Mr. Alvarez is partially depicted standing in the front doorway area of his residence. Mr. Alvarez can be heard repeatedly asking Officer 1 about whether he knew for sure it was him driving. The footage records Officer 1 repeatedly telling Mr. Alvarez that he is "detained" and directing him to come to Officer 1's patrol vehicle. After inquiring whether the officer has a warrant, Mr. Alvarez can be heard shutting the door of his residence as he says, "You cannot come into my house." The segment ends with Officer 1 returning to his nearby patrol vehicle.

The second segment begins with Sergeant Benitez, Officer 1 and Agent DeStefano approaching the front door of the residence. By this time, the vehicle is now unoccupied. Officer 2 can be seen standing between the front of the residence and the passenger side of Mr. Alvarez's parked vehicle. As Sergeant Benitez reaches the area of the front door, he can be heard saying, "We're here now. Come on out," as he knocks on the door. Agent

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<sup>8</sup> This individual was not identified by PAPD during the initial encounter or subsequent investigations.

DeStefano states, "Come on out. Or we're going to kick the door in." Mr. Alvarez replies from within, "Do you have a warrant?" Agent DeStefano responds: "We don't need one."

Sergeant Benitez then asks, "Wanna boot the door?" Agent DeStefano responds in the affirmative and tells Mr. Alvarez to "Get the fuck out." Sergeant Benitez is then observed kicking the door twice. After the first foot strikes the door but before the second strike, Mr. Alvarez is heard saying, "I'm coming out." As this is occurring, Agent DeStefano draws his handgun to a low-ready position and Officer 1 is seen removing and readying a pair of handcuffs. Agent DeStefano then points his gun in the direction of the doorway of the residence from which Mr. Alvarez emerges.

Sergeant Benitez is then seen stepping forward toward the doorway, and out of the camera's field of view. Agent DeStefano holsters his handgun and steps forward. Sergeant Benitez and Agent DeStefano are observed pulling Mr. Alvarez out of the doorway by his arms or clothing and placing him chest down on the hood of his vehicle. Sergeant Benitez is positioned on the left side of Mr. Alvarez's body, Agent DeStefano is positioned on the right side of his body, and Officer 1 is behind Agent DeStefano's right shoulder, leaning over the hood from the front bumper area. As Mr. Alvarez is being pulled out toward the vehicle, Officer 2 steps toward the door in an apparent effort to address another person in the doorway. He remains in this position with his back to Mr. Alvarez throughout the ensuing arrest.

As he is being pulled out, Mr. Alvarez can be heard saying "pendejo" which is Spanish for "asshole." Sergeant Benitez replies, "You think you are a tough guy now?" As he says this, Sergeant Benitez's right arm abruptly moves toward Mr. Alvarez's lower back or waistline. Because the arm is completely obscured by Agent DeStefano's body, it is unclear whether the sergeant's hand is open or closed and whether or how it makes contact with Mr. Alvarez. As Mr. Alvarez remains chest down over the hood of the car, Sergeant Benitez and Agent DeStefano are seen trying to gain control of Mr. Alvarez's hands behind his back, while Officer 1 is observed attempting to apply handcuffs to Mr. Alvarez.

Sergeant Benitez then uses what appears to be his open right hand to strike the back of Mr. Alvarez's head and presses his head down against the hood. As he does so, Sergeant Benitez tells Mr. Alvarez to shut up. Mr. Alvarez responds by saying, "He just hit me." Officer 1 successfully applies the second cuff to Mr. Alvarez's wrist. During the arrest, Officer 2 can be heard saying twice to those inside the residence, "leave the door shut," which is followed by the sound of a door closing. Sergeant Benitez again says to Mr. Alvarez, "You think you're a tough guy, huh?"

Once the handcuffs have been applied to Mr. Alvarez, Officer 1 is seen disengaging from Mr. Alvarez and walking towards his patrol vehicle. At the same time, Agent DeStefano is depicted disengaging from Mr. Alvarez, stepping back, and transmitting via his radio that Mr. Alvarez had been arrested, while Officer 1 is walking away. Sergeant Benitez is observed putting his right hand into the center of Mr. Alvarez's back and Mr. Alvarez is heard telling the sergeant to stop pushing him.

Sergeant Benitez is then observed grabbing the back of Mr. Alvarez's jacket with both of his hands in an apparent effort to stand him up. Almost immediately, Sergeant Benitez is seen pushing Mr. Alvarez chest down onto the area of the hood that abuts the passenger side of the front windshield. As he does so, Sergeant Benitez can be heard to say, "You think you are a tough guy? Huh?" It appears as if Mr. Alvarez's chest makes contact with the hood of the vehicle while his face appears to make contact with the windshield. Once the sergeant stands up Mr. Alvarez again and begins escorting him along the passenger side of the vehicle, Mr. Alvarez can be heard to say, "I'm bleeding." Sergeant Benitez can be heard to say, "You're going to be bleeding a whole lot more."

A third segment of the surveillance footage shows what appears to be Mr. Alvarez's father exiting the residence and asking in Spanish for the officers to look at his broken door. Officer 2 replies, "That's so sad," and instructs the father to go back inside.

A fourth segment of the surveillance footage shows another sergeant who has come on scene (Sergeant 2), and Agent DeStefano asking the remaining residents for the keys to Mr. Alvarez's vehicle for purposes of towing it away. After Sergeant 2 backs Mr. Alvarez's vehicle out of the carport, Sergeant Benitez enters the carport and asks Mr. Alvarez's father if he speaks English. Sergeant Benitez asks another man if he speaks English and when he says he does, he explains to the father that Mr. Alvarez was arrested for driving with a suspended license and that Mr. Alvarez was required to open the door when asked to do so by police. Sergeant Benitez tells Mr. Alvarez that the officers were lawfully entitled to force entry when Mr. Alvarez refused to come out and said that the father was lucky that he was not also arrested. The father asked if a warrant was required, and Sergeant Benitez tells him no.

A fifth segment of the surveillance footage is from the next day and shows an Acting Lieutenant and a Spanish-speaking officer talking with a man at the front door of Mr. Alvarez's residence. It appears as though the purpose of the visit was to provide the residents with information about how to file a claim with the City relating to the damage to the front door as a result of the officers' forced entry. Again, the two PAPD employees advise the residents that they had the right to force entry into the residence.

*Other Recordings: Post Arrest Interactions Between Mr. Alvarez and PAPD*

In a MAV recording from Officer 1's vehicle, Mr. Alvarez tells Officer 1 after arriving at the station that he did not come out of his home when directed to do so because the police did not have a warrant. Later, during the trip to the jail, Mr. Alvarez tells Officer 1 of the presence of cameras at his residence.

A camera also captured video and audio footage in the police station. A review of that footage depicts Mr. Alvarez and Officer 1 when at some point Mr. Alvarez tells Officer 1 that his teeth hurt. Mr. Alvarez further tells Officer 1 that an officer hit him in the tooth today. Officer 1 does not probe further but tells Mr. Alvarez that they are going to get him checked out.

Later in the sequence, Officer 2 arrives in the area and Mr. Alvarez tells him that he is not hurt “right now” but that somebody had hit his face and that his chin hurt. When the officer suggests that he was hurt as a result of being placed on the hood of his car, Mr. Alvarez repeats that “somebody hit me in the face.” Officer 2 asks Mr. Alvarez if he wanted a medic to see him prior to going to jail, but Mr. Alvarez says he is “good”.

Sometime later, Officer 2 asks Mr. Alvarez if he was in a fight earlier. Mr. Alvarez says he was not and asks why the officer is asking. Officer 2 refers to the disheveled appearance of Mr. Alvarez’s clothing and Mr. Alvarez replies, “That was you guys”.

Finally, although Sergeant Benitez’s car was not positioned in a way to recover any video of evidentiary value, his wireless microphone did capture audio that tracks the surveillance camera discourse described above. In addition, the audio captures Sergeant Benitez having an interaction with Mr. Alvarez after he is being searched and placed in the back of Officer 1’s vehicle. During that discussion, Sergeant Benitez suggests that Mr. Alvarez apologize to the officers for his behavior, which he ends up doing.

Sergeant Benitez’s recording equipment also captures subsequent comments made by him on scene. At one point, Sergeant Benitez is heard remarking as follows:

See how much they behave when we put our foot down. How quickly they behave when we put our foot down and that’s what we don’t do enough of. There’s a time. Ya. This car is definitely going. We’re going full court. And if dad comes out, he’s getting his ass going to jail too. Amazing how well behaved they become.

When one of the occupants of the residence approaches Sergeant Benitez and says something inaudible, Sergeant Benitez says, “If you want to talk to us, you speak English or bring somebody that speaks English.” When the tow truck driver arrives, Sergeant Benitez mentions to the driver that Mr. Alvarez was “gay”. The Sergeant Benitez tells the driver: “We’re not gonna get shit on out here by these frickin’ low lifes that are, you know, defying us, running from us.” Later he tells the driver: “We’re not backing down. We’re not going away and getting a warrant and [coming back] another time.”

### PAPD Administrative Investigation:

The emergence of the private surveillance video fourteen months after the original incident prompted the Department to consider the necessity of additional investigations considering the criminal and administrative accountability issues it presented.<sup>9</sup> The first of these to

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<sup>9</sup> In addition to the criminal and internal affairs investigations, the FBI informed PAPD that it had also opened a criminal investigation into the incident and issued a subpoena to the City for records. However, no apparent active investigation was conducted by the FBI and five years after the incident, it advised PAPD that the five-year federal statute of limitations had run and accordingly, it would take no further action. PAPD requested that the FBI provide that closure determination in writing, but the Bureau declined to do so.

begin was an Internal Affairs investigation, which PAPD initiated soon after the surveillance video was provided. The following is a synopsis of that investigation and the evidence that it produced:

#### *Mobile Activated Video Audit Logs*

One of the investigators assigned to the internal investigation reported that he reviewed the Mobile Activated Video (“MAV”) audit logs for officers involved in the incident. These logs showed that, the day after the incident, Officer 2’s MAV was accessed by the Acting Lieutenant who had arrived at the scene after Mr. Alvarez had been taken into custody.<sup>10</sup>

#### *Officer 1 Interview Statements*

In his administrative interview, Officer 1 stated that he did not recall Sergeant Benitez using force on Mr. Alvarez because the incident had occurred eighteen months prior<sup>11</sup>; he also asserted that he was focused on Mr. Alvarez’s hand and placing handcuffs on him. When shown the video during his interview, Officer 1 said that it did not appear that the handcuffed man was resisting when Sergeant Benitez pushed him into the windshield, and that the force appeared to be unreasonable. Officer 1 further stated that he did not hear Mr. Alvarez’s remarks about him being hit and bleeding or Sergeant Benitez calling him a tough guy and suggesting that he would bleed a lot more. Officer 1 said that after hearing the sergeant’s statements, he believed they were unnecessary, inappropriate, and discourteous.

Officer 1 further said he did not recall Mr. Alvarez telling him that he had been struck by an officer or that he was injured. When shown the footage of him doing so, Officer 1 said he had no independent recollection of Mr. Alvarez’s statements to him. Officer 1 stated that he should have, per PAPD policy, included in his report the fact that Mr. Alvarez was offered medical treatment and declined the offer.

#### *Agent DeStefano Interview Statements*

In his administrative interview, Agent DeStefano stated that he responded to the incident, and he recalled that after Mr. Alvarez was grabbed by Sergeant Benitez, he recalled Mr. Alvarez “actively resisting” efforts to get his hands behind his back to be handcuffed. Agent DeStefano said that he recalled Mr. Alvarez “trying to pull away” and “throwing his weight around.” Agent DeStefano said he did not see Sergeant Benitez deliver any blows to Mr. Alvarez. Agent DeStefano said he did not hear any of the officers say anything to Mr. Alvarez other than Sergeant Benitez saying: “You think you’re a tough guy now?” at some

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<sup>10</sup> Although this significant fact was cited in the investigative report, it would have been helpful if the investigator had also included information about the logs of Officer 2 and the other involved officers.

<sup>11</sup> As with the other subject officers, fourteen months of that delay was due to PAPD not learning about the surveillance video, and two months was due to Officer 1’s attorney not being available for the interview.

point. Agent DeStefano described Sergeant Benitez as “agitated” and “going off” but said he couldn’t recall any additional remarks by the sergeant.

After being shown the video, Agent DeStefano said that because he could not determine whether Mr. Alvarez was resisting Sergeant Benitez nor the exact blows or strikes delivered by the sergeant, he could not offer an opinion about whether the force was reasonable. Agent DeStefano did concede that a use of force report should have been prepared.

Agent DeStefano said that the sergeant’s statement that Mr. Alvarez would be “bleeding a lot more” violated policy because it was discourteous and unprofessional.

Agent DeStefano said that he recalled sending a message to another officer who had not traveled to the scene that “the fuse was lit”. Agent DeStefano said that his reference was to Sergeant Benitez’s “tough guy” remark and agitation with Mr. Alvarez’s behavior.

#### *Officer 2 Interview Statements*

In his administrative interview, Officer 2 stated that he had his back to the other officers because he was dealing with the other residents and telling them to go back inside when the other officers were bringing Mr. Alvarez into custody. Officer 2 further stated that he did not hear any of the verbal interaction between Mr. Alvarez and Sergeant Benitez during the arrest.

When shown the video, Officer 2 described the strikes and push by Sergeant Benitez to Mr. Alvarez as “not something [he] would do” and stated that they “did not look appropriate.” Officer 2 said that the push into the windshield appeared to be motivated by “anger” as opposed to any resistance. Officer 2 said the statements by Sergeant Benitez to Mr. Alvarez were inappropriate, unprofessional, and disrespectful.

#### *Acting Lieutenant Interview Statements*

In her administrative interview, the acting lieutenant said that she responded to the incident after she heard “a door was kicked.” She further stated that when she arrived, Mr. Alvarez had already been placed in a police car. The acting lieutenant said that she thought she walked over to look at Mr. Alvarez but was not sure if she spoke to him at the scene. The acting lieutenant said she may have talked to Mr. Alvarez, but that he was not cooperative.<sup>12</sup> Although Sergeant Benitez’ MAV recordings pick up him advising the acting lieutenant of the incident including the comment, “they’re all behaving now,” advising her that “Dad was pretty much of an a-hole too” and telling one of the residents, “You want to talk to us speak English or bring somebody who speaks English,” she indicated in her interview that she had no recollection of those comments being made.

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<sup>12</sup> The MAV recordings showed that the Acting Lieutenant remained on scene for approximately eight minutes.

According to the acting lieutenant, she called her supervisor about the incident. The supervisor instructed her to contact the residents and inform them of how to file a claim regarding the door. The acting lieutenant said that she then advised the on-scene sergeants of this direction. However, instead of complying, the sergeants took the occasion to chastise the residents for Mr. Alvarez running from the police. The acting lieutenant produced a text to her supervisor about this discussion:

Much to the irritation of [Sergeant Benitez], the damaged door jam folks now have a card and a case number to contact the City Attorney if they choose. It was not mentioned originally as I previously thought, a chastising about running from the police was given instead.

The Acting Lieutenant said in her interview that had returned to the residence herself and advised the occupants about how to file a claim for the damaged door. She believed she had learned about the “chastising” from her review of Officer 2’s MAV but was not positive.

The Acting Lieutenant said that approximately a month after the incident, she attended a meeting with peers and a third level supervisor. The Acting Lieutenant said she brought up this incident at the meeting including the irritation that seemed to be emanating from Sergeant Benitez. The Acting Lieutenant said that she had also seen several videos of Sergeant Benitez’ MAV recordings of other traffic stops where he was “verbally rough”. While according to the Acting Lieutenant, the stops did not show violations of policy, she was concerned that Sergeant Benitez’s conduct should be addressed as an “early intervention”. According to the Acting Lieutenant, she was advised by her supervisor that she should just “leave it alone”, that it wouldn’t be addressed, and not to watch MAV’s anymore.<sup>13</sup>

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*The tow truck driver* was also interviewed but stated that he had no recollection of any statements that Sergeant Benitez made to him.

*Sergeant Benitez* was initially scheduled for an interview, but he indicated that he was not going to participate in the investigation.<sup>14</sup>

Within eight months of the commencement of the Internal Affairs investigation, all investigative work had been completed. However, over two years passed between the

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<sup>13</sup> We have been advised that the new direction to supervisors that they stop reviewing MAV recordings as a routine part of supervisory responsibilities emanated from the highest levels of PAPD’s administration.

<sup>14</sup> As noted above, Sergeant Benitez was placed on administrative leave after the surveillance video of the incident was presented to PAPD. He also declined to provide a statement to the criminal investigator. Sergeant Benitez resigned from the Department approximately 19 months after the incident.

initiation of the case and the completion of the investigative report, finalization of the executive review process, and filing of administrative charges against the involved officers. It had been over three years since the incident.

Two of the officers who were charged with administrative violations appealed their discipline to an arbitrator. It took another 2 ½ years before the arbitrators issued their findings and the proceedings were completed.

## Criminal Investigation

We have been advised that after PAPD reviewed the surveillance video, it discussed the matter with representatives of the District Attorney who initially indicated no interest in PAPD's pursuing of a criminal investigation. After Mr. Alvarez's attorney released the video and it was publicized in the media, the District Attorney apparently revisited the issue and requested that a criminal investigation occur.

As a result of this request, but some 18 ½ months after the incident, PAPD opened a criminal investigation into the incident and then forwarded the completed report to the District Attorney for review. Most of the on-scene officers (Sergeant Benitez, Agent DeStefano, Officers 1 or 2) declined to provide statements for the criminal investigation. As detailed below, after PAPD's review was submitted, a DA investigator conducted additional investigation.

In addition to the information provided to internal affairs investigators, the Acting Lieutenant<sup>15</sup> who arrived after Mr. Alvarez had been detained was interviewed by the PAPD criminal investigator and she said that she was at the station when she heard the officers' radio traffic. The Acting Lieutenant said that she didn't feel the information she heard over the radio matched up, so she drove to the scene. When she arrived, she was advised about the event by Sergeant Benitez. The Acting Lieutenant said that Mr. Alvarez had a "little thing" above his eye but that Sergeant Benitez said that it was an old mark. The Acting Lieutenant said she did not photograph Mr. Alvarez on the night of the incident.

The Acting Lieutenant described asking Mr. Alvarez if he would like assistance with anything, but that Mr. Alvarez did not wish to engage. The Acting Lieutenant described being specifically told by Sergeant Benitez that there was no use of force. The Acting Lieutenant then called a supervisor to report the incident.

Agent DeStefano had approved Sergeant Benitez's supplemental report even though he was of subordinate rank to him. Asked about this, the Acting Lieutenant said that it was not

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<sup>15</sup> The Acting Lieutenant is no longer employed by PAPD.

“good” if a person of lower rank “approves” a report written by a sergeant but that she has seen that happen.<sup>16</sup>

The Acting Lieutenant also said that she met a woman sometime in the first half of year 2019 who came to the police department and wanted to talk to the Chief. The woman wanted to complain about how the police were treating people in the neighborhood. The Acting Lieutenant said that the woman was accompanied by a friend that she later realized was Mr. Alvarez. The Acting Lieutenant said that as the conversation was ending, Mr. Alvarez said he even had some video.

The PAPD criminal investigator also obtained PAPD car to car messages from the incident date. Included in those messages was one from Agent DeStefano to Agent 3 (who did not respond to the scene of the incident). The following messages occurred approximately three hours after Mr. Alvarez’s arrest:

Agent DeStefano: You missed out – the fuse was lit tonight.

Agent 3: That’s my favorite thing ever... I saw it go off before when I was brand new and I was like this is what its like in Los Angeles.

Agent DeStefano: Yup... it happened tonight.

The PAPD criminal investigator also reviewed a MAV recording from Sergeant 2’s vehicle. It captures a conversation between Sergeant 2 and Agent DeStefano in which Agent DeStefano says that Mr. Alvarez “pissed off the wrong sergeant”.

The PAPD criminal investigator reviewed a MAV recording between Officer 2 and Mr. Alvarez. During that recording, Officer 2 asks Mr. Alvarez if he needs a medic and Mr. Alvarez replies that he does not. Mr. Alvarez is also heard to say: “Somebody hit my face, that shit hurts”, “Ya, somebody hit me in the face”, and “The camera can probably prove that.”

The PAPD criminal investigator recommended forwarding his report to the District Attorney for consideration of the following charges: Peace Office Filing a False Report, Assault Under Color of Authority, Battery.

An investigator from the District Attorney’s Office conducted further investigation regarding the incident after receiving the materials from PAPD. As part of that investigation, the investigator reviewed the MAV of Sergeant Benitez. In addition to the statements identified by the Internal Affairs investigator and discussed above, the investigator reported that after Sergeant Benitez stated “You’re gonna be bleeding a whole lot more,” he had added, “What’s wrong? You’re not so tough now?”

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<sup>16</sup> To its credit, PAPD revised its protocols to prevent this from happening on a going forward basis. We discuss this change below.

The DA investigator further noted the following statements by Sergeant Benitez and captured by his MAV: "So we're going to tow the car too. It was used in the commission of the crime. No leniency here."

In addition to the statements referenced by the PAPD investigators, the DA investigator noted the following statement from Sergeant Benitez: "We put our foot down and they're all behaving themselves now."

In addition to the statement referenced by the PAPD investigators, the DA investigator noted the following statement from Sergeant Benitez to the tow truck driver: "I think they're trying to get the keys from the guy... this guy.... Flaming assholes in this family."

In referencing the comment made by Sergeant Benitez to the tow truck driver about Mr. Alvarez being gay, the DA investigator noted that the comment is followed by laughter.

In reviewing Officer 2's MAV recording, the DA investigator noted the following dialogue between Officer 3 and Officer 2:

Officer 2: Hi, How are ya?

Officer 3: Good.

Officer 2: Something finally happened.

Officer 3: I know we can actually do something for once. Changing of the guard around here.

Officer 2: Only because we have a new Chief. So we can actually be cops again.

Officer 3: (Laughing) I know.

The DA investigator noted that later, when Officer 3 began to conduct an inventory search of the car prior to it being towed, Officer 3 is heard to state:

Let's see what kind of disgusting stuff he had in here.<sup>17</sup>

In reviewing Agent DeStefano's MAV recording, the DA investigator noted that Agent DeStefano is laughing when recounting the incident to Sergeant 2. The sergeant is then heard to say: "The fuse was already lit earlier today, dude".

In reviewing Sergeant 2's MAV recording, the DA investigator noted that Sergeant 2 asks Mr. Alvarez's family for the key to the vehicle. The DA investigator indicated that the recording picks up the following exchange that appears to be between Sergeant 2 and Agent DeStefano (who is laughing).

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<sup>17</sup> This comment, even though not communicated to a member of the public, is entirely inappropriate for Officer 3 to have made. If PAPD has not addressed the impropriety of this comment with Officer 3, it should certainly do so.

Wrong person to say that to. You know [Sergeant Benitez] was going to fucking tow that shit. Lucky he didn't get [put to sleep].

The DA investigator noted that it was unclear who is saying what, as only Sergeant 2's microphone is unmuted.

The DA investigator reviewed the recordings from the camera at the PAPD police station. He noted that Officer 1 asked Officer 2: "Do we need to get him checked for all the scratches?" Officer 2 replies: "Is that from us or something else?"

The DA investigator notes that later Officers 1 and 2 have the following exchange:

Officer 1: I don't want to get turned around from jail.

Officer 2: Why?

Officer 1: Because of the scratches.

Officer 2: Pull his shirt up... He doesn't know about it.

Officer 1: My question is should I just go straight to Stanford?

Officer 2: This isn't an injury that requires going... Just a scratch.<sup>18</sup>

The DA investigator further noted that the recording from the PAPD station camera showed Mr. Alvarez continuing to touch the right side of his face while he was being processed. The investigator wrote that at one point, Mr. Alvarez puts his finger into the right side of his mouth and looked at the finger.

The DA investigator noted that the PAPD station camera captures this exchange between Mr. Alvarez and Sergeant Benitez:

Man: I'm taking this to trial. I'm not scared of you guys.

Sergeant Benitez: Well, you should be afraid of the police.

Man: I am. I'm not afraid to go to court.

The DA investigator's report further indicated that Officer 1's MAV video featured Agent DeStefano in the PAPD parking lot. According to the DA investigator's report, Agent DeStefano sees Agent 2 and walks toward him, smiling. The report indicates that Agent DeStefano can be heard saying: "Don't light the fuse" and "The fuse got lit" as he walks past Officer 1 and towards Agent 2<sup>19</sup>. The report further indicated that Officer 3 joins in the

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<sup>18</sup> The reference to getting turned around from jail is apparently a concern that the jail would not accept an injured individual until he receives medical attention and is cleared to be booked. The reference to Stanford is the local hospital where injured arrestees are routinely sent for examination and treatment.

<sup>19</sup> Agent 2 is no longer employed by PAPD.

conversation. According to the report, Agent DeStefano can then be seen “acting out” the incident. The report indicates that Agent DeStefano appears to grab, then slam his hand down on a patrol vehicle with enough force for the hit to be picked up on Officer 1’s microphone and then slaps his hand down a second time.

The DA investigator reviewed the above-reported message exchange between Agent DeStefano and Agent 3 (who did not respond to the location). In addition to that reported by the PAPD criminal investigator, the DA investigator noted the following exchange:

Agent 3: Amazing, I love it... that’s a 100% real cop’s cop right there. We got to 87<sup>20</sup> later. I want to hear it and to tell you what I saw before. Allegedly.

Agent DeStefano: Let me know.

As part of the investigation, the criminal investigator received materials from the attorney representing Mr. Alvarez in the civil litigation. One document noted as received was a letter from Sergeant Benitez to Mr. Alvarez, dated approximately 21 months after the incident. The letter states:

I am sorry for my actions during the arrest of Mr. Alvarez. Regrettably, I lost my composure and hope the settlement allows Mr. Alvarez to move forward with his life. Sincerely, [Sergeant Benitez]<sup>21</sup>

Twenty-seven months after the date of the incident, the District Attorney’s Office announced that it would not be filing any criminal charges in the case due to a lack of evidence. However, one week later, the DA’s Office announced that it would be reconsidering the matter in light of a newly discovered and liberal statute of limitations. Four months after that announcement, the DA’s Office reported that it had filed criminal charges against Sergeant Benitez. He was charged with two misdemeanors: assault under color of authority and falsifying a police report.

Fourteen months after the charges were filed, the now-former Sergeant Benitez pleaded guilty to those charges. As part of the plea agreement, former Sergeant Benitez was placed on one year probation and required to attend both anger management classes and LGBTQ sensitivity training.

### PAPD Administrative Review: Investigator's Findings and Conclusions

Thirty-eight and a half months after the incident, the lead Internal Affairs investigator authored a memorandum setting out the findings for the case.

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<sup>20</sup> 87 is a radio code indicating to meet up.

<sup>21</sup> As set out above, the apology letter was apparently written to fulfill a requirement of the settlement agreement in the civil litigation.

### *Sergeant Benitez*

The internal investigator reviewed the evidence and found that after Mr. Alvarez had been handcuffed, Sergeant Benitez forcefully grabbed Mr. Alvarez by his jacket to stand him up and began to walk him back toward the patrol vehicles. The investigator found that Sergeant Benitez then abruptly and forcefully pushed Mr. Alvarez's upper body into the hood and windshield area of the vehicle. The investigator noted that as he did so, Sergeant Benitez said, "You think you're a tough guy, huh?"

The investigator concluded that at the time this occurred, Mr. Alvarez was no longer resisting (if he ever was) and was not an imminent threat to the officer or others. The investigator reasoned that the statement by Sergeant Benitez supported the idea that the sergeant was acting out of frustration or anger and not using a technique designed to gain control in response to resistance. The investigator noted that Sergeant Benitez's statement that Mr. Alvarez was going to "bleed a whole lot more" belied any argument that the sergeant was dispassionately using force to overcome any resistance. The investigator concluded that Sergeant Benitez's force was unreasonable and unwarranted.

The investigator further found that Sergeant Benitez failed to document his use of force in his police report, as required by policy. The investigator noted that Mr. Alvarez told Sergeant Benitez he had been injured, but the sergeant failed to include this fact in his report. As a result, the investigator found that Sergeant Benitez authored a report he knew to be misleading. The investigator further found that Sergeant Benitez failed to notify a ranking supervisor who arrived on scene later of his use of force, also contrary to PAPD policy.

The investigator noted that while handcuffing Mr. Alvarez, Sergeant Benitez told him to "shut up" and that once he was handcuffed, Sergeant Benitez taunted him by calling him a "tough guy." The investigator further observed that when Mr. Alvarez said he was bleeding, Sergeant Benitez replied by stating that he would "be bleeding a whole lot more." The investigator found that the statements were not made for any legitimate purpose and found the comment about "bleeding a whole lot more" to be tantamount to a threat. The investigator found that Sergeant Benitez's comments were discourteous and disrespectful in violation of PAPD policy.

Additionally, the investigator found that Sergeant Benitez commented negatively about the people residing in the area when speaking to the tow truck driver. The investigator found that the remark was innately derogatory and supported a finding that Sergeant Benitez used derogatory language in contravention of policy.

The investigator concluded that the following policy violations should be sustained as to former Sergeant Benitez:

- False or misleading report
- Unreasonable force

- Discourteous treatment of the public
- Derogatory language
- Failure to report force.

#### *Officer 1*

The investigator found that there was insufficient evidence to prove that Officer 1 saw or heard the force and statements by Sergeant Benitez. However, the investigator noted that Mr. Alvarez after the incident repeatedly advised Officer 1 that he had been struck by an officer and that his tooth hurt. The investigator pointed out that PAPD policy requires supervisor notification when an individual alleges being struck, and that Officer 1 had not done this.

The investigator noted that while Officer 1 offered Mr. Alvarez medical treatment (which Mr. Alvarez declined), Officer 1 failed to document Mr. Alvarez's complaint of pain or injury and his subsequent refusal of treatment. The investigator noted that Officer 1 conceded that his failure to include this information in his report to be a violation of policy.

The investigator found that the following policy violations should be sustained:

- Failure to report a use of force
- Failure to document an offer of medical treatment and refusal.

The investigator found that the following potential policy violations should not be sustained:

- Failure to intercede or timely report
- False reporting.

#### *Agent DeStefano*

The investigator found that Agent DeStefano was in the immediate vicinity of the use of force. The investigator noted that after Mr. Alvarez had been placed in handcuffs, Agent DeStefano observed that Sergeant Benitez had pushed Mr. Alvarez back down onto the vehicle. The investigator noted that Agent DeStefano concluded that Sergeant Benitez had done this to overcome further resistance from Mr. Alvarez. The investigator noted that Sergeant Benitez's report did not mention any use of force. The investigator concluded that even if Agent DeStefano did not recognize the force as unreasonable, he had witnessed it. He then reviewed and approved Sergeant Benitez's report, which failed to properly document this force. As a result, the investigator concluded that Agent DeStefano knowingly approved a report that was inaccurate and unacceptable.<sup>22</sup>

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<sup>22</sup> The fact that a subordinate officer "approved" a report written by a supervisor was not expressly addressed in the investigation. This was because unfortunately, it was allowed at the time per policy and practice. As discussed in more detail below, a policy change prohibited the future continuation of that practice.

The investigator noted that as Sergeant Benitez's was kicking the door open, Agent DeStefano drew his weapon, which appeared at one point to be pointed at Mr. Alvarez. The investigator further noted that Agent DeStefano assisted Sergeant Benitez in controlling Mr. Alvarez on the hood. The investigator concluded that contrary to PAPD policy, Agent DeStefano failed to document pointing his firearm at a person as well as the force he employed to handcuff Mr. Alvarez.

The investigator found that the following policy violations should be sustained:

- Failure to document a use of force
- Failure to document a pointing of firearm
- Inadequate supervisory report review.

The investigator found that the following potential policy violation should not be sustained:

- Failure to intercede or timely report.

#### *Officer 2*

The investigator found that there was insufficient evidence to establish that Officer 2 saw Sergeant Benitez's excessive force as he had his back toward the incident when the force occurred. However, the investigator found that Mr. Alvarez had told Officer 2 that he had been struck by an officer and that his tooth hurt. As a result, the investigator concluded that Officer 2 violated PAPD policy when he failed to make the required supervisory notification in response to an allegation of being struck by an officer.

The investigator also found that Officer 2 offered medical attention to Mr. Alvarez but failed to prepare a report documenting the complaint of pain and his officer of treatment. The investigator noted that Officer 2 conceded that his failure to include this information in a report was a violation of policy.

The investigator found that the following policy violations should be sustained:

- Failure to report a use of force
- Failure to document an offer of medical treatment and refusal.

The investigator found that the following potential policy violations should be unfounded:

- Failure to intercede or timely report.

#### **Executive Review of Completed Investigation**

Thirty-nine months after the incident, the command staff member assigned to conduct the first level review of the matter noted that the failure of the incident to be discovered by the Department in a timely fashion eroded the community's trust in the Police Department and precluded PAPD from addressing it in a manner more contemporaneous to the event's occurrence.

The initial reviewer disagreed with the investigator's conclusion relating to Agent DeStefano and found that the officer did fail to promptly report an unreasonable use of force by Sergeant Benitez. The reviewer concurred with the finding Agent DeStefano more likely than not observed Sergeant Benitez abruptly and forcefully push Mr. Alvarez chest-down onto the windshield/hood area of his vehicle. The reviewer found that once Mr. Alvarez was lifted off the hood of the vehicle by Sergeant Benitez and standing upright, the video shows Agent DeStefano's head in direct line of sight of what was occurring. The reviewer also found that as Sergeant Benitez began his motion to slam Mr. Alvarez on the windshield/hood of the car, he told Mr. Alvarez "You think you're a tough guy?" and that Agent DeStefano's head was fixed toward Sergeant Benitez and Mr. Alvarez.

From there, the reviewer differed from the investigator in an important respect: namely, whether there was clear evidence that, at the time Sergeant Benitez used this force, Agent DeStefano recognized that Mr. Alvarez was no longer resisting and did not appear to pose an imminent threat. To the reviewer, it was more likely than not that Agent DeStefano recognized the force as not only having occurred, but also to have been unreasonable.

The reviewer further found that Agent DeStefano later reviewed and approved Sergeant Benitez's falsified police report that failed to document this force, knowing that the report was false and inaccurate.

The reviewer found that another factor supporting this finding was Agent DeStefano's failure to document any of his actions and observations at the scene; including the force he himself used to take Mr. Alvarez into custody. The reviewer concluded that this failure by Agent DeStefano was to minimize his role in what occurred in the carport area. The reviewer also found important Agent DeStefano's subsequent "re-enactment" of Sergeant Benitez's actions as further evidence that he observed the sergeant's excessive force.

The reviewer also found that Agent DeStefano had ample opportunity to report the force to an acting lieutenant and another sergeant who both arrived on scene within minutes of the incident. The reviewer noted that subsequent video shows Agent DeStefano in the immediate presence of the acting lieutenant and having multiple conversations with the other sergeant, but that he declined to report his use of force or Sergeant Benitez's use of force to them.

The reviewer found that Agent DeStefano's statements, actions, and demeanor throughout this incident revealed a clear lack of professionalism that reflected unfavorably upon the Department. The reviewer found that the investigation, including information about Agent DeStefano's subsequent descriptions to colleagues, provided insight into what Agent DeStefano thought about this incident: that what happened to Mr. Alvarez was amusing and provided an entertainment opportunity to be shared with others. The reviewer noted that Agent DeStefano laughed at the scene while telling another supervisor about what happened to Mr. Alvarez, commenting that Mr. Alvarez had "pissed off the wrong sergeant," sending a message to another officer that he "missed out" because "the fuse was lit tonight"

and then “acting out” the incident on the hood of a patrol car after saying, “Don’t light the fuse.”

The reviewer noted that even though Sergeant Benitez was no longer employed by Palo Alto as a sworn police officer, the Department chose to proactively complete the analysis and findings portion of the allegations against him. Consequently, the reviewer did a full assessment. This included a finding that the sergeant had failed to exercise self-control during the incident and noted that his actions resulted in criminal charges.<sup>23</sup> The reviewer found that, in addition to his criminal behavior, Sergeant Benitez’s statements, demeanor, and attitude failed to uphold Department expectations and standards, especially as a senior sergeant. The reviewer cited Sergeant Benitez’s referring to the residents of the area as “frickin’ low lifes”, taunting Mr. Alvarez by calling him a “tough guy”, telling Mr. Alvarez to “shut up”, threatening that Mr. Alvarez was going to be “bleeding a whole lot more”, and describing Mr. Alvarez as gay and making fun of his behavior. The reviewer also found that not only did the evidence support a finding that the report was misleading, but it also supported a finding that Sergeant Benitez knew the report was false. The reviewer concluded by indicating that, had Sergeant Benitez still been a member of the Department, his actions would have warranted severe discipline, up to and including termination.

The reviewer noted that the incident also had provided the Department an opportunity to revise policies, maximize the use of technology, provide training, seek input on policing initiatives and policy reform, and engage with community stakeholders on greater transparency and accountability, with the hope that such actions would lessen the likelihood of a similar incident from occurring in the future. As examples, the reviewer noted the following initiatives:

- Equipping all officers with body-worn cameras
- Requiring that reports be reviewed and approved by a person of greater rank than the author
- Review and reform of use of force, tactics, and de-escalation
- Greater emphasis on community engagement, transparency, and accountability
- Expanding the IPA’s scope of services to provide additional oversight of Department investigations involving force
- Training on topics that included Tactical Communication, LGBTQ Awareness for California Law Enforcement<sup>24</sup>, Critical Incident and De-escalation, and Strategic Communication.

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<sup>23</sup> As noted above, those charges eventually resulted in a criminal conviction against Sergeant Benitez. That conviction had not occurred at the time the reviewer authored his memorandum.

<sup>24</sup> As noted above, the LGBTQ training was required as one of the conditions of the agreement settling Mr. Alvarez’s civil lawsuit. We have been advised that the training had actually already been scheduled on PAPD’s in-service calendar prior to the settlement.

## Imposition of Discipline and Appeals

### *Agent DeStefano*

Approximately 40 months after the incident, Agent DeStefano received notice that PAPD intended to terminate his employment with the agency. It advised him that PAPD had found that Agent DeStefano had violated the following policies:

- Duty to intercede
- Failure to report use of force
- Failure to review reports for accuracy
- Failure to document his pointing of a firearm
- Conduct unbecoming.

To support the termination decision, the notice also referenced an earlier 2017 suspension of 88 hours for driving while intoxicated in a "hit and run" DUI collision.<sup>25</sup>

The notice concluded as follows:

Regarding the 2018 incident with Mr. Alvarez, you failed to document your own use of force, failed to notify a supervisor of excessive force that you witnessed, and then approved reports you knew to be false. Your conduct was despicable and has had an extremely negative impact on the public's trust in this Department. You covered up an unjustified use of force that eventually came to light only because of Mr. Alvarez's home surveillance system and his pursuit of legal claims against the City. For these reasons, termination is the appropriate penalty.

### *Skelly Decision: Agent DeStefano*

Agent DeStefano exercised his Constitutional rights to a Skelly determination.<sup>26</sup> The Skelly officer declined to modify the initial determination and discipline after hearing from the Agent and his attorney.

### *Arbitration Decision: Agent DeStefano*

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<sup>25</sup> The Arbitrator noted that Agent DeStefano had received performance evaluations over the years of Meets or Exceeds Standards or Outstanding, served as a field training officer, had been promoted to the rank of Agent, and had also received multiple commendations and awards in his tenure with the Department.

<sup>26</sup> The "Skelly" process affords peace officers the right to have their proposed discipline be reconsidered by a different decision-maker within the agency; an attendant hearing often features a response by the involved officer to the proposed findings.

Agent DeStefano proceeded to arbitration after receiving the final discipline notice. Upon conclusion of the arbitration hearing and five years and eight months after the incident, the arbitrator upheld PAPD's disposition and decision to terminate the officer.

#### *Officer 1*

Officer 1 was initially provided notice of PAPD's intent to terminate him from employment. The notice indicated that Officer 1 had violated PAPD's policy requiring notification following a use of force and his failure to document the fact that Mr. Alvarez had advised Officer 1 that an officer had hit him as well as his failure to document that Officer 1 had offered Mr. Alvarez medical assistance.

The notice indicated that Officer 1's failure to notify a supervisor of Mr. Alvarez's allegations and document his refusal of medical treatment as required by policy had a grave impact on the Department's ability to ensure a timely review of the incident. The notice indicated that Officer 1's failure to follow the rules appeared to have been a deliberate effort to make sure the use of force was covered up.

#### *Skelly Determination: Officer 1*

The Skelly officer determined that the policy violations should be sustained, but that Officer 1 had "taken responsibility" for his actions in a meaningful way.<sup>27</sup> As a result, based on the findings of the Skelly officer, PAPD decided to reduce the discipline from termination to a serious suspension.

#### *Arbitration Decision: Officer 1*

Following the Skelly hearing and final notice of suspension, Officer 1 took the matter to an arbitration hearing. The arbitrator ultimately imposed a more than five-fold reduction of the suspension.

During the arbitration, Officer 1 did not dispute that he had violated the policy violations set out in the notice. However, the arbitrator found that the following "mitigators" made his violations not egregious and not deserving of a significant suspension:

- Officer 1 was relatively inexperienced.
- Officer 1 was not familiar with all of PAPD's rules.
- Officer 1 accepted responsibility for his actions.
- Officer 1 did not believe Mr. Alvarez's allegations that he had been struck by an officer.
- Officer 1 was remorseful and had rehabilitated himself.
- Officer 1 had no prior disciplinary history.

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<sup>27</sup> While Officer 1 did admit that he failed to follow policy relating to his reporting requirements, his almost complete lack of recall relating to any of the events of the incident calls into question the degree to which he accepted responsibility.

Officer 1 is not likely to reoffend.

The arbitrator found that the officer had not deliberately tried to “cover up” the use of force and that Officer 1 did not see the use of force when it occurred. It noted that the Skelly officer, in reducing the discipline from termination to a significant suspension, had similarly found that Officer 1’s actions were not deliberate or intentional. The arbitrator also accepted Officer 1’s argument that because he was a new officer, he did not fully understand the policies that he needed to follow.

The arbitrator concluded that Officer 1 did not deliberately fail to comply with the rules but was only negligent. Accordingly, he completely accepted the Officer’s attorney’s recommendation to reduce the discipline to a low-level suspension – to the point of adopting the suspension award that his lawyer had suggested.

#### *Officer 2*

Officer 2 was initially provided notice of PAPD’s intent to terminate him from employment. The notice indicated that Officer 2 had violated PAPD’s policy requiring notification following allegations of injury by Mr. Alvarez as well as his allegations that he had been hit in the face. Officer 2 was also have found to have violated policy by his failure to document his offer of medical attention to Mr. Alvarez. The rationale for this finding was similar to the rationale for the finding against Officer 1.

Once Officer 2 was advised of PAPD’s intent to terminate him, he decided to retire from the Police Department.<sup>28</sup>

### IPA Review and Analysis

Without question, this case certainly qualifies as the most complex and significant episode in our tenure as the Independent Police Auditor for the City. The combination of severe misconduct, the number of officers involved as subjects, and the halting, multi-faceted, and convoluted process with which it was addressed lends itself to a number of observations, which we set forth below. Additionally, we offer recommendations that ideally will provide additional grist for PAPD in reckoning with the implications of this chapter in its recent history.

*A. The decision to conduct the administrative investigation internally was fraught and problematic.*

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<sup>28</sup> California Senate Bill 2 (Cal. Penal Code § 13510 et seq) requires police agencies to notify California’s Peace Officer Standards and Training (“POST”) of officers who voluntarily leave employ while administrative proceedings of misconduct are under way. The legislation is an effort to prevent officers who leave one agency under a disqualifying cloud to find employment as a peace officer at another agency. We have been advised that PAPD has advised POST of the circumstances surrounding Sergeant Benitez’ retirement, and the arbitration finding against Agent DeStefano.

We have been advised that after the surveillance video was provided to PAPD, the decision was made at PAPD's highest level to keep investigative responsibility for the administrative case within the agency, rather than delegating that role to an independent outsider acting on the authority of the Chief.<sup>29</sup> If the allegation had been simply one of excessive force by Sergeant Benitez, the case could have been well-handled internally. However, in light of the complicated dynamics involved, there were significant disadvantages to this approach.

As described in detail above, the force used by Sergeant Benitez had not been timely reported by either him or any of the on-scene witness officers, which created special complexities. This enlarged the focus of the investigation significantly, and eventually resulted in four PAPD sworn officers subject to potential termination for the force and the failure to appropriately report it. Moreover, as explained below, the initial information and the failure of PAPD to timely learn of the excessive force and additional misconduct by Sergeant Benitez meant that the investigation could have (and should have) looked into whether anyone in PAPD either learned or could have learned of the misconduct before the surveillance videos surfaced. That inquiry would have likely required that command staff be interviewed as part of the investigation – a problematic task for a PAPD assigned investigator of equal or subordinate rank.

While the internal investigators assigned to the matter conducted a creditable investigation in the face of challenging circumstances, as explained above, the initial findings as to Agent DeStefano ended up being countermanded by the first reviewer. In essence, the PAPD investigators were placed in a difficult position which could have been alleviated had the investigation been referred outside of the Department.

### **RECOMMENDATION 1**

PAPD should assign administrative investigations to outside investigators when factors such as failure to report force, multiple involved subjects, and discovery delays suggest inherent complications.

*B. The tolling of the Internal Affairs investigation resulted in an unnecessary delay in its completion and the accountability of involved officers.*

As detailed above, it was fourteen months after the incident that PAPD was given the surveillance video. We have been advised that, after reviewing the video excerpts, it discussed the matter with representatives of the District Attorney who initially indicated no interest in having PAPD pursue a criminal investigation. As a result, PAPD opened an Internal Affairs investigation. However, we were advised that after Mr. Alvarez's attorney

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<sup>29</sup> As we have noted in previous IPA reports, PAPD has a past practice of assigning selected administrative cases to outside investigators; the results, in terms of the quality of the work product, have generally been positive in our view.

released the video, the District Attorney apparently revisited the issue and requested a criminal investigation to occur.

Unfortunately, there is no documentation in the investigative file that explains this sequence of events. Guidance and interest in a criminal investigation by the prosecuting authority should be documented and included in the investigative file, so that any tolling or interruption in the completion of the internal investigation and review can be better understood.

PAPD could have held its internal investigation until the criminal investigation and District Attorney review was completed, to its credit it continued with evidence-gathering, and all the investigative work was completed in eight months. However, instead of proceeding to a disposition, the investigation was then held, apparently to wait for the District Attorney review to be completed. Even after charges were announced by the District Attorney against Sergeant Benitez, the Internal Affairs investigation continued to be held. As a result, it was more than three years after the incident before the involved officers received notice of PAPD's intended disciplinary outcome. And then it took another 2 ½ years before the arbitration hearings had been completed and the arbitrators reported their findings.

This was suboptimal in many respects. It is true that, per California statute, law enforcement agencies generally have one year to complete an internal investigation and notify involved officers of any intent to discipline. It is also true that the one-year clock does not begin until PAPD has "knowledge" of potential violations of policy, and that the one-year statute can be tolled when related criminal matters are pending. In this case, because PAPD's actual notice was not until it had been provided with the surveillance video and because there were ongoing criminal proceedings, it was technically possible for PAPD to delay resolution of the administrative matters without forfeiting its eventual right to take disciplinary action.<sup>30</sup>

There is some argument that waiting for the criminal case to resolve is preferable, so that an agency can use the results of those proceedings to shape its internal response or to avoid any interference with the prosecution. However, the policy arguments for proceeding apace with the internal proceedings in this case significantly outweigh any reason advanced to delay them.

First, the investigation of this case was already delayed for over a year because of PAPD's failure to timely learn of the excessive use of force and other misconduct. Second, after the surveillance tapes were released to the public, there was strong additional interest in resolving pending issues as soon as was practicable. Third, while Sergeant Benitez retired

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<sup>30</sup> In fact, since the criminal case against Sgt. Benitez was not resolved until recently, PAPD could have held the Internal Affairs disposition until then, and well into 2024. Extrapolating a similar 2 1/2-year timeline for the arbitrators' hearings and determinations, the internal proceedings could have well extended to 2026 or 2027.

within a few months of the internal investigation being commenced, Agent DeStefano and other subject officers continued to receive pay while the internal investigation was tolled for another eighteen months. Finally, the delay in the administrative case meant that all the involved officers had the specter of serious administrative consequences hanging over them for many months.

Simply because an agency *can* delay an internal investigation when there are ongoing criminal proceedings does not mean it *should*. In this case, once it discovered that this incident involved serious potential administrative issues for multiple officers, PAPD should have moved swiftly toward completing the internal investigation and review process in order to reach dispositions relating to the misconduct of the involved officers.

### **RECOMMENDATION 2**

PAPD should develop protocols that instruct internal investigators to document any discussions with the District Attorney regarding potential criminal investigations into alleged officer misconduct.

### **RECOMMENDATION 3**

PAPD should develop protocols that call for the completion and resolution of administrative investigations absent special circumstances, even when it could delay them because of outstanding criminal proceedings or other tolling provisions.

*C. The Internal Affairs investigation did not address missteps on the part of Officer 1 that resulted in the suppression of evidence and dismissal of criminal charges against Mr. Alvarez.*

Through his attorney, Mr. Alvarez filed a motion to suppress evidence that supported the criminal charges lodged against him. The court ruled in his favor in this regard, which led to the eventual dismissal of all criminal charges. The basis for the suppression of evidence focused on the failure of Officer 1 to confirm whether Mr. Alvarez's driver's license was, in fact, suspended prior to effectuating a detention.

Officer 1 testified at the hearing that he knew Mr. Alvarez from prior dealings with him and had been advised a few weeks prior to the incident that a fellow officer had ticketed Mr. Alvarez for driving with a suspended license. Officer 1 testified that prior to the detention he had run the license plate of the vehicle, which came back to Mr. Alvarez as well as the address at which he had parked the car. However, Officer 1 testified that prior to attempting to effectuate a detention, neither he nor any of the other responding officers ran a records check confirming that Mr. Alvarez's license was suspended until after his arrest.

The court found that Officer 1 lacked reasonable suspicion to effectuate a detention because there was a failure to confirm that Mr. Alvarez's driver's license was suspended prior to detaining him. As a result, the court granted the suppression motion, including the

drug paraphernalia and other evidence obtained during the search of his vehicle. Following the suppression of evidence, the District Attorney subsequently dismissed all criminal charges against Mr. Alvarez.

This issue was also raised in Mr. Alvarez's lawsuit. And while the transcripts of the suppression hearing and the lawsuit allegations were accessed and included in the internal affairs investigation, the issues relating to this aspect of Officer 1's missteps were not addressed. Even though this performance failure was not the initial focus of the internal investigation, investigators are trained to be cognizant that an investigation may reveal additional potential violations of policy; if they do, the scope of the investigation should be expanded accordingly. In this case, the procedural errors of Officer 1 should have been identified in the investigative report and considered in determining the appropriate disposition.

The broader issue is that, but for the excessive force allegation and surfacing of the surveillance video, PAPD would not have learned about the potential performance deficiencies of Officer 1 relating to the unconstitutional detention. This is because the dismissal of the criminal case did not by itself trigger additional administrative review of the incident.

Unfortunately, PAPD is not alone in law enforcement in failing to devise an effective feedback system to learn when officer mistakes lead to the suppression of evidence and the dismissal of charges. The judicial system can provide an important check when officers are found to have violated the Constitution. It is incumbent on a police agency to devise a system whereby such decisions are learned and, when appropriate, provide the basis for further review and corrective action.

#### **RECOMMENDATION 4**

PAPD should instruct internal affairs investigators to ensure that any potential performance issues are identified and addressed in the investigative report.

#### **RECOMMENDATION 5**

PAPD should work to devise an effective system so that officer performance issues that undermine a criminal prosecution can be communicated back to the agency for any appropriate investigation and corrective action.

*D. Supreme Court jurisprudence that was decided after this case makes it questionable whether PAPD officers currently would have the legal authority to forcibly enter a residence under similar circumstances.*

As detailed above, Mr. Alvarez repeatedly questioned whether the officers could break the door of his residence, pull him out, and arrest him without first obtaining a warrant. Further, as set out above, the officers and supervisors all told Mr. Alvarez and co-residents that they

did not need a a warrant to effectuate the arrest.<sup>31</sup> Importantly, the law was uncertain at the time. However, recent U.S. Supreme Court jurisprudence suggests that under a similar set of circumstances police would not have the legal authority to forcibly enter a home to effectuate a misdemeanor arrest.

In Lange v. California, 594 US \_\_\_\_, (2021), the Court found that an officer who followed a motorist who had not stopped when he turned on his overhead lights but instead went into his garage was not justified in doing so. It held that the pursuit of a fleeing misdemeanor subject does not automatically justify a warrantless entry into a home. The Court noted that a warrantless entry requires exigency such as a need to act to prevent imminent injury, the destruction of evidence, or a subject's escape, and that mere flight alone is not sufficient.

Because Lange was decided after the incident, the officers and supervisors cannot be faulted for not knowing of the Supreme Court direction subsequently provided on the parameters of warrantless misdemeanor entry. However, since the case has been decided, we were interested to learn whether PAPD had advised its officers on the restrictions on warrantless entry as set out by the Lange opinion. In the Alvarez incident, there was no indicia of imminent injury, the destruction of evidence, or escape. As a result, the warrantless entry by Sergeant Benitez would arguably no longer have any legal support. To PAPD's credit, it did advise its officers in 2021 of the import of the Lange decision in a case law update.<sup>32</sup>

*E. The decision to break the door, enter the residence, and arrest Mr. Alvarez was unnecessary and inconsistent with progressive policing practices.*

In addition to the forced entry and arrest having a tenuous legal foundation, a broader point is whether it was necessary to do so to effectively resolve the matter. As detailed above, the offense of driving with a suspended license had already been observed by Officer 1. Mr. Alvarez was known to PAPD. Instead of pushing to arrest or cite Mr. Alvarez that night, Officer 1 could have simply written a report with the salient facts and submitted it to the District Attorney. The suspected offense was a non-violent relatively minor misdemeanor and there was no need to effectuate an arrest that evening. Assuming the District Attorney

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<sup>31</sup> Though the issue was not expressly discussed in the investigation, the PAPD reviewer also opined that the entry into Mr. Alvarez's residence was lawful and within applicable policy at the time. Again, the uncertainty of the law at that time makes that opinion a reasonable interpretation.

<sup>32</sup> During the investigation, Agent DeStefano alleged in his internal affairs interview that there was urgency to enter the residence with out a warrant and arrest Mr. Alvarez to prevent him from either accessing a weapon of destroying or concealing contraband. But as detailed above, at the time that a warrantless entry was made, Mr. Alvarez was only suspected of driving on a suspended license and failing to respond to Officer 1's direction after he pulled his car into the driveway. There were no indicia that Mr. Alvarez was armed or that there was any "contraband" relating to the misdemeanor offenses he was suspected of having committed.

approved the requested charge, Mr. Alvarez could have been cited and subsequent court proceedings could have advanced without incident.

We have been advised that Officer 1 has been advised about how the situation could have been addressed in a manner that achieved the same public safety interest while lessening potential conflict. We suggest that PAPD continue to talk with its line officers about better strategies that reduce potential police/community conflict yet achieve similar public safety objectives.

#### **RECOMMENDATION 6**

PAPD should continue to identify and promote problem-solving strategies that result in less conflict and reduce potential use of force situations.

F. *The decision to tow Mr. Alvarez' car, while legal on its face, was likely retaliatory.*

A common traffic stop scenario involves an initial moving violation that leads to a detention, during which the police become aware that the operator is driving with a suspended license. Under that set of circumstances, the law provides officers the discretion to have the car towed, since the driver cannot legally operate the vehicle and leaving the vehicle on the side of the roadway has safety and other implications. Even then, though, and when applicable, officers have the discretion to allow a passenger with a valid license to drive the car away, thereby avoiding the need for a tow.

In this case, the scenario was somewhat unique. Mr. Alvarez had completed his trip and had parked his car in the carport area immediately adjacent to his residence. Thus, the normal rationale for towing the car was not present.

Nonetheless, as detailed above and captured by the MAV audio, Sergeant Benitez decided that there would be “no leniency” in this case because of Mr. Alvarez’s refusal to come out of his residence.<sup>33</sup> In essence, the towing of his car (and the attendant towing and storage charges that resulted) appeared to be retaliatory, a tax of sorts imposed by Sergeant Benitez for Mr. Alvarez’s perceived “contempt of cop”.<sup>34</sup> Again, this or similar scenarios could be used as a teaching moment on effective use of officer discretion – an example of the principle that just because an officer *can* take enforcement action does not mean the officer *should*.

#### **RECOMMENDATION 7**

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<sup>33</sup> Sergeant Benitez can also be heard on the MAV instructing officers that the towing charges will cost Mr. Alvarez another \$135 dollars and instructing them to “go for blood” regarding their dealings with Mr. Alvarez.

<sup>34</sup> According to Mr. Alvarez’s civil complaint, after he was released from custody, he was unable to pay the monies necessary to retrieve his vehicle from impound.

PAPD should use this or similar scenarios to reinforce to officers how their use of discretion should be wisely employed and to avoid taking any action that could be interpreted as retaliatory.

*G. Prior to the ultimate emergence of the private surveillance video, PAPD had multiple opportunities to learn that this incident involved a questionable use of force and other inappropriate conduct that needed to be investigated.*

As discussed above, when Sergeant Benitez used excessive force against Mr. Alvarez and made inappropriate comments to him in conjunction with that excessive force, neither he nor any of the other on-scene officers reported the use of force and the inappropriate comments. Moreover, after Mr. Alvarez was arrested, and he reported to officers that he had been hit and injured during the use of force, that colloquy was also not documented. And it was not until fourteen months later, after the attorney for Mr. Alvarez visited the City Attorney's office and provided surveillance video of the incident, that PAPD's leadership became aware of the problematic use of force.

Unquestionably, the failure by Sergeant Benitez and other witness officers to meet their reporting obligations per policy created challenges for the Department in contemporaneously learning about the incident's numerous problems. However, as detailed below, there were multiple other opportunities during which PAPD could and seemingly should have learned about the misconduct before it finally did via Mr. Alvarez's attorney.

### The Initial Response

As detailed above, after his arrest, Mr. Alvarez made several comments to the involved officers about a camera that he thought would have captured the incident. First, as Mr. Alvarez was being transported to the station, the MAV records that Mr. Alvarez informs Officer 1 that cameras would have recorded the use of force. Additionally, during a conversation with Officer 2, Mr. Alvarez tells him that the camera could prove that he had been hit in the face. However, neither of those officers pursued any inquiry with Mr. Alvarez about a camera possibly recording the incident or advised an uninvolved supervisor of this information. Had they done either, it would have likely spurred further inquiry of Mr. Alvarez and the discovery of the surveillance camera. That could have led to accessing the footage of the incident and a timely investigation.

As also described above, an acting lieutenant and uninvolved sergeant responded to the scene after Mr. Alvarez had been brought into custody and placed in a patrol car. And a review of Sergeant Benitez' MAV recordings shows that the acting lieutenant was privy to some concerning comments made by Sergeant Benitez, either to her or in her presence. Significantly, the MAV audit logs show that the acting lieutenant also accessed Officer 2's MAV the day after the incident – evidence that also could well have contributed to concern.

As detailed above, there are concerning comments made by Officer 2 on scene, including his comment about “finally something happened”. Moreover, if the acting lieutenant had reviewed Officer 2's MAV in its totality, she would have heard about the discourse between

Officer 2 and Mr. Alvarez at the station, where Alvarez talks about being injured (though declining an offer of medical treatment) – comments that should have triggered additional inquiry. Because the audit logs only confirm that the acting lieutenant opened the MAV recording and not the extent to which the recording was viewed, the most plausible explanation is that unfortunately she did not conduct a full review of Officer 2's MAV.

Finally, when the acting lieutenant returned the next morning with a Spanish-speaking officer to advise the family that they could file a claim for the broken door, they could have inquired of the occupants about whether the residence had any cameras that might have captured the incident. However, because these potential leads were not pursued, none of the information the acting lieutenant learned at the scene or through the review of Officer 2's MAV caused her to take any further action or inquiry.

### Supervisors' Meeting Where Conduct of Sergeant Benitez Is Raised

As detailed above, the acting lieutenant told internal investigators that a few weeks after the incident, she raised concerns at a second-and third-level supervisor's meeting about Sergeant Benitez's rough verbal manner as evidenced by this incident (as well as others).<sup>35</sup> She reported to have asked whether an intervention was appropriate. According to the acting lieutenant, after she raised her concerns about Sergeant Benitez, she was instructed at the meeting that no further action would be taken regarding her concerns. Concernedly, the internal investigation did not pursue this assertion by the acting lieutenant and did not interview the supervisor who reportedly instructed her not to take any further action regarding Sergeant Benitez. The internal investigation should have.<sup>36</sup>

### **RECOMMENDATION 8**

When information emerges during an internal investigation about potential shortcomings in managerial response to the underlying performance issues in the case, those issues should be pursued through additional lines of inquiry – including follow-up interviews of named personnel.

### Filing of Civil Claim

As detailed above, the City was placed on formal notice approximately 5 ½ months after the incident that Mr. Alvarez was alleging multiple acts of officer impropriety. In that claim, Mr. Alvarez alleged that he was subjected to excessive force, unlawful detention, and false

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<sup>35</sup> The meeting was not convened to discuss Sergeant Benitez' performance particularly but was instead a regularly scheduled supervisors meeting where a number of other matters were also discussed. During this meeting, the acting lieutenant raised the conduct of Sergeant Benitez.

<sup>36</sup> The acting lieutenant's report that PAPD command staff was aware of concerns relating to Sergeant Benitez's performance in the field was also raised at Agent DeStefano's arbitration hearing, yet PAPD did not apparently pursue this issue at that juncture either.

reports lodged against him. It is unclear when PAPD was notified by the City of the receipt of the claim. However, assuming that the claim was forwarded to PAPD for review, it would have afforded an opportunity for PAPD to assess the allegations and their potential legitimacy. Had that inquiry resulted in a thorough review of the officers' MAV recordings and surveillance camera recordings that captured Mr. Alvarez' complaints at the police stations (which it minimally should have), it would have learned of evidence that went toward corroborating Mr. Alvarez's allegations. However, whatever investigation into the civil claim that occurred was insufficient to uncover the excessive force and other misconduct by the PAPD officers.<sup>37</sup> Instead, the City summarily denied the claim three months after its receipt.

#### Review of MAV Videos by Command Staff Member

According to the PAPD investigator who conducted the criminal investigation, a command staff member reviewed some of the involved officers' MAV videos approximately ten months after the incident.<sup>38</sup> It is unclear what prompted this review by the command staff member, but the timeline of events may offer a clue as to the interest in doing so. As detailed above, the City's rejection of Mr. Alvarez's claim occurred about six weeks before this review of the MAV recordings. The suppression hearing which led to the dismissal of criminal charges against Mr. Alvarez occurred approximately a month before this MAV review. And the attorney for Mr. Alvarez sent out a preservation notice<sup>39</sup> to the City of Palo Alto approximately two weeks before this MAV review, signaling that Mr. Alvarez was interested in moving forward with a lawsuit. At the time, the command staff member who ended up reviewing some of the MAV recordings was the designated person for addressing litigation matters involving PAPD.

The PAPD investigator reported that the command staff member that accessed those videos was not able to see any use of force from the car cameras. A review of the MAV audit logs<sup>40</sup> confirms that a PAPD command staff member did access the MAV videos of Sergeant Benitez, Agent DeStefano, and Officer 1 – which did not capture the force incident because of the way the patrol cars were positioned. However, as detailed above, the MAV video/audios did provide significant indicia of a problematic incident, even if the actual force was not depicted. This includes, for example, the inappropriate comments of Sergeant Benitez such as “You are a tough guy” and “You will be bleeding a whole lot more.”

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<sup>37</sup> The IPA was not provided any materials related to the investigation of the civil claim.

<sup>38</sup> This command staff member is no longer employed by PAPD.

<sup>39</sup> A preservation notice is a request made of the City to preserve all reports and evidence relating to the allegations in the claim.

<sup>40</sup> The MAV audit logs create an audit trail whenever the MAV recordings are accessed and note the name of the employee that accessed those recordings.

Moreover, Sergeant Benitez's wholly inappropriate comments after the arrest to the tow truck driver were also discernible. In addition, as detailed above, the audio and video material from PAPD's camera at the station and the officers MAVs also featured ample grist for further concern (and led to the ultimate development of allegations against Officers 1 and 2).

As the internal investigator eventually did undertake months later, a full review of those recordings would have identified Mr. Alvarez complaining that he had been injured by officers and the fact that two responding officers had offered Mr. Alvarez medical treatment but had not documented it. An internal affairs investigation could then have been triggered months before the presentation of the surveillance tape by Mr. Alvarez's attorney. Unfortunately, the command staff member's apparent less than thorough review of the MAV recordings did not result in the misconduct that had occurred being discovered.

#### Visit by Mr. Alvarez to the Police Station

Finally, as noted above, the acting lieutenant reported that while she did not know the precise date, some time prior to the acquisition of the surveillance video from Mr. Alvarez's attorney, she had met with a neighborhood activist who raised issues about poor treatment by police. At that time, Mr. Alvarez, who had apparently accompanied the activist as a show of support, referenced the incident involving him and advised the acting lieutenant that it had been captured on videotape. However, the acting lieutenant did not contemporaneously document this fact, follow up with Mr. Alvarez to endeavor to acquire the video, or report the communication up the chain of command. As a result, an opportunity was lost to learn of the misconduct earlier in time.

#### Systemic Reform: A More Robust Response to Civil Claims

Under current PAPD protocols, had Mr. Alvarez shown up to the station and requested to file a civilian complaint about the incident, it would have triggered an internal investigation. Yet in this case the filing of the claim by Mr. Alvarez that was essentially a complaint of misconduct, did not cause a personnel investigation to be initiated.

While the filing of a claim is essentially a civilian complaint with a price tag attached, existing PAPD protocols did not apparently result in the same type of investigative response as a civilian complaint would have done. When a claim is filed alleging misconduct on behalf of PAPD officers, it should trigger a robust documented initial inquiry, including a thorough review of any existing documents and recordings of the incident. If that initial review indicates a potential violation of policy, the initial review should be transformed into a full-blown internal affairs investigation. As set out above, in this case, a robust review of the recordings would have identified problematic conduct and likely violations of policy. It is unfortunate that current procedures did not afford for such in this case.

### **RECOMMENDATION 9**

PAPD should devise protocols so that every claim that alleges misconduct is thoroughly reviewed and investigated as if a civilian complaint had been received.

*H. The Major Reduction of the Discipline by the Arbitrator Reviewing Officer 1's Misconduct Shows the Structural and Practical Defects of Such a System<sup>41</sup>*

The Racial and Identity Profiling Advisory Board (RIPA), which consists of current and former law enforcement officials, civil rights and oversight advocates, legal scholars, and experts in the field, recently released its annual report. In that report, the RIPA Board found that using binding arbitration for peace officers' disciplinary appeals raises accountability concerns. One of the concerns identified by the RIPA Board is that arbitrators often reduce disciplinary penalties for officers found liable for misconduct. The RIPA Board also noted that having an arbitrator as the final say on discipline allows for third parties who are not generally from the community to make final disciplinary decisions that overturn police supervisors' decisions. The report noted that, according to researchers, the tendency for arbitrators to side with officers is likely, because police officers often have some level of influence over the selection of arbitrators.<sup>42</sup>

In Palo Alto, any employee who is subject to formal discipline can select either an appeal with the City Manager or binding arbitration:

If the aggrieved employee elects final and binding arbitration in accordance with this provision, the parties shall mutually select an arbitrator. In the event the parties cannot agree on an arbitrator, they shall mutually request a panel of five arbitrators from the California State Conciliation Service or from the American Arbitration Association if either party objects to the State Conciliation Service, and select an arbitrator by the alternate strike method.

Thus, in Palo Alto, the attorneys retained to represent the police employee have significant say in who is selected to hear the arbitration and total veto power over any arbitrator who has upheld police disciplinary determinations in the past.

As noted above, while in Agent DeStefano's arbitration, PAPD's decision to terminate the officer was upheld, Officer 1's discipline was reduced more than five-fold by the arbitrator.

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<sup>41</sup> Because the City's binding arbitration post-disciplinary system had a significant impact on the eventual resolution of the administrative charges, it is incumbent on IPA to provide an independent assessment of those proceedings.

<sup>42</sup> See also, "Police Arbitration" Professor Stephen Rushin, *Vanderbilt Law Review*, Vol. 74:4:1023. (2021) (Study finds that arbitrators on appeal reduced or overturned police officer discipline in 52% of these cases. In 46% of cases involving termination, arbitrators ordered police departments to rehire previously terminated officers. On average, arbitrators reduced the length of officer suspensions by approximately 49%); "Police Arbitration and the Public Interest", Professor Stephen A. Plass, *Harvard Blackletter Law Journal*, Vol. 37 p 31 (2021) (The nuances of policing, require that publicly accountable individuals (as opposed to private arbitrators) have final authority for police discipline.)

In that arbitration, Officer 1 did not contest that he was liable for the policy violations alleged but maintained that the discipline was too severe. According to the arbitrator, the basis for reducing the discipline was that Officer 1's failure to report excessive force was not *intentional* since he did not see the excessive force at the time of the incident. While the arbitrator found that the City had established that Officer 1's conduct brought harm to the Department, he found that the officer was not the "proximate cause" of the harm.

The arbitrator's logic was misplaced: Officer 1 was not charged with failing to report excessive force, but rather with failing to document what Mr. Alvarez had told him about being struck and injured by an officer during the arrest. And that failure was not inadvertent; the officer clearly failed to write what Mr. Alvarez had told him and had no justification for his failure to do so. It is unclear what the arbitrator meant when he concluded that Officer 1 was not the "proximate cause" of the harm; certainly, Sergeant Benitez was the "actual cause" of the excessive force harm to Mr. Alvarez (which resulted in his successful prosecution and resignation from PAPD) but Officer 1 also certainly was a "proximate cause" of the harm to the Department's reputation. His failure to report Mr. Alvarez's complaints on being subjected to force and injured prevented the Department from learning about the excessive force and other misconduct for months (or potentially ever, but for the surfacing of the surveillance videos). The harm to the reputation of PAPD as a result of this lapse, which the California Supreme Court has said is the most important factor in evaluating discipline, was cited but not apparently weighed by the arbitrator.

The arbitrator agreed that Officer 1 knew or should have known that he was required to document Mr. Alvarez's statements about being injured and the fact that he was offered medical treatment. However, the arbitrator found that Officer 1 was a relatively new officer, and while he conceded that it was the responsibility of the officer to know the rules, the arbitrator found that he was obviously not familiar with all of them. The arbitrator found that Officer 1 was unaware of his duty to report that Mr. Alvarez alleged that a police officer injured him and thus found that his conduct was negligent rather than deliberate. The arbitrator further found that it was the responsibility of the Department to ensure that he knew and understood all of the rules. However, the arbitrator provided no evidence that the Department had failed in its responsibility to ensure that the officer knew the applicable rules.

The Department's Manual of Policy and Procedure contains all the rules applicable to this case. New officers particularly are expected to know these rules and significant training is provided to those officers when they become members of PAPD.

Policy Manual 106.5 is particularly instructive. It states in pertinent part:

Each member shall acknowledge that he/she has been provided access to and has had the opportunity to review the Policy Manual. Members shall seek clarification as needed from an appropriate supervisor for any provisions that they do not fully understand.

Again, the arbitrator decided that reduction of the discipline was appropriate because the officer was relatively new. But the arbitrator failed to note the Manual provision requiring that officers know the rules regardless of their experience level. Most significantly, had Officer 1 had some question about whether he needed to document what Mr. Alvarez had told him about being struck and injured during the arrest, he could have consulted a supervisor (as instructed by the Manual) as he was preparing his report, yet failed to do so. Using the arbitrator's logic, officers would be incentivized not to learn the rules so that they could later claim unawareness of them and escape the consequences thereof.

Case law in California has repeatedly and uniformly instructed that a police agency's disciplinary determination should not be overturned unless there has been an "abuse of discretion." See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 217-19. Courts instruct hearing officers to give deference to the employer's penalty decision considering such matters as the employer's administration of its own standards and rules. See *Kolender v. San Diego Civil Service Commission* (2007) 149 Cal.App.4<sup>th</sup> 464, 471. The fact that reasonable minds may differ regarding the penalty imposed supports a finding that the employer has acted within its discretion. *Ackerman v. State Personnel Board* (1983) 145 Cal.App.3d 395, 401. However, instead of being mindful of (or even acknowledging) this direction, the arbitrator cited non-California cases to support his position.

Finally, the arbitrator decided to severely reduce the discipline (perhaps more than coincidentally to the amount precisely suggested by the Union lawyer representing the officer) because Officer 1 had accepted responsibility for his actions, rehabilitated himself, had no prior or subsequent discipline, and there was little likelihood of reoccurrence. However, as detailed above, and as noted by the arbitrator, PAPD had already reduced Officer 1's discipline because of these very factors. In short and in essence, the arbitrator substituted his judgment about the appropriate outcome over the judgment of the leadership of the Palo Alto Police Department.

Given the significance of this episode in the Department's recent history, the outcome was especially notable and disappointing. But the questionable reasoning that apparently formed the foundation for the decision underscores the limitations of binding arbitration as a valid form of appeal and raises many of the issues identified by the RIPA Advisory Board, legal scholars, and progressive policing professionals. While the great majority of jurisdictions in California have similar binding arbitration agreements with their police associations, others have instead a Civil Service Commission or other City maintained body that hears the appeal. And others instead have non-binding arbitration whereby the arbitrator makes a recommendation which City leadership can then accept, modify, or reject.

The unfortunate result of this arbitration proceeding provides an opportunity for the City<sup>43</sup> to consider other options for post-disciplinary appeals.<sup>44</sup>

### **RECOMMENDATION 10**

In future discussions with the PPOA, the City should consider the viability of other options than binding arbitration for appealing officer discipline.

#### *I. PAPD Should Ensure that Officers and Supervisors Are Regularly Trained on Use of Force Policy and Reporting Requirements*

In both arbitrations stemming from this incident, the officers through their attorney argued that there was confusion between the current use of force reporting policy and actual practice. In fact, at the DeStefano arbitration, a current supervisor testified that it was his interpretation that a verbal command could be considered a use of force under PAPD policy. While this interpretation is nowhere supported by the current policy language, it is a good indication of both the importance of and need to remove any confusion among officers and supervisors about key elements of the PAPD policy expectations and the attendant reporting requirements.<sup>45</sup>

### **RECOMMENDATION 11**

PAPD should provide annual training to its officers and supervisors about what constitutes a use of force, what is reportable force and how it should be documented, what the review of force process entails, and documentation requirements about alleged force and/or injury from arrestees.

#### *J. The Arbitration Proceedings Revealed that PAPD Had Failed to Provide Mandated Supervisor Training to Agent DeStefano*

At former Agent DeStefano's arbitration hearing, his attorney alleged that the failure of PAPD to ensure that he receive mandated POST supervisor training contributed to his deficiencies in reporting the excessive use of force that he observed. While there was no evidence produced that such training would have better informed former Agent DeStefano

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<sup>43</sup> To be clear, while PAPD leadership may have input into how post-disciplinary appeals are handled, the recommendation is directed at City leadership since the labor agreement is between the City and the labor association.

<sup>44</sup> To be sure, there are counterarguments to maintaining the status quo, one being the relative rarity of police matters that end up going to arbitration in Palo Alto and perhaps more significantly the impact that any change in the disciplinary process might have on hiring and retention, especially considering the ongoing crisis in keeping police agencies fully staffed.

<sup>45</sup> We have been advised that since this incident, PAPD has briefed its personnel on the Department's use of force policy, including what constitutes force, the force documentation requirements, and the subsequent investigative responsibilities of supervisors once force is reported. We suggest that this critical topic be addressed with personnel at least annually.

regarding his reporting obligations as set out in Department policy, it was nonetheless an identified lapse in PAPD's compliance with training requirements. There is no further documentation in the materials examining how this lapse occurred. More significantly, there is no documentation to suggest that safeguards have been devised for ensuring the timely attendance of all new supervisors at the POST-mandated school. Whenever a deficiency in record keeping is identified, it is incumbent upon an agency to examine what led to the misstep and consider interposing additional protocols to prevent future lapses.

### **RECOMMENDATION 12**

PAPD should review its training recordkeeping and compliance protocols to ensure that newly promoted supervisors complete the POST-mandated training in an appropriate timely fashion.

### *K. PAPD's Reported Instruction to Supervisors Not to Review MAV Recordings of Subordinates Runs Contrary to Effective Supervision and Accountability*

As detailed above, when the acting lieutenant was interviewed, she indicated that she had been instructed to stop reviewing MAV recordings as part of her supervisory responsibilities. To the degree that PAPD supervisory staff were directed to stop conducting audits of recordings of police activity, such direction is inconsistent with best practices of supervision and accountability. The MAV recordings (now supplemented with body-worn-camera recordings) provide a wealth of information about how officers are handling calls that was previously not available to supervisors. Rather than discouraging supervisors to perform routine video/audio audits of their personnel's performance, command staff should be encouraging the use of such footage to identify both commendable and correctable behavior. It is incumbent upon PAPD to ensure that this guidance is effectively communicated to its supervisory staff so that supervisors can take full advantage of this tool.<sup>46</sup>

### **RECOMMENDATION 13**

PAPD leadership should formalize and promote its expectation that supervisors take advantage of MAV and body-worn-camera footage as an aid to reviewing officer performance in the field.

## **Conclusion**

This incident, in which a veteran sergeant dishonored his oath to uphold the Constitution by engaging in excessive force on a handcuffed detainee, stands as a low point for the PAPD. Nor did the deplorable conduct end with the sergeant: the Department also was and remains properly disappointed in the failures of the other on-scene officers to report the

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<sup>46</sup> PAPD's current policy 404 allows for such review of video/audio evidence: "Recordings may be reviewed in any of the following situations: ... (c) by a supervisor or manager for purposes of improving officer performance based on an articulable training issue."

incident fully and accurately. That “coverup” caused the excessive force and other misconduct to go unknown to the Department for over a year, and eventually compounded the harm to the agency's standing in the community. But for Mr. Alvarez’ civil action and the existence of a private surveillance recording, it likely would have never been discovered.

Considering that six years have passed before the last of the proceedings related to this incident reached its conclusion and given the change in leadership at the top of the organization, it is understandable that there is a sentiment among some in the City to move on and leave this matter behind. However, law enforcement organizations have an obligation to learn from past mistakes, and to recall them as part of an ongoing process of course correction and refinement. These recommendations are meant to contribute to that process, and to leave PAPD better positioned to detect and address problematic uses of force in the future.

## *Case 2: Allegation of Intentional Harm to Passenger During Transport*

### Factual Overview:

An adult male was stopped by a PAPD officer for Vehicle Code violations relating to the bicycle he was riding. He ran from the officer but then surrendered after a foot pursuit. It turned out he also had a warrant for his arrest, and the officer took him into custody and then brought him to jail for booking.

Near the end of that trip, the man (who was handcuffed and seat-belted in the rear of the vehicle), rocked backward and struck his head on the hard plastic seat behind him. This was agitating to him, and he accused the officer of intentionally causing the contact by "brake-checking" – a term for punitive driving maneuvers that are meant to upset the balance of arrested persons and cause the sort of collision inside the vehicle that the man experienced.

The officer immediately notified their<sup>47</sup> supervisor and alerted staff at the jail, who summoned a medical response. Though the man had no visible injury, he was brought to the hospital to be evaluated.

The Department treated the man's initial allegation as a complaint and initiated a review process.

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<sup>47</sup>For the balance of this Report, and in keeping with current PAPD practice for its public information-sharing, we are relying on gender neutral pronouns so as to not contribute inadvertently to the personal identification of involved Department members.

### PAPD Review:

The case was handled as a "Supervisor Inquiry Investigation" that was resolved as "Unfounded" based on the initial available evidence (and without needing a formal interview of the involved officer).

The supervisor whom the officer had called that night ended up going to both the jail and the hospital. The supervisor conducted a brief interview of the subject, who was quite lethargic but who nonetheless seemed to track the questions and provided voluntary responses.<sup>48</sup> Notably, while describing his injury and how it occurred, he did not repeat his earlier allegation that it had been intentional on the part of the officer.

The key evidence in the review was the officer's in-car camera system, which included a rear-facing angle and showed the moment where the man had fallen back. The supervisor found that the man's loss of balance had been preceded by his leaning forward – apparently while dozing – and then experiencing the momentum of a seemingly gradual and appropriate acceleration after the light turned green. There were no apparent instances of unusual or malicious handling of the vehicle by the officer during the transport.

In conducting the investigation, the handling supervisor came across – and subsequently addressed – two unrelated deviations from expected policy or procedure. The first related to the officer's driving during the initial efforts to pursue the fleeing subject; the officer had briefly travelled the wrong way down a one-way street in what was considered a non-emergency context. The second was the officer's apparent failure to ensure (as required by policy) that their body-worn camera was time-synced with the in-car camera system of the patrol vehicle. Both issues were relatively minor, but merited the corrective action by which they were resolved.

### IPA Review and Analysis

We concur with the finding that no violations of policy occurred. The Department's response to the initial allegation was proactive and thorough, beginning with the officer who was angrily accused of the "brake-check" by the complainant. Even though the allegation was not reiterated, the Department chose to treat his initial assertion as the basis for a supervisory inquiry into what had occurred. And PAPD's car cameras, which not every agency has and which remain in service even after the acquisition of personal body-worn cameras, provided convincing refutation of the man's complaint.<sup>49</sup>

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<sup>48</sup> The man's grogginess was somewhat consistent with his affect from the time of the arrest and did not appear to be a function of striking his head. He later acknowledged recent drug use to hospital staff.

<sup>49</sup> The "in-car" camera showed the backseat of the vehicle for the duration of the transport and captured the two instances (within a minute) where the complainant struck his head. Neither seemed to be the function of aggressive or unusual driving; and the officer's forward-facing body-

We were also impressed with the additional issue-spotting that emerged from the review. The goal of this sort of holistic analysis of events, which we have long endorsed, is to treat every review process as a valuable opportunity to see officer performance in real-world contexts, and to offer constructive reminders or corrections as needed. PAPD has shown a recent inclination to formalize this process in new ways. We consider it to be a commendable trend, and this case was an effective example of the concept at work.

## Internally Generated Investigation

### *Case 1: Investigation into Reporting and Procedural Issues Related to an Arrest and Use of Force*

#### Factual Overview

An officer on patrol observed a possible drug transaction in the parking lot of an all-night food establishment. The officer ended up contacting a subject, then sought to detain the person but then struggled to handcuff him. In pulling the subject down, the officer caused him to hit his face on the ground, injuring him. The man was taken into custody and medically cleared by at the scene by responding Fire Department personnel. Back at the police station, and as part of the officer's investigation into a charge that the subject was "under the influence" of an illegal drug, they conducted a forced blood draw in order to get a sample for evaluation. Then, as the man's facial injuries began to appear more pronounced, the officer brought him to the hospital – where he ended up being admitted.

The Department conducted a use of force review and determined that the officer's actions were consistent with policy. Months later, though, and in the context of the review of criminal charges<sup>50</sup> against the man, new issues emerged that would become the basis for an administrative investigation into possible misconduct.

One of these was seeming discrepancies between the officer's written report about the incident and the various videos collected by the District Attorney's Office. (These included recordings from the officer's body-worn camera, the in-car camera, and the different surveillance cameras from the business where the incident occurred.) The second concern was the legal admissibility of the forced blood draw, which had occurred without either the subject's consent or a warrant. The District Attorney's Office took the position that it would not be admissible.

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worn camera (which captured the audio of the man's pair of outbursts after hitting his head) confirmed this.

<sup>50</sup> Along with the "under the influence" allegation, the original charges against the subject included a probation violation, resisting arrest, and battery on a peace officer.

Taken together, these issues undermined the strength of the case and caused the District Attorney to decline to prosecute. In turn, the Department revisited the incident several months after the arrest and decided that further internal investigation was warranted. PAPD framed allegations against both the officer and the responding supervisor (who had completed the initial review of the officer's disputed crime report, and who had authorized and monitored the forced blood draw). To the Department's credit, it also explored additional allegations that emerged in the course of the administrative investigation itself.

### Outcome and Analysis

The Department ended up framing several specific charges, and the results were mixed: both officers were found to be culpable regarding some allegations, but not others. While we concur with each of these outcomes within the scope of the investigation *as framed*, our own review of the materials raised issues about aspects of the encounter – particularly with regard to the use of force as reported and the claims of battery by the subject – that merited inclusion in the Department's misconduct investigation. We discuss this concern below.

The investigation was handled by a PAPD executive. It had several strengths within the parameters of its limited scope, beginning with outreach to the Probation Department (for information about the subject's specific terms and requirements) and the District Attorney's Office (for discussion of the legalities of forced blood draw in light of recent court decisions). Along with interviews of the subjects, the evidence included extensive recordings that were assessed systematically and analyzed in a clear fashion.<sup>51</sup> Impressively, the investigation also used GPS mapping from the night of the incident to track the movements of the officer's patrol car in relation to both the claimed actions and the time stamps of the various relevant videos.

The assessment of the forced blood draw issue seemed particularly thoughtful and thorough. In relation to the decision-making of the officer and supervisor, the investigation determined their basis for believing they were justified in doing the warrantless procedure: it was a court decision that related to blood draws for probationers (which the subject was at the time of the arrest). As the investigator surmised in the analysis portion of the memo, the relevance of the case was at least arguable, but it was also less than definitive. And, in fact, neither the Probation Department nor the District Attorney took a supportive position as to the court decision's applicability when contacted as part of the PAPD review.<sup>52</sup>

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<sup>51</sup> For one helpful exhibit, surveillance video from the business where the incident took place was synced with body-worn camera recordings from the officer, thus providing a more complete view of what specifically transpired.

<sup>52</sup> Interestingly, the subject himself was clearly cognizant of the conditions of his probation, which only required him to submit to a urine test. He articulated his (accurate) understanding in the moments prior to the blood draw, but it was not heeded. (The urine test was not offered in light of the officer's concern that the subject would create a security concern if given the necessary freedom of movement.)

Accordingly, the Department found that both the officer and supervisor had violated policy by subjecting the man to a forced blood draw without legal authorization. At the same time, both employees were exonerated of a separate charge that they had violated the PAPD blood draw policy in the *manner* of the procedure – which was recorded and had followed appropriate protocol.

The investigator's memo also took the occasion to recommend refinements in Department policy (for more clarity regarding blood draw options in non-DUI cases such as this one) and more regular coordination and training with the District Attorney's Office to answer questions and keep officers apprised of changes in authorized and preferred investigative techniques.<sup>53</sup> This type of pro-active response to the "learning opportunities" presented by a given incident is a beneficial byproduct of internal review; the Department's focus on these changes is commendable.

The other main issue in the case was the seeming disconnect between the subject's actions (as captured on available video) and the officer's report. This was driven by the District Attorney's Office review of late-emerging surveillance videos from the business; the D.A. memo declining the case alluded to the absence of any suspected "hand to hand" drug transactions during the moments that preceded the officer's engagement with the subject.<sup>54</sup> The officer explained the seeming discrepancy in a way that was confirmed by the GPS analysis. The officer said that there was actually a gap of several minutes between the specific action that the officer considered to be a drug sale and their encounter with the subject, and described using that time to follow the vehicle that had departed from the parking lot immediately after interacting briefly with the subject, which had prompted the officer's suspicion. Because they did not see a basis for stopping the car and questioning the occupants, the officer decided to return to the original location.

The investigator found this explanation credible (particularly as supported by the different technological evidence). Nonetheless, in the investigator's view, the omission of the driving interlude in which the officer followed the other parties was a gap in the officer's report that rose to the level of a deviation from policy requirements. (Indeed, its significance was reinforced by the confusion that it caused for the prosecution in relation to the criminal case.) This was the basis for a second sustained violation against the officer.

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<sup>53</sup> To PAPD's credit, it issued a directly responsive Training Memorandum, subsequent to this case, which it provided to the IPA for review.

<sup>54</sup> While the officer recognized the subject and *believed* him to be an active probationer with search terms, confirmation of this did not occur until after the detention, use of force, and arrest. In the District Attorney's view, this meant that the legitimacy of the initial detention of the man turned on reasonable suspicion of illegal activity. And this was a suspicion that was not clearly supported by the video evidence.

To its credit, the Department also looked at additional issues. These included the propriety of the officer's initial approach, which led to a finding that the assertion of authority to stop the subject had been justified. (The investigator did find room for improvement in the officer's communication skills and efforts at explanation.) Also receiving scrutiny – and ending in the supervisor's exoneration – was a review of why the crucial video evidence had not been acquired and utilized in the initial supervisory investigation into the use of force.

We considered each of these conclusions to be reasonable. At the same time, the bifurcation of the force analysis from the rest of the review seemed awkward.<sup>55</sup> While a separate process does already exist for the supervisory review of every use of force, an incident that raises several different concerns and *includes* a significant force component probably warrants the inclusion of the force review into the broader investigation. This incident strikes us as a case in point. For example, our own consideration of the written report in relation to the video evidence raised concerns about the extent to which the "battery" charge against the subject (based on his alleged kicking of the officer) seemed corroborated. Given that reporting accuracy was already in play for the administrative review, the conscious ignoring of those elements in deference to the other process seemed suboptimal.

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<sup>55</sup> It should also be noted that the Department did not complete its official assessment of the use of force (deeming it within policy) for nearly six months – an unusual time lag that itself warranted managerial attention.

# Internal Workplace Investigations

## *Case 1: Allegation of Improper Bias in Promotional Process*

### Factual Overview:

This complaint was submitted by a PAPD member against Department leadership. It resulted from a promotional process for a supervisory position that had included the complainant as one of the applicants. The officer was not selected and had concerns about the legitimacy of that outcome.

When the decision was announced, the complainant asked for and received the chance to discuss their perspective and prospects for promotion in the future. Meanwhile, the complainant shared additional concerns about what they considered to be conspicuous limitations in the Department's diversity at the managerial level. This was relevant in part because of the complainant's own identity. The complainant asserted that there was a basis for a lawsuit or Human Resources complaint, and this prompted PAPD leadership to request an outside investigation as to the validity of that perception.

### Investigation and Outcome:

At the request of the City, a third-party professional investigator conducted the investigation into the complaint. The handling investigator relied upon interviews with both the complainant and the Department's key decision-maker for the process. The investigator also utilized pages of written documentation that were attached to the case file as exhibits. These included emails and handwritten notes by participants, all of which related to the promotional process and its aftermath.

The interviews were central to the ultimate determination – in part because of the considerable overlap between the two people's versions and perspectives. While straightforwardly denying that the complainant's race/ethnicity had worked to their detriment in any way, the decision-maker was also able to articulate a number of race-neutral factors for the outcome. The complainant's history with the agency – which included instances in which that person *had* been chosen for competitive assignments – and the high level of qualification shared by all the candidates (including others who had not been selected) were additional factors that justified the decision in a manner independent of bias.

Meanwhile, and significantly, the complainant told the investigator that they themselves did not personally believe that race was the ultimate reason for the promotion decision. Instead, the complainant explained, raising the issue was meant to bring attention to a larger

dynamic, which they believed dated back several years and which merited consideration. This was the fact that no sworn members of the current executive team (of nine people) at the agency were minorities.

Based on the aforementioned evidence, the investigator concluded that race had not been a determining factor in the decision-making process.<sup>56</sup>

#### IPA Review and Analysis:

We concurred with the finding that race had not been a part of the selection criteria and found the reasoning and the descriptions of the actual process to be persuasive. At the same time, the complainant's identification of an "area of concern" regarding the racial/ethnic makeup of the command staff seemed, in our view, to have been worthwhile.

As with this particular allegation, we have no specific reason to believe that bias – conscious or otherwise – has shaped PAPD decision-making regarding promotions, and we recognize that the selection process in any workplace commonly (if not inevitably) engenders a measure of disappointment among applicants who are not successful. Our understanding is that the Department leadership is appropriately conscious of the statistical reality cited by the complainant and is working with the City on promoting diversity and inclusion in constructive ways.

### *Case 2: Allegation of Discrimination/Hostile Work Environment*

#### Factual Overview:

This complaint was submitted by a lower-ranking officer against a superior. It had two components (each of which was illustrated by different specific examples of the alleged problematic conduct). The first related to the complainant personally and involved an allegation of different types of mistreatment by the supervisor that was motivated by discriminatory animus on the basis of several characteristics protected by law and Department policy. In the second, the complainant officer shared information about several other employees whom the complainant identified as also being mistreated by the supervisor.

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<sup>56</sup> The investigative report makes an overt reference to being limited in its scope: it is presented as a "fact-finding" document that refrains from drawing legal conclusions or formally evaluating whether policies were violated. Nonetheless, the nature of the factual analysis is somewhat dispositive here, and the report goes so far as to describe allegations as "exonerated."

### Investigation and Outcome:

The complainant brought these concerns to the City's Human Resources Department, based in part on a sense that the Police Department administration was aware of the supervisor's reputation and inappropriate conduct but had not acted to address it. A third-party professional investigator conducted the investigation into the complaint in an effort to ensure its independence and objectivity.

The handling investigator conducted interviews with the complainant, the subject supervisor, and several Department members who had been cited by the complainant either as percipient witnesses or as parties who (per the complainant) had themselves allegedly experienced some form of inappropriate behavior from the subject. The investigator summarized her investigative efforts in a lengthy memo that addressed the two main categories of allegations separately.

With regard to the alleged mistreatment of the complainant, the investigation determined that the "preponderance of the evidence" did not establish a violation of relevant City policy. This finding was further divided into individual conclusions for each of the specific examples of wrongful treatment that the complainant asserted. Some were addressed with a finding that the conduct had occurred but was not inherently improper. For others, the conduct at issue was recognized as being in some way ungracious, but it was found to be lacking in an established discriminatory motive.

With regard to the allegations that the supervisor had engaged in a pattern of mistreating other employees, the investigation again found there was insufficient proof that a City policy had been violated. The particulars of the supervisor's relationships with a number of named individuals were explored in detail. Though the inquiry yielded multiple examples of discord, none of the negative dynamics were found to be attributable to bias.<sup>57</sup>

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<sup>57</sup> As with the previous investigation cited above, the investigative report here is conscious about refraining from making final judgments as to appropriate legal or policy-based outcomes. Still, the factual conclusions that the investigator reaches (and explains) are somewhat definitive in stating a lack of sufficient evidence that policy violations occurred.

## IPA Review and Analysis:

We found this investigation to be a thorough<sup>58</sup> and thoughtful one. The investigator's numerous interviews provided the majority of the evidence, and her analysis of each was carefully considered in reaching persuasive conclusions. This included credibility determinations that showed nuance and depth in assessing the different parties' perspectives. And individual relationships were considered as distinct entities that merited – and received – distinct evaluations.

The investigation revealed a substantial number of co-workers (which included peers as well as subordinates) who actively disliked the supervisor's manner of dealing with them. It is also important to note that several of the alleged incidents giving rise to the complaint were found to have occurred, but there was no evidence that the conduct at issue was motivated by bias in violation of Department policy or law.

While respecting this outcome, we considered the case to be a good candidate for a dynamic we have long encouraged in Palo Alto and elsewhere: the willingness of a law enforcement agency to go beyond the "bottom line" conclusions of investigations, and to see complaint cases and other review processes as opportunities for constructive intervention, even when formal discipline is not warranted. Accordingly, we were gratified to learn that PAPD management also saw fit to use the investigation's findings as a basis for taking concrete action to address identified performance issues and improve the work environment.

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<sup>58</sup> For example, one of the complaints related to a particular call for service. We were impressed to note that the investigator acquired (and transcribed) the relevant radio traffic as an element in her evaluation of that issue.

## "Pointed Firearm" Incidents

This is the third audit cycle featuring a review of the Department's administrative handling of incidents in which officers point their firearms at a subject in the context of an enforcement encounter. PAPD submitted the materials for a total of nine cases<sup>59</sup>, which is the largest total so far.<sup>60</sup>

The Department continues to refine protocols for this new category of internal review responsibility. The overall result appears to be a combination of imperfection and progress for the evaluation system. We noted an overall increase in issue-spotting and careful review on the one hand; on the other, terse summaries and lengthy delays in identifying incidents or finalizing the reviews were still apparent in some instances.<sup>61</sup>

Importantly, though, the total number of events remains in line with previous reporting cycles, and each of them was determined to be consistent with policy (though occasionally prompting an insight that led to training or counseling). We agreed with those assessments. Officers seem to recognize and respect that weapon-pointing is a significant show of police authority that should be limited in purpose and duration.

The context for the nine deployments was as follows:

- Officers responded to reports about possible trespassers on private (but unoccupied) residential property. When the first of two subjects emerged into view, one officer briefly pointed their firearm until establishing that the man was unarmed and cooperative.
- Officers located a felony theft suspect lying under some shrubbery in the vicinity where a stolen bike had been abandoned. One officer gave commands and briefly pointed their weapon in the subject's direction until visually able to confirm that the man's hands were empty and he was cooperating. Surveillance camera footage later confirmed that this was the individual whom the police were seeking to apprehend.
- Officers responded to a food store where a male subject, believed to be armed, walked into the employee breakroom, and sat down. Three officers made a tactical

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<sup>59</sup> As detailed below, the 2018 incident separately had a "firearm pointing" element to it; it formed the basis for discipline because the Agent failed to report it.

<sup>60</sup> Two were holdovers from 2022, and two others carried over from the first half of 2023 – evidence of both the lingering need to refine these new protocols and the Department's retroactive diligence in addressing the events.

<sup>61</sup>In one case that was several months into 2023, an involved *supervisor* pointed his firearm but neglected to write a report about it as required by policy.

entry to encounter the man, who did have a firearm in his waistband (and whom PAPD later learned had allegedly been involved in a shooting incident earlier that day). The officers advanced to the area outside the break room, and the lead officer pointed a rifle at the seated subject while establishing communication and quickly achieving his cooperation.

- Officers served a search warrant in connection with a suspected robbery. When they knocked and announced their presence, two subjects appeared at the front window and began to lift the blinds. This prompted the officer at the front of the entry team to point their firearm briefly until able to establish clear visual contact with the male and female and ensure their cooperation.
- Officers located a stolen vehicle soon after receiving an initial report about it. One officer drove in front of the subject, and that vehicle was rear-ended by the stolen car before it stopped. That officer pointed their firearm at the driver/suspect until ensuring his unarmed cooperation.
- Officers combined with campus law enforcement to conduct a high-risk vehicle extraction of two subjects who had been involved in an alleged road rage incident (with a gun possibly involved). Multiple officers pointed their weapons initially and in controlled fashion as they directed the cooperative parties to emerge from the vehicle and submit to handcuffing.
- Multiple officers responded to the parking lot of a mall area after the license plate of a stolen vehicle (which had been carjacked the day before) was detected by cameras. A second car that was affiliated with the stolen car was nearby, and all seven individuals in the two cars were ultimately taken into custody after officers followed the vehicles and conducted a coordinated felony traffic stop. Three officers and two detectives (a subset of the overall PAPD personnel on scene) pointed their firearms at the outset of the contact with the subjects, based on the alleged crime and reports of a possible gun.
- Officers responded to the lobby area of a motel with information about a wanted subject who was experiencing a mental health concern. In response to the man's demeanor and ambiguous hand motions, one officer briefly pointed a rifle at the subject while giving directions; the man was extremely compliant.
- A supervisor responded along with several other officers to the apprehension in daytime traffic of a stolen vehicle. Officers surrounded the car and several withdrew their firearms, though only one pointed it at the subject driver, who surrendered without further incident.

As mentioned above, the supervisory reviews (which now include a formal memo) ranged in their thoroughness and attention to detail. For the shorter ones, some of this was a function of the straightforward nature of the incidents themselves. In other instances, though, the

concision gave the analysis a perfunctory quality.<sup>62</sup> And there were examples where issues were identified without an attendant action item for follow-up.<sup>63</sup>

Conversely, a few of the supervisory evaluations showed the potential value of the process as not only an accountability measure but also another opportunity to scrutinize and improve upon performance more generally. One memo relating to the mid-day traffic stop of a stolen vehicle on a busy street identified five separate tactical or procedural concerns – and described the relevant managerial steps taken in response. Two others noted deficiencies in adherence to the body-worn camera policy by one or more involved officers; these were also addressed.

Profanity – a longtime issue on our review of PAPD cases generally – continued to figure in these specific encounters, with four of the nine featuring some element of aggressive language. While there is a difference between gratuitous vulgarity and the words that sometimes emerge in a more intense and adrenalized context, the exceptions should not swallow the rule established by policy. To the Department's credit, it is noting these events with apparent diligence, and we encourage the continued effort to monitor and hopefully dissuade.

Overall, PAPD appears to be settling in to its new "pointed firearm" protocol in constructive ways. We consider it a useful addition to the agency's efforts to evaluate and improve upon officer performance.

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<sup>62</sup> One memo, which was completed quite belatedly after an apparent lag in initial identification, was just a few lines long and did not address a second officer's apparent weapon point in the context of a high-risk traffic stop.

<sup>63</sup> PAPD notes that there is currently no expectation that supervisors include the follow up action in these reports. However, consistent with our overarching philosophy of documented completeness, we recommend that PAPD advise their supervisors to report any informal action in the memorandum.