

OAKLAND POLICE DEPARTMENT

Office of Inspector General



REVIEW OF TASKS 28 & 29

March 22, 2011

CITY OF OAKLAND

Memorandum

To: Chief Anthony Batts

From: Office of Inspector General

Date: March 22, 2011

Subject: Audit of the Investigation of Criminal Misconduct and IAD Investigation Priority

On January 18, 2011, the Audit and Inspections Unit of the Office of Inspector General initiated a review of Tasks 28 and 29, Investigation of Criminal Misconduct and IAD Investigation Priority. The purpose of the review was to determine the Department's compliance with its policy and its progress in maintaining compliance with the requirements of Tasks 28 and 29 as set forth in the Negotiated Settlement Agreement.

To conduct the review, the review team examined internal investigations that involved an allegation of Manual of Rules, Section 314.42- OBEDIENCE TO LAWS. The rule states:

“Members and employees shall observe and obey all laws and ordinances. A violation of this section may include, but is not limited to the following:

- *Felony and serious misdemeanor crimes;*
- *Other misdemeanor crimes; or*
- *Driver's license status.”*

Those cases were reviewed to determine if they adhered to Departmental General Order M-4.1, CRIMINAL INVESTIGATIONS INVOLVING ACTIVE LAW ENFORCEMENT, OR A MEMBER OR EMPLOYEE OF THE DEPARTMENT

The internal investigations audited for this review were closed between January 1, 2010 and December 31, 2010.



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EXECUTIVE SUMMARY

On January 18, 2011, the Audit and Inspections Unit of the Office of Inspector General (OIG) initiated a review of Tasks 28 and 29, Investigation of Criminal Misconduct and IAD Investigation Priority. The purpose of the review was to determine the Department's compliance with its policy, Departmental General Order (DGO) M-4.1, and its progress in maintaining compliance with the requirements of Tasks 28 and 29 as set forth in the Negotiated Settlement Agreement (NSA).

Task 28 requires the Oakland Police Department (OPD) to report, as soon as possible, all uses of force; citizen complaints; and other member/employee-involved actions in which it appears there may be criminal misconduct by a member/employee to the Alameda County (ALCO) District Attorney's Office.

Task 29.1 requires OPD to coordinate its administrative investigation of its members/employees with the ALCO District Attorney's Office if a criminal proceeding is potentially viable. Task 29.2 states that when OPD initiates an interview or interrogation of OPD personnel and it appears that the subject may be charged with a crime, or the subject asserts his or her Fifth Amendment rights on the grounds the answers to questions posed may be incriminating, such interrogations are preceded by a Lybarger Advisement¹.

The previous Independent Monitoring Team (IMT) completed two reviews of Tasks 28 and 29. The first review, completed in August 2007, found the Department to be out of compliance with both Tasks 28 and 29. The IMT's second review, completed July 2009, found the Department to be in conditional compliance² with Task 28 and full compliance with Task 29.

This review team determined OPD to be in compliance with both Tasks 28 and 29, based on a review of 2010 internal investigations. OPD reported to the ALCO District Attorney's Office as required when there appeared to be criminal misconduct by a member or employee. OPD coordinated these investigations with the District Attorney's Office if a criminal proceeding was potentially viable and provided Lybarger Advisements when required prior to administrative interrogations.

¹ Lybarger Advisement - Enables governmental employers to obtain compelled statements for administrative purposes by advising the employee the compelled statement cannot be used in a criminal prosecution.

² Although the Department did not achieve the required 95% compliance rate, the IMT noted a significant improvement and thus found the Department in conditional compliance.

PURPOSE

The purpose of this review is to determine if OPD is adhering to its policy pertaining to the investigation of member/employee criminal misconduct and the requirements of Tasks 28 and 29, Investigation of Criminal Misconduct and IAD Investigation Priority, as set forth in the NSA.

BACKGROUND

Independent Monitoring Team Audit

The previous IMT completed two reviews of Tasks 28 and 29.

The first IMT review, which was completed in July 2007, found the Department to be out of compliance with Tasks 28, 29.1, and 29.2. For Task 28, the IMT noted although the Department had improved its notification to the ALCO District Attorney's Office and other law enforcement agencies of possible criminal misconduct of personnel, notifications were not timely. The IMT reported for Tasks 29.1 and 29.2 an inconsistent coordination between the administrative and criminal investigators and that OPD failed to properly provide a Lybarger Advisement in two of the eight cases reviewed.

The second IMT review, completed in July of 2009, found the Department in conditional compliance with Task 28 and in compliance with Tasks 29.1 and 29.2. For Task 28, the IMT reviewed 53 cases, and 19 of them included reasonable suspicion of serious criminal misconduct. Of those 19 cases, the IMT found the Department met the time requirements for notification in 17 cases (90%). Although an improvement from its 2007 audit finding, the IMT cited a continued misunderstanding of the purpose of notifications and policy requirements and thus a need for continued close oversight was recommended. The IMT added there was a dramatic improvement in the system for ensuring these cases are handled appropriately. They commended the Bureau of Investigations (BOI) and the Internal Affairs Division (IAD) for effectively addressing its previous problems handling criminal complaints against Department members and employees.

The IMT recommended commanders continue to monitor Tasks 28 and 29, the continued training of DGO M-4.1 to personnel involved, and the need to document proper notifications when there is apparent criminal misconduct. The IMT also suggested IAD continue to notify BOI or other relevant agencies when there is arguable apparent evidence of serious criminal misconduct.

Office of Inspector General

OIG COMPLIANCE OVERVIEW

Task 28

OPD reports to the Alameda County District Attorney's Office, as soon as possible, all uses of force; citizen complaints; and other member/employee-involved actions in which it appears there may be criminal misconduct by a member/employee

In Compliance

Compliance Requirement: 95%

Review Finding: 100%

Task 29.1

OPD coordinates its administrative investigation of members/employees with the Alameda County District Attorney's Office if a criminal proceeding is potentially viable

In Compliance

Compliance Requirement: Y/N

Review Finding: Y

Task 29.2

When OPD initiates an interview or interrogation of OPD personnel and it appears that the subject may be charged with a crime, or the subject asserts his or her Fifth Amendment rights on grounds that the answers to questions posed may be incriminating, such interrogations are preceded by a Lybarger Advisement

In Compliance

Compliance Requirement: 95%

Review Finding: 100%

SCOPE AND POPULATION

Audit Scope

The audit focused on OPD's policies, procedures, and practices in its handling of internal investigations regarding complaints against members/employees who allegedly were involved in criminal misconduct. DGO M-4.1 was used to determine the guidelines for conducting the audit on NSA Tasks 28 and 29. In addition, the audit was conducted to determine if the Department was in compliance with said tasks.

Audit Population

There were 84 IAD cases in which members/employees were alleged to have violated the Manual of Rules (MOR), Section 314.42-Obedience to Laws. The rule states:

“Members and employees shall observe and obey all laws and ordinances. A violation of this section may include, but is not limited to the following:

- *Felony and serious misdemeanor crimes;*
- *Other misdemeanor crimes; or*
- *Driver’s license status.”*

Upon review of the cases, the population size was reduced to 52 cases. There were 32 cases deselected for the following reasons:

Reason	Number
Alleged driving offenses not to include DUI’s. These driving offenses included allegations such as talking on the cellular phone, speeding and not using emergency equipment.	17
Allegations which did not include a crime	12
IAD discovered subject belonged to an outside agency	2
Subject was not employed with OPD at time of allegation	1
Total	32

Reference Material

Negotiated Settlement Agreement (Revised Dec 2008)

Department General Order M-4.1

IAD Policy and Procedure 05-03

IMT Reviews of Tasks 28 and 29, *Investigation of Criminal Misconduct and IAD*

Investigation Priority, dated August 2007 and subsequent review dated July 2009

Lybarger v. City of Los Angeles (1985)

AUDIT STEPS AND FINDINGS

Task 28

OPD reports to the Alameda County District Attorney’s Office, as soon as possible, all uses of force; citizen complaints; and other member/employee-involved actions in which it appears there may be criminal misconduct by a member/employee

Audit Steps

Each investigation was reviewed to establish if the MOR, Section 314.42, Obedience to Laws, was applied due to criminal misconduct. If it was determined the MOR violation was applied as a result of alleged criminal misconduct, the investigation was reviewed to determine if there was reasonable suspicion of a felony or a serious misdemeanor on the part of a member or employee.

If it was determined there was reasonable suspicion of criminal misconduct involving a felony or a serious misdemeanor on the part of a member or employee, each case was reviewed to find out if the Department's Criminal Investigations Division (CID) reported to the ALCO District Attorney's Office within 24 hours (as soon as possible) of conferring with the BOI Deputy Chief. The audit team determined OPD to be in compliance with Task 28, if the ALCO District Attorney's Office or other law enforcement agencies were notified of the apparent criminal misconduct within 24 hours.

The Reasonable Suspicion standard was applied as it is defined in General Order M-4.1:

Reasonable Suspicion

*From the totality of the circumstances, there is a specific, articulable, and objective basis for suspecting personnel of criminal activity. **There must be specific facts beyond the mere allegation of criminal misconduct.***

Findings

Of the 52 cases reviewed, there were 17 where there was possible reasonable suspicion of criminal misconduct. Nine of the cases were investigated by outside agencies and eight were OPD investigations. Of the eight OPD cases, two were applicable to Task 28 and found to show reasonable suspicion of a felony or serious misdemeanor on the part of a member or employee. Reasonable suspicion was determined by CID after a preliminary investigation of the allegation. The Department's IAD and CID coordinated their investigations to ensure separate investigations were conducted. The investigating officer consulted with the CID Commander then presented these cases directly to the District Attorney for charging. These notifications to the District Attorney were made within 24 hours of CID determining there was reasonable suspicion of criminal misconduct.

The review determined both cases (100%) were in compliance with Task 28.

CID investigated a total of eight allegations (part of the 52 cases reviewed) of criminal misconduct where the allegation rose to the level of a felony or a serious misdemeanor on the part of a member or employee. These allegations were serious enough to prompt CID to conduct a preliminary investigation. CID's preliminary investigations only found the said two to contain reasonable suspicion of criminal misconduct on the part of a member or employee.

Task 29.1

OPD coordinates its administrative investigation of members/employees with the Alameda County District Attorney's Office if a criminal proceeding is potentially viable

Audit Steps

Auditor reviewed 52 IAD investigations to insure the Department was adhering to its policies, DGO M-3 and M-4.1.

Findings

Of the 52 investigations reviewed, there were only two (4%) cases where a preliminary investigation found reasonable suspicion of criminal misconduct. The cases were handled properly by CID coordinating with the DA's Office. There were six (11%) cases in which CID conducted a preliminary investigation, but determined there was no reasonable suspicion of criminal misconduct on the part of an OPD member. There were 32 (63%) cases investigated by IAD where they determined said cases did not rise to the level of a felony or a serious misdemeanor nor were these cases forwarded to CID. These determinations were based on the investigative finding and not the mere allegation as in the 12 allegations deselected above. There were 12 (21%) cases investigated by an outside agency. In these 12 cases, IAD coordinated their investigation with the investigating agency. Therefore these cases were handled according to policy.

In summary the audit determined there were only two cases applicable to this task and both were in compliance.

Task 29.2

When OPD initiates an interview or interrogation of OPD personnel and it appears that the subject may be charged with a crime, or the subject asserts his or her Fifth Amendment rights on grounds that the answers to questions posed may be incriminating, such interrogations are preceded by a Lybarger Advisement

Audit Steps

The auditor reviewed 52 investigations to determine when the Lybarger Advisement was required.

Findings

Of the 52 investigations reviewed there were nine cases where Task 29.2 was applicable. These cases were determined to be applicable since it appeared the subject may be charged with a crime or criminal charges were potentially viable.

In each case, the audit revealed the Lybarger Advisement preceded the interview. The audit determined all nine cases complied with Task 29.2.

It was found that the language for Task 29.2 (Lybarger) is different than in General Order M-4.1. For Task 29.2 compliance, it needs to be apparent the subject may be charged with a crime for Lybarger to be necessary. General Order M-4.1 only requires reasonable suspicion a crime has occurred for Lybarger to be necessary. OPD is in compliance with Task 29.2; however, on two occasions investigators failed to provide a Lybarger Advisement to officers who were arrested off duty. In one of the cases the District Attorney advised they would not be charging the case. This notification was made prior to the administrative interview. For the other case, the subject was released prior to booking and no charges were to be sought. There were no charges to be filed in these cases; therefore Lybarger was not necessary for 29.2 compliance. Due to reasonable suspicion of criminal conduct, Lybarger was necessary pursuant to General Order M-4.1.

RECOMMENDATIONS

It is this audit team's recommendation all investigators receive refresher training on DGO M-4.1 to ensure Lybarger Advisements are provided when required. This training should extend to all persons who may conduct an administrative investigation.

CONCLUSION

The audit found OPD to be in compliance with both Tasks 28 and 29. OPD Internal Affairs Division and the Criminal Investigations Division did a good job ensuring separate investigations were conducted. The CID Commander has checks and balances in place such as the DGO M-4.1 Task Checklist, to ensure policy compliance. The CID Commander has taken over the responsibilities of notifying the appropriate City Offices, as well as the Chief of Police and Assistant Chief when there is reasonable suspicion of criminal misconduct. This allows for better coordination and control over notification requirements as outlined in M-4.1. The OPD has made significant progress since the IMT's 2007 review.