

Biannual Report



Biannual Report Fiscal Year 2016 & Fiscal Year 2017



Office of the
**INDEPENDENT
POLICE AUDITOR**

BAY AREA RAPID TRANSIT DISTRICT

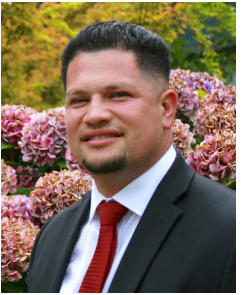
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Welcome



Russell Bloom
Independent Police Auditor



Patrick Caceres
Independent Police Investigator



Sarah Celso
Senior Administrative Analyst

The fifth and sixth years of operation for the Office of the Independent Police Auditor (OIPA) have been marked by significant change. The agency continued to fulfill its responsibility to provide independent investigations of citizen complaints and to provide input to the BART Police Department (BPD) designed to maintain the highest standards of accountability and transparency. With the resignation of OIPA's first Auditor in early 2016, I continued to perform investigative duties as well as those of Interim Auditor until my appointment by the BART Board of Directors in July of the same year. The strong infrastructure and effective practices established by my predecessor were key components allowing for a smooth transition into the new role.

OIPA recruited and hired a new Investigator who started working in January 2017, bringing many years of experience in the field of independent police oversight and policy analysis. Recent years also saw the retirement of the agency's Senior Administrative Analyst, and a lengthy recruitment process culminating in the hiring of a talented and dedicated replacement who effectively supported our mission throughout the period during which we worked to fulfill our responsibilities to the BART District and the community and to become, once again, fully staffed.

Despite the small size of our office, the vacancies did not impact our ability to complete and deliver thorough investigative reports to the BART Police Citizen Review Board (BPCRB) or to respond to complainants promptly and conscientiously. We embarked on a two-year cycle of training for BPCRB members and continued to expand our own knowledge of industry best practices, law enforcement oversight theories, and the evolution of progressive policing tenets.

OIPA identified and addressed issues related to panhandling with the BART system by drafting and presenting new policy language designed to avert any potential infringement of Constitutionally protected conduct. OIPA staff engaged in extensive discussion, research, and analysis around the crafting of a new, progressive Use of Force policy intended to minimize harm to subjects, bystanders, and officers alike. And our agency has increased its examination of individual use of force incidents in an effort to identify any problematic conduct or deficiencies in the Department's internal use of force review system. It also bears mentioning that BPD Chief of Police Kenton Rainey retired in December 2016 and was replaced by Chief Carlos Rojas in June 2017. This shift in leadership provides an opportunity for OIPA to monitor the maintenance of accountability measures established over the past six years by the outgoing Chief with input from OIPA and the BPCRB.

Significantly, the BART Police Citizen Oversight System has been subject to an independent third-party evaluation since January 2017, during which the evaluation team interviewed a number of stakeholders including complainants, community members, BPD staff, BPCRB members, and many others. In the upcoming year, the BART Board of Directors will have an opportunity to review and discuss over 50 individual recommendations for improvement of the system, and will ultimately determine whether to implement the recommendations. OIPA is looking forward to discussing the ways in which revisions to our mandate and to our practices and procedures might lead to the establishment of a more effective and responsive oversight model that even more deeply meets the needs and demands of the community while serving to help improve policing of the District.

I am honored to present this OIPA Biannual Report for the fiscal years 2016 and 2017.

A handwritten signature in blue ink, appearing to read "Russell G. Bloom".

RUSSELL G. BLOOM
Independent Police Auditor
September 2017

About Our Office

The Office of the Independent Police Auditor

Driven by the Bay Area community's need for restored public confidence and trust in the BART Police Department, and by the call for systemic change to address that need, BART's Office of the Independent Police Auditor (OIPA) was created.

What is OIPA?

OIPA was formed by Assembly Bill 1586, signed by the Governor of California in 2010 to provide effective, independent oversight of the BART Police Department by ensuring that internal police accountability systems function properly, that behavioral, procedural and policy deficiencies are identified and appropriately addressed, and that complaints are investigated through an objective and fair process. The operation of OIPA and the scope of its duties are defined by the BART Citizen Oversight Model (Model). The Model also defines the role of the 11-member BART Police Citizen Review Board.

Mission & Duties

Mission Statement

It is OIPA's mission to provide all members of the public with effective and independent oversight of the BART Police Department by conducting unbiased and thorough independent investigations and reviews of police department investigations, making policy recommendations to improve the performance of the police department, and maintaining continual communication with members of the public in the BART service area.

Duties

As defined by the BART Citizen Oversight Model adopted by the BART Board of Directors, OIPA is charged with a number of specific duties. Among them are the following:

- Accept complaints of misconduct against BART Police Officers
- Investigate complaints filed with OIPA that involve allegations of unnecessary or excessive use of force, racial profiling, sexual orientation bias, sexual harassment, the use of deadly force, and suspicious and wrongful deaths
- Review Internal Affairs investigations conducted by the BART Police Department, including those cases where the complainant has sought to appeal the findings issued by Internal Affairs

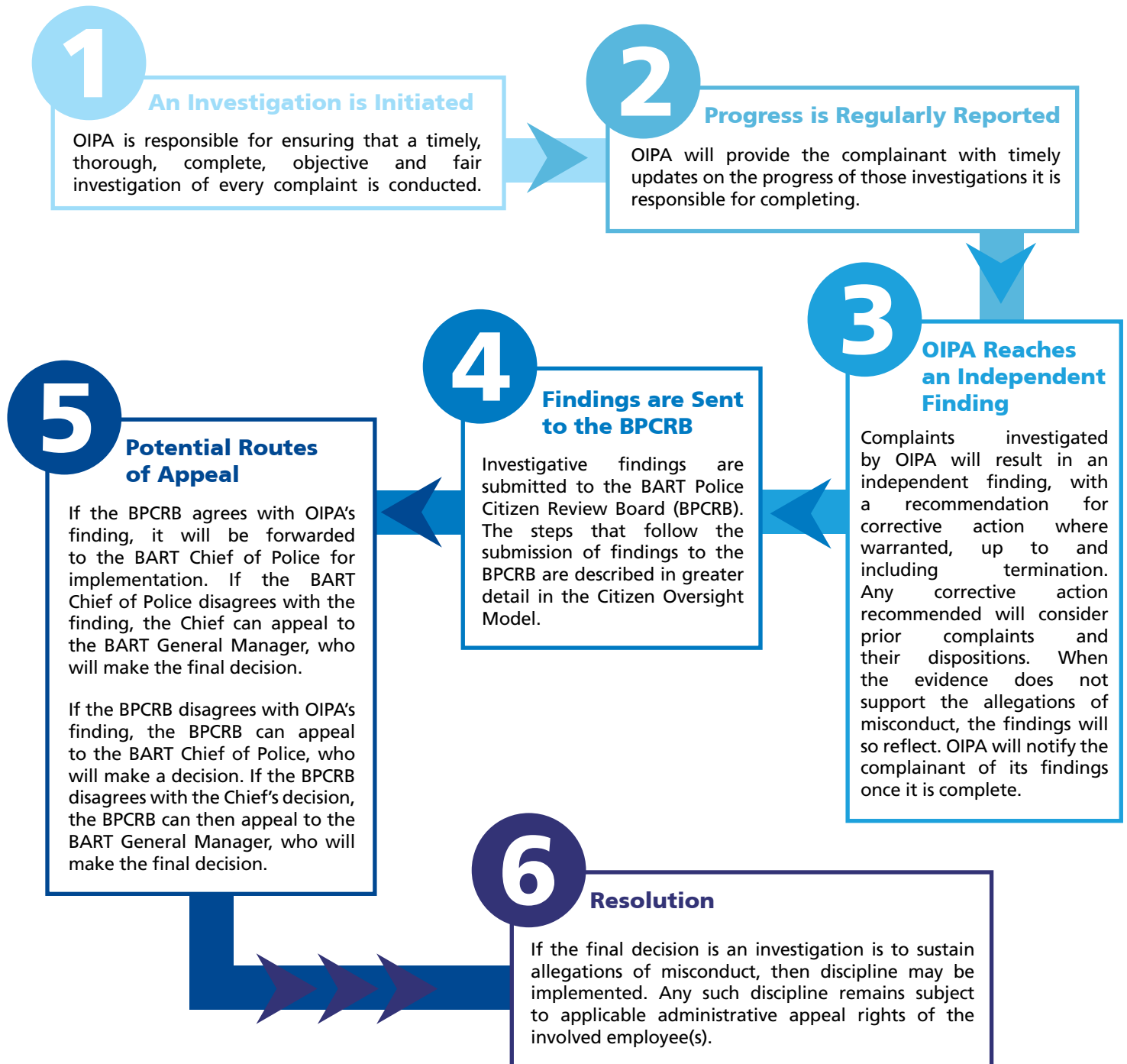


Above: OIPA Car Card

- Review Internal Affairs investigations conducted by the BPD, including those cases where the complainant has sought to appeal the findings issued by Internal Affairs
- Develop an alternative dispute resolution process for resolving some complaints
- Respond to the scene of officer-involved shooting incidents and monitor the ensuing BPD investigation
- Develop recommendations to improve BPD policies
- Maintain a regular program of community outreach
- Prepare annual reports for the public and the BART Board of Directors, and report regularly to the BPCRB at their monthly meeting

Every individual regardless of religion, race, immigration or documentation status, or national origin should feel safe to seek and obtain assistance from OIPA. A complaint can be filed if you are not a citizen and regardless of your immigration status.

Complaint Process



Executive Summary

Commitment to Community Outreach

During these years the Office of the Independent Police Auditor maintained its ongoing commitment to community outreach, including its efforts to focus on youth as well as some underrepresented groups in our community. OIPA was able to meet with a variety of groups and organizations around the Bay Area, allowing us to communicate our mission to various people all at one time. Additionally, we were pleased to collaborate with the BPCRB and Jack & Jill of America, Inc. (Contra Costa Chapter) on a forum to engage in meaningful dialogue about issues related to the police and the youth with whom they interact. Other organizations that we have connected with over the past two years were:

- California State University, East Bay - Criminal Justice Administration Students
- National Crime Prevention Council (Various Oakland Police Department Beats)
- The Scraper Bike Shed Grand Opening
- Berkeley Juneteenth Festival
- East Oakland Youth Development Center
- Kennedy High School Career Day
- San Jose Office of the Independent Police Auditor - Community Trust in Policing Forum
- Fremont High School - Capstone Exhibition
- BART New Station Agent & Recertification Classes
- BART Government & External Affairs Department
- BART Accessibility Task Force

Draft Recommendations Regarding BPD Policies and Procedures

OIPA recognizes the importance of its responsibility to make policy recommendations to BPD. Under the Citizen Oversight Model, OIPA is required to develop specific recommendations with the goal of improving BPD professionalism, safety, effectiveness and accountability. OIPA is also required to present any recommendation to the BPCRB for its review and comment. In keeping with its commitment to this responsibility, OIPA researched, drafted, and submitted a revised policy regarding BPD's approach to the enforcement of the law prohibiting aggressive panhandling on BART property.

Arguably, the most important policy for any police department is that which dictates how physical force may and may not be used by officers. OIPA participated in an extensive revision process during which BPD command staff, union representatives, and training personnel engaged in a series of meetings with a subcommittee of the BPCRB. OIPA staff provided data and research as well analysis with regard to some of the practical effects of specific language. The efforts of all of the engaged stakeholders resulted in the implementation of a progressive policy which may serve to increase the level of community trust by requiring officers to employ minimal force to accomplish lawful objectives.

Commitment to Training OIPA Staff

This year OIPA succeeded in renewing its commitment to ensuring that our own staff remains apprised of the latest scholarship and best practices with regard to oversight of law enforcement. We also sought to take a leadership role in this area by participating as panelists and presenters at various events during the course of the year. Some of the training activities included:

- Officer Involved Shooting for Field Supervisors
- Force Option Simulator
- Axon Body Worn Cameras

By the Numbers

In FY2016 and FY2017 combined, there were a total of 229 new or re-opened cases initiated by OIPA or BPD's Internal Affairs Unit. OIPA's share of all complaints received as compared with BPD Internal Affairs remained consistent at approximately 17% for this reporting period.

The three most common categories of alleged misconduct were (in order):

1. Excessive Force
2. Performance of Duty
3. Conducting Unbecoming an Officer

A total of 263 cases were closed in FY2016 and FY2017 combined. 157 of those cases were formal complaints and a total of 134 individual allegations were sustained.

The three most common sustained allegations were (in order):

1. Policy/Procedure
2. Performance of Duty
3. Conduct Unbecoming an Officer

No allegations were sustained in FY2017 for Excessive Force or Racial Profiling. Two allegations were sustained for Excessive Force in FY2016 and none for Racial Profiling.

The three most common types of discipline issued by case included (in order):

1. Letter of Discussion
2. Oral Counseling
3. Informal Counseling

There were also no terminations, but seven suspensions, one pay reduction, eight written reprimands and four allegations were criminal.

Four (or 25%) of the 12 complaints were independently investigated by OIPA and resulted in at least one sustained allegation. OIPA's recommendations for discipline in those cases included: one Written Reprimand, one Letter of Discussion and three Informal Counseling requirements.

Areas of Focus for OIPA 2016 & 2017



Left: Russell Bloom presenting to Criminal Justice Administration Students at California State University, East Bay, Hayward, CA (May 2016)
Right: Patrick Caceres, Fremont High School, Oakland, CA - Senior Capstone Presentations (May 2017)

Commitment to Community Outreach

The Citizen Oversight Model requires that OIPA develop and maintain a regular program of community outreach and communication for the purpose of listening to and communicating with members of the public, and educating the public about the services provided by OIPA, and the functions of the BPCRB. The importance of outreach efforts is regularly illustrated in a number of ways. There have been occasions when BPD activity has been the subject of significant community concern, which may be expressed through social media outlets. At the same time, the incident or conduct giving rise to the community's concerns did not result in a complaint of misconduct to OIPA, in large part due to a lack of awareness of the services provided by our agency. OIPA seeks to inform community members about our mandate and authority by meeting and talking with groups throughout the Bay Area, particularly students and young people who may be able to help us reach a critical mass of awareness. Importantly, OIPA has also become aware that key BART employees, including station agents, had limited awareness of our existence and/or our role within the BART structure. Because station agents are often the primary contact for BART patrons who have any type of complaint about the system, OIPA reinvigorated a program of education and outreach to station agents, and worked with BART management to supply each station with OIPA



informational brochures and complaint forms for appropriate distribution to the public. This program of internal outreach and education is ongoing as OIPA staff delivers presentations during the agent recertification program.

OIPA is exploring the development and maintenance of an online social presence, which may improve our communication with the public, and which may serve to increase awareness of the agency more efficiently and exponentially than can be accomplished with visits to schools and community groups. We are examining whether existing staffing levels can support such a program and maintain the degree of responsiveness to which OIPA is committed. Some of the groups and events with which we have engaged are listed here:

- East Oakland Youth Development Center
- Fremont High School Senior Capstone Presentations
- Genesis Public Meeting - Youth Power Forum
- Kennedy High School Career Day
- BART Accessibility Task Force
- BART Government & Community Relations Department
- BART Town Hall - Coalition on Homelessness

Draft Recommendations Regarding BPD Policies & Procedures

OIPA continued its practice of issuing periodic recommendations regarding BART Police Department Policies. We may become aware of an area for examination by way of an individual complaint, or in some cases, as a result of our review of BPD and Internal Affairs activity.

Aggressive Panhandling

On February 22, 2017 OIPA submitted a draft recommendation to the BART Police Department regarding BPD Policy 453 Aggressive Panhandling. The draft revision was inspired and conceived after OIPA review of enforcement contacts related to California Penal Code §647(c). The final OIPA recommendation was developed with significant input from Bay Area District Attorneys, and review and input from BPD command staff, the BART Police Citizen Review Board (BPCRB), the BART Police Officers Association, the BART Police Managers' Association, and a number of advocates and scholars including the San Francisco-based Coalition on Homelessness. A policy recommendation or a recommendation for revision may be spurred by examination of a specific complaint of misconduct by an officer. In one instance, a complaint of excessive use of force by an officer was investigated by BPD, and an OIPA review of the investigation indicated that the underlying initial contact was related to the perception by the officer that the subject was panhandling in violation of state law. Closer review of the underlying panhandling activity revealed that there was no violation of the law, and that the existing BPD policy regarding enforcement of the law which prohibits aggressive panhandling did not sufficiently differentiate between illegal aggressive conduct and communication protected by the First Amendment to the Constitution. A person may solicit donations, but may not "accost" people in an effort to solicit. A deeper review of contacts initiated in connection with panhandling activity exposed a gap in officers' understanding, much of which was reasonably attributable to inaccurate examples of aggressive panhandling included in the language of the existing policy. OIPA confirmed with representatives of the District Attorneys for Contra Costa, Alameda, Santa Clara, San Francisco, and San Mateo Counties that citations issued in the absence of aggressive or "accosting" conduct were insupportable under state law. OIPA drafted a revised policy which offered accurate examples of illegal conduct, and which required additional training for officers. The draft revision

was presented to the BPCRB at its regular meeting on February 13, 2017, and that body voted unanimously to accept the proposed draft. OIPA then submitted the revision recommendations to BPD, and the Department adopted and implemented the revised policy. Panhandling remains a source of concern and irritation for many BART riders, and BPD appropriately responds to those concerns by remaining attentive to panhandling activity. The language of the new policy ensures that officers recognize and appropriately differentiate between illegal conduct and the freedom of expression that is guaranteed to all under the US Constitution. It is important to note that a use of force by an officer that is employed to detain an individual without probable cause or reasonable suspicion of criminal activity cannot be justified. An increased awareness of the existence or absence of criminal activity has the potential to reduce the application of unjustified force, which in turn limits opportunities for physical injury to subjects, bystanders, and officers alike while also reducing potential liability to the District for the unjustified application of force in these cases. OIPA intends to continue to review the details of contacts connected with aggressive panhandling activity to ensure that the distinctions between protected and illegal conduct are recognized and that the additional training required by the new policy is being administered by the Department.

Use of Force

The Citizen Oversight Model requires that any proposed changes to policy initiated by the Department must be submitted to the BART Police Citizen Review Board for their review and comment. In early 2017, BPD sought to revise its policy governing use of force by officers, and specifically sought to create a tiered system for reporting differing levels of force employed by its officers. When the language revision was presented to the BPCRB, that body determined that other revisions to the existing policy were appropriate for consideration at that time.

The BPCRB formed a subcommittee which engaged with key BPD personnel in an effort to agree on new language. OIPA staff attended and participated in these meetings, mainly delivering data and research to inform the discussion. In July 2017, after extensive public discussion and input from community activists, attorneys, BPD officers, and union representatives an agreement was reached and new policy language was approved and implemented by the Chief of Police. The new language included a requirement that BPD officers "must strive to use the minimal amount of force necessary" to accomplish a legitimate law

enforcement purpose. The new, progressive language "builds upon the Supreme Court's broad principles in *Graham v. Connor* (1989) 490 U.S. 386 and is more restrictive than the constitutional standard and state law." Importantly, the revised policy includes a statement of commitment to safeguarding the life, dignity and liberty of all persons. The Department has also reasserted its commitment to accomplishing its mission by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force whenever feasible.

Specific requirements regarding de-escalation include a stated commitment to potentially reducing or eliminating the need to use force and to the prevention of injuries to subjects, officers, and the public. The new policy requires that officers continually assess the dynamics of a situation and make appropriate adjustments as circumstances shift. The policy suggests specific tactics, including slowing down the pace of an incident, waiting out subjects, creating distance and requesting additional resources such as mental health care providers to help resolve the incident. Notably, the policy now includes language which suggests a number of important considerations when assessing non-compliance. These include medical condition, mental, physical or hearing impairment, language barrier, drug interaction, or emotional crisis. It is noted within the policy that "understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public and officer safety."

In an era of increased awareness of the importance of public trust, and a deeper understanding of the factors that contribute to the diminution of that trust, the new BPD Use of Force Policy acknowledges and "recognizes that

transparency and accountability in the use of force is essential to preserving the trust of the community and to maintaining professional standards." To that end the policy also requires rigorous reporting and review of all instances of the use of force. The revised policy further states that at least annually, the BPD Operations Bureau Deputy Chief should prepare an analysis report on use of force incidents to include the identification of any trends, any training needs recommendations, any equipment needs recommendations, and any policy revision recommendations. That report should be submitted to the Chief of Police, the OIPA, and the BPCRB.

The lengthy, contentious, and collaborative process is illustrative of the value of involving civilian oversight professionals and volunteers in the process of crafting Department policy. In the months and years to come, OIPA intends to remain attuned to the effect of the policy on individual contacts and will monitor the impact of the implementation and revised training in addition to applying the new standard in our analysis of complaints alleging excessive or unnecessary use of force.



Above: Protest Activity by 12th Street BART Station in Oakland, CA

Observation of BART Police Department Response to Protest Activity

There is a vibrant history of political protest and the expression of free speech in the Bay Area. The proximity of BART station to such areas as Downtown Oakland's Frank Ogawa Plaza at City Hall sometimes requires a planned crowd management response from the Department. OIPA, in an effort to remain aware of the effectiveness of BPD crowd management and crowd control efforts endeavors to observe responses in real time where possible and where appropriate. This monitoring allows OIPA to better analyze and evaluate the nature of interactions between police and protestors even in the absence of a specific complaint of misconduct. These observations allow OIPA to evaluate whether existing BPD policies and practices are in need of any adjustments or revisions to ensure the Constitutional protection of free speech as officers work to maintain public safety.



Above: Anthony Finnell (Oakland Citizens' Police Review Board), Joyce Hicks (San Francisco Office of Citizen Complaints) and Russell Bloom (BART Office of the Independent Police Auditor) speaking on the Civilian Oversight Panel at the NOBLE Forum on 21st Century Policing (March 2016)

Commitment to Effective Training for OIPA Staff

OIPA endeavors to remain apprised of the latest scholarship and the best practices associated with oversight of law enforcement, and our staff was able to attend a number of forums and events to that end during this period. Additionally, we have sought more opportunities to participate as speakers and panelists in order to engage more deeply with experts in the field of oversight. Through these interactions and studies, OIPA has been better able to conduct timely, complete, thorough, and objective investigations in connection with individual complaints. By collecting the information and knowledge being offered by experts and practitioners, OIPA has been able to increase its efficiency and maintain the highest standards of quality in all areas, including systemic reviews and procedural analyses. In the fiscal years 2016 and 2017, trainings in which we participated or presented included:

- National Association for Civilian Oversight of Law Enforcement (NACOLE) 22nd Annual Training Conference - Confronting Systemic Injustice
- NACOLE 23rd Annual Training Conference - Civilian Oversight in a Changing Landscape
- National Organization of Black Law Enforcement Executives (NOBLE) Forum: 21st Century Policing
- Profiling: Developing a Mechanism to Identify, Quantify & Investigate Profiling Allegations Against Police
- Association of Local Government Auditors:

Accountability & Transparency in a Law Enforcement Environment

- Northern District of California Law Enforcement Executives' Summit: Building Community Trust & Justice - Police Legitimacy & Procedural Justice, Implementing the Recommendations of the Task Force on 21st Century Policing
- Race & Policing (State & Local Perspectives)
- Mediation Webinar: Strategies for a Successful Mediation Program
- California Peace Officers Association - Social Media Training (Can Cops Express Their Views?)
- Axon Body Worn Cameras Training
- Force Option Simulator
- Dispatch Training



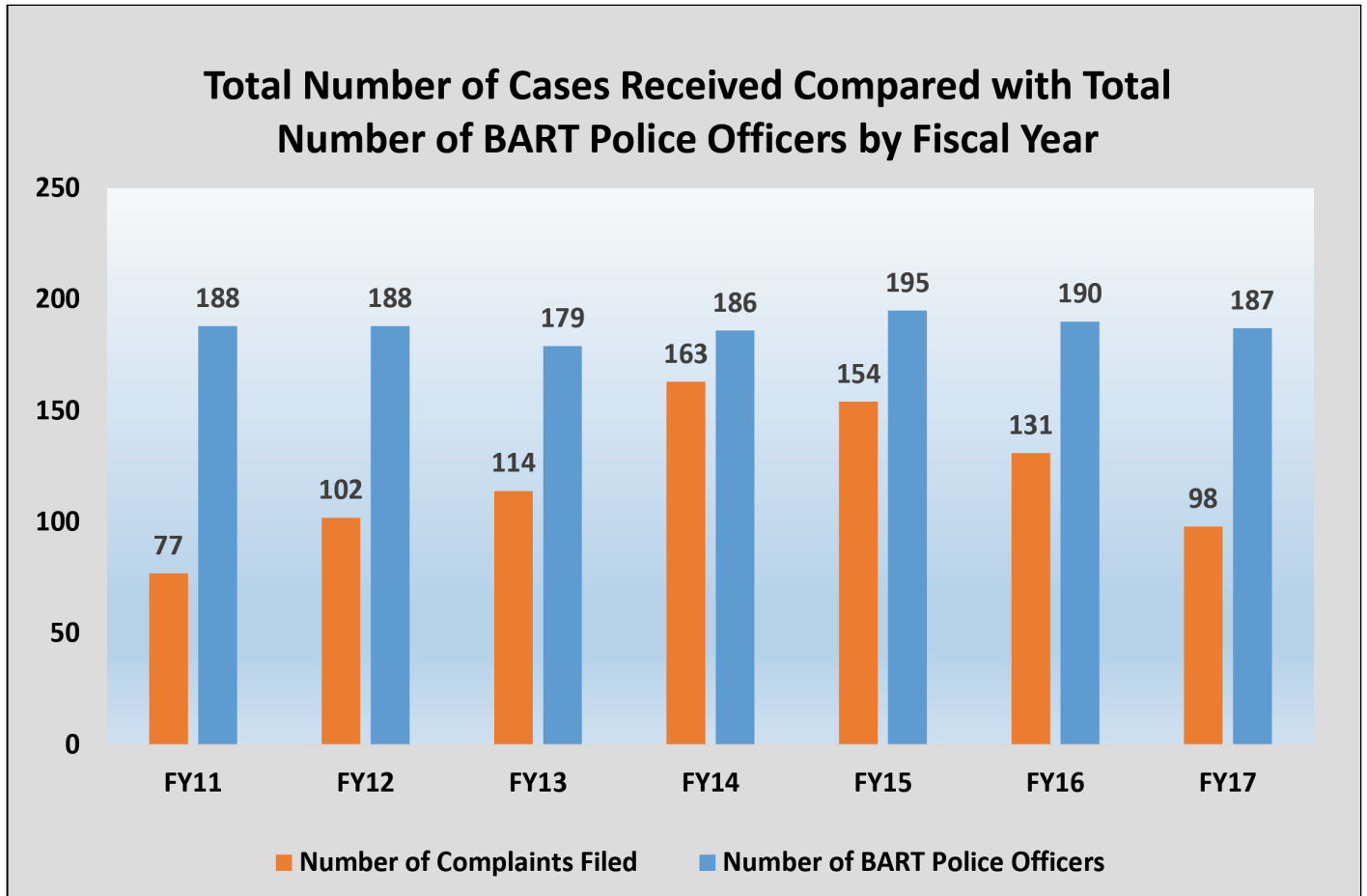
Above: Jennifer Friedenbach (Coalition on Homelessness) speaking to the BPCRB about homelessness.

Commitment to Effective Training for BPCRB

OIPA facilitated training for the BPCRB. In the fiscal years 2016 and 2017, the following training topics were presented to them at the BPCRB's monthly meetings:

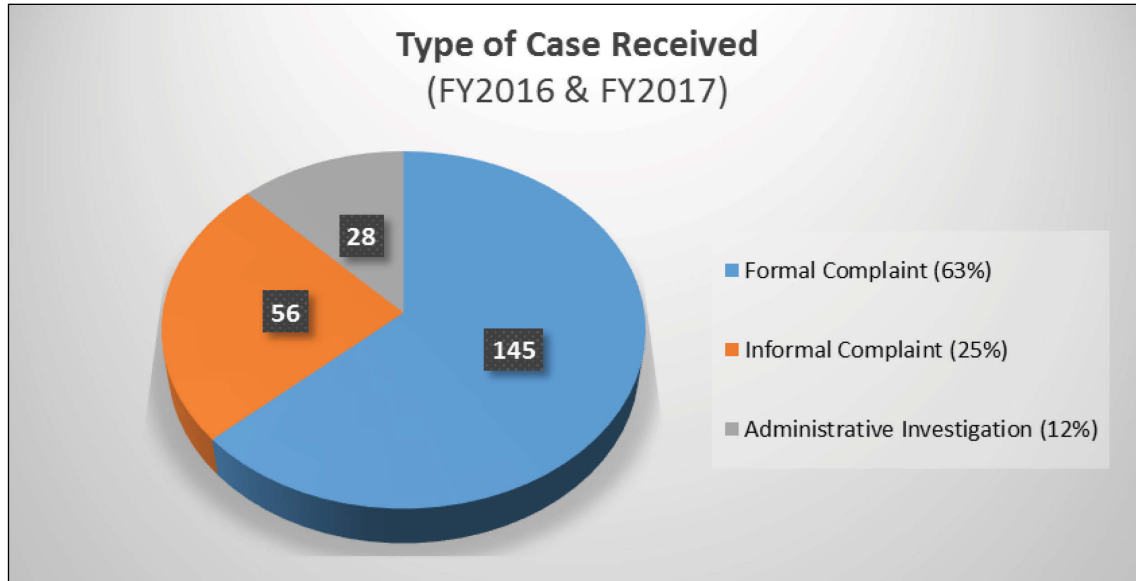
- Oversight Agency Basics
- Dropbox Business/File Hosting Service
- BPD Structure & Organization
- Crowd Management/Crowd Control
- Use of Force
- Officer Involved Shootings & In-Custody Death Investigations
- Bias-based Policing/Racial Profiling
- BPD Policy #467 - Homeless Persons
- Presentation by Coalition on Homelessness

2016 & 2017 By The Numbers

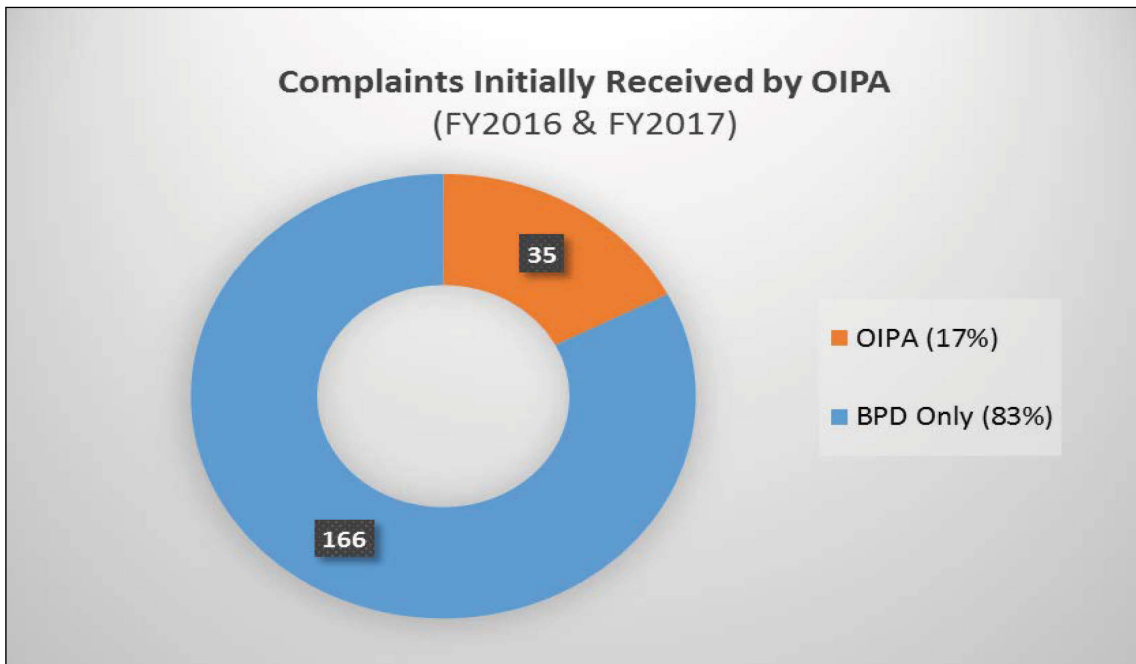


Graph 1. The total number of cases received by BPD annually includes all formal complaints, informal complaints, and administrative investigations.¹ The total number of sworn BPD officers annually is provided for comparison with the total number of complaints received. The total number of BPD officers is the number of positions budgeted minus the vacant positions. There was a 25% decrease in the total number of complaints filed with BPD in FY2017 compared with the prior fiscal year. However, the total number of BPD officers remained relatively constant at around 188 officers during the past two fiscal years.

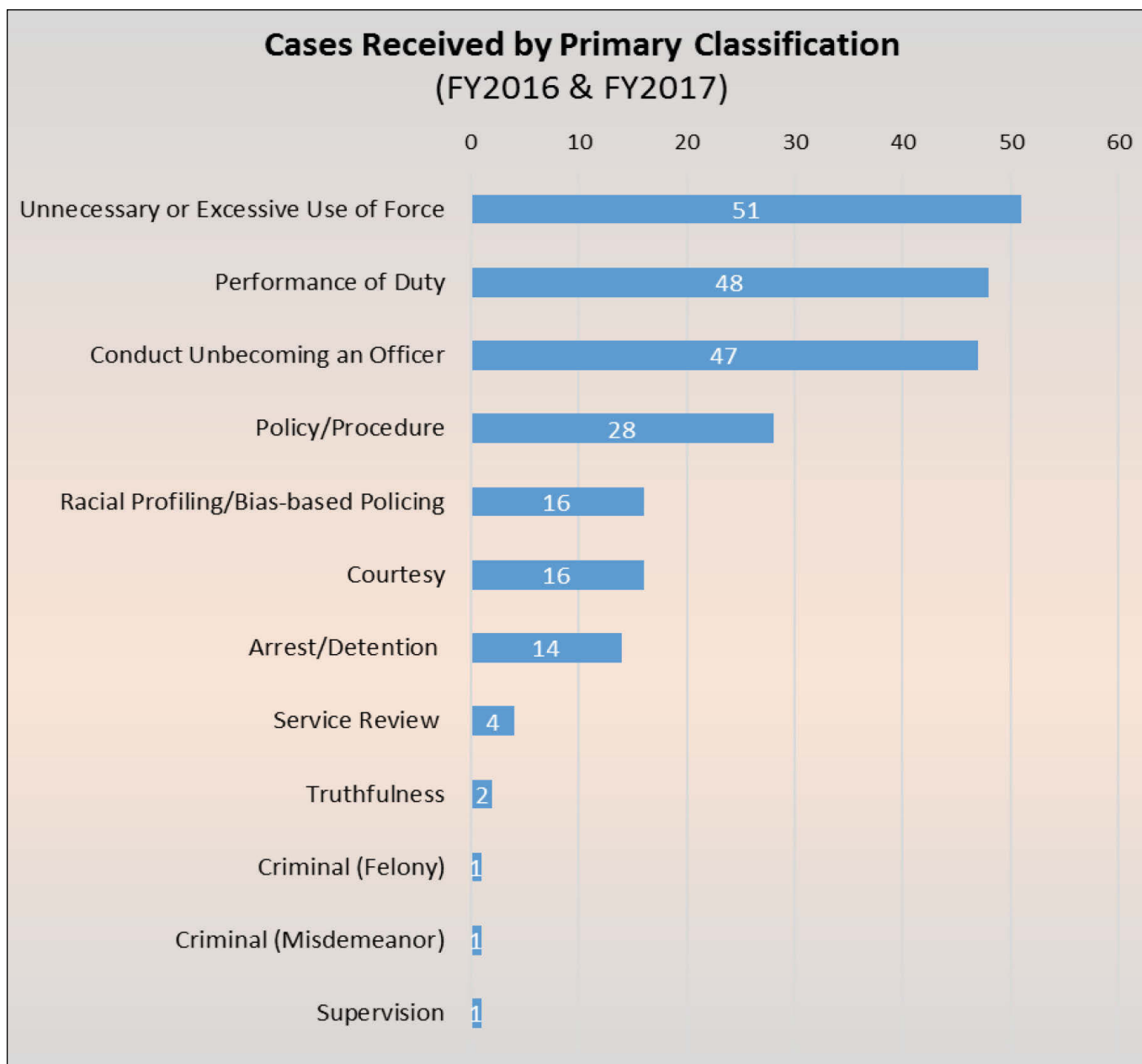
¹ Administrative investigations are cases internally generated and initiated by BPD.



Graph 2. Formal complaints represent the largest percentage of cases received during this reporting period. 63% of all cases filed in FY2016 and FY2017 were formal complaints requiring a full investigation. There were slightly more than twice as many informal complaints as administrative investigations. This percentage of formal complaints received is consistent with previous years.

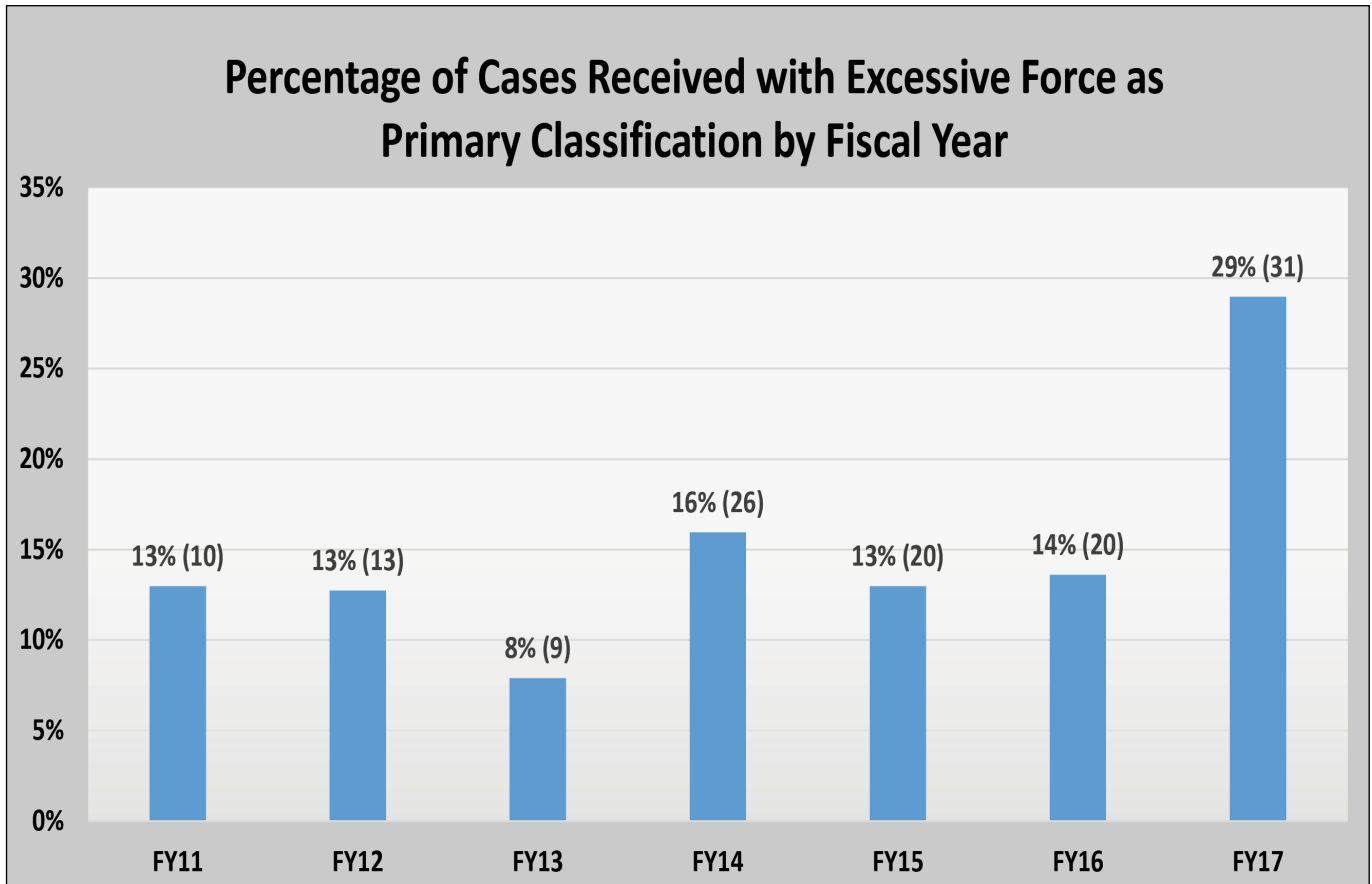


Graph 3. Complaints received by OIPA are a subset of the total number of cases addressed by BPD. Approximately 17% of all complaints were initially received by OIPA. OIPA received 35 total complaints in FY2016 and FY2017 combined. There was a 20% decrease in complaints received by OIPA between FY2016 and FY2017. The total number of complaints received by BPD decreased by 25%.

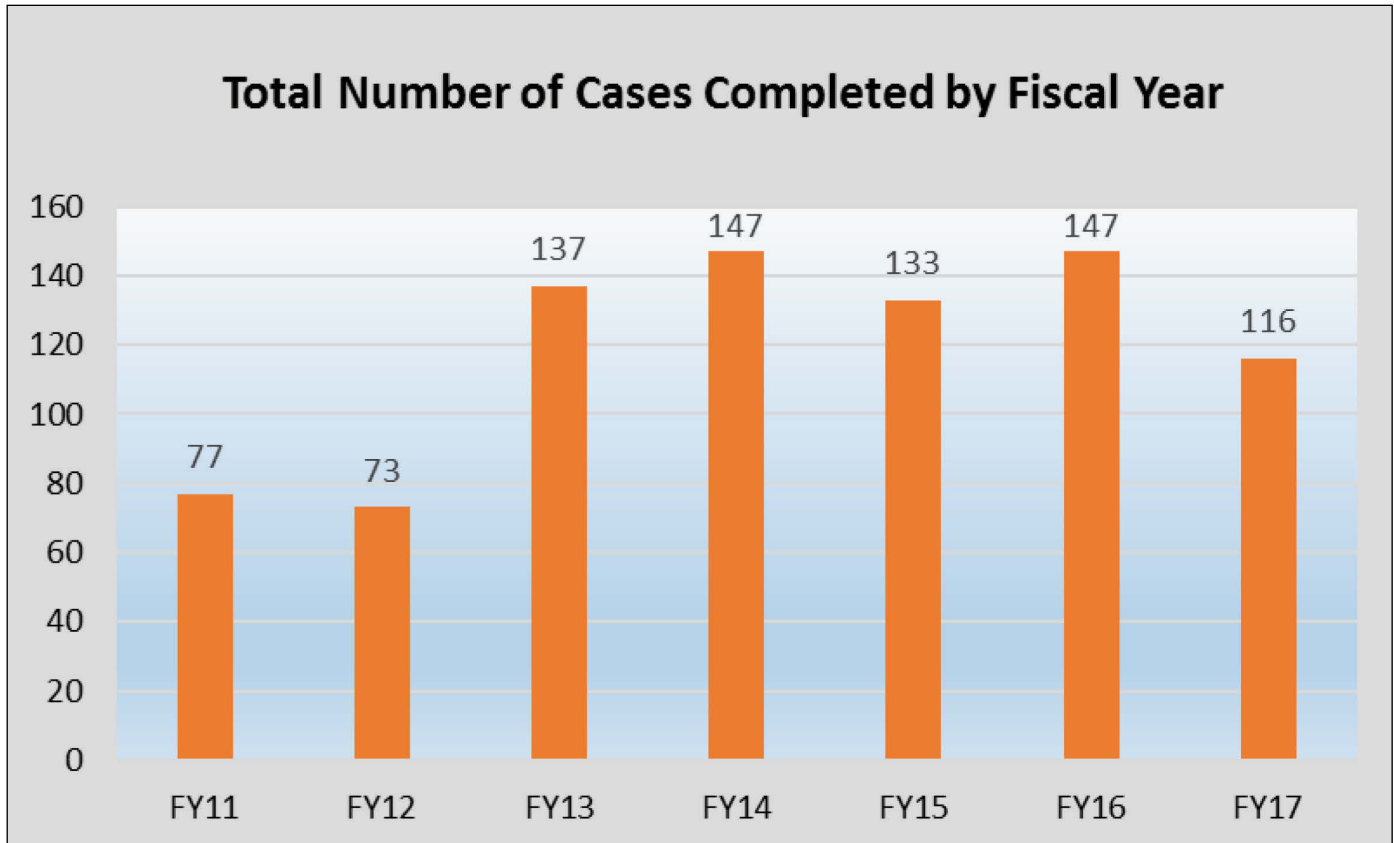


Graph 4. Complaints of misconduct are classified by specific allegations raised. Complaints often include multiple types of allegations but are given a primary classification for data entry. The primary classification is generally the most serious type of misconduct that has been alleged in the complaint. This graph is a breakdown of the 229 cases alleging misconduct that were filed or reopened during FY2016 and FY2017 reporting period, separated by primary classification.

The three most common primary classification allegations received were: Unnecessary or Excessive Force, Conduct Unbecoming an Officer, and Performance of Duty. 51 cases included an allegation of Unnecessary or Excessive Use of Force. Twenty-eight cases included an allegation of Racial Profiling/Bias-Based Policing during this reporting period.



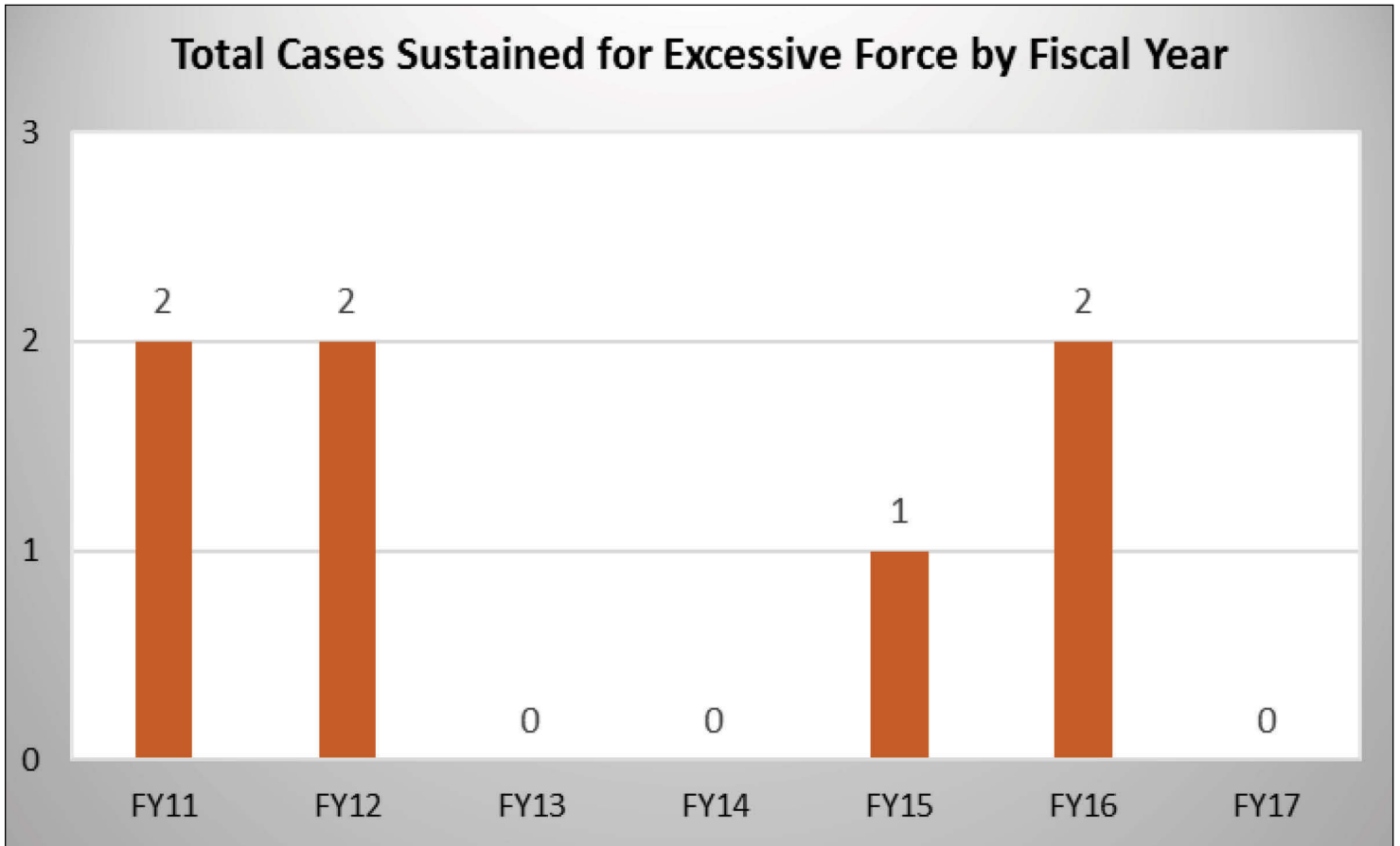
Graph 5. 29% or 31 cases received in FY2017 included at least one allegation of excessive force. This is the highest number of excessive force allegations and the highest percentage of total cases received by BPD.



Graph 6. There were 263 cases closed or re-closed in FY2016 and FY2017 combined. There were 147 investigations completed in FY2016 and 116 completed in FY2017. There were more cases completed than received during this reporting period, illustrating a faster completion rate for investigations by BPD and OIPA than in previous years.

SUSTAINED ALLEGATIONS FY2016 & FY2017		
ALLEGATION	FY2016	FY2017
Arrest or Detention	1	0
Conduct Unbecoming an Officer	13	5
Courtesy	6	1
Criminal	3	1
Force	2	0
Performance of Duty	23	12
Policy/Procedure	33	26
Racial Animus	1	0
Supervision	2	1
Truthfulness	3	1
TOTAL	87	47

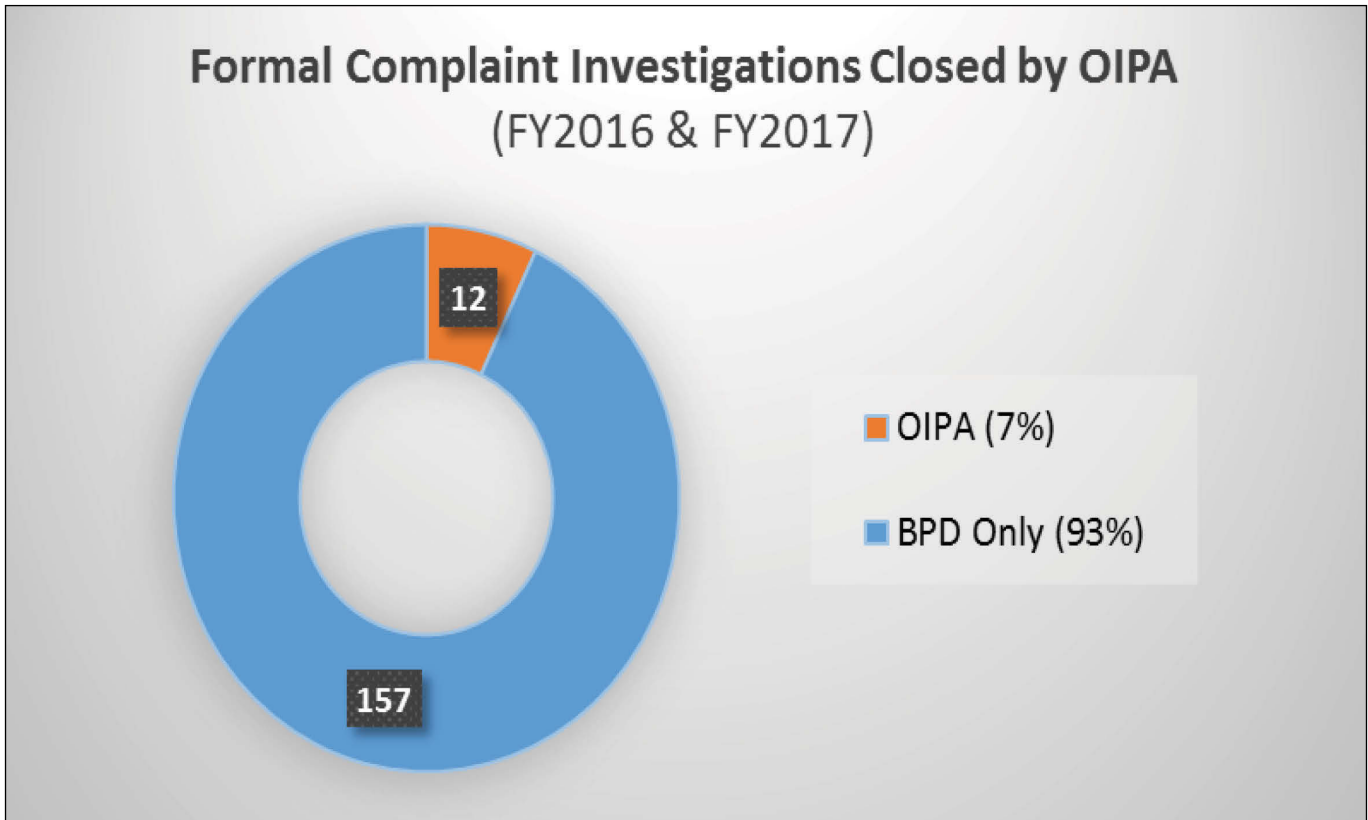
Chart 1. The two allegations with the highest number of sustained findings in FY2016 & FY2017 were Policy/Procedure and Performance of Duty.



Graph 7. In FY2016, two cases resulted in at least one sustained allegation for excessive force. There were no allegations of excessive force sustained in FY2017. Since FY2011, a total of seven cases included at least one sustained allegation of excessive use of force.

TYPES OF DISCIPLINE	NUMBER
Demotion	0
Informal Counseling	11
Letter of Discussion	15
Oral Counseling	14
Pay Step Reduction	1
Resign Prior to Discipline	1
Retire Prior to Discipline	4
Supervisor Addressed through Training	1
Suspensions	3
Suspension in Abeyance	4
Termination	0
Written Reprimand	8
TOTAL	62

Chart 2. In some cases, there were multiple officers that received discipline in connection with a single complaint. In FY2016 and FY 2017 discipline issued included no terminations, three suspensions, one pay reduction and seven written reprimands. Suspension in Abeyance refers to an officer suspension held off in consideration of specific terms or agreements made between the officer and department.



Graph 8. Complaints investigated and closed by OIPA represent a percentage of the total number of cases closed. Seven percent of all formal complaints closed in FY2016 and FY2017 combined were also closed by OIPA. OIPA closed 12 total complaints.

OIPA CASE DISPOSITIONS

Case No.	OIPA Case No.	Nature of Complaint	Allegation Types	Findings	Discipline	Action Taken by BPD
1	14-74	Officers improperly arrested complainant and were motivated to do so because of complainant's race.	-Racial Profiling -Policy/Procedure	-Unfounded -Exonerated	N/A	N/A
2	14-77	Officer made an inappropriate comment and abused authority, and a BPD Dispatcher failed to properly handle a complaint about an officer's actions.	-Racial Profiling -Conduct Unbecoming an Officer -Policy/Procedure -Performance of Duty	-Unfounded -Sustained -Sustained -Exonerated	Informal Counseling	Accepted
3	15-06	Excessive force was used by an officer and the officer treated complainant differently because of race.	-Excessive Force -Racial Profiling -Search or Seizure -Courtesy	-Not Sustained -Unfounded -Exonerated -Unfounded	N/A	N/A
4	15-17	Officer was rude during issuance of a citation and was motivated to act in that manner because of the complainant's race and appearance.	-Conduct Unbecoming an Officer -Racial Profiling -Policy/Procedure	-Unfounded -Unfounded -Exonerated	N/A	N/A
5	13-77	Complainant alleged racial profiling, improper detention, improper search, and improper arrest.	-Racial Profiling (2) -Arrest or Detention -Search or Seizure -Conduct Becoming	-Unfounded & Not Sustained -Exonerated -Exonerated -Unfounded	N/A	N/A
6	14-78	Officers improperly detained subject because of race.	-Racial Profiling -Arrest or Detention -Policy/Procedure	-Unfounded -Exonerated -Sustained	Written Reprimand	Accepted
7	15-04	Officers were overly aggressive and drew their firearms unnecessarily, and that response was based on subject's race.	-Excessive Force -Racial Profiling -Arrest or Detention -Conduct Unbecoming an Officer	-Exonerated -Unfounded -Exonerated -Unfounded	N/A	N/A

OIPA CASE DISPOSITIONS

Case No.	OIPA Case No.	Nature of Complaint	Allegation Types	Findings	Discipline	Action Taken by BPD
8	15-44	Officers were rude to subject because of subject's race.	-Racial Profiling -Courtesy	-Unfounded -Exonerated	N/A	N/A
9	16-25	Officers used excessive force while improperly detaining complainant, mistreated complainant, and did so because of complainant's disability. Officers did not properly report a use of force.	-Excessive Force -Racial Profiling/Bias-Based Policing -Arrest or Detention -Search or Seizure -Policy/Procedure (2) -Courtesy	-Exonerated -Unfounded -Exonerated -Exonerated -Sustained (2) -Unfounded	Letter of Discussion & Oral Counseling	Appealed & Denied
10	16-29	Officers generated a false police report and did not properly investigate a crime.	-Bias-Based Policing -Performance of Duty -Policy/Procedure	-Unfounded -Exonerated -Sustained	Informal Counseling	Accepted
11	16-31	Officers treated complainant differently because of his race and physical disability during a law enforcement contact.	-Bias-Based Policing -Arrest or Detention -Conduct Unbecoming an Officer	-Unfounded -Exonerated -Unfounded	N/A	N/A
12	17-06	Officer threatened and mistreated complainant because of complainant's race.	-Racial Profiling -Courtesy	-Unfounded -Unfounded	N/A	N/A

Chart 3. Four (or 25%) of the twelve complaints investigated by OIPA resulted in at least one sustained allegation. OIPA's recommendations for discipline included one written reprimand, one letter of discussion, and three informal counseling sessions. One of the four OIPA disciplinary recommendations was appealed by BPD and reversed by BART management.

Looking Forward

As the BART Police Department is undergoing significant internal reorganization including the appointment of a new Chief and the reassignment of Internal Affairs personnel, it is a key moment for OIPA to increase its vigilance and attention to assisting with the maintenance of accountability measures and practices. BART and its police department have demonstrated a commitment since the death of Oscar Grant in 2009 to establishing a high level of accountability, including the implementation of policies and procedures to evaluate and review use of force, the establishment of a body-worn camera program, and a multi-layered system of independent review including both OIPA and the BART Police Citizen Review Board. It is incumbent on OIPA and the BPCR volunteers to continue to closely examine the procedures and policies that were put in place, and to help ensure that changes to the existing systems do not diminish accountability and professionalism.

One significant ongoing process, mentioned earlier herein, will be the review and consideration by the BART Board of Directors of the Independent Review of the BART Police Oversight Structure (Appendix A) that was conducted by Michael Gennaco and Aaron Zisser and completed in July 2017. This review was conducted in compliance with a provision of the BART Citizen Oversight Model, and was intended to determine whether the need exists to adjust the system in order to improve its continued performance. OIPA, in consultation with the Chief of Police and the BART General Manager will provide the Directors with an assessment of the resources necessary to implement each of the 54 recommendations included in the report, and OIPA will also be making some internal reporting adjustments suggested in the report, some of which have already been implemented. Such adjustments will include enhanced reporting on OIPA's monitoring of Internal Affairs investigations, including the response of BPD to any recommendations for reevaluation of its processes or reconsideration of its findings.

In light of the implementation of a new and progressive Use of Force Policy, OIPA will pay special attention to BPD adherence thereto, and will also increase our attention to the quality and substance of Use of Force review by BPD supervisors. As always, OIPA will strive to maintain the high standard for investigative quality established at the inception of the agency, and we will increase our focus on scalable outreach efforts designed to inform and educate the most people possible. In this way, OIPA seeks to reassure all communities that we are effectively working to ensure that the police department is fulfilling its public safety responsibility while respecting and protecting the rights of all people. Key to our mission, OIPA seeks to provide thorough, timely, complete, and objective investigations of misconduct allegations, and to ensure that each finding is reached by way of quality investigative technique and reasoned analysis of the facts and the applicable policies.



Appendices

APPENDIX A

- Independent Review of the BART Oversight Structure - OIR Group: Executive Summary

APPENDIX B

- OIPA Recommendation for BPD Policy 453 - Aggressive Panhandling

APPENDIX C

- Revision to BPD Policy 300 - Use of Force



APPENDIX A

Independent Review of the BART Oversight Structure - OIR Group: Executive Summary

Independent Review of the BART Police Oversight Structure

June 2017



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I. Executive Summary

Overview of the review: Chapter 3-01 of the BART oversight model (hereinafter the “Model”) provides as follows:

The Board of Directors, with input from the BART Police Citizen Review Board, Auditor, BART Police Associations, complainants and the public, will evaluate the BART Police citizen oversight structure after the first year of implementation to determine if the need exists to make changes and or otherwise make adjustments to the system to improve its continued performance. This evaluation shall in no way be intended to eliminate the BART Police citizen oversight structure.¹

This review and report were commissioned and conducted in furtherance of BART’s compliance with this provision of the Model; that is, to facilitate the Board of Directors’ evaluation of the oversight structure.

Our review began in January 2017. We interviewed the stakeholders whose input is expressly set out in the Model, but we conducted many additional interviews with a broad range of other significant parties. We ensured that the evaluation takes account of the original impetus for the establishment of the oversight system – the January 1, 2009, shooting of Oscar Grant by a BART Police Department (BART PD) officer – as well as the subsequent systemic reviews of policies and practices. Because oversight’s effectiveness depends heavily on the community’s trust, engagement, and support, we placed a high premium on community attitudes and concerns regarding the oversight system. We measured these factors in a variety of ways.

During our review, all individuals we met were generous with their time, accessibility, and candor. Representatives of the Board of Directors, the BART Police Citizen Review Board, and the BART PD were particularly helpful in providing both relevant documents and important insights regarding the issues discussed herein. The Office of the Independent Police Auditor (OIPA) was especially helpful in facilitating the mechanics of our work, and was continually available to provide documents and important perspective. To the degree that our findings and recommendations may help enhance the current civilian oversight system, it reflects the cooperation, assistance, and acumen provided by these stakeholders.

The oversight system: The BART PD oversight system, established in July 2010 following a process that involved community input, consists of the OIPA and the BART Police Citizen Review Board. According to the Model, OIPA (with a current staffing level of three) is to conduct investigations of complaints alleging serious officer misconduct, make recommendations on BART PD policies and practices, audit Internal Affairs (IA) investigations, conduct close monitoring of officer-involved shootings, conduct community outreach, issue

¹ The Oversight Model is available on the website of the Office of the Independent Police Auditor: <https://www.bart.gov/about/policeauditor> and attached to this report as Attachment A.

public reports on investigation outcomes and trends, and provide staffing and other resources to the BART Police Citizen Review Board.

The BART Police Citizen Review Board consists of 11 members. Each of the nine Directors selects one member, while one is appointed by the police associations, and one is “at-large.” According to the Model, the Review Board is to hold monthly public meetings, review OIPA’s investigations, review BART PD and OIPA recommendations regarding BART PD policies, make its own recommendations regarding BART PD policies, conduct community outreach, and issue reports on its activities. Its members are also authorized under the Model to participate in officer and executive hiring.

Overview of findings: We found that the Model devised in response to the tragic shooting of Oscar Grant created two oversight entities that have served a valuable purpose in establishing effective civilian oversight over an agency that had no such previous external influences. The fact that we offer numerous recommendations designed to strengthen and clarify the original Model should in no way diminish the work of those who have worked diligently to fulfill the overarching objectives of accountability, advancing progressive police practices, and fostering greater community trust in law enforcement. Instead, this Report seeks to fulfill a key part of the Model’s original vision: one that recognized that a constructive re-assessment of BART’s nascent oversight program should be built into the design.

From that starting point, we found several areas in which the Model could benefit from revision and reform. These include significant omissions in the Model relating to investigations and auditing authority, and the ambiguities in provisions relating to outreach, reporting, investigations, and policy recommendations.

The review features a total of fifty-three recommendations. They range in scope from broad issues of jurisdiction and structure to more particular or technical adjustments to specific provisions in the Model. Among the key categories that produced specific suggestions for reform are the following:

Recommendations to expand authority and related findings: We recommend expanding the oversight system’s authority in two areas:

- **Broader audit authority:** First, we recommend expanding the auditing authority to allow OIPA to review any operational aspect of BART PD – as opposed to merely reviewing IA’s operations.
- **Investigations absent a complaint:** Second, we recommend authorizing OIPA to conduct its own independent investigation or review into any use of force or potential act of misconduct without the need to await receipt of a qualifying citizen complaint.

Other recommendations and findings:

- **Independence** from each other’s roles and responsibilities should be reinforced through structural changes to OIPA and the BART Police Citizen Review Board for the sake of their respective and mutual effectiveness. OIPA’s obligations relating to staffing the

Review Board should be removed, the requirement of a Review Board performance evaluation of the IPA should be eliminated, and orientation and training for Review Board members should be enhanced to delineate roles and responsibilities.

- **Case Auditing** should be conducted in a more consistent and thorough manner that allows for not only pre-completion input into the IA investigation, but also the ability to influence dispositions and discipline prior to BART PD's final decision.
- A **Systemic Auditing** protocol should be developed and implemented. OIPA should analyze trends and patterns, and it should be involved in BART PD procedures relating to use-of-force reviews and early identification of officers who may require remedial interventions.
- **Investigations** should address a broader range of complaints; any person should be able to file a complaint; and written protocols should be developed regarding investigative techniques, procedures, and coordination with other BART components to ensure confidence in OIPA's investigations and to ensure that it receives all complaints coming in to BART.
- **Use of Force Review** should become an arena in which OIPA more regularly participates, including assessing individual incidents, and contributing to holistic discussions of tactics and training, and other potential elements of constructive feedback.
- **Policy, procedure, and practice recommendations** should constitute a regular and formalized element of OIPA's interactions with and influence on BART PD.
- **Public reporting** by OIPA should be enhanced, in the form of greater detail with regard to its case monitoring role of internal investigations initiated by BART PD. Similarly, OIPA should report on the increased activities proposed in this report.
- **Mediation** should continue to be studied for ways to make it more attractive to complainants and officers.
- **An oversight system evaluation** should be conducted periodically.

APPENDIX B

OIPA Recommendation for BPD Policy 453 - Aggressive Panhandling

Aggressive Panhandling

453.1 PURPOSE AND SCOPE

The purpose of this policy is to regulate aggressive panhandling within the San Francisco Bay Area Rapid Transit District by protecting citizens from harassment without infringing upon the Constitutional protection of free speech under the First Amendment.

453.2 POLICY

The practice of aggressive panhandling has been identified as a significant social and safety concern. Departmental policies regulating aggressive panhandling are a necessary component of a coordinated approach to ameliorate the negative impact of aggressive panhandling activities on BART District property.

Panhandling for gratuitous donations is protected under the U.S. Constitution's First Amendment. However, aggressive panhandling is illegal under California law.

California Penal Code 647(c) provides that anyone who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms is guilty of disorderly conduct, a misdemeanor.

Merely requesting and/or receiving a gratuitous (free) donation is not a violation of law and cannot form the basis for a detention.

453.3 DEFINITIONS

Panhandling - The personal, spoken, written or gestural direct solicitation by a person of gratuitous donations of money, food or goods of any kind from any member of the public.

Accosting - Approaching and/or stopping somebody in order to speak to that person in an unreasonably insistent, threatening, intimidating, or intrusive manner.

Aggressive Panhandling - The solicitation of donations in an unreasonably insistent, threatening, intimidating, or intrusive manner.

453.4 EXAMPLES OF AGGRESSIVE PANHANDLING

Examples of aggressive panhandling include:

- The use of overt or veiled threats in an effort to solicit.
- The invasion of personal space by cornering, blocking, or following others in an effort to solicit.
- Touching others in an effort to solicit.
- Reaching or leaning into a car window or across a seated BART customer to solicit.
- Intimidating or obstructing vehicular or pedestrian traffic to solicit.

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Aggressive Panhandling

453.5 PROCEDURES

Although an officer may attempt a consensual contact in circumstances when reasonable suspicion of unlawful activity has not yet been established, an officer cannot detain a lawful panhandler unless and until the officer has established reasonable suspicion that an individual is being or has been accosted. When encountering a person suspected of aggressive panhandling where the continued freedom of the individual would not result in a breach of the peace or a more serious crime, police officers are encouraged to utilize referrals to other appropriate social service providers in lieu of physical arrest. The discretion to make a physical arrest of a person suspected of aggressive panhandling shall be the responsibility of the individual officer. When feasible, an officer shall collect evidence of aggressive panhandling prior to detaining or citing a person in connection with a violation of California Penal Code 647 (c). Such evidence may be obtained by way of:

- Personal observation of aggressive behavior by an officer.
- A statement made to an officer by an individual claiming to have been accosted in any manner including but not limited to the examples provided herein.
- Witness statements made to an officer or dispatcher.
- Video of aggressive conduct or accosting recorded using body-worn mobile video recorders, station video cameras, cell phone cameras, or any other video recording device.
- Audio recordings.

Any evidence collected by an officer that generates reasonable suspicion or probable cause to cite or detain an individual for violation of California Penal Code 647(c) shall be documented and included in the narrative section of the officer's police report.

Officers shall be able to articulate the means by which reasonable suspicion or probable cause was developed prior to detaining any individual suspected of aggressive panhandling.

Officers should rely on the elements listed in California Penal Code Section 647(c) as the basis for establishing reasonable suspicion of aggressive panhandling. Officers should be cautious in utilizing the elements listed in any local law or Municipal Code when assessing and establishing the existence of reasonable suspicion or probable cause to cite or detain because these laws may not apply to circumstances within the BART system and/or may not conform to the parameters set forth in this policy.

453.5.1 REPORTING

Officers having interactions and or contacts with persons suspected of aggressive panhandling as a result of self-initiated contact, a citizen complaint, or a BART employee complaint shall contact dispatch with the disposition of the incident.

453.5.2 TRAINING

Training on enforcement of California Penal Code section 647(c) and review of this Policy shall be conducted as directed by the Personnel and Training Division.

APPENDIX C

Revision to BPD Policy 300 - Use of Force

Use of Force

300.1 PURPOSE AND SCOPE

The BART Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department is committed to accomplishing this mission with respect and minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force, whenever feasible. This Department policy builds upon the Supreme Court's broad principles in *Graham v. Connor* (1989) 490 U.S. 386 and is more restrictive than the constitutional standard and state law. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial, non-biased, and reasonable manner.

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers must strive to use the minimal amount of force necessary.

300.1.1 DEFINITIONS

Definitions related to this policy include:

Deadly force - Force reasonably anticipated and intended to create a substantial likelihood of causing death or very serious injury.

Feasible - Capable of being done or carried out to successfully achieve a legitimate law enforcement objective without increasing the risk to the officer or bystander(s).

Force - The application of physical techniques or tactics, chemical agents or weapons to another person.

Legitimate law enforcement objective - Effect a lawful arrest, detention, or search; overcome resistance or prevent escape; prevent the commission of a public offense; in defense of others or in self-defense; gain compliance with a lawful order; to prevent a person from injuring himself/herself.

Minimal amount of force necessary - The lowest level of force within the range of objectively reasonable force that is necessary to effect an arrest or achieve a lawful objective without increasing the risk to others.

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Non-deadly Force - Any application of force that is not reasonably anticipated and intended to create a substantial likelihood of death or very serious bodily injury shall be considered non-deadly force.

Personal Body Weapons - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of high velocity kinetic energy transfer (impact) to gain control of a subject.

Proportionality - Considers whether a particular use of force is proportionate and appropriate to the totality of the circumstances, and requires officers to consider whether alternative lesser or non-force options are feasible and likely to be effective. Proportional force does not imply equal force; officers may use superior force, consistent with this policy.

Reasonable Belief - An objective belief determined by the facts and circumstances reasonably available to the officer at the time (on-scene and without hindsight) and viewed from the perspective of a reasonable peace officer in the same situation, guided by the principles set forth in this policy.

Reasonable Force - An objective standard of force viewed from the perspective of a reasonable officer, without the benefit of 20/20 hindsight, and based on the totality of the circumstances known to or perceived by the officer at the time.

Serious Bodily Injury - A bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in long-term loss or impairment of the functioning of any bodily member or organ.

300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers must strive to use the minimal amount of force necessary.

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably

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appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force. Retreating for a tactical advantage should be considered and utilized, when feasible and appropriate.

Officers shall not use force with bias, based upon: race; ethnicity or nationality; religion; sex, sexual orientation; economic status; age; cultural group; disability; or affiliation with any other similar identifiable group.

Use of force against vulnerable populations (such as, without limitation, children, elderly, pregnant women, people with physical and mental disabilities, and people with limited English proficiency) can undermine public trust and should only be used if no other options appear reasonable or effective. It is recognized that the above may not be readily apparent or known to the officer. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

The Department recognizes that transparency and accountability in the use of force is essential to preserving the trust of the community and to maintaining professional standards. This policy therefore requires rigorous reporting and review of all instances of the use of force.

300.2.1 DUTY TO INTERCEDE

A use of excessive force by law enforcement personnel is a matter of serious concern to the community, and even a single instance of excessive force may critically undermine public trust in the Department. Accordingly, any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when feasible, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law shall promptly report these observations to a supervisor.

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300.2.2 DE-ESCALATION TECHNIQUES

Officers shall use de-escalation techniques whenever feasible and appropriate: to potentially reduce or eliminate the need to use force; and to prevent injuries to the subject, the public and the officer(s). Use of de-escalation techniques must allow for the fact that officers are often forced to make split-second decisions, with limited information, and in circumstances that are tense, uncertain and rapidly evolving.

- (a) Officers shall, when feasible, continually assess the dynamics of a situation, and modulate their response and actions appropriately. Officers may be justified in using force at one moment, but not justified in using force the next moment due to a change in dynamics.
- (b) De-escalation techniques may include verbal persuasion, warnings and tactical de-escalation techniques, such as: slowing down the pace of an incident; “waiting out” subjects; creating distance (and thus the reactionary gap) between the officer and the threat; and requesting additional resources (e.g., specialized units, mental health care providers, negotiators, etc.) to resolve the incident.
 - 1. Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation.
 - 2. Officers should consider a variety of options, including lesser force or no force options.
 - 3. Officers should perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others.
 - 4. Officers shall not intentionally and unnecessarily escalate and/or create a need to use force.
 - 5. Officers should attempt to understand and consider possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject’s situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public and officer safety.
 - 6. Officers should continue de-escalation techniques, when feasible and appropriate, and take as much time as reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use force.
- (c) When an officer recognizes that mental illness, post-traumatic stress disorder, alcohol and/or drug addictions, or other health issues are causing an individual to behave erratically, the officer shall, when feasible and appropriate, try to de-escalate the situation using de-escalation and/or Crisis Intervention techniques.

Establishing Communication - Communication with non-compliant subjects is often most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.

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Supervisors conducting a use of force investigation will indicate de-escalation as a force option in BlueTeam whenever de-escalation was attempted or used in an incident.

300.3 FACTORS TO DETERMINE THE REASONABLENESS OF FORCE

The United States Supreme Court in *Graham v. Connor* (1989) 490 U.S. 386 held that an officer's use of force must be objectively reasonable under the totality of circumstances known to the officer at the time. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than 20/20 hindsight, and without regard to the officer's underlying intent or motivation.

There are circumstances in which a force option may be legally justified under the principles set forth in *Graham v. Connor*, but the use of that force option may not be appropriate, warranted, and/or necessary.

This policy builds upon the broad principles in *Graham v. Connor* by adding additional, more restrictive factors upon which an officer's use of force shall be evaluated. These factors should be considered when determining whether to apply force (as time and circumstances permit), and in evaluating whether an officer has used reasonable force.

Factors from *Graham v. Connor*:

- (a) The severity of the crime at issue.
- (b) Whether the suspect poses an immediate threat to the safety of the officer and others.
- (c) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Factors from the California Penal Code:

- (a) Any peace officer may use reasonable force to effect an arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance (Penal Code § 835a).
- (b) An officer may not, under color of authority, without lawful necessity, assault or beat any person (Penal Code § 149).

Additional factors set forth by case law and by this Policy:

- (a) Immediacy and severity of the threat to officers or others.
- (b) The feasibility, efficacy, and safety of alternative lesser or non-force options, including the availability of de-escalation techniques that might reduce or eliminate the need to use force, or prevent injuries to the subject, the public and the officer(s).
- (c) Whether the force option is proportionate and appropriate to the totality of the circumstances, and whether alternative lesser or non-force options are feasible and likely to be effective. Proportional force does not imply equal force; officers may use superior force, consistent with this policy.

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- (d) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (e) The conduct of the officer prior to the use of force. Specifically, did the officer violate policy and unnecessarily escalate the situation to a use of force.
- (f) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (g) The effects of drugs or alcohol.
- (h) Subject's mental state or capacity, including any apparent/known mental health issues.
- (i) Proximity of weapons or dangerous improvised devices.
- (j) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (k) The availability of other options and their possible effectiveness.
- (l) Seriousness of the suspected offense or reason for contact with the individual.
- (m) Training and experience of the officer.
- (n) Potential for injury to officers, suspects and others.
- (o) Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.
- (p) The risk and reasonably foreseeable consequences of escape.
- (q) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (r) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (s) Prior contacts with the subject or awareness of any propensity for violence.
- (t) Any other exigent circumstances.
- (u) Officers must strive to use the minimal amount of force necessary.

300.3.1 PAIN COMPLIANCE TECHNIQUES

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer
- (c) Whether the person has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

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300.3.2 PERSONAL BODY WEAPONS

Personal body weapon strikes, punches, lifts or kicks for which the officer has received department-approved training, may be used when the officer reasonably believes that the use of such force appears necessary to further a legitimate law enforcement purpose.

Personal body weapon strikes, punches, or kicks to the rear of the head, neck or spine are prohibited. The only exception to this prohibition would be under exigent circumstances when deadly force is justified and reasonable.

300.3.3 CAROTID CONTROL HOLD

The use of the carotid restraint is prohibited. The only exception to this prohibition would be under exigent circumstances when deadly force is justified and reasonable.

300.3.4 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. However, officers are discouraged from using force solely to prevent a person from swallowing evidence or contraband. In the instance when force is used, officers should not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the Department for this specific purpose.

300.3.5 DRAWING/DEPLOYING A FIREARM

Whenever an officer draws/deploys a firearm during the performance of his/her duties to defend, detain or take any person into custody (the suspect is contacted or arrested, the officer is present and is within potential sight of the suspect), it is considered a use of force and an account of the incident must be made in a police report. The officer should include in the narrative of the report how the weapon was used in the incident, as well as the justification for such action. The documentation of how the weapon was used should include information on how the weapon was presented. The officer must notify a supervisor as soon as practical, and the supervisor will complete a Use of Force Investigation with accompanying documentation as outlined in this policy.

Whenever an officer draws/deploys a firearm during the performance of his/her duties in the presence of others, but does not use the firearm to defend, detain or take any person into custody (the suspect is not contacted or arrested), it is not considered a use of force and an account of the incident must be made in a police report.

Whenever an officer draws/deploys a firearm during the performance of his/her duties in the not presence of others, it is not considered a use of force and no documentation is required. An example of that type of incident would include, but is not limited to, the search of an empty building or car where no person is contacted during the search.

300.4 DEADLY FORCE APPLICATIONS

Use of deadly force is justified in the following circumstances:

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- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the subject is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

- (a) The person has a weapon or is attempting to access one and it is reasonable to believe the person intends to use it against the officer or another.
- (b) The person is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the person intends to do so.

Strikes, punches, or kicks to the rear of the head, neck or spine are prohibited, unless exigent circumstances exist and use of deadly force is justified.

Choke holds are also prohibited, unless exigent circumstances exist and use of deadly force is justified.

The use of deadly force against a person who presents only a danger to himself/herself is prohibited.

When feasible, officers should immediately attempt to administer or obtain medical aid for a person who has been subject to injury resulting from the use of deadly force.

300.4.1 SHOOTING AT OR FROM MOVING VEHICLES

Shots fired at or from a moving vehicle are rarely effective. It is also noted that in many circumstances, disabling the driver of a vehicle may increase the potential for harm to bystanders and/or the officer.

- Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants.
- Officers shall not intentionally and unnecessarily move into the path of an approaching vehicle to create their own exigent circumstance.
- Officers should not shoot at any part of a moving vehicle in an attempt to disable the vehicle.
- Officers shall not discharge a firearm at a moving vehicle or its occupants when there are other reasonable means available to avert the threat.
- Officers shall not discharge a firearm from a moving vehicle when there are other reasonable means available to avert the present threat.

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- Officers may only shoot at a moving vehicle under exigent circumstances, when the driver and/or occupants are targeting others with the intent to cause great bodily injury or death and there are no other reasonable means available to avert the threat.

300.4.2 WARNING SHOTS

Discharging a firearm for the purpose of a “warning shot” is prohibited.

300.5 REPORTING THE USE OF FORCE

Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances.

Supplemental reports will be completed by personnel who are present when force is used by another officer. Officers have a duty to report all pertinent facts known to them.

All police reports, inclusive of any supplemental reports, involving the documentation of a use of force must be reviewed and approved by a supervisor prior to the employee going off duty.

300.5.1 NOTIFICATION TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain.
- (d) The individual indicates intent to pursue litigation.
- (e) Any application of a control device as defined in Policies 308 and 309:
 1. Batons and other impact weapons
 2. Chemical agents (OC Spray)
 3. SIMS Projectile
 4. Conducted Electrical Weapon (any activation whether effective or not)
- (f) Any application of a restraint device other than handcuffs or the WRAP.
- (g) The individual subjected to the force was rendered unconscious.
- (h) An individual was struck or kicked.
- (i) An officer draws/deploys a firearm during the performance of his/her duties to defend, detain or take any person into custody (the suspect is contacted or arrested, the officer is within potential sight of the suspect).
- (j) An individual alleges any of the above has occurred.

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300.5.2 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

The Records Manager or the authorized designee shall ensure that data required by the Department of Justice (DOJ) regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is collected and forwarded to the DOJ as required by Government Code § 12525.2.

300.5.3 EMPLOYEES WHO USE FORCE WHILE ON A SPECIAL ASSIGNMENT

When a BART Police employee has a use of force as defined in this policy, the use of force must be reported to a BART Police supervisor and investigated in accordance with this policy.

When two or more BART Police officers are temporarily assigned to assist an outside agency or multi-agency task force in the performance of law enforcement activities, a BART police supervisor should also be present.

300.6 MEDICAL CONSIDERATION FOLLOWING A USE OF FORCE

Prior to booking or release, and as soon as possible under the circumstances, medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the subject's injuries, medical assistance may consist of examination by fire personnel, paramedics, hospital staff or medical staff at the jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage nearby if appropriate.

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300.7 SUPERVISOR RESPONSIBILITY

An uninvolved supervisor should respond to the scene of a reported use of force. The supervisor is expected to do the following:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) When possible, separately obtain a recorded interview with the subject upon whom force was applied. This interview should not be conducted in the presence of officers who were involved in using force. If this interview is conducted without the person having voluntarily waived his/ her Miranda rights, the following shall apply:
 - 1. The content of the interview should not be summarized or included in any related criminal charges.
 - 2. The recording should be saved and attached in the BlueTeam entry for the use of force investigation.
 - 3. The recording of the interview should be distinctly marked for retention until all potential for civil litigation has expired.
- (d) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (e) Identify any witnesses to the use of force. Interview and record witness statements for inclusion in the use of force investigation.
- (f) Review the portion(s) of the Axon Flex video pertaining to the use of force and/or allegation of misconduct.
- (g) Review and approve all related reports.

In the event that an uninvolved supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit. The investigation will be documented in a Use of Force Investigation checklist and narrative as warranted.

When practical, supervisors who use force or witness the use of force by another officer in a given situation should not obtain statements from other officers as part of a report on the use of force, as such is the responsibility of an uninvolved supervisor. Furthermore, involved supervisors and officers shall not attempt to influence other officers' or civilian witnesses' accounts of what occurred during the incident or otherwise compromise the integrity of the use of force investigation.

Use of Force Investigation Reports will be forwarded and reviewed through the chain of command. Each reviewer in the process will make a determination as to whether the use of force was justifiable or non-justifiable.

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300.7.1 USE OF FORCE INVESTIGATION, DOCUMENTATION, AND REVIEW

Use of force must be documented in a police report and reviewed by a supervisor who was not directly involved in the incident.

The following categories and parameters will explain levels of force and the respective reporting, investigation, documentation, and review requirements. Incidents will be categorized as Level 1, Level 2, Level 3, or Level 4.

Level 1: Not a Reportable Use of Force:

Level 1 Incident Parameters:

- (a) Subject allowed him/herself to be searched, escorted, and/or handcuffed. The suspect offered no resistance, and the officer did not use force to overcome resistance. The officer did not use force in the absence of resistance.
- (b) No suspect injury or complaint of injury due to interaction with officer.
- (c) No allegation of misconduct against officer, regarding force.
- (d) Officer body camera was activated in a timely manner, per policy.
- (e) Officer used any of following:
 - 1. Professional presence and/or verbalization
 - 2. TASER/LLIMs Deployed (no activation)
 - 3. Drawn/deployed firearm, but no suspect contacted or arrested

Level 1 Incidents should be documented by an officer in an appropriate police report, citation, Field Interview, and/or CADS entry. Supervisors will review police report narratives for approval.

Level 2: Use of Force

Level 2 Incident Parameters:

- (a) No suspect injury or complaint of injury due to interaction with officer.
- (b) No allegation of misconduct against officer, regarding force.
- (c) Officer body camera was activated in a timely manner, per policy.
- (d) Officer used any of the following force options:
 - (a) Control holds/pressure point application
 - (b) Leverage
 - (c) Grab
 - (d) Bodyweight
 - (e) Takedown that is non-dynamic (no forceful impact)
 - (f) Vehicle pursuit with no collision

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- (g) Firearm drawn/deployed but not fired, suspect contacted

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation, including taking statements from the suspect and witnesses, and taking photos of the involved parties. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into BlueTeam and attach a completed Use of Force Investigation Checklist.

Supervisors do not need to take witness statements from fire and medical personnel under the following circumstance: an officer assists medical personnel to restrain and/or secure a subject to a gurney for medical transport in a non-criminal detention (i.e. 5150 or 5170 detention), and all of the following conditions are met:

- (a) The officer only used force options limited to the following: grab, hold, leverage, and/or bodyweight.
- (b) No subject injury or complaint of injury due to interaction with officer.
- (c) No allegation of misconduct against officer, regarding force.
- (d) Officer body camera recorded the use of force.
- (e) The unit number for the fire and medical personnel is obtained.

Level 3: Use of Force

Level 3 Incident Parameters:

- (a) Would have otherwise been classified as a Level 2, except one or more of the following apply:
 - 1. Suspect injury or complaint of injury due to interaction with officer.
 - 2. Allegation of misconduct against officer, regarding force.
 - 3. Officer body camera was not activated during use of force.
- (b) The use of force is Level 3 if the officer used any of the following force options:
 - 1. Dynamic/forcible takedown
 - 2. TASER Activation/LLIMS Activation
 - 3. Chemical Agents/Munitions
 - 4. Impact Weapon Strikes Personal
 - 5. Body Weapons
 - 6. Police canine deployment resulting in injury

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation, including taking statements from the suspect and witnesses. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into BlueTeam and attach a completed Use of Force Investigation Checklist. The supervisor will also complete a Use of Force

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Investigation Report narrative for review through the Use of Force Review process. Use of Force involving police canines will be documented and reviewed additionally per Policy 318.

Level 4: Use of Deadly Force

Level 4 Incident Parameters:

- (a) Use of firearm, officer involved shooting
- (b) Or any force likely to cause death or serious bodily injury

An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to Policy 310.

300.7.2 WATCH COMMANDER RESPONSIBILITY

A watch commander will review the Use of Force Investigation Report to ensure compliance with this policy and that any training issues are addressed.

Nothing in the policy precludes the watch commander from requiring that a supervisor complete a Use of Force Investigation Report for any incident involving force.

300.8 TRAINING

Officers will receive annual training on this policy (at a minimum) and demonstrate their knowledge and understanding.

300.9 USE OF FORCE ANALYSIS

At least annually, the Operations Bureau Deputy Chief should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police, the Office of the Independent Police Auditor, and the BART Police Citizen Review Board. The report should not contain the names of officers, suspects or case numbers, and should include:

- (a) The identification of any trends in the use of force by members.
- (b) Training needs recommendations.
- (c) Equipment needs recommendations.
- (d) Policy revision recommendations.

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