



Office of the Independent
Police Auditor

ANNUAL REPORT
2013 - 2014



Office of the Independent Police Auditor
Annual Report 2013 – 2014

Mark P. Smith
Independent Police Auditor

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MESSAGE FROM THE INDEPENDENT POLICE AUDITOR

The third year of operation for the Office of the Independent Police Auditor (OIPA) has been one filled with both great progress and great challenge. As OIPA continued the pursuit of its mission to provide all members of the public with effective and independent oversight of the BART Police Department (BPD), we made ourselves more readily accessible to the public, improved communication and information-sharing between our office and BPD, and enhanced our own set of skills through relevant training. OIPA accomplished all of this while also further broadening our robust efforts at public outreach.

At the same time, OIPA was faced with a lengthy vacancy in its sole Independent Police Investigator position, which lasted for half of this reporting year. In a small office such as ours, this vacancy had a substantial impact on our ability to complete our work as expediently as we would have liked, particularly in the area of investigations and investigative reviews. Although we made positive strides toward many of our goals, much of this year was also focused on reprioritizing our workload to ensure that we continued to meet all of our primary responsibilities pursuant to the BART Citizen Oversight Model (Model).

OIPA is charged with meeting a wide array of responsibilities under the Model, the most substantive of which have been outlined in detail in previous reports in this series. As discussed further in this report, and despite the substantial staffing challenge mentioned above, OIPA was successful this year in rapidly responding to all contacts from the public, including complainants and others; conducting thorough, unbiased investigations into complaints involving excessive force, racial profiling, etc.; reviewing completed BPD investigations for thoroughness and fairness; progressing further toward the implementation of a complaint mediation program; monitoring BPD's investigation into an officer-involved shooting; crafting policy recommendations; producing monthly reports on complaint and investigation activity; supporting the BART Citizen Review Board (CRB); and conducting outreach, with a primary focus on outreach to youth.

Though it did not occur until after the end of this reporting period, it is meaningful to note that OIPA has once again become fully staffed and that remarkable progress has been made in completing our oldest investigations and investigative reviews, and in doing so more expeditiously. As we seek to solidify the progress we have made, while still effectively addressing OIPA's other varied responsibilities, the future for OIPA beyond some of the challenges faced this past year appears very bright.

I am pleased to present this third Annual Report of the Office of the Independent Police Auditor, for the year 2013-2014.



MARK P. SMITH
Independent Police Auditor
March 2015

EXECUTIVE SUMMARY

Community Outreach

During this year the Office of the Independent Police Auditor (OIPA) expanded its community outreach efforts, averaging more than one outreach event each month. We also met our goal of maintaining a primary focus on outreach toward youth, with approximately 60% of the groups we met with having a youth-oriented focus. One of our most successful and well-attended events came in the form of a presentation to, and discussion with, the local chapter of a group called Jack and Jill of America; children and their parents came together to talk about how current events involving law enforcement impacted their own families and to learn about how OIPA could be of service to them.

Policy Recommendations

OIPA also made a series of policy recommendations to the BART Police Department (BPD) this year on important topics including Use of Force, TASERs, and Racial Profiling/Bias-Based Policing. All three of these policy areas are undoubtedly of great concern to those who come into contact with law enforcement, and OIPA sought to identify areas where BPD's policies could be strengthened and clarified. Our draft recommendations in each of these areas were reviewed by the Citizen Review Board (CRB) prior to being finalized. Subsequent to some additional collaboration with BPD, each recommendation was eventually moved forward toward incorporation into the BPD policy manual.

Facilitation of Training for the Citizen Review Board

Continuous training for the members of the CRB is important as they must be equipped with the information required to dutifully meet their responsibilities. This year, and often with the direct assistance of BPD, OIPA facilitated training for the CRB on topics including:

- Use of pepper spray as a less-lethal weapon
- Use of TASER as a less-lethal weapon
- Policy and law behind police use of force
- Intersection between law enforcement and mental health issues

By the Numbers

174 new or re-opened investigations were initiated by BPD's Internal Affairs Unit or OIPA during the course of the year. The total number of complaints brought directly to OIPA this year increased by 127% over last year's total, as more and more people throughout the Bay Area learned about our office and their ability to file a complaint with us. OIPA's share of all citizen complaints received as compared with BPD Internal Affairs increased by 9% from one-quarter to one-third.

Each investigation that was initiated included an average of 1.8 allegations of misconduct. The most common categories of misconduct being alleged were (in order): Conduct Unbecoming an Officer, Neglect of Duty, Unauthorized Force, Improper Arrest/Detention, Improper Procedure or Complaint against Policy, Discourtesy, and Racial Profiling/Bias-Based Policing.

154 investigations were closed or re-closed during the course of the year. Of these, 19 (or 12%) had a primary finding of *Sustained*, indicating that at least one instance of misconduct was determined to have occurred. 36 (or 23%) had a primary finding of either *Unfounded* or *Exonerated*, indicating that no misconduct was determined to have occurred. In 17 investigations (or 11%), it could not be definitively determined whether misconduct did or did not occur. The remaining cases were completed with an alternative disposition; the most common of these alternative dispositions was a *Supervisory Referral* which accounted for 50 cases (or 32%) and is commonly used for less formal citizen complaints.

AREAS OF FOCUS FOR THE OFFICE OF THE INDEPENDENT POLICE AUDITOR 2013-2014

Continued Expansion of Community Outreach

A robust program of community outreach has quickly become a centerpiece of the Office of the Independent Police Auditor's overall operations. Civilian oversight of law enforcement, as is practiced by OIPA with respect to the BART Police Department, acts as a crucial bridge between the police and the communities they serve; in order for an oversight office like OIPA to play such an important role effectively, however, it is incumbent upon us to make sure we are continuously connecting with all the various segments of the community that make up the BART District. It is this point of view that guides OIPA's commitment to outreach.

Additionally, OIPA has previously acknowledged its recognition that youth are far too commonly a segment of society that ends up engaged in negative interactions with law enforcement. As was the case last year, OIPA maintained a focus on outreach toward youth as a part of its larger outreach plan. In 2013-2014, some of the groups that OIPA was able to meet with are:

- Bayview Hunters Point Mobilization for Adolescent Growth in our Communities ("B Magic")
- Adams Point Neighborhood Crime Prevention Council
- Temescal Neighborhood Crime Prevention Council
- Alice B. Toklas LGBT Democratic Club
- The Spanish Speaking Unity Council
- Centerforce Youth Court
- Youth Guidance Center
- Businesses United in Lending and Development ("BUILD")
- New Horizons/Central Elmhurst Neighborhood Crime Prevention Council
- Oakland California Youth Outreach
- Huckleberry Youth Center
- Community Works West
- "Mo' Magic," a San Francisco Neighborhood Based Non-Profit Organization



OIPA Presentation, Centerforce Youth Court



OIPA and CRB Presentation, Alice B. Toklas LGBT Democratic Club

As has been done in past years, OIPA supplemented these more individualized outreach efforts to specific community-based organizations with a broader community forum that was open to the public at large. Noting a gradual decrease in attendance at these forums over time as more and more people around the Bay Area have become familiar with our office, OIPA focused its efforts on just one such forum this year, which was held at the Mission Cultural Center for Latino Arts in San Francisco. As always, we appreciated the discussion amongst attendees, CRB members, and OIPA staff during the course of the evening.



Community Forum Discussion at Mission Cultural Center for Latino Arts

In lieu of seeking out general public audiences for additional public forums hosted solely by OIPA, this year we sought to increase our effectiveness by partnering with a local organization that already had an audience interested in issues related to law enforcement oversight. Specifically, with the help of the CRB, we were very fortunate to partner with a local chapter of an organization called Jack and Jill of America to host one of their regular meetings.

Among other things, Jack and Jill of America focuses on strengthening youth through leadership development and civic duty. OIPA was able to educate a large group of young people and their parents about civilian oversight of BPD. Just as importantly, as we were equipped with meaningful knowledge about the audience with which we would be meeting, we successfully tailored our presentation specifically toward the youth in attendance. We discussed what rights and responsibilities a young person has when contacted and/or arrested by the police; we listened to the impressions of police that the youth had formed through both personal experience as well as current events; and we answered intelligent questions posed by the youth and their parents about issues ranging from the definition of the term “excessive force,” to the training regimen of BPD, to the effectiveness of the citizen complaint process. In short, we found tremendous value in partnering with a local organization that we knew had a ready audience to hear OIPA’s message and engage us in a meaningful dialogue, and we anticipate replicating this outreach strategy in the future.



OIPA Presentation to Jack and Jill of America

Draft Recommendations Regarding BART Police Department Procedures, Practices, and Training

The Office of the Independent Police Auditor continued its practice of issuing periodic recommendations regarding BART Police Department policies.¹ In keeping with our goal of examining those policies that are of greatest interest to the public, this year OIPA addressed BPD's policies on Use of Force, Racial Profiling, and Conducted Electrical Weapons (TASERs). Additionally, OIPA formed a recommendation for a new BPD policy to implement a Complaint Mediation Program.

Use of Force

The use of force by police is undoubtedly one of the greatest areas of concern for members of the public who have entrusted their safety and security to the law enforcement agencies that police them. Not surprisingly, written use of force policies such as BPD's may often be lengthy and multi-faceted in an attempt to be comprehensive in their aim to dictate appropriate conduct surrounding the use of force by officers. OIPA's review of BPD's Use of Force policy arose specifically out of a handful of investigations we reviewed that involved the use of force by BPD officers. Our reviews raised two concerns in particular and, as such, we limited our recommendation in this case to only those sections of BPD's policy that were relevant to our concerns.

OIPA recommended that stronger language be included in BPD's Use of Force policy to ensure that, whenever possible, the supervisory officer responsible for conducting an investigation into the force used by officers be one who was not involved in the incident that gave rise to the use of force itself. Having such an investigation done by a supervisor who was at the scene, or even involved in taking into custody the subject upon whom force was used, unnecessarily creates the appearance of impropriety because the supervisor may be seen as having a vested interest in finding the use of force in policy due to his/her own involvement in the underlying incident. Second, OIPA recommended that BPD's policy should require statements obtained from the subject upon whom force was used, as a part of a supervisor's investigation into the use of force, to be obtained outside the presence of any of the officers involved in the use of force. This recommendation sought to minimize the chance that an individual upon whom force had been used would feel intimidated into giving false information about the incident due to the physical proximity of the officer(s) who had used force upon the individual.

After the present reporting period, OIPA met with members of BPD's command/executive staff to discuss these recommendations in greater detail. OIPA is pleased to note that BPD largely concurred with the recommended changes and, in an effort that was equally collaborative and productive, suggested some additional edits that OIPA believes will strengthen the policy even more. Since then, BPD has initiated the process of adopting the recommendations into its policy manual. For further detail about BPD's policy on Use of Force, as well as OIPA's complete recommendation regarding that policy, see Appendix A.

¹ It is not uncommon for OIPA, during the regular course of its work, to informally discuss policies with BPD and to make suggestions for alternatives or improvements. Much of OIPA's work is comprised of determining whether a given policy was violated in a specific instance, and discussions about policy and possible changes to it are therefore to be expected. However, it is important for OIPA to also take advantage of its responsibility to publicly issue recommendations on BPD policy, particularly where the underlying issue is likely to be of interest to members of the public, so that they may be informed and reach their own conclusions regarding the matter.

Racial Profiling

Like the use of force, racial profiling by police is another area of heightened concern for many members of the public. OIPA therefore examined BPD's policy in this area, titled, "Racial- or Bias-Based Profiling." In this instance, it is notable that one of OIPA's biggest concerns about the policy was addressed through another avenue prior to the issuance of OIPA's recommendation. Specifically, an OIPA complaint investigation involving this policy revealed that it was limited to prohibiting inappropriate justifications for specific *actions* taken by police officers (such as detaining a person solely because of that person's race), while not at all addressing inappropriate justifications for *omissions* or failures to act on the part of police officers (such as deciding not to detain a person solely because of that person's race). The OIPA complaint investigation dealt specifically with the latter circumstance. Pursuant to the findings reached by OIPA in that case, BPD's policy on racial profiling was appropriately modified to account for improperly-based decisions about whether to take law enforcement action or otherwise provide service.

In addition to this important modification, OIPA suggested some ways to make BPD's policy on racial profiling even more robust. Most notably, OIPA recommended adding the term "Bias-Based Policing" into the title of the policy. Although terminology surrounding the same issues that are addressed by policies such as this one seems to vary widely from jurisdiction to jurisdiction, OIPA felt that this term most effectively encompassed all of the relevant behavior, decisions, actions, inactions, etc. that this policy seeks to prohibit.

Also, OIPA commended BPD for its notably comprehensive, and non-exhaustive, list of factors which are prohibited from being used as the basis for providing differing levels of law enforcement service. However, we also recommended one addition to the list that we felt was of particular importance in order to best reflect the wealth of diversity enjoyed in the San Francisco Bay Area. Taking a cue from a similar policy revision to the City and County of San Francisco's Administrative and Police Codes, OIPA recommended the addition of "gender identity" to BPD's list of factors in this portion of the policy.

After the present reporting period, OIPA met with members of BPD's command/executive staff to discuss these recommendations in greater detail. OIPA is pleased to note that BPD largely concurred with the recommended changes and, in an effort that was equally collaborative and productive, suggested some additional edits that OIPA believes will strengthen the policy even more. Since then, BPD has initiated the process of adopting the recommendations into its policy manual. For further detail about BPD's policy on Racial- or Bias-Based Profiling, as well as OIPA's complete recommendation regarding that policy, see Appendix B.

Conducted Electrical Weapons (TASERs)

A third important policy reviewed by OIPA this year was BPD's policy on the use of Conducted Electrical Weapons (TASERs). In its review, OIPA felt that BPD's policy lacked clarity in a number of areas, both in content and in form. Our recommendations therefore focused on making the policy clearer, while acknowledging that any policy governing the use of a less-lethal weapon like a TASER may naturally bring with it a level of complexity.

Among other things, OIPA's primary substantive recommendation was to clarify the instances when a TASER may be used, as well as the instances when it may not be used. Although BPD's original policy attempted to do the same thing, OIPA found the use of conditional qualifiers that had to be satisfied before TASER use was authorized to be confusing and, arguably, internally inconsistent. As such, OIPA attempted to simply list a series of illustrative examples of when TASER use would likely be appropriate, followed by a series of examples of when it would likely be inappropriate. In our recommendation, this

list was preceded by a clear restatement of the legal standard that governs all use of force by law enforcement. OIPA's approach to the policy on Conducted Electrical Weapons was drawn directly from the Model Policy on this issue adopted by the International Association of Chiefs of Police National Law Enforcement Policy Center.

After the present reporting period, OIPA met with members of BPD's command/executive staff to discuss these recommendations in greater detail. OIPA is pleased to note that BPD largely concurred with the recommended changes and, in an effort that was equally collaborative and productive, suggested some additional edits that OIPA believes will strengthen the policy even more. Since then, BPD has initiated the process of adopting the recommendations into its policy manual. For further detail about BPD's policy on Racial- or Bias-Based Profiling, as well as OIPA's complete recommendation regarding that policy, see Appendix C.

Complaint Mediation Program

Pursuant to its responsibility in the Citizen Oversight Model, OIPA has worked with the CRB, BPD, and the BART Police Associations to develop a voluntary alternative dispute resolution process for resolving those complaints which involve conduct that may most appropriately be corrected or modified through less formal means. Even after the relevant stakeholders had concurred on the process, it was crucial for BPD to integrate the entire program into its own policy manual in order for the program to be initiated.

This integration was done through the creation of a new policy (*BPD Policy 1021 – Complaint Mediation Program*), and there was also a need to make some modifications to correlated policies that were affected by the new program. Additionally, there was a need to ensure that affected BPD staff members, particularly within the Professional Standards Bureau (which, like OIPA, intakes complaints that could potentially be subject to the new mediation program) were sufficiently apprised of the mandates of the new policy and given time to adjust their work procedures accordingly.

In all, the process of implementing a new complaint mediation program was a lengthy but important one. OIPA submitted its completed draft of the policy documents to the CRB for its review during this reporting year; after approval by the CRB, in the subsequent reporting year, the policy was adopted in full and implemented by BPD. To read the BPD policy that encompasses the structure of the program, see Appendix D.

Facilitation of Training for the Citizen Review Board

One of the responsibilities assigned to the Office of the Independent Police Auditor in the Citizen Oversight Model is to facilitate training for the Citizen Review Board. Much like OIPA's policy recommendations, this year we attempted to focus our training for the CRB on some of the issues of greatest concern to the public at large with respect to law enforcement. With assistance from subject matter experts from the BART Police Department itself, for instance, OIPA facilitated training for the CRB on topics including the use of Pepper Spray as a less-lethal weapon, the use of the TASER as a less-lethal weapon, and the policy and case law governing the Use of Force by police.

Recognizing the indisputable intersection in current society between law enforcement and individuals experiencing issues with mental health, OIPA also called upon a professional from the Alameda County Behavioral Health Care Services Crisis Response Team to share common experiences and lessons learned from playing an important role in situations involving a police response to a person undergoing a mental

health crisis. Finally, given the role of the CRB within the disciplinary process that may result from certain complaints of misconduct, OIPA worked with members of BART's Labor Relations staff to educate the CRB on the rules that govern Progressive Discipline for members of BPD's police unions.

Updated Information Sharing with the BART Police Department

The Office of the Independent Police Auditor considers its healthy and frequent communication with the BART Police Department to be a major strength within the civilian oversight system at BART. As BPD progresses its own departmental information technology, it is incumbent upon OIPA to keep pace in order to ensure that we maintain ready access to all material we are authorized to have according to the BART Citizen Oversight Model.

This year, BPD moved its entire policy manual to an online, web-based platform. This platform is now used to make updates and changes to policies in the manual, to electronically audit officers' acknowledgments of having received and understood new and modified policies, and to facilitate periodic training on various parts of the existing policies in the manual as a refresher to officers in the field. OIPA moved swiftly to obtain its own direct access to the new online platform. When we conduct an investigation into a particular allegation of misconduct, we seek to do so comprehensively, noting any additional potential or apparent policy violations that occurred during the incident that gave rise to the initial complaint. This is just one reason why it is crucial that we remain acutely aware of any and all modifications made to BPD's policies, as well as the adoption of any new policies into the manual.

Another area of responsibility for OIPA calls for a response to a specific set of critical incidents involving BPD such as those involving serious injury to an officer as well as officer-involved shootings. In the past, OIPA has not experienced any issues in receiving timely notification of such incidents when they occur. However, we are well-aware of the rapidly evolving nature of many law enforcement interactions, as well as how a situation can quickly escalate from one type of interaction to another, more critical one.

Because of this, OIPA worked with BPD to broaden the categories of incidents that result in immediate notification to an OIPA staff member. Increased knowledge of incidents as they are developing will allow OIPA to be even better-equipped to respond as required whenever those critical incidents that are designated by the Model do occur. OIPA sees these notification protocols as something of an ongoing project, as more and more is learned over time about what types of incidents will be most helpful for OIPA to be immediately notified about to allow us to meet our responsibilities. We look forward to continuing our positive work with BPD in this area, as necessary.

Maintaining Connections with Outside Organizations

The Office of the Independent Police Auditor has always found great value in shared learning and meaningful connections with certain agencies and organizations outside of BART. We previously reported on invitations that our office received from two different California municipalities, each at different stages of initiating civilian oversight of law enforcement, asking us to share our own experiences about oversight at BART and provide some guidance based on those experiences. After responding to these requests to the best of our ability, OIPA is proud to say that we have maintained our relationship with both of these municipalities over the course of this past year and continued to provide guidance and support when called upon to do so. As one example, the BART Independent

Police Auditor was invited to make an in-person presentation on the development of civilian oversight to the Sonoma County Community and Local Law Enforcement Task Force.

OIPA has also maintained strong ties with the National Association for Civilian Oversight of Law Enforcement (NACOLE), which is the nation's premier professional association of organizations and individuals working directly in the field of law enforcement oversight. In addition to regular attendance at the NACOLE Annual training conference, this year OIPA staff assisted in organizing a regional NACOLE training event for oversight practitioners here in the Bay Area. We look forward to continuing to be active participants and leaders in the field of civilian oversight, through deepened relationships with our counterpart agencies, including ones even younger than our own, as well as through our efforts to organize more opportunities for information sharing amongst our colleagues here in the Bay Area.

Increased Accessibility

From its inception, the Office of the Independent Police Auditor has strived to make itself readily accessible to all members of the public. The principle that all individuals must be afforded the opportunity to avail themselves of the services that OIPA was established to provide, without regard to language spoken, socioeconomic status, physical or mental disability, etc., is one that underlies the entire purpose for having civilian oversight of law enforcement at BART.

This year, OIPA worked to expand its accessibility. We had previously created informational brochures about our office in all five of the BART corps languages (English, Spanish, Korean, Vietnamese, and Simplified Chinese). This year, pursuant to a very helpful request from members of the BART Accessibility Task Force, we produced our brochures in Braille as well. Additionally, we sought to increase the circulation of our office brochures around the Bay Area and were successful in distributing them to nearly 50 public libraries throughout Oakland and San Francisco.

Finally, in an effort to quickly and effectively educate members of the public who seek to know more about what OIPA does and/or how to file a complaint, we created an office video that is available on our webpage and that we have also used during many of our outreach efforts over the course of the past year. As with many of the tasks we take on, OIPA views at least some aspects of increasing accessibility to our office as an ongoing pursuit. We plan to continue our efforts to be responsive to requests in this area and to seek out effective ways to make sure we remain a readily accessible service to the public.

2013-2014 BY THE NUMBERS

The BART Citizen Oversight Model dictates that this report shall include a breakdown of cases filed over the course of the last year, including complaints about the police received by the Office of the Independent Police Auditor, the BART Police Department, or any other District departments. The following tables are designed to satisfy the specific reporting requirements as stated in Chapter 1-04(J) of the Model.

It is important to note that the nature of the data being reported is one that lends itself to occasional change. For example, a case that was initially labeled as a Citizen Complaint during the month it was received might later be determined to be a Comment of Non-Complaint during a subsequent month. The data reported here is aggregated from OIPA's monthly reports filed with the Citizen Review Board and generally reflects cases as they were initially received; it therefore might not reflect some changes that have taken place since. Importantly, OIPA has communicated with BPD Internal Affairs each month since OIPA started its periodic reporting; as a part of this communication we take the opportunity to reconcile every case and discuss any changes to cases, such as the one in the example above, so that no case is unaccounted for and that every change made can be explained and justified.

Total Number of Cases Filed or Reopened; Number of Pending Cases at Month-End

	Number of Cases Filed ²	Number of Open Cases ³
July 2013	15	44
August 2013	17	43
September 2013	14	44
October 2013	16	51
November 2013	18	58
December 2013	14	62
January 2014	9	53
February 2014	11	55
March 2014	19	65
April 2014	18	68
May 2014	12	57
June 2014	11	60
TOTALS	174	

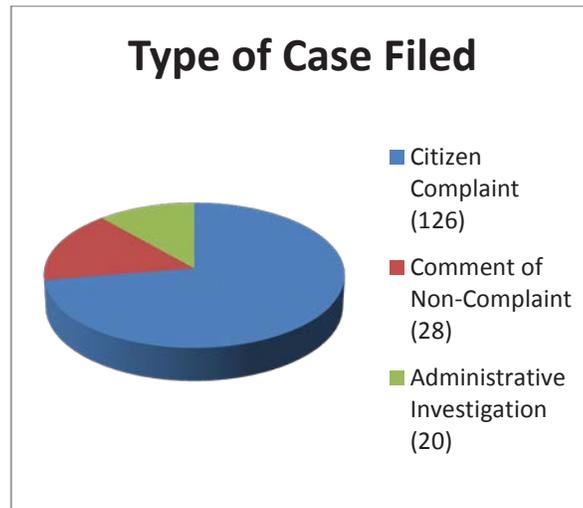
The number of cases filed or reopened this year represents an increase of 56 cases, or 47%, from 2012-2013.

² This number includes all Citizen Complaints filed against members of the BART Police Department, whether with OIPA or BPD, as well as Comments of Non-Complaint filed with BPD and Administrative Investigations initiated internally by BART Police Department members. It also includes any previously-closed cases that were reopened during the reporting period for further investigation. This number refers to individual cases, each of which could potentially have more than one allegation of misconduct subject to investigation, and each of which could also potentially involve more than one accused BPD employee.

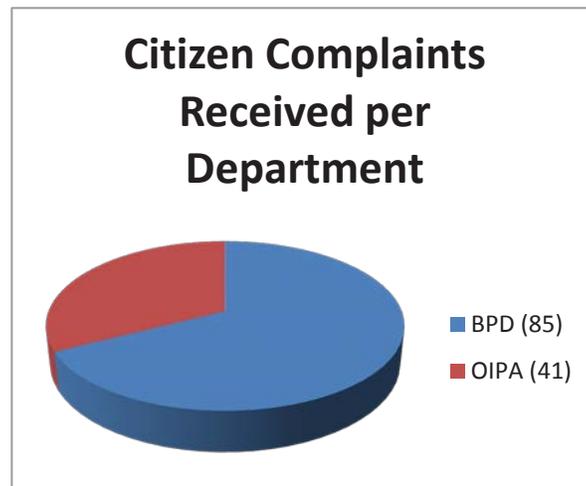
³ This number indicates all investigations that are open as of the end of each reporting period. It includes Citizen Complaints (regardless of whether the investigation is being conducted by OIPA, the BART Police Department, or both), Comments of Non-Complaint, and Administrative Investigations.

Types of Cases Filed or Reopened/Citizen Complaints Received per Department

Out of the 174⁴ cases alleging misconduct against BPD officers that were filed or reopened during the 2013-2014 reporting period, 126 were Citizen Complaints, 28 were received by BPD as Comments of Non-Complaint,⁵ and 20 were Administrative Investigations⁶ internally initiated by BPD.



Of the 126 Citizen Complaints that were filed or reopened, 41 (or 33%) of them were initiated through OIPA.⁷ The number of complaints received by OIPA increased by 23, or 127%, from 2012-2013 and the share of all incoming complaints received by OIPA (as opposed to BPD) increased by 9% from one-quarter to one-third.



⁴ This number includes one case re-opened by BPD for further investigation at the request of OIPA. The case is included in OIPA's total in the table titled "Citizen Complaints Received per Department."

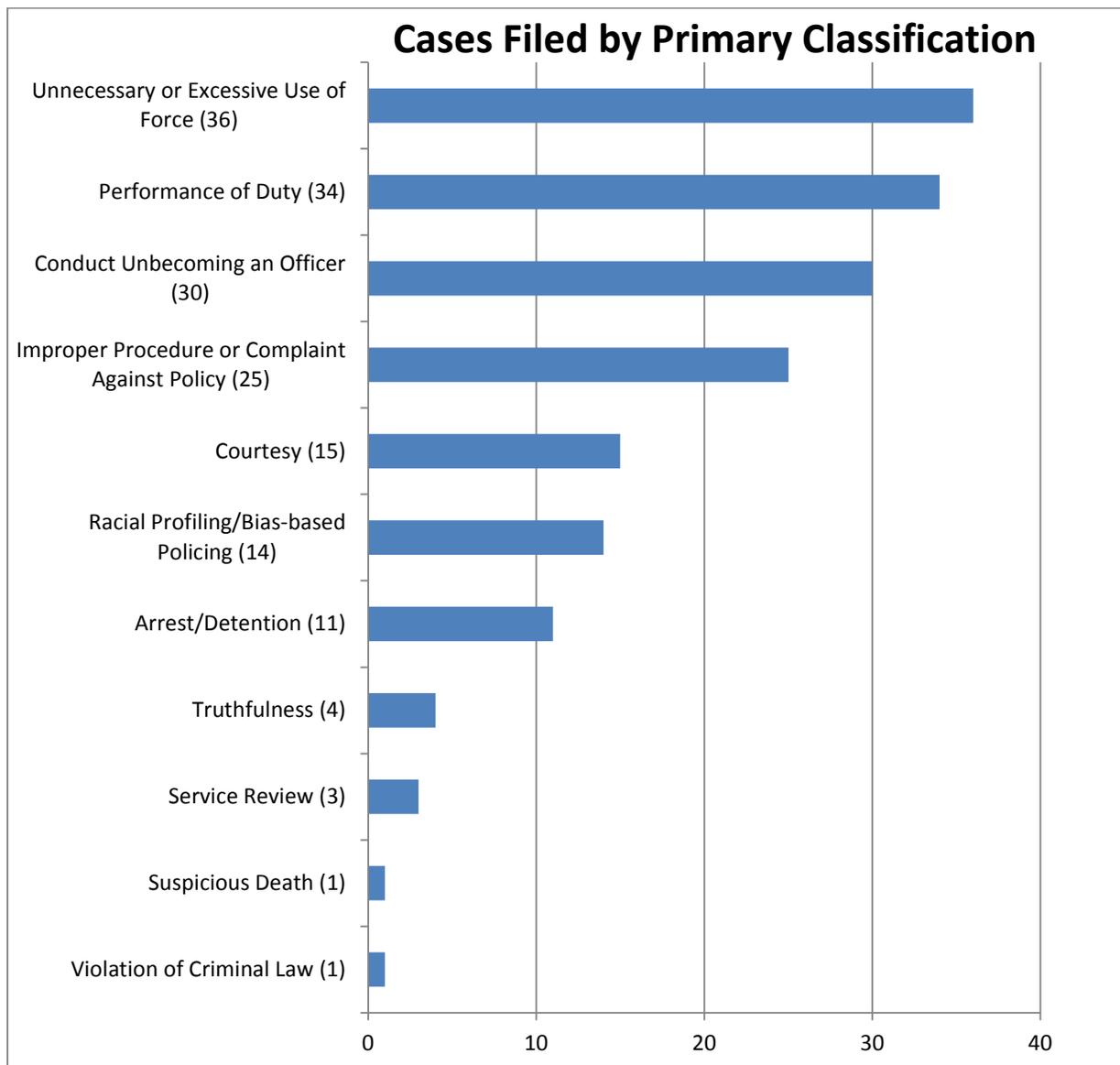
⁵ As defined by BPD, a Comment of Non-Complaint is, "A comment on the actions of a Department employee, where the reporting party expressly states that they do not want to make a complaint." (2013 BPD Policy Manual, Policy 1020.1.1(e)).

⁶ Administrative Investigations are those generated internally, by BPD, as opposed to by a complainant or other external reporting party.

⁷ Four of these cases appear to have been received, independently, by both OIPA and the BART Police Department. They are included only in OIPA's total, however, in order to avoid being double-counted.

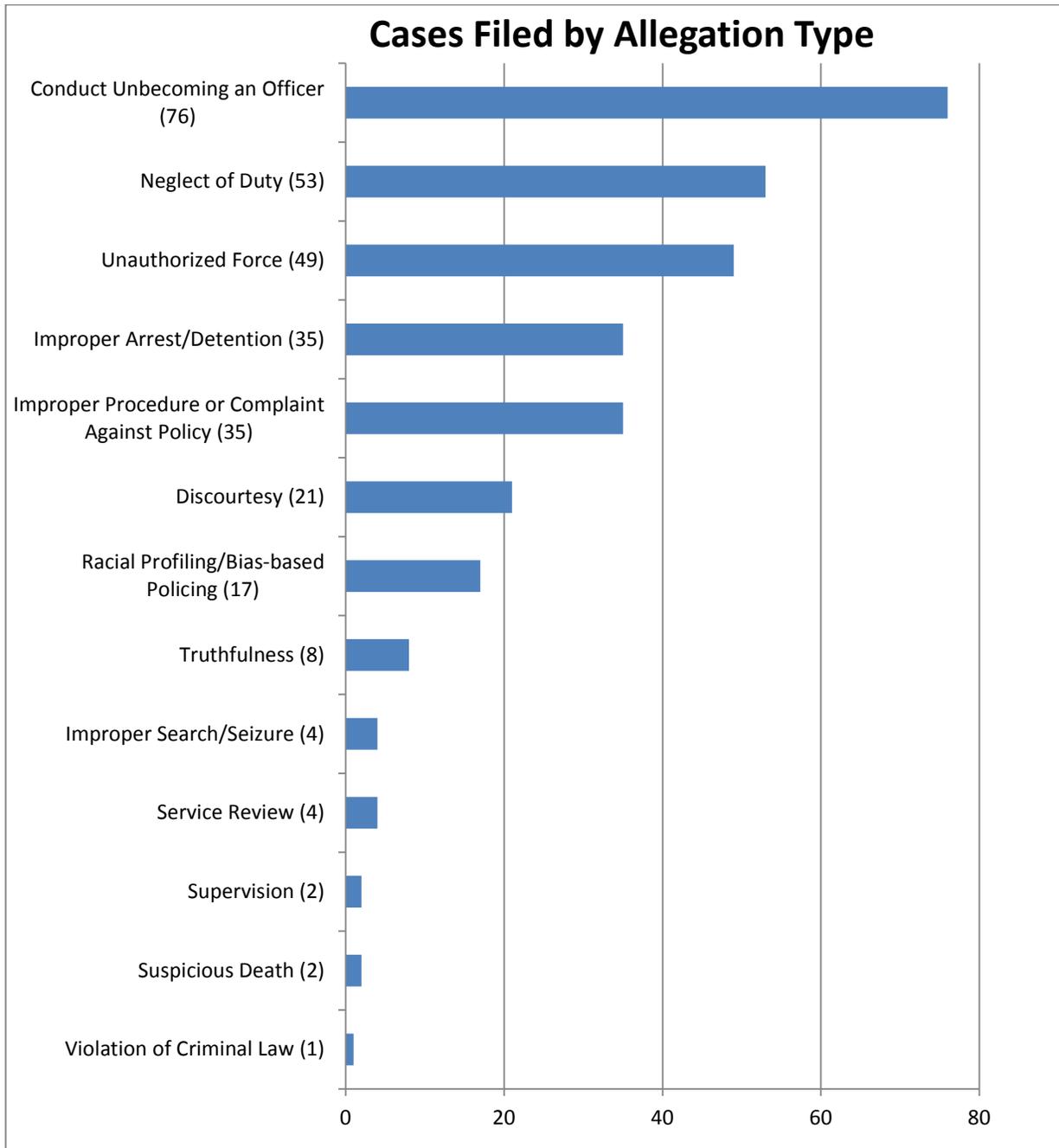
Complaints of misconduct are classified by the specific allegations they have raised. As complaints commonly include multiple types of allegations, they are also given a primary classification; the primary classification is generally the most serious type of misconduct that has been alleged. Following is a breakdown of the 174 cases alleging misconduct that were filed or reopened during the 2013-2014 reporting period, separated by primary classification.

Note that classifications can sometimes change over the course of an investigation for a variety of reasons. For example, as investigators uncover more information about a complaint, they may learn that more serious allegations than those initially raised are involved. Additionally, it is important to note that for cases that have been both initiated and completed within the current reporting period, the primary classification is determined by the findings of the case instead of the initial allegations that were raised (i.e. – the most serious *Sustained* allegation would become the primary overall classification).⁸



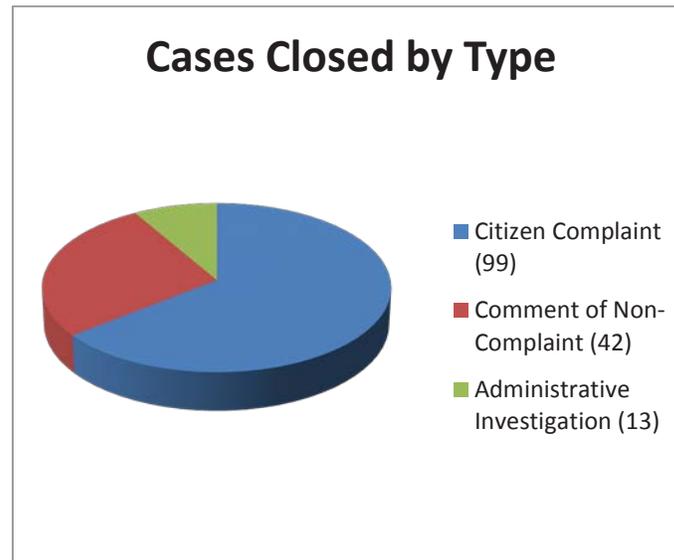
⁸ For more information on the hierarchy of findings, see Page 17 of this report.

Following is a breakdown of allegation types for the 174 cases alleging misconduct that were filed or reopened during the 2013-2014 reporting period. Each case may include multiple allegations and/or multiple involved officers, which is why the total number of allegation types is significantly greater than the total number of cases. Once again, allegations are commonly added to or removed from a case during the course of an investigation for a variety of reasons; a significant number of the allegations reported here may have been changed or removed over the course of the year. This chart is therefore most appropriately seen as a reflection of all of the allegations that were raised during 2013-2014, whether they ultimately survived to the end of an investigation or not.



Disposition of Cases Completed

During the 2013-2014 reporting period, 154 investigations were completed.⁹ 99 of these investigations were Citizen Complaints, 42 were Comments of Non-Complaint, and 13 were Administrative Investigations. It should be noted that the majority of cases reported on here were completed by BPD; this is largely a reflection of OIPA's investigative jurisdiction which, as dictated by the Citizen Oversight Model, is substantially smaller than that of BPD's.



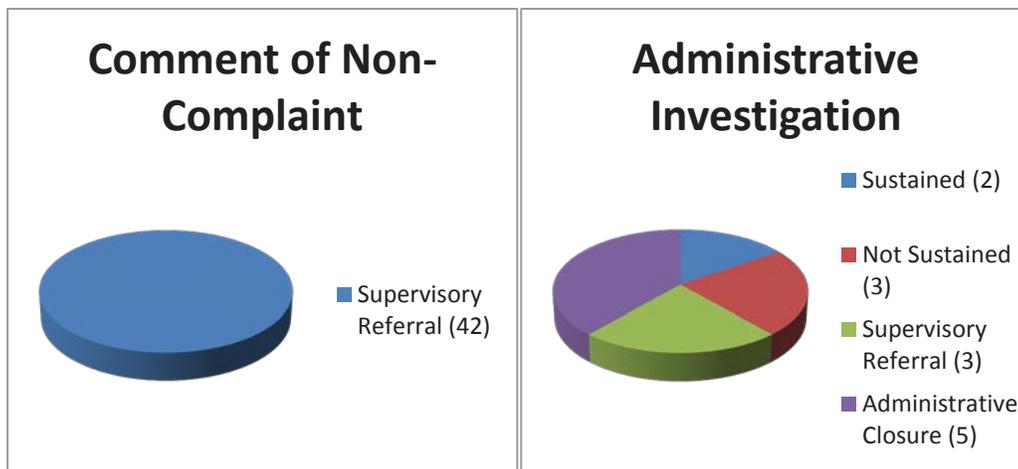
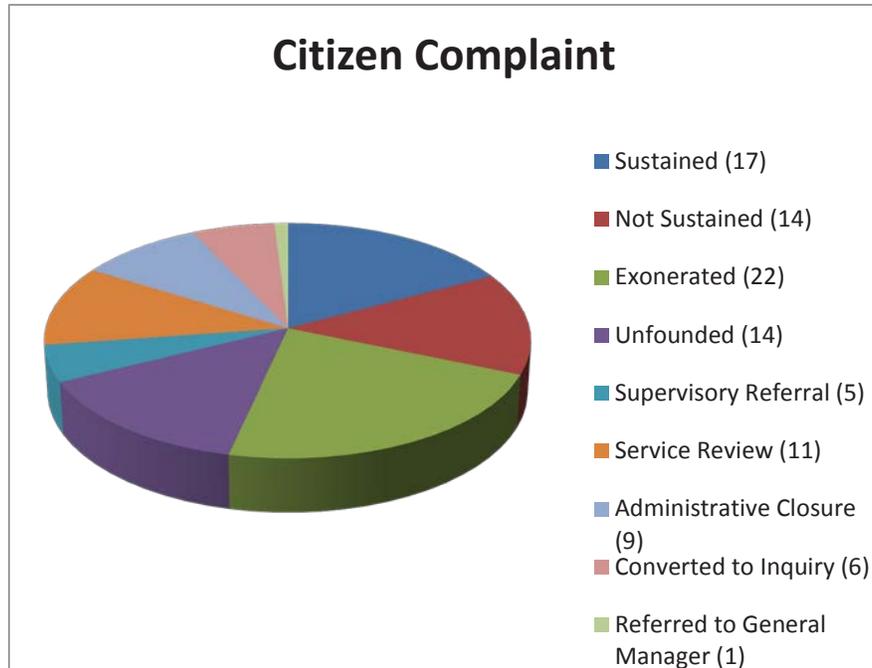
These same 154 completed cases are reported on in further detail below. First, these completed cases have been separated by type (Citizen Complaint, Comment of Non-Complaint, or Administrative Investigation) and overall finding. As with classifications, overall findings are generally assigned to a case according to a hierarchy and depend upon which finding has been reached for each allegation included in a case. If any allegation in the case has been *Sustained*, that will dictate the overall finding as *Sustained* regardless of the findings of all other allegations. This means that a case may be deemed *Sustained* solely on the basis of an allegation other than the most egregious one.

This hierarchy, and the resulting overall finding, is the same when any allegation in a case has been *Not Sustained* (absent any *Sustained* allegations, of course). If all allegations in a case are adjudicated as *Unfounded* and/or *Exonerated*, then the overall finding will be the one linked to the case's most egregious allegation. Two additional overall findings utilized by BPD for allegations of misconduct are *Supervisory Referral*¹⁰ and *Service Review*.¹¹ Absent any other findings in a case, either of these two may become the overall finding.

⁹ This number includes any cases that were re-closed during the reporting period after having been reopened by BPD for further investigation at the request of OIPA.

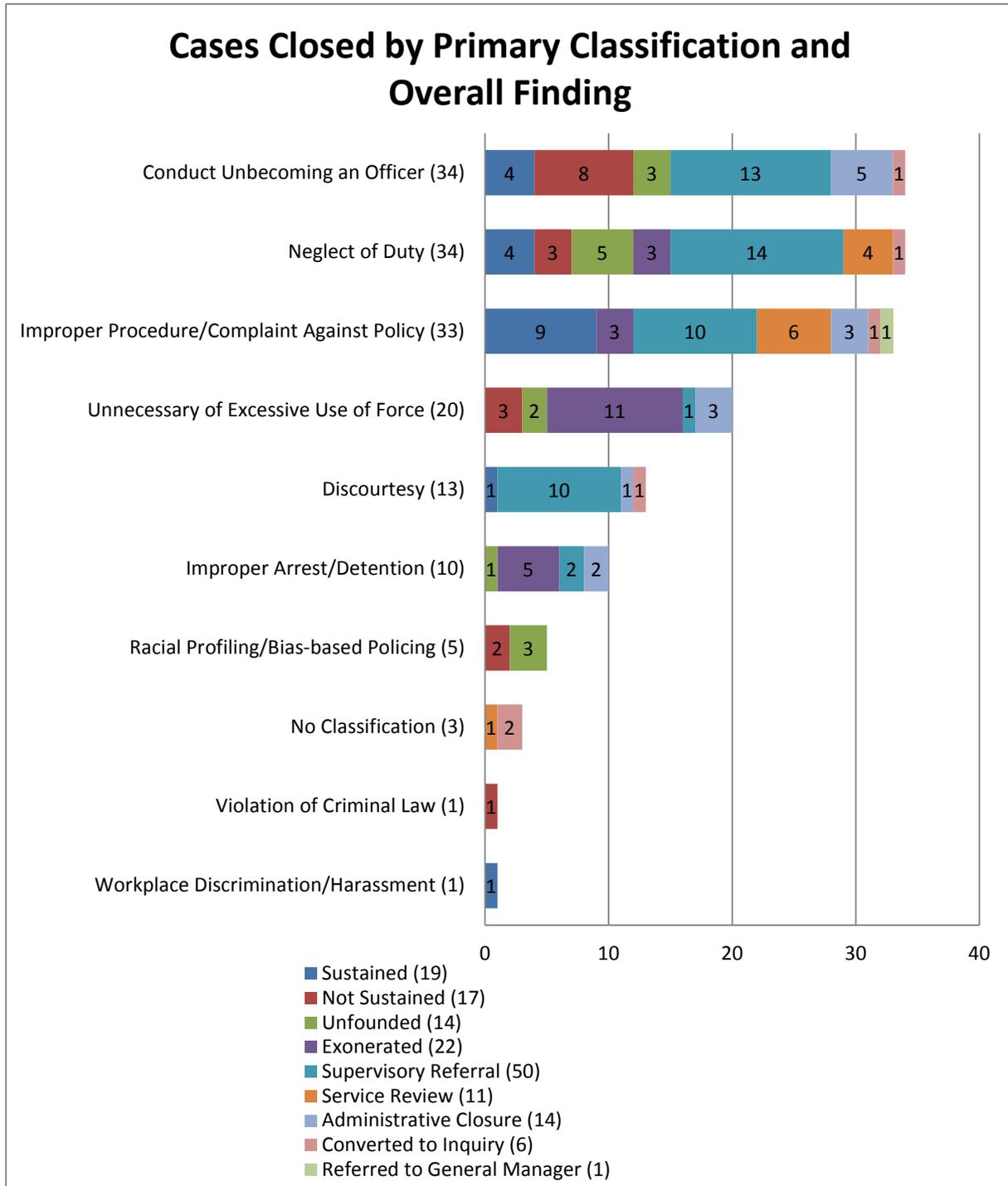
¹⁰ In defining a *Supervisory Referral*, the BPD Manual indicates that an assigned supervisor will address the issue informally with the involved employee and document the content of the conversation in a memorandum to the Internal Affairs Section. (2013 BPD Policy Manual, Policy 1020.1.1(f)).

¹¹ According to BPD, when an individual raises a concern pertaining to a global practice throughout the Department, such as Department policy, procedure, or tactics, the concern may be addressed through a *Service*



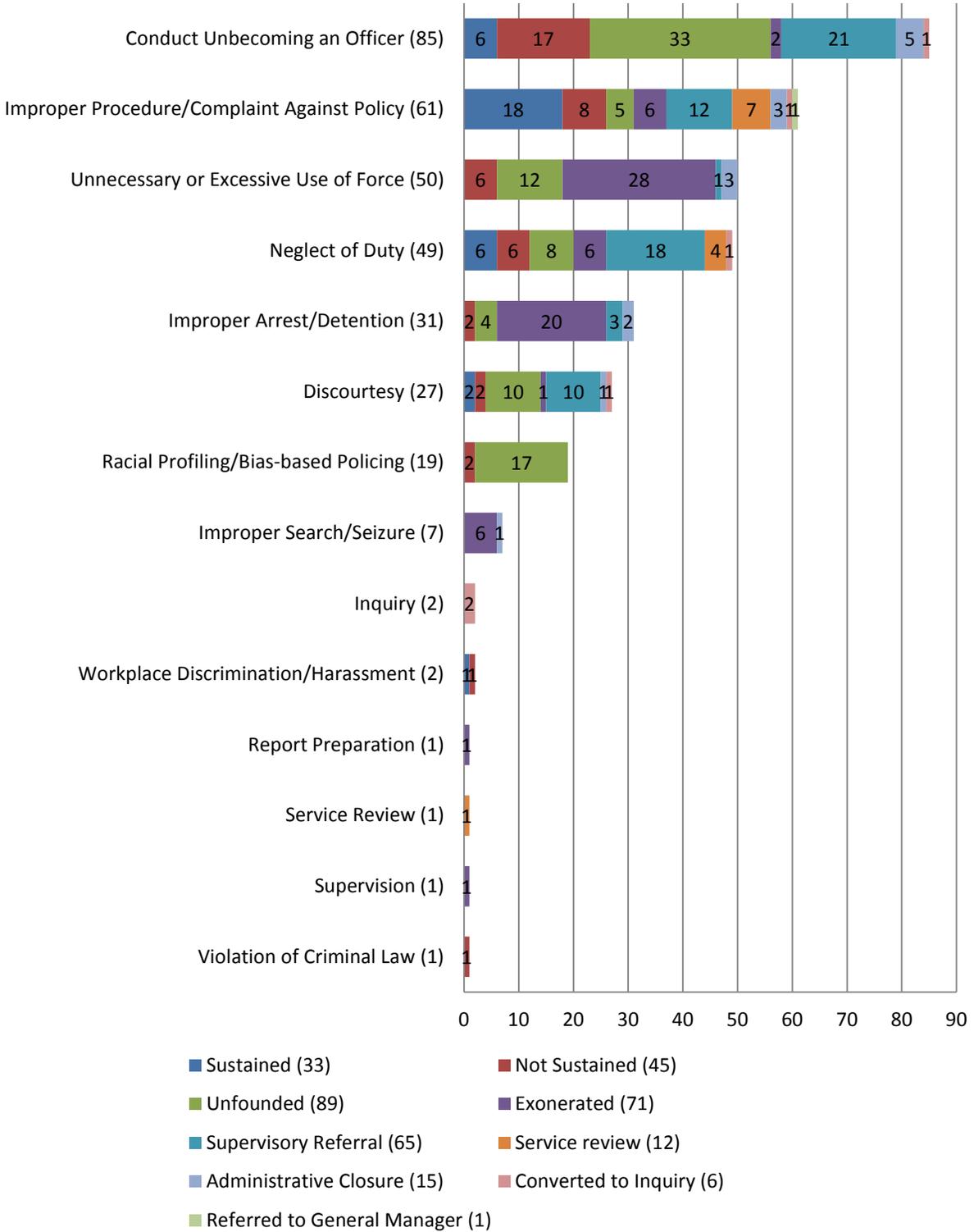
The next chart is a breakdown of the 154 cases completed during the 2013-2014 reporting period separated by primary classification and overall finding. A *Sustained* allegation in a case will also become the primary classification of the case, regardless of whether there are more egregious allegations that have not been *Sustained*, and regardless of what the previous primary classification of the case might have been. If multiple allegations in a case have been *Sustained*, then the most egregious one will dictate the primary classification of the case. This is also true when any allegation in a case has been *Not Sustained* (absent any *Sustained* allegations, of course). If all allegations in a case are adjudicated as *Unfounded* and/or *Exonerated*, then the primary classification will be the one linked to the most egregious allegation.

Review conducted by Internal Affairs, a designated review committee, or a member of the Command Staff. Depending on the circumstances, a *Service Review* could yield a change to Department policy, training, or tactics.



As mentioned previously, each closed case may include multiple different allegations of misconduct, each of which receives its own finding; furthermore, there may be only one category of misconduct alleged in a case, but it could be alleged against multiple different officers who each subsequently receive an individual finding. The next chart shows a breakdown of each allegation that received a finding as part of a completed case during the 2013-2014 reporting period. Note that the number of individual allegations with a finding far exceeds the number of closed cases in the previous chart.

Allegations Completed by Classification and Finding



Report on Discipline

For each allegation of misconduct that is *Sustained* against an officer, BPD may ultimately issue discipline to that officer as a result.¹² Below is an account of the discipline issued during 2013-2014. Note that the cases below do not necessarily correspond to the investigations completed with at least one *Sustained* allegation over the course of the reporting year, as the actual imposition of discipline commonly takes place one or more months after an investigation is complete; this is, in part, because of the due process afforded to employees who are subject to discipline.¹³

Case #	Nature of Sustained Allegation(s) ¹⁴	Classification of Sustained Allegation(s)	Action Taken
1	Officer improperly delayed the arrest of complainant until after a complaint was filed.	<u>Officer #1</u> <ul style="list-style-type: none"> • Performance of Duty • Conduct Unbecoming an Officer 	<u>Officer #1</u> Letter of Discussion ¹⁵
2	Officer drove recklessly and failed to notify BPD after an official contact by another law enforcement agency.	<u>Officer #1</u> <ul style="list-style-type: none"> • Criminal • Conduct Unbecoming an Officer • Policy/Procedure 	<u>Officer #1</u> Written Reprimand
3	Officer did not initiate a complaint as requested by complainant.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling
4	One officer discriminated against a second officer on the basis of gender.	<u>Officer #1</u> <ul style="list-style-type: none"> • Workplace Discrimination / Harassment 	<u>Officer #1</u> Letter of Discussion
5	Officer did not complete a required report regarding a contact with an individual.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling

¹² As outlined in labor agreements between BART and its two police unions, BPD subscribes to a system of progressive discipline for its employees.

¹³ In a handful of cases not reported on here, no discipline was issued as a result of a *Sustained* finding because the subject employee retired from service prior to issuance.

¹⁴ Although male pronouns (“him,” “his,” etc.) have been used in the descriptions of alleged misconduct in this chart, they do not necessarily indicate the gender of the actual subject officer in each description.

¹⁵ A “Letter of Discussion” is defined by BPD as “informal” discipline and consists of a written memorandum to the subject employee making him or her aware of some unacceptable behavior. The memorandum is presented to the subject employee for signature and placed into his or her personnel file for a period of up to six months, at which time it is purged. (BPD Policy Manual, Policy 340.3.1(b)).

6	Officer improperly accessed a law enforcement database and misused the information that was obtained.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure (4 Counts) • Conduct Unbecoming an Officer 	<u>Officer #1</u> Termination
7	Officer misused discretion regarding the issuance of a citation and failed to complete a required report.	<u>Officer #1</u> <ul style="list-style-type: none"> • Conduct Unbecoming an Officer • Policy/Procedure 	<u>Officer #1</u> Written Reprimand
8	Officer did not properly document a contact with an individual.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling
9	Officer did not complete a use of force report as required.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling
10	Officer used inappropriate language toward complainant during complainant's arrest.	<u>Officer #1</u> <ul style="list-style-type: none"> • Conduct Unbecoming an Officer • Courtesy 	<u>Officer #1</u> Informal Counseling
11	Officers did not detain an individual for further investigation as they should have.	<u>Officer #1</u> <ul style="list-style-type: none"> • Performance of Duty <u>Officer #2</u> <ul style="list-style-type: none"> • Performance of Duty 	<u>Officer #1</u> Letter of Discussion <u>Officer #2</u> Informal Counseling
12	Officer did not take enforcement action against a person who potentially fare-evaded, did not document contact with the person, and did not activate his recording device.	<u>Officer #1</u> <ul style="list-style-type: none"> • Performance of Duty (2 counts) • Policy/Procedure 	<u>Officer #1</u> Letter of Discussion
13	Officer gave complainant incorrect information regarding a court date.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling
14	Officer did not activate his recording device.	<u>Officer #1</u> <ul style="list-style-type: none"> • Policy/Procedure 	<u>Officer #1</u> Informal Counseling

15	Officer did not activate his recording device.	<u>Officer #1</u> • Policy/Procedure	<u>Officer #1</u> Informal Counseling
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Cases Being Appealed

Separate from the 174 incoming cases reported on earlier, OIPA received 1 appeal of a case that was previously investigated by BPD. All appeals undergo a comprehensive review, and OIPA has the authority to direct BPD to complete follow-up investigative work, beyond that which was initially done. After directing such follow-up investigation by BPD, OIPA agreed with 3 of the 4 findings reached by BPD and disagreed with the 1 remaining finding. OIPA submitted its conclusions to the CRB, which met in closed session to review the outcome of the appeal. The CRB voted, by majority, to adopt all of OIPA's conclusions; subsequently, BPD changed the one finding that had been disagreed with to match the finding reached by OIPA.

Cases Submitted from OIPA to the CRB

All completed OIPA investigations and appeals are submitted to the CRB, which then votes on whether to agree or disagree with the findings that have been reached. If the CRB disagrees with OIPA, they have the option to appeal to the BART Chief of Police. No such appeals occurred during this reporting period.

Cases Reviewed/Monitored by OIPA

OIPA reviews misconduct investigations conducted by BPD in a variety of different ways. Though work-intensive, some reviews are completed informally, with any concerns being addressed through a conversation with BPD Internal Affairs investigators. It is this type of review that occurs each month when OIPA prepares a periodic report for the CRB. OIPA performs a review of some sort on each new case that came in during the month, and each closed case that was completed during the month. Therefore, without accounting for any of the other instances when OIPA finds reason to examine a particular BPD investigation, OIPA reviewed more than 328 cases in this fashion in 2013-2014.

In addition, OIPA actively monitors those cases that are initiated through our office, even though they do not fall within our investigative jurisdiction. We have a responsibility to ensure that those cases are investigated in a timely, thorough, complete, objective, and fair manner. During the 2013-2014 reporting period OIPA monitored 32 such cases, which is double last year's total.¹⁶

Beyond citizen complaints, OIPA also monitors BPD's administrative investigations into officer-involved shootings (OISs). One such critical incident occurred during this reporting period, tragically resulting in the death of a BPD officer. As required by the Model, OIPA was notified of the OIS immediately and responded directly to the scene to begin its monitoring role; in turn, OIPA made a timely notification to the Chairperson of the CRB upon learning that the incident involved a death. OIPA was able to participate in a walkthrough of the scene and to observe interviews of involved employees. Throughout the BPD investigation, OIPA maintained access to the evidence that was being gathered and analyzed by

¹⁶ These cases overlap with the number of reviewed cases mentioned earlier. These cases, however, receive a higher level of scrutiny from OIPA than some others that are reviewed more informally.

the investigators. OIPA's monitoring of this complex investigation remained ongoing as of the end of this reporting period.

LOOKING FORWARD

In the year ahead, the Office of the Independent Police Auditor looks forward to continuing its progress toward becoming a recognized leader in the field of civilian oversight of law enforcement, both locally and nationally. As mentioned above, much effort has been spent on our part to become a source of knowledge, particularly for emerging oversight agencies that are just being formed, much as OIPA was formed just a handful of years ago. We have also taken seriously our opportunities to become more deeply connected to the National Association for Civilian Oversight of Law Enforcement, and to do so in a growing leadership role. In its first three years of operation, OIPA is continuing to develop into a robust civilian oversight agency; looking forward, it is our intent to also play a substantial role in the continued development of the oversight field on a national scale.

As in the past, OIPA plans to maintain its commitment to a vigorous program of community outreach, as well as a focus on outreach to youth. This will be accomplished partially through continued meetings with community-based organizations of all kinds throughout the Bay Area. Additionally, we will look to reeducate BART patrons about our office through efforts such as a car card campaign, which we found measurable success with over a short period in the past. Finally, we will also seek to make ourselves even more accessible to all those we conduct outreach with by facilitating the submission of complaints involving the BART Police Department online for the first time. We are confident that this additional avenue for filing a complaint will make the process quicker and easier for a large segment of the public.

Finally, as we look to take on new and continuing challenges, we will also spend the first part of the year refocusing our effort toward completing our investigations and investigative reviews at our regular pace. With the office fully-staffed, we will once again have the capacity to produce our high-quality investigative work more rapidly, while still living up to all of our other oversight responsibilities. OIPA looks forward to the combination of steadiness and increased prominence within the field of civilian oversight that we plan to work toward in 2014-2015.

APPENDICES

APPENDIX A

OIPA Policy Recommendation for BPD Policy 300 – Use of Force

APPENDIX B

OIPA Policy Recommendation for BPD Policy 402 – Racial- or Bias-Based Profiling

APPENDIX C

OIPA Policy Recommendation for BPD Policy 309 – Electronic Control Device - TASER

APPENDIX D

OIPA Policy Recommendation for BPD Policy 1021 – Complaint Mediation Program

APPENDIX A

OIPA Policy Recommendation for BPD Policy 300 – Use of Force

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: BART Police Department, Chief of Police DATE: December 9, 2013

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 300**

Chapter 1-04(G) of the Citizen Oversight Model (Model) states that the Office of the Independent Police Auditor (OIPA) shall develop recommendations concerning General Orders and Directives, procedures, practices, and training of the BART Police Department (BPD), with the goal of improving professionalism, safety, effectiveness, and accountability. In accordance with this section of the Model, OIPA has developed a recommendation with regard to *BPD Policy 300 – Use of Force*.

More specifically, OIPA's recommendation focuses on Sections 300.4 and 300.5 within BPD's Use of Force Policy, which are titled, respectively, "Reporting the Use of Force" and "Supervisor Responsibility." OIPA has chosen to address these two sections in particular after reviewing a number of BPD investigations involving a use of force and arriving at the conclusion that the language in these two sections could be strengthened in a way that would help ensure that their mandates are always upheld.

OIPA recognizes that there may be instances in which a supervisor responds to a use of force incident and, by virtue of public safety necessity, assists subordinate personnel in taking a subject into custody. It is based upon that understanding that OIPA feels a supervisor who has become involved in a use of force should not also have a collateral responsibility for conducting an ensuing investigation into the use of force. That responsibility should be reserved solely for an uninvolved supervisor. Following this course of action will help to minimize the likelihood of any impropriety, and the appearance of any impropriety, surrounding the use of force investigation.

Additionally, when an uninvolved supervisor does conduct an investigation into the use of force, the interview of the subject upon whom force was used must take place outside the presence of the officers who used the force. Regardless of whether the force used in a given instance is ultimately deemed to have been reasonable and within policy or not, the potential for a subject upon whom force was used to feel intimidated while participating in an investigation of that force is simply too high if the officers who used force are allowed to be present. This intimidation factor must be eliminated in order to help minimize the likelihood of any impropriety, and the appearance of any impropriety, surrounding the use of force investigation.

Based on the above reasoning, OIPA feels that the language in Sections 300.4 and 300.5 of BPD's Use of Force policy could be strengthened by making these matters more explicitly clear. Following is an unmarked copy of Policy 300, as issued; an annotated copy of Policy 300, displaying the edits suggested by OIPA as well as explanations for those edits; and a copy of what Policy 300 would look like after incorporating the edits suggested by OIPA.



Mark P. Smith
BART Independent Police Auditor

Use of Force

300.1 PURPOSE AND SCOPE

This policy recognizes that the use of force by law enforcement requires constant evaluation. Even at its lowest level, the use of force is a serious responsibility. The purpose of this policy is to provide officers of this department with 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, each officer is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

300.1.1 PHILOSOPHY

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 human encounters and when warranted, may use force in carrying out their duties.

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

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. It is also understood that vesting officers with the authority to use reasonable force and protect the public welfare requires a careful balancing of all human interests.

300.1.2 DUTY TO INTERCEDE

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of such excessive force. Such officers should also promptly report these observations to a supervisor.

300.2 POLICY

It is the policy of this department that 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 effectively bring an incident under control. "Reasonableness" of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any interpretation of reasonableness must allow for the fact that police officers are often forced to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.

Given that no policy can realistically predict every possible situation an officer might encounter in the field, it is recognized that each officer must be entrusted with well-reasoned discretion in determining the appropriate use of force in each incident. While it is the ultimate objective of every law enforcement encounter to minimize injury to everyone involved, nothing in this policy requires an officer to actually sustain physical injury before applying reasonable force.

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300.2.1 USE OF FORCE TO EFFECT AN ARREST

Any peace officer that has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the 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 of the person being arrested; nor shall such officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance (Penal Code § 835a).

300.2.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether or not to apply any level of force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration. These factors include, but are not limited to:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time).
- (b) Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion and number of officers vs. subjects).
- (c) Influence of drugs/alcohol (mental capacity).
- (d) Proximity of weapons.
- (e) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances).
- (g) Seriousness of the suspected offense or reason for contact with the individual.
- (h) Training and experience of the officer.
- (i) Potential for injury to citizens, officers and suspects.
- (j) Risk of escape.
- (k) Other exigent circumstances.

It is recognized that officers are expected to make split-second decisions and that the amount of an officer's time available to evaluate and respond to changing circumstances may impact his/her decision.

While various degrees of force exist, each officer is expected to use only that degree of force reasonable under the circumstances to successfully accomplish the legitimate law enforcement purpose in accordance with this policy.

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

300.2.3 NON-DEADLY FORCE APPLICATIONS

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

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Each officer is provided with equipment, training and skills to assist in the apprehension and control of suspects as well as protection of officers and the public.

Non-deadly force applications may include but are not limited to pain compliance techniques, takedown techniques, and personal body weapons as described in this policy manual, and leg restraints, control devices (baton, chemical agents, OC spray and SIMS), ECD device, and K-9 bites described in Policy Manual §§ 306, 308, 309 and 318 respectively.

300.2.4 PAIN COMPLIANCE AND TAKEDOWN TECHNIQUES

Pain compliance and/or takedown techniques may be very effective in controlling an actively resisting individual. Officers should only apply those pain compliance and/or takedown techniques for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such a technique appears necessary to further a legitimate law enforcement purpose. Officers utilizing any pain compliance and/or takedown technique should consider the totality of the circumstance including, but not limited to:

- (a) The potential for injury to the officer(s) or others if the technique is not used
- (b) The potential risk of serious injury to the individual being controlled
- (c) The degree to which the pain compliance and/or takedown technique may be controlled in application according to the level of resistance
- (d) The nature of the offense involved
- (e) The level of resistance of the individual(s) involved
- (f) The need for prompt resolution of the situation
- (g) If time permits (e.g., passive demonstrators), other reasonable alternatives

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

300.2.5 CAROTID RESTRAINT

The carotid restraint is not authorized for use by this agency.

300.2.6 PERSONAL BODY WEAPONS

Personal body weapon strikes, punches, lifts or kicks for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such weapon appears necessary to further a legitimate law enforcement purpose, may be used.

As with the pain compliance and takedown techniques, officers utilizing personal body weapons should consider the totality of the circumstances prior to usage. Unless exigent circumstances exist, personal body weapon strikes, punches, lifts or kicks to the rear of the head, neck or spine are prohibited.

300.3 DEADLY FORCE APPLICATIONS

While the use of a firearm is expressly considered deadly force, other force might also be considered deadly force if the officer reasonably anticipates and intends that the force applied will create a substantial likelihood of causing death or very serious injury. Use of deadly force is justified in the following circumstances:

Bay Area Rapid Transit Police Department

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Use of Force

- (a) An officer may use deadly force to protect himself/herself or others from what he/she reasonably believe would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing suspect when the officer has probable cause to believe that the suspect 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 or future potential risk of serious bodily injury or death to any other person if the suspect is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

300.3.1 TEMPORARY ASSIGNMENT OF EMPLOYEES WHO USE FORCE

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 shall also be present.

When a BART Police employee applies a use of force under the above listed circumstances, the use of force must be reported and investigated per Policy 300.

300.4 REPORTING THE USE OF FORCE

Any use of force by a member of this Department which utilizes any method of pain compliance, personal body weapons, a "take down", impact weapons, alternate weapons, chemical agents, K-9 bite, electronic control devices, SIMS deployment, lethal force, or any other physical force that either results in injury or non-injury to the subject shall be documented promptly, completely, and accurately in an appropriate report depending on the nature of the incident. The use of particular weapons may require the completion of additional report forms as specified in Departmental policy and/or law. In addition to thorough documentation of the use of force in the narrative of the police report, the tab in the MO data entry section of the report writing program shall be utilized to document the type of force used.

Supervisory notification shall be made as soon as practical following the application of physical force, under any of the aforementioned 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.

The application of an arm or wrist hold by an officer for the sole purpose of conducting a search of and/or placing handcuffs on a person is not considered a use of force.

The report must then be reviewed by a supervisor. The reviewing supervisor must review the use of force, and make a recommendation on whether the use of force was justified or not. In cases involving the use of force by a supervisor, the next rank shall conduct the review and recommendation. This recommendation will be documented on the Supervisors' Use of Force Report, and forwarded to the Chief of Police, via the chain of command. The appropriate Lieutenant and Deputy Chief will review the report and Use of Force Report, and comment on the use of the arrest control device (s) or technique. The report and Use of Force Report will be forwarded to the Chief of Police for information. The chief will forward the report to the Professional Standards Section for logging. The Professional Standards Section will forward the report to the Use of Force Review Board.

Whenever an officer draws a firearm during the performance of his/her duties to defend, detain or take any person into custody, it is considered a use of force and an account of the incident shall be made in a police report. The officer should include in the narrative

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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. Examples of such documentation include, but are not limited to; the firearm was concealed against the officer's thigh or held at a low-ready position or pointed directly at a person. As soon as practical, a supervisor shall be notified and a Supervisor's Use of Force Report completed as required by §300.5

Incidents involving the drawing of a firearm that do not involve defending, detaining or taking a person into custody, and not in the presence of bystanders, do not require documentation in a police report. 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. Any situations where a firearm is pointed at a person or could in any way be perceived as being used to detain, or attempt to detain, a person shall be fully documented in a police report and Supervisor's Use of Force Report. Situations where an officer deploys a firearm in the presence of bystanders, but does not point the firearm at any person or use it to defend, detain or take any person into custody, is not considered to be a use of force, but must be fully documented in the narrative of a police report.

Once approved, the supervisor will attach a copy of the report in Blue Team and document on the Supervisor's Use of Force Report whether the drawing of the firearm was within departmental policy. The supervisor will forward the report with comments, via the chain of command, to the Chief of Police as described above. The Chief of Police will forward the Use of Force Report to the Internal Affairs Section for logging. The Internal Affairs Section will forward the report to the Use of Force Review Board. The Internal Affairs Section will notify the officer(s) of the finding.

Once the review board completes its review, the Supervisor's Use of Force Report will be forwarded to the affected officer(s) and the report and findings will be forwarded to the Internal Affairs Section. A record of all reported incidents, whether on or off-duty, will be maintained in the Internal Affairs Section Office.

Members of the Department's S.W.A.T. Team will document the use of S.W.A.T. weapon systems deployed during a team activation at the direction of the S.W.A.T. Commander.

300.4.1 NOTIFICATION TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of physical force, as defined in section 300.4.

300.4.2 MEDICAL ATTENTION FOR INJURIES SUSTAINED USING FORCE

Prior to booking or release, immediate medical assistance shall be obtained for any person who has sustained visible injury, expressed a complaint of injury or continuing pain, or who has been rendered unconscious. 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 an audio recording is made of the contact or an interview with the individual, any refusal should be included, if possible.

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

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death and should be examined by qualified medical personnel as soon as practicable. Any individual exhibiting signs of distress after such an encounter shall be medically cleared prior to booking.

300.5 SUPERVISOR RESPONSIBILITY

A supervisor should respond to an incident in which there has been a report of an application of force. The supervisor is expected to:

- (a) Obtain the basic facts from the involved officer(s)
- (b) Ensure that any injured parties are examined and treated
- (c) Separately interview the subject(s) upon whom force was applied
- (d) Ensure that photographs have been taken of any areas involving visible injury or complaint of pain as well as overall photographs of uninjured areas
- (e) Identify any witnesses not already included in related reports
- (f) Review and approve all related reports
- (g) Complete a Supervisors' Use of Force Report in Blue Team and forward to the on duty Watch Commander.

In the event that a 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.

Use of Force

300.1 PURPOSE AND SCOPE

This policy recognizes that the use of force by law enforcement requires constant evaluation. Even at its lowest level, the use of force is a serious responsibility. The purpose of this policy is to provide officers of this department with 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, each officer is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

300.1.1 PHILOSOPHY

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 human encounters and when warranted, may use force in carrying out their duties.

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

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. It is also understood that vesting officers with the authority to use reasonable force and protect the public welfare requires a careful balancing of all human interests.

300.1.2 DUTY TO INTERCEDE

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of such excessive force. Such officers should also promptly report these observations to a supervisor.

300.2 POLICY

It is the policy of this department that 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 effectively bring an incident under control. "Reasonableness" of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any interpretation of reasonableness must allow for the fact that police officers are often forced to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.

Given that no policy can realistically predict every possible situation an officer might encounter in the field, it is recognized that each officer must be entrusted with well-reasoned discretion in determining the appropriate use of force in each incident. While it is the ultimate objective of every law enforcement encounter to minimize injury to everyone involved, nothing in this policy requires an officer to actually sustain physical injury before applying reasonable force.

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300.2.1 USE OF FORCE TO EFFECT AN ARREST

Any peace officer that has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the 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 of the person being arrested; nor shall such officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance (Penal Code § 835a).

300.2.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether or not to apply any level of force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration. These factors include, but are not limited to:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time).
- (b) Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion and number of officers vs. subjects).
- (c) Influence of drugs/alcohol (mental capacity).
- (d) Proximity of weapons.
- (e) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances).
- (g) Seriousness of the suspected offense or reason for contact with the individual.
- (h) Training and experience of the officer.
- (i) Potential for injury to citizens, officers and suspects.
- (j) Risk of escape.
- (k) Other exigent circumstances.

It is recognized that officers are expected to make split-second decisions and that the amount of an officer's time available to evaluate and respond to changing circumstances may impact his/her decision.

While various degrees of force exist, each officer is expected to use only that degree of force reasonable under the circumstances to successfully accomplish the legitimate law enforcement purpose in accordance with this policy.

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

300.2.3 NON-DEADLY FORCE APPLICATIONS

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

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Each officer is provided with equipment, training and skills to assist in the apprehension and control of suspects as well as protection of officers and the public.

Non-deadly force applications may include but are not limited to pain compliance techniques, takedown techniques, and personal body weapons as described in this policy manual, and leg restraints, control devices (baton, chemical agents, OC spray and SIMS), ECD device, and K-9 bites described in Policy Manual §§ 306, 308, 309 and 318 respectively.

300.2.4 PAIN COMPLIANCE AND TAKEDOWN TECHNIQUES

Pain compliance and/or takedown techniques may be very effective in controlling an actively resisting individual. Officers should only apply those pain compliance and/or takedown techniques for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such a technique appears necessary to further a legitimate law enforcement purpose. Officers utilizing any pain compliance and/or takedown technique should consider the totality of the circumstance including, but not limited to:

- (a) The potential for injury to the officer(s) or others if the technique is not used
- (b) The potential risk of serious injury to the individual being controlled
- (c) The degree to which the pain compliance and/or takedown technique may be controlled in application according to the level of resistance
- (d) The nature of the offense involved
- (e) The level of resistance of the individual(s) involved
- (f) The need for prompt resolution of the situation
- (g) If time permits (e.g., passive demonstrators), other reasonable alternatives

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

300.2.5 CAROTID RESTRAINT

The carotid restraint is not authorized for use by this agency.

300.2.6 PERSONAL BODY WEAPONS

Personal body weapon strikes, punches, lifts or kicks for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such weapon appears necessary to further a legitimate law enforcement purpose, may be used.

As with the pain compliance and takedown techniques, officers utilizing personal body weapons should consider the totality of the circumstances prior to usage. Unless exigent circumstances exist, personal body weapon strikes, punches, lifts or kicks to the rear of the head, neck or spine are prohibited.

300.3 DEADLY FORCE APPLICATIONS

While the use of a firearm is expressly considered deadly force, other force might also be considered deadly force if the officer reasonably anticipates and intends that the force applied will create a substantial likelihood of causing death or very serious injury. Use of deadly force is justified in the following circumstances:

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- (a) An officer may use deadly force to protect himself/herself or others from what he/she reasonably believe would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing suspect when the officer has probable cause to believe that the suspect 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 or future potential risk of serious bodily injury or death to any other person if the suspect is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

300.3.1 TEMPORARY ASSIGNMENT OF EMPLOYEES WHO USE FORCE

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 shall also be present.

When a BART Police employee applies a use of force under the above listed circumstances, the use of force must be reported and investigated per Policy 300.

300.4 REPORTING THE USE OF FORCE

Any use of force by a member of this Department which utilizes any method of pain compliance, personal body weapons, a "take down", impact weapons, alternate weapons, chemical agents, K-9 bite, electronic control devices, SIMS deployment, lethal force, or any other physical force that either results in injury or non-injury to the subject shall be documented promptly, completely, and accurately in an appropriate report depending on the nature of the incident. The use of particular weapons may require the completion of additional report forms as specified in Departmental policy and/or law. In addition to thorough documentation of the use of force in the narrative of the police report, the tab in the MO data entry section of the report writing program shall be utilized to document the type of force used.

Supervisory notification shall be made as soon as practical following the application of physical force, under any of the aforementioned circumstances. Such notification must be made to an uninvolved supervisor, meaning one who was not involved in the incident that resulted in the use of force and who was not present during the use of force.

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. However, involved officers, meaning those who use force in a given incident or those who witness the use of force by another officer in a given incident, shall 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 (see Section 300.5 below). Furthermore, involved officers shall not attempt to influence other officers' or civilian witnesses' accounts of what occurred during the incident or otherwise conspire to thwart the integrity of a report on the use of force.

The application of an arm or wrist hold by an officer for the sole purpose of conducting a search of and/or placing handcuffs on a person is not considered a use of force.

The report must then be reviewed by a an uninvolved supervisor. The reviewing supervisor must review the use of force, and make a recommendation on whether the use of force was justified or not. In cases involving the use of force by a supervisor, the next rank shall conduct the review and recommendation. This recommendation will be documented on the Supervisors' Use of Force Report, and forwarded to the Chief of

Comment [OIPA1]: OIPA feels it is important to explicitly clarify that a supervisor who has no involvement in the use of force that occurred should be the one to receive notification. Ensuring that an uninvolved supervisor is called upon to initiate a response to a use of force upon being notified of one helps minimize not only the potential for actual impropriety, but also the appearance of any impropriety.

Comment [OIPA2]: With regard to the administrative examination into the propriety of a use of force, OIPA feels it is crucial that involved parties and witnesses refrain from influencing each other's accounts of what occurred as much as possible so that there is neither undue contamination from one party's account to the next nor the appearance of such contamination. Either of these things threaten to negate the ability of an administrative examination to objectively determine whether or not the use of force was appropriate.

Comment [OIPA3]: See Comment #OIPA1 above.

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Police, via the chain of command. The appropriate Lieutenant and Deputy Chief will review the report and Use of Force Report, and comment on the use of the arrest control device (s) or technique. The report and Use of Force Report will be forwarded to the Chief of Police for information. The chief will forward the report to the Professional Standards Section for logging. The Professional Standards Section will forward the report to the Use of Force Review Board.

Whenever an officer draws a firearm during the performance of his/her duties to defend, detain or take any person into custody, it is considered a use of force and an account of the incident shall 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. Examples of such documentation include, but are not limited to; the firearm was concealed against the officer's thigh or held at a low-ready position or pointed directly at a person. As soon as practical, a supervisor shall be notified and a Supervisor's Use of Force Report completed as required by §300.5

Incidents involving the drawing of a firearm that do not involve defending, detaining or taking a person into custody, and not in the presence of bystanders, do not require documentation in a police report. 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. Any situations where a firearm is pointed at a person or could in any way be perceived as being used to detain, or attempt to detain, a person shall be fully documented in a police report and Supervisor's Use of Force Report. Situations where an officer deploys a firearm in the presence of bystanders, but does not point the firearm at any person or use it to defend, detain or take any person into custody, is not considered to be a use of force, but must be fully documented in the narrative of a police report.

Once approved, the supervisor will attach a copy of the report in Blue Team and document on the Supervisor's Use of Force Report whether the drawing of the firearm was within departmental policy. The supervisor will forward the report with comments, via the chain of command, to the Chief of Police as described above. The Chief of Police will forward the Use of Force Report to the Internal Affairs Section for logging. The Internal Affairs Section will forward the report to the Use of Force Review Board. The Internal Affairs Section will notify the officer(s) of the finding.

Once the review board completes its review, the Supervisor's Use of Force Report will be forwarded to the affected officer(s) and the report and findings will be forwarded to the Internal Affairs Section. A record of all reported incidents, whether on or off-duty, will be maintained in the Internal Affairs Section Office.

Members of the Department's S.W.A.T. Team will document the use of S.W.A.T. weapon systems deployed during a team activation at the direction of the S.W.A.T. Commander.

300.4.1 NOTIFICATION TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of physical force, as defined in section 300.4.

300.4.2 MEDICAL ATTENTION FOR INJURIES SUSTAINED USING FORCE

Prior to booking or release, immediate medical assistance shall be obtained for any person who has sustained visible injury, expressed a complaint of injury or continuing pain, or who has been rendered unconscious. 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

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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 an audio recording is made of the contact or an interview with the individual, any refusal should be included, if possible.

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 and should be examined by qualified medical personnel as soon as practicable. Any individual exhibiting signs of distress after such an encounter shall be medically cleared prior to booking.

300.5 SUPERVISOR RESPONSIBILITY

A **an uninvolved** supervisor should respond to an incident in which there has been a report of an application of force. The **uninvolved** supervisor is expected to:

- (a) Obtain the basic facts from the involved officer(s)
- (b) Ensure that any injured parties are examined and treated
- (c) Separately interview the subject(s) upon whom force was applied; **such interviews shall be conducted outside the presence of any officers involved in the use of force or the incident that led to it**
- (d) Ensure that photographs have been taken of any areas involving visible injury or complaint of pain as well as overall photographs of uninjured areas
- (e) Identify any witnesses not already included in related reports
- (f) Review and approve all related reports
- (g) Complete a Supervisors' Use of Force Report in Blue Team and forward to the on duty Watch Commander.

In the event that **a 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.

Comment [OIPA4]: See Comment #OIPA1 above.

Comment [OIPA5]: To help minimize the chance that a subject upon whom force was applied feels intimidation, and decides to alter his/her account of the force that was used as a result, OIPA feels it should be explicitly clarified that the uninvolved supervisor's interview of the subject shall take place away from any officers who were involved in the use of force or the incident that led to it.

Comment [OIPA6]: See Comment #OIPA1 above.

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300.1 PURPOSE AND SCOPE

This policy recognizes that the use of force by law enforcement requires constant evaluation. Even at its lowest level, the use of force is a serious responsibility. The purpose of this policy is to provide officers of this department with 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, each officer is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

300.1.1 PHILOSOPHY

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 human encounters and when warranted, may use force in carrying out their duties.

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

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. It is also understood that vesting officers with the authority to use reasonable force and protect the public welfare requires a careful balancing of all human interests.

300.1.2 DUTY TO INTERCEDE

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of such excessive force. Such officers should also promptly report these observations to a supervisor.

300.2 POLICY

It is the policy of this department that 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 effectively bring an incident under control. "Reasonableness" of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any interpretation of reasonableness must allow for the fact that police officers are often forced to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation.

Given that no policy can realistically predict every possible situation an officer might encounter in the field, it is recognized that each officer must be entrusted with well-reasoned discretion in determining the appropriate use of force in each incident. While it is the ultimate objective of every law enforcement encounter to minimize injury to everyone involved, nothing in this policy requires an officer to actually sustain physical injury before applying reasonable force.

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300.2.1 USE OF FORCE TO EFFECT AN ARREST

Any peace officer that has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the 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 of the person being arrested; nor shall such officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance (Penal Code § 835a).

300.2.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether or not to apply any level of force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration. These factors include, but are not limited to:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time).
- (b) Officer/subject factors (age, size, relative strength, skill level, injury/exhaustion and number of officers vs. subjects).
- (c) Influence of drugs/alcohol (mental capacity).
- (d) Proximity of weapons.
- (e) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances).
- (g) Seriousness of the suspected offense or reason for contact with the individual.
- (h) Training and experience of the officer.
- (i) Potential for injury to citizens, officers and suspects.
- (j) Risk of escape.
- (k) Other exigent circumstances.

It is recognized that officers are expected to make split-second decisions and that the amount of an officer's time available to evaluate and respond to changing circumstances may impact his/her decision.

While various degrees of force exist, each officer is expected to use only that degree of force reasonable under the circumstances to successfully accomplish the legitimate law enforcement purpose in accordance with this policy.

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

300.2.3 NON-DEADLY FORCE APPLICATIONS

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

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Each officer is provided with equipment, training and skills to assist in the apprehension and control of suspects as well as protection of officers and the public.

Non-deadly force applications may include but are not limited to pain compliance techniques, takedown techniques, and personal body weapons as described in this policy manual, and leg restraints, control devices (baton, chemical agents, OC spray and SIMS), ECD device, and K-9 bites described in Policy Manual §§ 306, 308, 309 and 318 respectively.

300.2.4 PAIN COMPLIANCE AND TAKEDOWN TECHNIQUES

Pain compliance and/or takedown techniques may be very effective in controlling an actively resisting individual. Officers should only apply those pain compliance and/or takedown techniques for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such a technique appears necessary to further a legitimate law enforcement purpose. Officers utilizing any pain compliance and/or takedown technique should consider the totality of the circumstance including, but not limited to:

- (a) The potential for injury to the officer(s) or others if the technique is not used
- (b) The potential risk of serious injury to the individual being controlled
- (c) The degree to which the pain compliance and/or takedown technique may be controlled in application according to the level of resistance
- (d) The nature of the offense involved
- (e) The level of resistance of the individual(s) involved
- (f) The need for prompt resolution of the situation
- (g) If time permits (e.g., passive demonstrators), other reasonable alternatives

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

300.2.5 CAROTID RESTRAINT

The carotid restraint is not authorized for use by this agency.

300.2.6 PERSONAL BODY WEAPONS

Personal body weapon strikes, punches, lifts or kicks for which the officer has received P.O.S.T. or other departmentally approved training, and only when the officer reasonably believes that the use of such weapon appears necessary to further a legitimate law enforcement purpose, may be used.

As with the pain compliance and takedown techniques, officers utilizing personal body weapons should consider the totality of the circumstances prior to usage. Unless exigent circumstances exist, personal body weapon strikes, punches, lifts or kicks to the rear of the head, neck or spine are prohibited.

300.3 DEADLY FORCE APPLICATIONS

While the use of a firearm is expressly considered deadly force, other force might also be considered deadly force if the officer reasonably anticipates and intends that the force applied will create a substantial likelihood of causing death or very serious injury. Use of deadly force is justified in the following circumstances:

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- (a) An officer may use deadly force to protect himself/herself or others from what he/she reasonably believe would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing suspect when the officer has probable cause to believe that the suspect 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 or future potential risk of serious bodily injury or death to any other person if the suspect is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

300.3.1 TEMPORARY ASSIGNMENT OF EMPLOYEES WHO USE FORCE

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 shall also be present.

When a BART Police employee applies a use of force under the above listed circumstances, the use of force must be reported and investigated per Policy 300.

300.4 REPORTING THE USE OF FORCE

Any use of force by a member of this Department which utilizes any method of pain compliance, personal body weapons, a "take down", impact weapons, alternate weapons, chemical agents, K-9 bite, electronic control devices, SIMS deployment, lethal force, or any other physical force that either results in injury or non-injury to the subject shall be documented promptly, completely, and accurately in an appropriate report depending on the nature of the incident. The use of particular weapons may require the completion of additional report forms as specified in Departmental policy and/or law. In addition to thorough documentation of the use of force in the narrative of the police report, the tab in the MO data entry section of the report writing program shall be utilized to document the type of force used.

Supervisory notification shall be made as soon as practical following the application of physical force, under any of the aforementioned circumstances. **Such notification must be made to an uninvolved supervisor, meaning one who was not involved in the incident that resulted in the use of force and who was not present during the use of force.**

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. **However, involved officers, meaning those who use force in a given incident or those who witness the use of force by another officer in a given incident, shall not obtain statements from other officers as a part of a report on the use of force, as such is the responsibility of an uninvolved supervisor (see Section 300.5 below). Furthermore, involved officers shall not attempt to influence other officers' or civilian witnesses' accounts of what occurred during the incident or otherwise conspire to thwart the integrity of a report on the use of force.**

The application of an arm or wrist hold by an officer for the sole purpose of conducting a search of and/or placing handcuffs on a person is not considered a use of force.

The report must then be reviewed by **an uninvolved** supervisor. The reviewing supervisor must review the use of force, and make a recommendation on whether the use of force was justified or not. In cases involving the use of force by a supervisor, the next rank shall conduct the review and recommendation. This recommendation will be documented on the Supervisors' Use of Force Report, and forwarded to the Chief of Police, via the

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chain of command. The appropriate Lieutenant and Deputy Chief will review the report and Use of Force Report, and comment on the use of the arrest control device (s) or technique. The report and Use of Force Report will be forwarded to the Chief of Police for information. The chief will forward the report to the Professional Standards Section for logging. The Professional Standards Section will forward the report to the Use of Force Review Board.

Whenever an officer draws a firearm during the performance of his/her duties to defend, detain or take any person into custody, it is considered a use of force and an account of the incident shall 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. Examples of such documentation include, but are not limited to; the firearm was concealed against the officer's thigh or held at a low-ready position or pointed directly at a person. As soon as practical, a supervisor shall be notified and a Supervisor's Use of Force Report completed as required by §300.5

Incidents involving the drawing of a firearm that do not involve defending, detaining or taking a person into custody, and not in the presence of bystanders, do not require documentation in a police report. 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. Any situations where a firearm is pointed at a person or could in any way be perceived as being used to detain, or attempt to detain, a person shall be fully documented in a police report and Supervisor's Use of Force Report. Situations where an officer deploys a firearm in the presence of bystanders, but does not point the firearm at any person or use it to defend, detain or take any person into custody, is not considered to be a use of force, but must be fully documented in the narrative of a police report.

Once approved, the supervisor will attach a copy of the report in Blue Team and document on the Supervisor's Use of Force Report whether the drawing of the firearm was within departmental policy. The supervisor will forward the report with comments, via the chain of command, to the Chief of Police as described above. The Chief of Police will forward the Use of Force Report to the Internal Affairs Section for logging. The Internal Affairs Section will forward the report to the Use of Force Review Board. The Internal Affairs Section will notify the officer(s) of the finding.

Once the review board completes its review, the Supervisor's Use of Force Report will be forwarded to the affected officer(s) and the report and findings will be forwarded to the Internal Affairs Section. A record of all reported incidents, whether on or off-duty, will be maintained in the Internal Affairs Section Office.

Members of the Department's S.W.A.T. Team will document the use of S.W.A.T. weapon systems deployed during a team activation at the direction of the S.W.A.T. Commander.

300.4.1 NOTIFICATION TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of physical force, as defined in section 300.4.

300.4.2 MEDICAL ATTENTION FOR INJURIES SUSTAINED USING FORCE

Prior to booking or release, immediate medical assistance shall be obtained for any person who has sustained visible injury, expressed a complaint of injury or continuing pain, or who has been rendered unconscious. 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

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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 an audio recording is made of the contact or an interview with the individual, any refusal should be included, if possible.

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 and should be examined by qualified medical personnel as soon as practicable. Any individual exhibiting signs of distress after such an encounter shall be medically cleared prior to booking.

300.5 SUPERVISOR RESPONSIBILITY

An **uninvolved** supervisor should respond to an incident in which there has been a report of an application of force. The **uninvolved** supervisor is expected to:

- (a) Obtain the basic facts from the involved officer(s)
- (b) Ensure that any injured parties are examined and treated
- (c) Separately interview the subject(s) upon whom force was applied; **such interviews shall be conducted outside the presence of any officers involved in the use of force or the incident that led to it**
- (d) Ensure that photographs have been taken of any areas involving visible injury or complaint of pain as well as overall photographs of uninjured areas
- (e) Identify any witnesses not already included in related reports
- (f) Review and approve all related reports
- (g) Complete a Supervisors' Use of Force Report in Blue Team and forward to the on duty Watch Commander.

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.

APPENDIX B

OIPA Policy Recommendation for BPD Policy 402 – Racial- or Bias-Based Profiling

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: BART Police Department, Chief of Police DATE: February 10, 2014

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 402**

Chapter 1-04(G) of the Citizen Oversight Model (Model) states that the Office of the Independent Police Auditor (OIPA) shall develop recommendations concerning General Orders and Directives, procedures, practices, and training of the BART Police Department (BPD), with the goal of improving professionalism, safety, effectiveness, and accountability. In accordance with this section of the Model, OIPA has developed a recommendation with regard to *BPD Policy 402 – Racial- or Bias-Based Profiling*.

It is important to begin by describing how BPD’s policy regarding this matter has undergone fairly recent changes, and by acknowledging that OIPA feels the current policy is already a notable improvement over prior ones. One of OIPA’s complaint investigations, which was concluded on September 7, 2012, involved an allegation of Racial/Bias Based Profiling.

Note: “Racial/Bias Based Profiling” was the title of BPD Policy 402 at the time of the incident that gave rise to the complaint. It is slightly different than BPD’s current title for Policy 402. Further discussion about the most appropriate title for the policy, in OIPA’s opinion, is described below.

In its conclusion, OIPA noted that BPD’s Racial/Bias Based Profiling policy (at the time) focused too narrowly on detaining an individual on an improperly discriminatory basis. OIPA recommended that BPD broaden its policy to prohibit other law enforcement actions in addition to detentions, and even to prohibit the omission of taking an action, if such omission is based on an improperly discriminatory justification.

As OIPA was working on its investigation, OIPA staff and BPD staff both attended a training seminar focused on “Fair and Impartial Policing.” The seminar spent a substantial amount of time fostering debate about how to arrive at the best title and definition of what BPD now refers to as “Racial- or Bias-Based Profiling,” as well as the importance and the challenge of arriving at that definition and title for any law enforcement agency. Policies from a handful of agencies throughout the country were compared and contrasted. Some were more narrowly tailored, while others were far broader in their prohibitions against certain biased activity; some had titles that used the term, “Racial Profiling,” while others favored terms like, “Biased Policing.” While there were not necessarily any absolute truths or easy answers uncovered, in OIPA’s opinion the

debate helped clarify some of the issues to be considered by a law enforcement agency in crafting its policy to address inappropriately biased activity on the part of its employees.

On June 13, 2013, as previously alluded to, BPD made some substantial changes to Policy 402. The title remained essentially the same, but the definition of “Racial- or Bias-Based Profiling” was significantly clarified and broadened. It was clarified largely through the inclusion of a non-exhaustive list of the types of factors that were prohibited from being used as the basis for providing differing levels of law enforcement service, including race, ethnicity, nationality, etc. It was broadened by abandoning its limitation to improperly “detaining a suspect” and instead prohibiting improper decisions about “whether to take law enforcement action or to provide service.”

The changes made by BPD to Policy 402 were important ones, and they satisfied the primary concern that OIPA originally raised in the conclusion to its investigation as described above. However, OIPA feels that the current policy can be made even stronger with some additional edits. First, OIPA believes that a better title for this policy would be “Racial Profiling or Bias-Based Policing.”

OIPA feels that although racial profiling often describes the type of activity BPD’s policy aims to prohibit, it arguably leaves room for other inappropriately biased conduct that would not necessarily be described as “profiling” on the part of an officer. “Bias-Based Policing” is a term that is intended to broaden the types of improper law enforcement actions (or omissions to act) that are prohibited beyond solely those which could be classified as “profiling.” It is also intended to more broadly prohibit all types of improper bias, whether race-based or not.

As expressed by members of the BART Citizen Review Board at its January 13, 2014 regular meeting, however, there is good cause to refrain from simply abandoning the term “racial profiling” altogether in the title and body of this policy. The continued inclusion of that term may prove to be of substantial assistance to individuals who are already familiar with it and are seeking to initiate a complaint of misconduct on that basis. For these reasons, OIPA favors the use of both “Racial Profiling” and “Bias-Based Policing” for the title of BPD Policy 402.

One other notable suggested change to BPD Policy 402 is an addition to the non-exhaustive list of factors which are prohibited from being used as the basis for providing differing levels of law enforcement service (including race, ethnicity, national origin, etc.). In comparing similar lists from different jurisdictions, OIPA feels that BPD’s list is relatively extensive and mindful of the multi-faceted diversity that exists in the Bay Area. One important addition, however, would be the term “gender identity.”

As noted by the San Francisco Human Rights Commission, transgender people have been subjected to discrimination in a variety of arenas.¹ As such, the San Francisco Administrative Codes and Police Codes were amended to prohibit discrimination based on gender identity.² In a place as rich in diversity as the Bay Area, it seems sensible to explicitly include this factor

¹ See <http://www.sf-hrc.org/index.aspx?page=29>.

² See San Francisco Administrative Code, Chapter 12A, Section 12A.2. and San Francisco Police Code, Article 33, Section 3302.

amongst the list of factors that are prohibited from being used as the basis for providing differing levels of law enforcement service.

Any police department's policy prohibiting improper bias by its employees in the fulfillment of their responsibilities is bound to be one of its most important because it immediately and directly affects the level of confidence that various segments of the public have in the department's commitment to protecting and serving them as fully and fairly as other segments of the public are being protected and served. When such trust erodes, even amongst only some segments of the public, a police department begins to lose credibility and also falls short of meeting its responsibility to those it is meant to serve. OIPA feels that the current BPD Policy 402 is a good policy, and that it is certainly a vast improvement over the previous version. Based on the above reasoning, however, OIPA also feels that this important policy can be made even stronger with a few edits.

Following is an unmarked copy of Policy 402, as issued; an annotated copy of Policy 402, displaying the edits suggested by OIPA as well as explanations for those edits; and a copy of what Policy 402 would look like after incorporating the edits suggested by OIPA.



Mark P. Smith
BART Independent Police Auditor

Racial- or Bias-Based Profiling

402.1 PURPOSE AND SCOPE

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in racial- or bias-based profiling or violate any related laws while serving the community.

402.1.1 DEFINITION

Definitions related to this policy include:

Racial- or bias-based profiling - An inappropriate reliance on factors such as race, ethnicity, national origin, religion, sex, sexual orientation, economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding whether to take law enforcement action or to provide service.

402.2 POLICY

The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

Race, ethnicity or nationality, religion, sex, sexual orientation, economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as the basis for providing differing levels of law enforcement service or the enforcement of the law.

402.3 RACIAL- OR BIAS-BASED PROFILING PROHIBITED

Racial- or bias-based profiling is strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., suspect description is limited to a specific race or group).

402.4 MEMBER RESPONSIBILITY

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of racial- or bias-based profiling to a supervisor.

402.4.1 REASON FOR DETENTION

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class.

To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the officer's reasonable suspicion or probable cause for the detention, as applicable.

Nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

Bay Area Rapid Transit Police Department

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Racial- or Bias-Based Profiling

402.4.2 REPORTING TRAFFIC STOPS

Each time an officer makes a traffic stop, the officer shall report any information required in the Traffic Function and Responsibility Policy.

402.5 SUPERVISOR RESPONSIBILITY

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy.

- (a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.
- (b) Supervisors should periodically review MAV recordings, MDC data and any other available resource used to document contact between officers and the public to ensure compliance with the policy.
 - 1. Supervisors should document these periodic reviews.
 - 2. Recordings that capture a potential instance of racial- or bias-based profiling should be appropriately retained for administrative investigation purposes.
- (c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.
- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who discloses information concerning racial- or bias-based profiling.

402.6 ADMINISTRATION

Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent racial- or bias-based profiling and submit an overview, including public concerns and complaints, to the Chief of Police.

This report should not contain any identifying information regarding any specific complaint, citizen or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors shall review the annual report and discuss the results with those they are assigned to supervise.

402.7 TRAINING

Training on racial- or bias-based profiling and review of this policy should be conducted as directed by the Personnel and Training Section.

- (a) All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of racial- or bias-based profiling.
- (b) Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.
- (c) Each sworn member of this department who received initial racial- or bias-based profiling training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

~~Racial or Bias-Based Profiling~~ ~~Racial Profiling or Bias-Based Policing~~

402.1 PURPOSE AND SCOPE

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in ~~racial or bias-based profiling~~ racial profiling or bias-based policing or violate any related laws while serving the community.

402.1.1 DEFINITION

Definitions related to this policy include:

~~Racial or bias-based profiling~~ Racial Profiling or Bias-Based Policing - An inappropriate reliance on factors, ~~whether actual or perceived,~~ such as race, ethnicity, national origin, religion, sex, sexual orientation, ~~gender identity,~~ economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding ~~whether and/or how to take law enforcement action or to otherwise provide service of any kind.~~

402.2 POLICY

The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

~~Except as provided for by Section 402.3 of this policy, Race,~~ ethnicity or nationality, religion, sex, sexual orientation, ~~gender identity,~~ economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as ~~the~~ basis for providing differing levels of law enforcement service or the enforcement of the law in determining whether and/or how to take law enforcement action or otherwise provide service of any kind.

402.3 ~~RACIAL OR BIAS-BASED PROFILING~~ RACIAL PROFILING AND BIAS-BASED POLICING PROHIBITED

~~Racial or bias-based profiling~~ Racial profiling and bias-based policing ~~is~~are strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., ~~when a suspect suspect's~~ description is limited to a specific race or group).

402.4 MEMBER RESPONSIBILITY

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of ~~racial or bias-based profiling~~ racial profiling or bias-based policing to a supervisor.

Comment [OIPA1]: When used in addition to the term "Racial Profiling," OIPA feels that the term "Bias-Based Policing" is better suited to a policy that prohibits improper bias of any kind, whether it is race-based or not; it also is better suited to address any kind of law enforcement action, inaction, or other decision that is based on an improper bias, whether that decision involves the act of profiling or not. As noted by the marked edits, OIPA's suggestion is to replace the term "Bias-Based Profiling" globally throughout the policy.

Comment [OIPA2]: It is important to specify that the inappropriate reliance on a perceived characteristic, even if the perception is ultimately determined to be inaccurate, is just as prohibited as the inappropriate reliance on an accurate characteristic.

Comment [OIPA3]: Recognizing that transgender people have been discriminated against in a variety of arenas, OIPA feels it is appropriate to add "gender identity" to this list of factors that are prohibited from being used as the basis for providing differing levels of law enforcement service.

Comment [OIPA4]: OIPA feels that these edits clarify and broaden the definition of Racial Profiling or Bias-Based Policing.

Comment [OIPA5]: In Section 402.3 of this policy, BPD appropriately gives an example of how factors such as race, ethnicity, etc., may appropriately be used by employees in the course of carrying out their law enforcement responsibilities. This edit references that section for the sake of clarity.

Comment [OIPA6]: See Comment #3.

Comment [OIPA7]: OIPA feels that these edits clarify and broaden the prohibition against Racial Profiling and Bias-Based Policing, in part by utilizing the same wording as was used above in the definition section.

Comment [OIPA8]: This is meant merely as clarifying language.

402.4.1 REASON FOR DETENTION

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class.

To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the officer's reasonable suspicion or probable cause for the detention, as applicable.

Nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

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OIPA Policy Recommendation - BPD Policy 402 (Annotated)

Bay Area Rapid Transit Police Department

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~~Racial or Bias-Based Profiling~~ Racial Profiling or Bias-Based Policing

402.4.2 REPORTING TRAFFIC STOPS

Each time an officer makes a traffic stop, the officer shall report any information required in the Traffic Function and Responsibility Policy.

402.5 SUPERVISOR RESPONSIBILITY

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy.

- (a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.
- (b) Supervisors should periodically review MAV recordings, MDC data and any other available resource used to document contact between officers and the public to ensure compliance with the policy.
 1. Supervisors should document these periodic reviews.
 2. Recordings that capture a potential instance of ~~racial or bias based profiling~~ racial profiling or bias-based policing should be appropriately retained for administrative investigation purposes.
- (c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.
- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who witnesses an instance of racial profiling or bias-based policing and discloses information concerning racial or bias-based profiling reports it in accordance with Section 402.4 of this policy.

402.6 ADMINISTRATION

Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent ~~racial or bias based profiling~~ racial profiling and bias-based policing and submit an overview, including public concerns and complaints, to the Chief of Police.

This report should not contain any identifying information regarding any specific complaint, citizen or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors shall review the annual report and discuss the results with those they are assigned to supervise.

402.7 TRAINING

Training on ~~racial or bias based profiling~~ racial profiling and bias-based policing and review of this policy should be conducted as directed by the Personnel and Training Section.

- (a) All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of racial profiling or ~~racial or bias based profiling~~ bias-based policing.
- (b) Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.
- (c) Each sworn member of this department who received initial racial profiling

Comment [OIPA9]: Although no retaliatory action should be condoned against an employee who meets his/her responsibility of reporting bias-based policing to a supervisor, OIPA feels that the potential for disciplinary action (which is viewed by OIPA as separate from retaliation, but might not be viewed as such by BPD employees) should not be precluded against an employee who discloses information about bias-based policing outside the bounds of this policy. In other words, an employee who ultimately provides information about an instance of bias-based policing after initially attempting to "cover up" that instance instead of reporting it to a supervisor as required, should not be immune from potential discipline. This edit seeks to account for such a circumstance, as well as similar ones, by explicitly referring to the reporting requirements contained in Section 402.4.

or ~~racial or bias-based profiling~~ bias-based policing training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

OIPA Policy Recommendation - BPD Policy 402 (Annotated)

Racial Profiling or Bias-Based Policing

402.1 PURPOSE AND SCOPE

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Bay Area Rapid Transit Police Department do not engage in [racial profiling or bias-based policing](#) or violate any related laws while serving the community.

402.1.1 DEFINITION

Definitions related to this policy include:

Racial Profiling or Bias-Based Policing - An inappropriate reliance on factors, [whether actual or perceived](#), such as race, ethnicity, national origin, religion, sex, sexual orientation, [gender identity](#), economic status, age, cultural group, disability or affiliation with any other similar identifiable group as a factor in deciding whether [and/or how](#) to take law enforcement action or [otherwise](#) provide service [of any kind](#).

402.2 POLICY

The Bay Area Rapid Transit Police Department is committed to providing law enforcement services to the community with due regard for the racial, cultural or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group.

[Except as provided for by Section 402.3 of this policy](#), race, ethnicity or nationality, religion, sex, sexual orientation, [gender identity](#), economic status, age, cultural group, disability or affiliation with any other similar identifiable group shall not be used as [a basis in determining whether and/or how to take law enforcement action or otherwise provide service of any kind](#).

402.3 RACIAL PROFILING AND BIAS-BASED POLICING PROHIBITED

[Racial profiling and bias-based policing](#) are strictly prohibited. However, nothing in this policy is intended to prohibit an officer from considering factors such as race or ethnicity in combination with other legitimate factors to establish reasonable suspicion or probable cause (e.g., [when a suspect's](#) description is limited to a specific race or group).

402.4 MEMBER RESPONSIBILITY

Every member of this department shall perform his/her duties in a fair and objective manner and is responsible for promptly reporting any known instances of [racial profiling or bias-based policing](#) to a supervisor.

402.4.1 REASON FOR DETENTION

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class.

To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the

officer's reasonable suspicion or probable cause for the detention, as applicable.

Nothing in this policy shall require any officer to document a contact that would not otherwise require reporting.

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OIPA Policy Recommendation - BPD Policy 402

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Racial Profiling or Bias-Based Policing

402.4.2 REPORTING TRAFFIC STOPS

Each time an officer makes a traffic stop, the officer shall report any information required in the Traffic Function and Responsibility Policy.

402.5 SUPERVISOR RESPONSIBILITY

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy.

- (a) Supervisors should discuss any issues with the involved officer and his/her supervisor in a timely manner.
- (b) Supervisors should periodically review MAV recordings, MDC data and any other available resource used to document contact between officers and the public to ensure compliance with the policy.
 1. Supervisors should document these periodic reviews.
 2. Recordings that capture a potential instance of [racial profiling or bias-based policing](#) should be appropriately retained for administrative investigation purposes.
- (c) Supervisors shall initiate investigations of any actual or alleged violations of this policy.
- (d) Supervisors should ensure that no retaliatory action is taken against any member of this department who [witnesses an instance of racial profiling or bias-based policing and reports it in accordance with Section 402.4 of this policy](#).

402.6 ADMINISTRATION

Each year, the Patrol Bureau Commander shall review the efforts of the Department to prevent [racial profiling and bias-based policing](#) and submit an overview, including public concerns and complaints, to the Chief of Police.

This report should not contain any identifying information regarding any specific complaint, citizen or officers. It should be reviewed by the Chief of Police to identify any changes in training or operations that should be made to improve service.

Supervisors shall review the annual report and discuss the results with those they are assigned to supervise.

402.7 TRAINING

Training on [racial profiling and bias-based policing](#) and review of this policy should be conducted as directed by the Personnel and Training Section.

- (a) All sworn members of this department will be scheduled to attend Peace Officer Standards and Training (POST)-approved training on the subject of [racial profiling or bias-based policing](#).
- (b) Pending participation in such POST-approved training and at all times, all members of this department are encouraged to familiarize themselves with and consider racial and cultural differences among members of this community.
- (c) Each sworn member of this department who received initial [racial profiling or bias-based policing](#) training will thereafter be required to complete an approved refresher course every five years, or sooner if deemed necessary, in order to

keep current with changing racial and cultural trends (Penal Code § 13519.4(i)).

OIPA Policy Recommendation - BPD Policy 402

APPENDIX C

OIPA Policy Recommendation for BPD Policy 309 – Electronic Control Device - TASER

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: BART Police Department, Chief of Police DATE: May 21, 2014

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 309**

Chapter 1-04(G) of the Citizen Oversight Model (Model) states that the Office of the Independent Police Auditor (OIPA) shall develop recommendations concerning General Orders and Directives, procedures, practices, and training of the BART Police Department (BPD), with the goal of improving professionalism, safety, effectiveness, and accountability. In accordance with this section of the Model, OIPA has developed a recommendation with regard to *BPD Policy 309 – Electronic Control Device - TASER*.

Many of the changes we are suggesting primarily involve a reorganization of the current policy in an attempt to maximize clarity and internal consistency. For instance, *Section 309.1 – Purpose and Scope* in the current policy presents a definition of what a Conducted Electrical Weapon (CEW) is, but not a clear purpose for the BPD TASER policy that follows. OIPA suggests moving the definition of CEW into *Section 309.1.1 – Definitions*. As another example, *Section 309.2(j)* in the current policy addresses an equipment question that is related to Department issued Oleoresin Capsicum, which has its own section devoted to it in a separate BPD policy. As this language appears to be superfluous with regard to *Policy 309*, we suggest removing it.

In addition to these types of recommendations, OIPA has also included a couple more substantive ones. One example concerns *Section 309.1 – Purpose and Scope*, which was previously mentioned. OIPA feels that it is indeed a good idea to set out a clear purpose and scope for this policy, so we crafted one to be used in that section. The primary substantive policy suggestion, however, is being made with regard to *Section 309.4 – Use of the TASER*. This section focuses on when an officer is/is not authorized to activate a TASER.

OIPA felt that this crucial section had some language that could potentially be confusing to both officers and members of the public. For example, one part of this section in the current policy indicates that a suspect must pose an “immediate threat” to an officer or a member of the public before the TASER may be activated. However, another part of the same section indicates that the TASER may be activated to subdue a subject who is merely “potentially... physically resisting” an officer (and not necessarily actually physically resisting), which seems to be a contrast with a subject who poses an immediate threat.

Although this portion of the policy does appropriately address the many considerations that factor into the appropriateness of a TASER activation by an officer, OIPA feels that it can be made clearer and, therefore, stronger. OIPA recommends starting this section by clearly stating the legal standard for what constitutes an acceptable use of force by a police officer. Then, subject to that standard, OIPA listed what it believes are illustrative examples of situations in which the activation of a TASER would/would not generally be appropriate. Our recommendations for this section were heavily influenced by the content and structure of the Model Policy on Electronic Control Weapons published by the International Association of Chiefs of Police.

In hopes of not introducing any new confusion or lack of clarity to *BPD Policy 309*, OIPA left intact as much of the original policy's language and formatting as possible in sections that were not directly affected by our recommendations. Additionally, OIPA presented a draft of its recommendations to the BART Citizen Review Board (CRB) at its meeting on May 12, 2014 for their review and comment. Taking those comments into account, OIPA has now finalized its recommendation.

Following is an unmarked copy of Policy 309, as issued; an annotated copy of Policy 309 that incorporates the suggestions being made by OIPA and includes commentary on the most notable ones; and a version of Policy 309 that is marked to show all of the edits being recommended.



Mark P. Smith
BART Independent Police Auditor

Electronic Control Device - TASER

309.1 PURPOSE AND SCOPE

The Conducted Electrical Weapon (CEW) is a less lethal device which is intended to temporarily incapacitate or stun a violent or potentially violent individual without causing serious injury. It is anticipated that the appropriate use of such a device will result in fewer serious injuries to officers and suspects.

309.1.1 DEFINITIONS

Verbal Warning Reference - Any verbal notification to a subject(s) that an officer will activate a CEW.

Deployment - Removal of the CEW from the holster, regardless of where the CEW is held or pointed.

Activation - Depressing the trigger of the CEW causing an arc or firing the probes.

(For report writing purposes and supervisory response, exceptions to activation reporting are Department training and spark and maintenance tests).

309.2 POLICY

The only CEW authorized and issued by this Department is the TASER® X26. All sworn personnel shall receive Department-approved training and may be issued a TASER for use during their current assignment.

- (a) A TASER shall be assigned and carried (i.e., worn on the person, as described at the end of this Section) as a part of a uniformed officer's and sergeant's equipment, in a holster that is designed to fit the TASER® X26. Employees must request and have the approval of the Chief, or his designee, to *not* carry the TASER as part of their uniform equipment. Non-uniformed officers may secure the TASER in the driver's compartment of their Department vehicle.
- (b) All TASERS shall be clearly and distinctly marked with factory yellow X26 markings on the sides to differentiate them from the duty weapon and any other device.
- (c) Officers should carry a total of two or more TASER cartridges on their person when carrying the TASER. Only Department issued cartridges are authorized.
- (d) Officers shall be responsible for ensuring that their assigned TASER is properly maintained and in good working order at all times. Whenever an assigned TASER is damaged or inoperable, the officer shall immediately notify his/her supervisor and document the specific damage or inoperability issue in a memo sent via the chain of command to the Support Services Deputy Chief. The notified supervisor shall make an effort to have a reserve TASER assigned to the officer during that shift. Reserve TASERS shall be located in the Watch Commander's cabinet at LMA. The supervisor shall document the damaged TASER's serial number and the assigned officer's name and badge number in an email to the Support Services Lieutenant to facilitate the equipment repair.
- (e) TASERS shall not be altered from the original factory specifications and markings.
- (f) Officers should not hold both a firearm and the TASER at the same time unless lethal force is justified.

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Electronic Control Device - TASER

- (g) Officers who locate a broken cartridge or have an unintentional discharge shall forward the cartridge to a Department TASER armorer. It should be loosely packaged and sealed in a brown evidence bag.
- (h) TASERS with a battery life of 20% or less shall be removed from service. These TASERS should be forwarded to the Support Services Lieutenant for battery replacement.
- (i) The Support Services Lieutenant will ensure that TASER armorers conduct annual TASER memory downloads for all TASERS.
- (j) Due to the flammable contents in some chemical agent containers, officers shall only carry Department issued Oleoresin Capsicum (OC), which is water based and will not ignite.

There are two authorized ways for officers to carry the TASER:

- In a holster, opposite side from the duty weapon with no portion of the TASER crossing the mid-line of the officer's belt when it is holstered. When carried in this manner, the officer shall use a support-hand draw only.
- In a drop leg holster, worn on the support hand side only (opposite the duty weapon). When carried in this manner, the officer shall use a support-hand draw only.

309.3 VERBAL AND VISUAL WARNINGS

Unless it would otherwise endanger officer safety or is impractical due to circumstances, a verbal announcement of the intended use of the TASER shall precede its application in order to:

- (a) Provide the individual with a reasonable opportunity to voluntarily comply
- (b) Provide other officers and individuals with warning that a TASER may be activated

If after a verbal warning an individual continues to express an unwillingness to voluntarily comply with an officer's lawful orders, and it appears both reasonable and practical under the circumstances, the officer may, but is not required to, display the electrical arc (provided there is not a cartridge loaded into the TASER) or laser in a further attempt to gain compliance prior to the application of the TASER. The aiming laser should never be intentionally directed into the eyes of another as it may permanently impair his/her vision.

The fact that a verbal and/or other warning was given, or reasons a warning was not given, shall be documented in any related reports.

309.4 USE OF THE TASER

It is essential that officers exercise sound discretion and consider the totality of the circumstances surrounding any incident where the TASER may be activated. Objective facts must indicate the suspect poses an immediate threat to the officer or a member of the public.

As with any law enforcement equipment, the TASER has limitations and restrictions requiring consideration before its use. The TASER should only be used when its operator can safely approach the subject within the operational range of the TASER. Although the TASER rarely fails and is generally effective in subduing most individuals, officers should be aware of this potential and be prepared with other options in the unlikely event of such a failure.

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Every application of the TASER becomes a separate use of force and must be justified by the officer. In instances where a warning is provided prior to the use of the TASER, the subject must be given reasonable time to comply.

If, after a single application of the TASER, an officer is still unable to gain compliance from an individual and circumstances allow, the officer should consider:

- Whether or not the probes are making proper contact
- If use of the TASER is limiting the ability of the individual to comply
- If other options or tactics may be more appropriate

This, however, shall not preclude an officer from multiple, reasonable applications of the TASER on an individual. When probes are in contact with the individual or when drive stun mode is in contact with the individual, no more than three activations should be administered on the same individual. The TASER should not be intentionally activated at the subject's head, neck, chest, or groin.

Authorized personnel may use the TASER when circumstances known to the individual officer at the time indicate that the application of the TASER is reasonable to subdue or control:

- (a) A violent or physically resisting subject.
- (b) A potentially violent or physically resisting subject, if:
 1. The subject has verbally or physically demonstrated an intention to resist; and
 2. The officer is able to justify that the use is based upon an objectively reasonable belief that a suspect poses an immediate threat to the officer or others; and
 3. The officer has given the subject a verbal warning of the intended use of the TASER followed by a reasonable opportunity to voluntarily comply; and
 4. Other available options reasonably appear ineffective or would present a greater danger to the officer or subject.
- (c) A vicious animal that appears to present a danger to the officer or the public.

Although not absolutely prohibited officers should avoid, absent extenuating circumstances, applying the TASER to any of the following individuals:

- (a) Pregnant females
- (b) Elderly individuals, obvious juveniles, or the visibly frail
- (c) Individuals who have been recently sprayed with alcohol-based pepper spray or potentially flammable chemical agents, or who are otherwise in close proximity to any combustible material
- (d) Individuals whose position or activity may result in collateral injury (e.g., falls from height, operating vehicles)
- (e) Handcuffed persons, unless they pose an immediate threat of great bodily injury to themselves or others
- (f) Fleeing subjects (fleeing should not be the sole justification for activating a TASER against a subject; personnel should consider the severity of the offense, the subject's threat level to others, and the risk of serious injury to the subject before deciding to use a TASER on a fleeing subject)

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- (g) Subjects who are simply non-compliant or who are in control of a vehicle in motion (including automobiles, motorcycles and bicycles).
- (h) Individuals suspected of being under the influence of drugs/alcohol or exhibiting symptoms of excited delirium (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or imperviousness to pain). These subjects may be more susceptible to collateral problems and should be closely monitored (e.g., breathing pattern) following the application of the TASER until they can be examined by paramedics or other medical personnel.

Personnel should evaluate whether the use of the TASER is reasonable, based upon all circumstances (including those listed above); if the TASER is used, the officer will be required to justify why the level of resistance or threat necessitated its use (e.g., potential for violence, nature of crime, proximity of weapons, etc.). In some cases, other control techniques may be more appropriate as determined by the subject's degree of resistance and/or threat level to others.

Because the application of the TASER in the drive stun mode (i.e., direct contact without darts) relies primarily on pain compliance and requires close proximity to the subject, the controlling effects may be limited. Additional caution should be exercised.

When the probes are in contact with a person, no more than one officer should intentionally activate a TASER against that person.

The TASER shall not be used:

- To torture, psychologically torment, or inflict undue pain on any individual
- As a prod or escort device
- To rouse unconscious, impaired, or intoxicated individuals

309.4.1 FACTORS TO DETERMINE REASONABLENESS OF FORCE

The application of the TASER is likely to cause intense, momentary pain. As such, officers should carefully consider and balance the totality of circumstances available prior to using the TASER including, but not limited to, the following factors:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time)
- (b) Officer/subject factors (i.e., age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects)
- (c) Influence of drugs/alcohol (mental capacity)
- (d) Proximity of weapons
- (e) The degree to which the subject has been effectively restrained and his/her ability to resist, despite being restrained
- (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances)
- (g) Seriousness of the suspected offense or the reason for contact with the individual
- (h) Training and experience of the officer
- (i) Potential for injury to citizens, officers, and suspects
- (j) Risk of escape
- (k) Other exigent circumstances

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309.4.2 REPORT OF USE

It is essential that officers exercise sound discretion and carefully articulate the totality of the circumstances giving rise to every TASER application. Verbal warnings, deployments, and TASER activations shall be documented in the related crime report. The TASER tab in the MO data entry section of the report writing program shall be utilized to document the type of usage (verbal, deployment, or activation). The incident shall be thoroughly documented in the narrative of the police report.

When the TASER is activated the police report should include the following:

- (a) Details of the subject's level of aggression justifying activation
- (b) Number and approximate duration of cycle(s)
- (c) Point of impact of the probes and/or drive stun mode on a subject
- (d) Response and actions of the subject after activation
- (e) Number of officers on scene
- (f) Names of individuals who provided medical care on scene and the names of medical personnel who removed the probes
- (g) Serial numbers of the TASER and cartridge
- (h) Photographic evidence, to include the subject prior to and after probe removal, the drive stun contact point, and any injuries incurred by the subject or officer as result of the incident
- (i) Name of the person receiving custody of the subject and advised of the TASER activation on the subject

Supplemental reports shall be completed by personnel who are present during an activation.

A TASER armorer shall download the on-board TASER memory and save it with the related crime report; the on-scene supervisor is responsible for assigning this task. TASERs will not be taken out of service after an activation unless directed by a command-level officer.

309.4.3 SUPERVISORY RESPONSIBILITY

A supervisor shall respond to the scene of any CEW activation including negligent or unintentional activations. The supervisor shall confirm (with the officer) that any probes that have pierced a subject's skin are removed by medical personnel and that the subject is medically cleared, as outlined in Section 309.5, prior to being booked into a detention facility. The supervisor will confirm that all evidence (including the CEW's memory record) has been collected, review and approve the related crime reports, and provide a replacement CEW cartridge(s) as necessary.

Upon reviewing the report, the supervisor must make a copy for review by the officer's chain of command and complete a Supervisor's Use of Force Report. The reviewing supervisor must review the use of the CEW and make a recommendation on whether the use of the CEW was justified or not. A copy of the approved police report and completed Use of Force Report will be forwarded to the Chief of Police via the chain of command. The incident will be reviewed in accordance with Policies 300 and 301.

Justifiable: When the circumstances, at the time of using the CEW, were consistent with the provisions of this Policy, the use of the device shall be classified as justifiable.

Unjustifiable: When the circumstances, at the time of using the CEW, were not consistent with the provisions of this Policy, the use of the device shall be classified as unjustifiable.

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The Professional Standards and Training Division Deputy Chief will forward the police report and Use of Force Report to the Chief of Police for review. The Chief of Police will forward the report and signed Use of Force Report to the Internal Affairs Section who will log the report and send it and the Supervisor's Use of Force report to the Use of Force Review Committee Chairperson.

Negligent or unintentional activations of a CEW cartridge shall be reported immediately to a supervisor. The incident shall not be documented as a use of force. The incident shall be documented in a memo, via the chain of command to the Division Deputy Chief to which the employee reports. This memo will include the CEW and cartridge serial numbers and an explanation of the circumstances surrounding the activations. Officers responsible for accidental, unintentional or unjustifiable discharges shall be subject to progressive discipline. Negligent activations shall be included in the Departments Early Intervention system.

309.5 MEDICAL TREATMENT

Only qualified medical personnel, including certified paramedics, should remove TASER darts from a person's body. Used TASER darts shall be considered a sharp biohazard, similar to a used hypodermic needle. Universal precautions should be taken accordingly.

All detained or arrested persons who have been struck by TASER darts or who have been subjected to the electric discharge of the device shall be transported, by medical personnel, for medical assessment at a local medical facility as soon as practicable.

Special consideration (including enhanced observation and a Code 3 medical response) should be provided to individuals who fall under any of the following categories:

- (a) The person is suspected of being under the influence of a controlled substance(s) and/or alcohol
- (b) The person may be pregnant
- (c) The person reasonably appears to be in need of medical attention
- (d) The TASER darts are lodged in a sensitive area (e.g., groin, female breast, near the eyes)
- (e) The person requests medical treatment

In addition, persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond physical characteristics, imperviousness to pain, or who require a protracted physical encounter with multiple officers to bring them under control, may be at an increased risk of sudden death and should be examined by qualified medical personnel as soon as practicable (a Code 3 medical response). All individuals shall be medically cleared, prior to booking.

If any person subjected to an unintentional application refuses medical attention, such a refusal should, absent extenuating circumstances, be witnessed by medical personnel and shall be fully documented in related reports. If an audio recording is made of the contact or interview with the individual, any refusal should be included.

The transporting officer shall inform any person receiving custody or any person placed in a position of providing care that the individual has been subjected to the application of the TASER.

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309.6 TRAINING

In addition to the initial Department approved training required to carry and use a TASER, annual training will be provided to all sworn personnel. A reassessment of an officer's knowledge and/or practical skills may be required at any time if deemed appropriate.

A certified TASER instructor should ensure that TASER training material and lesson plans include the following:

- (a) A review of this Policy
- (b) A review of the Use of Force Policy 300
- (c) Target area considerations, to include techniques or options to reduce the intentional application of probes near the head, neck, chest, and groin
- (d) De-escalation techniques
- (e) Scenario-based training

309.6.1 TASER INSTRUCTOR TRAINING

The below, listed training is from the Department's Training Plan and is either mandatory, essential, or desirable (the Training Plan is located within the G:/drive, Training Unit folder):

- Mandatory TASER training - Basic instructor course
- Desirable TASER training - TASER armorer certification course, advanced instructor course

309.6.2 REMEDIAL TRAINING

Any employee who acts in a grossly unsafe manner or demonstrates dangerous and/or extremely poor decision-making skills in the deployment of and/or application of any use-of-force related task (in the field or in training) shall be required to attend mandatory remedial training prior to returning to full-duty status.

If, in the opinion of the supervisor/primary instructor at the site of the training, the employee's decision making and actions are so unsafe that if returned to full duty he/she may be a safety hazard to him or herself, fellow employees, and/or the public, the supervisor/primary instructor shall recommend additional mandatory remedial training for the employee. The primary instructor shall contact the on-duty Watch Commander as soon as practicable and make the recommendation for additional mandatory remedial training.

If the request for additional training is approved, the employee shall be removed from an on-duty patrol status and placed into a temporary administrative position until such time as that employee satisfactorily completes the mandatory remedial training.

Repeated failures to correct such deficiencies may result in implementation of the Progressive Discipline System, similar to Policy Section 461.5.1. Nothing in this Policy precludes the Department from requiring an employee to successfully complete remedial training to correct lesser safety violations and/or marginal tactical decision-making skills, without the employee first being removed from full-duty status.

309.7 TASER® X26 NOMENCLATURE

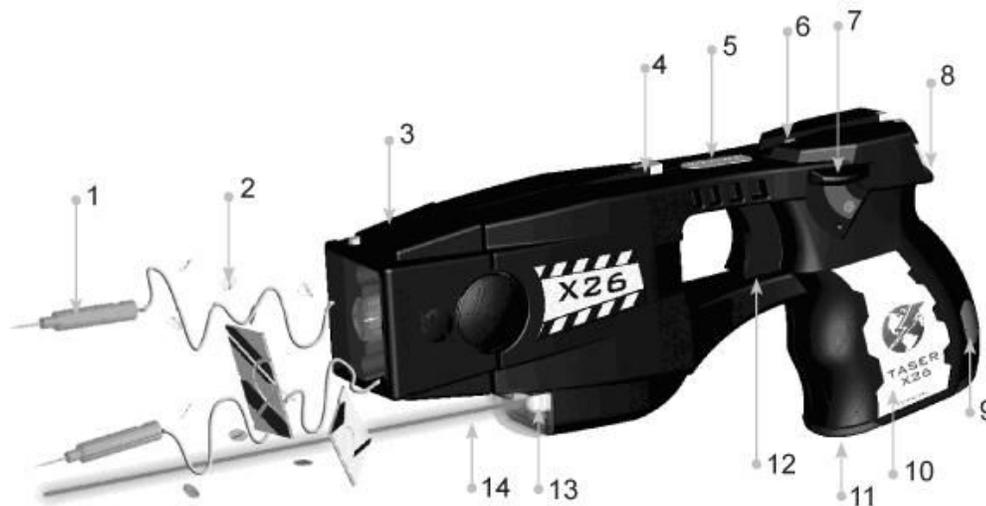
- 1 - Probes
- 2 - AFID Tags
- 3 - TASER Cartridge

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- 4 - Mechanical Sight
- 5 - Serial Number Plate
- 6 - Illumination Selector Switch
- 7 - Safety Switch
- 8 - Central Information Display (CID)
- 9 - DPM Release Button
- 10 - Stainless Steel Shock Plate
- 11 - Digital Power Magazine (DPM)
- 12 - Trigger
- 13 - Low Intensity Lights (LIL)
- 14 - Built-in Laser (pointing to beam)



Conducted Electrical Weapon (TASER)

309.1 PURPOSE AND SCOPE

The purpose of this policy is to provide direction on what constitutes the appropriate and authorized use of conducted electrical weapons.

309.2 DEFINITIONS

Conducted Electrical Weapon (CEW) - a device that uses electricity to temporarily incapacitate, stun, or apply pain to an individual in order to overcome resistance.

Verbal Warning - A verbal notification to a subject and/or nearby officers that an officer will activate a CEW.

Deployment - Removal of the CEW from the holster, regardless of where the CEW is held or pointed.

Activation - Depressing the trigger of the CEW causing an arc of electricity and/or the firing of the probes.

(For report writing purposes and supervisory response, exceptions to activation reporting are Department training and spark and maintenance tests).

309.3 EQUIPMENT

The only CEW authorized and issued by this Department is the TASER® X26. All sworn personnel shall receive Department-approved training and may be issued a TASER for use during their current assignment. No officer is authorized to deploy or activate a TASER prior to receiving Department-approved training.

- (a) A TASER shall be assigned and carried (i.e., worn on the person, as described at the end of this Section) as a part of each uniformed officer's and sergeant's equipment, in a holster that is designed to fit the TASER® X26. Employees must request and have the approval of the Chief, or his designee, to *not* carry the TASER as part of their uniform equipment. Non-uniformed officers may secure the TASER in the driver's compartment of their Department vehicle.
- (b) All TASERs shall be clearly and distinctly marked with factory yellow X26 markings on the sides to differentiate them from the duty weapon and any other device.
- (c) Officers should carry a total of two or more TASER cartridges on their person when carrying the TASER. Only Department issued cartridges are authorized.
- (d) Officers shall be responsible for ensuring that their assigned TASER is properly maintained and in good working order at all times. Whenever an assigned TASER is damaged or inoperable, the officer shall immediately notify his/her supervisor and document the specific damage or inoperability issue in a memo sent via the chain of command to the Support Services Deputy Chief. The notified supervisor shall make an effort to have a reserve TASER assigned to the officer during that shift. Reserve TASERs shall be located in the Watch Commander's cabinet at LMA. The supervisor shall document the damaged TASER's serial number and the assigned officer's name and badge number in an email to the Support Services Lieutenant to facilitate the equipment repair.

Comment [OIPA1]: This title reflects the definition used elsewhere in this policy, and it also reflects the term of art presently in use by TASER, Inc., which is the only Conducted Electrical Weapon authorized for use by the BART Police Department.

Comment [OIPA2]: This section has been modified to provide a clear purpose to the policy, as opposed to a definition of Conducted Electrical Weapon (which has instead been moved to the subsequent section).

Comment [OIPA3]: This section, which focuses on authorized equipment, malfunctioning equipment, and carrying of equipment, has been renamed and modified for internal consistency.

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- (e) TASERS shall not be altered from the original factory specifications and markings.
- (f) Officers who locate a broken cartridge or have an unintentional discharge shall forward the cartridge to a Department TASER armorer. It should be loosely packaged and sealed in a brown evidence bag.
- (g) TASERS with a battery life of 20% or less shall be removed from service. These TASERS should be forwarded to the Support Services Lieutenant for battery replacement.
- (h) The Support Services Lieutenant will ensure that TASER armorers conduct annual TASER memory downloads for all TASERS.

There are two authorized ways for officers to carry the TASER:

- In a holster, opposite side from the duty weapon with no portion of the TASER crossing the mid-line of the officer's belt when it is holstered. When carried in this manner, the officer shall use a support-hand draw only.
- In a drop leg holster, worn on the support hand side only (opposite the duty weapon). When carried in this manner, the officer shall use a support-hand draw only.

309.4 USE OF THE TASER

It is the policy of this Department that an officer shall use only that amount of force which is objectively reasonable in light of the facts and circumstances confronting the officer at the time of the event giving rise to the use of force. Activation of the TASER is, at all times, subject to this standard. Each individual activation of the TASER, even during the same incident, becomes a separate use of force and must be objectively reasonable. In some cases, other control techniques may be more appropriate as determined by the subject's degree of resistance and/or threat level to others.

Subject to the objective reasonableness standard, an officer generally may activate the TASER when grounds to arrest or detain are present, and the subject:

- Uses force or attempts to use force against the officer or another person
- Physically resists the arrest or detention or demonstrates an intention to physically resist (such as the assumption of a fighting stance)
- Refuses to comply with verbal orders without any physical resistance or demonstrated intention to physically resist, but is believed to be armed
- Flees in order to evade arrest or detention and presents an imminent or immediate threat to the officer or other individuals

Officers may also generally activate the TASER to subdue a vicious animal that presents a danger to the officer or other individuals.

Similarly subject to the objective reasonableness standard, an officer generally may not activate the TASER when the subject:

- Refuses to comply with verbal orders without any physical resistance or demonstrated intention to physically resist, and is not believed to be armed
- Flees in order to evade arrest or detention but does not present an imminent or immediate threat to the officer or other individuals

Comment [OIPA4]: This section contains the primary substantive recommendations for change to the policy. In an attempt to minimize confusion regarding the recommended changes to the policy, OIPA attempted to retain language from the original policy wherever possible (including when that language is moved from one part of the policy to another).

OIPA feels it is important to clearly identify the legal standard for what constitutes acceptable force by a police officer, and we did so in the first sentence of this section. References to this paramount legal standard are repeated throughout this section.

Within that legal standard, OIPA next presents some likely scenarios in which the use of a TASER would generally be appropriate; this is followed by examples of when the use of a TASER would generally be inappropriate. OIPA feels that these examples provide increased clarity for officers when compared with the original policy's categorization of a potentially violent or physically resisting subject, upon whom a TASER may be used only if each of 4 additional conditions regarding the subject have been met, according to the involved officer. On a separate note, the recommended language also brings the policy more in line with the Model Policy on Electronic Control Weapons adopted by the International Association of Chiefs of Police National Law Enforcement Policy Center.

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Although not absolutely prohibited, officers should avoid, absent extenuating circumstances, applying the TASER to any of the following individuals:

- (a) Pregnant females
- (b) Elderly individuals, obvious juveniles, or the visibly frail
- (c) Individuals who have been recently sprayed with alcohol-based pepper spray or potentially flammable chemical agents, or who are otherwise in close proximity to any combustible material
- (d) Individuals whose position or activity may result in collateral injury (e.g., falls from height, operating vehicles)
- (e) Handcuffed persons, unless they pose an immediate threat of great bodily injury to themselves or others
- (f) Subjects who are in control of a vehicle in motion (including automobiles, motorcycles and bicycles).
- (g) Individuals suspected of being under the influence of drugs/alcohol or exhibiting symptoms of excited delirium (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or imperviousness to pain). These subjects may be more susceptible to collateral problems and should be closely monitored (e.g., breathing pattern) following the application of the TASER until they can be examined by paramedics or other medical personnel.

Officers should not hold both a firearm and the TASER at the same time unless lethal force is justified. The TASER shall never be used:

- (a) To torture, psychologically torment, or inflict undue pain on any individual
- (b) As a prod or escort device
- (c) To rouse unconscious, impaired, or intoxicated individuals

In addition to the specific circumstances listed above, all evaluations of a use of force subject to the objective reasonableness standard may take into account a number of factors including, but not limited to:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time)
 - (b) Officer/subject factors (i.e., age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects)
 - (c) Influence of drugs/alcohol (mental capacity)
 - (d) Proximity of weapons
 - (e) The degree to which the subject has been effectively restrained and his/her ability to resist, despite being restrained
 - (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances)
 - (g) Seriousness of the suspected offense or the reason for contact with the individual
 - (h) Training and experience of the officer
 - (i) Potential for injury to citizens, officers, and suspects
 - (j) Risk of escape
 - (k) Other exigent circumstances
-

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309.4.1 **ADDITIONAL CONSIDERATIONS**

As with any law enforcement equipment, the TASER has limitations and restrictions requiring consideration before its use. The TASER should only be used when its operator can safely approach the subject within the operational range of the TASER. Officers should be aware of the potential that a TASER will fail to subdue an individual, and they should be prepared with other options in the event of such a failure.

If, after a single application of the TASER, an officer is still unable to gain compliance from an individual and circumstances allow, the officer should consider:

- (a) Whether or not the probes are making proper contact
- (b) Whether use of the TASER is limiting the ability of the individual to comply
- (c) Whether other options or tactics may be more appropriate

This, however, shall not preclude an officer from multiple, reasonable applications of the TASER on an individual. When probes are in contact with the individual or when drive stun mode is in contact with the individual, no more than three activations should be administered on the same individual. The TASER should not be intentionally activated at the subject's head, neck, chest, or groin.

Because the application of the TASER in the drive stun mode (i.e., direct contact without darts) relies primarily on pain compliance and requires close proximity to the subject, the controlling effects may be limited. Additional caution should be exercised.

When the probes are in contact with a person, no more than one officer should intentionally activate a TASER against that person.

309.5 **VERBAL AND VISUAL WARNINGS**

Unless it would otherwise endanger officer safety or is impractical due to circumstances, a verbal warning of the intended use of the TASER shall precede its application in order to:

- (a) Provide the individual with a reasonable opportunity to voluntarily comply
- (b) Provide other officers and individuals with warning that a TASER may be activated

In instances where a verbal warning is provided prior to the use of the TASER, the subject must be given reasonable time to comply.

If after a verbal warning an individual continues to express an unwillingness to voluntarily comply with an officer's lawful orders, and it appears both reasonable and practical under the circumstances, the officer may, but is not required to, display the electrical arc (provided there is not a cartridge loaded into the TASER) or built-in laser in a further attempt to gain compliance prior to the application of the TASER. The laser should never be intentionally directed into the eyes of another as it may permanently impair his/her vision.

The fact that a verbal and/or other warning was given, or reasons a warning was not given, shall be documented in any related reports.

Comment [OIPA5]: OIPA retained most of the language that follows here from the original policy. As the language deals primarily with important considerations once a TASER has already been activated, however, OIPA separated into its own subsection within the larger "Use of the Taser" section.

Comment [OIPA6]: OIPA moved this language from another portion of the original policy into the section called "Verbal and Visual Warnings" for the sake of consistency.

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309.6 REPORT OF TASER USE

It is essential that officers exercise sound discretion and carefully articulate the totality of the circumstances giving rise to every TASER application. Verbal warnings, deployments, and TASER activations shall be documented in the related crime report. The TASER tab in the MO data entry section of the report writing program shall be utilized to document the type of usage (verbal, deployment, or activation). The incident shall be thoroughly documented in the narrative of the police report.

Comment [OIPA7]: The remainder of the policy does not contain any substantive recommendations for change. All remaining changes from the original policy are cosmetic in nature, such as renumbering for the sake of consistency.

When the TASER is activated the police report should include the following:

- (a) Details of the subject's level of aggression justifying activation
- (b) Number and approximate duration of cycle(s)
- (c) Point of impact of the probes and/or drive stun mode on a subject
- (d) Response and actions of the subject after activation
- (e) Number of officers on scene
- (f) Names of individuals who provided medical care on scene and the names of medical personnel who removed the probes
- (g) Serial numbers of the TASER and cartridge
- (h) Photographic evidence, to include the subject prior to and after probe removal, the drive stun contact point, and any injuries incurred by the subject or officer as result of the incident
- (i) Name of the person receiving custody of the subject and advised of the TASER activation on the subject

Supplemental reports shall be completed by personnel who are present during a TASER activation.

A TASER armorer shall download the on-board TASER memory and save it with the related crime report; the on-scene supervisor is responsible for assigning this task. TASERS will not be taken out of service after an activation unless directed by a command-level officer.

309.7 SUPERVISORY RESPONSIBILITY

A supervisor shall respond to the scene of any TASER activation including negligent or unintentional activations. The supervisor shall confirm (with the officer) that any probes that have pierced a subject's skin are removed by medical personnel and that the subject is medically cleared, as outlined in Section 309.8, prior to being booked into a detention facility. The supervisor will confirm that all evidence (including the TASER's memory record) has been collected, review and approve the related crime reports, and provide a replacement TASER cartridge(s) as necessary.

Upon reviewing the report, the supervisor must make a copy for review by the officer's chain of command and complete a Supervisor's Use of Force Report. The reviewing supervisor must review the use of the TASER and make a recommendation on whether the use of the TASER was justified or not. A copy of the approved police report and completed Use of Force Report will be forwarded to the Chief of Police via the chain of command. The incident will be reviewed in accordance with Policies 300 and 301.

Justifiable: When the circumstances, at the time of using the TASER, were consistent with the provisions of this Policy, the use of the device shall be classified as justifiable.

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Unjustifiable: When the circumstances, at the time of using the TASER, were not consistent with the provisions of this Policy, the use of the device shall be classified as unjustifiable.

The Professional Standards and Training Division Deputy Chief will forward the police report and Use of Force Report to the Chief of Police for review. The Chief of Police will forward the report and signed Use of Force Report to the Internal Affairs Section who will log the report and send it and the Supervisor's Use of Force report to the Use of Force Review Committee Chairperson.

Negligent or unintentional activations of a TASER cartridge shall be reported immediately to a supervisor. The incident shall not be documented as a use of force. The incident shall be documented in a memo, via the chain of command to the Division Deputy Chief to which the employee reports. This memo will include the TASER and cartridge serial numbers and an explanation of the circumstances surrounding the activations. Officers responsible for accidental, unintentional or unjustifiable discharges shall be subject to progressive discipline. Negligent activations shall be included in the Department's Early Intervention system.

309.8 MEDICAL TREATMENT

Only qualified medical personnel, including certified paramedics, should remove TASER darts from a person's body. Used TASER darts shall be considered a sharp biohazard, similar to a used hypodermic needle. Universal precautions should be taken accordingly.

All detained or arrested persons who have been struck by TASER darts or who have been subjected to the electric discharge of the device shall be transported, by medical personnel, for medical assessment at a local medical facility as soon as practicable.

Special consideration (including enhanced observation and a Code 3 medical response) should be provided to individuals who fall under any of the following categories:

- (a) The person is suspected of being under the influence of a controlled substance(s) and/or alcohol
- (b) The person may be pregnant
- (c) The person reasonably appears to be in need of medical attention
- (d) The TASER darts are lodged in a sensitive area (e.g., groin, female breast, near the eyes)
- (e) The person requests medical treatment

In addition, persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond physical characteristics, imperviousness to pain, or who require a protracted physical encounter with multiple officers to bring them under control, may be at an increased risk of sudden death and should be examined by qualified medical personnel as soon as practicable (a Code 3 medical response). All individuals shall be medically cleared, prior to booking.

If any person subjected to an unintentional application refuses medical attention, such a refusal should, absent extenuating circumstances, be witnessed by medical personnel and shall be fully documented in related reports. If an audio recording is made of the contact or interview with the individual, any refusal should be included.

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The transporting officer shall inform any person receiving custody or any person placed in a position of providing care that the individual has been subjected to the application of the TASER.

309.9 TRAINING

In addition to the initial Department approved training required to carry and use a TASER, annual training will be provided to all sworn personnel. A reassessment of an officer's knowledge and/or practical skills may be required at any time if deemed appropriate.

A certified TASER instructor should ensure that TASER training material and lesson plans include the following:

- (a) A review of this Policy
- (b) A review of the Use of Force Policy 300
- (c) Target area considerations, to include techniques or options to reduce the intentional application of probes near the head, neck, chest, and groin
- (d) De-escalation techniques
- (e) Scenario-based training

309.9.1 TASER INSTRUCTOR TRAINING

The below, listed training is from the Department's Training Plan and is either mandatory, essential, or desirable (the Training Plan is located within the G-drive, Training Unit folder):

- Mandatory TASER training - Basic instructor course
- Desirable TASER training - TASER armorer certification course, advanced instructor course

309.9.2 REMEDIAL TRAINING

Any employee who acts in a grossly unsafe manner or demonstrates dangerous and/or extremely poor decision-making skills in the deployment of and/or application of any use-of-force related task (in the field or in training) shall be required to attend mandatory remedial training prior to returning to full-duty status.

If, in the opinion of the supervisor/primary instructor at the site of the training, the employee's decision making and actions are so unsafe that if returned to full duty he/she may be a safety hazard to him or herself, fellow employees, and/or the public, the supervisor/primary instructor shall recommend additional mandatory remedial training for the employee. The primary instructor shall contact the on-duty Watch Commander as soon as practicable and make the recommendation for additional mandatory remedial training.

If the request for additional training is approved, the employee shall be removed from an on-duty patrol status and placed into a temporary administrative position until such time as that employee satisfactorily completes the mandatory remedial training.

Repeated failures to correct such deficiencies may result in implementation of the Progressive Discipline System, similar to Policy Section 461.5.1. Nothing in this Policy precludes the Department from requiring an employee to successfully complete remedial training to correct lesser safety violations and/or marginal tactical decision-making skills, without the employee first being removed from full-duty status.

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309.10 TASER® X26 NOMENCLATURE

- 1 - Probes
- 2 - AFID Tags
- 3 - TASER Cartridge
- 4 - Mechanical Sight
- 5 - Serial Number Plate
- 6 - Illumination Selector Switch
- 7 - Safety Switch
- 8 - Central Information Display (CID)
- 9 - DPM Release Button
- 10 - Stainless Steel Shock Plate
- 11 - Digital Power Magazine (DPM)
- 12 - Trigger
- 13 - Low Intensity Lights (LIL)
- 14 - Built-in Laser (pointing to beam)



~~Electronic Control Device Conducted Electrical Weapon (TASERe - TASER)~~

309.1 PURPOSE AND SCOPE

~~The Conducted Electrical Weapon (CEW) is~~ The purpose of this policy is to provide direction on what constitutes the appropriate and authorized use of conducted electrical weapons. ~~a less lethal device which is intended to temporarily incapacitate or stun a violent or potentially violent individual without causing serious injury. It is anticipated that the appropriate use of such a device will result in fewer serious injuries to officers and suspects.~~

309.4.12 DEFINITIONS

Conducted Electrical Weapon (CEW) - a device that uses electricity to temporarily incapacitate, stun, or apply pain to an individual in order to overcome resistance.

Verbal Warning Reference - ~~Any~~ verbal notification to a subject(s) and/or nearby officers ~~that an officer will activate a CEW.~~

Deployment - Removal of the CEW from the holster, regardless of where the CEW is held or pointed.

Activation - Depressing the trigger of the CEW causing an arc of electricity and/or the firing of the probes.

(For report writing purposes and supervisory response, exceptions to activation reporting are Department training and spark and maintenance tests).

309.2309.3 POLICY EQUIPMENT

The only CEW authorized and issued by this Department is the TASER® X26. All sworn personnel shall receive Department-approved training and may be issued a TASER for use during their current assignment. ~~No officer is authorized to deploy or activate a TASER prior to receiving Department-approved training.~~

- (a) A TASER shall be assigned and carried (i.e., worn on the person, as described at the end of this Section) as a part of ~~each~~ uniformed officer's and sergeant's equipment, in a holster that is designed to fit the TASER® X26. Employees must request and have the approval of the Chief, or his designee, to *not* carry the TASER as part of their uniform equipment. Non-uniformed officers may secure the TASER in the driver's compartment of their Department vehicle.
- (b) All TASERs shall be clearly and distinctly marked with factory yellow X26 markings on the sides to differentiate them from the duty weapon and any other device.
- (c) Officers should carry a total of two or more TASER cartridges on their person when carrying the TASER. Only Department issued cartridges are authorized.
- (d) Officers shall be responsible for ensuring that their assigned TASER is properly maintained and in good working order at all times. Whenever an assigned TASER is damaged or inoperable, the officer shall immediately notify his/her supervisor and document the specific damage or inoperability issue in a memo sent via the chain

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of command to the Support Services Deputy Chief. The notified supervisor shall make an effort to have a reserve TASER assigned to the officer during that shift. Reserve TASERs shall be located in the Watch Commander's cabinet at LMA. The supervisor shall document the damaged TASER's serial number and the assigned officer's name and badge number in an email to the Support Services Lieutenant to facilitate the equipment repair.

~~(d) —~~

(e) TASERs shall not be altered from the original factory specifications and markings.

~~(f) — Officers should not hold both a firearm and the TASER at the same time unless lethal force is justified.~~

OIPA Policy Recommendation - BPD Policy 309 (Marked Version)

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- ~~(g)(f)~~ Officers who locate a broken cartridge or have an unintentional discharge shall forward the cartridge to a Department TASER armorer. It should be loosely packaged and sealed in a brown evidence bag.
- ~~(h)(g)~~ TASERS with a battery life of 20% or less shall be removed from service. These TASERS should be forwarded to the Support Services Lieutenant for battery replacement.
- ~~(h)(h)~~ The Support Services Lieutenant will ensure that TASER armorers conduct annual TASER memory downloads for all TASERS.
- ~~(j)~~ ~~Due to the flammable contents in some chemical agent containers, officers shall only carry Department issued Oleoresin Capsicum (OC), which is water based and will not ignite.~~

There are two authorized ways for officers to carry the TASER:

- In a holster, opposite side from the duty weapon with no portion of the TASER crossing the mid-line of the officer's belt when it is holstered. When carried in this manner, the officer shall use a support-hand draw only.
- In a drop leg holster, worn on the support hand side only (opposite the duty weapon). When carried in this manner, the officer shall use a support-hand draw only.

309.3309.4 **USE OF THE TASER**

It is the policy of this Department that an officer shall use only that amount of force which is objectively reasonable in light of the facts and circumstances confronting the officer at the time of the event giving rise to the use of force. Activation of the TASER is, at all times, subject to this standard. Each individual activation of the TASER, even during the same incident, becomes a separate use of force and must be objectively reasonable. In some cases, other control techniques may be more appropriate as determined by the subject's degree of resistance and/or threat level to others.

Subject to the objective reasonableness standard, an officer generally may activate the TASER when grounds to arrest or detain are present, and the subject:

- Uses force or attempts to use force against the officer or another person
- Physically resists the arrest or detention or demonstrates an intention to physically resist (such as the assumption of a fighting stance)
- Refuses to comply with verbal orders without any physical resistance or demonstrated intention to physically resist, but is believed to be armed
- Flees in order to evade arrest or detention and presents an imminent or immediate threat to the officer or other individuals

Officers may also generally activate the TASER to subdue a vicious animal that presents a danger to the officer or other individuals.

Similarly subject to the objective reasonableness standard, an officer generally may not activate the TASER when the subject:

- Refuses to comply with verbal orders without any physical resistance or demonstrated intention to physically resist, and is not believed to be armed

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- Flees in order to evade arrest or detention but does not present an imminent or immediate threat to the officer or other individuals

Although not absolutely prohibited, officers should avoid, absent extenuating circumstances, applying the TASER to any of the following individuals:

- (a) Pregnant females
- (b) Elderly individuals, obvious juveniles, or the visibly frail
- (c) Individuals who have been recently sprayed with alcohol-based pepper spray or potentially flammable chemical agents, or who are otherwise in close proximity to any combustible material
- (d) Individuals whose position or activity may result in collateral injury (e.g., falls from height, operating vehicles)
- (e) Handcuffed persons, unless they pose an immediate threat of great bodily injury to themselves or others
- (f) Subjects who are in control of a vehicle in motion (including automobiles, motorcycles and bicycles).
- (g) Individuals suspected of being under the influence of drugs/alcohol or exhibiting symptoms of excited delirium (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or imperviousness to pain). These subjects may be more susceptible to collateral problems and should be closely monitored (e.g., breathing pattern) following the application of the TASER until they can be examined by paramedics or other medical personnel.

Officers should not hold both a firearm and the TASER at the same time unless lethal force is justified. The TASER shall never be used:

- (a) To torture, psychologically torment, or inflict undue pain on any individual
- (b) As a prod or escort device
- (c) To rouse unconscious, impaired, or intoxicated individuals

In addition to the specific circumstances listed above, all evaluations of a use of force subject to the objective reasonableness standard may take into account a number of factors including, but not limited to:

- (a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time)
- (b) Officer/subject factors (i.e., age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects)
- (c) Influence of drugs/alcohol (mental capacity)
- (d) Proximity of weapons
- (e) The degree to which the subject has been effectively restrained and his/her ability to resist, despite being restrained
- (f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under the circumstances)
- (g) Seriousness of the suspected offense or the reason for contact with the individual

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- (h) Training and experience of the officer
- (i) Potential for injury to citizens, officers, and suspects
- (j) Risk of escape
- (k) Other exigent circumstances

309.4.1 ADDITIONAL CONSIDERATIONS

It is essential that officers exercise sound discretion and consider the totality of the circumstances surrounding any incident where the TASER may be activated. Objective facts must indicate the suspect poses an immediate threat to the officer or a member of the public.

As with any law enforcement equipment, the TASER has limitations and restrictions requiring consideration before its use. The TASER should only be used when its operator can safely approach the subject within the operational range of the TASER. Although the TASER rarely fails and is generally effective in subduing most individuals, officers should be aware of this the potential that a TASER will fail to subdue an individual, and they should be prepared with other options in the unlikely event of such a failure.

OIPA Policy Recommendation - BPD Policy 309 (New Version)

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~~Every application of the TASER becomes a separate use of force and must be justified by the officer. In instances where a warning is provided prior to the use of the TASER, the subject must be given reasonable time to comply.~~

~~If, after a single application of the TASER, an officer is still unable to gain compliance from an individual and circumstances allow, the officer should consider:~~

- ~~•(a) Whether or not the probes are making proper contact~~
- ~~•(b) ~~If~~ Whether use of the TASER is limiting the ability of the individual to comply~~
- ~~•(c) ~~If~~ Whether other options or tactics may be more appropriate~~

~~This, however, shall not preclude an officer from multiple, reasonable applications of the TASER on an individual. When probes are in contact with the individual or when drive stun mode is in contact with the individual, no more than three activations should be administered on the same individual. The TASER should not be intentionally activated at the subject's head, neck, chest, or groin.~~

~~Authorized personnel may use the TASER when circumstances known to the individual officer at the time indicate that the application of the TASER is reasonable to subdue or control:~~

- ~~(a) A violent or physically resisting subject.~~
- ~~(b) A potentially violent or physically resisting subject, if:
 - ~~1. The subject has verbally or physically demonstrated an intention to resist; and~~
 - ~~2. The officer is able to justify that the use is based upon an objectively reasonable belief that a suspect poses an immediate threat to the officer or others; and~~
 - ~~3. The officer has given the subject a verbal warning of the intended use of the TASER followed by a reasonable opportunity to voluntarily comply; and~~
 - ~~4. Other available options reasonably appear ineffective or would present a greater danger to the officer or subject.~~~~
- ~~(c) A vicious animal that appears to present a danger to the officer or the public.~~

~~Although not absolutely prohibited officers should avoid, absent extenuating circumstances, applying the TASER to any of the following individuals:~~

- ~~(a) Pregnant females~~
- ~~(b) Elderly individuals, obvious juveniles, or the visibly frail~~
- ~~(c) Individuals who have been recently sprayed with alcohol based pepper spray or potentially flammable chemical agents, or who are otherwise in close proximity to any combustible material~~
- ~~(d) Individuals whose position or activity may result in collateral injury (e.g., falls from height, operating vehicles)~~
- ~~(e) Handcuffed persons, unless they pose an immediate threat of great bodily injury to themselves or others~~
- ~~(f) Fleeing subjects (fleeing should not be the sole justification for activating a TASER against a subject; personnel should consider the severity of the offense, the subject's threat level to others, and the risk of serious injury to the subject before deciding to~~

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use a TASER on a fleeing subject

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- ~~(g) Subjects who are simply non-compliant or who are in control of a vehicle in motion (including automobiles, motorcycles and bicycles).~~
- ~~(h) Individuals suspected of being under the influence of drugs/alcohol or exhibiting symptoms of excited delirium (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or imperviousness to pain). These subjects may be more susceptible to collateral problems and should be closely monitored (e.g., breathing pattern) following the application of the TASER until they can be examined by paramedics or other medical personnel.~~

~~Personnel should evaluate whether the use of the TASER is reasonable, based upon all circumstances (including those listed above); if the TASER is used, the officer will be required to justify why the level of resistance or threat necessitated its use (e.g., potential for violence, nature of crime, proximity of weapons, etc.). In some cases, other control techniques may be more appropriate as determined by the subject's degree of resistance and/or threat level to others.~~

~~Because the application of the TASER in the drive stun mode (i.e., direct contact without darts) relies primarily on pain compliance and requires close proximity to the subject, the controlling effects may be limited. Additional caution should be exercised.~~

~~When the probes are in contact with a person, no more than one officer should intentionally activate a TASER against that person.~~

~~The TASER shall not be used:~~

- ~~• To torture, psychologically torment, or inflict undue pain on any individual~~
- ~~• As a prod or escort device~~
- ~~• To rouse unconscious, impaired, or intoxicated individuals~~

309.4309.5 VERBAL AND VISUAL WARNINGS

Unless it would otherwise endanger officer safety or is impractical due to circumstances, a verbal **announcement warning** of the intended use of the TASER shall precede its application in order to:

- (a) Provide the individual with a reasonable opportunity to voluntarily comply
- (b) Provide other officers and individuals with warning that a TASER may be activated

In instances where a verbal warning is provided prior to the use of the TASER, the subject must be given reasonable time to comply.

If after a verbal warning an individual continues to express an unwillingness to voluntarily comply with an officer's lawful orders, and it appears both reasonable and practical under the circumstances, the officer may, but is not required to, display the electrical arc (provided there is not a cartridge loaded into the TASER) or **built-in** laser in a further attempt to gain compliance prior to the application of the TASER. The **aiming**-laser should never be intentionally directed into the eyes of another as it may permanently impair his/her vision.

The fact that a verbal and/or other warning was given, or reasons a warning was not given, shall be documented in any related reports.

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~~309.5~~ ~~USE OF THE TASER~~

~~It is essential that officers exercise sound discretion and consider the totality of the circumstances surrounding any incident where the TASER may be activated. Objective facts must indicate the suspect poses an immediate threat to the officer or a member of the public.~~

~~As with any law enforcement equipment, the TASER has limitations and restrictions requiring consideration before its use. The TASER should only be used when its operator can safely approach the subject within the operational range of the TASER. Although the TASER rarely fails and is generally effective in subduing most individuals, officers should be aware of this potential and be prepared with other options in the unlikely event of such a failure.~~

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~~Every application of the TASER becomes a separate use of force and must be justified by the officer. In instances where a warning is provided prior to the use of the TASER, the subject must be given reasonable time to comply.~~

~~If, after a single application of the TASER, an officer is still unable to gain compliance from an individual and circumstances allow, the officer should consider:~~

- ~~• Whether or not the probes are making proper contact~~
- ~~• If use of the TASER is limiting the ability of the individual to comply~~
- ~~• If other options or tactics may be more appropriate~~

~~This, however, shall not preclude an officer from multiple, reasonable applications of the TASER on an individual. When probes are in contact with the individual or when drive stun mode is in contact with the individual, no more than three activations should be administered on the same individual. The TASER should not be intentionally activated at the subject's head, neck, chest, or groin.~~

~~Authorized personnel may use the TASER when circumstances known to the individual officer at the time indicate that the application of the TASER is reasonable to subdue or control:~~

- ~~(d) A violent or physically resisting subject.~~
- ~~(e) A potentially violent or physically resisting subject, if:
 - ~~1. The subject has verbally or physically demonstrated an intention to resist; and~~
 - ~~2. The officer is able to justify that the use is based upon an objectively reasonable belief that a suspect poses an immediate threat to the officer or others; and~~
 - ~~3. The officer has given the subject a verbal warning of the intended use of the TASER followed by a reasonable opportunity to voluntarily comply; and~~
 - ~~4. Other available options reasonably appear ineffective or would present a greater danger to the officer or subject.~~~~
- ~~(f) A vicious animal that appears to present a danger to the officer or the public.~~

~~Although not absolutely prohibited officers should avoid, absent extenuating circumstances, applying the TASER to any of the following individuals:~~

- ~~(i) Pregnant females~~
- ~~(j) Elderly individuals, obvious juveniles, or the visibly frail~~
- ~~(k) Individuals who have been recently sprayed with alcohol-based pepper spray or potentially flammable chemical agents, or who are otherwise in close proximity to any combustible material~~
- ~~(l) Individuals whose position or activity may result in collateral injury~~

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~~(e.g., falls from height, operating vehicles)~~

~~(m) Handcuffed persons, unless they pose an immediate threat of great bodily injury to themselves or others~~

~~(n) Fleeing subjects (fleeing should not be the sole justification for activating a TASER against a subject; personnel should consider the severity of the offense, the subject's threat level to others, and the risk of serious injury to the subject before deciding to use a TASER on a fleeing subject)~~

OIPA Policy Recommendation - BPD Policy 309 (Marked Version)

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- ~~(e) Subjects who are simply non-compliant or who are in control of a vehicle in motion (including automobiles, motorcycles and bicycles).~~
- ~~(f) Individuals suspected of being under the influence of drugs/alcohol or exhibiting symptoms of excited delirium (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or imperviousness to pain). These subjects may be more susceptible to collateral problems and should be closely monitored (e.g., breathing pattern) following the application of the TASER until they can be examined by paramedics or other medical personnel.~~

~~Personnel should evaluate whether the use of the TASER is reasonable, based upon all circumstances (including those listed above); if the TASER is used, the officer will be required to justify why the level of resistance or threat necessitated its use (e.g., potential for violence, nature of crime, proximity of weapons, etc.). In some cases, other control techniques may be more appropriate as determined by the subject's degree of resistance and/or threat level to others.~~

~~Because the application of the TASER in the drive stun mode (i.e., direct contact without darts) relies primarily on pain compliance and requires close proximity to the subject, the controlling effects may be limited. Additional caution should be exercised.~~

~~When the probes are in contact with a person, no more than one officer should intentionally activate a TASER against that person.~~

~~The TASER shall not be used:~~

- ~~• To torture, psychologically torment, or inflict undue pain on any individual~~
- ~~• As a prod or escort device~~
- ~~• To rouse unconscious, impaired, or intoxicated individuals~~

~~309.4.1 FACTORS TO DETERMINE REASONABLENESS OF FORCE~~

~~The application of the TASER is likely to cause intense, momentary pain. As such, officers should carefully consider and balance the totality of circumstances available prior to using the TASER including, but not limited to, the following factors:~~

- ~~(a) The conduct of the individual being confronted (as reasonably perceived by the officer at the time)~~
- ~~(b) Officer/subject factors (i.e., age, size, relative strength, skill level, injury/exhaustion, number of officers vs. subjects)~~
- ~~(c) Influence of drugs/alcohol (mental capacity)~~
- ~~(d) Proximity of weapons~~
- ~~(e) The degree to which the subject has been effectively restrained and his/her ability to resist, despite being restrained~~
- ~~(f) Time and circumstances permitting, the availability of other options (what resources are reasonably available to the officer under~~

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~~the circumstances)~~

~~(g) Seriousness of the suspected offense or the reason for contact with the individual~~

~~(h) Training and experience of the officer~~

~~(i) Potential for injury to citizens, officers, and suspects~~

~~(j) Risk of escape~~

~~(k) Other exigent circumstances~~

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309.4.2309.6 REPORT OF TASER USE

It is essential that officers exercise sound discretion and carefully articulate the totality of the circumstances giving rise to every TASER application. Verbal warnings, deployments, and TASER activations shall be documented in the related crime report. The TASER tab in the MO data entry section of the report writing program shall be utilized to document the type of usage (verbal, deployment, or activation). The incident shall be thoroughly documented in the narrative of the police report.

When the TASER is activated the police report should include the following:

- (a) Details of the subject's level of aggression justifying activation
- (b) Number and approximate duration of cycle(s)
- (c) Point of impact of the probes and/or drive stun mode on a subject
- (d) Response and actions of the subject after activation
- (e) Number of officers on scene
- (f) Names of individuals who provided medical care on scene and the names of medical personnel who removed the probes
- (g) Serial numbers of the TASER and cartridge
- (h) Photographic evidence, to include the subject prior to and after probe removal, the drive stun contact point, and any injuries incurred by the subject or officer as result of the incident
- (i) Name of the person receiving custody of the subject and advised of the TASER activation on the subject

Supplemental reports shall be completed by personnel who are present during ~~ana~~ TASER activation.

A TASER armorer shall download the on-board TASER memory and save it with the related crime report; the on-scene supervisor is responsible for assigning this task. TASERs will not be taken out of service after an activation unless directed by a command-level officer.

309.4.3309.7 SUPERVISORY RESPONSIBILITY

A supervisor shall respond to the scene of any ~~CEW-TASER~~ activation including negligent or unintentional activations. The supervisor shall confirm (with the officer) that any probes that have pierced a subject's skin are removed by medical personnel and that the subject is medically cleared, as outlined in Section 309.58, prior to being booked into a detention facility. The supervisor will confirm that all evidence (including the ~~CEW's-TASER's~~ memory record) has been collected, review and approve the related crime reports, and provide a replacement ~~CEW-TASER~~ cartridge(s) as necessary.

Upon reviewing the report, the supervisor must make a copy for review by the officer's chain of command and complete a Supervisor's Use of Force Report. The reviewing supervisor must review the use of the ~~CEW-TASER~~ and make a recommendation on whether the use of the ~~CEW-TASER~~ was justified or not. A copy of the approved police report and completed Use of Force Report will be forwarded to the Chief of Police via the chain of command. The incident will be reviewed in accordance with Policies 300 and 301.

Justifiable: When the circumstances, at the time of using the ~~CEW~~TASER, were consistent with the provisions of this Policy, the use of the device shall be classified as

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justifiable.

Unjustifiable: When the circumstances, at the time of using the ~~CEW~~TASER, were not consistent with the provisions of this Policy, the use of the device shall be classified as unjustifiable.

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The Professional Standards and Training Division Deputy Chief will forward the police report and Use of Force Report to the Chief of Police for review. The Chief of Police will forward the report and signed Use of Force Report to the Internal Affairs Section who will log the report and send it and the Supervisor's Use of Force report to the Use of Force Review Committee Chairperson.

Negligent or unintentional activations of a ~~CEW-TASER~~ cartridge shall be reported immediately to a supervisor. The incident shall not be documented as a use of force. The incident shall be documented in a memo, via the chain of command to the Division Deputy Chief to which the employee reports. This memo will include the ~~CEW-TASER~~ and cartridge serial numbers and an explanation of the circumstances surrounding the activations. Officers responsible for accidental, unintentional or unjustifiable discharges shall be subject to progressive discipline. Negligent activations shall be included in the Department's Early Intervention system.

309.5309.8 MEDICAL TREATMENT

Only qualified medical personnel, including certified paramedics, should remove TASER darts from a person's body. Used TASER darts shall be considered a sharp biohazard, similar to a used hypodermic needle. Universal precautions should be taken accordingly.

All detained or arrested persons who have been struck by TASER darts or who have been subjected to the electric discharge of the device shall be transported, by medical personnel, for medical assessment at a local medical facility as soon as practicable.

Special consideration (including enhanced observation and a Code 3 medical response) should be provided to individuals who fall under any of the following categories:

- (a) The person is suspected of being under the influence of a controlled substance(s) and/or alcohol
- (b) The person may be pregnant
- (c) The person reasonably appears to be in need of medical attention
- (d) The TASER darts are lodged in a sensitive area (e.g., groin, female breast, near the eyes)
- (e) The person requests medical treatment

In addition, persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond physical characteristics, imperviousness to pain, or who require a protracted physical encounter with multiple officers to bring them under control, may be at an increased risk of sudden death and should be examined by qualified medical personnel as soon as practicable (a Code 3 medical response). All individuals shall be medically cleared, prior to booking.

If any person subjected to an unintentional application refuses medical attention, such a refusal should, absent extenuating circumstances, be witnessed by medical personnel and shall be fully documented in related reports. If an audio recording is made of the contact or interview with the individual, any refusal should be included.

The transporting officer shall inform any person receiving custody or any person placed in a position of providing care that the individual has been subjected to the application of the TASER.

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309.6309.9 TRAINING

In addition to the initial Department approved training required to carry and use a TASER, annual training will be provided to all sworn personnel. A reassessment of an officer's knowledge and/or practical skills may be required at any time if deemed appropriate.

A certified TASER instructor should ensure that TASER training material and lesson plans include the following:

- (a) A review of this Policy
- (b) A review of the Use of Force Policy 300
- (c) Target area considerations, to include techniques or options to reduce the intentional application of probes near the head, neck, chest, and groin
- (d) De-escalation techniques
- (e) Scenario-based training

309.6.1309.9.1 TASER INSTRUCTOR TRAINING

The below, listed training is from the Department's Training Plan and is either mandatory, essential, or desirable (the Training Plan is located within the G:/drive, Training Unit folder):

- Mandatory TASER training - Basic instructor course
- Desirable TASER training - TASER armorer certification course, advanced instructor course

309.6.2309.9.2 REMEDIAL TRAINING

Any employee who acts in a grossly unsafe manner or demonstrates dangerous and/or extremely poor decision-making skills in the deployment of and/or application of any use-of-force related task (in the field or in training) shall be required to attend mandatory remedial training prior to returning to full-duty status.

If, in the opinion of the supervisor/primary instructor at the site of the training, the employee's decision making and actions are so unsafe that if returned to full duty he/she may be a safety hazard to him or herself, fellow employees, and/or the public, the supervisor/primary instructor shall recommend additional mandatory remedial training for the employee. The primary instructor shall contact the on-duty Watch Commander as soon as practicable and make the recommendation for additional mandatory remedial training.

If the request for additional training is approved, the employee shall be removed from an on-duty patrol status and placed into a temporary administrative position until such time as that employee satisfactorily completes the mandatory remedial training.

Repeated failures to correct such deficiencies may result in implementation of the Progressive Discipline System, similar to Policy Section 461.5.1. Nothing in this Policy precludes the Department from requiring an employee to successfully complete remedial training to correct lesser safety violations and/or marginal tactical decision-making skills, without the employee first being removed from full-duty status.

309.10 ~~309.7~~ TASER® X26 NOMENCLATURE

- 1 - Probes

Bay Area Rapid Transit Police Department

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~~Electronic Control Device~~ Conducted Electrical Weapon - TASER

- 2 - AFID Tags
- 3 - TASER Cartridge

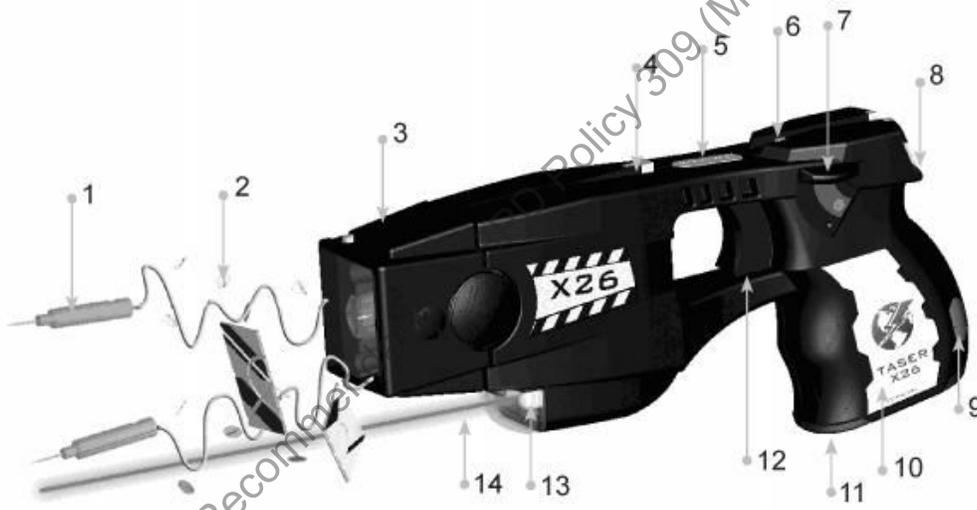
OIPA Policy Recommendation - BPD Policy 309 (Marked Version)

Bay Area Rapid Transit Police Department

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~~Electronic Control Device~~ Conducted Electrical Weapon - TASER

- 4 - Mechanical Sight
- 5 - Serial Number Plate
- 6 - Illumination Selector Switch
- 7 - Safety Switch
- 8 - Central Information Display (CID)
- 9 - DPM Release Button
- 10 - Stainless Steel Shock Plate
- 11 - Digital Power Magazine (DPM)
- 12 - Trigger
- 13 - Low Intensity Lights (LIL)
- 14 - Built-in Laser (pointing to beam)



APPENDIX D

OIPA Policy Recommendation for BPD Policy 1021 – Complaint Mediation Program

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

MEMORANDUM

TO: BART Police Department, Chief of Police DATE: August 8, 2014

FROM: Independent Police Auditor

SUBJECT: **Policy Recommendation – BPD Policy 1021**

Chapter 1-04(G) of the Citizen Oversight Model (Model) states that the Office of the Independent Police Auditor (OIPA) shall develop recommendations concerning General Orders and Directives, procedures, practices, and training of the BART Police Department (BPD), with the goal of improving professionalism, safety, effectiveness, and accountability. Additionally, Chapter 1-04(D) of the Model calls on OIPA to develop an alternative dispute resolution process for certain complaints, and to secure the concurrence of the BART Citizen Review Board (CRB) and the BART Police Associations (Associations) prior to implementation. In accordance with these sections of the Model, OIPA has developed *BPD Policy 1021 – Complaint Mediation Program*.

This policy recommendation is being made in a notably different manner than some of OIPA's previous ones, and it is important to briefly explain this difference. In November 2013, OIPA made its first presentation of a written draft mediation program to the CRB, after having had also discussed it with both the Associations and members of BPD's command staff. In a continuous effort to incorporate the comments, suggestions, and edits made by all parties involved in the development of the program, four more drafts were subsequently crafted before the final one was ultimately agreed to by all required parties at the CRB meeting in March 2014.

Since that time, OIPA worked with the BPD Support Services Bureau to reformat the written draft mediation program, without altering any of the substantive content therein, so that it would be consistent with the BPD Policy Manual. As a result of this work, *BPD Policy 1021 – Complaint Mediation Program* has now been created and stands ready for implementation and incorporation into the BPD Policy Manual.¹

For your review, following is the final written draft mediation program agreed to by the CRB and the Associations in March 2014, as required by the Model; also following is the reformatted version of the program that has been deemed ready for inclusion in the BPD Policy Manual by the BPD Support Services Bureau and is presently being recommended by OIPA. Please feel

¹ Through discussions with BPD's Office of Internal Affairs, OIPA acknowledges that some edits to *BPD Policy 1020 – Internal Investigation of Allegations of Misconduct* may still be required at this time in order to ensure that it is not inconsistent with, or in conflict with, the new policy initiating a complaint mediation program. OIPA is hopeful that any such edits can be made quickly so as not to delay the implementation of the mediation program any more than necessary.

free to contact me at your convenience with any questions about the complaint mediation program.

A handwritten signature in black ink, appearing to read "M. P. Smith", written over a horizontal line.

Mark P. Smith
BART Independent Police Auditor

Attachments (2)

OFFICE OF THE INDEPENDENT POLICE AUDITOR

Complaint Mediation Program

1. Introduction

Chapter 1-04(D) of the BART Citizen Oversight Model (Model) gives the Office of the Independent Police Auditor (OIPA) the responsibility for developing a system of voluntary alternative dispute resolution that can be utilized to resolve certain complaints of misconduct with less formality than that which comes with a full investigation. Alternative dispute resolution in the form of mediation can often yield the optimal outcome of an incident involving alleged misconduct, both for the complainant and the involved employee. It may be the most effective way for a complainant to feel that his or her concern was genuinely listened to, and it presents an opportunity for an employee to share his or her views about the incident that gave rise to the complaint in a non-interrogatory setting.

OIPA is of the opinion that mediation can be particularly effective to resolve complaints of misconduct against BART Police Department (BPD) employees that arise primarily due to a lack of effective communication between the complainant and the employee. Such complaints do not seem to be uncommon. For example, when an individual does not understand why a police officer has issued a particular command, or when an officer does not understand why an individual has reacted to a command in an unexpected way, the potential for a negative interaction (and the subsequent initiation of a complaint) rises. By maximizing the chance that each party will listen to the other's point of view, mediation often makes it possible for both sides to gain a new understanding of each other and of why the interaction between them might have escalated into a conflict in the first place.

Therefore, OIPA establishes the Complaint Mediation Program.

2. Scope of Complaint Mediation Program

Complaints of misconduct may involve BPD police officers, BPD civilian employees, or a combination thereof. As a mediation process can often be beneficial for all parties to a complaint, OIPA feels it is sensible to make the Complaint Mediation Program available for complaints involving all BPD employees, both sworn and civilian. Doing so will also minimize confusion as to the eligibility of a complaint for the program when some of the allegations involve a BPD police officer while others involve a BPD civilian employee. In light of this, the term "employee" is commonly used throughout this document and is meant to include both BPD sworn officers and BPD civilian employees.

3. Potential Benefits of Complaint Mediation Program

a. For Complainants

- i. More expedient resolution of complaint
- ii. Opportunity to have concerns heard directly by involved employee
- iii. Enhanced sense of finality to complaint process

- iv. Better understanding of law enforcement procedures, which may lead to minimization of future complaints

b. For Officers

- i. More expedient resolution of complaint
- ii. Complaint handled outside of formal disciplinary process
- iii. Opportunity to explain justification for actions directly to complainant
- iv. Better understanding of issue that led to complaint, which may lead to minimization of future complaints

c. For BART

- i. Increased public confidence regarding police department
- ii. More efficient use of resources
- iii. Better customer service

4. Goals of Complaint Mediation Program

Mediation involves the informal resolution of a complaint of misconduct against a BPD employee through a face to face meeting in which a professional mediator serves as a neutral facilitator and where the complainant and the involved employee both ultimately agree to an acceptable resolution. Mediation is based on voluntary participation by all parties to a dispute, and it focuses on understanding, problem solving, and reconciliation rather than fact finding, determining guilt or innocence, and assigning responsibility.

5. Complaint Mediation Program Rules

The eligibility of complaints for inclusion in the Complaint Mediation Program is detailed in this section. As a corollary, any complaints that are not eligible for inclusion in the program, for any reason, shall be handled as complaints pursuant to BPD Policy 1020 and/or the Model, as applicable.

a. Case eligibility

- i. Participation in the Complaint Mediation Program must be voluntary for both the complainant(s) and the involved employee(s). Before the actual mediation process begins, all such parties must consent to the process in writing. Without written consent from all complainants and involved employees, the case is ineligible for inclusion in the program. Written consent may be obtained from the parties at the site of mediation, prior to the mediation session beginning.
- ii. Complaints that include the below-listed allegations and/or alleged circumstances are ineligible for the Complaint Mediation Program, regardless of the consent of the involved parties; when a complaint involves any of these allegations and/or alleged circumstances, as

well as other allegations and/or alleged circumstances not on this list, the entire complaint is ineligible for the Complaint Mediation Program:¹

1. Use of Deadly Force
 2. Suspicious and Wrongful Deaths
 3. Unnecessary or Excessive Use of Force
 4. Truthfulness
 5. Racial Animus
 6. Bias-Based Policing and/or Racial Profiling
 7. Sexual Orientation Bias
 8. Sexual Harassment
 9. Arrest or Detention
 10. Search or Seizure
 11. Reporting Misconduct
 12. Workplace Discrimination/Harassment
 13. Supervision
 14. Substantial injury suffered by any of the involved parties
- iii. Subject to all of the exclusions listed in Section 5.a.ii, the types of allegations eligible for inclusion in the mediation include, but are not necessarily limited to:
1. Performance of Duty
 2. Conduct Unbecoming an Officer
 3. Courtesy
 4. Policy/Procedure
 5. Policy Complaint²

b. Officer Eligibility

- i. Any new complaint is ineligible for the Complaint Mediation Program when any involved employee who is being accused of misconduct in the complaint:
 1. Has had any allegation of misconduct Sustained against him or her within the 12 months prior to the date that the new complaint was initiated; or
 2. Has been accused of misconduct in a Citizen Complaint, Administrative Investigation, or Comment of Non-Complaint, or any combination thereof, on three or more occasions within the 12 months prior to the date that the new complaint was initiated; or
 3. Has participated in the Complaint Mediation Program, as an employee being accused of misconduct, on three or more occasions within the 12 months prior to the date that the new complaint was initiated.

¹ Many of the terms included in this list, as well as the list in Section 5.a.iii, were taken from the Model and/or from BPD's Office of Internal Affairs. Both of these offices are responsible for classifying incoming complaints of misconduct regarding BPD employees. As the terminology used in such classification may change from time to time, this list may need to be updated accordingly.

² When a complaint that is otherwise eligible for mediation, but the complaint is against a BPD policy and not a specific employee, BPD may designate an employee that it feels is appropriate to participate in the mediation as a BPD representative.

c. *Discretion of the Chief of Police*

- i. The Chief of Police, or the Chief's designee, at his or her discretion, may deem any complaint ineligible for mediation. The Chief shall promptly notify OIPA upon making such a determination.

6. **Complaint Mediation Program Procedures**

a. *Intake of New Complaints*

- i. Upon receiving a new complaint of misconduct that does not, on its face, fall into the prohibited categories listed in Section 5.a.ii, BPD's Office of Internal Affairs (IA) shall inform the complainant that his or her complaint ***may*** be eligible for the Complaint Mediation Program ***in lieu of an investigation***. IA shall also inform the complainant of his or her option, regardless of eligibility for mediation, to have the complaint handled in accordance with the procedures laid out in BPD Policy 1020. If the complainant prefers to pursue mediation, IA shall forward the complainant's contact information to OIPA, which shall then be responsible for contacting the involved employee(s) pursuant to Section 6.b.
 1. IA shall continue its practice of recording all new complaints in its case database, including the assignment of a case number to each complaint. All cases that end up being a part of the Complaint Mediation Program shall be categorized as "Citizen Complaints."
 2. IA shall attempt to identify and gather all evidence about the new complaint that is known or reasonably should be known to be perishable, even if all parties to a complaint indicate their consent to have it handled through the Complaint Mediation Program. The gathering of such evidence is important if mediation does not ultimately take place, in which case a formal investigation may be required to be completed instead.³
- ii. Upon receiving a new complaint of misconduct that does not, on its face, fall into the prohibited categories listed in Section 5.a.ii, OIPA shall inform the complainant that his or her complaint ***may*** be eligible for the Complaint Mediation Program ***in lieu of an investigation***. OIPA shall also inform the complainant of his or her option, regardless of eligibility for mediation, to have the complaint handled in accordance with the procedures laid out in BPD Policy 1020. If the complainant prefers to pursue mediation, OIPA shall notify IA of the information about the complaint it has learned at that point (as is already done with other complaints received by OIPA). OIPA shall then be responsible for contacting the involved employee(s) pursuant to Section 6.b.
 1. IA shall attempt to identify and gather all evidence about the new complaint that is known or reasonably should be known to be perishable, even if all parties to a

³ It is acknowledged that even with the requirement to collect perishable evidence, IA may not be made aware of as much information about the circumstances giving rise to the complaint as they would be by conducting a series of formal interviews; their ability to discover some of the evidence, perishable or not, that is relevant to the complaint may therefore be curtailed to some degree.

complaint indicate their consent to have it handled through the Complaint Mediation Program. The gathering of such evidence is important if mediation does not ultimately take place, in which case a formal investigation may be required to be completed instead.⁴

b. Consent from all Involved Employees

- i. Once a complainant has indicated a preference to pursue mediation of an eligible complaint, OIPA shall determine whether all involved employees are eligible for mediation in accordance with Section 5.b. If any involved employees are ineligible, OIPA will inform the complainant that mediation is not a viable option for that complaint, which will instead be handled in accordance with BPD Policy 1020. If all involved employees are eligible for mediation, OIPA shall contact each of them to determine whether they consent to mediation of the complaint against them. In making such contact, OIPA shall notify each involved employee of the nature of the allegation(s) raised against him or her. Contact with the employees will be made by OIPA via email message, with a copy to each employee's supervisor.⁵
 1. If any one of the involved employees decline to consent to mediation, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.
 2. Once the required email notification has been sent to the involved employees, if OIPA does not subsequently receive a response from any one (or more) of the employees for more than 7 calendar days after that employee was last on-duty, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify the complainant and IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.
 3. If any employees are involved who are unable to be identified through the best efforts of OIPA, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.
 4. If all of the involved employees have been successfully identified and deemed eligible for mediation, and all of them have indicated their consent to mediation of the complaint involving them, then the mediation process shall continue pursuant to Section 6.c.

c. Referral to SEEDS

- i. OIPA shall contact the SEEDS Community Resolution Center (SEEDS) to initiate mediation proceedings. OIPA will also be responsible for providing SEEDS with whatever information they require about the complaint at issue. In accordance with standard SEEDS operating

⁴ See Note 3.

⁵ OIPA shall make good faith efforts to establish contact with all involved employees via any means it deems effective and appropriate. The use of email is meant to be the single mandated method of contact in each case. Email is the preferred mandatory method because it lends itself to easy documentation and record-keeping.

procedure, SEEDS will then establish contact with the involved parties and schedule a date and time for the mediation to take place. BPD employees shall be allowed to attend mediation while on-duty, but they shall inform their immediate supervisor as far in advance as is reasonably feasible before doing so. BPD employees who attend mediation while off-duty shall be compensated for their time.

- ii. As noted above in Section 5.a.i., all parties to mediation must document their consent to the mediation process in writing. Once such documentation has been submitted to either IA, OIPA, or SEEDS (i.e. – at the site of mediation) by all parties, the subsequent failure of the complainant to attend a mediation session scheduled by SEEDS shall not result in any further investigation by IA into the underlying complaint; conversely, the subsequent failure of any of the involved BPD employees to attend a mediation session scheduled by SEEDS shall result in the termination of mediation efforts with respect to the underlying complaint, which will be then be handled by IA pursuant to BPD Policy 1020.
- iii. Notwithstanding Section 6.c.ii above, if, for any reason, SEEDS is unable to schedule a date for the mediation that is within 90 days of the date that the underlying complaint was initiated, OIPA will notify SEEDS to cease further attempts at scheduling the mediation. IA shall then handle the complaint pursuant to BPD Policy 1020.
- iv. Upon completion of its mediation efforts, SEEDS will contact OIPA to inform it of the outcome of those efforts. OIPA will, in turn, notify IA of the outcome.
 1. If SEEDS reports that mediation occurred, IA shall indicate the disposition of the underlying Citizen Complaint as “Mediated.” No further investigation will be conducted by IA with regard to the mediated complaint, and the complaint shall not be relied upon, in any way, as a basis for disciplinary proceedings or in the evaluation of an employee. This does not preclude a mediated complaint from being considered when determining officer eligibility for a separate mediation, in accordance with Sections 5.b.2 and 5.b.3.
 2. If SEEDS reports that mediation did not occur, SEEDS will also send a “No Mediation Letter” to the party that was requesting the mediation.
 - a. Involved BPD employees in receipt of such a letter may forward a copy to IA, which shall include the copy in the file for the associated case. IA shall also indicate the disposition of the underlying Citizen Complaint as “Mediated,” and shall treat the case as described in Section 6.c.iv.1 above.
 - b. Complainants in receipt of such a letter may forward a copy to IA, which shall include the copy in the file for the associated case. IA shall then handle the complaint pursuant to BPD Policy 1020.
- v. Exclusive of any materials it deems confidential in line with its standard operating procedures, SEEDS shall deliver all of the materials it has related to the mediation proceeding (i.e. - written consent to the mediation from the involved parties) to OIPA. OIPA shall deliver a copy of all such materials to IA.
- vi. OIPA shall be responsible for the payment of all fees arising out of the mediation services provided by SEEDS pursuant to the Complaint Mediation Program.

d. Conduct of Mediation

- i. The mediation itself shall be conducted according to the rules established for Community Mediation by SEEDS. Neither OIPA nor IA shall have any role in conducting any of the mediation sessions, nor shall they be present during any such sessions.
- ii. Pursuant to SEEDS standard practice, requests by either party in a mediation to be accompanied by a representative or another person must be made directly to SEEDS prior to the mediation session; this is so that consent can be sought by SEEDS from the opposite party before the request is granted to the requesting party.

Complaint Mediation Program

1021.1 PURPOSE AND SCOPE

Alternative dispute resolution in the form of mediation can often yield the optimal outcome of an incident involving alleged misconduct, both for the complainant and the involved employee. It may be the most effective way for a complainant to feel that his or her concern was genuinely listened to, and it presents an opportunity for an employee to share his or her views about the incident that gave rise to the complaint in a non-interrogatory setting. By maximizing the chance that each party will listen to the other's point of view, mediation often makes it possible for both sides to gain a new understanding of each other and of why the interaction between them might have escalated into a conflict in the first place.

Mediation is based on voluntary participation by all parties to a dispute, and it focuses on understanding, problem solving, and reconciliation rather than fact finding, determining guilt or innocence, and assigning responsibility.

1021.2 ELIGIBILITY FOR MEDIATION

The eligibility of complaints for inclusion in the Complaint Mediation Program is detailed in this section. As a corollary, any complaints that are not eligible for inclusion in the program, for any reason, shall be handled as complaints pursuant to Department Policy 1020 and/or the BART Citizen Oversight Model, as applicable.

1021.2.1 CASE ELIGIBILITY

Participation in the Complaint Mediation Program must be voluntary for both the complainant(s) and the involved employee(s). Before the actual mediation process begins, all such parties must consent to the process in writing. Without written consent from all complainants and involved employees, the case is ineligible for inclusion in the program. Written consent may be obtained from the parties at the site of mediation, prior to the mediation session beginning.

(a) Complaints that include the below-listed allegations and/or alleged circumstances are ineligible for the Complaint Mediation Program, regardless of the consent of the involved parties; when a complaint involves any of these allegations and/or alleged circumstances, as well as other allegations and/or alleged circumstances not on this list, the entire complaint is ineligible for the Complaint Mediation Program:

1. Use of Deadly Force
2. Suspicious and Wrongful Deaths
3. Unnecessary or Excessive Use of Force
4. Truthfulness
5. Racial Animus

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6. Bias-Based Policing and/or Racial Profiling
 7. Sexual Orientation Bias
 8. Sexual Harassment
 9. Arrest or Detention
 10. Search or Seizure
 11. Reporting Misconduct
 12. Workplace Discrimination/Harassment
 13. Supervision
 14. Substantial injury suffered by any of the involved parties
- (b) Subject to all of the exclusions listed above, the types of allegations eligible for inclusion in the Complaint Mediation Program include, but are not necessarily limited to:
1. Performance of Duty
 2. Conduct Unbecoming an Officer
 3. Courtesy
 4. Policy/Procedure
 5. Policy Complaint*

*When a complaint is eligible for mediation, but the complaint is against a Department policy and not a specific employee, the Department may designate an employee that it feels is appropriate to participate in the mediation as a Department representative.

1021.2.2 OFFICER ELIGIBILITY

Any new complaint is ineligible for the Complaint Mediation Program when any involved employee who is being accused of misconduct in the complaint:

- (a) Has had any allegation of misconduct Sustained against him or her within the 12 months prior to the date that the new complaint was initiated; or
- (b) Has been accused of misconduct in a Citizen Complaint, Administrative Investigation, or Comment of Non-Complaint, or any combination thereof, on three or more occasions within the 12 months prior to the date that the new complaint was initiated; or
- (c) Has participated in the Complaint Mediation Program, as an employee being accused of misconduct, on three or more occasions within the 12 months prior to the date that the new complaint was initiated.

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1021.2.3 DISCRETION OF THE CHIEF OF POLICE

The Chief of Police, or the Chief's designee, at his or her discretion, may deem any complaint ineligible for mediation. The Chief shall promptly notify the Office of the Independent Police Auditor (OIPA) upon making such a determination.

1021.3 COMPLAINT MEDIATION PROGRAM PROCEDURES

1021.3.1 INTAKE OF NEW COMPLAINTS BY INTERNAL AFFAIRS SECTION

Upon receiving a new complaint of misconduct that does not, on its face, fall into the prohibited categories listed in Section 1021.2.1, the Internal Affairs Section shall inform the complainant that his or her complaint may be eligible for the Complaint Mediation Program in lieu of an investigation.

Internal Affairs shall also inform the complainant of his or her option, regardless of eligibility for mediation, to have the complaint handled in accordance with the procedures laid out in Department Policy 1020. If the complainant prefers to pursue mediation, Internal Affairs shall forward the complainant's contact information to OIPA, which shall then be responsible for contacting the involved employee(s) pursuant to Section 1021.3.3.

Internal Affairs shall continue its practice of recording all new complaints in its case database, including the assignment of a case number to each complaint. All cases that end up being a part of the Complaint Mediation Program shall be categorized as "Citizen Complaints."

Internal Affairs shall attempt to identify and gather all evidence about the new complaint that is known or reasonably should be known to be perishable, even if all parties to a complaint indicate their consent to have it handled through the Complaint Mediation Program. The gathering of such evidence is important if mediation does not ultimately take place, in which case a formal investigation may be required to be completed instead.*

*It is acknowledged that even with the requirement to collect perishable evidence, Internal Affairs may not be made aware of as much information about the circumstances giving rise to the complaint as they would be by conducting a series of formal interviews; their ability to discover some of the evidence, perishable or not, that is relevant to the complaint may therefore be curtailed to some degree.

1021.3.2 INTAKE OF NEW COMPLAINTS BY THE OFFICE OF THE INDEPENDENT POLICE AUDITOR

Upon receiving a new complaint of misconduct that does not, on its face, fall into the prohibited categories listed in Section 1021.2.1, OIPA shall inform the complainant that his or her complaint may be eligible for the Complaint Mediation Program in lieu of an investigation. OIPA shall also inform the complainant of his or her option, regardless of eligibility for mediation, to have the complaint handled in accordance with the procedures laid out in Department Policy 1020. If the complainant prefers to pursue mediation, OIPA shall notify Internal Affairs of the information about the complaint it has learned at that point (as is already done with other complaints received

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by OIPA). OIPA shall then be responsible for contacting the involved employee(s) pursuant to Section 1021.3.3.

Internal Affairs shall attempt to identify and gather all evidence about the new complaint that is known or reasonably should be known to be perishable, even if all parties to a complaint indicate their consent to have it handled through the Complaint Mediation Program. The gathering of such evidence is important if mediation does not ultimately take place, in which case a formal investigation may be required to be completed instead.*

*It is acknowledged that even with the requirement to collect perishable evidence, Internal Affairs may not be made aware of as much information about the circumstances giving rise to the complaint as they would be by conducting a series of formal interviews; their ability to discover some of the evidence, perishable or not, that is relevant to the complaint may therefore be curtailed to some degree.

1021.3.3 CONSENT FROM ALL INVOLVED EMPLOYEES

Once a complainant has indicated a preference to pursue mediation of an eligible complaint, OIPA shall determine whether all involved employees are eligible for mediation in accordance with Section 1021.2.2. If any involved employees are ineligible, OIPA will inform the complainant that mediation is not a viable option for that complaint, which will instead be handled in accordance with BPD Policy 1020. If all involved employees are eligible for mediation, OIPA shall contact each of them to determine whether they consent to mediation of the complaint against them. In making such contact, OIPA shall notify each involved employee of the nature of the allegation(s) raised against him or her. Contact with the employees will be made by OIPA via email message, with a copy to each employee's supervisor.*

*OIPA shall make good faith efforts to establish contact with all involved employees via any means it deems effective and appropriate. The use of email is meant to be the single mandated method of contact in each case. Email is the preferred mandatory method because it lends itself to easy documentation and record-keeping.

If any one of the involved employees decline to consent to mediation, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.

Once the required email notification has been sent to the involved employees, if OIPA does not subsequently receive a response from any one (or more) of the employees for more than 7 calendar days after that employee was last on-duty, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify the complainant and IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.

If any employees are involved who are unable to be identified through the best efforts of OIPA, the complaint will be deemed as ineligible for the Complaint Mediation Program. OIPA shall notify IA of this, and IA shall handle the complaint pursuant to BPD Policy 1020.

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If all of the involved employees have been successfully identified and deemed eligible for mediation, and all of them have indicated their consent to mediation of the complaint involving them, then the mediation process shall continue pursuant to Section 1021.3.4.

1021.3.4 REFERRAL TO SEEDS

OIPA shall contact the SEEDS Community Resolution Center (SEEDS) to initiate mediation proceedings. OIPA will also be responsible for providing SEEDS with whatever information they require about the complaint at issue. In accordance with standard SEEDS operating procedure, SEEDS will then establish contact with the involved parties and schedule a date and time for the mediation to take place. BPD employees shall be allowed to attend mediation while on-duty, but they shall inform their immediate supervisor as far in advance as is reasonably feasible before doing so. BPD employees who attend mediation while off- duty shall be compensated for their time.

As noted above in Section 1021.2.1, all parties to mediation must document their consent to the mediation process in writing. Once such documentation has been submitted to either IA, OIPA, or SEEDS (i.e. – at the site of mediation) by all parties, the subsequent failure of the complainant to attend a mediation session scheduled by SEEDS shall not result in any further investigation by IA into the underlying complaint; conversely, the subsequent failure of any of the involved BPD employees to attend a mediation session scheduled by SEEDS shall result in the termination of mediation efforts with respect to the underlying complaint, which will be then be handled by IA pursuant to BPD Policy 1020.

If, for any reason, SEEDS is unable to schedule a date for the mediation that is within 90 days of the date that the underlying complaint was initiated, OIPA will notify SEEDS to cease further attempts at scheduling the mediation. IA shall then handle the complaint pursuant to BPD Policy 1020.

Upon completion of its mediation efforts, SEEDS will contact OIPA to inform it of the outcome of those efforts. OIPA will, in turn, notify IA of the outcome.

If SEEDS reports that mediation occurred, IA shall indicate the disposition of the underlying Citizen Complaint as “Mediated.” No further investigation will be conducted by IA with regard to the mediated complaint, and the complaint shall not be relied upon, in any way, as a basis for disciplinary proceedings or in the evaluation of an employee. This does not preclude a mediated complaint from being considered when determining officer eligibility for a separate mediation, in accordance with Section 1021.2.2.

If SEEDS reports that mediation did not occur, SEEDS will also send a “No Mediation Letter” to the party that was requesting the mediation.

Involved BPD employees in receipt of such a letter may forward a copy to IA, which shall include the copy in the file for the associated case. IA shall also indicate the disposition of the underlying Citizen Complaint as “Mediated.” No further investigation will be conducted by IA with regard to the mediated complaint, and the complaint shall not be relied upon, in any way, as a basis for disciplinary proceedings or in the evaluation of an employee. This does not preclude a mediated

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complaint from being considered when determining officer eligibility for a separate mediation, in accordance with Section 1021.2.2.

Complainants in receipt of such a letter may forward a copy to IA, which shall include the copy in the file for the associated case. IA shall then handle the complaint pursuant to BPD Policy 1020.

1021.3.5 CONDUCT OF MEDIATION

The mediation itself shall be conducted according to the rules established for Community Mediation by SEEDS. Neither OIPA nor IA shall have any role in conducting any of the mediation sessions, nor shall they be present during any such sessions.

Pursuant to SEEDS standard practice, requests by either party in a mediation to be accompanied by a representative or another person must be made directly to SEEDS prior to the mediation session; this is so that consent can be sought by SEEDS from the opposite party before the request is granted to the requesting party.

Exclusive of any materials it deems confidential in line with its standard operating procedures, SEEDS shall deliver all of the materials it has related to the mediation proceeding (i.e. - written consent to the mediation from the involved parties) to OIPA. OIPA shall deliver a copy of all such materials to IA.

1021.3.6 COST OF MEDIATION

OIPA shall be responsible for the payment of all fees arising out of the mediation services provided by SEEDS pursuant to the Complaint Mediation Program.



Bay Area Rapid Transit (BART)
Office of the Independent Police Auditor
300 Lakeside Drive, 14th Floor
Oakland, CA 94612

mail: P.O. Box 12688, Oakland, CA 94604-2688

phone: (510) 874-7477

fax: (510) 874-7475

email: oipa@bart.gov

web: www.bart.gov/policeauditor