



U.S. Department of Justice

Civil Rights Division

*Special Litigation Section - PHB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530*

November 9, 2004

VIA FACSIMILE AND U.S. MAIL

Frank James, Esq.
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
Southtrust Tower
420 North 20th Street, Suite 1600
Birmingham, AL 35203-5202

Re: Investigation of the Alabaster Police Department

Dear Mr. James:

As you know, in March 2003, the Civil Rights Division initiated an investigation of the Alabaster Police Department ("APD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(3). We would like to take this opportunity to express our appreciation for the cooperation we have received thus far from the City of Alabaster and the APD in our investigation.

To date we have reviewed relevant APD policies and conducted interviews with City officials, all of the APD command staff and a cross-section of APD supervisors. We have interviewed line officers and participated in ride-alongs. We have also talked to community leaders and other citizens.

At the beginning of our investigation, we committed to providing the City with technical assistance to improve APD's practices and procedures. We already communicated a number of recommendations during our meetings with you and the APD command staff in May 2003 and January 2004. This letter is intended to supplement that guidance and is focused on APD's written policies.

It is important to point out, however, that our fact-gathering process is not yet complete. Indeed, we have made no determination that APD officers engaged in a pattern or practice of unconstitutional conduct. This letter, therefore, is simply a recitation of some of the concerns we

have identified to date. We hope this letter will assist in our mutual goal of promoting officer safety while ensuring that the APD provides the best possible police service to the people of Alabaster.

I. APD POLICIES

Policies and procedures are the primary means through which police departments communicate their standards and expectations to officers. Accordingly, it is critical that APD's policies and procedures are complete, accessible to all officers, and up-to-date.

A. Distribution and Accessibility

APD's Policy and Procedure Manual ("the Manual") is provided to all APD officers on computer disk when they commence employment. Officers are responsible for printing out a hard copy of the Manual. Officers sign a form acknowledging receipt of the disk.

It is our understanding that there is no process for reviewing or updating the Manual on a regular basis. Instead, new and revised policies are added to the disk upon approval by the Chief, and the disks are then reissued to officers. Our review of the Manual indicates that this method of maintaining the Manual may result in inconsistencies between older policies and more recently issued policies. For example, Chapter 12, Internal Affairs, Section 12.3.0, which sets forth the procedures to be used in processing citizen complaints, does not reference the APD Standard Internal Complaint Form. However, Chapter 27, Citizen Complaints on Police Personnel, Section 27.1.3.C requires the completion of this form upon receipt of any complaint. We recommend that APD review its Manual to ensure consistency between policies, and that APD repeat this review upon issuance of any new or revised policies. We also recommend that each policy include the date it is issued.

Moreover, APD's practice of distributing the Manual and revisions to the Manual on disk may not adequately ensure that officers review and understand new policies or revisions to existing policies. We recommend that the APD ensure that every officer is issued an APD Manual in hard copy (as well as an electronic copy, if desired), and that officers maintain manuals that contain all current policies. We recommend that the APD revise its requirement that officers acknowledge receipt in writing of policies and procedures to include a signed statement that the officer has read and understands the Manual and any revisions to the Manual.

To facilitate APD's implementation of these recommendations, we suggest APD designate an individual to be responsible for reviewing the Manual and any revised or new policies to ensure consistency. This individual would also be responsible for ensuring that all officers receive both electronic and hard copies of the Manual and revisions to the Manual, and for maintaining copies of officers' signed statements acknowledging receipt and understanding of the Manual and any revisions.

B. Organization

Policies and procedures should be clear, comprehensive and organized so as to be accessible to officers. APD's Manual contains twenty-seven (27) chapters that are not organized topically or according to another readily identifiable system.¹ For example, several chapters address policies and procedures pertaining to the use of force, but these chapters are spread throughout the Manual. See, e.g., Chapter 5, Use of ASP Expandable Batons; Chapter 10, Firearms; Chapter 15, O.C. Spray and/or Chemical Agent; and Chapter 22, Canine Operations. This structure makes it difficult for officers to locate all relevant information on a particular topic in the Manual.²

We recommend that the APD arrange its policies in a manner that allows immediate access to a complete policy, such as organizing the policies according to subject matter (administrative, operations, investigations, personnel, technical services, etc.). APD should review each policy to ensure that (1) all information directly pertaining to a particular topic is contained within the section of the Manual addressing that topic; and (2) information or policies that indirectly pertain to or inform other policies are cross-referenced. Policies should be reevaluated on a regular basis to ensure they are clear, internally consistent, and incorporate accepted, modern police practices.

II. USE OF FORCE

In the course of duty police officers are sometimes required to use deadly and non-deadly force. Because the use of force can place officers, civilians, and subjects at serious risk of harm, it is incumbent upon law enforcement agencies to ensure that officers use force appropriately. Use of force policies and procedures must clearly set forth standards for appropriate use of force.

APD's policies on the use of force during arrests, including the use of firearms, are set forth in Manual Chapter 3, "Administration," Section 3.22.0-3.29.0. This section includes APD's use of force reporting policy. We recommend that the APD remove the force-related policies from Chapter 3 because the policies are not administrative, and consolidate force-related information into a specific chapter applying to all uses of force.

A. Definition of Use of Force and Use of Force Continuum

¹ The Manual defines the terms "General Orders," "Bulletins," "Personnel Rules and Regulations," and "Procedural Manual." However, the APD does not issue General Orders or Bulletins, and all personnel and procedural rules and regulations are contained in the Manual. To avoid confusion, we recommend APD delete references to these terms.

² Chapter 3 of the Manual, entitled "Administration," appears to function as a "catch-all" chapter containing unrelated information on a variety of important topics. At 43 pages long, Chapter 3 is approximately twice the length of the next longest chapter in the Manual, and is four times the length of the majority of the other chapters. As a result, Chapter 3 is unwieldy and its contents difficult to access.

Officers should be provided with clear policies that establish guidelines for the use of force, including limitations on the use of deadly force and prohibitions on the use of unauthorized types of force. Uses of excessive force by police officers are violations of the Fourth Amendment, and are analyzed under the Fourth Amendment's objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 394 (1989). The analysis requires a balancing of the quality of intrusion on the individual's Fourth Amendment interests against the governmental interests. Id. at 396. The criteria courts apply to assess an excessive force claim include the severity of the crime at issue, whether the suspect presents an immediate safety threat to the officers or others, and whether the suspect is actively resisting or attempting to evade arrest. Id. Lack of specific policy guidance in the appropriate use of force may lead officers to believe they are justified in using force in situations in which it would be unreasonable or unnecessary. Conversely, unclear or too general policies may result in officers refraining from using necessary and appropriate force for an unwarranted fear of using excessive force.

Although APD officers may carry a variety of weapons, ranging from Oleoresin Capsicum ("OC") spray to the ASP baton to their service firearms, APD's policies do not guide officers on when to use each weapon in relation to other choices. APD does not employ a use of force continuum, matrix, or any other description of levels of suspect resistance and appropriate officer use of force responses. APD's policy does not mandate or describe de-escalation techniques that can minimize officers' use of serious force. We recommend that APD's force policy include a use of force continuum. When properly designed and implemented, a use of force continuum is a fluid and flexible policy guide. Many departments employ the continuum because it provides a useful tool in training officers to consider lower levels of force first, which protects the safety of both the officer and the civilian. Moreover, a use of force continuum emphasizes that officers' presence, verbal commands, and use of "soft hands" techniques (using hands to escort rather than to control subjects) can often be used as alternatives to other more significant uses of force. APD's force policy should describe how the various force options may be used, how the various applications of the options affect their placement in the use of force progression, and what level of force is appropriate in response to what type of resistance by suspects. The continuum should include the actual types of force used by APD, including canines and tasers.

APD's force-related policies fail to fully address what constitutes "deadly force." Chapter 3, Section 3.29.1 provides that an officer may discharge his firearm, among other reasons, to defend himself from death, serious injury, or felonious assault, and to defend another person from death or serious injury when that person was unlawfully attacked and other means have failed. APD policy fails to identify what uses of the baton constitute deadly force and fails to indicate that a strike to the head with an impact weapon, including a police radio or flashlight, is an application of deadly force. Similarly, the policy fails to identify uses of physical force that may constitute deadly force, such as the application of a carotid hold.

Chapter 10, Section 10.2.1.A of the Manual cites Section 3.43 of the State of Alabama General Statutes. We believe the intended reference is to Section 13A-3-27 of the Alabama Code, which provides, in relevant part:

(b) A peace officer is justified in using deadly physical force upon another person when and to the extent that he reasonably believes it necessary in order:

(1) To make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, unless the officer knows that the arrest is unauthorized

Ala. Code § 13A-3-27. The Supreme Court has determined that deadly force is only permissible when a suspect poses an immediate threat of serious physical harm to the officer or another person. Tennessee v. Garner, 471 U.S. 1, 11 (1985). The only exception to this general prohibition is the “fleeing felon” rule, that allows police officers to use deadly force to prevent the escape of a suspect in cases where there is probable cause to believe the suspect either poses an immediate threat of serious harm to the officer or another or has committed a crime involving the infliction or threatened infliction of serious physical harm. Id.; Vaughan v. Cox, 343 F.3d 1323, 1329-30 (11th Cir. 2003). Yet even in those circumstances police are required to provide a warning (if feasible) before using deadly force. Garner, 471 U.S. at 11. Deadly force is only permissible for as long as the threat remains. When the threat is over, the use of deadly force must stop.

B. Specific Uses of Force

We have reviewed APD’s use of force policies regarding specific uses of force and have the following comments.

1. Firearms

APD’s firearms policy fails to provide clear guidance on the circumstances in which officers are authorized to use firearms. Both Chapter 3, Section 3.29.1.A (“Authorized Use of Firearms”), and Chapter 10, Section 10.2.1.A.2 (“Use of Firearms Policy”) should be revised to adhere to constitutional standards regarding the use of deadly force, set forth supra, Section II.A.

APD’s firearm policy references six different types of firearms without providing clear guidance on which officers are authorized or required to carry which firearms.³ Section 10.6.0, “Authorized Weapons,” provides that members shall only carry weapons issued by the Department or approved by the Chief of Police. The policy does not specify whether off-duty members may, or are required to, carry Department firearms, nor does it set forth the procedure for requesting the Chief’s approval to carry a personal firearm. The guidance on ammunition is also inconsistent. For example, the section on police patrol rifles specifies the kind and amount of ammunition officers are authorized to carry, but this information is not provided for shotguns,

³ Specifically, APD’s firearm policy references the use of “service revolvers” (Section 10.4.1.A), “automatic weapons” (Section 10.6.3.C), shotguns (Section 10.8.2.B), “hide-out weapons,” (Section 10.8.1.A), police patrol rifles (Section 10.10.0), and “personal weapons” (Section 10.10.0).

service revolvers, or automatic weapons. The section on patrol rifles provides that officers carrying personal weapons may carry any amount of extra ammunition. We recommend the policy clearly identify the equipment officers are expected to carry routinely. We further recommend that APD establish a system of accountability for both Department-issued and personal ammunition so that the Department is able to monitor how much ammunition is used and the circumstances in which it is used. This will facilitate investigations into firearm discharges.

While Section 10.10.4 of APD's Firearms policy requires officers to qualify semi-annually on patrol rifles, the policy does not require regular qualification on any other firearm. We recommend that officers qualify to use each and every type of firearm the APD allows them to carry at least once a year, including "hideout weapons"⁴ and shotguns as described in Section 10.8.0.

Section 10.6.3.C provides that officers shall not remove or use Department automatic or gas weapons without the approval of the Chief, Captain or Sergeant. The policy should identify exceptions to the policy, if any, for circumstances in which there is not time to obtain supervisory approval and/or supervisors are unavailable to provide approval.

Section 10.2.1.B.6 prohibits officers from firing their weapons at a moving vehicle unless the occupants of the vehicle "are using deadly physical force against the officer or another person." The policy does not specify whether the moving vehicle itself can constitute "deadly physical force" justifying the use of a firearm. To minimize risk of harm to officers and others if the driver of the moving vehicle were shot, we recommend that the policy prohibit officers from shooting at vehicles that are used as weapons, unless the officer or a third-party is unable to move out of the path of the oncoming vehicle, or the driver or occupants of the car (for some reason other than the fact that they are using the car as a weapon) pose an imminent threat of death or serious injury to the officer or the public. The policy should include a prohibition on officers intentionally placing themselves in the paths of moving vehicles.

The potential for serious injury, including death, is high when officers are allowed to shoot at moving vehicles. The bullets could ricochet off the moving target and hit the officer or an innocent bystander, or the bullet could disable the driver of the vehicle causing the car to crash into the officer or a third party. Since the risks presented by officers firing at moving vehicles far outweighs any benefit that could be attained by such an action, because it is very difficult to disable a moving vehicle by shooting at it, officers should be prohibited from firing at moving vehicles except in those circumstances set forth in the preceding paragraph.

Section 10.5.1 provides that a firearms review panel will be convened to review firearms

⁴ "Hide-out weapons" are concealed weapons, such as leg-holstered firearms, that function as secondary weapons should officers be forced to relinquish their primary firearms and/or their primary firearms malfunction or they run out of ammunition.

discharges that are referred to the panel by the Chief. We recommend that the APD firearms instructor be a permanent member of the panel.

2. ASP Baton and Nightstick

Chapter 5 sets forth APD's policy on the use of the ASP Baton. According to the policy, the ASP Baton may be used by an officer to subdue a violently resisting subject, in self-defense, or in defense of a third party. The policy provides that blows from the ASP baton "capable of inflicting permanent injury" must be avoided unless a "life-threatening situation" exists. However, the policy fails to define either "blows capable of inflicting permanent injury" or "life-threatening situation." We recommend that APD identify head strikes as blows capable of inflicting permanent injury. "Life threatening situation" should be defined as a situation in which the use of deadly force would be authorized.

Section 5.3.2.b provides that uniformed APD officers may carry the ASP baton at their discretion. It is not clear from this policy whether officers are required to carry any alternatives to the ASP baton, such as a sidehandle baton, nightstick, or flashlight. Because officers may unnecessarily resort to their firearms if intermediary force options are not available, we recommend that APD require all officers to carry ASP Batons, as well as O.C. Spray, at all times.⁵

The use of nightsticks is briefly referenced in Chapter 3, Section 3.29.6.F, which prohibits the "unnecessary, excessive, or brutal use of the nightstick," and provides that it shall be used "with discretion and common sense, and then only as a 'come along' when necessary or as a defensive weapon when attacked." If nightsticks are not authorized and issued to APD officers, this policy should be deleted, and the carrying of nightsticks, like all unauthorized weapons, should be prohibited. If nightsticks are authorized and issued to APD officers, this policy should be expanded to provide adequate guidance on their use. The term "come-along" should be defined as a method of using the baton as leverage to move a resistant suspect. We note that this is the only reference we have found in the Manual to nightsticks, and it is inexplicably located within a section of the Manual dealing with firearms. We recommend that any nightstick policy be consolidated with Chapter 5, on ASP batons, so that the policy addresses all impact weapons.

3. O.C. Spray and Aerosol Tear Gas

Section 10.9.0 of APD's firearms policy addresses the use of aerosol tear gas. Section 10.9.2.B provides that tear gas

is intended primarily for use in those cases where the officer is attempting to

⁵ Chapter 15, Section 15.5.3.C provides that "All uniformed personnel will carry the chemical agent propellant on his/her gun belt at all times."

subdue an attacker or a violently resisting suspect or under other circumstances within the rule of law which permits the lawful and necessary use of force and which is best accomplished by the use of tear gas.

The last section of this policy (“or under other circumstances . . .”) fails to provide adequate guidance to officers as to when the use of tear gas is appropriate. Tear gas, once dispersed, covers a wide area and can affect many individuals. A tear gas cannister may be thrown back towards officers. Accordingly, tear gas should only be deployed by Special Operations Units in situations such as crowd control or when necessary to extract a suspect such as a barricaded gunman. It should only be carried by officers trained and authorized in its use.

4. Canine

When we toured APD in May 2003, we learned that APD has a canine unit consisting of one canine officer and one canine. APD has since adopted a canine policy, set forth as Chapter 22 of the Manual, which was provided to us during our January 2004 tour.

It is our understanding that APD’s canine unit is used only for drug search operations, and that APD’s canine is trained only for drug search operations. However, this is not reflected in the canine policy. Instead, the policy includes procedures that indicate canines may be used for physical apprehension. For example, Section 22.1.3.A.3 states that canines may be used for “making or maintaining an arrest when circumstances justify such use.” Section 22.1.3.B.4 sets forth procedures to be used “should the K-9 cause physical apprehension.”

Because the use of canines for physical apprehension constitutes a use of serious force, a canine policy must include the following information at a minimum: the circumstances in which canines would be deployed and whether they would be deployed on- or off-leash; whether handlers are required to issue a verbal warning before releasing their canines; whether prior supervisory approval is required to deploy a canine; what canine methodology is employed by the Department’s canine program;⁶ and the training and certification required for both canine and handler to perform physical apprehensions. Since APD does not use its canine for physical apprehensions, nor is the canine trained for this purpose, we recommend that the APD’s canine policy be revised to prohibit the use of canines for physical apprehension.

APD should revise the canine policy to provide more guidance on the appropriate use of the canine for drug search operations. We note that on April 5, 2004, the U.S. Supreme Court granted certiorari in Illinois v. Caballes, 802 N.E.2d 202 (Ill. 2003) to decide the question of whether the Fourth Amendment requires a reasonable, articulable suspicion to justify using a

⁶ For example, “find and bark” methodology requires training the canine to bark but not attack upon locating the subject.

drug-detection dog to sniff a vehicle during a legitimate traffic stop.⁷ APD will ultimately need to conform its canine policy to the Supreme Court's holding Caballes. In addition, the policy should state whether the canine is to be deployed on or off-leash, and should address whether a supervisor must approve, be present at, and/or be notified of a canine deployment.

Because the use of a canine, even when limited to drug search operations, may result in an unintended use of force should the canine react to an unanticipated threat, the canine handler must be an experienced officer specifically trained in canine handling.

5. Taser

It is our understanding that APD recently purchased and began to use tasers. APD did not have a policy governing the use of tasers when we visited in May 2003, but enacted a draft policy after our May visit and provided it to us when we returned in January 2004. The draft taser policy, however, is a subsection of APD's firearms policy. We recommend that APD create a separate taser policy.

While the policy provides useful general guidelines on the use of the taser, it does not provide adequate guidance on specific situations in which the use of the taser is appropriate. Because they are a targeted deployment device, tasers may be the best choice for de-escalating an incident in a crowded situation. The taser may also be effective in stopping a fleeing suspect. The policy does not specify which officers or rank of officers will be authorized to carry and deploy tasers, and whether carrying tasers will be mandatory or optional. We recommend that the policy be revised to include these details.

C. Use of Force Reporting

APD's current policies and procedures do not clearly indicate when uses of force are to be reported, nor do the current policies and procedures clearly indicate how uses of force are to be recorded. Chapter 3, Section 3.11.4.D requires APD officers to provide a written report to the Chief "whenever it is necessary to use any unusual physical force [or] other means." The policy should, but does not, define either "unusual physical force" or "other means." The policy further requires that if the officer must use physical force, or "other means," to overcome "actual physical resistance," the officer will, on approval of the Chief, charge the subject with interfering with an officer and/or assault. No specific form for reporting the use of force is referenced in

⁷ The defendant in Caballes is arguing that his conviction should be overturned because the Illinois officers did not have probable cause under Terry v. Ohio, 392 U.S. 1 (1968) to suspect the presence of illegal drugs in the suspect's car before a canine unit "alerted" on the truck, where marijuana was discovered. The State, citing the Supreme Court's holdings in United States v. Place, 462 U.S. 696 (1983) and City of Indianapolis v. Edmond, 531 U.S. 32 (2003), contends that canine sniffs do not implicate the Fourth Amendment because a sniff is not a search.

this section. However, other sections that reference this requirement refer to use of force reports using varying terms. For example, Section 15.7.1.A of APD's O.C. spray policy requires that an officer must complete the APD's "Chemical Use of Force" report upon the use of a chemical agent. Section 10.9.4.D of APD's revised Firearms, Tear Gas, Patrol Rifle, and Taser policy provides only that "the use of the spray will be reported, as is the discharge of the service revolver." In contrast, Section 3.29.3.C of APD's Administration Chapter provides that "A member who discharges his service weapon accidentally or intentionally (except at firearms range) shall make a verbal report to his Superior Officer as soon as circumstances will permit, and shall file a written report with his Commanding Officer as soon as practical thereafter, describing the circumstances in detail under which the firearms was discharged." The APD's ASP Baton Policy does not reference the requirement that the use of force be reported.

In our original document request of July 22, 2003, and again during our visit to Alabaster on January 7-8 2004, we requested copies of all completed APD use of force forms since March 2002. APD produced two reports. While it is possible that APD officers have been required to use force only twice since March 2002, it is also possible that the use of force is being under-reported in part due to officer confusion around reporting requirements.

We recommend that the APD adopt a policy that requires reporting for all uses of physical or instrumental force beyond unresisted handcuffing on a form dedicated solely to recording use of force information. The form should be able to record discrete information about multiple uses of force by multiple officers in a single incident. The form should require an officer to provide a detailed description of the incident, beginning with the basis for the initial contact, continuing through the specific circumstances and actions that prompted each use of force, resulting injuries, and medical treatment. Check boxes should be supported by a narrative, where appropriate. The form should include a section to indicate whether the named witnesses provided statements and for supervisors to evaluate each use of force. The reporting policy should also specify a time frame in which the use of force information must be recorded, the responsibility of the first-line supervisor to ensure force is documented, and a procedure for the information to be provided to the chain-of-command. Finally, the policy should establish a review mechanism to ensure that officers are complying with the reporting procedures, and provide for appropriate administrative sanctions for officers who fail to comply.

The information regarding each use of force should be tracked in an Early Warning System ("EWS"), as discussed below. The APD should train all officers in use of force reporting and in the use of the use of force form.

D. Use of Force Review and Investigation

The routine review of officer uses of force is critical to a department's ability to ensure officers are using force in a manner consistent with constitutional standards and the department's policies. Use of force reviews may identify both officer training needs and patterns of unauthorized or excessive uses of force. APD lacks a clear policy on reviewing uses of force

and investigating those that appear excessive, avoidable, and/or indicative of potentially criminal misconduct.

We recommend that the APD establish a policy requiring the review and investigation of all uses of force beyond un-resisted handcuffing. We recommend that the APD establish guidelines regarding the initiation of the review and investigation process. Guidelines should identify the circumstances in which an officer's supervisor is required to make command notifications, to respond to the scene to gather and preserve evidence, and to ensure injured person(s) receive prompt medical attention.

We recommend that the Internal Affairs Office be responsible for routinely responding to the scene and investigating serious uses of force, including uses of force in which the subject is injured or complains of excessive use of force, uses of force that require hospitalization or result in death, and all head strikes and firearm discharges, except discharges in the course of training or certification.

The policy should require the officer assigned to investigate an incident to evaluate each use of force as well as any instance of potential officer misconduct discovered in the course of the investigation. The investigating officer should be required to refer any incident of potential misconduct through the chain-of-command to the Chief.

III. VEHICLE PURSUIT POLICIES

A. Vehicle Pursuits

APD's vehicle pursuit policy, set forth in Chapter 18 of the Manual, sets forth the policies and procedures that guide APD officers' pursuit of known or suspected criminals. There is a high risk of harm to the officer, the subject, uninvolved bystanders, and other drivers during high-speed vehicle pursuits. Accordingly, well-defined guidelines that identify circumstances in which it is appropriate to initiate a vehicle pursuit are critical elements of a vehicle pursuit policy. Training in appropriate vehicle pursuit techniques is essential.

APD's Vehicle Pursuit Policy provides only general guidelines to officers on when to initiate and when to terminate vehicle pursuits. Section 18.1.6.F states:

as a general rule, pursuit is not recommended or favored when the potential danger to the officer and general public outweighs the potential advantage of apprehending a fleeing vehicle by such means.

The policy identifies nine "questions" or factors officers should consider when deciding whether to initiate or terminate a vehicle pursuit, including: the nature of the offense; the time of day; weather conditions; road conditions; traffic conditions; geographic location; population density; officer familiarity with the area; and vehicle capability and reliability. The policy does not provide specific guidance to officers in how to evaluate and balance these factors. Instead, the

decision as to whether to initiate or terminate a vehicle pursuit is left largely within the officer's discretion.

APD's policy apparently permits vehicle pursuit for traffic violations and other misdemeanor offenses. See Section 18.2.1.A. Additionally, insofar as the policy contemplates "continuing pursuits" (defined as "over a greater distance and for a long period of time"), the policy suggests that pursuits can continue indefinitely. See Section 18.2.2 B. If the officer continues a pursuit without success, the policy provides for the use of "boxing-in" and "ramming" techniques in "extreme" emergency situations. However, the policy does not describe or define "emergency." See Sections 18.3.0 and 18.4.0. APD policy provides for the use of roadblocks, another technique that poses a significant risk of harm to officers, subjects, and bystanders.

We recommend that APD revise the Vehicle Pursuit Policy to clearly prescribe the circumstances in which vehicular pursuit is authorized. More guidance should be provided on when to terminate a pursuit, and the policy should be revised to limit the distance and time a supervisor may authorize a pursuit to continue. Section 18.2.6.F provides that when a pursuit enters another jurisdiction the appropriate police department will be contacted "if possible." This section should be revised to indicate that such contact is mandatory.

Finally, it is our understanding that APD has procured and is now using tire deflation devices, also known as "Spike Strips." Spike Strips are a safer alternative to the use of roadblocks and we commend APD for adopting this system. The rules governing APD officers' use of Spike Strips are set forth in a newly created policy, Chapter 23.1.0. Ideally, the use of Spike Strips should reduce or eliminate the need for roadblocks, ramming, and boxing-in techniques.

IV. INVESTIGATIONS

A. Investigation of Citizen Complaints

A fair and impartial process for receiving and investigating citizen complaints is crucial to ensuring officer accountability and supervision. Not only does such a process deter misconduct, but it also is an important tool for maintaining good community relations and ensuring that the community has confidence in, and respect for, the Department. Aspects of APD's prior citizen complaint process had the potential to discourage the filing of complaints and to impair their effective tracking and resolution. The APD revised its previous policy in November 2003 to provide more accessibility to the public in the citizen complaint process.

1. Intake and Tracking of Citizen Complaints

Under APD's new policies, Chapter 27 (Citizen Complaints on Police Personnel), Section 27.1.0, any person believing he or she was treated "less than professionally" by a member of the APD may file a complaint. The complaint may be registered by telephone, in

person, or in writing, and may also be filed anonymously. Section 27.1.2. During our January 2004 APD tour, we were told that all APD employees were trained in the handling and processing of complaints. We noted that the new procedure for handling complaints was posted prominently by the entrance to the police station.

APD has created a “Standard Internal Complaint Form” (“Complaint Form”) to be completed “after a particular and specific complaint is received.” Section 27.1.4. This form is then to be given immediately to the Chief for assignment and investigation. Id. We were told that officers carry complaint forms that citizens can fill out immediately. The complaint form currently records the complainant’s statement, officer’s statement, supervisor’s comments, and disposition.

APD’s new policy is a marked improvement over its prior policy, particularly because it increases public access to the complaint process. We recommend that APD continue to accept all phoned, faxed, and anonymous or confidential complaints. Every officer in the department should continue to be required to accept a complaint presented by a citizen, and that upon receipt, the officer be required to submit the complaint to a supervisor in writing.

Although the APD is to be commended for its new complaint intake policy, there are a number of areas that could benefit from modification. For example, APD’s new policy on citizen complaints does not explicitly state to what degree it overrides or supersedes matters dealing with citizen complaints contained in Chapter 12, Section 12.3.1. Because Chapter 12 contains a number of policies inconsistent with Chapter 27 (e.g., requirements that complaints be made in person, in writing, under oath)⁸, it is unclear which policy an officer must follow.

We recommend that APD delete superseded portions of the APD policy manual and ensure that officers are well-trained on current policy. We also recommend that the Complaint Form currently required by Section 27.1.3 be used not only for citizen complaints, but also for internal complaints, where an officer reports inappropriate action by another officer.

Many APD officers have not been properly trained to record a citizen complaint about a fellow officer. Our expert consultant’s review of completed complaint forms determined that some officers recording citizen complaints omitted crucial information, failed to ask important questions, and did not record such basic facts as the names of witnesses. Investigations of these complaints would be hampered by the absence of this information. All officers should be trained on how to take a citizen complaint.

⁸ APD’s old complaint policy included other problematic practices, such as requirements that the complainant commit to testifying against an officer, or that a complainant release personal medical information at the time the complaint is filed. Any medical release should be narrowly tailored to information regarding the injury alleged in the complaint.

APD's Complaint Form appears to be poorly designed. Our expert consultant noted that based on his review of complaint forms, officers were unable to complete them accurately. We recommend APD redesign the Complaint Form to assist officers in more completely capturing relevant information. Our recommendations for redesign are discussed below in Part IV.D., "Investigative Findings."

Though it is APD policy to make publicly available an annual summary of IA dispositions, it is unclear whether this occurs. Moreover, it does not appear that there is in policy or practice a requirement to notify individual complainants of the disposition of their complaints. We recommend APD notify all complainants of the disposition of their complaints, including the finding and an explanation of the finding.

2. Referral for Investigation and Internal Investigative Procedure

A referral to Internal Affairs ("IA") may be initiated within the department or by citizen complaint. It appears that under current APD policy, internally generated and citizen complaints are to be investigated in the same fashion.

The Chief makes the ultimate determination as to how each allegation of misconduct is referred for investigation within the APD. If the allegation is criminal, the Chief may choose to assign a matter to an outside police agency for investigation. Chapter 27, Section 27.1.5. The Chief may refer to IA complaints deemed "major." Chapter 12, Section 12.3.1(d). Major complaints are those that may be criminal or that would carry severe discipline or reprimand. Id. Minor violations, Section 12.3.1(1), are referred by the Chief to the Captain of Police, who may himself investigate and act, or may assign the complaint to the Patrol Division Commander or the Watch Commander for investigation. Chapter 27, Section 27.1.6. Under APD policy, the IA is delegated the authority of the Chief for investigatory purposes. Chapter 12, Section. 12.4.1. Current IA policy states that any investigation begun by a supervisor may be ordered stopped at any time and assumed by the IA. Section 12.4.2.

During investigations of potentially criminal misconduct, officers are read Miranda rights before questioning. Officers accused of administrative wrongdoing are advised of other rights and obligations.⁹ Section 12.5.1.A.1-2. Officers are permitted counsel "during any interview concerning allegations of misconduct by the employee," Section 12.5.2, and may be required to

⁹ APD officers can be required to answer all questions specifically, narrowly and directly related to the performance of their duties. Refusal to comply with an order to answer these questions violates departmental rules, subjecting the officer to further discipline, which may include dismissal. However, any required self-incriminatory admission made during the interview may only be used in subsequent administrative proceedings, and may not be used in a criminal action. Section 12.5.1.A.2.a-c.

be polygraphed. Section 12.5.3. In circumstances where the department orders a polygraph for an officer, the complainant, if known, must also agree to submit to a polygraph. Id.

We note several issues concerning APD's current procedures for referring and investigating internally generated misconduct allegations. As an initial matter, APD policy is unclear as to what conduct will trigger a criminal investigation. APD should establish written policies clearly indicating when investigations of possible criminality by APD employees will be handled by an outside investigatory agency, and when the District Attorney's Office will be notified.

In addition, APD has developed only general investigative protocols. Section 12.5.4. APD policy does not sufficiently specify the duties of officers responsible for conducting investigations. APD should require investigators to conduct in-person, mechanically recorded interviews with all complainants, relevant officers, and witnesses. We recommend establishing guidelines concerning when recorded interviews are transcribed. APD should establish guidelines regarding when to compel statements pursuant to Garrity v. New Jersey, 385 U.S. 493 (1967), and ensure that officers are adequately informed of their rights against self-incrimination to preserve the integrity of potential criminal investigations. APD should require photographs of all injured parties. APD policies should specify the documents that investigators must collect and preserve in the investigative file, including all relevant police reports.

APD policy does not explicitly state that officers must report violations of law or APD codes of conduct that would be subject to disciplinary action. A policy should be established requiring officers who witness misconduct by other officers to report such conduct to an IA supervisor.

APD should also develop a protocol specifying the responsibilities of officers who are the subject of an investigation, consistent with Garrity concerns and constraints. The protocol should require subject officers to provide non-testimonial evidence, if warranted, such as submitting to a chemical test, releasing relevant medical information or turning in a firearm for a ballistics analysis. A subject officer should also be required to produce all statements, reports and notes completed in his or her course of duties that are related to the allegations.

APD's policy on special investigations, Section 12.5.3.C.5, suggests that an officer's requirement to submit to polygraph testing depends on the complainant's willingness to submit to polygraph testing. APD should clarify that an officer's duty to submit to polygraph testing is independent of a complainant's willingness to be polygraphed.

B. Internal Affairs Office: Structure and Organization

1. Organization and Responsibilities

The IA component of law enforcement agencies safeguards the integrity of the department and its officers. It should seek to ensure that those who enforce the law will themselves follow the law, as well as maintain an acceptable level of professionalism. This mission requires appropriate administration, staffing, and investigative procedure.

APD IA policies are contained in Chapter 12, Internal Affairs Component, Section 12.1.0 et seq. APD's IA division has primary supervisory responsibility for the review and investigation of all internal as well as citizen complaints against officers. Section 12.4.1. APD policy requires maintenance of a complaint log and a central file for complaints, regular audits of complaints, and publication of an annual summary of complaints and investigations. Section 12.4.3. These policies enable department officials to obtain details concerning specific complaints and investigations, as well as details about complaints and investigations over specified time periods.

2. Staffing and Training

An IA component must be appropriately staffed, and staff must be trained to handle investigative and administrative responsibilities. Currently, the APD's IA division is staffed by a lieutenant and two investigators who investigate allegations and recommend whether disciplinary action should be taken. APD's IA staffing level is sufficient to conduct timely investigations. However, there appear to be no policies establishing selection criteria for IA positions, nor are there recruiting or training procedures. In selecting an IA officer, their disciplinary histories, if any, must be taken into account to ensure that only officers with the highest ethical standards serve as investigators. IA officers should not be selected to investigate a particular matter if they had any involvement in the incident under review or whose relationship with an officer in question would create an appearance of bias. APD also currently offers no incentives to encourage qualified officers to apply for IA duties.

Given the potential implications of IA investigations, it is critical that IA officers be properly trained in investigative procedure. All IA officers should receive investigatory training. Officers must be trained on how to ask questions, what types of questions to ask, how to develop and preserve evidence, as well as the various constitutional requirements that are associated with these inquiries.

C. Supervisory Review and Treatment of Minor Violations

If the Chief determines a complaint to be "minor," the Chief refers it to the subject officer's supervisory chain of command for investigation. A supervisor's investigation is limited to questioning the officer, witnesses, and complainants, as well as securing relevant evidence. Chapter 12, Section 12.3.1. Upon completing the inquiry, the supervisor forwards to the unit commander the investigative report of the alleged violation, all documents and evidence, and a recommendation for disposition. Section 12.3.2. During our most recent tour of the APD, we were told that the patrol lieutenant conducts the investigation of "minor" citizen complaints.

APD's policy does not clearly define what constitutes a "minor" category infraction, and does not specifically identify the kinds of complaints to be investigated by IA, command staff, or the chain of command. The distinction between major and minor infractions is not sufficiently articulated in APD policy. This is a particularly important issue because this categorization determines whether IA will be responsible for the investigation. We recommend that APD more clearly define major and minor infractions.

To the extent command officers investigate citizen complaints, APD should require them to be properly trained in investigatory procedures. APD policy should prohibit a supervisor from investigating a complaint against another officer if the supervisor was involved in, or present during, the incident under review, or has a relationship with the officer that might undermine the integrity of the investigation or that creates an appearance of bias.

D. Investigative Findings

APD's policy directs that a supervisor's recommendations, or those made by IA at the conclusion of an IA investigation, are referred to the Chief for a final determination of whether a violation has been sustained according to the evidence. See Chapter 12, Section 12.7.1.¹⁰

APD's investigation protocol does not set forth the requirements for what evidence must be gathered during an investigation. For example, a supervisor's investigation permits "questioning the officer, witnesses and complainants, and securing all relevant evidence." Section 12.3.1. There is no specification of what questions are to be asked or what evidence is to be gathered. Our review of completed APD citizen complaint forms showed that officers often failed to inquire about basic facts necessary for a proper investigation. This failure stemmed in part from the complaint form's poor design that does not direct officers to ask relevant questions.

We observed that many of the complaint forms contained little useful information regarding the specific complaint. Some complaint forms contained no complaint statements, others listed that a "verbal discussion" was held with an officer – a form of disciplinary action – despite a finding that a complaint was "unfounded." Some complaint forms conveyed information in such vague terms that it was not possible to understand the complaint. Many forms were unsigned by the investigator. Because citizen complaint investigations often did not develop all relevant evidence, it is difficult for APD to determine whether citizen complaints may signal general problems in the APD, such as in the way APD officers conduct traffic stops.

10

APD Policy Section 12.7.2 separates investigative findings into four categories: "sustained," "exonerated," "not sustained," and "unfounded." "Sustained" complaints are those where it is determined that the alleged conduct took place and violates policy. "Exonerated" complaints are those where it is determined that the alleged conduct took place but does not constitute a violation of policy. Complaints categorized as "not sustained" are those where there is not enough evidence to determine whether misconduct has taken place. "Unfounded" complaints are those where it is determined that the alleged conduct did not take place.

APD should revise its policies to develop an investigative protocol for citizen complaints that requires a summary of the investigation and an assessment of the police action that is the subject of the complaint. The protocol should require a finding as to whether: (1) the police action was in compliance with policy, training and legal standards; (2) the incident involved additional misconduct; (3) the use of different tactics should or could have been employed; (4) the incident indicates a need for additional training, counseling or other non-disciplinary corrective measures; or (5) the incident suggests that APD should revise its policies, training, tactics, or equipment. The APD protocol should state that the preponderance of the evidence is the standard of proof for an administrative investigation.

We suggest that the complaint form should be redesigned to include the name of the officer investigating the complaint, and the names of those individuals interviewed about the complaint. The form could be divided into three sections: (1) investigation; (2) findings; and (3) resolution. All information necessary for the investigation of the complaint would go in the investigation section: complainant's name; nature of complaint; officer(s) involved; investigator's name; a statement of all relevant information discovered in the investigation; names of witnesses; and any other relevant information. The findings section would state the investigator's findings and rationale. The third section would note whether any discipline was taken, the date it was taken, and whether the complainant was notified.

V. DISCIPLINE

The imposition of discipline is crucial to address and minimize officer misconduct. APD policy allows for both oral and written reprimands, and in some cases, the filing of formal charges subject to a departmental hearing. It appears, however, that these methods of discipline have not been used systematically.

We recommend that the APD develop a consistent system to impose discipline. Such a system should identify ranges of appropriate disciplinary action that would look not only to the nature of the infraction, but to other factors, such as prior disciplinary history. Those serving on a departmental hearing panel charged with imposing discipline must be appropriately trained. A disciplinary system should track all discipline received by an officer as well as the dates of disciplinary action.

VI. SUPERVISORY OVERSIGHT

A. Risk Assessment and Management

APD command staff should examine and review officer conduct on a regular basis as a proactive measure to minimize and detect misconduct, and to identify training and policy issues. The new APD citizen complaint procedure requires a Captain to meet annually with every APD officer to "display and discuss" all contents of an officer's individual complaint file. Chapter 27, Section 27.1.9. On our January 2004 tour of the APD, we were told that in practice, the Chief meets privately every six months with each officer not only to review complaint reports, but to

discuss any problems or concerns officers may have concerning the department. The current practice of meeting and discussing complaints and other issues with each officer is an appropriate way of troubleshooting potential problems in the department. In addition to this practice, the APD should also adopt an EWS as an integral part of its risk management program.

B. Early Warning System

An EWS is a program, often computerized, designed to collect data on individual officers for the purpose of maintaining, integrating, and retrieving information necessary for effective supervision and management of a police department and its personnel. It may track uses of force, citizen complaints, IA investigations, service calls, and other items relevant to an officer's conduct. A police department can then use EWS data regularly and proactively to promote best professional police practices; accountability and management; manage the risk of police misconduct and potential liability; evaluate and audit the performance of officers and units; and to identify, manage, and control at-risk officers, conduct, and situations. APD does not currently utilize an EWS.

Despite APD's relatively small size, APD can develop an EWS that is appropriate for its needs. APD could develop a paper-based EWS system rather than an electronic system if necessary. Even a simple EWS would provide a useful assessment of each officer's conduct. It should contain information on all investigations and complaints, including non-sustained complaints and complaints prior to final disposition, uses of force, criminal arrests and charges, civil lawsuits, training history, supervisory reviews, discipline, and other corrective actions, as well as awards and commendations.

We recommend that the APD require supervisors to review the EWS data of every officer they supervise on a regular basis. APD should establish guidelines regarding specific events that will trigger an additional supervisory review, such as a specific number of uses of force or citizen complaints within a discrete period.

C. Vehicle Video and Audio Tape System

Vehicle video recording, as well as the audio recording of field interviews, can be an important tool in protecting the integrity of a department, its officers, and officer interactions with the public. Chief Oliver initiated the use of vehicle videotapes and hand-held cassettes used to record field interviews. These policies have been codified at Chapter 9, Section 9.1.0 et seq. Generally, the officers we interviewed during our visit to APD – including the Chief – were pleased with the results of the new policy. APD vehicle video cameras are designed to automatically turn on when a cruiser's emergency lights are switched on. We were told that officers are required to manually turn on their hand-held tape recorders – kept in their jacket or shirt pockets – in nearly all instances when they speak with a citizen. Written policy, however, requires recorded conversations in domestic dispute cases, field interviews, interrogations, arrests, and "other times when an officer considers it appropriate...." Sections 9.1.1, 9.3.9 and 9.3.10. APD policy allows a supervisor to review a tape at any time. Section 9.6.2.

Some officers may not be complying with APD's Vehicle Video Camera and Tape policies (Sections 9.3.6, 9.5.1, and 9.5.2). One supervising officer reported that on some occasions, particularly with hand-held recorders, officers claimed dead batteries or forgetfulness as reasons the cassette did not record an encounter. Officers should be held accountable for negligent and foreseeable failures to follow APD policy, such as "forgetting" to tape an encounter or allowing batteries to run down.

It is unclear how and when these video and audio tapes are reviewed by supervisors. We recommend that APD institute periodic and random review of video and audio tapes to ensure compliance with APD's recording policy. APD officers should expect random reviews and internal auditing of their citizen interactions.

VII. TRAINING

A. Field Training

1. APD's Field Training Program

Field training for new officers is an integral component of any comprehensive officer training program, and minimizes the risk of officers engaging in problematic behaviors, including the use of excessive force. APD recruits generally begin their officer training at a regional police academy along with recruits from 73 neighboring police departments. Because of the diversity of the departments and their policies, the academy teaches basic courses and relies upon individual police departments to teach recruits about their unique policies and procedures. The ADP field training program is the first opportunity new recruits have to learn APD policies and procedures. APD's field training policy focuses primarily on records and accountability. APD administers written examinations on field training subject matters, and relies upon daily evaluation reports to evaluate recruit performance. APD's training model does not appear to utilize role-playing and "real-life" training models, but instead focuses more on evaluating routinized performance through written materials. This field training method has been questioned by some police practice experts because it focuses more on evaluation than teaching officers how to react to potential situations.

We recommend that APD update its field training program, exam, and evaluation methods. The fact that no one has ever failed APD's field training program suggests it may be insufficiently rigorous.

Notwithstanding the field training and exam provided to recruits, APD's policy requirements for its current field training program policy service are sparse, offering merely "guidelines" that require ride-a-longs with current APD officers. Chapter 26, Section 26.1.0 et seq. Trainees are then to be "evaluated" with "material that is expected of them," and told that a written test will be given at the end of the program.

Generally, APD's field training program should be updated to reflect current training techniques and police procedures. Training and teaching should be emphasized over evaluation. Updated categories of training, such as community policing, department goals, mission statement, and values, should be developed and implemented. Field training should cover and test "high liability" items such as unconstitutional uses of excessive force and illegal searches and seizures.

We recommend the APD ensure that new recruits are trained in high liability APD policies and procedures before they are placed on patrol, even with another officer. At a minimum, the APD should ensure that each recruit has successfully completed the requirements of the field training program before placing that recruit on solo patrol. For many recruits the eleven week field training program will be sufficient; however, those recruits who are unable to complete the program in eleven weeks should be held over until they have completed the program.¹¹

We recommend that APD design its field training exams to better reflect a substantive knowledge of the information necessary to be an effective officer. The exam should avoid questions that suggest the answer. Recruits who fail the exam should be required by policy to return for additional training, or perhaps not become officers.

We recommend that the daily reports completed by field training officers ("FTO") contain enough information to provide a useful review of trainee performance. Our review of "Officer's Daily Observation Reports" found that the reports contain too few comments to evaluate performance. Training evaluations should reflect proper APD policy. In one case, an officer's evaluation we reviewed stated the trainee "is very nice to the public and will be corrected when nice is not the best policy." Without further elaboration or explanation, this comment is inappropriate because it does not identify how being "nice" is improper.

2. APD's Field Training Instructors

Well-qualified FTO instructors are critical to ensuring well-trained police recruits. APD's current policy appears to contain no criteria to evaluate the qualifications or effectiveness of those providing field training. The APD has no eligibility criteria for FTOs pertaining to the applicants' complaint and disciplinary histories, performance levels or special skills.

¹¹ During our tour, we were told that under certain circumstances, APD may allow recruits to begin working in the field as patrol officers before attending the state police academy. Regardless of the quality of field training an APD officer will receive, and though it may comport with state law, it is not the best practice to allow recruits who have not yet attended the police academy to ride with officers, particularly if the recruits are armed. If APD wishes to hire officers and utilize their services prior to their attending the police academy, it would be better to give those recruits tasks inside the department that are ministerial or administrative.

We recommend that officers who train recruits should have at least three years experience on the APD. Additionally, FTO instructors should have completed a course on how to serve in that capacity, such as those offered by the Law Enforcement Training Officer's Association. An FTO's experience and interpersonal skills should be factored into selection criteria.

We recommend that the APD take measures to recruit and train qualified FTOs, including providing additional incentives to encourage officers to apply to become FTOs. The APD should develop a mechanism for removing FTOs who fail to perform adequately, and whose actions while serving as FTOs would have disqualified them from selection. The APD should standardize the procedure for evaluating field training officers and solicit anonymous evaluations of those individuals by their probationary officers.

B. In-service training

In-service training is a valuable tool for ensuring that officers maintain familiarity with issues that are essential to police work. APD's in-service training covers the basic elements of police duties, such as radar certification, information on fugitive warrants, regulation reviews, and various safety issues. Monthly Police Officer Service Training ("POST") meetings are held and attendance is taken.

Although APD provided us with monthly records documenting the training topics covered and those attending monthly POST meetings, it did not produce documents reflecting the substance of in-service training by including curricula, lesson-plans, or other materials. From the class list, it appears that during the years 2002 and 2003, there is little if any training aimed at developing supervisors, and no community-relations oriented training.

We recommend that the APD provide additional blocks of mandatory, annual, in-service training that would include training on the use of force, searches and seizures, legal developments, and police integrity. Use of force training should train officers to use only reasonable force and instruct them in de-escalation techniques that can help them avoid using force or minimize the amount of force used, rather than focusing solely on when an officer is legally justified in using force. We recommend that this training focus on discussions and role-play with officers about particular scenarios (preferably taken from actual incidents involving APD officers) with the goal of educating officers regarding the legal and tactical issues raised by the scenarios. The APD should document that all officers have successfully completed the training.

We recommend that all investigators receive annual in-service training including investigatory techniques, interview skills and APD investigatory policies. Records of in-service training should, where applicable, include details regarding what subject was taught, who taught the material, and how much time was devoted to the matter. Documentation of in-service training may prove important should the need arise to defend APD training practices in litigation. Tests given during in-service training should be documented. APD should create a

training committee that should meet several times a year to decide on the upcoming year's training. The committee should organize training so that it properly addresses the Department's needs and weaknesses. The committee should include the Chief, but should also include representatives throughout the chain of command.

We note that one potential resource for the APD in establishing and improving in-service training programs may be the long-standing training and grant programs operated by other components of the Department of Justice, such as the Office of Justice Programs. While these programs are completely separate and independent of the Civil Rights Division's investigations, we would be pleased to provide you with contact information for exploring the availability of such programs.

We look forward to working with you and the APD in the coming months as our investigation proceeds.

Sincerely,

/s/ Shanetta Y. Cutlar

Shanetta Y. Cutlar
Chief
Special Litigation Section

cc: Mayor David Frings

Chief Stanley Oliver