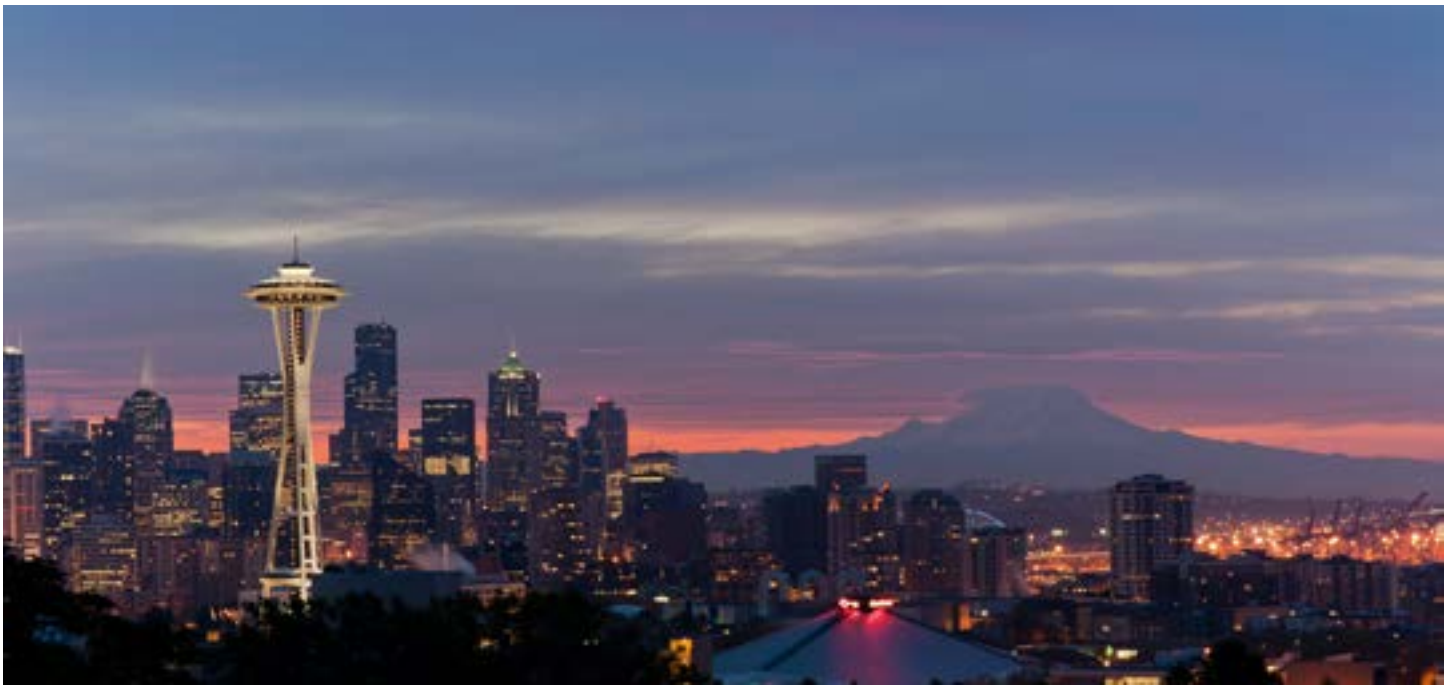
Seattle Office of Inspector General



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Audit of Disciplinary System for SPD Sworn Personnel

November 30, 2021

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Audit Selection, Objective, and Scope

The 2017 Accountability Ordinance (Ordinance 125315) set forth significant reforms to the disciplinary system for SPD sworn personnel, many of which were subject to modification or eliminated as a result of the 2018 Seattle Police Officers' Guild (SPOG) and Seattle Police Management Association (SPMA) collective bargaining agreements (CBA). The implementation of the Accountability Ordinance and the impact of the SPOG and SPMA CBAs on accountability have been a matter of significant public interest, and pertinent to the future of the consent decree as well as upcoming collective bargaining with SPD employee unions. This audit is intended to provide a better understanding of how the disciplinary system for SPD sworn personnel currently operates, and the impacts of that system on individual officer accountability as well as community members affected by police misconduct.[1]

OIG initiated this audit in December of 2020 as part of the OIG 2020 work plan, with the objective to assess provision 3.29.420 (A) of the Accountability Ordinance:

> *"SPD disciplinary, grievance, and appeal policies and processes shall be timely, fair, consistent, and transparent."*

The disciplinary system for SPD sworn personnel is highly complex, as demonstrated by the 'subway map' developed by OIG in 2019 (See Appendix). This audit examines the latter half of the disciplinary system, beginning when an investigation has concluded and the OPA Director has issued a Director Certification Memo (DCM) with recommended findings, and continuing through the Chief's issuance of discipline and any resolution on appeal.[2]

As such, the scope of this audit is focused on disciplinary actions and training referrals for SPOG and SPMA members resulting from OPA investigations conducted over the period from January 1, 2018, to the beginning of fieldwork, on March 24, 2021. In limited areas of the audit OIG will note the use of an expanded scope to assess processes going back through 2015.

Issues that arose in conducting this audit which were not part of the scope of this audit may become areas examined in future audit work.

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1 For the purposes of this audit, individual officer accountability means that disciplinary action is taken by the Department when appropriate and is documented in a transparent manner, as well as given proper consideration in future discipline and other pertinent situations.

2 Because OIG's Investigation function conducts oversight of OPA classifications and investigations, those functions are outside the scope of this audit.

Executive Summary

Within the scope of this audit OIG did not observe conditions generally thought to be most harmful to accountability or public trust (e.g., a pattern of arbitrators overturning discipline or a chronic failure to address repeated misconduct). However, current processes and practices, alongside SPOG and SPMA provisions, create gaps in the discipline system. These collectively impact the timeliness, fairness, consistency, and transparency of discipline for individual officers, and diminish transparency and fairness for community members affected by police misconduct.

Key findings in this report include:

- Proposal and Determination of Discipline: The process for recommending and determining discipline is generally consistent and timely, however steps can be taken to increase the transparency and fairness of the process for complainants.
- Accountability for Minor Violations: Use of the "Not Sustained Training Referral" designation combined with CBA recordkeeping restrictions have created a gap in accountability for minor violations of policy.
- Enforcement of Discipline: Suspensions are not consistently served in a timely manner, in some cases mitigating the financial impact of discipline.
- Disciplinary Records: A significant number of disciplinary actions were not documented in personnel folders, potentially impacting public records requests and employment checks.
- Communicating Case Resolution to Complainants: Lapses in OPA processes resulted in complainants not receiving relevant updates on case status and resolution, as required.
- Arbitration and Alternatives: The PSCSC does not provide a significantly different standard of review from SPOG arbitration and currently lacks the capacity to function as the sole route of appeal, as was envisioned in the 2017 Accountability Ordinance.
- SPOG Arbitrator Selection: SPOG grievances have largely not reached arbitration under the current CBA, so arbitration could not be fully evaluated. However, weak controls related to arbitrator selection as provided in the CBA do not ensure fairness, consistency, transparency, or timeliness.

OIG would like to acknowledge the full and timely assistance of SPD, OPA, and other City personnel while conducting this audit. OIG is confident that participants in the disciplinary process share a desire for an efficient and effective system, and have been active partners in recognizing and addressing issues identified during the course of this audit.

Types of Findings in this Report

Because the topics discussed in this report are of significant public interest, findings in this report will not be limited to those which are accompanied by recommendations. This report will also include matters for consideration and descriptive findings for the benefit of policymakers and the public.

- Finding with Recommendation: OIG identified an internal control deficiency and will recommend how the auditee may improve internal controls to resolve the deficiency.[3]
- Matter for Consideration: OIG identified a possible internal control deficiency, however no specific action is being recommended for the auditee to take at this time.
- Descriptive Finding: OIG finds it important to report on a noted condition, however no internal control deficiency is identified.

Disciplinary System Snapshot

The following graphic illustration represents the final dispositions of all disciplinary actions within the primary scope of this audit.

Exhibit 1

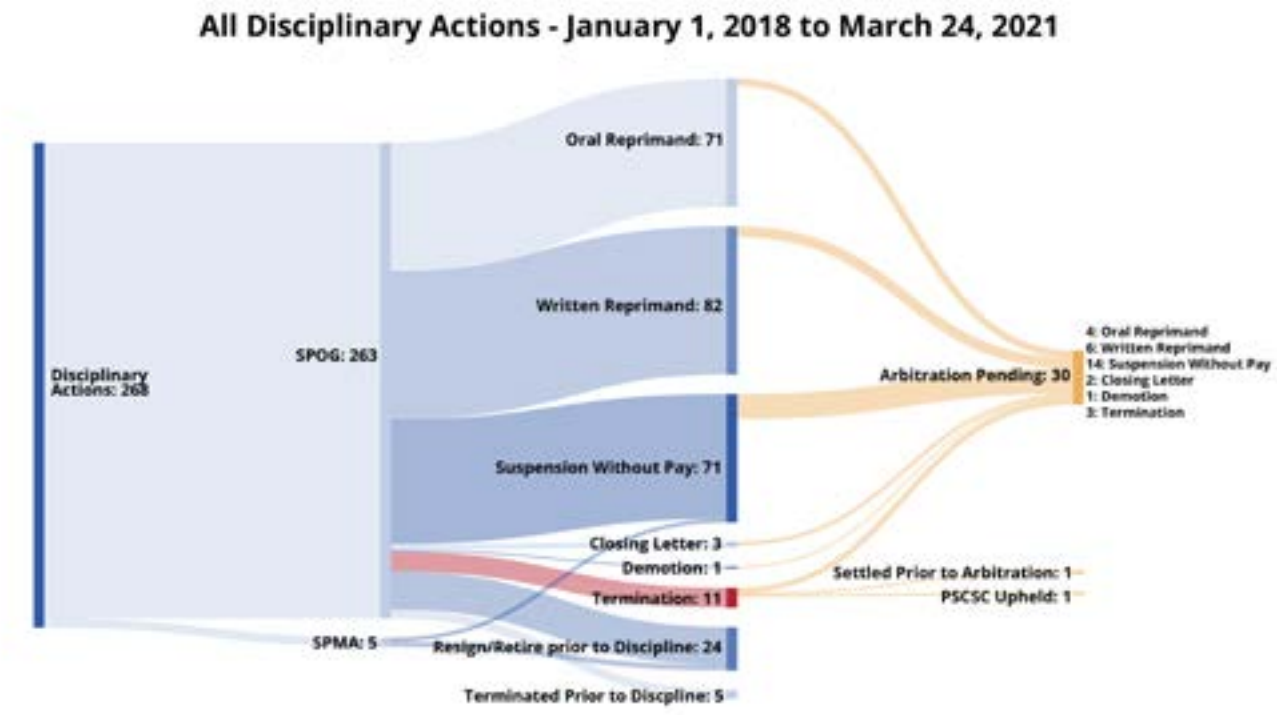


Diagram created using SankeyMATIC

3 Per the GAO Standards for Internal Control in the Federal Government (the Green Book), OV1.01 "Internal control is a process effected by an entity's oversight body, management, and other personnel that proves reasonable assurance that the objectives of an entity will be achieved."

Proposal and Determination of Discipline

Background and Methodology

When OPA issues a DCM at the conclusion of an investigation that recommends sustaining a policy violation, a Discipline Committee meeting is held to discuss the proposed sustainment and appropriate level of discipline for the violation. The Discipline Committee includes the OPA Director, the named employee's chain of command, and SPD's Employment Counsel.[4] Prior to the meeting OPA provides attendees with the DCM and investigation file. The Employment Counsel identifies potentially comparable cases (comps) for the Committee to review and discuss, as well as the personnel history of the named employee. If the Discipline Committee concurs with OPA's recommendation of one or more Sustained findings, the Committee will then confer on the appropriate level of discipline to impose. The OPA Director may also amend the DCM based on feedback from the chain of command.

From this discussion a range of discipline may be recommended to the Chief. If the chain of command disagrees with the OPA Director's recommendation of sustainment, they will prepare a separate memorandum for the Chief outlining why they do not believe that a finding should be sustained. If the Discipline Committee agrees that discipline should be at the level of a reprimand, that reprimand will be drafted, reviewed, and issued by the Chief shortly after the discipline meeting. If that recommended discipline includes suspension, demotion, transfer, or termination of employment, a Proposed Disciplinary Action Report (DAR) will be provided to the employee and a Loudermill hearing will be offered to the employee prior to any discipline being finalized by the Chief.[5]

As explained in the Accountability Ordinance 3.29.010 (C),

> *"[…] the Chief is responsible and accountable to the Mayor and City Council for the administration and management of SPD and is the final decision-maker, subject to appeal rights, in all matters related to misconduct, including discipline."*

Thus, the Chief may choose not to follow OPA's or their own chain of command's recommendations regarding sustainment or level of discipline, however some controls do exist to limit this possibility. These controls will be discussed later in this section of the report.

While OIG could not fully observe and assess all aspects of this process, such as Loudermill hearings, the steps and considerations from the issuance of a DCM to issuance of disciplinary action appeared to be generally consistent and timely. However, other actions could be taken to increase transparency and fairness for complainants and the public.

Key steps in this section of the audit:

- Examined the DCMs, Proposed DARs, and Final DARs for 159 randomly selected disciplinary actions from a total population of 268;
- Reviewed an additional 15 disciplinary actions to complete a 100% review of terminations and retirement/resignation in lieu (RIL) of discipline;[6]
- Reviewed packets of comps provided to the Discipline Committee for 16 randomly selected cases within our sample of disciplinary actions;
- Attended Discipline Committee meetings for five cases and were debriefed by the OPA

4 SPD Employment Counsel is an Assistant City Attorney assigned to SPD.

5 A Loudermill hearing provides an employee due process by giving them an opportunity to meet with the Chief to explain their perspective and offer mitigating information prior to disciplinary action.

6 The Department distinguishes between RIL Discipline and RIL Termination when it can assert that the sustained finding of misconduct would have resulted in termination. For the purposes of this report, they are jointly referred to as RIL Discipline.

Director on a sixth;

- Reviewed Sergeant, Lieutenant, and Captain promotional rosters for years 2017-2020 and corresponding HR records of promotion histories; and
- Reviewed the application of progressive discipline in 29 disciplinary actions within the disciplinary action sample, where OIG auditors observed that misconduct may have been repeated.

Matters for Consideration: Discipline Committee Observation

OIG's review of the Discipline Committee was limited in scope and did not include all chains of command or all levels of discipline, so OIG did not assess the function of the Committee itself. OIG attended Discipline Committee meetings for five cases and was debriefed by the OPA Director on a sixth. After the meetings, OIG spoke individually with three precinct commanders who had attended the Committee meetings. Given the limited ability to review this process, OIG notes the following related to the use of comps and how minor policy violations are addressed:

Use of Comparable Cases as a Framework for Discipline

OIG assessed the use of 'comps' as a framework for the Discipline Committee to assign consistent and fair levels of discipline. For any case before the Discipline Committee, SPD's Employment Counsel will provide approximately 5 to 10 relevant past cases, prioritizing those which are most recent. The Discipline Committee will examine the provided comps and determine which they feel are most similar to the case at hand. Those cases may then be referenced at the Discipline Committee when determining a level of discipline to recommend. OIG conducted a limited review of prior comps provided to the Discipline Committee and noted that the proximity of comps to the finding being considered varied significantly by case and allegation. For most allegations, the Discipline Committee was presented with at least one closely related comp, and often more than one. However, because comps are based on prior discipline, they are of limited use for misconduct without robust past precedent such as social media conduct, or when unique circumstances are present, as is often the case in uses of force.

Because the comps framework is based on past practice, it may also restrict efforts by the Department to modify disciplinary penalties in the future. While the Committee and Chief may recommend and issue discipline that significantly departs from prior disciplinary levels, abrupt departures from past precedent risk challenge on appeal. The Department may mitigate this risk by communicating a change in expectations to employees ahead of time, however it may ultimately be left to an arbitrator's judgment whether such communication was sufficient.

OIG considered whether an alternative control common to other law enforcement entities, a disciplinary matrix, would better ensure consistency, fairness, and transparency in disciplinary decisions and appeals. A disciplinary matrix may take many forms but is generally a uniform guide for levels of discipline based on the seriousness of the infraction, prior disciplinary history, and any aggravating and mitigating circumstances. A published disciplinary matrix may further accountability by establishing transparency for disciplinary penalties, and can be adjusted by policy makers or the Chief of Police to meet community expectations and clearly emphasize priorities. A well-developed disciplinary matrix may also reduce the discretion of both the Chief and an arbitrator by prescribing established penalties for given violations.

However, OIG is not making a recommendation that SPD implement a disciplinary matrix, as such a system may also create unintended and unreasonable restrictions. Prescribed disciplinary penalties may lack the flexibility needed to address outlier cases that most affect community trust, and a discipline matrix that does not account for new or unique circumstances may force misalignment between the severity of a violation and penalty. Further, a discipline matrix may still

allow for a significant degree of subjectivity at the classification stage.

There are significant tradeoffs between the flexibility of the current comps framework and the transparency and consistency of a possible discipline matrix, and the design of a discipline matrix is crucial to determining the significance of those tradeoffs. This matter should be further considered by policy makers, the Department, and police accountability partners.

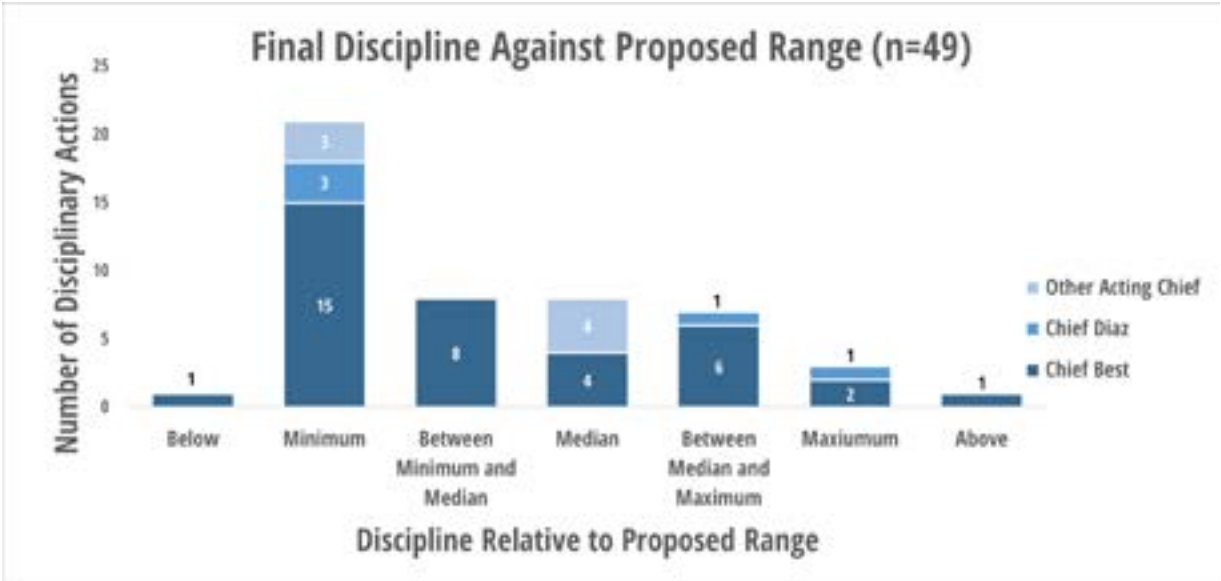
Discipline for Minor Violations

OIG observed that the Discipline Committee, on more than one occasion, initially disagreed on whether to recommend a sustained finding for a minor violation of policy. In these cases, the chain of command recognized that an alleged behavior occurred, but argued that a Not Sustained Training Referral was more suitable than a Sustained finding with discipline. However, the Committee also recognized that Training Referrals may not always be an appropriate way of addressing minor policy violations. Specifically, members of the Committee noted that training referrals may be ineffective when supervisors appeared to agree with the actions of the named employee, or when the employee already knew the policy they would be retrained on. These discussions indicated a gap in disciplinary options available to the Committee in cases where OPA found that a minor violation of policy occurred, but the Discipline Committee felt it did not warrant formal discipline. The use of 'Not Sustained' Training Referrals in such instances is further discussed in a later finding.[7]

Matter for Consideration: Chiefs have tended to apply the lower end of proposed disciplinary ranges

The Disciplinary Committee proposed a range of discipline to Chiefs for 49 actions within the audit sample.[8] A Chief's final discipline was in the lower half of a proposed disciplinary range in 61% of these cases. In 45% of cases, a Chief's final discipline was at the minimum of the range, while 8% of the time it was at the maximum (see Exhibit 2). When presented with a range between Suspension and Termination, Chiefs in all five cases OIG reviewed chose Suspension.

Exhibit 2



7 None of the meetings observed or cases within our sample involved the chain of command issuing a separate disagreement memo, and according to the OPA Director, such disagreement memos are issued rarely.

8 Disciplinary actions signed by Former Chief Best represent approximately 75% of our sample, thus there was not sufficient data to draw distinctions between Chiefs.

Among all disciplinary actions sampled, mitigating factors were cited in DARs 140% more frequently than aggravating factors.[9] A positive performance record and officer admission of fault were the two most-cited mitigating circumstances.

When presented with a range between Suspension and Termination, Chiefs in all five cases OIG reviewed chose Suspension.

Consideration of mitigating and aggravating factors appears to have some relationship with the level of discipline chosen by Chiefs. Where one or more mitigating factor was listed on the DAR, Chiefs selected the lesser half of a disciplinary range 63% of the time. Whereas when one or more aggravating factor was identified the lesser half of a disciplinary range was selected 52% of the time. Most notably, Chiefs chose the lesser half of a discipline range in 73% of cases where there was no aggravating factor cited.

OIG also notes that all cases with proposed disciplinary ranges involve levels of discipline in which the named employee may choose to have a Loudermill hearing with the Chief prior to finalization of discipline. These hearings give the employee a chance to address allegations made against them, potentially disputing or admitting fault. This opportunity to address allegations is generally the last step before the Chief determines discipline and may in some cases sway the Chief toward the lower end of a recommended disciplinary range.

Finding: OPA has rarely provided the Chief opportunities to meet with Complainants during the disciplinary process

Per Accountability Ordinance 3.29.125 (G):

> *"In cases where a Sustained finding has been recommended by the OPA Director and hearing from the complainant would help the Chief better understand the significance of the concern or weigh issues of credibility, the OPA Director may recommend that the Chief meet with the complainant prior to the Chief making final findings and disciplinary decisions."*[10]

OIG finds that the meeting envisioned in 3.29.125 (G) of the Accountability Ordinance serves a similar function to a Victim Impact Statement in criminal proceedings. The Department of Justice describes a Victim Impact Statement as providing "an opportunity to express in your own words what you, your family, and others close to you have experienced as a result of the crime. Many victims also find it helps provide some measure of closure to the ordeal the crime has caused." Further, affording complainants the opportunity to articulate their perspective in-person promotes fairness, as officers are already entitled to present their perspective to the Chief at a Loudermill hearing.

The OPA Director identified that he has only recommended one complainant meeting to a Chief, and in that case Former Chief Best declined to meet with the complainant.[11] The OPA Director identified that his practice has been to only make a recommendation for the Chief to meet with a complainant if the case hinged on the credibility of the witness and the case was a close call. Aside from the noted case, he had not determined such a meeting was necessary in any other matter.

OIG finds that the OPA Director's application of the complainant meeting provision has been narrower than the intent of the Accountability Ordinance, as the meeting is not just to assess the credibility of the complainant, but for the Chief to understand the significance of the complainant's concern.

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9 Multiple aggravating and mitigating factors may be discussed on a DAR.

10 The SPOG CBA specifies in regard to 3.29.125 (G) that "In the event the Chief meets with a complainant as provided in this section, notes will be taken at the meeting, and a copy of those notes will be made available to the Guild."

11 The Chief ultimately terminated the employee.

Because the OPA Director has only recommended a complainant meeting to the Chief in cases which hinge on a close question of credibility, opportunities have been missed for complainants and the Chief to discuss the impact of misconduct that OPA has recommended be sustained. However, upon further discussion of the issue during this audit, the OPA Director stated he was open to examining broader application of the 3.29.125 (G) provision. While OIG did not discuss the potential for more complainant meetings with the Chief, OIG is aware that on at least one occasion the Chief reached out following the termination of an officer, to apologize to a family affected by the officer's actions. It would be beneficial for the Chief and the OPA Director to explore how to better incorporate the perspective of complainants during the disciplinary process in the future.

> **1) Recommendation: The OPA Director, in consultation with the Chief of Police, should develop criteria to more consistently identify opportunities for complainants to speak with the Chief of Police as provided in the Accountability Ordinance 3.29.125 (G)**

Descriptive Finding: Chiefs generally apply progressive discipline to repeat offenses, although limitations exist

Per SPD Employment Counsel, an employee's disciplinary history is a significant factor when considering levels of discipline. This is reflected in Disciplinary Action Reports, where OIG noted the Chief cited repeated violations of policy as an aggravating factor 22 times within this audit's disciplinary sample, and an employee's general disciplinary history 11 times.

Generally, in a progressive discipline system, penalties start small and progress through documented warnings, to suspensions, and eventually discharge. Employees should be counseled at each step of discipline about what they did wrong and how to improve their performance in the future, and be notified that future misconduct will result in increased discipline.

Within our sample of disciplinary actions were some in which the employee appeared to have committed recurring violations of policy. When discipline for a prior violation was imposed before the occurrence of a subsequent violation of the same policy, the Chief generally considered the prior violation as an aggravating factor and applied a higher level of discipline to the subsequent violation. The application of progressive discipline becomes less clear where a subsequent violation occurred before discipline was imposed for the prior incident.[12] In these overlapping cases, the Chief is generally restricted by legal consideration from weighing the first when determining discipline for the second. This is because one element of demonstrating 'just cause' in disciplinary action is having provided an employee adequate notice that their conduct could be the basis for discipline. This principle is true also for the escalation of progressive disciplinary penalties based on prior conduct. An arbitrator may consider that an SPD employee had not been warned about prior conduct until they have received discipline or other documented supervisor action.

Illustrative of how this affects overlapping cases, OIG noted one example of an employee with sustained violations of *'5.001 Standards and Duties – Professionalism'* for incidents that happened less than one month apart. For these, the officer received two separate 15-day suspensions. OIG also noted another employee who committed two violations of *'4.010 Employee Time Off'* six months apart and received two separate 5-day suspensions with the second DAR stating,

> *"Because [the first] discipline was imposed after the conduct in [the second] case, it is not being relied on in determining the level of discipline imposed here."*

However, this standard is not absolute, as Chiefs did escalate discipline in some overlapping cases

12 In the cases reviewed, the median number of calendar days between the first incident and first disciplinary action was 275.

examined in this audit. Most recently in 2020, Chief Diaz justified terminating an officer in part because,

> *"At the time of this incident, you were under active investigation for another incident involving alleged biased comments and unprofessional comments. That investigation ultimately resulted in a lengthy suspension. While that suspension was not imposed until after [the incident], the first investigation provided you with ample opportunity to reexamine the Department's policies on bias and professionalism and to reflect on your obligations to comport yourself in a manner consistent with those policies. You did not do so."*[13]

While OIG finds the application of progressive discipline in overlapping cases was not entirely consistent throughout our review, departures from standard practice may be a fair and appropriate response to repeated serious misconduct occurring in a short period of time. When violations overlap, it is ultimately the Chief's judgment as to whether the totality of circumstances warrant an escalation of disciplinary penalty that would likely be upheld on appeal. Considering that there may be a substantial amount of time from when an initial incident occurs to when discipline is finalized, misconduct that is repeated months apart may in some cases not be subject to progressive discipline.

Matter for Consideration: Chiefs may impose discipline outside of a recommended level without triggering Accountability Ordinance notification requirements

Per Accountability Ordinance 3.29.135:

> *"If the Chief decides not to follow one or more of the OPA Director's written recommendations on findings following an OPA investigation, the Chief shall provide a written statement of the material reasons for the decision within 30 days of the Chief's decision on the disposition of the complaint. If the basis for the action is personal, involving family or health related circumstances about the named employee, the statement shall refer to "personal circumstances" as the basis. The written statement shall be provided to the Mayor, the Council President and the Chair of the public safety committee, the City Attorney, the OPA Director, the Inspector General, and the CPC Executive Director, and be included in the OPA case file and in a communication with the complainant and the public. If any findings or discipline resulting from an investigation are changed pursuant to an appeal or grievance, this responsibility shall rest with the City Attorney."*

This requirement to notify appears to be a significant control in deterring a Chief from undermining OPA's accountability role. OIG noted a limited number of cases in which the Chief did not follow OPA's recommendation to sustain a finding of misconduct. In these instances, Chiefs issued appropriate notifications of their decision to the Mayor, City Council, and others as identified in the Accountability Ordinance.

However, the notification requirements as outlined in the Accountability Ordinance only pertain to the sustainment of an allegation, and not the recommended level of discipline. When a Chief imposes discipline outside of a recommended range, external notification is not required. This is because recommendation of a disciplinary level is not made by OPA, but the Discipline Committee of which OPA is only a participant.

OIG noted one case in its review where the Chief went below the recommended disciplinary range. In this case the Disciplinary Committee recommended a 1-to-3-day suspension for what OPA found to be an out-of-policy use of force. The Chief ultimately imposed an oral reprimand, and no external notifications were sent because the finding remained Sustained. While clear

13 OIG notes that SPOG did not grieve this termination.

that this one instance does not constitute a pattern, nor was the reduction of the Discipline Committee's recommended discipline in this case so severe as to undermine the accountability system, OIG finds that this represents a potential control weakness. Because there is no control on the Chief's adherence to a proposed disciplinary range so long as the finding remains Sustained, a future Chief may be able undermine the accountability system and public trust by severely or consistently reducing discipline to minimal levels without triggering transparency requirements.

Descriptive Finding: Prior Sustained findings are generally not a significant barrier to promotion, especially at the Sergeant level

Per SPD Policy *'2.020 – Appointments and Probation'*:

> *"1. Review of an Employee's Performance History When Considering Promotion or Selection for Field Training Officer, Specialty Unit or Higher or Bonus Pay Position*
>
> *The data underlying an employee's performance and disciplinary history (PAS, use-of-force, OPA complaints, EEO complaints, on-duty collisions, vehicle pursuits, being named in police action claims or lawsuits, K9 apprehension-bite ratio and unexcused failure to appear in mandatory training) may be considered when an officer applies for promotion"*

OIG observed that members of the Discipline Committee, in forming recommendations, weighed the impact that disciplinary action may have on employees' promotional potential. This concern extended to the sustainment of minor technical violations of policy such as incidental failure to activate BWV, attend training, or properly complete reports. While OIG does not assess whether and how greatly promotional potential should be considered in determining discipline for any given case, this audit did seek to assess the actual impact discipline has had on officers seeking promotion.

Currently, a promotional roster is generated every two years for ranks of Sergeant, Lieutenant, and Captain. Employees are ranked on these rosters by their combined scores from assessments and service credit. Prior or ongoing discipline is not factored into ranking and has no bearing on whether an employee can take an assessment.

Once promotional rosters are generated, the Chief can select a promotee from the top 5 employees on the roster.[14] OIG reviewed all promotional rosters from 2017 to 2020 and identified limited evidence that individuals with Sustained findings were passed over for promotion. Of the 2018 Sergeant roster, the top 33 names were promoted largely in the order in which they had been ranked. At the time of fieldwork, the top 16 names on the 2020 Sergeant promotional roster had also been promoted in order of ranking. Individuals promoted on these two rosters included 13 employees with Sustained findings of misconduct since 2015. Among these were employees with suspensions and some individuals with multiple Sustained findings. Our review identified similar results for Lieutenant and Captain ranks.[15]

It is ultimately the Chief's discretion as to who to appoint from promotional rosters. However, a 2001 settlement agreement between SPOG and the City provides protections for officers who are passed over on the Sergeant promotional roster for reasons that may include prior discipline.[16] Key elements of this agreement are shown below:

> *"2.1 On behalf of all Defendants, the City of Seattle agrees to make changes to its promotional practices for police officers and sergeants, as more fully outlined in the*

14 If considering for more than one vacancy the pool of names will expand on a 1 for 1 basis.

15 One individual appears to have been passed over for Lieutenant on the 2017 roster who also had a Sustained finding for professionalism. OIG did not assess if prior discipline was a determining factor.

16 Per the SPD HR Director the settlement agreement does not apply to the Lieutenant promotional roster, however OIG is aware that SPOG has grieved this matter.

following paragraphs. […]"

"2.6 In those instances where there is a candidate ranked higher on the register who is not promoted in favor of a candidate ranked lower on the register, the higher ranking candidate will meet with his/her Bureau Commander and the Chief of Police. During the meeting, the candidate will be informed of the reason for the decision and any perceived deficiencies in the employee's acceptability for promotion. […] In those cases where an employee is not perceived to have deficiencies but is passed over because of the exercise of the Chief's reasonable discretion, that employee shall have the status of an employee who has successfully completed an action plan for future promotions, as described in paragraph 2.7"

"2.7 […] the Bureau Commander and Chief of Police, in consultation with the candidate, will prepare an action plan setting forth proposed steps that the candidate can take to address the concerns set forth in the feedback meeting. The plan shall be composed of objective elements and be capable of completion with reasonable effort within 90 calendar days. The design and contents of the final action plan shall be at the Chief's discretion. A candidate may not grieve the design and contents of the final action plan at its inception, but if the Candidate is removed from the promotional register for failure to successfully complete the final action plan, the Candidate may include in a removal grievance that the final action plan was an abuse of the Chief's discretion. If the candidate is not deemed to have completed the action plan within the first 90 calendar days, he/she may file a grievance over whether the plan is composed of objective elements and is capable of completion with reasonable effort within 90 calendar days. The plan shall be signed by both the candidate and the Chief. The Chief and the Bureau Commander will meet with the candidate after 90 calendar days to review the candidate's progress. If the action plan has not been successfully completed at that time, the Chief and the Bureau Commander will meet again with the candidate after an additional 90 calendar days. If after a total of 180 calendar days, in the Chief's reasonable discretion the candidate has not successfully completed the action plan, the Chief may, upon notice to the candidate and the Guild, exempt the candidate from consideration for promotion and remove the candidate from the promotional register."

"2.10 In some cases, the candidate will have recently had a sustained complaint regarding such a serious act of misconduct as to render the candidate unfit at the present time for promotion and an action plan is not feasible. Provided the disciplinary action arising from the sustained complaint is finalized (no active grievances or civil service appeals), upon advance notice to the candidate and the Guild, the Chief at his reasonable discretion may exempt the candidate from consideration for promotion and the candidate will be removed from the promotional register. […]"

"2.13 A candidate may not be passed over more than one (1) time after successful completion of the action plan without just cause"

The settlement agreement does not define what serious acts of misconduct may render the candidate unfit for promotion, though SPD Policy *'5.002 – Responsibilities of Employees Concerning Alleged Policy Violations'* does provide examples of what the Department considers serious policy violations. OIG finds, based on our review of promotional rosters, that the disciplinary history of an employee has not served as a barrier to the promotion of most employees in recent years. Further OIG finds under the 2001 settlement agreement, it appears prohibitively difficult for a Chief to pass over an officer for promotion to Sergeant, absent a recently sustained finding of serious misconduct.

Accountability for Minor Violations

Background and Methodology

This audit sought to examine community concerns related to OPA's use of Not Sustained Training Referrals, specifically as a substitute for a Sustained finding where discipline may not be appropriate or warranted.[17]

The Accountability Ordinance provides the OPA Director with authority to exercise judgment in determining how to address complaints of police misconduct, including recommendation of a finding and issuance of Training Referrals. This audit did not seek to evaluate the OPA Director's judgment in issuing Not Sustained Training Referrals, but instead identify patterns and criteria used to form and explain that judgment.

OIG noted that the OPA Director regularly articulated, in the text of DCMs, mitigating circumstances considered in issuing Not Sustained Training Referrals. In a limited number of cases the OPA Director issued Not Sustained Training Referrals despite an employee's prior related behavior. This was most often regarding allegations that an employee violated SPD policy *'5.001 Standards and Duties - Professionalism.'* However, OIG did not find in these cases that the OPA Director failed to consider an employee's related history, or articulate reasonable factors in choosing not to sustain.

Rather, OIG finds that a general preference for Not Sustained Training Referrals in cases where OPA found violations of policy occurred, but were technical, inadvertent, or unlikely to be repeated, was indicative of a gap in finding categories as they are currently defined by OPA. The effect of this gap has been further compounded by how Training Referrals are memorialized for future reference.

Key steps in performing this section of the audit:

- Reviewed 249 randomly selected Not Sustained Training Referrals from a population of 732. Review included Director Certification Memos (DCMs) and corresponding SPD responses in IAPro and the Performance Appraisal System (PAS);
- Examined 34 Sustained training referrals issued by Chiefs on DARs, and corresponding SPD responses in IAPro and PAS;
- Examined relevant case histories of 16 employees who received Not Sustained Training Referrals for potentially repeated behavior; and,
- Conducted review of policies for eight local law enforcement entities across the nation, and three recent Department of Justice consent decrees on policing.

Matter for Consideration: OPA lacks an appropriate category of finding for minor violations of policy found to have occurred

Approximately 16% of allegations investigated by OPA within the scope of our audit resulted in Not Sustained Training Referrals, compared with approximately 11% Sustained findings.[18,19] Among Not Sustained Training Referrals, the most common policies alleged to have been violated were:

17 OIG applied standards from the Green Book in examining these concerns. Per the Green Book, "Management should evaluate performance and hold individuals accountable for their internal control responsibilities." Further, "[...] Management holds personnel accountable through mechanisms such as performance appraisals and disciplinary actions."
18 OPA recommends sustainment, and it is the Chief who makes the final decision.
19 Approximately 8% of Not Sustained Training Referrals were for allegations OPA originally recommended as Sustained, but later changed on an amended DCM.

Exhibit 3

Policies with more than 10 Training Referrals	% of all Training Referrals within audit scope
5.001 - Standards and Duties	20%
16.090 - In-Car and Body-Worn Video	11%
15.180 - Primary Investigations	7%
8.400 - Use of Force Reporting and Investigation	7%
5.140 - Bias Free Policing (Primarily Reporting)	6%
15.410 - Narcotics Activity Report	6%
13.031 - Vehicle Eluding/Pursuits	6%
6.220 - Voluntary Contacts, Terry Stops & Detentions	6%

Per the OPA manual (2016):[20]

> *"If the preponderance of the evidence shows that misconduct did occur, the recommended finding will be "Sustained." When the preponderance of the evidence shows that misconduct did not occur, the recommended finding will be "Not Sustained". In the event that the preponderance of the evidence shows that the actions of an employee violated SPD policy, but such actions were consistent with specific and known SPD training and/or supervisory direction proven to have been provided to the employee prior to the incident under review, the OPA Director may consider such facts in determining whether a Sustained or Not Sustained finding should be recommended, and in recommending discipline."*[21]

The OPA manual outlines five sub-categories of Not Sustained. These are 'Unfounded', 'Lawful and Proper', 'Inconclusive', 'Management Action', and 'Training Referral'. While OPA uses the term 'training', these referrals may be limited to counseling between named employees and their supervisor about the relevant policy.

Regarding Training Referrals, the manual says:

> *"When a "Not Sustained" finding is recommended and there may have been a minor violation of policy, but it was not willful and did not rise to the level of misconduct, OPA can require the employee's chain of command to provide appropriate training, counseling and/or review the situation for deficient policies or inadequate training. This encourages the chain of command to address well-intentioned mistakes through education and counseling."*

The determination of whether a policy violation is Sustained or Not Sustained does not always reflect whether the violation happened, but as specified in the above section, Not Sustained Training Referrals may reflect the OPA Director's judgment as to whether a violation rose to the level of misconduct.[22] The OPA manual does not define misconduct.[23] Instead it provides limited examples of behaviors that are not misconduct; "a minor or technical violation of policy, an inadvertent act, etc." These guidelines lack clarity and provide the OPA Director a high degree of flexibility in determining what constitutes misconduct and therefore what violations are or

20 OPA has finalized an updated manual effective January 1, 2022.
21 OIG identified that approximately 8% of 'Not Sustained' Training Referrals cited SPD policies or supervisor direction as a mitigating factor in the violation. OPA may also address gaps in training, policy and supervision by not sustaining and issuing a Management Action Recommendation.
22 In only 5% of Not Sustained Training Referrals was there a lack of evidence for the policy violation cited as the reason why OPA could not sustain.
23 Alternatively, the SPD manual section *'5.002- Responsibilities of Employees Concerning Alleged Policy Violations'* provides examples of 'minor' and 'serious' violations of policy but does not define misconduct.

are not recommended as a Sustained finding. This may be confusing to external stakeholders and result in findings that are contrary to a common understanding of what is meant by Sustained and Not Sustained.

The determination of whether a policy violation is Sustained or Not Sustained does not always reflect whether the violation happened

For reference, consent decrees between the Department of Justice and police departments in recent years have required use of a standard set of findings following administrative investigation into misconduct:

a) "Unfounded," where the investigation determines, by a preponderance of the evidence, that the alleged misconduct did not occur or did not involve the subject officer;

b) "Sustained," where the investigation determines, by a preponderance of the evidence, that the alleged misconduct did occur;

c) "Not Sustained," where the investigation is unable to determine, by a preponderance of the evidence, whether the alleged misconduct occurred; or

d) "Exonerated," where the investigation determines, by a preponderance of the evidence, that the alleged conduct did occur but did not violate policies, procedures, or training.

OIG conducted an additional limited review of eight other law enforcement agencies' policies to find how they classified minor policy violations following an administrative investigation into misconduct.[24] Our review identified that law enforcement agencies employ a variety of findings following an internal affairs investigation. Four of those OIG examined generally limited their findings to the same as the previously cited consent decree findings; 'Sustained', 'Not Sustained', 'Exonerated', and 'Unfounded'. Other agencies employed a broader range of findings, some of which identified an area of failure such as 'Training Failure' or 'Supervision Failure'. However, in all agencies reviewed, both Sustained and Not Sustained findings appeared to be based only on the sufficiency of evidence in proving whether a violation occurred.[25]

Exhibit 4

Law Enforcement Agency	Definition of Sustained (or equivalent)	Definition of Not Sustained (or equivalent)
King County Sheriff's Office	The allegation is supported by sufficient factual evidence and was a violation of policy.	There is insufficient factual evidence either to prove or disprove the allegation.
Tacoma Police Department	Sustained is a final disposition of a complaint when it is found that the member acted improperly with respect to the Department policy.	Not sustained is a final disposition of a complaint when the investigation is unable to substantiate whether or not misconduct or violation of policy or procedures occurred.
Spokane Police Department	When the investigation discloses sufficient evidence to establish that the act occurred and that it constituted misconduct.[26]	When the investigation discloses that there is insufficient evidence to sustain the complaint or fully exonerate the employee.

24 This review included the police departments of Tacoma, Spokane, Portland, Los Angeles, San Francisco, Chicago, New York, as well as the King County Sheriff's Office. OIG reviewed policy documents for these agencies but did not evaluate the implementation or operation of those policies.

25 Three reviewed departments (Spokane, Los Angeles, and New York) provide that an act must have 'constituted misconduct' to be Sustained. However, this report will explain in footnotes for each department that these considerations are materially different from OPA's.

26 The Spokane Police Department Manual does not appear to differentiate policy violations from misconduct. Further, section 340.3 of their manual provides a list of misconduct examples, some of which are categories that OPA has previously classified as 'Not Sustained' including attendance, unsafe driving, sleeping on duty, and unsatisfactory work performance.

Portland Police Bureau	The preponderance of evidence proves a violation of policy or procedure.	The evidence was insufficient to prove a violation of policy or procedure.
Los Angeles Police Department	When the investigation discloses that the act complained of did occur and constitutes misconduct.[27]	When the investigation discloses insufficient evidence to prove or disprove clearly the allegations made.
San Francisco Police Department	A preponderance of the evidence proves that the alleged conduct occurred and that the conduct violated Department policy or procedure.	The evidence fails to prove or disprove that the alleged conduct occurred.
Chicago Police Department	When the allegation is supported by substantial evidence.	When there is insufficient evidence to either prove or disprove the allegation.
New York Police Department	There was a preponderance of evidence that the acts alleged occurred and constituted misconduct.[28]	There was insufficient evidence to establish whether or not there was an act of misconduct.

Further, the policies of all agencies in this review allowed minor violations to be addressed through formal or informal actions as part of a Sustained finding. These actions included coaching, training, warning, admonishment, or no discipline.

While there is no policy or collective bargaining agreement related to SPD personnel that prohibits the issuance of Sustained findings with a training referral, no-discipline, or similar option,[29] OPA's practice is not to recommend Sustained findings with any action less than an oral reprimand, which is considered formal discipline.

Prior to 2019, OPA did recommend non-disciplinary Sustained findings, otherwise known as 'Closing Letters'. These were for cases where violations were proven, but mitigating circumstances were present. According to both the OPA Director and SPD Employment Counsel, SPOG repeatedly grieved Closing Letters and it was due to the volume of grievances that OPA ceased issuing them. Our audit did not assess the underlying objections by SPOG to Closing Letters. SPOG's current position on Closing Letters is unclear and SPOG representatives did not provide a response to inquiry about this matter.

In choosing not to utilize 'Sustained - No Discipline' recommendations, the OPA Director is limited in addressing minor, proven, violations of policy through issuance of a Not Sustained Training Referral or a 'Sustained – Oral Reprimand'.[30] The OPA Director indicated during this audit that an Oral Reprimand may feel unfair for a first-time minor policy violation, and technical violations such as inadvertent failure to activate body-worn video, missed trainings, and failure to generate a report may not warrant discipline. That determination is within the OPA Director's discretion, but

27 For violations not constituting misconduct Los Angeles provides for a 'Sustained – No Penalty' finding: "The investigation supports sustaining the allegation; however, 'No Penalty' is the appropriate disposition. In all cases, appropriate corrective action shall be taken which may involve, but is not limited to, counseling, training or action other than formal discipline."

28 The New York Police Department's Disciplinary System Penalty Guidelines specify that "When an allegation(s) of misconduct against a member of the service is investigated and evidence is found to show that the event did occur, that the member in question engaged in the action, and that the act itself was a violation of Department guidelines, the allegation is deemed by the investigator to be "substantiated." Substantiated allegations of misconduct result in remedial action along a disciplinary continuum."

29 The OPA Manual specifically provides the Director may recommend training as part of a Sustained finding.

30 The OPA Director may also issue a Management Action in cases where they identify gaps in training, policy and supervision.

after deciding not to address a violation with discipline, a Not Sustained Training Referral is the only action available in most cases.

Not Sustained Training Referrals may be a poorly suited resolution for some policy violations. OIG observed discussion in the Discipline Committee that Training Referrals were not always suitable in instances where an employee already understands policy, or where the supervisor who would be tasked to deliver training sees nothing wrong with the behavior at issue. In addition, OIG noted the issuance of Not Sustained Training Referrals in which it is unclear what role a supervisor would have in administering training, other than to warn the employee against repeating the violation. Examples from our review include employees who recognized and self-reported failure to activate in-car video or body-worn video, employees who failed to attend trainings or OPA interviews, and an employee found to have been sleeping on duty. Warnings are an important initial step in progressive discipline, but they should be documented for future reference. As discussed in our next finding, Training Referrals are not being memorialized in a consistent manner by virtue of their Not Sustained disposition.

Finding: SPD responses to Not Sustained Training Referrals are subject to inconsistent recording practices that may impact accountability

The Accountability Ordinance 3.29.410 (B) requires that,

> *"SPD shall respond in writing to any Training Referral or Supervisor Action referral with an explanation of actions taken."*

When OPA issues a Not Sustained Training Referral, it describes in the DCM how the named employee's supervisor should conduct the training and where to provide their summary of actions taken. Currently, these instructions specify that supervisors must memorialize responses in the "appropriate database." According to the OPA Director, the appropriate database is the BlueTeam data entry and routing module within the IAPro case management system. Previously, OPA directed supervisors to memorialize their responses to Not Sustained Training Referrals in PAS.[31]

This change was made after it was determined that recording Not Sustained Training Referrals in PAS may have been contrary to the SPOG CBA. The relevant provision in the CBA states:

> *"Performance appraisals shall not include references to acts of alleged misconduct that were investigated and unfounded, exonerated or not sustained, or sustained and reversed on appeal."*[32]

Our audit of SPD responses to Not Sustained Training Referrals identified that the chain of command created some form of responsive entry in IAPro for 93% of cases.[33] However, since May 2018, supervisors also created responsive entries in PAS for approximately 48% of Not Sustained Training Referrals sampled.[34] OPA's direction to memorialize training in the 'appropriate database' has proven ambiguous. Some supervisors continued to believe that PAS was the appropriate database. Illustrative of this confusion, one commander's response to OPA in October 2018 stated,

> *"Sergeant [...] has additionally followed instructions to add this retraining and associated counseling in an appropriate database, Officer [...]'s PAS."*

An employee's complete coaching and counseling history may be relevant to supervisors, who

31 Within DCMs OIG sampled, the latest instruction to enter a training into PAS appears in April 2018.
32 This provision is consistent in both the 2014 and 2018 SPOG CBAs.
33 Chain of command responses were sometimes stored outside of BlueTeam, in the case files themselves as memos or as screenshots of PAS entries.
34 OIG did not review the PAS entries of employees who had separated from the department at the time of fieldwork as their PAS profiles were no longer active, however there was sufficient evidence in our remaining sample to comment on PAS usage.

have discretion in addressing minor policy violations and may choose not to refer an allegation to OPA where they deem it appropriate to handle the matter directly instead. This decision may be made without complete information, as prior coaching and counseling memorialized in IAPro is not independently accessible to supervisors. Because Not Sustained Training Referrals may stem from minor violations of policy that OPA found to have happened, the exclusion of these records from records available to a supervisor is significant. Further, SPD Employment Counsel identified that their practice was to consult PAS, but not BlueTeam, in gathering an employee's history for consideration by the Discipline Committee.[35]

Because OPA classified some minor violations of policy as Not Sustained, and the training addressing these violations was subsequently not recorded in PAS, a gap exists wherein personnel who commit minor violations of policy are not held accountable through either disciplinary actions or performance appraisals. A recommendation will be made in conjunction with the next finding.

Finding: SPD responses to Sustained Training Referrals ordered by the Chief are subject to inconsistent recording practices that may impact accountability

Personnel who commit minor violations of policy may not be held accountable through either disciplinary actions or performance appraisals

When training is ordered by the Chief as part of a Sustained finding, the Professional Standards Bureau is responsible for assigning this training to the appropriate bureau for completion. A 'DAR Training' incident is then created in IAPro and the training is routed to the appropriate bureau in BlueTeam. Similar to a Not Sustained Training Referral, the supervisor conducting the training is expected to respond to the referral, and documentation of this response is kept in IAPro.

OIG reviewed a sample of training referrals issued by the Chief as a part of discipline and noted that 35% did not have a responsive record of completion in IAPro. There appear to be a variety of reasons for this including the 'DAR Training' incident not being assigned correctly, not completed once assigned, or never created. The Professional Standards Bureau identified that there is not a consistent process for following up on Sustained Training Referrals after an initial routing is sent, and the OPA Director stated that his office is not involved in Sustained Training Referrals issued by the Chief as part of discipline.

Unlike Not Sustained Training Referrals, training resulting from a Sustained finding is not restricted from being entered in PAS by section 7.13 of the SPOG CBA. However, the Department does not instruct supervisors to enter Sustained Training Referrals into PAS, and most supervisors have not done so. 74% of sampled Training Referrals issued by the Chief as part of a Sustained finding do not have a responsive entry in PAS.

As with the prior finding, the lack of centralized database for coaching and counseling may negatively affect supervision and progressive discipline, and may limit review of training effectiveness. PAS remains a primary record for other forms of coaching and counseling by supervisors, including responses to Supervisor Actions issued by OPA, follow-up actions triggered by the Early Intervention System, and minor violations of policy investigated by supervisors.[36] While noting that the SPOG CBA is a significant reason for recording practices in certain circumstances, OIG finds it inconsistent and ineffective that either form of Training Referral

35 OPA does maintain 'officer cards' to track whether an employee has previously received a Training Referral. OIG did not assess the accuracy of these records.

36 SPD Manual Section 5.003 provides for Supervisors to fully investigate and take corrective action, within their authority, when they witness or receive allegations of an employee's minor policy violation. These are known as Frontline Investigations. However, according to OPA data no Frontline Investigations have been reported for sworn personnel since 2018. The reasons for this are not discussed in this report because non-OPA investigations were outside the scope of this audit.

discussed in this report should be recorded in a separate system from other coaching and counseling solely because it stemmed from an OPA investigation.

Further, IAPro is not suitable as the primary repository for Training Referral responses. Because the software is designed for case management and contains sensitive materials, it has strict permissions. Training records held in BlueTeam and IAPro are generally locked from independent access by supervisors. While implementation of training as ordered is of primary importance and can be ensured through assignment and follow-up in BlueTeam, a consistent and accessible record of training is an essential element of accountability and must be provided for as well.

2) **Recommendation: SPD should design or modify the means of memorializing Sustained and Not Sustained Training Referrals in a way that:**

   a) **Centralizes documentation of all Training Referrals, Supervisor Actions, Minor Violations of Policy, and any other performance coaching delivered by the Chain of Command**

   b) **Makes such documentation available for independent access by supervisors**

Enforcement of Discipline

Background and Methodology

Per the Accountability Ordinance 3.29.420 (A)(3):

> *"SPD shall implement discipline when it is imposed or shortly thereafter, not upon conclusion of any disciplinary appeal process."*

OIG examined the enforcement of discipline; specifically the service of reprimands, and orders of demotion and suspensions. Our review discovered no instances where ordered discipline was not served or was delayed by a pending appeal. However, significant control issues related to the service of suspensions do exist.

Key steps in performing this section of the audit:

- Reviewed documentation of 134 reprimands and demotion and suspension orders in personnel files and IAPro; and,
- Reconciled payroll records against orders for 24 suspensions.

Finding: Financial impacts of disciplinary suspensions may be lessened by weak internal controls

Unpaid suspensions by their nature are intended to impose a financial penalty for misconduct. When an SPD employee is suspended, a receipt is signed by the employee and their supervisor in which they identify the dates the suspension will be served. This document specifies that:

> *"All discipline must be completed within two pay periods absent written approval by the Executive Director of Human Resources."*[37]

Suspensions may in some cases need to exceed two pay periods so as not to affect an employee's pension and medical benefits. SPOG CBA section 3.4 provides that suspensions may be served non-consecutively in these cases:

> *"An employee will be precluded from using accrued time balances to satisfy a disciplinary penalty that mandates suspension without pay when the suspension is for eight or more days. However, if precluding such use of accrued time negatively affects the employee's pension/medical benefit, the unpaid suspension may be served non-consecutively."*[38]

According to SPD HR, SPOG employees need to work 90 paid hours per reporting month for pension credits, and 80 paid hours per month to maintain health care benefits.[39] Once suspension dates are determined, the suspension order is then sent to the SPD Employment Counsel's staff, and then forwarded to Payroll to ensure the suspension is served. Per the SPD Payroll Supervisor, Payroll audits timesheets against the orders and if a day is missed, not served, or served on a different day they will notify SPD Employment Counsel. Once all days are served, Payroll notifies SPD Employment Counsel that the suspension orders have been completed.

OIG reviewed payroll records for 24 suspensions within our sample of disciplinary actions. OIG noted that in all cases suspensions were served completely or were in the process of being served,

37 SPD Employment Counsel provided examples demonstrating this two-pay period requirement has been standard on suspension orders since at least 2015. OIG observed that some suspension orders in that time have alternatively identified that approval for more than two pay periods must be granted by an Assistant Chief or Chief of Police.

38 Section 3.29.420 (A)(8) of the Accountability Ordinance prohibited the use of accrued time balances to satisfy an unpaid suspension, however it was agreed in the SPOG CBA that the cited provision (3.4) would continue to be applicable. OIG did not find any instance where accrued balances were used to serve a suspension, and per the HR Director, the Department has not approved this kind of use.

39 Overtime is paid time and counts toward this calculation.

however several suspensions were broken-up well beyond what may be required to maintain benefit coverages. Included in our sample were three 30-day suspensions, a 20-day suspension,[40] and one 15-day suspension. All of those were served across five or more pay periods. Two of the 30-day suspensions were served over 10 pay periods in reoccurring sets of three days.

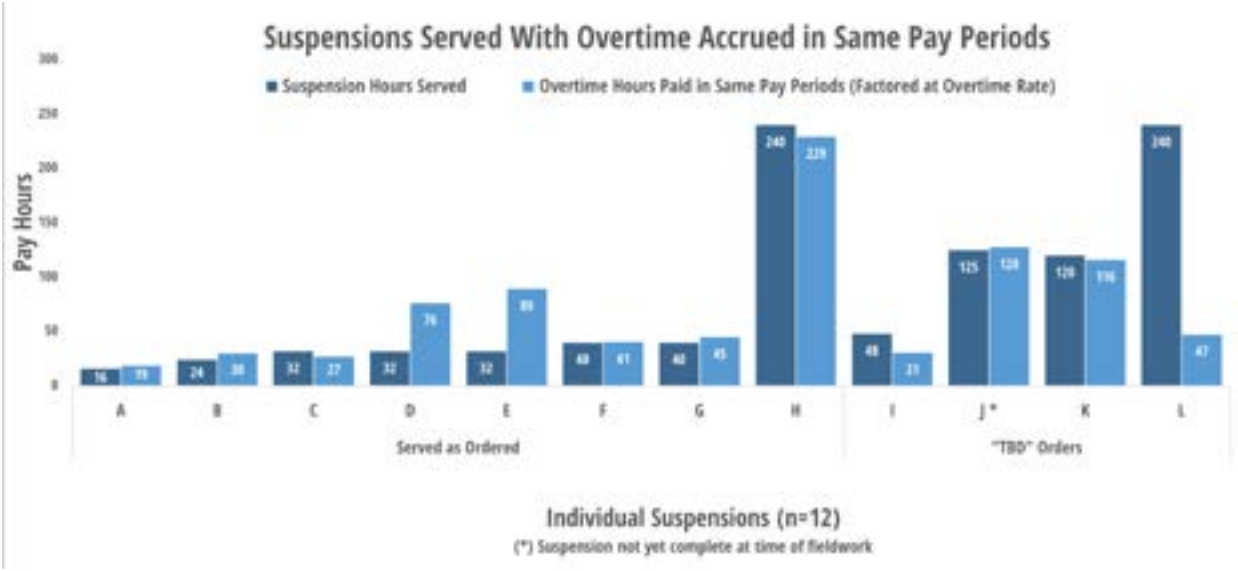
Some suspensions were broken-up across several pay periods, in excess of what may be required to maintain benefit coverages

Although the Department designed a control requiring that suspensions served across more than two pay periods be authorized by the HR Director, this control has not been consistently used in practice. SPD HR staff identified that approval of suspension orders was based on each individual's chain of command, and that the HR Director was not involved in the implementation of suspensions. There may be legitimate operational reasons to allow the chain of command to spread out the service of a suspension (e.g., maintenance of minimum staffing levels). However, within sampled suspensions there is no evidence of secondary review and authorization to ensure those decisions are made for legitimate operational purposes.

Some of the suspensions that exceeded two pay periods were served as ordered, but others were initially signed with dates identified as "TBD." Based on information provided by Payroll and SPD Employment Counsel staff, these orders do not appear to have been finalized before the employee began serving the suspensions. In such cases, the general practice is for the Department to backdate suspension orders to match the days served.

The noted elongation of suspensions is significant because the department does not have rules prohibiting overtime work during the pendency of a suspension. OIG observed that overtime was commonly accrued in the same pay periods as a suspension was served. Twelve suspensions within our sample were served alongside the accrual of at least one full day of overtime pay (see Exhibit 5). Six of these suspensions were entirely offset by overtime worked in the same pay periods. Due to ineffective controls, the service of suspensions has not been consistent, and in some cases employees have been able to significantly lessen the financial impact of an unpaid suspension. OIG finds that this conflicts with the standard of timely, consistent, and fair discipline.

Exhibit 5



40 A 30-day suspension with 10 days held in abeyance.

Further, the Department does not place any restriction on secondary employment during the pendency of a suspension. While controls over secondary employment are outside the scope of this audit, it is a reasonable inference that spreading a suspension across a regular schedule of days or serving a suspension on days chosen for the employee's convenience, may provide opportunity to serve suspension days in coordination with secondary employment.

3) **Recommendation: SPD should ensure the process by which suspensions are ordered and served meets the following criteria:**

   a) **All suspension orders are reviewed and approved by the Executive Director of HR or an Assistant Chief prior to being served, and**

   a) **All suspensions are served as soon as feasible with consideration for relevant collective bargaining provisions and emergency operational needs.**

4) **Recommendation: SPD should prohibit the accrual of overtime for employees who have not completed ordered suspensions.**

Matter for Consideration: The Department lacks adequate controls to prevent employees from working overtime concurrent with service of a suspension

Per SPD Policy 4.020.7:

> *"Employees On Sick Leave, Military Leave, Disciplinary Suspension, or Limited Duty Will Not Work Department Overtime"*

During the review of suspensions, it was noted that payroll records for one employee indicated they worked nine hours of voluntary overtime shifts with the Traffic Unit on the same days they served a suspension.

SPD does not appear to have implemented adequate controls to prevent a potential policy violation of this manner. According to the Traffic Unit, employees are not required to fill out an Overtime Request Form for the purpose of special events where volunteers are requested. Further, there is no process for verifying with an employee's chain of command that the employee has permission to work the event.[41] SPD Payroll does have a process for auditing suspension days served, however the recording of overtime hours on dates of suspension does not appear to have been detected and corrected.

41 OIG did not assess department-wide overtime controls as a part of this audit. The Seattle City Auditor in 2016 issued a report in which they identified that SPD controls were not adequate for the monitoring and oversight of overtime.

Disciplinary Records

Background and Methodology

Per the Accountability Ordinance 3.29.440 (E),

> *"All SPD personnel and OPA case files shall be retained as long as the employee is employed by the City, plus either six years or as long as any action related to that employee is ongoing, whichever is longer. SPD personnel files shall contain all associated records, including Equal Employment Opportunity complaints, and disciplinary records, litigation records, and decertification records"*

Additionally, per the Accountability Ordinance 3.29.440 (F):

> *"For sworn employees who are terminated or resign in lieu of termination, such that the employee was or would have been separated from SPD for cause and at the time of separation was not "in good standing," SPD shall include documentation in SPD personnel and OPA case files verifying (a) a letter was sent by SPD to the Washington State Criminal Justice Training Commission (WSCJTC) regarding de-certification and consistent with the requirements set forth in subsection 3.29.420.A.11; (b) whether action was taken by the WSCJTC in response to that letter; (c) that the Chief did not and will not grant the employee authorization to serve in a Special Commission capacity, as a reserve officer or as a retired officer in a private company that provides flagging, security, or related services; and (d) that the Chief did not or will not grant any request under the Law Enforcement Officers Safety Act to carry a concealed firearm. The latter two actions shall also be taken and documentation included in the SPD personnel and OPA case files whenever a sworn employee resigns or retires with a pending complaint and does not fulfill an obligation to fully participate in an OPA investigation."*

SPD personnel files are stored at SPD HR offices in paper copy only. Included in these files are records of final discipline in the form of a DAR. OIG assessed the retention of disciplinary documentation and use of that information.

Key steps in performing this part of the audit were:

- Conducted an in-person review of physical files for 159 randomly selected disciplinary actions from a population of 268;[42]
- Reviewed physical files for additional for 15 disciplinary actions which were terminations or retirement/resignation in lieu (RIL) of discipline;
- Reviewed form CJ 1902 "Notification of Officer Separation" sent to the WSCJTC for 43 employees who were terminated or resigned/retired in lieu of discipline after January 1, 2015; and,
- Reviewed HR files containing prior LEOSA and Special Commission authorizations

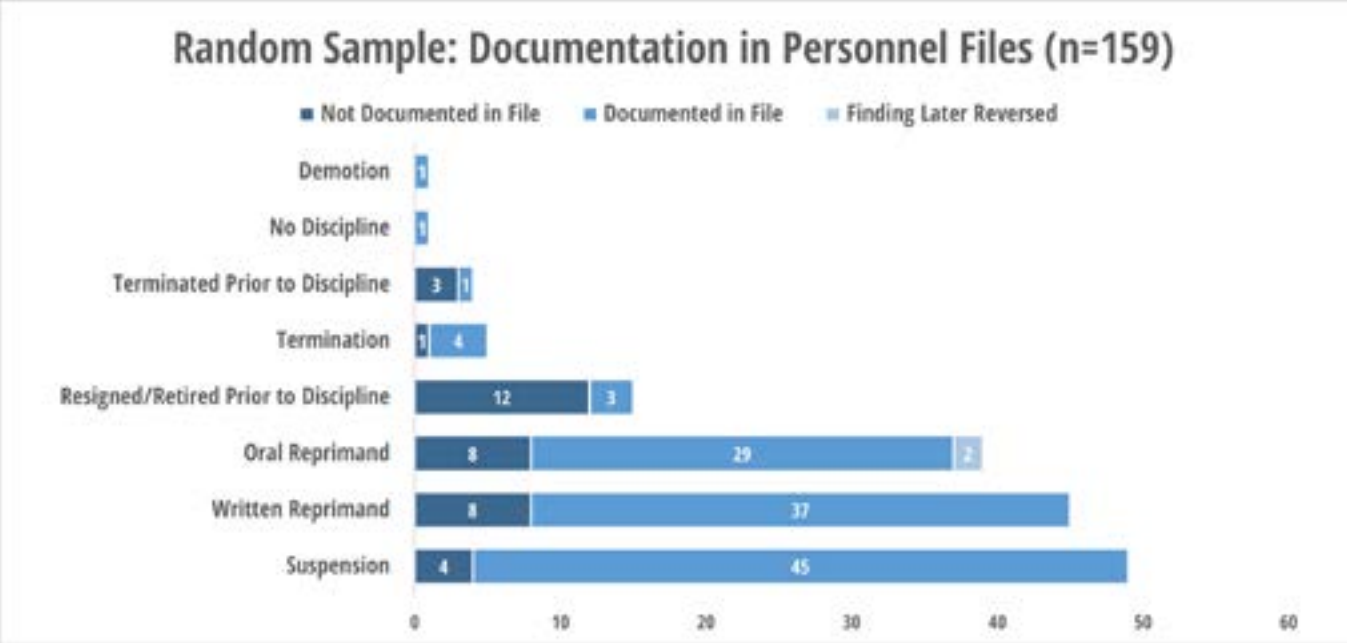
Finding: A significant number of Disciplinary Action Reports are absent from personnel folders

This audit's review of disciplinary documentation demonstrated that approximately 23% of DARs were absent from personnel folders (see Exhibit 6). OIG conducted a supplemental sample to ensure 100% examination of DARs where the disciplinary action was either termination or resignation/retirement in lieu of discipline and found that 64% of these DARs were absent from personnel files.

42 This is the same sample of disciplinary actions examined in the 'Proposal and Determination of Discipline' section of this report

OIG could not assess whether copies of disciplinary documentation had ever been placed in the files, as SPD does not have controls to track the addition or removal of folder contents. The HR Director believed that these records had never been placed in the file and identified that personnel turnover and a shift in duties in 2018 had caused the filing process to lapse.

Exhibit 6



The absence of disciplinary documentation from personnel folders does not mean there is no record of the discipline. With only one exception, documentation noted as absent from personnel files was otherwise viewable in OPA case files. However, when records of disciplinary action are not contained in appropriate personnel files there may be significant impacts.

64% of DARs were absent from personnel files where disciplinary action was termination, or when the officer retired/resigned prior to discipline.

Incomplete disciplinary documentation may create gaps in post-employment verifications, especially for those employees who were terminated or resigned/retired in lieu of discipline. Other jurisdictions seeking to employ a current or former SPD employee may view the hardcopy personnel file as part of a background check. If an outside employer does not also double-check with OPA for prior disciplinary actions, there may be important adverse information missing about the employee. Additionally, Public Disclosure Requests (PDR) related to affected employees may be incomplete due to absent DARs. Per the HR Director, any PDR requestor that asked for only the 'personnel file' of an employee would receive what is maintained in the physical file kept by HR.

Additionally, the SPD Employment Counsel has previously referenced personnel files as a primary source when examining the disciplinary history of an employee as part of a 'just cause' analysis. Any time there is a disciplinary process, it is important that the Disciplinary Committee and Chief of Police be presented with a complete view of an employee's prior history. Without a reliable file, any 'just cause' analysis may be incomplete.

OIG provided SPD management a list of the missing files, and the department responded with 12 of the disciplinary documents identified. SPD HR also reports that efforts to correct the rest of the affected personnel folders are ongoing, however OIG had not conducted follow-up work to verify by the completion of fieldwork.

5) **Recommendation: SPD should audit and rectify disciplinary documentation for all current sworn personnel and sworn personnel who have been separated since 2018, and provide the results of this process to OIG.**

6) **Recommendation: SPD should design and implement controls for the contents of personnel folders to track the insertion and removal of documentation.**

Finding: WSCJTC, LEOSA, and Special Commission documentation are not maintained in personnel folders

SPD HR does not maintain relevant WSCJTC decertification, LEOSA,[43] and Special Commission[44] documents in SPD personnel files as required by the Accountability Ordinance. OIG observed that WSCJTC documentation was retained in a separate folder, and SPD does not document denial of LEOSA or Special Commission authorization when an employee separates not 'in good standing'.

Per the HR Director there is no specific reason why the department doesn't maintain WSCJTC documents in personnel files or generate relevant LEOSA and Special Commission denial letters. Documents relevant to an employee's employment as a peace officer may be omitted from a PDR or not be available for consideration by a future employer if appropriate WSCJTC documents are not maintained in the personnel file.

Further, without documenting preemptive denial of LEOSA and Special Commission statuses, the department lacks a preventative control in judging applications. Following audit fieldwork, SPD HR provided updated process documents identifying that when an applicant for Special Commission or LEOSA does not separate 'in good standing' the department will place a letter of denial in their personnel folder. Because OIG has yet to assess the implementation and operation of this control, a recommendation is still issued in this report.

7) **Recommendation: SPD should design or modify processes to produce and store relevant WSCJTC, LEOSA, and Special Commission documentation in personnel folders in accordance with Accountability Ordinance requirements**

Finding: Chiefs approved LEOSA applications for two former employees who appear to have been ineligible

Chiefs approved LEOSA applications as recently as 2019 and 2020 for two employees who retired with pending complaints who had also not participated in the underlying OPA investigations.

According to the HR Director, Chiefs were unaware of investigations against officers in these cases because they had not been provided with applicants' investigation histories contained in IAPro. Had denial letters been preserved in SPD personnel files, as required in the Accountability Ordinance and explained in the prior finding, these applications may have been denied without the need for an additional check in IAPro.

According to the HR Director, the department has changed processes to check LEOSA applicants in IAPro. OIG expects that this added check, in conjunction with actions specified in the prior recommendation should be sufficient to address this finding, and thus will not issue a separate recommendation.

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43 The Federal Law Enforcement Officer Safety Act authorizes retired and separated law enforcement officers nationwide to carry concealed weapons throughout the country.

44 Specially Commissioned Officers are defined in SMC 5.55.225 as having the power to issue citations, issue civil infractions, enter and inspect premises and establishments, seize evidence or make arrests for unlawful conduct as defined in SMC.

Matter for Consideration: SPD did not initially notify WSCJTC of potential disqualifying conduct upon the separation of nine officers

For the period reviewed in the scope of our audit, RCW 43.101.010 (8)(a) defined 'Discharged for disqualifying misconduct' as having the following meanings:[45]

> *"(i) A peace officer terminated from employment for:*
>
> *(A) Conviction of (I) any crime committed under color of authority as a peace officer, (II) any crime involving dishonesty or false statement within the meaning of Evidence Rule 609(a), (III) the unlawful use or possession of a controlled substance, or (IV) any other crime the conviction of which disqualifies a Washington citizen from the legal right to possess a firearm under state or federal law;*
>
> *(B) conduct that would constitute any of the crimes addressed in (a)(i)(A) of this subsection; or*
>
> *(C) knowingly making materially false statements during disciplinary investigations, where the false statements are the sole basis for the termination*
>
> *(b) A peace officer or corrections officer is "discharged for disqualifying misconduct" within the meaning of this subsection (8) under the ordinary meaning of the term and when the totality of the circumstances support a finding that the officer resigned in anticipation of discipline, whether or not the misconduct was discovered at the time of resignation, and when such discipline, if carried forward, would more likely than not have led to discharge for disqualifying misconduct within the meaning of this subsection (8).*
>
> *(9) When used in context of proceedings referred to in this chapter, "final" means that the peace officer or corrections officer has exhausted all available civil service appeals, collective bargaining remedies, and all other such direct administrative appeals, and the officer has not been reinstated as the result of the action. Finality is not affected by the pendency or availability of state or federal administrative or court actions for discrimination, or by the pendency or availability of any remedies other than direct civil service and collective bargaining remedies."*

In 2020, the Department became aware that several employees had not been referred for potentially disqualifying misconduct, and as a result performed an internal audit of prior WSCJTC notifications. Following the internal audit, SPD submitted revised notifications to the WSCJTC for eight officers who had separated from 2015 to 2019, noting that potentially disqualifying misconduct had occurred.[46]

During fieldwork for this audit, OIG reviewed separation notices for an additional 12 employees and noted that in 11 of these cases SPD did send timely notifications to the WSCJTC of possible disqualifying conduct. SPD does not appear to have submitted a revised notification for one employee who retired prior to a sustained finding of dishonesty in 2015.[47]

SPD's Employment Counsel makes recommendations to SPD HR on whether to notify the WSCJTC of disqualifying misconduct, however SPD has discretion in deciding to follow that recommendation. OIG was not able to assess the legal opinions provided by counsel regarding the reviewed employees, and whether it was followed. However, as evidenced by the results of SPD's 2020 internal audit, the process for review was not effective.

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45 The state law governing revocation of certification for peace officers changed in 2021, significantly expanding the scope of misconduct that may result in decertification. See RCW 43.101.105.

46 SPD also submitted revised notification for another three student officers who were not within our sample and not evaluated in this audit.

47 Because OIG could not view the conclusions of the internal audit, it is unclear if the circumstances of the employee's separation were identified by SPD.

According to WSCJTC records at the time of audit fieldwork, none of the eight officers SPD submitted revised notifications for were employed as peace officers within Washington State. However, all were still under review by the WSCJTC. WSCJTC records reflect that the employee who SPD did not flag for dishonesty in 2015 retired in good standing and was not employed at the time of fieldwork as a peace officer within Washington State.

SPD's internal review process appears to have improved in 2020. This review found that in 2020 SPD properly notified the WSCJTC of potential disqualifying conduct in all cases identified as meeting criteria defined in state law at that time.

Matter for Consideration: SPD has not yet developed ongoing internal monitoring of disciplinary or complaint data

Our audit assessed the use of disciplinary and complaint data at both the organizational and employee levels. SPD uses a system called DAP (Data Analytics Platform) to generate reports from a variety of SPD and City systems, including OPA's case management system IAPro. IAPro data was certified for use in DAP in 2021.

According to SPD, employee performance dashboards[48] in DAP are capable of presenting complaint history for employees, but do not currently. Per SPD staff, the exclusion of complaint data from employee performance dashboards was due to concerns that complaint data on its own may not be a reliable indicator of concerning behavior. The current SPOG CBA may also limit supervisor access to relevant complaint information.[49] The utility of complaint information should be assessed based on the level of information available to supervisors. Alternatively, records of Sustained findings may not be subject to the same restriction and may be made more easily accessible so that supervisors fully understand the disciplinary history of their employees.

At the time of fieldwork, the Department identified that it had not yet developed an internal monitoring system for complaint or disciplinary trends across operational levels. It was engaged with outside entities on research projects using complaint data and were developing potential areas of internal research using complaint data, though those efforts were not yet in production.

The Department has only recently established a means of internally analyzing disciplinary and complaint data. However, without using complaint and disciplinary data to perform ongoing monitoring and conduct periodic evaluations, the department may miss an opportunity to identify, and respond to trends across the department, units, or with individual employees.

48 Available to Sergeants, Lieutenants, and Captains.
49 3.6 (H) of the 2018 SPOG CBA controls access to "OPA files."

Communicating Case Resolution to Complainants

Background and Methodology

The Accountability Ordinance 3.29.100 (J) requires that

> *"OPA shall be responsive to community needs and concern through means including, but not limited to, the following:*
>
> *1. Maintaining frequent and regular communications with complainants and named employees about the status of their investigations, including information to complainants about disciplinary appeal and grievance processes and any outcomes that result in the modification of final findings and discipline determinations"*

OIG sought to test the consistent and timely communication of OPA case status to those affected by police misconduct.

Key steps in performing this part of the audit were:

- Examined the transmittal of Closed Case Summary (CCS) to complainants in 110 randomly selected cases with Sustained findings of misconduct, from a population of 153. OIG examined an additional 5 non-random cases for supplementary analysis; and,
- Examined relevant notifications to complainants in all 91 cases with an allegation date after January 1, 2015, where some form of appeal was later filed.[50]

Finding: OPA did not notify complainants of sustained findings in a timely manner

Complainants experienced significant delays from 2018-2020 in receiving notifications of a sustained finding and disciplinary action.[51] The average number of days between when a disciplinary action was issued and when OPA sent a CCS to complainants in each sampled year was 101 (2018), 70 (2019), and 75 (2020). At the extreme, one complainant was sent a CCS 361 days after disciplinary action had been issued. When complainants are not notified in a timely manner of their case status, they may feel they have not been given serious consideration as participants in the disciplinary process. In some cases OIG reviewed, complainants voiced frustration in not knowing the status of their case weeks or months after the Chief had issued final discipline.[52]

OPA staff identified that prior to November 2020, administrative staff resources were limited and the timely transmittal of the CCS to complainants was not prioritized. OPA staff reported that process changes in late 2020 and 2021 led to improved timeliness in CCS transmittals. While the scope of our audit did not include enough of 2021 to fully assess the timeliness of more recent complainant contacts, OIG notes that notification times appear to have improved.

8) Recommendation: OPA should define an internal deadline in its manual for sending CCS to applicable complainants.

50 14 cases were examined as part of both samples.

51 The scope of this audit did not include a review of CCS transmittal for cases without a Sustained finding. However, complainants in those cases may be similarly affected.

52 Delays in notification may also have other consequences. A week after one employee was terminated, the complainant in that case reached out to OPA for an update, claiming legal action had already been taken against her by the employee. OPA sent a closed case summary the next day.

Finding: OPA did not notify complainants about the filing or resolution of appeals

OPA is responsible for notifying complainants about any appeals or resolution of appeals. OIG identified 24 cases with Sustained findings in which there was an identified community member complainant who was not notified of an appeal, nor where applicable, any resolution of that appeal. Of these 24 cases, 11 were suspensions or terminations, including five Sustained findings for use of force.[53]

OPA staff identified that the process for notifying complainants of appeal status lapsed from 2016 through mid-2020. They explained that a change in OPA personnel meant that OPA no longer received documents for the filing or closing of appeals from SPD Employment Counsel. OPA staff report that they have recently resumed the practice of sending notifications to complainants regarding appeals. OIG notes that in the most recently appealed case examined during fieldwork, OPA had sent notification of an appeal to the complainant. However, at the end of fieldwork, OPA did not have a plan to issue notifications to complainants who were not originally notified of appeals in prior years.

> **9) Recommendation: OPA should examine cases with pending or resolved appeals where complainants were not notified of the appeal and determine if notifications should be made.**

Finding: OPA lacks criteria for notifying parties affected by misconduct who are not complainants

OIG noted during fieldwork that community members who were directly affected by instances of sustained misconduct, but who did not themselves file a complaint to OPA, were sometimes not notified of case status. Specifically, this inconsistency appeared in cases referred to OPA by SPD, where the referring supervisor or internal review board were listed as the complainant in IAPro. While in limited cases there was evidence that OPA had taken steps to notify involved community members that a complaint had been filed on their behalf, more often the involved community member did not appear to receive notifications. Community members who are not the complainant but are the person impacted by the alleged misconduct should receive case notifications. In some cases, individuals may not be aware that a complaint was made on their behalf.

The OPA manual outlines several points during an investigation in which the OPA investigator should contact a complainant. However, the OPA manual does not define when other involved parties may receive similar notifications. The decision of who is labeled a complainant is based on OPA's administrative intake process. If OPA receives a complaint from SPD, an involved community member may be initially listed in the case management system as a witness, subject, or suspect. According to OPA, classification labels determined at the start of a case typically remain.

> **10) Recommendation: OPA should create criteria for identifying and notifying individuals of the creation and resolution of a case in which they were not the complainant but were directly involved in the capacity of a complainant.**

53 In three additional use of force cases resulting in suspensions, subjects of the force were not considered complainants and thus received no notifications of appeal.

Arbitration and Alternatives

Background and Methodology

Currently, SPOG members have two routes to appeal a disciplinary action. The first is a multi-step grievance processes outlined in the CBA in which the final step is arbitration. The other is to file an appeal with the Public Safety Civil Service Commission (PSCSC), a three-member commission that governs appointments, promotions, testing, layoffs, recruitment, retention, classifications, removals, and discipline for City Police and Fire Departments.[54]

The PSCSC was identified in the 2017 Accountability Ordinance to be the only route of appeal for SPD employees:

> *"All appeals related to SPD employee discipline shall be open to the public and shall be heard by PSCSC."*[55]

However, this was modified in the 2018 SPOG CBA:

> *"The parties have agreed that appeals related to employee discipline can go through arbitration pursuant to the collective bargaining agreement or to the PSCSC. The City may re-open the Agreement for the purpose of bargaining over members of the public attending arbitrations, and the parties will not change their current practice until after a change is achieved through the negotiation process."*

Separately, in November 2018, the City of Seattle's Disciplinary Review Board (DRB)[56] issued a decision in the Adley Shepherd case appealed under the prior SPOG CBA. In a 2-1 decision, the Board overturned the termination of former SPD Officer Shepherd and instead ordered him reinstated with a 15-day suspension. Although the Board found Shepherd violated multiple policies by striking a handcuffed woman in the back of his patrol car, the Board majority found that discharge was "too severe a penalty, considering the circumstances of his use of force and other mitigating considerations."

Following the reinstatement of Shepherd and reimposition of disciplinary grievances in the 2018 SPOG CBA, United States District Judge James Robart, in his oversight of the consent decree, raised concerns about the continued standard of review in disciplinary arbitration,

> *"It is the court's understanding that the new CBA with SPOG does not retain the PSCSC or the PSCSC's standard of review as set forth in the Accountability Ordinance. Rather, the new CBA reverts to the old appeal process used by the DRB—the same process that was utilized to overturn former Chief O'Toole's discipline of Officer Shepherd and return him to duty."*

Judge Robart issued an Order to Show Cause and ultimately found the City partially out of compliance with the consent decree. In doing so he stated,

> *"The court so rules due to the changes in the Accountability Ordinance that occurred following implementation of SPOG's CBA and the City's reversion to an arbitration system that is materially unchanged from the old, inadequate accountability regime."*

OIG finds it important to identify that at the time of fieldwork, no terminated officers had been reinstated on appeal since Adley Shepherd, and Adley Shepherd's reinstatement was ultimately overturned by the Superior Court for King County. That judgment was upheld by the Washington

54 SPMA members may also choose between their CBA grievance process or the PSCSC. However, this report will discuss SPMA grievance procedures only as a point of comparison, as no SPMA grievances were filed or heard within the primary scope of this audit.

55 3.29.420 (7)(a)

56 The DRB was an avenue for challenging disciplinary actions in the 2014 SPOG contract. It was replaced by the grievance process in the 2018 CBA. Both of these processes employ principles of arbitration.

State Court of Appeals. However, OIG sought to identify what controls exist in the SPOG CBA and the alternative route of appeal, the PSCSC, to standardize the review of appeals in the future.

Key steps in performing this section of the audit:

- Conducted a review of the SPOG and SPMA CBAs, PSCSC charter and rules, academic articles on police arbitration, and relevant prior decisions for both routes of appeal; and,
- Examined 79 prior decisions issued by arbitrators on the SPOG roster within the past 20 years.

Descriptive Finding: The PSCSC and SPOG Arbitration provide a similar standard of review for appeals of disciplinary action

A recent academic paper on police arbitration in which Adley Shepherd's appeal was a focal point noted,

> *"As is often the case in police disciplinary matters, Seattle's police union contract empowers this arbitrator, as part of a panel, to lead an independent hearing to review factual and legal determinations made by the police chief."*[57]

Consistent with the DRB's decision, the same paper then went on to find that across the country,

> *"[…] the most common justification for overturning or reducing disciplinary action was a determination that the punishment was disproportionate. In some cases, arbitrators found that a punishment was disproportionate because it failed to properly consider mitigating factors in an officer's record. In other cases, arbitrators found that a punishment was disproportionate to the punishments given to other similarly situated officers in the same department who committed the same type of misconduct in the past. And in many cases, the arbitrator simply exercised her independent judgment in concluding that the penalty given by the police chief or city official was disproportionate relative to the offense committed."*

In hearing SPD disciplinary appeals, arbitrators and the PSCSC apply a 'just cause' standard.[58] As explained in the aforementioned 2021 paper,

> *"[…] 'just cause' standards generally provide arbitrators with broad authority to review the sufficiency of evidence presented against the officer, the procedural due process protections afforded to the officer during the investigation and earlier adjudication, the proportionality of the punishment to the alleged offence, and the consistency of the punishment with that given to other officers accused of similar wrongdoing."*

When such a review is conducted to reassess all relevant issues with little deference to the original disciplinary determination, it is analogous to a de novo review.[59]

Deference to the Chief

No sections of the current SPOG CBA speak to the level of deference an arbitrator must give to the to the Chief's prior disciplinary decision. Thus, arbitrators may apply any level of deference to the Chief they deem appropriate in their decision-making. Although the Shepherd case was appealed under the prior CBA, the DRB's decision illustrates how an arbitrator may justify substituting their own judgment for a Chief's on a matter of proportionality:

> *"The neutral Board member is cognizant of, and usually adheres to the principle of deferring to management's judgment of the appropriate penalty once misconduct has been proven*

57 Rushin, Stephen, Police Arbitration, 74 Vand. L. Rev. 1023 (2021)
58 The PSCSC uses a 'good faith for cause' standard. This meaning is equivalent to 'just cause'.
59 From Latin, meaning "from the new." When a court hears a case de novo, it is deciding the issues without reference to any legal conclusion or assumption made by the previous court to hear the case.

and no "due process" violations have been shown. Nonetheless, under CBAs, a neutral decision-maker may overturn an ultimate penalty that is unduly severe"[60]

Similarly, PSCSC commissioners are not clearly required to give any level of deference to a Chief's disciplinary decision. Per SMC Chapter *'4.08 - Public Safety Civil Service'*:

"[…] the Commission may affirm the action of the appointing authority, or if it shall find that the action was not made in good faith for cause, shall order the immediate reinstatement or reemployment of such person in the office, place, position or employment from which such person was removed, suspended, demoted, or discharged. The Commission upon such hearing, in lieu of affirming the removal, may modify the order of removal, suspension, demotion, or discharge by directing a suspension, without pay, for up to thirty (30) days, and subsequent restoration to duty, or demotion in classification, grade or pay."

The PSCSC has considered the level of deference to the Chief previously in the 2009 decision *Werner v. SPD*, in which an officer appealed termination for a sustained finding of dishonesty. In that decision the Commission majority found that

"[…] termination was the inappropriate punishment given facts and circumstances of this case."

The King County Superior Court later remanded the finding to the Commission to reconsider whether termination was an unfair punishment. In that second decision the Commission majority opinion upheld termination and stated,

"Both common sense and the law require that we give some deference to the Chief's decision."

The dissenting opinion stated,

"If we believe that the discipline violates any of the principles of just cause, we should not defer to the Chief's judgment but instead exercise our powers to modify the discipline as appropriate"[61]

Although the Commission in *Werner v. SPD* ultimately gave deference to the Chief's determination on the level of discipline to impose, no control appears to have kept the Commission from initially overruling the Chief on a matter of proportionality. Further, it appears to remain an open question among Commissioners whether such deference should be given.

<u>New Evidence and Testimony</u>

The 2017 Accountability Ordinance prohibited the introduction of new evidence in a grievance or appeal if the employee or their bargaining representatives were aware of that evidence at the time of an OPA investigation:

"To ensure the integrity and thoroughness of investigations, and the appropriateness of disciplinary decisions, if at any point during an OPA investigation the named employee or the named employee's bargaining representative becomes aware of any witness or evidence that the named employee or the employee's bargaining representative believes to be material, they shall disclose it as soon as is practicable to OPA, or shall otherwise be foreclosed from raising it later in a due process hearing, grievance, or appeal. Information not disclosed prior to a due process hearing, grievance, or appeal shall not be allowed into the record after the OPA investigation has concluded if it was known to the named employee or the named

60 *Seattle Police Officers Guild (on behalf of Shepherd) v. City of Seattle, SPD*

61 OIG notes the dissenting opinion was written by the employee-elected Commissioner, who remains a commissioner to date.

employee's bargaining representative during the OPA investigation, and if OPA offered the employee an opportunity to discuss any additional information and suggest any additional witnesses during the course of the employee's OPA interview."

However, in the 2018 SPOG CBA, the parties agreed that the above section would not be implemented. Parties instead agreed on the following, which does not foreclose on the possibility of new evidence or witnesses being raised during an appeal:

"[…] In the interest of the Chief receiving relevant information prior to making a disciplinary decision, the parties have agreed that in the event new material evidence is presented to the Chief at a due process hearing, the Chief may return the matter to OPA, and the 180-day period will be extended to allow the OPA to investigate the new evidence and provide it to the Chief (see Article 3.5F) of the Agreement). Additionally, in order to minimize the likelihood that either party is unduly surprised at an appeal hearing, the parties agree that fifteen days prior to a discipline appeal hearing, each party will disclose any experts not previously used in the due process hearing or the grievance procedure."

Similarly, the PSCSC is permitted to re-review evidence and hear new evidence, and must do so if competent and relevant. Per the Commission's Rules of Practice and Procedure:

"Subject to other provisions of these rules, all competent and relevant evidence shall be admissible. In passing upon the admissibility of evidence, the Commission shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings in the superior courts of the State of Washington."

According to the Executive Director of the PSCSC, the Commission may hear evidence that the Chief did not hear, including hearsay testimony, though such evidence would be given appropriate weight.

Burden of Proof

SPOG CBA article 3.1 specifies the following regarding the burden of proof to be applied by an arbitrator:

"The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration. For example, and without limitation on other examples or applications, the parties agree that these principles include an elevated standard of review (i.e. – more than preponderance of the evidence) for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment.)"[62,63]

OIG conducted a limited review of past decisions by arbitrators who are currently on the SPOG CBA roster and found a significant degree of variability in how arbitrators explained their views on evidentiary standards. The most common position noted was that 'preponderance of evidence' should be used except in cases of termination or other career-threatening punishment, in which case 'clear and convincing' should be applied. Some arbitrators appeared reticent to adhere to strict evidentiary standards and instead claimed to be guided by what appeared true. Finally, some arbitrators appeared to prefer a higher burden of proof in all cases regardless of severity. The later position was taken in 2021 by an arbitrator in issuing their decision on a SPOG member's suspension:

62 For comparison, the SPMA CBA states only that "The standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration, applying the same evidentiary standard as in any other allegation of misconduct."

63 Article 3.1 directly contradicts the Accountability Ordinance 3.29.135 (F), which states "Termination is the presumed discipline for a finding of material dishonesty based on the same evidentiary standard used for any other allegation of misconduct."

> *"Article 3.1 of the Agreement does not limit an elevated standard of review to termination cases involving an alleged stigmatizing offense. It uses the elevated standard of review for such an allegation as an example of "established principles of labor arbitration." In my view, one of the established principles of labor arbitration is that an employer contemplating discipline must have more than a bare preponderance of the evidence. To sustain discipline, I require that evidence must be clear and convincing."*

In this case, the City interpreted Article 3.1 of the CBA to mean that 'clear and convincing' was intended by both parties to only be applied to findings of dishonesty, which was not a finding in this case. Given this interpretation, it is evident that the CBA's language regarding burden of proof is not universally understood and fosters inconsistent application of evidentiary standards.

Burden of proof in the SPOG CBA is not universally understood and fosters inconsistent application by arbitrators

The PSCSC's rules establish an ambiguous standard for discipline involving demotion, suspension, or termination that does not directly translate to a preponderance of evidence:

> *"At any hearing on appeal from a demotion, suspension, or termination, the disciplining authority shall have the burden of showing that its action was in good faith for cause. At any other hearing, the petitioner or appellant shall have the burden of proof by a preponderance of the evidence."*[64]

There is no clearly understood evidentiary standard in either available route of appeal. A subject matter expert consulted during this audit identified that even if there was a clear standard, it would not necessarily be applied consistently or guarantee a uniform result. As illustrated in the DRB's decision to overturn the termination of former Officer Shepherd, the neutral board member applied a preponderance of evidence standard in finding that Shepherd violated policy, however this same evidentiary standard was then weighed as a reason not to terminate:

> *"A related consideration is that while the neutral Board member has concluded that a preponderance of the evidence has shown a policy violation, this violation was certainly not proven beyond a reasonable doubt, or even, perhaps, by clear and convincing evidence.*
>
> *[...] Ultimately, the neutral Board member found the weight of the evidence supported a finding that the SPD's policy on handcuffed suspects was violated. However, the question was a close one. This is a consideration weighing against the appropriate penalty being discharge."*

Our review finds that nothing in Commission rules at this time ensures a materially different standard of review from that currently applied in arbitration as provided under the SPOG CBA. Without effective controls in bargaining agreements, municipal code, or organizational policies, SPOG members pursuing appeals through arbitration or the PSCSC remain subject to standards of review largely defined by individual arbitrators and Commissioners.

Matter for Consideration: The PSCSC lacks the capacity and resources to function as a sole route of appeal

As identified at the beginning of this section, the Accountability Ordinance specified that the PSCSC would be the sole route of appeal for SPD employee discipline. However, this was never realized due to agreements in the 2018 SPOG CBA. Employees remained free to appeal discipline either through the PSCSC or disciplinary grievances ending in arbitration, as provided in the CBA. However, disciplinary grievances are clearly preferred by employees when they have the support

64 In the PSCSC's most recent case *Novisedlak v. Seattle Police Department,* the Commission addressed the burden of proof by concluding that just cause would be proven if SPD made a "showing of substantial evidence to support its decision."

of SPOG.[65] Only one SPD disciplinary case has been decided by the PSCSC since 2013, though others have been filed and withdrawn.[66]

The PSCSC is charged with governing appointments, promotions, promotional testing, layoffs, recruitment, retention, classifications, removals and discipline for employees of Seattle Police and Fire Departments. The Commission is composed of three Commissioners, one appointed by the Mayor, one by the City Council, and one elected by SPD and SFD employees. The Commission is supported by two full-time employees who also are shared with the Civil Service Commission.

OIG discussed the role of the PSCSC with the Commission's full-time staff who expressed that it would not be feasible for the Commission as it currently exists to assume the higher workload assigned to them in the Accountability Ordinance. The role of Commissioner is not a full-time position. Commissioners are paid a $200 stipend per pay period regardless of workload, and during the most recent four-day hearing of an SPD appeal, some Commissioners had to take time off work and use vacation to attend. According to the Executive Director of the PSCSC, the Commission would require more resources as well as time to prepare if they were to ever become the sole route of disciplinary appeal for SPD.[67]

OIG also notes that because Commissioners are appointed or elected, they are not necessarily neutral arbiters.[68] While Commissioners have a practice of disclosing conflicts of interest and recusing themselves when appropriate, the Commission did not at the time of fieldwork have policies regarding disclosure of, or recusal for, conflicts of interest.

This report considers the PSCSC's current capacity limitations as only a matter for the City to consider and plan for if the PSCSC were to become the sole route of appeal in the future. However, possible lack of neutrality noted among Commissioners is a risk to the Commission even in its present, limited role. Because of this, OIG is issuing the following recommendation.[69]

11) Recommendation: The PSCSC should adopt rules for identifying and addressing conflicts of interest for Commissioners hearing disciplinary appeals.

65 Per SPOG representatives, if the SPOG Board of Directors votes not to support an employee's appeal, the employee may only appeal through the PSCSC.
66 *Novisedlak v. SPD* was decided in May of 2021
67 Such preparation may include the hiring of hearing officer, as the PSCSC is authorized to do in the Accountability Ordinance 4.08.070 (J).
68 The Accountability Ordinance set forth a requirement that Commissioners not be City employees or have worked for SPD within the past 10 years, however it was agreed in the CBA that this was a matter for bargaining.
69 OIG has authority under the Accountability Ordinance section 3.29.200 (H) to review and audit policies and practices of other City departments and offices in areas related to policing. OIG believes that this authority includes the issuance of recommendations for those departments and offices as part of audits.

SPOG Arbitrator Selection

Background and Methodology

OIG recognizes the decisions of arbitrators are of significant public interest. However, at the time of fieldwork only one case had been heard and decided by an arbitrator under the current SPOG CBA process and within the scope of this audit. This lack of available sampling precludes analysis of fairness or consistency of appeal outcomes. Future audit work may include this analysis if cases provide information for review.

Although OIG did not have sufficient evidence to assess how the SPD disciplinary process stands under arbitration, this audit did assess the design of the arbitrator selection process under the current SPOG CBA.

In 2021 Washington State legal code (RCW 41.58.070) was revised to standardize arbitrator selection statewide for all disciplinary grievance arbitrations involving law enforcement personnel heard on or after January 1, 2022, provided a new collective bargaining agreement is not agreed upon before then. Under the new procedures, the current arbitrator selection process would be replaced with a roster of up to 18 arbitrators selected by the Public Employment Relations Commission (PERC) and assigned to grievances by the PERC's Executive Director. The law also places a control on the timeliness of hearings,[70] and sets forth new training requirements for arbitrators on racism, implicit bias, and the daily experiences of law enforcement personnel.[71] Despite this impending change, it is worth providing analysis of the system as it currently exists.

Key steps in performing this section of the audit:

- Examined current arbitrator assignments for SPOG CBA grievances;
- Contacted 10 arbitrators on the SPOG roster who were selected to hear a pending case; and,
- Analyzed the status and duration of currently pending appeals.

Matter for Consideration: The current SPOG CBA does not adequately ensure fairness, consistency, and transparency in the arbitrator selection process

The SPOG CBA defines how a roster of arbitrators will be selected for the duration of the contract:

> *"The arbitrator shall be selected from a permanent panel of arbitrators created in the following manner. The parties will each submit a list of ten (10) acceptable arbitrators. The arbitrators submitted by each party shall be on either the AAA and/or the Federal Mediation and Conciliation Service (FMCS) panels of Pacific Northwest Arbitrators and will charge for travel only within Washington/Oregon. Any name on both the Guild and City lists is automatically on the panel. Each party will then have the opportunity to strike two names from the remaining names on the list of the other party. The parties will then randomize the list through an agreed upon methodology. Absent agreement on a methodology, names shall be randomized by the PERC (the "List"). The List will be used by the parties for arbitrator selection for the duration of the Agreement. Selection of an arbitrator will operate as follows:*
>
> *1. The parties will alternate who goes first, starting with the Guild going first in the first arbitration conducted under this Agreement.*
>
> *2. The party going first will have the option to strike or accept the top name on the List. The other party then will have the option to strike or accept the top name on the List. After each party has gone, the top name on the List will be the arbitrator that hears the grievance. Any arbitrator struck by a party, or selected to hear a case, shall rotate to the bottom of the list.*

70 See RCW 41.58.070(13)(a)
71 See RCW 41.58.070 (11)

3. The parties will continue sequentially down the List for all future arbitrations.

4. The List will remain in effect until a new collective bargaining agreement is reached, at which time the parties will go through the above process and update the List, thereby ensuring that there will be a sufficient number of labor arbitrators to resolve disputes. The List will be appended to the 2015 – 2020 collective bargaining agreement. In the event either party seeks to modify the selection process in negotiations for the 2021 bargaining agreement, and the parties are unable to agree, the status quo doctrine will be inapplicable to resolution of this issue in interest arbitration"

Following the procedure above, the City and SPOG created a list of 16 arbitrators; eight selected by the city and eight selected by SPOG. All pending cases, including those carried over from the prior CBA, were allocated to the new roster of arbitrators in a meeting between City and SPOG attorneys in 2019, and another assignment of pending cases was done in 2020. The individual arbitrator assignments resulting from these meetings were viewed by OIG, however formal notes were not maintained on the striking process so OIG could not assess its operation. Nonetheless, significant differences in the number of cases assigned to different arbitrators suggest that both parties exercise preferences in passing over arbitrators they see as unfavorable through the striking process. At the time of fieldwork, no further arbitrator selections had been made.[72]

The striking of arbitrators is itself not a control issue as it may serve to remove less-neutral arbitrators. However, the design of the SPOG CBA's alternate striking mechanism does not provide for re-randomization of the arbitrator list after each selection is made. Because cases are also assigned in the order in which the grievance is received and each party can strike only one arbitrator per selection round, the process allows for limited multi-case strategies to position arbitrators one side sees as favorable.[73]

There is no evidence to suggest that the arbitrator selection process has been manipulated by either party to the CBA. However, it is common practice in labor arbitration for unions and employers to use strategies to ensure they select an arbitrator most favorable to their position. The pursuit of strategies to manipulate the arbitrator list, even within the bounds of the collective bargaining agreement, may erode the transparency and fairness of the disciplinary system.

Matter for Consideration: The SPOG CBA does not ensure the timely hearing of cases before an arbitrator

SPD Employment Counsel provides OPA and OIG with a semi-annual report detailing all appealed cases that have been opened, remained open, or were closed in the reporting period. As of the report ending June of 2021, there were 75 cases pending arbitration, all of which involved SPOG members.[74] Of these, it was noted that arbitrators had already been selected in all but two cases.[75] The report includes appeals dating back to 2016 and 2017 and the average amount of time a case had been pending arbitration at the end of the reporting period was 2.8 years.[76,77]

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72 SPOG had, at the time of fieldwork, filed four Step-4 grievances since the 2020 selection meeting, however three of these are for the same OPA case and may be grouped together for the purposes of arbitrator selection. All were pending arbitrator selection at the time of fieldwork.

73 The CBA does limit the window to 30 days in which a case can be referred to arbitration after Step 3 of the grievance process is complete. This is a significant control in limiting the strategic sequencing of cases referred to arbitration however it does not preclude the possibility.

74 The report groups cases by OPA case number. Some cases include the appeals of multiple individuals. These may be heard together. For the purposes of this finding multiple grievances that are part of the same case are counted as one case.

75 These two cases were added in the last month of the reporting period and were still pending arbitrator selection.

76 Twenty-one of the pending cases do not involve an officer who was currently employed by SPD at the time of fieldwork. Of these, the disciplinary action being appealed was less than termination in 19 cases.

77 There is no contractual limit on how long a case could remain pending.

There are several reasons for the backlog. There have been noted difficulties in scheduling arbitrators for virtual hearings during the COVID-19 pandemic, and many of the pending cases were delayed by being carried over from the prior CBA's grievance process. However, a control weakness in the timelines provided by the SPOG CBA allows for these delays to persist. The SPOG CBA provides two relevant time limits related to arbitration:

> *"If the grievance is not settled at Step 3, the grievance may be referred to arbitration, to be conducted under the voluntary labor arbitration rules of the American Arbitration Association (AAA). Referral to arbitration by either party must be made within thirty (30) calendar days after the Step 3 response is due."*

Additionally,

> *"An arbitration hearing shall generally be conducted within ninety (90) calendar days from the date the arbitrator provides potential dates to the parties, recognizing that the parties may extend the timeline to account for availability. Requests for an extension will not unreasonably be denied."*

However the SPOG CBA does not specify a time limit within which the parties must **schedule** an arbitrator.[78] This gap in controls allows for cases to remain pending indefinitely, provided that neither the City nor SPOG contacts arbitrators to initiate the scheduling of a hearing. Because grievances are filed by SPOG and disciplinary action has already been taken, the City generally views it as SPOG's burden to initiate the process of scheduling hearings with arbitrators.[79] OIG asked SPOG representatives if there was a reason for the delays from the Guild's perspective, but they did not identify any specific reason. They did, however, note they wished to clear out more cases because members frequently inquire as to their status and seek resolution.

Most arbitrators on the SPOG roster have not been notified that they've been selected to hear a case.

In May 2021, OIG reached out to 10 arbitrators who are on the SPOG CBA roster and who had, according to SPD Employment Counsel records, been selected for cases that were awaiting scheduling. OIG asked if they were aware of any SPD disciplinary cases which they may have been selected to hear. Nine arbitrators responded; only one of which knew they had been selected. While this audit was unable to identify why the arbitrators had not been contacted after selection, the backlog is enabled by weakness in the design of CBA timelines. Without a well-defined requirement to processes cases in a timely fashion, resolution for employees and complainants continues to be unnecessarily delayed.

78 This omission is also made in the SPMA CBA.
79 In limited circumstances the City has initiated contact with an arbitrator.

Conclusion

This audit found that current processes and practices, alongside SPOG and SPMA CBA provisions, have created gaps in the discipline system. These collectively impact the timeliness, fairness, consistency, and transparency of discipline for individual officers, and diminish transparency and fairness for community members affected by police misconduct. Observed examples of this included opaque application and recording of Not Sustained Training Referrals, inconsistent and untimely service of suspensions, inconsistent retention of disciplinary documents in personnel folders, and untimely resolution of cases filed for arbitration. Additionally, complainants were not consistently being identified in OPA cases or receiving timely notification of case status.

This report also noted that Chiefs have demonstrated a clear preference for lower levels of discipline when presented with a proposed range by the Discipline Committee, and notably so when that range included termination. This trend may be in part because the relevant employees are entitled to a Loudermill hearing with the Chief, while complainants have not been presented an equivalent opportunity to have their perspectives heard.

The disciplinary system appears to generally account for, and escalate disciplinary penalties according to, an officer's disciplinary history. Appeals remain an area of great potential impact on individual officer accountability, and OIG notes no significant disciplinary actions were overturned or reduced in the period reviewed by this audit, though few appeals were actually heard.

Further work should be done to assess the impacts of appeals once the backlog of cases is cleared and more robust conclusions can be drawn. Findings discussed in this audit may be topics for future follow-up review, along with as facets of the disciplinary system that were outside the scope of this audit, including the application of Rapid Adjudication and Mediation to resolve OPA cases, SPD compliance with SB 5051, classification and effectiveness of Supervisor Actions, discipline for EEO cases, and complainant communication for Not-Sustained cases.

Recommendations

1. The OPA Director, in consultation with the Chief of Police, should develop criteria to more consistently identify opportunities for complainants to speak with the Chief of Police as provided in the Accountability Ordinance 3.29.125 (G)

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Q1 2022

Proposed Implementation Plan: The OPA Director will meet with the Chief before the end of 2021 to develop criteria to more consistently identify opportunities for complainants to speak with the Chief.

2. SPD should design or modify the means of memorializing Sustained and Not Sustained Training Referrals in a way that:

a. Centralizes documentation of all Training Referrals, Supervisor Actions, Minor Violations of Policy, and any other performance coaching delivered by the Chain of Command, and

b. Makes such documentation available for independent access by supervisors

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Underway, completed first quarter of 2022

Proposed Implementation Plan: The department is considering the most effective way to memorialize training referrals and management follow-up, likely via Blue Team and/or IAPro.

OIG COMMENT: This report notes that Blue Team/IAPro is an effective way of routing responses to Training Referrals, but is not an effective repository for memorialization of training or coaching because such reports are not independently accessible by supervisors. OIG recognizes that the Department is constrained by current CBA language, but emphasizes that access limitations in Blue Team/IAPro as it currently exists are significant. While access limitations exist, other performance coaching documentation should not be brought into that system for the sake of centralization.

3. SPD should ensure the process by which suspensions are ordered and served meets the following criteria:

a. All suspension orders are reviewed and approved by the Executive Director of HR or an Assistant Chief prior to being served, and

b. All suspensions are served as soon as feasible with consideration for relevant collective bargaining provisions and emergency operational needs.

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Underway, completed first quarter of 2022

Proposed Implementation Plan: Department workflow is being modified to ensure the Executive Director of HR reviews dates of suspension service prior to those dates being implemented.

Recommendations

4. SPD should prohibit the accrual of overtime for employees who have not completed ordered suspensions.

Management Response

☐ Concur ☐ Do Not Concur

Estimated Date of Implementation: Not Specified

Proposed Implementation Plan: This change would require bargaining with affected unions and would be a labor policy decision.

OIG COMMENT: OIG accepts this may be a matter for bargaining and SPD is not taking a position in their response. Regardless, this recommendation is part of an identified solution (in conjunction with Recommendation #3) for an issue that may significantly impact public trust in the disciplinary system. OIG will evaluate the status of this recommendation after the conclusion of bargaining.

5. SPD should audit and rectify disciplinary documentation for all current sworn personnel and sworn personnel who have been separated since 2018, and provide the results of this process to OIG

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Second quarter of 2022

Proposed Implementation Plan: Any disciplinary documentation that was identified as un-filed has been remedied. The department will be conducting a more complete audit of discipline filed back through 2018.

6. SPD should design and implement controls for the contents of personnel folders to track the insertion and removal of documentation

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: First Quarter of 2022

Proposed Implementation Plan: A tracking document will be used in each personnel filed to track the insertion and removal of documents. HR staff will be provided training on use of the tracker.

7. SPD should design or modify processes to produce and store relevant WSCJTC, LEOSA, and Special Commission documentation in personnel folders in accordance with Accountability Ordinance requirements

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Not Specified

Proposed Implementation Plan: All WSCJTC, LEOSA and Special Commission documents will be filed. Because separated employees no longer have active personnel files, and in some cases where an employee separated years prior and even the archived personnel file is no longer available, some documents will need to be filed separately.

Recommendations

8. OPA should define an internal deadline in its manual for sending CCS to applicable complainants

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: January 1, 2022

Proposed Implementation Plan: The revised OPA Manual, which goes into effect on January 1, 2022, states that OPA will send the CCS within 15 days, when feasible.

9. OPA should examine cases with pending or resolved appeals where complainants were not notified of the appeal and determine if notifications should be made

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Q4 2021

Proposed Implementation Plan: We will examine the cases with pending or unresolved appeals and discuss whether it makes sense to send notifications.

10. OPA should create criteria for identifying and notifying individuals of the creation and resolution of a case in which they were not complainant but were directly involved in the capacity of a complainant

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Q1 2022

Proposed Implementation Plan: We will discuss this internally and create criteria for identifying and notifying involved individuals while still respecting their stated communication preferences.

11. The PSCSC should adopt rules for identifying and addressing conflicts of interest for Commissioners hearing disciplinary appeals

Management Response

☑ Concur ☐ Do Not Concur

Estimated Date of Implementation: Work to begin in 2022, with intention to implement new rule before 2023

Proposed Implementation Plan: The Executive Director will research and draft rule/s for identifying and addressing conflicts of interest for Commissioners hearing disciplinary appeals. The PSCSC makes changes to its rules in accordance with the City's agency rulemaking process, SMC 3.02.030.

Management Response

SPD and OPA did not submit a written response other than the information reflected on the preceding recommendations pages. The PSCSC provided the following response:

City of Seattle

PUBLIC SAFETY CIVIL SERVICE COMMISSION

Andrea Scheele, Executive Director

MEMORANDUM

DATE: November 18, 2021

TO: Lisa Judge, Inspector General
Office of Inspector General

FROM: Andrea Scheele, Executive Director
Public Safety Civil Service Commission

SUBJECT: PSCSC Response to Discipline Audit Draft Report

The PSCSC is grateful for the opportunity to be interviewed for and respond to the Draft Discipline Audit Report and thanks OIG for the thoughtful and thorough work of its public safety auditors and staff.

PSCSC Response to OIG Recommendation: The PSCSC concurs with the OIG's recommendation to adopt rules to identify and address conflicts of interest for Commissioners hearing disciplinary appeals and will begin to implement the recommendation in 2022. It expects it will complete this work by the end of 2022. The PSCSC notes that historically and as a general rule, commissioners try to identify actual and/or potential conflicts of interest as soon as possible, and voluntarily recuse themselves when a conflict does or may exist. We agree that developing clear guidance for identifying and addressing conflicts of interest will improve clarity and transparency in our processes.

Formal Response to Discipline Audit Draft Report:

The PSCSC concurs with the factual findings of the report, with the following comments:

- On deference to the Chief's disciplinary decision:

Post-*Werner v. SPD*, the PSCSC has continued to give what it feels is appropriate deference to the Chief's disciplinary decisions, but as the report states, it is not clearly required to do so.

- On the PSCSC's lack of capacity and resources to function as the sole route of appeal:

It is the Executive Director's understanding that prior to the passage of the Accountability Ordinance, neither the PSCSC nor the Civil Service Commissions (CIV) department (which houses and serves as the

City of Seattle Civil Service Commissions
Seattle Municipal Tower, 700 Fifth Avenue, Suite 1670 PO Box 94729 Seattle, WA 98124-4729
Tel (206) 233-7118, Fax: (206) 684-0755, http://www.seattle.gov/CivilServiceCommissions/

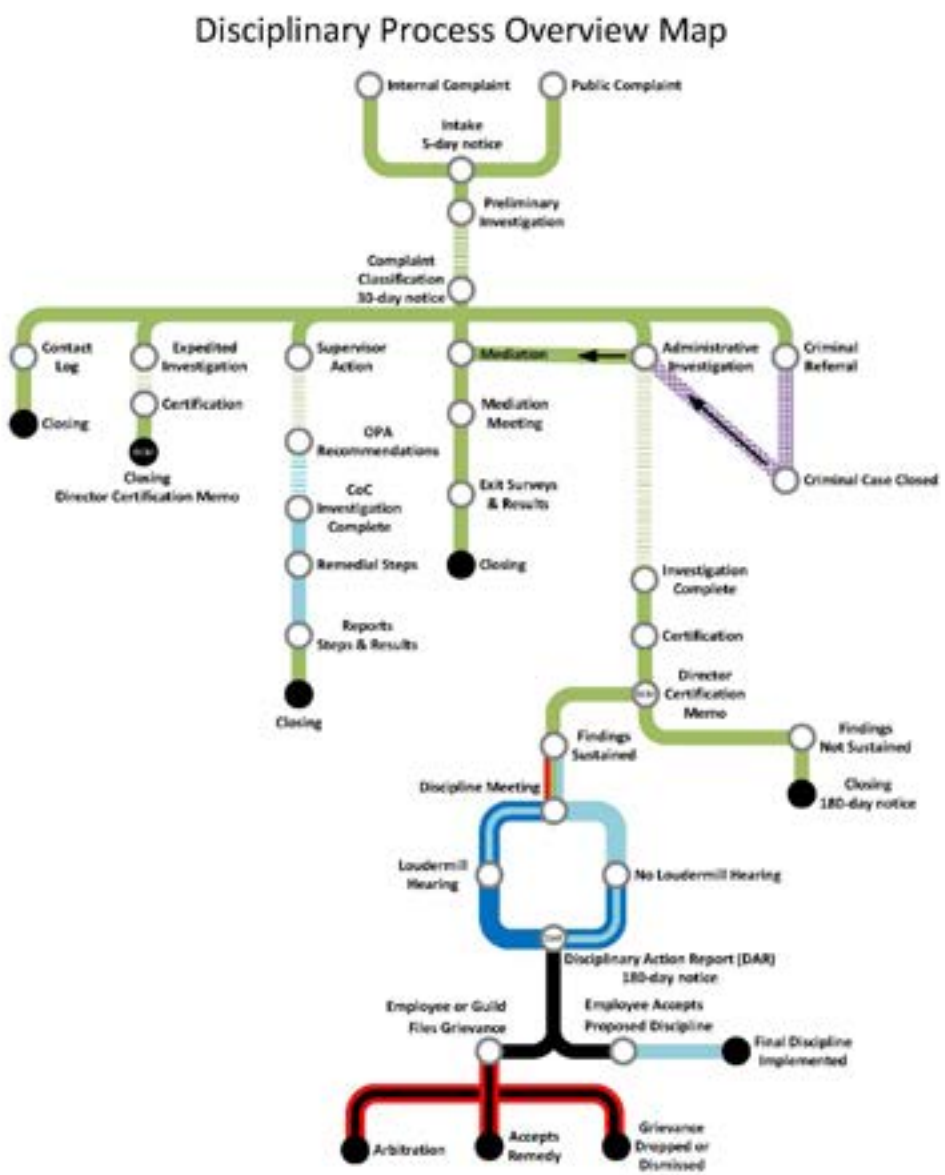
administrative support structure for the PSCSC and the CSC) were consulted about what changes were needed to enable the PSCSC to successfully function as the sole pathway for police disciplinary appeals.

If the number of appeals to be heard by the PSCSC were to significantly increase, so would its need for support and resources. As the report described, the PSCSC (primarily through its Executive Director) also directs, oversees, and makes final decisions on public safety classifications, reinstatement requests, entry-level and promotional civil service testing for candidates and employees of the Seattle Police and Fire departments. That work, much of which is performed by SHR staff but directed and for which the PSCSC is ultimately responsible, involves exam development and administration, maintenance of hiring and promotional registers, and providing certifications to SPD and SFD in order to hire and promote employees into all public safety positions. The CIV department has a total of two employees, and also supports the Civil Service Commission and the civil service system. The scope of work is large but largely invisible to those outside of the public safety agencies. This context is provided because it illustrates that the hearing of appeals is only part of the work that PSCSC and its Executive Director perform.

The PSCSC agrees with and emphasizes the report's description of the PSCSC's current structural limitations:

> *"OIG discussed the role of the PSCSC with the Commission's full-time staff who expressed that it would not be feasible for the Commission as it currently exists to assume the higher workload assigned to them in the Accountability Ordinance. The role of Commissioner is not a full-time position. Commissioners are paid a $200 stipend per pay period regardless of workload, and during the most recent four-day hearing of an SPD appeal, some Commissioners had to take time off work and use vacation to attend. According to the Executive Director of the PSCSC, the Commission would require more resources as well as time to prepare if they were to ever become the sole route of disciplinary appeal for SPD."*

Appendix: Disciplinary Process Overview Map



General Methodology

Methodology for specific components of this audit were addressed alongside the corresponding findings in the report. However, as it concerns the general conduct of the audit, OIG:

- Met with the Community Police Commission and former OPA Auditor, Judge Anne Levinson (Ret.) for input during the audit initiation process;
- Met with the OPA Director and OPA staff for input and information on internal controls throughout the audit process;
- Met with SPD Employment Counsel and SPD Executive Director of HR for input and information on internal controls throughout the audit process;
- Met with PSCSC staff for input and information on internal controls throughout the audit process;
- Met with SPOG representatives for input on the disciplinary process and to ask questions relevant to controls examined in this audit;
- Examined relevant SPOG and SPMA CBAs, the 2017 Accountability Ordinance, relevant RCW chapters, SPD policy manual, OPA Internal Operations and Training manual (2016), consent decree and related filings, and various media coverage of prior SPD disciplinary actions;
- Reviewed OPA case documentation stored in IAPro and performance coaching documentation in PAS; and,
- Conducted interviews of various SPD and City of Seattle personnel regarding the disciplinary process and related controls

Audit Standards

OIG conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The Office of Inspector General for Public Safety (OIG) was established in 2017 via Ordinance 125315 to help ensure the fairness and integrity of the police system in its delivery of law enforcement services. OIG provides independent auditing of the management, practices, and policies of the Seattle Police Department and the Office of Police Accountability. Additionally, OIG oversees ongoing fidelity to organizational reforms implemented pursuant to the goals of the 2012 Consent Decree and Memorandum of Understanding.

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