

GRIEVANCE RESPONSE

at

**Step 3 of the Memorandum of Understanding Between the
City of Oakland and Oakland Police Officers Association**

Grievants: Officer William Berger #9264
Officer Brandon Hraiz #9285
Officer Josef Phillips #9446
Officer Craig Tanaka #9484

Violations of Manual of Rules Section 370.27-1f
(Use of Physical Force)
Internal Affairs Case No. 18-0249

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Submitted on: March 1, 2021

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TABLE OF CONTENTS

I. INTRODUCTION1

II. RELEVANT POLICIES2

III. ISSUE2

IV. FACTS2

 A. The Incident2

 1. Summary2

 2. The Video.....5

 3. Additional Facts5

V. REVIEW PROCESS.....6

 A. Overview.....6

 B. Dispositions.....8

 1. Definitions.....8

 2. Dispositions at Each Step.....8

 C. Criminal Investigations Division (CID) – March 12, 2018 – March 6, 2019.....10

 D. Internal Affairs Division (IAD) – March 12 – October 19, 2019.....10

 1. Overview.....10

 2. Details on Use of Force.....11

 3. IAD Video Analysis.....15

 4. Sgt. I. Ramirez III’s Analysis15

 5. Video Analysis - Imaging Forensics.....16

 6. Training.....19

 7. Other Issues.....21

 8. Concluding Observation re IAD Investigation21

 E. Executive Force Review Board – February 8, 2019.....22

 1. Comprehensive Review24

2.	The Resulting Findings	24
F.	EFRB’s Additional Assessments and Deliberations	29
1.	IAD Training and Policy Recommendations	30
2.	Criminal Investigation Division Procedures	30
3.	Initial Assessment of Misconduct and IAD Findings	31
4.	Use of Force - All Officers - IAD Initial Findings	32
G.	Chief of Police Addendum - February 8, 2019	32
H.	Compliance Director’s Addendum to EFRB Report – February 19, 2019	33
I.	Compliance Director’s Complaint Investigation Report – February 22, 2019	35
J.	District Attorney Report – March 6, 2019	35
K.	Community Police Review Agency (CPRA) Report - April 22, 2019	37
L.	Compliance Director’s Disciplinary Determinations Memo – June 12, 2019	44
M.	Compliance Director’s Supplement to Findings – June 27, 2019	45
N.	Police Commission, Skelly Officer, and City Administrator	47
1.	Police Commission Discipline Committee – July 9, 2019	47
2.	Skelly Officer Decision After Proposed Terminations (April 2020)	48
3.	Interim City Administrator – May 11, 2020	48
4.	Step 3 Meeting – November 30, 2020	48
VI.	OTHER IMPORTANT FACTS	51
A.	The Officers and Their Job Records	51
1.	Officer Berger	51
2.	Officer Hraiz	52
3.	Officer Tanaka	52
4.	Officer Phillips	52
B.	Training Deficiencies	52

1.	Training Deficiencies Pertinent to the Substantiality of the Evidence to Prove Excess Use of Force	52
2.	New Policy and Training Bulletin on Dealing with Armed, Unconscious Persons	53
3.	Key Elements of the Policy and Training Bulletin:	54
C.	Disciplinary Standards	54
D.	Officer Phillips.....	55
VII.	DISCUSSION.....	55
A.	Standards.....	55
1.	Preponderance of the Evidence.....	55
2.	“Just Cause”	56
B.	Application – Just Cause.....	58
1.	Substantial Evidence of Culpability.....	59
a.	Video Evidence Does Not Suggest Culpability	59
b.	Evidence of Proper (Not Excessive) Use of Lethal Force	61
c.	The Compliance Director’s Concerns about Officer Credibility	64
d.	The Compliance Director’s Concerns About the Investigation.....	65
e.	Training Deficiencies Pertinent to the Substantiality of the Evidence to Prove Excess Use of Force.....	66
i.	Actions Not Inconsistent with Training	66
ii.	The Later-Implemented Policy	66
C.	Conclusion – Excess Use of Force.....	67
D.	“Exonerated,” Or “Not Sustained?”	67
E.	<i>If the Shootings Violated MOR 370.27-1f – Use of Physical Force, Was Termination the Appropriate Penalty?</i>	68
1.	Lack of Training	68
2.	The Stage Was Set by No Fault of the Officers	69

3. Job Records.....70

4. Disparate Treatment.....71

VIII. SUMMARY AND CONCLUSIONS74

DRAFT

I. INTRODUCTION

This Report addresses grievances challenging the terminations of four police officers employed by the Oakland Police Department (OPD). The four officers –Brandon Hraiz, Josef Phillips, Craig Tanaka, and William Berger – were among a total of six OPD sworn personnel who were accused of misconduct in connection with a March 11, 2018 shooting that took the life of Joshua Pawlik. The four officers, along with Sergeant Francisco Negrete, were accused of (and ultimately terminated for) excess use of force in violation of Manual of Rules section 370.27-1f – Use of Physical Force, Level 1.¹

The Memorandum of Understanding (MOU) between the Oakland Police Officers Association and the City requires the City to prove that just cause supported the discipline. (MOU Article X.) In accordance with the MOU, each of the terminated officers initiated a grievance alleging that “just cause” did not support termination and that the City was obligated to reinstate them with full backpay. Employees who dispute their discipline have a right to final and binding arbitration (*id.*), meaning that judicial review of the arbitration decision is unavailable except on very limited grounds.²

The grievance is now at Step 3 of the grievance procedure. Step 3 provides for a meeting between the grievant and the Step 3 City representative, and for a response in writing.³ The City’s Director of Human Resources commissioned the undersigned to serve as the City’s Step 3 representative. On July 10, 2020, I received 46 compact discs containing 402 folders and 5,305 documents.⁴ These included Skelly notices containing over 2,000 pages of material for each individual. A flash drive and a link to the documents were provided to the City simultaneously

¹ Sgt. Negrete and Lieutenant Alan Yu were also accused of violating Manual of Rules, Section 285-00-1 (Supervisors – Authority and Responsibilities). Separate Step 3 Reports address their grievances.

² See California Code of Civil Procedure, section 1286.6 (grounds for vacating arbitration award) and *Social Services Union v. Alameda Co. Training and Employment Bd.* (1989) 207 Cal.App.3d 1458 (doubt resolved in favor of upholding the award). In addition to the statutory grounds, a common law exception exists “in those rare cases where according finality to the arbitrator’s decision would be incompatible with the protection of a statutory right or where the award contravenes an explicit legislative expression of public policy.” (*City of Palo Alto v. Serv. Employees Internat. Union* (1999) 77 Cal.App.4th 327, 334, citations and internal quotation marks omitted.)

³ Through Mike Rains, legal counsel for the officers, the officers waived Step 3 timelines.

⁴ During the course of my inquiry, additional documents were gathered from the Department and web sources.

with issuance of this Report.⁵

Step 3 meetings occurred on November 30, 2020. The meetings were digitally recorded. Mike Rains, who is Counsel for the grievants, had the full opportunity to present argument and additional documents in support of the grievances, and the grievants had an opportunity to present information about their backgrounds and experience and to clarify their individual perspectives about the allegations. In the first meeting, Mr. Rains, on behalf of the subject officers and Sgt. Negrete, addressed in detail the use of force allegations. Mr. Rains also submitted a variety of documents to supplement his argument. In a later meeting with Sgt. Negrete and Mr. Rains, the alleged failure to supervise was discussed in similar detail. A Step 3 meeting with Lieutenant Yu and his counsel followed.⁶

The present document comprises the City's Step 3 response to the grievances concerning the terminations of the four officers. As noted in footnote 1, the grievances of Lieutenant Yu and Sgt. Negrete are addressed in separate Reports.

II. RELEVANT POLICIES

The policies, procedures and bulletins relating to this case appear in a separate document (Compendium of OPD Rules, located at Section 3, Item 33 of the Table of Contents.)

III. ISSUE

Did the four OPD Officers who shot Joshua Pawlik on March 11, 2018 engage in an excess use of force, thereby violating Manual of Rules section 370.27-1f – Use of Physical Force?⁷ If not, what remedy is recommended? If so, what discipline is recommended?

IV. FACTS

A. The Incident

1. Summary

An underlying report by the Department's Executive Force Review Board (EFRB) succinctly

⁵ All documents can be immediately accessed by clicking the desired row in the Table of Contents. An additional copy of the flash drive was provided to the City for transmission to counsel for the officers once the City releases the instant Response.

⁶ The information received during the Step 3 meeting with the four officers is detailed in section V.N.4. Sgt. Negrete was also present during the discussion of the excess use of force allegations.

⁷ Officer Phillips received a Level 2 violation, as the beanbag round he fired was not lethal. The others received Level 1 violations. All officers were terminated.

describes the incident, and is quoted here (pp. 4-6):

On March 11th, 2018, at approximately 1817 hours, OPD officers were dispatched to the area of 928 40th Street, City of Oakland, on the report of a person armed with a firearm. Information initially came from a citizen, via Oakland Fire Department (OFD) dispatch, that a person (later identified as force subject Pawlik) was down on the ground, between two houses on the east side of 928 40th Street, apparently unconscious, and armed with a handgun. The caller, (b)(5)(B) gave a description of the subject, cautioning that he was unable to verify whether the item in Pawlik's hand was indeed a gun. OPD Officer J. Philips, working as call sign 2112, was dispatched to the scene in "Code 3" status (emergency lights and sirens activated), and arrived at approximately 1821 hours. Officer Philips approached on foot, leaning over from the front steps of 928 40th Street to peer down the area between the two buildings. There, visible from the street, Officer Philips saw Pawlik, and observed that Pawlik had a semi-automatic handgun in his right hand. Officer Philips reported his observations over the patrol radio, and noted that Pawlik might be under the influence of alcohol. Officer Philips retreated to his parked patrol car, and moved it backwards in the #2 lane of westbound 40th Street until it was parked in front of the opening where Pawlik was lying. Using the vehicle as cover, Officer Philips maintained an observation post to monitor Pawlik's actions while additional units arrived. The next unit on scene was Sgt. H. Webber 8223, who gave direction to Officer Philips and also stood by waiting for additional resources.

Sgt. F. Negrete, working as Crime Reduction Team 1 (CRT1) supervisor call sign 6L71, heard the situation developing via the patrol radio, gathered two of his direct subordinates, Officer W. Berger and Officer B. Hraiz, and responded to the scene. Sgt. Negrete, assigned an AR-15 rifle due to his ancillary duties as a member of the OPD Tactical Team (SWAT) Entry Element, reported that he and the two officers (Berger and Hraiz were assigned AR-15 rifles as members of the Patrol Rifle Officer, or PRO, program) were bringing their rifles to the incident.

In the meantime, additional patrol officers arrived on scene. A large perimeter was set around the 900 block of 40th Street, with a rear perimeter (supervised by Sgt. A. Pierce) set up in the 900 block of 41st Street. Officers also set up traffic control points to keep traffic and pedestrians from entering the 900 block of 40th Street. The officers on scene requested for medical assistance to stage, away but ready, in the event that Pawlik was suffering from a gunshot wound or other trauma. Lieutenant A. Yu, the Bureau of Field Operations 1 (BFO 1) watch commander, arrived on scene and became the incident commander.

Once on scene, Sgt. Negrete began formulating a plan to take Pawlik into custody. To this end, Sgt. Negrete formed a Designated Arrest Team (DAT) which included himself (as the officer in charge of giving commands), Sgt. Webber (SIM beanbag), Officers Hraiz and Berger (primary cover with their AR-15 rifles) and Officer Philips (electronic control weapon, or ECW). Sgt. Negrete also requested that Officer Craig Tanaka, another of his

direct subordinates and a PRO, go to the Eastmont substation to retrieve the Bearcat, an armored vehicle which can withstand impacts from small arms fire.

While the DAT was waiting for the Bearcat, other officers were busy attempting to evacuate inhabitants from nearby residences and controlling access to the area. During this time, Sgt. Negrete discussed several contingencies with his team, he also met with Lieutenant Yu to discuss the plan of action for taking Pawlik into custody once the Bearcat arrived. While they waited, Pawlik shifted enough so that officers knew he was alive, but did not wake up or otherwise respond to the presence of the officers.

At approximately 1904 hours, Officer Tanaka arrived on scene with the Bearcat. Sgt. Negrete directed Officer Tanaka to replace Officer Philips' patrol SUV, #1447, with the Bearcat, placing the Bearcat as a piece of cover between the position of the officers in the street and where Pawlik was lying. Sgt. Webber moved the patrol SUV as Officer Tanaka, under the guidance of Sgt. Negrete, maneuvered the Bearcat into position. Once the Bearcat was in position, Sgt. Negrete directed Officer Hraiz to the Bearcat's turret.

Once Officer Hraiz got into the turret, Sgt. Negrete had Officer Tanaka move the Bearcat forward a few more feet, to give Officer Hraiz a better angle of view of Pawlik. As this occurred, Officer Berger noticed that Pawlik was moving, and called out "movement" to alert the rest of the team. Sgt. Negrete, who was standing behind the Bearcat at the front passenger side quarter panel, called Officer Berger to his position of cover behind the engine block. Officer Tanaka turned off the engine just as Pawlik moved again, and the officers began to verbally direct Pawlik.

For the next approximately 48 seconds, the officers gave Pawlik at least 12 commands, including, "Police, don't move", "Get your hands up", and several slight variations of "Get your hand off the gun" including one in Spanish. Pawlik did not reply to the officers, nor did he drop the gun or relinquish his grasp on it. Officers reported seeing Pawlik sit up, slightly, as if he were going to start getting up from the ground.

By this time Officer Tanaka, who had driven the Bearcat to the scene, had gotten out of the Bearcat through the passenger-side door and was just to the left of Sgt. Negrete, who was himself to the left of Officer Berger. Officer Hraiz was in the turret of the Bearcat, and Officer Philips, who had been just behind Sgt. Negrete and Officer Berger, had moved to Officer Berger's right with the SIM-loaded shotgun.

As the officers continued to give commands, Pawlik moved his head up and down, looking in the direction of the Bearcat and the officers. Pawlik was lying on his back and rolled slightly on his right side, with his body almost perpendicular to the length of the small walkway between the two houses where he was lying. The officers reported that, even though they gave Pawlik commands to get his hands off the gun, Pawlik did not remove his right hand from the handgun. Suddenly, Pawlik rocked his head and upper body forward, as if he was going to get up, and the officers reported seeing the barrel of the gun

in Pawlik's hand raise to point towards them. The officers also reported that Pawlik looked directly at them, that he appeared "agitated", "irritated", or "upset", and that he seemed to understand what was happening. Officers Hraiz, Berger, Tanaka, and Sgt. Negrete reported feeling that their lives and the lives of the other officers were in danger, and they all fired several rounds from their AR-15 rifles at Pawlik within the span of approximately three (3) seconds. Pawlik was struck by several rounds. Sgt. Negrete put together a small team of officers and advanced with them behind a ballistic shield towards Pawlik's location. Once there, the officers separated the handgun from Pawlik and saw that he had sustained severe injuries.

Sgt. Negrete requested that medical personnel come in to provide aid to Pawlik, but Pawlik succumbed to his injuries and was later pronounced dead on scene.

Lieutenant Yu initiated a Level 1 Force call-out, and CID and IAD investigators responded to the scene to begin the investigations.

2. The Video

A video taken by Sgt. Webber at the scene became central in what developed into an outcome-determinative dispute in the review process herein. Sgt. Webber did not participate in the shooting but when on the scene he had thoughtfully placed his PDR on the dashboard of the Bearcat, in order to record the event. The resulting grainy, cloudy, and low image quality video was enhanced by experts and was the subject of intensive review by Internal Affairs Division (IAD), the District Attorney OIS Team, the EFRB, the Chief, Robert Warshaw (the Federal Compliance Director/Monitor pursuant to the Consent Decree (Compliance Director)),⁸ the Citizen's Police Review Agency (CPRA), the Police Commission Discipline Committee, the Skelly Officer, and finally the City Administrator. The video and its impact on this case is discussed extensively below.

3. Additional Facts

The Autopsy showed that Pawlik had toxic levels of Benzodiazepine, cocaine, Fentanyl, Levamisole, opiates and Tramadol in his circulatory system.

⁸ In *Delphine Allen, et al. v. City of Oakland, et al.*, U.S. Northern Dist. Case No. C00-4599, the plaintiffs leveled allegations of systemic abuse against OPD and the City in connection with officers' use of force. This resulted in a Consent Decree enacted in the year 2000. Since 2014, an Amended Memorandum of Understanding (AMOU) governs the departmental operations tied to the Consent Decree. The AMOU appears at Section 1, item 5 in the digital exhibits folder that accompanies this Report.

On February 5, 2019, Pawlik's family initiated litigation against the City. On April 23, 2020, the parties reached a settlement of \$1.4 million.

V. REVIEW PROCESS

A. Overview

Starting the next day, the case began its way through levels of review by which different expert panels assessed whether the conduct of the six involved personnel violated Department General Orders.⁹ Committees comprised of and/or informed by subject matter experts evaluated this case, assessing the extent of compliance with policies; procedures; and training regarding Use of Force, Video, Patrol Procedures, Designated Arrest Team Procedures, Specialty Impact Munitions, Firearms, Patrol Rifle Officer, Command and Control, Bearcat Specialty Vehicle, Criminal Investigators, and Internal Affairs Force Investigator.

As summarized in **Table 1**, over the ensuing 25-month period, the following entities and personnel participated in comprehensive, multi-level review of the incident:

- District Attorney Officer Involved Shooting Team
- OPD Criminal Investigation Division (CID)
- OPD Internal Affairs Division (IAD)
- Executive Force Review Board (EFRB)
- Community Policing Review Agency (CPRA)
- Chief of Police
- Federal Compliance Director/Compliance Officer Pursuant to Consent Decree (Compliance Director)
- Police Commission Discipline Committee
- Police Commission
- Skelly Officer
- City Administrator

⁹ A parallel investigative process involving the Department's Criminal Investigations Division (CID) unit and representatives of the District Attorney's office led to the Alameda County District Attorney's determination not to press charges against the officers.

Table One – Key Dates

DATE	EVENT
2018	
March 11	Shooting of Pawlik
March 11	Crime Report Initiated
March 12 (convened)	IAD and CID commence investigation
March 12	Autopsy/coroner's report issued
March 22	Subject officers given notices of IA investigation and reminded to not discuss per OPD policy
April 13	CPRA assigns an investigator
April 14 and August 31	IAD - Initial and Supplemental Witness Interviews
October 19	IAD Report
November 28-29	EFRB conducts initial hearings and requests additional info from IAD
December 27	New CPRA Investigator assigned to case/additional complaint is filed
2019	
January 8	IAD Memo to EFRB Providing Additional Analysis
January 8	EFRB reconvenes, agrees with IAD – no excess use of force violation; sustain level II, failure to supervise
February 8	Chief's Analysis and Addendum to EFRB Report-No Policy violations
February 19	Compliance Director's Addendum to EFRB - Overturns Findings of Chief
March 6 (issued)	DA Report and Letter to Chief of Police (no criminal charges will be filed)
April 22	CPRA Report (exonerated); Police Commission receives CPRA findings and Compliance Director's Addendum, convenes Discipline Committee
June 12	Compliance Director's Disciplinary Findings
June 27 (issued)	Compliance Director's Supplemental to 2/19/19 Addendum and 6/12/
July 1, 2, 5, 7, 9	Discipline Committee Meets
July 9	Discipline Committee Issues Finding Upholding Compliance Director Recommendations
July 9	Police Commission recommends terminations
July 11	Skelly Notices Issued
2020	
February 14	Officers' Skelly Responses ¹⁰
April	Skelly Report Issued ¹¹
April 21 – May 11	Appeals filed
August 17	Compliance Director's Report to the U.S. District Court re Pawlik Shooting

¹⁰ Skelly meetings did not occur.

¹¹ The Report did not state the day of issuance.

B. Dispositions

1. Definitions

Following are the definitions for the four standard terms describing ultimate case outcomes:

Unfounded: The investigation clearly established that the allegation is not true.

Exonerated: The investigation clearly established that the actions of the police officer that formed the basis of the complaint are not violations of law or departmental policy.

Not-sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation made in the complaint.

Sustained: The allegation disclosed sufficient evidence to clearly prove the allegation made in the complaint.

2. Dispositions at Each Step

In the first three levels of review (CID, IAD and EFRB), the subject officers were cleared of allegations of excess use of force. The charges against Sgt. Negrete and Lt. Yu for failures in supervision and oversight of the scene were sustained, with Negrete's lapses held more serious ("Class 1") than Lt. Yu's ("Class 2").¹² In her subsequent review, the Chief agreed with all findings except for those involving Sgt. Negrete, whose Class 1 she modified to Class 2.

Thereafter, in actions that have been heavily disputed on both legal and factual grounds, and over the objection of the City and the officers, the Compliance Director intervened. Overriding the determinations made previously, the Compliance Director sustained the allegations of excessive use of force for all officers and Sgt. Negrete, sustained Lieutenant Yu's Class 2 violation, and sustained a Class 1 finding as to Sgt. Negrete. He concluded that five of the members should be

¹² With respect to deficient supervision, the MOR's differentiate between "Class 1" (more severe) and "Class 2" (less severe) conduct. The deficient supervision allegations against Lieutenant Yu and Sgt. Negrete required an assessment of the severity of such misconduct. Through the review chain, Yu's misconduct was rated a "Class 2." The Compliance Director and Skelly Officer agreed, charging Yu with a five-day suspension, which he appealed. The deficient supervision against Sgt. Negrete fluctuated, with the Chief reducing a Class 1 finding to Class 2. The remaining three levels of review disagreed, imposing a Class 1 finding which, combined with the sustained allegations of excess use of force, ultimately resulted in Sgt. Negrete's termination. As indicated below, these issues are addressed in a separate document.

terminated, and that Lt. Yu should receive a five-day suspension.¹³

In the next step of the process, on June 13, 2019, a subcommittee of the Police Commission, referred to as the Discipline Committee, reversed the pre-Compliance Director findings of the Citizen’s Police Review Agency (CPRA) and agreed with the Compliance Director. Next, rejecting the protestations of counsel for the five members facing termination and Lt. Yu, the Skelly officer – like the subcommittee – reached the same conclusions as the Compliance Director, recommending termination of the remaining personnel, and sustained a five-day suspension for Lieutenant Yu. The City Administrator sustained the Skelly Officer’s findings.

These various steps are catalogued in **Table Two**.

Table Two – Administrative¹⁴ Dispositions

ENTITY	CONCLUSION – ALL SHOOTERS (MOR 370.27 – Use of Force, Level 1)	CONCLUSION - NEGRETE (MOR 285.00 – Supervisors– Authority and Responsibilities, Class I and II)	CONCLUSION - YU MOR 234.00-2Command Officers –Authority and Responsibilities, Class 1 and II)
IAD	Exonerated	Exonerated Class 1 Sustained Class 2	Exonerated Class 1 Sustained Class 2 ¹⁵
EFRB	Exonerated	Exonerated Class 1 Sustained Class 2	Exonerated Class 1 Sustained Class 2
Chief’s Analysis	Exonerated	Exonerated Class 1 Sustained Class 2	Exonerated Class 1 Sustained Class 2

¹³ Under the City Charter, where the EFRB and the Chief agree on the resolution of a disciplinary matter, the decision is final. That occurred here. However, when the Compliance Director intervened, he took the position that in accordance with the Consent Decree, he was, effectively, the “Chief.” Therefore, in his view, a disagreement existed, leading to his having the authority effectively to supplant the Chief’s determination with his own. The federal court later confirmed the correctness of the Compliance Director’s position.

¹⁴ As noted above, the DA cleared the accused personnel of criminal liability on March 6, 2019.

¹⁵ IAD initially recommended that Lt. Yu be exonerated entirely. After further investigation, IAD sustained a Class 2 violation.

ENTITY	CONCLUSION – ALL SHOOTERS (MOR 370.27 – Use of Force, Level 1)	CONCLUSION - NEGRETE (MOR 285.00 – Supervisors– Authority and Responsibilities, Class I and II)	CONCLUSION - YU MOR 234.00-2Command Officers –Authority and Responsibilities, Class 1 and II)
Compliance Director’s Addendum to EFRB Report (8 pp.)	Sustained	Sustained Class 1	Sustained Class 2
CPRA	Exonerated	Exonerated Class 1 Sustained Class 2	Exonerated Class 1 Sustained Class 2
Compliance Director’s Supplement to Findings (51 pp.)	Sustained	Sustained Class 1	Sustained Class 2 (5 day suspension)
Discipline Committee (Subcommittee of Police Commission)	Sustained	Sustained Class 1	Sustained Class 2 (demotion)
Skelly Officer	Sustained	Sustained Class 1	Sustained Class 2 (5 day suspension)
Final Action	Sustained	Sustained Class 1	Sustained Class 2 (5 day suspension)

C. Criminal Investigations Division (CID) – March 12, 2018 – March 6, 2019

CID’s review occurred simultaneously with that of IAD. CID’s responsibility was to assess potential criminal liability of the suspect. After reviewing CID’s report, the DA agreed that criminal charges were not justified and that no further action would be taken on the case. The CID Report is discussed in section V.C below.

D. Internal Affairs Division (IAD) – March 12 – October 19, 2019

1. Overview

IAD’s Report numbered 838 pages.¹⁶ IAD’s report ultimately cleared (“exonerated”) the officers of the allegations of excess use of force. IAD unqualifiedly found all witnesses to be credible.

As explained in detail below, IAD’s process was extensive. However, it is important to put the IAD report in context of this case and its outcome. The IAD investigative process had serious deficiencies, later documented and critiqued by the EFRB, CPRA and the Compliance Director. Pre-investigative procedures were deficient. The problems began immediately after the incident,

¹⁶ After two days of meetings regarding the IAD report, the EFRB sought additional information relative to the performance of Sgt. Negrete, Lt. Yu, and Officer Tanaka. The supplemental information IAD provided is not relevant to the excess use of force allegations in this report.

with officers being allowed to select their sequestration partners and retain their cell phones for a time – protocol violations that created doubt about the integrity of the investigation. Questioning was inadequate, particularly in relation to hand and arm movements by the suspect and height and positioning of the gun, and relative to discrepancies between officers’ statements about those issues. Questions correlating officer statements with the content of the video were also lacking, both in initial questioning and in a second round of questioning in August. The long delay (about five months) between the first and second interviews was another very significant deficiency, as memories fade over time; time between interviews can enable collusion between witness; and full analysis cannot occur until the interviews are complete.¹⁷ These and other problems deprived later reviewers of the opportunity to further interview witnesses, and they cast doubt (indeed, disbelief by the Compliance Director) on the ultimate conclusion exonerating the officers from excess use of force allegations.

2. Details on Use of Force

The report relayed the sequence of incidents:

1. Sgt. Negrete’s Plan

At approximately 1837 hrs Negrete discussed his contingencies and plan with Lt. Yu. Lt. Yu agreed to the plan. At about 1841 hrs, Negrete restated the plan and contingencies to the members of the DAT (Berger, Hraiz, and Phillips). The contingencies, in order, were the following:

- Sgt. Negrete would give verbal commands to Pawlik.
- If there was no response from Pawlik, an attempt would be made to rouse Pawlik using sirens and/or announcements.
- If there was still no response, Pawlik would be struck with a bean bag round.
- If there was no response, again strike Pawlik with a bean bag round.
- If there was still no response, Pawlik would be “tazed” (struck with an ECD electronic control device).
- If all those steps fail, the DAT would approach Pawlik on foot, using shields for cover.

2. Positioning of the Bearcat

¹⁷ The initial questioning of each officer about the video was very brief, with no probing on the above or any other issue. Follow up interviews in August were no better.

At approximately 1904 hours, Tanaka arrived with the Bearcat. He began to position the Bearcat in the street, in front of Pawlik's location. As this was happening; Negrete, Hraiz, Berger, and Phillips continued to monitor Pawlik from positions of cover. The Bearcat was moved into its final position and its engine shut off. Tanaka exited the Bearcat and took a position of cover behind it, along with Negrete, Berger, and Phillips. Hraiz positioned himself in the Bearcat's turret.

3. Sgt. Negrete's Commands

Pawlik then began to move his body, and appeared to awaken or regain consciousness (Means, Opportunity, Ability). Negrete then brought his rifle up and pointed it toward Pawlik. Negrete issued commands to Pawlik. He stated:

- "Police, don't move."
- "Get your hands up."
- "Hands up."
- "Hands off the gun."
- "Get your hand off the gun."
- "Hey, do not move."
- "Get your hand off that gun young man."
- "Get your hand off that gun."
- "Get your hand off the gun."
- (Via P.A. microphone by Ofc. J. Yu) "Get your hand off the gun."
- (By Officer Berger, in Spanish) "Suelta la pistola."
- "Get your hand off that gun."
- "Get your hand off the ... " (shots are fired by the officers).

4. Pawlik's Reaction

IAD noted:

Pawlik did not say anything, looked in the officers' direction, and continued to move his body while apparently starting to sit up. Video analysis shows that Pawlik's right arm moves approximately 1/3 of a second before the shooting. Although Pawlik had been moving his body for several seconds by this time, only after his right arm (gun in his right hand) moves do the officers fire their guns. The subject officers provided consistent statements (detailed ahead), indicating that Pawlik was pointing the gun at them. Video evidence shows that the officers fired their guns virtually simultaneously. Video analysis was unable to determine who fired first, due to how quickly the shots were fired and technological limitations. Due to all of these factors (demonstrating Intent, Means, Opportunity, Ability), Pawlik was presenting a lethal threat to the officers at this time. Sgt. Negrete, and Officers Hraiz, Berger, and Tanaka all fired their rifles at Pawlik, striking him multiple times. Phillips fired a less-lethal bean bag round at this time as well, striking Pawlik once. The officers fired from an estimated distance of approximately 40 feet.

Video evidence indicates that Pawlik had a clear and unobstructed line of fire in the direction of the bearcat and its surroundings. This includes any portion of the officers' bodies (heads and upper torsos) not behind or inside the Bearcat.

5. Basis for Use of Force

IAD applied criteria pertinent to excess use of force, first describing and crediting Negrete's statement:

In his statements (CID and IAD) Negrete believed Pawlik posed an immediate threat to himself and the other members of the DAT. He stated that he based this on the fact that Pawlik ignored the officers' lawful commands, and pointed his pistol (Intent, Means, Opportunity, Ability) at Negrete and his fellow officers. Negrete fired seven (7) 5.56mm rounds from his Noveske rifle at Pawlik.

Negrete's backdrop was the side and back yard of 928 40th Street. Negrete was aware that officers had attempted evacuations of surrounding residences and ensured that no pedestrians could enter the area.

During his statement to IAD, Sgt. Negrete stated the following:

- The subject (Pawlik) sat up, looked around and then looked in the direction of the officers.
- Sgt. Negrete commanded Pawlik to drop the gun.
- Pawlik looked right and then looked back at the officers again.

- Pawlik grasped the gun, closed his hand around the gun and raised the gun.
- Sgt. Negrete believed the firearm was pointed directly at him and remembers looking down the barrel of the subject's gun.
- He did not observe Pawlik's fingers on the trigger, but believed the subject was purposely and intentionally pointing his gun at him because he had given clear and loud instruction which the subject failed to follow.
- He reacted instinctively by electing to use lethal force when he thought his life and other officers' lives were in danger.
- He fired 3-5 rounds within one (1) second, shooting at a rapid rate, until he observed the subject fall backwards. He said he believed all the rounds (fired by himself and other officers) were fired simultaneously.
- Lethal force was necessary, because he believed at the time if he didn't shoot the subject he would have lost his life.

Pawlik was armed and about to use what Negrete believed to be lethal force on himself and other officers. Negrete indicated that his only force option, based on his OPD training, was his Noveske rifle as lethal force to stop the immediate threat presented. The following conditions existed at the time of the shooting:

The severity of the crime:

Pawlik was in possession of loaded firearm in a public place (25850(a) PC)

Pawlik ignored the officers' commands, and pointed his loaded handgun at Negrete and his fellow officers (417(c) PC)

Whether the Subject posed an immediate threat to the safety of officers or others:

Negrete believed Pawlik had the intent, means (pointing the pistol at the officers) and the opportunity, and ability (Pawlik had possession of a loaded firearm and a clear and unobstructed view of the officers) to shoot the officers. Although Pawlik had been unresponsive, he was now awake, moving, and posed an immediate threat to the officers.

Force Investigations Section 18F-0067

Officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts. Additionally, officers had attempted evacuations of nearby residents. Despite these measures, officers had no way of knowing if additional citizens were still in the surrounding residences. Pawlik posed a danger to the public by pointing his gun in a residential neighborhood.

Whether the subject was actively resisting arrest or attempting to evade arrest by flight:

Pawlik did not comply with officers' orders to drop the gun.

Video analysis shows that Pawlik was holding the gun in his right hand and that his right arm moved as the officers gave him commands to drop the gun.

Based on the totality of the evidence, it is reasonable to believe that Negrete perceived the threat as he described it. Therefore, his use of force was found to comply with the law and OPD policy.

This investigation found that the involved member's actions leading up to the use of force did not aggravate the situation, or make the use of force more likely to occur. The actions also did not create the circumstances that lead to, or contributed to the use of force. Negrete stopped firing his gun in less than three seconds, proceeding to reassess the threat. This is a proper and reasonable de-escalation of force.

Recommendation:

- Based on the evidence and factors above, the investigation recommended a finding for Negrete's UOF#1 (Level 1, Type 1) of "EXONERATED."

IAD proceeded to review each officer's recollections about the events. The recalls of each officer about details¹⁸ were not exactly the same, but all conveyed the common core: Pawlik did not obey commands, looked agitated or aggressive, and turned his gun in the officer's direction, causing each officer to believe that a lethal threat was present and to shoot Pawlik.

3. IAD Video Analysis

IAD's assessment of the video included an analysis conducted by Sgt. I. Ramirez III and also external review and analysis by an expert in the field. Given the high relevance of this issue, the analyses are quoted extensively below.

4. Sgt. I. Ramirez III's Analysis¹⁹

Sgt. Ramirez is a Digital Analysis Specialist employed by OPD. The IAD Report relays Sgt. Ramirez's findings as follows:

OPO's Homicide Unit tasked Sgt. I. Ramirez (OPD Digital Analysis Specialist) with an analysis of involved officers' PORO (Personal Digital Recording Device) videos. The

¹⁸ See IAD Report, pp. 109-110 (Berger), 110-112 (Hraiz), 112-114 (Tanaka), and 115-117 (Phillips). Analyses of Tanaka and Phillips differed because their conduct raised additional issues. These additional issues ultimately dropped away, with the noteworthy exception that the ultimate termination of Phillips did not give any weight to the fact that the one round he discharged was a non-lethal beanbag round.

¹⁹ Sgt. Ramirez's analysis appears at pp. 773-794 of the IAD Report.

analysis sought to clarify the video, for the purpose of observing more detail. Involved officers' videos were also synchronized as well, to their location and actions, in relation to one another, at the time of the shooting. Ramirez concluded the following (paraphrased for clarity, when necessary): The subject (Pawlik) was lying on his back in a supine position with his right-hand palm up, with a gun in his hand (Ramirez discerns the gun through color changes in the video, at the location of Pawlik's right hand). As the armored vehicle is put in place, the subject started move. The subject lifts his head and torso towards the street where the officers are located. It appears as the subject is moving to a sitting position when the OIS occurs. Because of the resolution of the captured video and the distance of the camera from the subject, there was not enough detail to see the right hand clearly. But using areas of contrast, [Ramirez] tracked movements of identified objects, in areas of interest. It appeared to me that the subject attempted to sit up by "rocking." This is supported by the analysis of the PORO video when the subject appears to move his feet in, bending at the knees, then extending the legs out a bit. There is not enough information to clearly see the gun and/or its exact movement. In the area of the right hand there is some changes in contrasting areas. The movement was slight, but as shown in the control video, it supports the movement was in an upward position.

Through [Ramirez's] analysis, the video evidence is consistent with the subject moving in a way consistent with a person sitting up and that the gun moved vertically before the gun was in the subject's hand, and the contrast changes in the clarified video.

For more information on Sgt. Ramirez's report, please refer to **Appendix C-2 (Forensic) of the IAD Report.**

5. Video Analysis - Imaging Forensics

OPD CID contacted the outside digital analysis company, Imaging Forensics, to analyze involved officers' PDRD video footage. George Reis is the company's principal. The resulting report appears at pp. 795-799 of IAD's initial report.

The Imaging Forensics report provides as follows (emphasis added):

Analyst's Background

I provide forensic photography, video analysis, and photographic analysis through my business, Imaging Forensics, Inc. I also provide training in these disciplines primarily to police and government agencies. I have over 25 years of experience in this field including 15 years at the Newport Beach Police Department. I have provided training to the US Secret Service, FBI, US Army Crime Lab, and other federal, state, and local police departments throughout the US and Canada. More than 2,000 agents, detectives, Police officers, and analysts have taken my courses. I am certified by the Law Enforcement and Emergency Services Video Association (LEVA) as a Forensic Video Analyst, and in Forensic Photography and Imaging by the International Association for Identification. In

addition, I am on the Forensic Photography Certification Board for the IAI and have been a member of the Forensic Video Analysis Certification Board. I am also a member of the Editorial Review Board for the Journal of Forensic identification. In 2007, I wrote the book, Adobe Photoshop CS3 for Forensics Professionals. I have also written several articles that have appeared in law enforcement magazines and a white paper on image authentication for Adobe, Inc. Since 1995, I have worked hundreds of cases and testified more than 60 times in court and depositions in criminal and civil cases. I have testified in Federal court, Military court and in state courts in California, Washington State, Kansas, Arizona, Colorado, Massachusetts, New York, New Jersey, and Hawaii. A copy of my CV has been delivered with this report.

Scope of Work

I have been retained by the City of Oakland, CA to analyze Video footage from nine body worn video cameras related to an officer involved shooting. I was initially retained to provide a clarified version of one of the Videos, which I provided in August 2018 - for that clarification I enlarged the video and adjusted the contrast and brightness levels to show detail. The method used for the enlargement was Bi-Linear, which retains a large amount of the natural shape of objects when enlarging, to prevent pixilation. I was then further retained to analyze the video to determine four things: 1) if the male adult is in possession of a firearm; 2) the body movement of the male adult in the 30 second period [sic] prior to the firearm discharges, especially any movement of his right hand; 3) the movement of the male adult's right hand in relation to each firearm discharge; and 4) the chronology of the firearm discharges to include the total time from the first firearm discharge to the last firearm discharge.

Items Reviewed

I was provided with videos from the body worn cameras that included recordings from the incident, as well as two still photographs taken after the shooting. Of the video recordings, only one of them contained video footage that showed the male adult during the period of interest. However, all nine contained audio that I used in analyzing the chronology of the firearm discharges.

Video Files

The files in this case are of low resolution, 848 x 480 pixels, the male adult is about five percent of the width of the file. The light level is low and of very low contrast. The camera angle is at a low angle due to the position of the male adult (prone) and the position of the camera (approximately chest high) and the distance from the camera to the subject. The video files have both spatial and temporal compression. Spatial compression reduces the file size based on the data of individual frames and results in lower resolution, a blockiness to the tile, and sometimes a shift in the edges of objects. Temporal compression reduces the file size by discarding information that changes less than a given amount from one

frame to another, and reuses information that falls within a given threshold. This can result in objects moving at a different velocity than they really did. The combination of all of these factors makes it difficult to see any significant detail in the images. Objects that are smaller than about 2 square inches may appear as a single darker or lighter pixel than the surrounding pixels.

For this analysis, I used a method of enlargement called Nearest Neighbor. This method simply enlarges the pixels in the image without resampling them, which results in shapes that may not appear natural, but that provide the most accurate detail for determining the edges of objects. For the purposes of this analysis, enlarging the video using Nearest Neighbor avoids smoothing areas of contrast, which could result in the misinterpretation of objects in the video.

In this, analysis, I used both of the clarified video files in forming my opinions, that is, the clarified video from my initial retention that was delivered in August, and the clarified video using the Nearest Neighbor enlargement method.

Analysis

I was tasked with analyzing the video files for four specific things, each is addressed below.

1.) Is the male adult (Pawlik) in possession of a firearm?

Due to several factors (resolution, compression, lighting, distance from camera, angle of view), this could not be discerned from an analysis of this video.

2.) The body movement of the male adult (Pawlik) in the 30 second period to the firearm discharges (by the officers), especially on any movement of his right hand.

Because of the resolution, compression, low contrast light, distance from camera and the angle of view, small, subtle movements cannot be discerned. The right hand is not visible in the video prior to the shots being fired. There is some movement of the subject's head, and possibly his left arm and hand, as well as his right arm, during the 30 seconds prior to the first shot.

In addition to the above, the subject's feet move several times during the 30 seconds prior to the first shot.

I have provided a video and a PDF file that illustrates these movements.

3.) The movement of the male adult's right hand in relation to each firearm discharge.

There are two factors that limit the ability to make this analysis. First is that, due to the factors listed above, it is not possible to discern the exact position of the subject's right hand prior to the first shots. In addition to this, there are limitations regarding the audio recording that make it impossible to determine the exact number of shots fired, or their exact timing. It is possible, however, to see some movement of the right arm during the time the shots are being fired. The video I provided illustrates these movements.

4.) The chronology of the firearm discharges to include the total time from the first firearm discharge to the last firearm discharge.

Many audio recorders, including body worn cameras, use Automatic Levels Control or Audio Gain Control which can result in the inability to record the separate, individual shots fired. The audio files were compared with the audio file spectrum in each of the body worn cameras that recorded the event. All were found to be consistent with each other, but all likely do not record each individual shot that was fired.

It is likely, however, that the first shot was recorded correctly, and that the last shot was recorded correctly, or very close to it (within a frame or two). There are approximately 12 shots that can be discerned - but it is possible that the recording equipment did not record all firearm discharges.

In the video and PDF files that I have provided, I included an image depicting the audio spectrum from the same video file as the source for the video footage. The files provided begin 30 seconds prior to the first shot, and show that the duration of the shots was 2 seconds and 7 frames (at 30 frames per second, this is 2-23 seconds, or approximately 2 ¼ seconds).

Conclusion

Because of the low resolution, compression, distance from camera, lighting, and angle of view, discerning if the male adult is in possession of a firearm is not possible. The position of the right hand during the 30 seconds prior to the first shot is not possible for the same reasons, however, it is possible to see his head movement, some movement of his right arm just prior to the first shot, his overall body position, and some movement of his feet, and possibly his left arm and hand. The exact number of shots fired, and their exact timing cannot be determined, as microphones often have an automatic gain (levels) control that could prevent two or more shots in rapid succession from each being recorded. The total duration of the shots was approximately 2.23 seconds.

I have illustrated my observations in a video file and a PDF copy of that file, which are delivered with this report.

6. Training

The IAD Report had a long list of areas for additional training, including developing and implementing training “designed to assist personnel in the proper handling of incidents involving unresponsive armed individuals. This training should extend beyond pre-existing training of individuals barricaded inside vehicles.” (IAD Report, p. 127 (emphasis added).) Most important for purposes of this case, however, is the following text (IAD Report, pp. 100-101):

Training Review

A global analysis on tactics, and training is an important aspect of the review process. The review should answer the question: Did the officer(s) who acted in a particular incident respond correctly based upon their training?

In addition, a vital theme that should run through the whole review process is, how do we, as an agency, take constructive steps to improve in areas that have been identified as in need of repair or refinement? This is a systematic approach, ensuring that the lessons learned - both successes and failures - are identified and followed up on.

Prior to this incident, all the individuals received OPD Departmental training via Basic Police Academy, Power OMS and/or Continued Professional Training. All officers involved in the incident had qualified with their firearms, as required per departmental policy.

Connection to Previous Incident Assessment

IAD noted that the current incident under investigation has several strong similarities with an Officer Involved Shooting from 6 Jun 2015 (IAD Case #15-0436; EFRB 15F-0230; RO#15-029~134). In this incident, a male was reported to be stopped in the roadway, sleeping / unresponsive in a vehicle, with a gun at his side. Officers approached the unresponsive male and ended up shooting him, resulting in his death. Several recommendations were made in the subsequent Internal Affairs Investigation in which the Executive Force Review Board concurred. One of these recommendations was that a training group be organized for specific tactical and scene management training for barricaded subjects inside of a vehicle.

During this current investigation, IAD found that involved personnel reported having attended training of this type, specifically dealing with barricaded (or sleeping) subjects inside a vehicle. None had reported receiving any training of dealing with an unconscious or unresponsive person armed with a gun, out in the open, however. During the last three years, OPD personnel have shot and killed two different individuals whom they contacted unresponsive and armed with a gun. Officers have received some more narrowly focused training in this area. However, this is clearly an issue of great importance and the Department would benefit by exploring all possible paths to becoming fully proficient at safely and judiciously handling these incidents.

Recommendation:²⁰

It is recommended that the Department develop and implement training designed to assist personnel in the proper handling of incidents involving unresponsive armed individuals. This training should extend beyond pre-existing training of individuals barricaded inside vehicles.

7. Other Issues

IAD noted that they were required to also assess and make recommendations about other issues surrounding their analysis. Germane to this case, IAD identified the following issues for follow up:

- Use of the Bearcat (pp. 118-119, 127);
- Scene management, including sequestration of personnel (pp. 121, 125)
- Attaching PDRDs to all vehicles (p. 127)
- Reviewing options for improving resolution of video captured by PDRD, because “This would greatly aid in subsequent analysis of videos during investigations such as this one” (p. 124)
- Work Cell phone collection (p. 126);
- Use of external experts (p. 127);
- Need for prompt interview of command personnel (p. 127);
- Training for Negrete and LT. Yu re anticipating contingencies (p. 128).
- Researching the availability, acquisition, and use of any specialized tools that would allow for remote monitoring and/or communication with armed individuals (p. 128).

8. Concluding Observation re IAD Investigation

The IAD investigation was the result of hundreds if not thousands of person hours of work. A variety of elements of the report were positive and useful, and the utilization of an outside expert regarding the video ended up with work product that placed the video in proper perspective in this case. The report and IAD process as a whole, however, were marred by investigators’ failures in questioning witnesses and timely completion of the investigation. These problems caused the Compliance Director to discard the conclusions of the investigation and castigate the

²⁰ The EFRB repeated this recommendation, and the Compliance Director pursued it, resulting in the creation of a subcommittee that promulgated a new policy.

department for investigative inadequacies.

The definition of “exonerated” must be noted. “Exonerated” means “the investigation *clearly established* that the actions of the police officer that formed the basis of the complaint are not violations of law or departmental policy.” (Emphasis added.) Given the deficiencies in the IAD investigation, it is hard to say that it *definitively* demonstrated the officers did not violate any law or policy.

E. Executive Force Review Board – February 8, 2019

At the direction of the Chief of Police, OPD convened the EFRB.²¹ OPD convenes Boards to review Level 1 and 2 uses of force; in-custody deaths; fatal vehicle pursuits; and certain matters that the Chief of Police directs a Board to review.

The following offices and individuals participated in the EFRB process in this case:

VOTING MEMBERS	NAME
Bureau of Field Operations 2	Deputy Chief L. Armstrong
Patrol Area 2	Captain C. Bolton
Patrol Area 4	Captain N. Joshi

²¹ As explained on OPD’s web site:

The Executive Force Review Board (EFRB) investigates serious situations where force was used by police officers. The Board is made up of at least one Deputy Chief of Police and two other members at the rank of Captain of Police or higher. The EFRB reviews investigations completed by the Homicide Section, Internal Affairs Division, and District Attorney’s Office, and makes a recommendation to the Chief of Police.

The EFRB review goes far beyond the issue of whether the force itself was justified or legal. The review addresses tactics and supervision to determine if the officers or their supervisors were in a position that contributed to force being used. Even when legally compliant, a use of force may violate Department tactics or training. Such a violation may result in officers facing discipline. We look for patterns in individual officer uses of force. If a problem appears, we take corrective action immediately to prevent inappropriate uses of force from occurring.

See

<http://www2.oaklandnet.com/government/o/OPD/a/data/useofforce/level1/index.htm#:~:text=The%20Executive%20Force%20Review%20Board,Captain%20of%20Police%20or%20higher.&text=Such%20a%20violation%20may%20result%20in%20officers%20facing%20discipline.>

NON-VOTING MEMBERS	NAME
Training Division Commander	Captain J. Bassett
Internal Affairs Division Commander	Captain S. Millington
Force Investigations Commander	Lieutenant T. Mork

NON-VOTING MEMBERS	NAME
Technical Writer	Sgt. J. Turner
Video Technician	Sgt. I. Ramirez
Use of Force Coordinator	Police Records Specialist Nicole Causapin
City Attorney's Office	Supervising Deputy City Attorney K. Bliss

PRESENTERS	NAME
Criminal Investigation Division Commander	Acting Captain E. Lewis
Homicide Section Commander	Lieutenant R. Brandwood
Primary Criminal Investigation Division Investigator	Sgt. R. Vass
Secondary Criminal Investigation Division Investigator	Sgt. L. Sanchez
Internal Affairs Division Force Investigator	Sgt. J. Haney
Patrol Procedures Subject Matter Expert	Sgt. A. Jones
Bearcat, Specialty Impact Munitions, Firearms, and Patrol Rifle Officer Subject Matter Expert	Sgt. T. Sotto
Bearcat and Patrol Rifle Officer Subject Matter Expert	Lieutenant M. Beaver
Command and Control Subject Matter Expert	Lieutenant C. Shannon

ADDITIONAL ATTENDEES	
ATTENDEES	NAME
Independent Monitoring Team	Chief S. Kiyler
Independent Monitoring Team	Commander J. Girvin
Oakland Police Commission	Commission Chair T. Smith
Internal Affairs Division	Sgt. J. Skrdlant
Office of Inspector General	Lieutenant A. Mendoza
Internal Affairs Division	Sgt. L. Ausmus
Observer (Retired US Magistrate Judge)	Hon. M. James

1. Comprehensive Review

The EFRB’S comprehensive deliberations and analyses are chronicled in its Report, issued on or about January 8, 2019. Among other materials, the Board reviewed: the CID Investigative Action Report (IAR), the Force Investigations Section Report No. 18-0249, PDRD footage, the OPD file for RD Number 18-012685, witness statements, audio and video recording of personnel statements, surveillance video, and radio traffic related to the incident.

At the conclusion of the CID and IAD investigation presentations, and prior to the Board’s deliberations, subject matter experts testified in front of the Board regarding all aspects of Department policies, procedures, operations, and training as were pertinent to comprehensive review of the incident. This led to the Board issuing a detailed Use of Force Assessment that analyzed the incident step by step in light of guiding case law²² and Departmental policy developed thereunder. These authorities require application of a “totality of circumstances” analysis to determine the reasonableness of officer use of force. This process culminated in a comprehensive 47-page report that not only assessed the appropriateness of the use of force, but also recommended steps for training, investigative guidelines, areas for policy review and change.

2. The Resulting Findings

The Board’s findings lie at the core of this case. They are accordingly provided verbatim here (footnotes omitted):

The Board assessed each use of force under *Graham v. Connor*, as well as the event(s) that led to each use of force. *Graham v. Connor* and its progeny require an assessment of the

²² *Graham v. Connor* (1989) 490 U.S. 386, 396; *Bryan v. McPherson* (9th Cir. 2010) 630 F.3d 805, 826.

reasonableness of the officers' actions in light of the totality of the facts and circumstances confronting them, including the following three factors: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight."

A. Initial Investigation and Detention/Arrest Assessment

The Board assessed the initial attempts to detain Pawlik, in light of the facts known to the officers at the time of the incident. The Board reviewed the audio recording of the call for service, which was originally routed to the OFD dispatch center, where the caller reported that he saw a male subject unresponsive in between two houses, with an object in his hand that could have been a firearm. Based on this information, OPD officers were dispatched to the scene.

Officer Philips was the first on scene, and approached the area on foot where Pawlik was lying. Officer Philips, peering down the walkway between the two structures from the steps of 928 40th Street, observed Pawlik with a handgun in his right hand. Officer Philips saw that Pawlik was breathing, and did not have any apparent injuries, and reported his observations over the patrol radio. Based on the details given by the caller, plus the observations of Officer Philips confirming that Pawlik was armed with a handgun in his right hand, the Board determined that there was reasonable suspicion to detain Pawlik to investigate whether the handgun Pawlik was carrying was loaded in a public place, a violation of Penal Code § 25850(a).

Once the officers made their plan and the Bearcat arrived, Pawlik woke up. The officers gave several commands, which Pawlik did not follow. Notably, the officers gave several commands for Pawlik to drop the gun; instead, Pawlik raised the gun and pointed it in the direction of the officers. All four of the officers who shot Pawlik gave statements attesting to the fact that Pawlik pointed the handgun at the officers (a violation of Penal Code § 417(c)), as did Officer Philips. All of the officers were found credible by IAD, and the Board discussed that no evidence contradicts the officers' statements that Pawlik raised the gun and that it was pointed in their direction after failing to comply with commands to drop the gun. The Board noted that the video forensic analysis presented by CID and IAD confirmed that Pawlik lifted the handgun up and pointed it towards the officers, after he had been told to drop the gun. The Board determined that the officers, at the time of the use of force, had probable cause to arrest Pawlik for violations of Penal Code § 148(a) (Resist, Obstruct, or Delay Peace Officer) and Penal Code § 417(c) (Brandish Firearm in Presence of a Peace Officer).

Based on the totality of the circumstances, the Board determined that the detention and arrest of Pawlik was legal and within Department Policy.

B. Use of Force

The Board concurred with CID and IAD's assessment that five (5) separate officers utilized force during this incident. Four officers (Sgt. Negrete, Officer Berger, Officer Hraiz, and Officer Tanaka) used lethal force, while Officer Philips fired a less-lethal SIM from a shotgun. The Board analyzed PDRD video from the incident and observed that each officer who used lethal force fired all of their shots almost simultaneously, and that the total amount of time between the first round and the last round by all the officers was just under three seconds. Given the compressed timeframe of each use of force, plus the testimony of the subject matter experts regarding the way that officers are trained to fire when faced with a lethal threat (i.e., to continuously shoot and assess the threat, and to stop shooting only when the lethal threat no longer presents itself), the Board analyzed each officer's lethal use of force as a single event and decision.

The Board reviewed each use of force independently, assessing the objective reasonableness of the force based not only on the *Graham v. Connor* Supreme Court precedent but also on OPD policy regarding the use of force.

Although the Board analyzed each officer's actions, the analysis was essentially the same for all officers – including Officer Phillips, who wielded the non-lethal beanbag gun.²³

The Board's analysis was as follows:

The Board began deliberations on this use of force by reviewing the IAD findings. IAD found that Pawlik was in possession of a loaded firearm in a public place, a violation of Penal Code § 25850(a), and that he did not obey the commands of officers and pointed a loaded handgun at the officers in violation of Penal Code § 417(c). The Board agreed that the severity of the original crime, possession of a loaded firearm in public, increased when the officers gave Pawlik commands to which he did not comply. The Board addressed this further in their analysis of the immediacy of the threat posed by Pawlik, but noted that this non-compliance increased the severity of the overall situation.

IAD's investigation led the investigators to the conclusion that Pawlik posed an immediate threat to Sgt. Negrete when Sgt. Negrete fired his AR-15 rifle at Pawlik. Specifically, IAD found that Pawlik had the intent, means, opportunity, and ability to shoot the officers when he pointed the handgun he possessed at officers, and that this action constituted an immediate threat of lethal force.

²³ Because Officer Phillips used non-lethal force, the issue pertinent to his use of force was described as "Impact/Impromptu Weapon with Contact - Regardless of Injury Level 2, Type 12," rather than as "Lethal Firearm Discharge Level 1, Type 1" – the description applicable to the four other shooters. This difference was not a significant factor in the Board's stated analysis. See section VI.D below for a discussion of this issue.

The Board concurred that [each officer] reasonably perceived Pawlik as an immediate threat to [himself] and other officers at the time the force was used. The Board noted that OPD's General Order K-03, *Use of Force*, characterizes a person as posing an immediate threat if "the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated." The Board examined in detail whether it was reasonable for [each officer] to believe that Pawlik posed an immediate threat.

- **Intent:** The Board noted that Pawlik did not say anything to the officers during the encounter, but that a reasonable officer could infer a likely intent based on Pawlik's actions. Once Pawlik woke up after the Bearcat arrived on scene, the officers gave at least 12 separate commands to Pawlik over the course of approximately 48 seconds, at least seven of which commanded Pawlik to take his hand off the gun. Pawlik did not drop the gun and began to move his body as if to sit up. At this point, Pawlik demonstrated an intent not to comply with the officers' commands, however officers did not use force. As officers continued to give commands to drop the gun, Officer Berger reported that Pawlik sat up and appeared "agitated", as if the officers were bothering him. Officer Berger reported that Pawlik then laid down briefly before sitting up again and raising the right hand, holding the firearm, and pointing it directly at him. Officer Berger thought that Pawlik was going to shoot him.

The Board noted that all the involved officers reported seeing Pawlik raise the handgun and point it towards them, but that the un-enhanced PDRD video of Pawlik's movements was not clear enough to discern whether this occurred. However, OPD video forensic analyses showed Pawlik's arm and body moving in a manner consistent with him pointing the handgun at the officers. Moreover, PDRD confirms that all the officers fired their weapons almost simultaneously, evidencing that all the officers perceived the same lethal intent and threat. Given the totality of the circumstances, the Board agreed that there was sufficient evidence to come to a finding that Pawlik had indeed pointed the handgun at the officers.

- **Means:** The Board unanimously agreed that Pawlik possessed the handgun recovered from near his body at the conclusion of the incident, and that a reasonable officer could have believed that it was loaded and capable of inflicting great bodily injury or death on one of the officers or a member of the public. Officer Philips had gotten close enough to view the handgun in Pawlik's hand. Additionally, Sgt. M. Rowley, who was on scene, used a pair of binoculars to view Pawlik. Sgt. Rowley reported to the officers on scene that he believed the handgun to be a ".45" (.45 caliber, a common handgun caliber available in the US and capable of causing great bodily injury or death and an authorized caliber which OPD personnel may carry on duty). On the other hand, there were no facts that would have led the officers to believe that the gun was not loaded. (Officers confirmed at the end of the incident that the weapon was in fact loaded.)

- **Opportunity:** The Board agreed that Pawlik possessed the opportunity to shoot the officers. While the officers were behind a piece of cover, subject matter expert Sgt. Jones testified that a piece of cover may lower, but does not entirely negate, the chance of an officer being struck by a round, and that officers are trained accordingly. The officers were positioned in such a way as to put the Bearcat armored vehicle in between them and the threat (Pawlik), but still had their heads and parts of their upper bodies exposed as they both attempted to communicate with Pawlik and keep vigilant surveillance on Pawlik as part of their primary duties: contain the subject and take him into custody. From where Pawlik was lying a reasonable officer could conclude that Pawlik could have fired the handgun and struck Officer Berger or one of the other officers.
- **Ability:** The Board found that a reasonable officer could have concluded that Pawlik was capable of firing the handgun he possessed at the officers. Pawlik, though initially asleep or unconscious, roused himself after the Bearcat arrived on scene. Once he did so, Pawlik did not follow the clear and loud commands of the officers as they told him several times to take his hand off the gun. Just before Officer Berger used force, Pawlik made a sudden movement which was captured on Sgt. Webber's PDRD and appeared to be Pawlik attempting to sit or get up. Video forensic analyses showed further evidence that Pawlik's hand, containing the handgun, was moving upwards from the ground just before Officer Berger used force. The officers noted that Pawlik, aside from initially being unresponsive, did not appear injured or otherwise unable to utilize the handgun to fire at officers.

The Board also agreed with IAD's assessment that, although officers had restricted the public's access to the scene by establishing a perimeter and traffic control posts, and had attempted evacuations of nearby residences, the officers could not be certain other members of the public would be out of harm's way if Pawlik fired his handgun into a nearby structure or generally in the area. The Board determined that Pawlik's pointing of the firearm in a residential area posed an immediate threat to the public.

IAD determined that, at the time that [each officer] used force, Pawlik’s passive resistance (in failing to comply with the officers’ orders) had escalated to active and potentially lethal resistance (in raising the weapon at the officers). The investigators noted that Pawlik did not comply with the officers’ orders to drop the gun, and that video analysis showed that Pawlik was holding a handgun in his right hand and that his right arm moved as the officers gave him commands to drop the gun. The Board agreed, noting that the officers gave Pawlik several commands to get his hand off the gun. The time between when Pawlik awoke and when the officers used force, approximately 48 seconds, was brief but was sufficient time for Pawlik to gather his faculties and take his hand off the handgun. The Board noted that the officers were all wearing full police uniforms, and that the OPD Bearcat says “OAKLAND POLICE DEPARTMENT” in large white letters on the side).

Based on the totality of the circumstances, the Board determined that [each officer’s] use of force ... was reasonable under law and In Compliance with OPD Policy.

The Board also agreed with IAD’s assessment that [each officer] properly de-escalated his force once Pawlik was no longer a threat. The IAD investigation found that [each officer] fired his ... rounds in less than three seconds, and then stopped firing as Pawlik fell back to the ground. [Each officer] re-assessed, determined that Pawlik was no longer a lethal threat, and then worked with other officers to take Pawlik into custody.

F. EFRB’s Additional Assessments and Deliberations

The EFRB Report went well beyond assessing the use of force issue. As noted at page 3 of the Report, some of the key points that the EFRB analyzed are:

- Whether the use of force or the actions taken by members complied with the law and/or with OPD policy and training;
- Whether the incident presents training opportunities;
- The reason for the initial encounter with the police;
- Whether any member could have made a different tactical decision that may have resolved the situation with less force or none at all;
- Whether any member’s actions contributed to the need to use force;
- The supervisors’ performance;
- The opportunity to revise policy or to create new policy;
- Equipment functionality;
- The quality of the use-of-force and/or incident investigation; and
- Superior tactics or performance.

To these ends, the EFRB covered the following:

1. IAD Training and Policy Recommendations

As the EFRB noted, “as part of its far-reaching investigation and assessment of the entirety of the incident and the actions of OPD personnel before, during, and after the incident, IAD made a number of recommendations regarding training and policy that the Board considered and accepted.” These recommendations concerned the conduct of post-incident/pre-investigation procedures, IA investigations, training, and record keeping. (EFRB Report, p. 36.)

The issue of training deserves special emphasis. IAD specifically recommended that the Department “develop and implement additional training on encounters with unresponsive armed persons as well as on reasonable contingencies to expect during critical incidents involving a [Designated Arrest Team].” (*Id.*) As noted in section VI.B.2 below, due to efforts of the Compliance Director, the federal court, and a citizen subcommittee, a new training policy governing encounters with armed, unconscious suspects was subsequently implemented. Had the new policy’s approach to this law enforcement challenge been in place during the Pawlik incident, it would have required all personnel involved in this incident to take a completely different approach to the situation, very likely avoiding the tragedy here.²⁴

2. Criminal Investigation Division Procedures

Similar to concerns later expressed by the Compliance Monitor, the EFRB pointedly acknowledged the need for improvements in the conduct of investigations. (EFRB Report, p. 37 (emphasis in original).)

The Board discussed the procedures followed by CID during Level 1 force investigations at length, and developed several recommendations to enhance future investigations of this type. The Board was adamant about ensuring that CID investigators have adequate training on sequestering and interviewing **all** involved officers in a Level 1 force incident, to include command and supervisory officers who may not have directly used force but were supervising or managing the incident.

The Board directed CID to develop training on several aspects of Level 1 force investigations, including on sequestering subjects. In this incident, officers on scene who used force were allowed to “self-select” the member who sequestered them, in some cases calling off-duty members to respond to the scene. The Board recognized that, although there was no evidence of impropriety in this case, this practice could lead to doubts about the integrity of the investigation, and the Board directed CID to review its policies and procedures on this issue, and develop training if appropriate.

²⁴ The lack of specific training as well as the implementation of the new policy are relevant to this Step 3 Report. See discussion at section VI.B below.

The Board also noted that CID needed additional training on all aspects of lethal force investigations, to include reviewing and critically examining all pieces of evidence discovered during an investigation and resolving all discrepancies to the best of their abilities. In this incident, the autopsy report from the Coroner's Office medical examiner initially listed one wound on Pawlik's back as a gunshot entry wound, which was incongruent with the visual evidence from the PDRD as well as the statements of the officers. This was not resolved by CID investigators, and IAD had to re-contact the examiner to resolve the discrepancy. (The medical examiner, upon taking a second look, advised that this wound was likely an exit wound but was misidentified due to the ballistic characteristics of high-velocity rifle rounds.)

The Board directed CID to examine the lethal-force investigation protocols and practices of other, similar departments to ascertain whether there are best practices which might be adopted by the Department. The Board noted that CID faces a staffing challenge with Level 1 force investigations because the assigned investigator likely also has other homicide cases that he or she is investigating, which can affect how expeditiously CID can complete a Level 1 force investigation. The Board felt that any opportunities to identify best practices which might streamline or reduce the total investigation time, as well as enhance quality, should be explored.²⁵

Stemming from the discussion of self-deployment, the EFRB examined training and practice surrounding the utilization of DATs. The EFRB resolved that "additional training was needed for supervisors and commanders on the supervisory and leadership aspects of leading a DAT," and recommended that all members, regardless of rank, receive additional training on the roles and responsibilities of a DAT. The EFRB Board also recommended that supervisory and command staff receive additional training on the supervision and leadership of a DAT.

3. Initial Assessment of Misconduct and IAD Findings

The EFRB assessed not only the use of force issue, but also "the entirety of the circumstances including adherence to Department policy and procedure." (EFRB Report, p. 39)

²⁵ In addition to the above two crucial areas, the EFRB also made recommendations regarding Patrol Rifle Officer Program, DATs and Equipment Issue and Customization. (EFRB Report, pp. 37-38). These recommendations are not pertinent to the present case.

4. Use of Force - All Officers - IAD Initial Findings

IAD's investigation found that all five of the uses of force identified and examined during their investigation were objectively reasonable under law and in accordance with OPD Policy. IAD recommended that all five force use incidents (MOR 370.27-1) be found as **Exonerated**.

G. Chief of Police Addendum - February 8, 2019

On February 8, 2019, Former Chief Kirkpatrick issued a Supplement to the EFRB's report. The Chief accepted the analyses of IAD and the EFRB (p. 1-2, Underlining in Original):

The evidence in this case is vast: it includes hours of PDRD video and audio (including subject and witness interviews), and hundreds of pages of documentary evidence. The Internal Affairs Division (IAD) Report of Investigation, including its analysis and recommended findings, is more than 830 pages long. The Executive Force Review Board (EFRB or the Board) took three separate hearing days to evaluate both IAD's and CID's evidence and presentations, and to make their findings. In evaluating the Board's conclusions and recommendations, I personally reviewed the underlying evidence, including, but not limited to, the PDRD footage (including the enhanced video and expert report), subject and witness statements, and the autopsy report. For the reasons described below, I accept the analysis and unanimous findings by both IAD and the EFRB that the lethal force used in this case was within law and policy.

Each of the four officers who used lethal force stated that they did so only after they saw Pawlik begin to raise his arm and hand off of the ground and point the gun in their direction. The video analysis was inconclusive regarding the specific movement of Pawlik's lower arm, hand and the gun just prior to the shooting. However, it is not inconsistent with the officers' statements that Pawlik looked at the officers, raised his arm and pointed the gun toward them. Also, other evidence corroborates the statements. For example, the statement that he gripped the gun is supported by the fact that the gun was flung behind Pawlik when he was shot. Moreover, the evidence shows that Pawlik did not comply with numerous (12) commands to take his hand off the gun as he looked toward the officers and moved in a rocking motion to sit up. Despite Pawlik's movement and failure to comply with numerous commands, the officers did not initially fire their weapons. Thus, the evidence does not contradict the officers' statements that they fired only after perceiving a lethal threat, when Pawlik raised his arm and pointed the gun in their direction.

The most compelling evidence of a reasonably perceived threat was that the five officers shot almost simultaneously at Mr. Pawlik, with all shots fired within 2.23 seconds. I find this evidence persuasive and corroborative of the officers' statements regarding their perceptions of an immediate threat. In other words, the evidence supports that this was not the perception of just one officer, with sympathetic fire trailing the initial shot after a delay; this was the perception of multiple officers. The evidence shows the individual shots

occurred too closely together to be sympathetic fire. This is illustrated in a frame-by frame analysis of the shooting. There are at least three rounds distinguishable in the PDRD video which was recorded at a rate of 30 frames per second. The first shot is captured at frame #1714 and the more visible bean bag contrail is captured at frame #1731. There are also several shots between the first shot and the bean bag round. The video analysis was not able to discern which shots came from each particular officer. However, we know that the first rifle shot and the bean bag were two different officers. They occurred just over a half second apart. These shots are so close together that they are not likely sympathetic fire. Based on my training and experience, I know that studies in the field of human factors teach that firing a weapon at a threat or other stimulus takes time to perceive and react. Accordingly, sympathetic fire generally includes a sufficient delay for the second officer firing to perceive and react not to a lethal threat – but to the sound of the first weapon firing. Here, at least three of the shots took place within 0.5 seconds, and all 22 lethal rounds and one less-lethal bean bag round were fired within 2.23 seconds. The multiple shots fired almost simultaneously and the incredibly short period of time between the first shot and the bean bag deployment (.567 seconds), suggest that (at least two of) the officers perceived and reacted to the same stimulus or threat. Also compelling is the fact that the officers stopped their fire almost simultaneously. The video evidence that the officers started and stopped their fire almost simultaneously is persuasive to me that the five officers independently perceived a lethal threat and independently perceived when that threat no longer presented itself.

Her analysis included the following (at p. 2):

Lethal force analysis requires an assessment of the reasonableness of the officers' perceptions under the totality of the circumstances without the benefit of 20/20 hindsight. Based on the evidence, I find that there is not a preponderance of evidence of a violation of policy or law. Indeed, the greater weight of the evidence shows that each officer independently concluded that Pawlik posed a lethal threat. I find that the evidence shows that the officers' perceptions of an immediate threat were reasonable under the circumstances.

Overall, hers was a moderate assessment (p. 3):

The loss of an individual's life is a tragic outcome that OPD trains extensively to avoid—a fact borne out by the tremendous reduction in the number of the Department's officer involved shootings in recent years. I am committed to supporting and continuing this trend, and to holding officers accountable when they use unreasonable force. In this case, however, after a careful review and analysis of all of the evidence and the application of the Fourth Amendment's objective reasonableness test, I agree with the recommendation of IAD and the unanimous decision of the EFRB that the force used was within law and policy.

H. Compliance Director's Addendum to EFRB Report – February 19, 2019

As noted above, the federal court has determined that the Compliance Director has the final say regarding discipline covered by the Consent Degree and AMOU. Therefore, even though the Chief and CPRA agreed on the case disposition– which would have resolved the matter in the absence of the Consent Decree – the Compliance Monitor intervened and, stepping in the shoes of the Chief, disagreed with the CPRA, setting in motion a decisional chain that ultimately resulted in the officers’ dismissals.

The Compliance Director’s initial response (Addendum) to the EFRB and Chief Kirkpatrick was swift and definitive. His later more detailed analysis (June 27, 2019 Compliance Director Supplement to Findings Addendum of February 19, 2019 and Disciplinary Determinations of June 12, 2019, discussed below) was even more pointed. Both focused on the video and on the Compliance Director’s perception that IAD and the EFRB had either ignored or failed to give the video the strong weight he thought it deserved in assessing the facts (See February 19, 2019 Compliance Director’s Addendum to EFRB Report, page 1 [“I have found no reference to the use of the video during the questioning of the involved officers.”].) As is explained further in the “Discussion” section below, however, the Compliance Director’s analysis failed to address the fact that IAD interviewed the subject officers both before and after the video was reviewed, or that the video is explicitly discussed in every single report including all the available analysis from third party resources and video experts. Moreover, the Compliance Director fails to acknowledge that his conclusion that the video had clear evidentiary value was not shared by any other reviewer, including the expert who reviewed the video at IAD’s request.

In a crucial aspect of his determination, the Compliance Director concluded – based entirely on his own review of the video – that: “Mr. Pawlik’s slight movements did not constitute intent and a reasonable officer should not have concluded such.” (Compliance Director’s Addendum, p. 2.) His suggestion that no reasonable officer would reach the same conclusion as the involved officers is belied, however, by the fact that all the reviewing officers of IAD, the EFRB, the Chief of Police, and the CPRA (as discussed below) did so conclude – uniformly supporting the five officers at the scene who are qualified and have spotless job records.²⁶

The Compliance Director also noted that Sgt. Negrete failed to plan for a foreseeable exigency, e.g., Pawlik awakening and not complying with commands. This is true, but it reflects on Negrete not the officers. The possibility (or even likelihood) that they were not properly positioned or deployed is not something from which an adverse inference can be drawn

²⁶ It is of interest that an officer at the scene – Officer Julie Yu – witnessed the events unfold, though she did not see the crucial second or two before the officers fired on Pawlik. Her statement to IAD indicated that the gun was pointed in the officers’ general direction and that Pawlik was in a position to fire his gun at the officers moments before they shot him. Her statement was consistent with those of the officers. Like IAD, the EFRB found Ms. Yu to be credible. Yu’s statement was ignored by the Compliance Director, who instead gave virtually controlling weight to the video.

regarding *their* potential culpability, because they were not involved in the planning.

I. Compliance Director’s Complaint Investigation Report – February 22, 2019

On February 22, 2019, the Compliance Director signed a “Complaint Investigation Report” containing his determinations regarding the six involved personnel. This form is used to set forth the investigation’s recommended findings, with review sign-offs by the supervisor, commanders, Deputy Chief, and Chief. The Compliance Director signed in the stead of OPD personnel who would otherwise have signed.

J. District Attorney Report – March 6, 2019

The District Attorney’s Officer Involved Shooting (OIS) Team investigates officer involved shootings throughout the county. It includes highly experienced deputy district attorneys as well as experienced district attorney investigators who are sworn peace officers. The OIS Team commenced their investigation the day after the incident. Due to delays in the IAD companion investigation, the DA Report issued just short of a year later.

The District Attorney confirmed the scope of her task to criminal law review (p. 2):

The OIS Team focuses exclusively on the question of whether there is sufficient evidence to prove beyond a reasonable doubt that a law enforcement official committed a crime in connection with the shooting death. The OIS Team does not examine collateral issues such as whether law enforcement officials complied with internal policies, used appropriate tactics, or any issues that may give rise to civil liability. This report should not be interpreted as expressing any opinions on non-criminal matters.

As will be seen from the ultimate work product, the OIS Team’s meticulous analysis ascertained *facts*, and those findings are highly relevant.

The District Attorney explained the scope of OIS’s review (at pp. 2-3):

As part of its investigation, the OIS Team reviewed, among other things, police reports, dispatch communication recordings and records, evidence technician reports, diagrams, sketches, crime lab reports, photographs, and recorded statements. The OIS Team reviewed body camera footage and forensically analyzed versions of the body camera footage. The OIS Team also reviewed the Alameda County Coroner Investigator’s Report; autopsy protocol, and toxicology report relating to Mr. Pawlik.

OIS’s investigation included intensive review of video and audio evidence from 34 officers.

The District Attorney’s lengthy conclusion is extraordinarily important in this case. It is accordingly quoted in its entirety (emphasis added):

The credible and admissible evidence shows that all four officers acted in what they actually believed to be self-defense or defense of others. The examined evidence does not support the contention that the shooting of Mr. Pawlik was criminal. At the time the officers fired their weapons, they had reason to believe that Mr. Pawlik would shoot the officers, their fellow officers, and other residents of the community near the scene. When Mr. Pawlik pointed his loaded pistol at the police officers, they had reason to believe he would shoot at them. Mr. Pawlik did not comply with the repeated commands from the officers to drop the gun and take his hand off the gun.

The statements of the shooting officers are corroborated. Most importantly, all four shooting officers and the beanbag shotgun shooter all shot at nearly the exact same time in response to the threat. The audio of the body-worn cameras corroborated that the shooting was over after just over two seconds. After giving commands for 37 seconds, the officers all perceived the threat from Mr. Pawlik and shot at the same time. This corroborates the officers' statements of how they saw Mr. Pawlik raise the gun in their direction.

Through the body worn camera footage from the hood of the Bearcat does not capture the position of Mr. Pawlik's pistol at the time of the shooting, video analysis determined that Mr. Pawlik's right side moved just before the shooting. The video showed Mr. Pawlik looking in the direction of the officers after he woke up. The footage showed how Mr. Pawlik did not comply with the numerous orders to drop the weapon while he appeared to be looking in the direction of the officers giving the commands. Rather than follow the orders of the police, Mr. Pawlik appeared to look in the direction of the officers, sit up further, and make a movement with his right arm a split second before the officers fired their weapons. ***Though the footage does not clearly show how high Mr. Pawlik raised his pistol, the movement in the area of his shoulder and the officers' nearly simultaneous shooting corroborates the shooting officers' assertions that Mr. Pawlik pointed the gun in their direction.***

The Bearcat offered protection, but the officers were still potentially exposed to gunfire if Mr. Pawlik had shot at them. The Bearcat did not cover the officers' entire bodies. The officers that were not in the turret had their heads exposed to potential gunfire. Additionally, the safety of any civilians in the area was at risk. The area of the incident is residential with many homes close together. The homes across the street were downrange from the direction Mr. Pawlik pointed his pistol. All of the homes across the street and adjacent to Mr. Pawlik's position abutted the street. There are few obstacles that would interfere with the path of a bullet from his gun if he would have shot at the officers. Though the officers attempted to evacuate the homes across the street, there is no guarantee that civilians in the area would have left their homes or been completely safe from the possibility of Mr. Pawlik shooting in their direction. Moreover, had Mr. Pawlik fired the gun, the force and range of fired bullets posed a risk of injury or death to any number of persons located in the densely populated~ urban area.

Given the evidence of Mr. Pawlik's actions, the officers' decision to shoot Mr. Pawlik

appears reasonable under the circumstances. *All four officers believed that Mr. Pawlik intended to kill them individually or fellow officers.*

Given the totality of the circumstances, it appears that each of the four officers reasonably believed that he or other officers or civilians were in imminent danger of great bodily injury or death, at the time the shots were fired. Further, there is no evidence upon which this office could rely to disprove the officers' stated belief that they feared for their own lives and the lives of their fellow officers and civilians.

The analysis of this investigation includes consideration of whether it was reasonable for the officers to act when they did, rather than waiting to see if Mr. Pawlik would eventually comply with the officers' commands to drop his gun. The incident developed rapidly once Mr. Pawlik woke up. This required the four officers to make rapid decisions in a dangerous situation. The law requires that the reasonableness of the officers' actions be assessed with the understanding that "police are often forced to make split second judgments - in circumstances that are tense, uncertain, and rapidly evolving." This was such a circumstance. Moreover, had the officers waited to take action, the consequences of such inaction could have resulted in the killing of fellow officers or nearby residents. The likelihood of such a result is not insignificant in this case.

Accordingly, in applying the California District Attorney's Uniform Crime Charging Standards to the present case, there is insufficient evidence to support a criminal prosecution against Sergeant Frank Negrete, Officer William Berger, Officer Brandon Hraiz, and Officer Craig Tanaka, and this Office contemplates no further action in this case.

While the criminal burden of proof (reasonable doubt) is higher than preponderance, *the above factual findings are unequivocal and definitive.* Further, because they come from the County's Chief law enforcement officer who charges officers criminally if the facts sufficiently show excess use of force, they are highly relevant.

K. Community Police Review Agency (CPRA) Report - April 22, 2019

Established by Measure LL, amending the Oakland City Charter, the CPRA is an arm of the Police Commission. CPRA investigates public complaints concerning alleged misconduct of Department sworn employees. (Oakland City Charter sections 604(a)(2), 604(f).) The CPRA's role is to make findings and proposals for discipline, which are reviewed by the Police Chief.

If the Chief agrees with the CPRA, the subjects of the investigation receive the notice of findings and intent to impose discipline. If the Chief disagrees, the findings instead go to a Discipline Committee that is subordinate to the Police Commission. The Discipline Committee then resolves the dispute, and refers its decision to the Chief for notification to the subject officer. (Oakland City Charter section 604(f).)

The responsibilities of the CPRA and EFRB overlap in part. But whereas the EFRB is an arm of the Police Department and reports to the Chief, the CPRA is effectively an arm of the Police Commission. The Commission's Charter mandate is to "oversee the Oakland Police Department (hereinafter, Department) in order to ensure that its policies, practices, and customs conform to national standards of constitutional policing." (Oakland City Charter section 604(a).)

The two-part CPRA report was extraordinarily detailed, reflecting an analysis of substantial scope conducted with great care by an agency separate from OPD. Due to the delays in the IAD investigation, the CPRA did not conduct a further investigation, with the exception of one witness. For the same reason, it did not refer the matter back to IAD to conduct a further investigation. The CPRA also noted, "Further interviews were not conducted due to concerns as to the reliability of the information given the time that has passed."²⁷

In an intriguing turn of events, the CPRA – an agency separate from OPD that was established to keep OPD *accountable* – exonerated the officers, reaching opposite conclusions from the Compliance Director's February 19, 2019 addendum and spurring him to issue a Supplement to Findings on June 27, 2019 (discussed in Section J, below).

CPRA's investigator was Joan Saupe, a criminal defense lawyer with 30 years of experience. Her analysis was extraordinary detailed and thoughtful. She reviewed the facts of this case in light of departmental rules, federal case law, and the four controlling criteria (intent, means, opportunity, ability).²⁸ Following is a lengthy quotation showing her key analysis. On the crucial

²⁷ The Compliance Director took the CPRA to task for not conducting a further investigation. The accompanying text above explains why CPRA did not do so. As discussed elsewhere, IAD owns the investigative deficiencies that are clearly extant in this case.

²⁸ See discussion at pp. 26-27, *supra*. Importantly, in addition to its reference to *Graham v. Connor, supra*, the CPRA also analogized to a more recent federal case, *Colongue v Hamilton* (1st Circuit, 2018) 906 F.3d 150 (emphasis added):

In *Colongue v Hamilton* (1st Circuit, 2018) 906 F.3d 150, a recent fatal shooting case also decided on the basis of "qualified immunity," a suicidal man was brandishing a semi-automatic handgun and pointing it at himself and various times at a 45-degree angle over troopers' heads, and ignoring orders to put the gun down for hours. When the suicidal man extended his arm over the officers' heads at about 45 degrees and was told again to put the gun down, after waiting eleven seconds, a tactical police team officer

question of whether Pawlik – armed with a gun – was “reasonably perceived to be an immediate threat to the officers at the time they used lethal force on him,” the CPRA Investigator turned quickly to the video evidence and analyzed it in detail. She started with the observation that while the video “shows important information for analysis”, ***“it is not true-to-life size as the officers would have seen the events, it is grainy when enlarged, and per expert analysis, it is not possible to see the movement of the gun.”*** Referring to George Reis, the Imaging Forensics expert, she further said (CPRA Report, page 11):

Mr. Reis concluded that due to several factors, resolution, compression, distance from the camera, lighting, and angle of view, discerning if the adult male (Mr. Pawlik) in the PDRD video was in possession of a firearm is not possible. The position of the right hand during the 30 seconds prior to the first shot is not possible for the same reason. However, he stated it is possible to see his overall head movement, some movement of his right arm just prior to the first shot, his overall body position, and some movement of his feet, and possibly his left arm and hand. Given that Mr. Reis is an expert in this field and Sgt. Ramirez is not, Mr. Reis’ analysis of the Webber PDRD was considered by the CPRA Investigator as the credible analysis of the two conflicting findings.

The remaining gist of the CPRA report was extraordinarily fact intensive. It is quoted here at length.

4) It is more likely true than not, that when Mr. Pawlik’s gun raised towards the officers it could be perceived as an objectively reasonable immediate threat under the law, which would allow officers to use deadly force[.]

The law in *Graham v. Connor* (1989) 490 U.S. 386, holds that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. The reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are

shot and killed him. The court found the officer who fired had qualified immunity. The court found there was little comfort between a gun aimed directly at a person’s head and a gun aimed at a forty-five-degree angle over the person’s head. The court held that there was no controlling authority or a consensus of persuasive authority sufficient to put an officer on notice that his conduct fell short of the constitutional norm. The court held that the plaintiff in the case had to show that an objectively reasonable officer would have known his conduct violated the law. ***In this case, there is no law or OPD rule such that the officers would have been on notice that a man in the process of raising a gun at them, even if minorly, is not an immediate threat or that they fell short of the constitutional norm.***

“objectively” reasonable in light of the facts and circumstances surrounding them, without regard to their underlying intent or motivation.

Here, all the officers who used force stated that the gun was pointed at them and they were fearful for their lives.

The recent Supreme Court case *Kisela v. Hughes* (2018) 138 S.Ct. 1148, is also instructive. This was an excessive force case, in which an officer shot a woman who approached another woman who was standing nearby with a large kitchen knife. The woman with the knife ignored at least two commands to drop the knife. The Court of Appeals for the Ninth Circuit held that the officer who shot Ms. Hughes violated the Fourth Amendment. The Supreme Court decided it did not have to determine whether or not the officer violated the Fourth Amendment, because “even assuming a Fourth Amendment violation occurred,” the Court decided the officer was entitled to “qualified immunity.” Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights, of which a reasonable person would have known. The focus of the Court was whether the officer had fair notice that his or her conduct was unlawful, judged against the law at the time of the conduct. The court said that existing precedence must have placed the statutory or constitutional questions beyond debate: “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it. Just as the court held in *Isela* that, “this is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment,” similarly in this case it is not an obvious case that any competent officer would have known that shooting Mr. Pawlik would violate OPD rules and the Fourth Amendment.

The act of Mr. Pawlik sitting up, even with the gun in hand pointed at the officers, can reasonably be interpreted by other people as harmless; that Mr. Pawlik was confused, and was doing nothing more than sitting up, and he was not “aiming” for the officers. However, it can equally be interpreted that Mr. Pawlik was raising the gun to fire. We have no facts to counter that the officers who used lethal force’s perceptions were so implausible, that it is objectively unreasonable. It is the perception of the officers who used lethal force that controls in this matter unless facts can disprove their testimony.

This is the case, even if the officers had perception issues as to where the gun was and how it was moving. *Krueger v. Fuhr* (8th Circuit 1993) 991 F2d 435 held that an erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable. Reasonableness must be determined from the point of view of a reasonable officer in the situation rather than with the 20/20 vision of hindsight. Even an officer’s erroneous perception or belief does not alter the legitimacy of the use of force if the perception is objectively reasonable (*Krueger v. Fuhr* (8th Cir. 1993) 991 F.2d. 435). Law and OPD rules do not require a police officer risk his or her life if they are in

perceived immediate danger.

The Fourth Amendment does not require police officers to wait until a suspect shoot to confirm that a serious threat of harm exists (*Elliott v. Leavitt* (4th Circuit 1996) 99 F.3d 640). “No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life ... the Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, or the nature of the threat or the suspect’s intent to cause them harm-the Constitution does not require that certitude precede the act of self-protection” (*Id.*).

The situation Mr. Pawlik presented when initially reported was precarious from the very beginning. Mr. Pawlik had a gun in his hand pointed in the direction of the street where the officers had to watch him since he was between two houses, they did not have access to, in the process of attempting to detain him. The officers prior to firing their weapons recognized this predicament of the placement of the gun in Mr. Pawlik’s hand. As heard on Sgt. Negrete’s PDRD (one of two/21:01) someone says, “When the dude wakes man, it’s going to be a problem. No Bueno.” Basically, unless Mr. Pawlik released his hold on the gun, any movement of the gun in an upward position by Mr. Pawlik could be interpreted by the officers as a threat.

Once Mr. Pawlik woke up, the threat intensified because Mr. Pawlik was an unpredictable, unknown person with a gun in his hand. Mr. Pawlik was told to drop the gun, and he did not. He started to sit up with the gun. Sitting up, the gun was perceived by the officers who fired as still being in Mr. Pawlik’s hand, and still pointed generally in their direction. This continued raising of a gun when given orders to drop it had been made, meant to these officers that Mr. Pawlik intended to harm them. As each of the officers stated in their interviews, at this point they felt that the final four, of the four elements to determine if a person is an “Immediate Threat” as set forth in OGO K-3 were met. One, Mr. Pawlik had the means, as he had a gun, a lethal weapon, in his hand. Two, he had the opportunity as he was generally facing towards the officers who were in front of him, partially exposed, with a gun in his hand and he could have fired at any time. Three, he had the ability, as he was conscious and looking at them with the gun already in his hand. Fourth, his intent could be perceived, because he had been told multiple times by officers to drop the gun, but he did not. Mr. Pawlik continued to sit up with the gun in his hand, and the gun was being lifted upwards in their direction.

The officers who used force had stated the gun was raised from a few inches to up to two feet at the time they shot. Questioning may have helped understand the variations in the officers’ testimony; whether it was based on varying perceptions or truthfulness. However, variation can also occur from perceptions based on the quickness of the event, and given the angle of the gun if it was in the process of moving upwards. Mr. Pawlik was in the process of sitting up, and as such the gun and arm would likely be in motion-whether

intentionally, or unintentionally. Also, if the gun barrel was somewhat tilted up, there would be variation from the bottom of the~ gun to the barrel-especially in motion. For example, Officer Berger talked about Mr. Pawlik's hand being at 14 inches when the gun left Mr. Pawlik's hand. If the gun was in Mr. Pawlik's hand still as his arm went back, there could be a variation in what was perceived as the height of the gun.

Generally, the subject officers were sequestered prior to their initial interviews, however, it is felt that a sequestering of them in separate locations such as separate patrol vehicles would have been a better practice, rather than moving them off to one side in the general area of each other with Sgt. Jim. While there is no evidence of collusion in testimony, this is also not verifiable.

At least some of the officers would have known or assumed that the incident was being filmed. All of the subject officers had on PDRDs, as did the other officers in the vicinity acting as back-up. Sgt. Webber openly stated on scene that he put his PDRD on the wide-bar of Officer Phillips' patrol vehicle (Negrete PDRD/22: 15) as well as the BearCat, so any officer lying risked being caught on video doing so.

If the officers fired when the gun was actually raised no more than a few inches, the officers made a decision that Mr. Pawlik was a threat with that minimal movement. They did not wait to see if Mr. Pawlik's sitting up was just sitting up with the gun in hand or he was harmless. The decision to shoot here was a split-second decision unfolding quickly once Mr. Pawlik woke up and ignored the officers' warnings. In the few seconds to make a decision as to whether to fire or not, as the officers were faced with here, it would be difficult for the officers to determine if Mr. Pawlik was raising his gun to shoot, or raising his gun as he was merely getting into a better seating position. This was not a risk that officers are required by law or OPD rules to take. The hardest part in analyzing this case is that decision as to whether Mr. Pawlik's lifting his gun in the general direction of the officers, perhaps minorly - as some have stated, a few inches-while trying to sit up at the time firing commenced was a reasonable threat when judged from the perspective of a reasonable officer on the scene, rather than 20/20 vision of hindsight as *Graham v. Connor* requires. This case has facts that lie close to dividing lines.

The court said that the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers ... violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation. As in other Fourth Amendment contexts, however, the reasonableness inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation ... An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an

objectively unreasonable use of force constitutional” (*Graham, supra*).

In *Colongue v Hamilton* (1st Circuit, 2018) 906 F.3d 150, a recent fatal shooting case also decided on the basis of “qualified immunity,” a suicidal man was brandishing a semi-automatic handgun and pointing it at himself and various times at a 45-degree angle over troopers’ heads, and ignoring orders to put the gun down for hours. When the suicidal man extended his arm over the officers’ heads at about 45 degrees and was told again to put the gun down, after waiting eleven seconds, a tactical police team officer shot and killed him. The court found the officer who fired had qualified immunity. The court found there was little comfort between a gun aimed directly at a person’s head and a gun aimed at a forty-five-degree angle over the person’s head. The court held that there was no controlling authority or a consensus of persuasive authority sufficient to put an officer on notice that his conduct fell short of the constitutional norm. The court held that the plaintiff in the case had to show that an objectively reasonable officer would have known his conduct violated the law.

In this case, there is no law or OPD rule such that the officers would have been on notice that a man in the process of raising a gun at them, even if minorly, is not an immediate threat or that they fell short of the constitutional norm.

It is recognized that those in charge of this incident, Sgt. Negrete and Incident Commander Lt. Yu, basically set up an extremely limited response scenario for Mr. Pawlik to escape deadly force: wake up, understand what was going on, release the weapon, and through it all, don’t move the gun in any significant way that could be interpreted as more of a threat than it already is. The mood of so many officers facing Mr. Pawlik with his gun in hand, waiting to see him move with it, contributed to setting the response that took place. An alternate plan or any restraint was never discussed with the officers on scene who were facing Mr. Pawlik with their rifles despite the precariousness of the situation. Mr. Pawlik sitting up with the gun still in his hand was a very real possibility. Yet what would happen when he did was never discussed. Certainly, the plan choices made here by those in charge for OPD were not the only choices that could have been made.

However, the right to use deadly force when an immediate danger is perceived cannot be confused with other tactics that could have been taken in an attempt to prevent the loss of life here even if some risk by doing so was involved. “A better tactic,” “best options,” and “likely scenarios” can and should be discussed after the fact, and hopefully used in future scenarios. But they are not the law. In *Plakas v. Drinski* (7th Cir. 1994) 19 F.3d 1143, the court stated that there is no law that says the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.

The CPRA had additional questions that they wanted answered or wished OPD IA had asked, but as CPRA pointed out (and as noted above), by the time it received the investigations many months and interviews had passed and they felt it would be pointless to restart an investigation

that late in the process. (CPRA Report, p. 3.) The fact that CPRA received the investigation and materials so late (nearly a year after the shooting occurred) made it very difficult for any reasonable and credible re-interviews of witnesses to occur. In addition, several internal bodies, CID, IAD and EFRB had all already made conclusions without the additional questions being asked. Taken together, this put CPRA in a difficult position. Ultimately, however, CPRA concluded (correctly, in my opinion) that any additional statements or answers to additional questions would have been unreliable.

It is plain from a reading of the CPRA's report that that group did what it was charged to do. As a civilian oversight board, the CPRA has the autonomy and discretion to make reasonable evidentiary determinations. In this case, the CPRA members conducted themselves as a professional oversight body ought to.

L. Compliance Director's Disciplinary Determinations Memo – June 12, 2019

By memo of the above date, the Compliance Director “determined discipline for the ... sustained findings.” The disposition (termination) for each of the four personnel who deployed rifles (Negrete, Berger, Hraiz, and Tanaka) was identically worded:

On 11 March 2018, Officer [____] was involved in a lethal use of force – the discharge of his patrol rifle – resulting in the death of Joshua Pawlik. On 22 February 2019, I waived the discipline process based on the seriousness of this case, the number of officers involved, and to preserve the confidentiality of the investigative material. I disagreed with the Chief of Police and overturned her findings as they pertain to the most serious MOR violations. This use of force was determined to be out of compliance with OPD policy, resulting in a SUSTAINED finding for a violation of MOR 370.27-1f Use of Physical Force – Level 1. Given the severity of the violation and the resultant consequences, coupled with my review of the range for this violation listed in the Discipline Matrix, I have determined that termination is warranted in this case.

The disposition for Officer Phillips – who shot Pawlik in the shin with a non-lethal beanbag round – was also termination. However, he was cited with a “Level 2” excess use of force violation:

On 11 March 2018, Officer Phillips was involved in a lethal use of force resulting in the death of Joshua Pawlik. Officer Phillips fired one Drag-Stabilized Less-Lethal beanbag round at Mr. Pawlik. On 22 February 2019, I waived the discipline process based on the seriousness of this case, the number of officers involved, and to preserve the confidentiality of the investigative material. I disagreed with the Chief of Police and overturned her findings as they pertain to the most serious MOR violations. This use of force was determined to be out of compliance with OPD policy, resulting in a SUSTAINED finding for a violation of MOR 370.27-1h Use of Physical Force – Level 2. Given the severity of the violation and the resultant consequences, coupled with my review of the range for this violation listed in the Discipline Matrix, I have determined that termination is warranted in

this case.

M. Compliance Director's Supplement to Findings – June 27, 2019

The Compliance Officer's Supplement expanded on his February 19 criticisms in five areas:

Limitations and Delays in CPRA Investigations (p. 2): Under this heading, the Compliance Director stated that although the CPRA identified deficiencies in the OPD investigation it “took no action to address or rectify these deficiencies” and “failed to conduct an additional, independent investigation.” The Compliance Director further argued that this meant the flaws in OPD's investigation carried over to the CPRA's investigation.

The CPRA had stated: “Discrepancies should have been questioned at the time. Any such information elicited now, over a year after the incident, would not be considered sufficiently reliable, and therefore the subject officers were not re-interviewed by the CPRA” (CPRA ROI, p. 12). Noting that fact the Compliance Director criticized the CPRA for not itself conducting additional interviews earlier in the process, stating he was “unsure” why the CPRA had waited so long to begin its investigation given that “[b]ased on the CPRA's mandate, the CPRA had the authority to commence its own investigation shortly after the incident.” (P. 3)

Determination of Findings (pp. 3-4): Under this heading the Compliance Director further critiqued the CPRA's conclusion that the officers should be “exonerated” despite the deficiencies in the investigation, stating it is “inexplicable that given the CPRA's legitimate concerns about what occurred and its questioning the credibility of some OPD personnel, the CPRA still found it appropriate to come to a finding of exonerated for the uses of force.” Pointing to the definition of “exonerated” stated elsewhere in the CPRA ROI (“[t]he investigation clearly established that the actions of the police officers that formed the basis of the complaint are not violations of law or department policy”), the Compliance Director concluded that the CPRA had failed to meet its own stated standard when it exonerated all the officers in their uses of force.

Video Evidence (pp. 6-8): The Compliance Director disregarded the video analysis conducted by Sgt. I. Ramirez III as “substandard and an embarrassment,” and therefore not worthy of his consideration. As to the analysis by the outside expert, the Compliance Director acknowledged that the expert stated he could not definitively conclude from the video that Pawlik was holding a firearm. Based on his own viewing and interpretation of the video, however, the Compliance Director found no ambiguity at all, stating (at page 8):

The statements as to the exact actions of Mr. Pawlik by the officers involved in the OIS are inconsistent; and as already noted, the CPRA found OPD's interviews of these officers to be flawed. Nonetheless, the CPRA exclusively relied upon the involved officers' statements to determine the findings in this investigation. The video evidence exists, and it does not support the officers' statements that Mr. Pawlik was pointing a weapon at them at the time they fired their weapons, nor a justification for the use of deadly force. Instead,

as noted in the Compliance Director's Addendum to the EFRB of February 19, 2019, the video shows Mr. Pawlik's actions "to be consistent with someone who was waking up and attempting to orient himself. He was moving minimally. He was a live human being - and any reasonable officer should not have expected him to remain perfectly still. His movements, as seen on the video, do not coincide with the movements to which the officers claim they reacted. Mr. Pawlik's slight movements did not constitute intent and a reasonable officer should not have concluded such." Particularly persuasive are the movements of Mr. Pawlik's right hand in reaction to being shot. It moves abruptly up from the ground; that is, it starts at the ground. The officers assert that his hand was off the ground - some say significantly off the ground - and he was pointing the handgun at them before shots were fired. If that were the case, his hand would have to move noticeably downward before it started back upward. The video does not show this.

Based on this analysis, the Compliance Director asserted the CPRA had "simply ignored flagrant contradictions between what the video shows and what the officers state." Ignoring any ambiguity in the video itself, the Compliance Director concluded that because the video did not *prove* the officers' statements, he must conclude Pawlik did not take the actions they alleged and therefore their actions were out of policy.

Analysis of Justification (pp. 8 – 13): Under this heading, the Compliance Director argued that the CPRA report had failed to establish Pawlik had "the 'apparent desire' to harm anyone," and affirmed that "the use of force should be deemed out of policy on that factor alone." He also rejected the CPRA's conclusion that "the officers did not have cover sufficient to protect them if Pawlik *had* shot at them."

The Compliance Director was also critical of CPRA's failure to give weight to the statements of *uninvolved* officers, whose accounts, he believed, conflicted with those of the involved officers. His concern focused on conflicting statements about Pawlik's "mental state," as suggested by his facial expression. The involved officers stated that Pawlik looked "irritated" (Officer Berger), "angry and agitated and ... like he knew what was going on around him" (Officer Hraiz), and "purposefully grasping the gun" (Sgt. Negrete). These characterizations conflicted, in his view, with statements from uninvolved officers to the effect that Pawlik appeared to be intoxicated, under the influence (Officer Palomo), or dazed with eyes "open just a little as slits" (Officer Julie Yu). The Compliance Director stated (at page 11):

The marked difference between the involved and uninvolved officers' observations is critical, since the involved officers used their characterizations to justify their actions. Yet the CPRA, which appropriately identified the contrasting descriptions between the involved and uninvolved officers, did not factor that into its analysis of justification. Only the involved officers provide the characterizations that purport to show Mr. Pawlik's intent to cause harm, whereas the other officers provide descriptions more in line with someone waking from unconsciousness or a deep sleep. Most importantly, these uninvolved officers' descriptions are supported by an objective viewing of the available video, which

contradicts the assertions of the involved officers; and also supports that Mr. Pawlik did not pose an immediate threat to anyone.

The Compliance Director maintained that these differences were critical, since the involved officers' justifications were based in part on their characterization of Pawlik's expression. (p. 11.)²⁹

N. Police Commission, Skelly Officer, and City Administrator

1. Police Commission Discipline Committee – July 9, 2019

The Discipline Committee is akin to a subcommittee of the Police Commission, and is subordinate to that body. (Oakland City Charter section 604(g)(2).) If the Chief and CPRA disagree on a case, the Discipline Committee convenes and resolves the matter. (Id.)

Because the Monitor *qua* Chief disagreed with the CPRA, the matter was referred to the Discipline Committee. Parroting the Monitor's analysis, the Police Commission followed the Compliance Director's lead (July 9, 2019 Discipline Committee Report, pp. 5-6, emphasis added):

The Committee finds that the most essential piece of evidence in its review and analysis to be the video from the Portable Digital Recording Device (PDRD) of OPD Sgt. Webber. The Committee also finds that *the PDRD video speaks for itself*. From their vantage point on top of the Bearcat, Officers engaged with Mr. Pawlik in an attempt to wake him. Officers shined a bright light on Mr. Pawlik in an apparent attempt to view Mr. Pawlik more clearly, but also to blind and confuse Mr. Pawlik. The PDRD video confirms that Mr. Pawlik's response to Officers attempting to rouse him was to act consistently as a man who was sleeping, unconscious or drunk and being startled and awoken from his slumber. In coming to consciousness, Mr. Pawlik lifted his head more than one time but was unsuccessful in other movements. Mr. Pawlik eventually attempted to sit up by using his right elbow. The PDRD video also confirms that at no time did Mr. Pawlik raise the handgun towards the officers or otherwise in a threatening manner towards Officers. Mr. Pawlik attempted to raise his head and sit up by using his right elbow for leverage. It was this movement that apparently caused Sgt. Negrete and Officers Hraiz, Tanaka, Berger and Phillips to fire upon Mr. Pawlik killing him.

The Committee does not find persuasive Officer testimony that Mr. Pawlik lifted moved or pointed the handgun in a threatening manner towards Officers. The PDRD video clearly shows that Mr. Pawlik did not lift, move or point the handgun in a threatening manner towards the Officers.

²⁹ The Compliance Director also asserted that an objective viewing of the video supported the view of the noninvolved officers. This issue is addressed in section VII.B.1.a.

The Committee also finds instructive the PDRD's recording of Officer Berger's statement to Officer Phillips: "If that gun moves ... bag him." This statement shows, at minimum, Officer Berger's desire to fire a bean bag at Mr. Pawlik based on any movement, not just threatening movement, or at worst, Officer Berger's desire to shoot a rifle round at Mr. Pawlik killing him. This line of thinking was inconsistent with Sgt. Negrete's plan to deploy bean bags to Mr. Pawlik's shins should Mr. Pawlik continue to be unresponsive.

The PDRD video also clearly shows that Officers provided conflicting statements to Mr. Pawlik such as "don't move" and "move your hand away from the gun." However, the conflicting statements were not controlling as it appears that Mr. Pawlik was not able to comprehend what was being told him after having been awoken from his sleep or unconsciousness.

2. Skelly Officer Decision After Proposed Terminations (April 2020)

After receiving *Skelly* notices, the officers had a due process right to present their arguments for why the terminations should not be sustained. Represented by common counsel (Zachery Lopes of the Rains Lucia law firm), each officer did so, emphasizing just cause requirements. Skelly Officer Michael Gennaco rejected those arguments. The Skelly decision parroted the analysis of the Compliance Director, rejecting the argument that the Discipline Committee needed to explain why it rejected the City's expert's findings. The Skelly Officer (at page 10) cited with approval the Discipline Committee's repeat of the Monitor's conclusion: "the PDRD video speaks for itself," commenting also that the "PDRD video clearly shows Mr. Pawlik did not lift, move or point the handgun in a threatening manner toward the Officers." (Skelly Report at p. 10; also see page 13, citing Committee Report at pp. 5-6.)

The Skelly Officer made a passing reference to "just cause" (page 13) but did not otherwise discuss the principle.

3. Interim City Administrator – May 11, 2020

The Interim City Administrator signed termination notices on May 11, 2020, referencing the Discipline Committee's determination. No analysis was included.

4. Step 3 Meeting – November 30, 2020

The Step 3 meeting was recorded, and the recording is preserved as an Exhibit in the digital exhibit's binder. The five members who were accused of excess use of force attended. In the last portion of the meeting, Sgt. Negrete was excused to enable the four officers to state any additional perspective relative to the supervision they received. Following is a summary of the meeting.

Mike Rains, the Grievants' attorney, referenced three key framing issues regarding the standards for imposing discipline and evaluating evidence. First, Mr. Rains emphasized that to impose

discipline the City must show just cause for the discipline. Mr. Rains referenced this point in his criticism of the Compliance Director's report for not mentioning just cause, in his discussion of past arbitration decisions, and in his discussion of why he thought the City was losing at arbitration.³⁰

Second, Mr. Rains emphasized that *Graham v. Connor* establishes the standard for evaluating the legitimacy of a use of force. Uses of force must be evaluated from the perspective of a reasonable officer on the scene. If a citizen draws a gun on the police, they can reasonably expect deadly force. The Constitution does not require certainty that they will fire the gun.

Third, Mr. Rains noted that video evidence does not automatically trump other forms of evidence and he also noted that an officer's memory differing from video evidence is not necessarily deceitful.

With these framing issues in mind, Mr. Rains defended the Grievants' use of force with evidence that they reasonably perceived an imminent threat from Pawlik. OPD policy requires the officers to reasonably believe that an individual has the means, opportunity, ability, and intent to use deadly force. He had the means because he had a gun. He had the opportunity because he was facing the officers. He had the ability because he was conscious. The officers reasonably believed he had the intent since he was told seven times to drop the gun. In this discussion, Mr. Rains quoted at length from the Alameda County DA's report, which found that the Officers acted in self-defense. He emphasized that the Alameda DA was specifically unlikely to protect police officers from prosecution for excess use of force.

Mr. Rains substantiated the imminent nature of the threat by referencing the officers' simultaneous decision to shoot as well as forensic evidence. Pawlik's wrist was completely blown up. Mr. Rains contended that such wrist damage could only occur if his arm was raised up in a position to shoot. Mr. Rains also claimed that Pawlik's finger was on the trigger because Pawlik's DNA was on the trigger.³¹

Additionally, Mr. Rains argued that the video evidence was not conclusive. Four different analyses were conducted and the most definitive one from Imaging Forensics could not determine the exact position of Pawlik's arm. Consequently, the video evidence did not contradict the officer's statements that Pawlik's arm was raised. Mr. Rains emphasized this inconclusiveness would undermine the City's ability to win at arbitration since the Compliance

³⁰ As noted on pp. 57-58 below, of a total of 16 disciplinary arbitration decisions between the City and OPOA from 2010 to 2015, seven were upheld. In the remaining cases, however, arbitrators found that the discipline was not supported by just cause, and as a result ordered either reinstatement with backpay or reduction of the penalty.

³¹ This point was questioned, however, since the presence of Pawlik's DNA on the trigger didn't indicate *when* Pawlik's finger was on the trigger.

Director based his rejection of the CPRA and Chief Kirkpatrick's recommendations on the video's conclusiveness.

In this discussion, Mr. Rains responded to the idea that the officers' statements in their IA interviews differed on the degree to which Pawlik's arm moved. He noted that he was shocked that everyone agreed that Pawlik had the gun in his right hand. If anything, uniformity in the officers' responses would have increased suspicion around the decision to use force.

Moreover, Mr. Rains criticized the Monitor's integrity and decision-making. He provided evidence from a 2012 Declaration of Alameda County District Attorney Nancy O'Malley where O'Malley argued that the Compliance Director encouraged IA investigators to change their decisions following investigations. He also noted that he had notified Ed Swanson, who he described as an attorney who works for the Compliance Director, that the Oakland Police Department had suppressed exonerating evidence in the case of (b)(5)(B) [REDACTED]. In his view, Swanson was unlikely to have not notified the Compliance Officer of this information and in any event, he said that neither the Compliance Director nor Swanson responded to him.

Towards the end, Mr. Rains placed these arguments in the context of recent arbitration decisions. First, in cases where circumstances developed rapidly, he argued that arbitrators are likely to uphold uses of force. Second, arbitrators have upheld that video evidence does not discount other forms of evidence. On that basis, he suggested that if the City relied on the video evidence available in this case, it would lose at arbitration.

Mr. Rains responded to a variety of arguments offered by the Compliance Director for imposing discipline. The Compliance Director criticized the failure of the CPRA to conduct an independent investigation. Mr. Rains responded that it was the CPRA's decision whether they want to conduct an independent investigation, that the investigation's insufficiencies did not undermine the officers' case, and that if one could criticize the CPRA for not conducting an independent investigation, one could also criticize the Oakland Police Commission for the same reason.

Additionally, the Compliance Director criticized the decision to not reference the video when interviewing the suspects. Mr. Rains responded to this idea by noting that the investigators likely did not reference the video because it was not definitive.

Also, the Compliance Director noted that the officers had given Pawlik conflicting commands. Mr. Rains responded that the "upshot" of the majority of the commands was for Pawlik to get his hands off the gun and so the officers reasonably believed that Pawlik's response was one of defiance.

Last, the officers were asked if they had any contrition for potential mistakes they had made. They were also asked if they would have done anything differently. Officer Hraiz observed that while no planning is perfect, the team, including Negrete, dealt with the situation to the best of

their abilities. Officer Phillips said that he would not do anything differently. Officer Tanaka noted the difficulty of the question and that if they had responded differently, someone else could have died. Officer Burger noted that it would be appropriate for officers to suggest alternate courses of action and noted that OPD training had always affirmed that officers don't need specific direction to address lethal threats. Following this discussion, the Grievants departed.

VI. OTHER IMPORTANT FACTS

A. The Officers and Their Job Records

I reviewed the past five years of performance reviews for each of the involved staff members. These were mostly annual performance evaluations with a few being probationary reviews. In two cases, there were rank changes (officer to sergeant or from sergeant to lieutenant). I paid significant attention to the past three years, looking for any deficiencies or areas of concern that might have bearing on this case.

(b) (3)

The following are a brief synopsis of some of the highlights located in each subject members' work history reviews.

(b) (3)

(b) (3)

B. Training Deficiencies

1. Training Deficiencies Pertinent to the Substantiality of the Evidence to Prove Excess Use of Force

The record is clear that OPD officers had not received specific training on how to safely and properly deal with unconscious armed suspects. This left to Sgt. Negrete the task of improvising a plan and receiving Lt. Yu's input. Lt. Yu approved the plan. The plan proved inadequate.

Importantly, and as IAD noted, the present incident had several strong similarities to a June 6,

2015 Officer Involved Shooting (IAD Case #15-0436; EFRB 15F-0230; RO#15-029~134) wherein a male was reported to be stopped in the roadway, sleeping/unresponsive in a vehicle, with a gun at his side. In that prior case, Officers approached the unresponsive male and ended up shooting him, resulting in his death. IAD noted that several recommendations were made in the subsequent Internal Affairs Investigation in which the Executive Force Review Board concurred. One of these recommendations was that a training group be organized for specific tactical and scene management training for barricaded subjects inside of a vehicle with a weapon.

During the investigation herein, IAD found that involved personnel reported having attended training dealing with barricaded (or sleeping) subjects inside a vehicle, but none reported receiving any training of dealing with an unconscious or unresponsive person armed with a gun out in the open. During the last three years, OPD personnel have shot and killed two individuals who were unresponsive and armed with a gun. Officers have received some more narrowly focused training in this area, but none directly applicable to the fact pattern herein, leaving the ranks (and supervisors and managers) unprepared for this contingency.

2. New Policy and Training Bulletin on Dealing with Armed, Unconscious Persons

As a result of the tragedy in this and another similar case, the Compliance Director and federal court focused attention on the need for a new policy in this area. This led to formation of a subcommittee dedicated to devising a new policy focused on how to safely secure the arrest of suspects under these circumstances. The new policy was enacted in January 2021.³² The Police Commission's press release announced:³³

Oakland, CA - Last night, the Oakland Police Commission voted unanimously to make Oakland the first city in the nation with specific policy guidance for police interactions with unresponsive individuals found in possession of a weapon.

The Oakland Police Department has been involved in two high-profile officer involved shootings of armed unresponsive individuals in recent years. Both Demouria Hogg (2015) and Joshua Pawlik (2018), were shot and killed by members of the Department after being discovered asleep or unconscious with a weapon.

In September 2020, the Oakland Police Department presented the Police Commission with

³² This policy is one of three policies ordered by Judge William Orrick III in response to the Compliance Monitor's review of the Pawlik shooting. The other two policies ordered by Judge Orrick are guidance for DATs that respond to critical incidents, and a policy for use of the Department's Bearcat armored vehicle.

³³ See <https://cao-94612.s3.us-west-2.amazonaws.com/news/Press-Release-Armed-Unresponsive-Person-Policy.v10821.pdf>.

a draft Armed Unresponsive Persons policy for review and approval. The Commission appointed a Special Ad-Hoc Committee comprised of Commissioners, members of the OPD command and training staff, and members of the community to review the draft; and the ad-hoc committee spent the final 3 months of 2020 negotiating changes to improve the policy with language that integrates community concerns and expectations. Community representatives were given unprecedented access to OPD training and staff as part of this review process, and the final Training Bulletin reflects the hard work of the Committee to find consensus around language that speaks to the needs of the community while respecting the difficult work of law enforcement in engaging these complex incidents.

3. Key Elements of the Policy and Training Bulletin:

The new policy and training bulletin have key features. They:

- Center OPD response on the preservation of human life and safety; including that of the public, officers, and the unresponsive person.
- Emphasize de-escalation, including the important concepts of communication, time, distance, and cover to allow for a peaceful resolution of critical incidents.
- Stress assessment and the importance of strategically responding to complex interactions instead of merely reacting to them.
- Clearly identify the difference between persons in possession of a rearm or another weapon; and provides officers with additional tools to address incidents where no rearms are involved.
- Clearly differentiate between physical cover and armed cover provided by officers deploying lethal or less lethal weapons.
- Require officers to be aware of the need for additional considerations when engaging members of vulnerable populations.
- Require officers to bring in specialized resources such as OPD Mobile Crisis Teams or translators to assist in the peaceful resolution of difficult incidents when necessary and feasible.

If this new policy had been in effect when the Pawlik incident occurred, the approach to capturing Pawlik would have been clearly defined by policy. That would have either avoided the tragedies of this case or formed a solid basis for adverse findings against officers who did not abide by the policy's terms. The lack of training covering this specific scenario, despite institutional knowledge that training in this area was necessary, is a significant element in assessing officer culpability in the just cause environment.

C. Disciplinary Standards

OPD Training Bulletin V- T contains the Department Disciplinary Policy. It provides that

Complaints against Departmental personnel shall be categorized as Class 1 or Class 2 offenses. It further provides:

1. Class 1 offenses are the most serious allegations of misconduct and, if sustained, shall result in disciplinary action up to and including termination and may serve as the basis for criminal prosecution.

Excess Use of Force can be either a “Class 1” (more serious) or “Class 2” offense.

The penalty for a violation of MOR 370.27-1, Use of Physical Force – Level 1 – 4 for a first offense may span from counseling to termination.

It is clear from the foregoing that termination is not automatic for a sustained “Class 1” excess use of force case.

D. Officer Phillips

Sgt. Negrete assigned Officer Phillips the task of utilizing a nonlethal beanbag gun. In the IA investigation, Officer Phillips stated that Sgt. Negrete’s instruction was, “if he starts to move, ... hit him with the beanbag gun.” Officer Phillips stated that Pawlik did not comply with Sgt. Negrete’s instructions, and when he saw Pawlik move, gun in hand, he feared for his own safety and discharged the beanbag gun, hitting Pawlik in the shin. It later developed during the investigation that at some point soon before Pawlik woke up, Officer Berger told Officer Phillips, in effect, “if he moves, bag him.” While the term “bag” is ambiguous, it is commonly accepted to refer to deployment of a beanbag. The beanbag round was not a causal factor in Pawlik’s death.

VII. DISCUSSION

A. Standards

1. Preponderance of the Evidence

For permanent employees, the employer has the burden of proving by a preponderance of the evidence that sufficient cause existed for discipline to be imposed. The “preponderance” standard is met when adequate, admissible evidence shows that it is “more likely than not” that an employee violated the operative rule. California cases have confirmed that the preponderance of evidence standard, and not the more stringent clear and convincing evidence standard, applies in police officer discipline cases. (See *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1076; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 810.)³⁴

³⁴ Counsel for the officers maintain that a higher standard – “clear and convincing evidence” –

2. “Just Cause”

As noted in the Introduction, the MOU between the Oakland Police Officers Association and the City requires the City to prove that “just cause” supported disciplinary action. (MOU Article X.) Employees who dispute their discipline have a right to final and binding arbitration (*id.*), meaning that judicial review of the arbitration decision is unavailable except on very limited grounds. When an arbitrator decides that just cause does not support the charges, they will be vacated. When an arbitrator sustains charges but believes that the discipline was excessive, the discipline will not be sustained and will be reduced.³⁵

“Just cause” exists where substantial evidence of culpability for rule violation(s) has been

applies in this matter. This contention is not correct. The standard of “clear and convincing evidence” is reserved for cases involving criminal conduct or stigmatizing behavior. Typically, stigmatizing behavior is shown by demonstrating that the employee would be precluded from subsequent work in his or her profession due to stigma or the revocation of a professional license. “It is the totality of professional employment opportunity involving vested interest rights which requires the higher standard.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.) The analysis in *Ettinger* justifying the application of a higher standard of proof contemplated the revocation of a professional license, such as that of a medical or legal professional. (See *Ettinger, supra*, at p.856.) Stigmatizing charges levied against an employee’s good name, reputation, honor or integrity may foreclose the employee’s freedom to take advantage of other employment. (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 573.) It must be the type of allegation that might damage the employee’s reputation and standing in the community. (*Enomoto v. Brown* (1981) 117 Cal.App.3d 40, 413; *Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 308.) In California, Police Officers are not required to obtain licensing similar to medical or legal professionals.

Under *Brady v. Maryland* (1963) 373 U.S. 83, criminal defendants have a right to receive disclosure of prior acts of serious misconduct involving dishonesty or lack of integrity by police officers who were involved in the incident. An officer’s inclusion on a *Brady* list renders the officer a liability in any criminal case in which the officer was involved – a serious problem for any officer on such a list, because one of the most important jobs of police officers is to testify in court. Excess use of force may be a basis for inclusion on a *Brady* list. However, the Public Safety Officers Procedural Bill of Rights Act prohibits adverse employment actions based solely on an officer’s placement on a *Brady* list. (Gov. Code, § 3305.5.) Hence, the prospect of *Brady* list inclusion for excess use of force, without more, does not justify elevating the burden of proof beyond its established basis.

³⁵ As noted in footnote 8, neither the Consent Decree nor the AMOU affects an officer’s right to invoke pre-and post-deprivation due process and administrative appeal rights to contest the discipline. Further, the AMOU does not “limit the power of the Oakland City Council, the Mayor, the City Administrator, the City Attorney and the OPD from exercising their authority and satisfying their duties as set forth in the Charter and other applicable law.”

established through a full and fair investigation, consistent with fundamental principles of due process (see *Tucson Unified School Dist.*, 89-1 ARB §8236 (White, 1989); *United Tel. Co. of Fla.*, 61 LA 443 (Murphy, 1973); see also *Grace Indus., Inc* , 102 LA 119, 123 (Knott, 1993) [due process requires that employer conclude that sufficiently sound reasons exist for discipline based on a “careful and unbiased investigation of the charge”]). The most famous attempt to formalize the requirements of “just cause” was made by Arbitrator Carroll Daugherty in 1964, in the form of seven questions that must be answered in the affirmative for just cause to exist:

- (1) Was the employee on notice of the possible or probable disciplinary consequences of their conduct?
- (2) Is the rule at issue reasonably related to the orderly, efficient, and safe operation of the employer’s business?
- (3) Did the employer conduct a satisfactory investigation before imposing discipline?
- (4) Was the investigation conducted fairly and objectively?
- (5) Did the investigation establish substantial evidence or proof of guilt?
- (6) Has the employer applied its rules, orders and penalties evenhandedly and without discrimination?
- (7) Was the degree of discipline imposed reasonably related to both the seriousness of the offense and the record of the employee’s service?

(*Grief Bros. Cooperaage Corp.*, 42 LA 555, 557-59 (Daugherty, 1964.) As even Daugherty himself acknowledged, however, the facts of every case are unique and often these specific questions “cannot be applied with slide-rule precision.” (*Id.* at 557.) At minimum, however, it is universally acknowledged that just cause requires a fair investigation, substantial evidence, and that any disciplinary action must be:

- (a) even-handed (i.e., without disparate treatment);
- (b) consistent with existing standards and practices; and
- (c) take into account the employee’s job record, training, and all other mitigating and aggravating factors reflected in the record.

Progressive discipline is a component of just cause in connection with performance deficiencies and minor misconduct, but it applies less - or not at all - to more serious types of misconduct. (*Municipality of Anchorage*, 128 LA 1153; see generally *International Harvester Co.*, 12 LA 1190 (McCoy, 1949); compare *City of Cuyahoga Falls*, 138 LA 1206 (Belkin, 2018) [discharge without progressive discipline upheld for police officer who placed co-worker in chokehold];

City of Stayton, 138 LA 1917 (Latsch, 2018) [City found to have just cause to discharge police officer for using excessive force in traffic stop with paraplegic driver]; *PPG Industries*, 122 LA 1250 (Suntrup, 2006) [discharge upheld for violation of important safety rule, despite being first offense].)

In this case, the most significant question is whether the City had “just cause” to conclude that the officers violated standards regarding use of lethal force, and if so, whether terminations were an appropriate response to those violations. However, none of the decision-makers who determined that termination was appropriate applied just cause principles. Only the Skelly officer referenced the principle, but he did not apply it.³⁶

The consequences of a failure to apply just cause principles are best explained by the City’s history in arbitrations over police discipline. I have reviewed 16 arbitration decisions covering the time period 2010 – 2015, involving OPD sworn personnel who appealed serious disciplinary action to final and binding arbitration. In each of those decisions, the issue presented to the arbitrator was whether “just cause” supported the disciplinary action. In seven of those cases, the disciplinary actions were upheld because the City met its burden. In the remaining cases, however, arbitrators found that the discipline was not supported by just cause, and as a result ordered either reinstatement with backpay or reduction of the penalty.

Apropos of this point, at the Step 3 meeting in this case, Mike Rains (counsel for the officers herein) produced a letter he wrote to Edward W. Swanson, Esq. (court-appointed investigator in the Consent Decree case) regarding a report Mr. Swanson wrote for and filed with the United States District Court on March 21, 2016. Mr. Rains’ letter focused on one particular case, but the final paragraph was broader in scope. It said (emphasis added):

When all is said and done, this is just one in an entire litany of cases I could provide to you where an officer’s discipline was rescinded or reduced by an arbitrator, not because the arbitrator misunderstood the facts or misapplied the law, *but because the Department imposed discipline in the first place which was unsupported by the facts or the law pertaining to “just cause” for discipline.*

At the Step 3 meeting, Mr. Rains indicated that he did not receive a response to this letter. A summary of Mr. Rains’ comments about this and other issues appears at section V.N.4 above.

B. Application – Just Cause

³⁶ Although the seriousness of misconduct can result in bypassing steps of progressive discipline, it is not a basis for ignoring just cause principles –especially where the employer in the underlying labor contract has agreed to the just cause standard. Indeed, where progressive discipline is not applied, it is all the more important to check the other boxes.

1. Substantial Evidence of Culpability

One of the key requirements of “just cause,” especially in cases where binding arbitration is the applicable dispute resolution vehicle, is that any discipline to be supported by “truly substantial” evidence. (See *Grief Bros. Cooperage Corp.*, *supra* at 558.) This means that the decision to impose discipline (and regarding what level of discipline is appropriate) must be based on a fair evaluation of the record as a whole, including all evidence both for and against culpability, without cherry-picking. (See, for example, *Standard Parking Plus Corp.*, 137 LA 1785 (Saunders, 2017) [due process requires a thorough and unbiased investigation that seeks confirmation of wrongdoing by examining corroborating witnesses or collecting verifying evidence]; compare *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal. 4th 93, 107-108 [implied-in-fact agreement to terminate only for good cause requires employer to have “fair and honest” reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation].)

a. Video Evidence Does Not Suggest Culpability

The IAD, EFRB, CPRA and Chief of Police all found the video to be inconclusive in and of itself on the key question of whether Pawlik’s movements presented an imminent threat that justified a lethal response. As detailed in Section 5 of this Report, the review and analysis of the video by all these entities was comprehensive. Indeed, IAD supplemented its internal analysis by referring the matter to a highly qualified expert, who found the video to be similarly inconclusive. It bears emphasis, too, that this conclusion was not just made by reviewers associated with the department; it was also made by the CPRA – the watchdog agency created by Charter to provide external review and assure public accountability. It bears further emphasis that the expert OIS Team – further external reviewers who carefully examined all evidence – not only held that the video was inconclusive, but that it was clear enough to corroborate the officers’ statements:³⁷

Though the [video] footage does not clearly show how high Mr. Pawlik raised his pistol, the movement in the area of his shoulder and the officers’ nearly simultaneous shooting corroborates the shooting officers’ assertions that Mr. Pawlik pointed the gun in their direction.

Believing that CID, IAD, EFRB and the Chief all failed to properly or adequately assess the video evidence, the Compliance Director rejected the above conclusions. (See Addendum to

³⁷ The Skelly Officer stated that given the higher burden of proof in criminal proceedings, the determinations of the District Attorney were irrelevant. The OIS Team, however, did not rely on the higher standard of proof in analyzing *the facts*. Rather, as noted above, the Team’s analysis of the facts and its assessment of the video evidence, as described above, was clear and definitive.

EFRB Report, at pp. 1 (“I have found no reference to the use of the video in the questioning of the involved officers.”).³⁸ Indeed, in the Compliance Director’s view, the video not only didn’t confirm the officers’ statements about Pawlik’s movements immediately before the shots were fired, it affirmatively proved that Pawlik did not present an imminent threat at the time he was shot.

The Compliance Director’s June 27 Supplement stated (at page 15, emphasis added):

The video speaks for itself. In its raw form - and in the numerous enhanced versions available to CID, IAD, the EFRB, and the CPRA-the video does not support the involved officers’ accounts of Mr. Pawlik’s actions; and it certainly does not support a justification for the use of deadly force. In fact, the video clearly supports our February 19, 2019 findings [of excess use of force].

If the available video, in any of its iterations, corroborated the officers' statements, it would have served as a reliable basis for an exoneration conclusion. But the fact is that it does not corroborate the officers’ statements and certainly does not serve to justify the use of deadly force. The video was examined by two experts, who each produced enhanced versions. The video cannot be ignored. The video, raw and enhanced, simply does not support the officers’ assertions about Mr. Pawlik’s actions. Accordingly, the conclusion must be that the actions assigned to Mr. Pawlik did not occur, and the officers’ actions were out of policy.

Crucially, the Compliance Director relied on this interpretation of the video to conclude that “Mr. Pawlik’s slight movements did not constitute intent and a reasonable officer should not have concluded such.”³⁹ CID, the OIS team, and the members of the EFRB have highly qualified law enforcement professionals who studied the video carefully. The OIS Team’s assessment is indicative. The Team noted that Pawlik made “a movement with his right arm a

³⁸ It is problematic that in the initial interviews, IAD did not confront the officers with the video nor ask the sort of detailed or probing questions that might have uncovered inconsistencies large enough to create credibility issues. However, in supplemental interviews in August 2018, IAD investigators asked the officers many additional questions regarding the video. That said, months of delay in questioning witnesses generally leads to failed memory (or claims of failed memory). It also can enable witnesses to prepare in detail with their legal counsel for anticipated questions, and even for possible collusion. Where all subjects are represented by the same law firm, a heightened opportunity exists for witnesses to coordinate their statements.

³⁹ The CPRA reached the opposite conclusion from the Compliance Director *after* he stated his conclusion about the video. This is noteworthy because the CPRA and Compliance Director appear to share a similar goal (effective oversight of OPD). Given the Monitor’s role as the protector of a Negotiated Settlement Agreement meant to correct past injustices by OPD and the CPRA’s companion role as a watchdog agency over OPD, the CPRA’s disagreement with the Monitor is noteworthy.

split second before the officers fired their weapons. *Though the footage does not clearly show how high Mr. Pawlik raised his pistol, the movement in the area of his shoulder and the officers' nearly simultaneous shooting corroborates the shooting officers' assertions that Mr. Pawlik pointed the gun in their direction.*"

This was consistent with the findings of the other reviewers. Despite the graininess of the video and the Compliance Officer's firmly held belief that the video was dispositive as to the officers' culpability, the Compliance Director, like all other reviewers, agreed that Pawlik's arm moved before the officers discharged their weapons. *As will be shown in the next section, this undisputed fact is the most important one in this case.*

b. Evidence of Proper (Not Excessive) Use of Lethal Force

The officers were not required to wait for Pawlik to raise the gun higher or point it squarely at them before they took action. When confronting an obviously armed suspect whose gun arm moves even "slightly," police officers have a sound basis to conclude that danger was imminent and to therefore fire their weapons. As Chief Kirkpatrick stated (at page 1, emphasis added):

The policy that governs this matter is Department General Order K-3: Use of Force. The relevant sections of this 12-page policy are the definitions of Reasonable Force (Section II.A), the definition of Immediate Threat (Section II.B) and Discharging a Firearm at a Person (II.D). Starting with the authority to discharge a firearm, the policy states that lethal force ... "is authorized only when there is reasonable cause to believe there is an immediate threat of death or serious bodily injury." Thus, in determining whether there was reasonable cause to use lethal force, my threshold question is whether the facts and circumstances in this case meet the criteria of an "immediate threat." The policy states: "An immediate threat is considered to exist if a person has demonstrated actions that would lead one to reasonably believe the suspect will continue to pose a threat of death or serious bodily injury if not apprehended without delay. A person is an immediate threat, if the person is reasonably perceived by a member or employee to have present intent, means, opportunity and ability to complete the threat, *regardless of whether the threatened action has been initiated.*"

To review:

1. One can see from the video that Pawlik had an object in his right hand that turned out to be (and the officers' readily saw as) a loaded firearm. The involved officers were aware that Pawlik had his hand on the gun. The CPRA recited the content of an interview with Officer Julie Yu, who observed Pawlik with and without binoculars. As the CPRA noted (at page 10):

Officer Julie Yu, who also looked at the gun with binoculars, said the barrel (of the gun) looks "insanely protruding" (Rowley PDRD/8:33). Officer Julie Yu tells Officer Berger, so he's got the base of it (the gun). His thumb's up. He hasn't twitched that hand at all ... uh-his thumb is moving. Uh, his thumb is moving. You see his right thumb. It just moved

up. It was on the butt of the gun at first-like this flat-and he just picked it up ... Do you see how he has it canted like a square. It was down earlier. (Yu PDRD/one of two, 13:47). Officer Yu also commented at one point, “I can barely hold my phone when I fall asleep with it in my hand. He’s not letting go” (Yu PDRD/one of two, 26:35).

Further:

Officer Yu felt Mr. Pawlik could easily raise the weapon and have shot it. Having it in that direction, he could have easily anchored the muzzle in the ground to get a better grip the same as raising the gun six inches in the air to get a better grip. Officer Yu felt Mr. Pawlik could easily just drop the gun, but he never released the gun. It was still pointed to the ground anywhere from ninety to forty-five degrees to the ground.... She said even in that weird angle the muzzle was still pointed in a southbound direction, and if Pawlik pulled the trigger, it would have ricocheted in the direction of the officers.

2. When Pawlik awakened, he appeared to be initially unaware of his surroundings or what is going on. However, after multiple commands from officers and a significant lapse of time, his facial movement was consistent with developing an awareness of the officers. This was a critical juncture, because Pawlik had an opportunity to follow the commands of the officers and, at minimum, release his grasp on the firearm – something that would be instinctive given the commands given, and the clear and overwhelming police presence. Also, in the key seconds immediately before the shooting occurred, Pawlik appeared to begin to sit upright and look directly at the officers giving commands. His head turned and looked face-on to the officers and the camera. The officers described this “look” to be irritated and/or angry and aggressive. Due again to the video distortion, this description can neither be confirmed nor refuted. But at minimum, this last “look” appears to be of someone cognizant of the situation. His looking squarely at the officers – recognition – would, especially coupled with his failure to drop the weapon, give any reasonable officer pause.

3. As noted in the previous section, it was at this crucial point in time that Pawlik’s arm moved. Again, the extent and direction of movement cannot be discerned from the video. But the key question is *whether Pawlik’s movement justified a lethal response*. The reviewers before the Compliance Director’s involvement said “yes.” *In contrast, as noted above, the Compliance Director called Pawlik’s motion “[1] slight movement [that 2] did not constitute intent and [3] a reasonable officer should not have concluded such.” These three points lie at the core of the Compliance Director’s analysis, and each of them is problematic.*

First, the extent and direction of Pawlik’s undisputed arm movement were crucial issues on which the video does not shed full light. From an investigative standpoint, then, the video does

not “speak for itself.”⁴⁰

Second, although we cannot get into the mind of the decedent, his *intent* can be inferred from his *actions*. In this case, those actions include Pawlik’s arm movement and its direction, and his looking in the direction of the officers. In all its haziness, the video still provides evidence from which *intent* (i.e., whether he intended to fire on the officers) could be inferred.

Third, what a reasonable officer “should have concluded” can only be judged by reference to what a reasonable officer *experienced, observed and inferred*. The officers were already on high alert because they knew Pawlik had a gun and could awaken at any time. It is noteworthy (as CPRA stated at page 17) that when he awoke and started to sit up, the officers did not discharge their weapons. “They were not firing based on body movement alone,” CPRA said (at page 17). The discharge of their weapons occurred after the movement of his gun hand and the perception that the gun was pointing, if not pointed, in their direction. Pawlik’s shattered wrist show that his hand was in upward motion, just as does the pistol’s ultimate location – which was consistent with the upward motion of Pawlik’s arm. They stopped firing as soon as the threat was no longer present.

Each officer’s perception about Pawlik’s movements just before he was shot was that the gun was in motion in their direction and that this is what caused them to fire their weapons. They were best positioned to observe his movement. Their statements were consistent with the observations of some other observers, and were not refuted by any officer who was in a position to observe Pawlik’s movement at the most relevant moments in this case. The CPRA summarized:

Sgt. Rowley [a noninvolved witness] looked at the gun through binoculars. He is heard saying when discussing the gun, “that’s his hand on top of the kind of trigger/handle area.” Sgt. Rowley said the gun is pointed kind of in our direction (Rowley PDRD/3:25).

Further, the officers fired their weapons virtually simultaneously, strongly suggesting that each of them saw the same thing and had the same perception, and strongly refuting a contention of “sympathetic” fire.

Finally, reliance on the video does not take into account the fact that video evidence is often far

⁴⁰ This does not take away from the fact that the flaws in the investigation prevented against a definitive resolution of the factual issue of how much Pawlik’s gun moved. As the CPRA observed:

... More detail should have been elicited though in the interviews immediately following the shooting, as to how exactly the gun was being held and in what manner, and if that position ever changed, from all officers who observed the gun pre-shooting.

less reliable than the naked eye. As noted by one expert quoted in a recent Lexipol article:⁴¹

Cameras don't track with an officer's eyes. They don't capture tactile cues, such as when a suspect flexes muscles and starts to resist. They don't reveal a suspect's prior history known to the officer. They don't record at the speed of life. They don't capture images in 3-D or represent distances accurately. They don't accurately reproduce what the human eye sees, and they don't reproduce the subjective fear an officer feels.

What is certain in this case is that the vision of the officers was clear – not clouded – and had the benefit of three-dimensional depth perception.

In a just cause venue, the evidence of culpability must be substantial. Here, looking only at the video evidence discussed above, the evidence of culpability is insubstantial: it does not meet the “preponderance” test. On the other hand, taking into account the totality of information including the video, the evidence of *non*-culpability is substantial.

c. The Compliance Director's Concerns about Officer Credibility

The Compliance Director juxtaposed officer credibility against what he considered to be a clear video depiction of the event. Conflicts between the statements of involved vs. uninvolved officers were of particular concern.

One issue was the conflict between non subject and subject officers regarding Pawlik's facial expression just before he was shot. As discussed in section VII.B.1.b above, in describing Pawlik's expression when he turned his head toward them upon awakening, the subject officers variously described expressions that implied intentionality and hostility. IAD, however, identified five noninvolved officers on scene who were apparently able to observe Mr. Pawlik at some point soon before the shooting. These witness officers described Mr. Pawlik as “having a dazed look;” “appearing drowsy;” “like anyone waking up from a sudden loud noise;” “startled from a deep sleep, extremely drunk or passed out;” “not really getting it in regards to commands;” and “like he was under the influence and did not appear lucid, or unconscious.”

The Autopsy report indicates that toxic levels of Benzodiazepine, cocaine, Fentanyl, Levamisole, opiates and Tramadol were in Pawlik's circulatory system. Given how many drugs were in Pawlik's system and given further that he was just awakening, it is quite possible – indeed, in my view, likely – that he was in a stupor. However, the facts discussed above reduce or eliminate the relevance of inconsistencies about Pawlik's visage.⁴² A suspect who is in a stupor – or even

⁴¹ Lexipol, *Honest But Inaccurate: Why Video Doesn't Capture What Is Experienced*, Von Kliem and Dr. John Black, November 16, 2020. <https://www.lexipol.com/resources/blog/honest-but-inaccurate-why-video-doesnt-capture-what-is-experienced/>

⁴² Due to flaws in the investigation, a definitive inference cannot be drawn about the

smiling - but is beginning to point a gun toward an officer is as dangerous as one who has a hostile look.⁴³ Conflicting statements about Pawlik's facial expression are inconsequential under these circumstances.

Another issue of concern to the Compliance Director were the statements of two involved officers. Officer Tanaka's description of the movement of Pawlik's gun (12 to 24 inches) was not consistent with the evidence, including the statements of other involved officers. An inconsistency between Officer Berger's first (March) and second (August) statements were troubling: for the first time in August, e.g., he stated that he had used binoculars in viewing the situation.

Nevertheless, as correctly noted by the CPRA, variation can occur from perceptions based on the quickness of the event, being under stress, varying levels of training and experience, various angles, and so forth. It is clear the officers were under stress at the time, as can be heard in their voices. Given how rapidly the event unfolded, it is not at all unusual that perceptions and recollections of the events can occur, such as the angle and movement of the gun. The deficiencies in IAD questioning failed to nail down the facts tightly; had they asked questions about the video frame by frame, some discrepancies may have been clarified (or highlighted). But witness statements were not so inconsistent (or consistent) as to raise a red flag of concern.

d. The Compliance Director's Concerns About the Investigation

As noted variously above, the Compliance Director's profound concerns were also directed toward serious problems with IAD's investigation, allegedly inappropriate action and statements by former Chief Kirkpatrick,⁴⁴ and misjudgments and omissions by the EFRB and CFRA. The legitimacy of these concerns, however, does not contribute to a conclusion that the evidence is

inconsistencies. The CPRA Report (at p. 13) lamented IAD's failure to conduct timely and more effective fact-gathering:

Discrepancies should have been questioned at the time. Any such information elicited now, over a year after the Incident, would not be considered sufficiently reliable, and therefore the subject officers were not re-interviewed by the CPRA.

⁴³ As the CPRA Report stated (at pp. 16-17):

The ability to tell when someone is or could be drunk, drugged, or mentally confused, is important when formulating tactics. However, whether intently staring at the officers or looking at them in confusion, if Mr. Pawlik raised his gun at them, he was still an immediate danger and the act of raising a gun directly at an officer when told to drop it can be construed as intent. A not fully lucid, drugged or confused person, can fire a gun in his hand.

⁴⁴ Chief Kirkpatrick was later terminated.

sufficient to meet the “preponderance” test.

e. Training Deficiencies Pertinent to the Substantiality of the Evidence to Prove Excess Use of Force

i. Actions Not Inconsistent with Training

The test for excessive use of force is an objective one, calling for assessment of whether a reasonable, *similarly trained* officer with would have deployed lethal force under all the circumstances. Here, the conduct of the officers both before and during the shooting was not inconsistent with their training. Before the shooting, their positioning was determined or approved by their sergeant, with approval from Lt. Yu, and was not in conflict with Department policy. The problem with this case rests elsewhere – in Sgt. Negrete’s failure to plan for the contingency that Pawlik would awaken before the main plan was put in play. Further, during the split second or two after Pawlik’s movement, the four rifle officers’ discharges of their weapons was based on their training regarding use of force. Each of them stated that he saw Pawlik’s arm and gun move. As pointed out by the Chief (among others), neither the law nor Department policy required them to wait until the gun was pointed squarely at them before acting.

Based on the foregoing, the conduct of all four officers was consistent with what a reasonable officer with similar training would have done. This further demonstrates that the conclusion that the officers applied excessive force is not supported by a preponderance of the evidence.

ii. The Later-Implemented Policy

As noted in section VI.B.2 above, as a result of this and other similar cases, the Compliance Director and federal court focused attention on the need for a new policy in this area. This led to formation of a subcommittee dedicated to devising a new policy focused on how to safely secure the arrest of suspects under these circumstances. Enacted in January 2021, the policy includes a variety of elements that might not have resulted in Pawlik being peaceably arrested, but that certainly would have entirely transformed the officers’ approach to this case. The key components focus on preservation of human life and safety; de-escalation through “communication, time, distance, and cover;” “strategically responding to complex interactions instead of merely reacting to them;” and differentiating between physical cover and armed cover provided by officers deploying lethal or less lethal weapons. The policy also requires officers to bring in specialized resources “to assist in the peaceful resolution of difficult incidents when necessary and feasible.”

If the policy had been in effect in the Pawlik incident, the approach to capturing Pawlik would have been clearly defined by policy, either avoiding the tragedies of this case, or forming a solid basis for adverse findings against officers who did not abide by its terms. Indeed, if Sgt. Negrete’s setup of the officers before the shooting had been in conflict with such a policy, the officers would have had a duty to speak out to Sgt. Negrete to try to attain policy compliance.

The lack of training, despite institutional knowledge that training in this area was necessary, is a significant element in assessing officer culpability in the just cause environment.

C. Conclusion – Excess Use of Force

At bottom, the Compliance Director’s analysis of the justification for the use of force relies on the proposition that unless someone can *prove* Pawlik had intent, the use of force was out of policy. This determination is at odds with burden of proof principles. It is not incumbent on employees to prove that their use of force was within policy: instead, *the employer* must prove that the employees’ actions were out of policy. The determination is also inconsistent with department policy and training. When someone points a firearm at you, it is generally recognized and accepted that the person has the intent to harm. Officers cannot normally know the suspect’s intent with certainty, especially in a split-second situation.

Nobody will ever know why Pawlik did not drop the firearm. Absent a known intent, it is inconceivable to replace it with a finding that he did not intend harm unless he pointed the weapon squarely at the officers and discharged it. A requirement that the officers wait until the gun was squarely pointed at them would wrongly place them in harm’s way.

Based on the foregoing, the evidence is inadequate to meet the just cause “substantial proof” prong, and there is not a preponderance of evidence supporting the conclusion that any of the officers violated law or department policy.

D. “Exonerated,” Or “Not Sustained?”

The next question is whether an “exonerated” finding – vs. a finding of “not sustained” – is appropriate. A cloud hangs over IAD’s investigation in this case – a point of agreement between EFRB, CPRA, and the Compliance Director. The months of delay in scheduling the follow-up interviews precluded effective questioning of the officers in August. IAD delays did not give the EFRB or CPRA adequate review time, eliminating the possibility of follow-up investigations.

These flaws could cause a reviewer to conclude that the evidence is not clear enough to substantiate exoneration of an officer, resulting in a finding of “not sustained” rather than “exonerated.” However, the evidence is clear that given all the circumstances that are ascertainable, including Pawlik’s gun movement, a reasonable officer in the position of the four officers herein would have concluded that Pawlik posed an imminent threat, justifying a lethal response.

“Exonerated” is especially an appropriate conclusion regarding Officer Phillips. Sgt. Negrete instructed him to shoot at Pawlik’s shin to wake him up once the stage was set. Later, Officer Berger (unadvisedly) told Officer Phillips, “if he moves, bag him” – a contrary direction from a non-supervisor. In either event, Officer Phillips did not need to wait until he believed that a lethal shot by Pawlik was imminent in order to fire a nonlethal round at Pawlik. On this basis,

the controversies about the investigation and the video are irrelevant to Officer Phillips' situation. There is no legitimate argument supporting a conclusion that his use of force violated the law or Department policy, and he must be exonerated.

E. If the Shootings Violated MOR 370.27-1f – Use of Physical Force, Was Termination the Appropriate Penalty?

Under California law, if the employer has cause to implement discipline, the decision about the level of discipline is within the employer's sound discretion and should not be lightly overridden. Here, the Compliance Director's conclusion that the use of lethal force violated policy apparently led him to an *automatic* conclusion that termination was the appropriate penalty given Pawlik's death. However, under just cause standards, the level of discipline to apply to misconduct must take into account a variety of factors, including mitigating and aggravating factors; departmental disciplinary standards; past practices; and the determinations made by arbitrators in prior, pertinent cases. An examination of Oakland police arbitration decisions makes clear that arbitrators are not adverse to reducing disciplinary penalties when the employer's decision does not take into account mitigating factors.

In this case, the Monitor and Skelly Officer's decisions found that terminations of the four officers (and Sgt. Negrete) was appropriate in part because it resulted in Pawlik's death – surely a serious aggravating factor. However, meaningful mitigating factors exist in this case. The lack of any reference to mitigating factors in the determinations that led to terminations is troubling, especially in light of the scrutiny that arbitrators have applied in reviewing OPD disciplinary actions, as well as the clear notice Mr. Rains's response to Mr. Swanson's formal query about why the City was losing so many arbitration cases.

1. Lack of Training

An employee's awareness of job obligations – i.e., knowledge of the employment “rule” – is an integral element of just cause. (Compare *Crittenton Hosp. Med. Ctr.*, 131 LA 606, 610 (Goldberg, 2012) [no just cause for discharge when rule requiring treatment of psychiatric patients in seclusion was “not clearly delineated”]; *Arrow Gear Co.* (Cohen, 2010) 127 LA 1370 [no good cause to discharge employee for pushing co-worker where zero-tolerance policy was unpublished and grievant was unaware of it]; *Vesuvius USA Corp., Tyler Plant*, 114 LA 940 (Rivera, 2000) [discharge of employee who entered false data reduced in light of employer's failure to properly train employee].)

In police employment, officers learn the essential rules – perhaps primary among those rules, restrictions on the use of lethal force – through training. Here, the lack of a training policy, regimen or bulletin is a highly relevant factor – especially in light of the recognition of the need for a different approach for dealing with armed unconscious persons and the later promulgation of a new policy and training bulletin.

Even if the shooting of Pawlik constituted excessive use of force, the lack of a training policy, regimen or bulletin *specific to addressing armed, unconscious persons* should have been taken into account in determining the disciplinary penalty. As noted in section V.D, a 2015 incident involving a fatal use of force on an unarmed, unconscious suspect resulted in a resolve that training should be designed for this contingency. The Pawlik incident had several strong similarities to that case. IAD noted that several recommendations were made in the subsequent Internal Affairs Investigation in which the Executive Force Review Board concurred. One of these recommendations was that a training group be organized for specific tactical and scene management training for barricaded subjects inside of a vehicle. IAD noted that Officers have received some more narrowly focused training in this area, but none directly applicable to the fact pattern herein, leaving the ranks (and supervisors and managers) unprepared for this contingency. The recent adoption of a new policy and training bulletin addressing how to deal with armed, unconscious individuals shows what the Department could have done before the Pawlik incident to avoid a repeat of the prior fatal shooting.

2. The Stage Was Set by No Fault of the Officers

In assessing MOR violation and the penalty for it, the reviewers after the Compliance Director's involvement did not differentiate between the four officers and Sgt. Negrete. But there is a significant mitigating factor pertinent to the four officers that does not apply to Sgt. Negrete.

After Sgt. Negrete volunteered to be the supervisor of the team that assembled for this incident, he assembled the Designated Arrest Team (DAT) and planned for contingencies. He instructed the officers on where they should locate and approved the weaponry (including Sgt. Negrete, four personnel armed with semi-automatic rifles and one (Officer Phillips) armed with a non-lethal beanbag gun). He instructed the team on how to approach the unconscious Pawlik to affect his surrender, and instructed Officer Phillips to be ready to deploy the nonlethal beanbag round as part of an effort to cause Pawlik to drop his weapon. Sgt. Negrete decided to be actively involved on the DAT – as the fourth rifle officer – which impeded his ability to oversee the operation effectively and deprived the officers of the ability to receive moment by moment direction from their supervisor. The fact that all five personnel were pointing their weapons at Pawlik when he awoke was part of the stage that Sgt. Negrete set. Sgt. Negrete did not take steps to assure that only one voice would be giving commands to Pawlik to drop the gun, resulting in issuance of many different and somewhat contradictory, potentially confusing commands to Pawlik. A single speaker giving a repeated command over the BearCat loudspeaker or a bullhorn may have made a difference.

The point here is not to denigrate Sgt. Negrete –a respected SWAT officer with a history of public service and a clean record. (Nor can we forget that Sgt. Negrete shared his plan with his supervisor, Lt. Yu, who approved it.) Rather, the point is that in the crucial moment or two—when Pawlik began to rise up, rotate to his right, and begin (in the officers' perception) to move his gun at least slightly in the officers' direction – the officers were, unnecessarily, in a position of vulnerability vis-à-vis Pawlik, and as it turns out, also one of vulnerability to excess use of

force allegations. The officers were situated based on their sergeant’s decision and direction – one approved (actively or implicitly) by his Lieutenant. The officers were not in a position to challenge the plan, because the set up was not inconsistent with policy, and had they wished to do so, things were moving too fast. Most important, the fact that the officers were part of a five-officer DAT, all armed heavily to confront an unconscious armed suspect, was not their fault nor was it of their making. (Compare *Zinsco Elec. Prods.*, 65 LA 487 (Erbs, 1975) [reinstatement with full back pay ordered where grievant was following supervisor’s orders and accident that occurred was equally attributable to supervisor].) This, then, is the opposite of a situation where officers acting without direct supervision (or in violation of directions) overreacted to a suspect by being thoughtless of protocol and lacking in judgment.

3. Job Records

In a just cause analysis, the job records and past performance of employees found to have violated departmental rules are usually taken into account – favorably (mitigating) or not (aggravating). (Cf. *City of Bridgeport*, 101 LA 295 (Cain, 1993) [45-day suspension deemed excessive for employee who processed/granted benefit for own son in light of good 10-year employment history, fact employee had relied on supervisor to review form, and emotional distress at time form was processed]; *Nutrition Grp.*, 132 LA 1289 (Kobell, 2013) [24-year good service and temporary overreaction in context of stress justify mitigation of discharge to 5-day suspension].) Of course, when it comes to serious misconduct, job records become less relevant or even irrelevant, depending on severity.

(b)(3) [REDACTED]

Job records are relevant to a “just cause” determination because, unless termination is automatic for a given offense,⁴⁵ an employee’s positive qualities and good past work are a value to their employer on a variety of levels: to preserve institutional memory; to serve as a resource for more junior employees; to be able to perform tasks efficiently due to subject matter knowledge

⁴⁵ In Oakland, excess use of force does not give rise to automatic termination. Implementing a “zero tolerance” policy would require advance negotiations, and under the Charter, an impasse would be subject to binding interest arbitration.

informed by experience; to be cultivated for potential future promotion; and to promote efficiency, because good institutional knowledge enhances delivery of public services. Taking job history into account is also the sign of a fair employer, because good performance is an employee's stock in trade for times when their performance does not meet expectations. It is also the sign of an insightful employer: if an employee's conduct has been uniformly good until an aberrant act occurs, the employee's past reliability should be taken into account.

The converse of the above is also true. Poor past performance can reflect a behavior pattern that is often indicative of potential future problems. Poor past performance is a drag on an organization's forward positive momentum that can cause inefficiencies, morale problems, and in a public safety department, significant risk.

Another reason that job histories are relevant in police employment specifically ties into the practical issues of recruiting and training new police recruits. High risks jobs such as police officers require extensive training. Every police vacancy that is going to be filled with a new recruit is going to cost substantial monies going toward police academy and training costs, often with the result that a potential recruit elects to forego a job offer or, worse, washes out of the academy or during probation. Replacement costs and risks are yet another reason to assess the qualifications and contributions of errant officers in deciding whether they should be retained.

This is not to say that good job performance means an officer who engages in excess use of force should be retained. It depends on the seriousness of the offense and a weighing of all disciplinary factors. But it is to say that except where termination is a foregone conclusion consistent with the employer's history in implementing discipline, just cause requires consideration of this element. There is no indication that job histories were taken into account in the decision to terminate the officers based on two seconds out of years of each officer's positive performance on behalf of the City of Oakland.

4. Disparate Treatment

The City has suffered significant losses in cases where arbitrators have found that lower ranked personnel received more onerous disciplinary penalties than higher ranked officers who were ultimately responsible for the management of a critical incident.

For example, on March 17, 2010 Arbitrator Harris decided a case where a Sergeant was accused of: (b)(3) (2) failing to supervise his team or follow procedures, resulting in the shooting death of a civilian; (b)(3). Arbitrator Harris found that the City had not met its burden of establishing just cause for termination. Noting the disparate treatment of grievant the Arbitrator reasoned that the City seemed to have placed all blame for possible violations of procedure on the Sergeant while failing to hold more-senior level officers to account for their role in the incidents. As the Arbitrator explained (at page 41), "[a]t the heart of the City's argument is the contention that the Grievant acted outside the scope of what his

commanders had approved. This contention is unsupported by the evidence. Lt. [redacted], the tactical commander, unequivocally explained that the Grievant executed the plan *which had been approved by his superiors at the command post*. . . the weight of the evidence establishes that the Grievant executed the plan *as authorized by his superiors*.” (Emphasis added.) As a result, the Arbitrator held that there was no just cause for any disciplinary action, and that the Sergeant was to be reinstated to his former position and made whole for lost wages and benefits.

In another case decided by Arbitrator Greenberg on May 15, 2013, a Lieutenant and Captain were accused of gross dereliction of duty in connection with the response to a shooting that resulted in the deaths of four officers. In finding that the City had not met its burden to establish just cause for demoting the officers, the Arbitrator found that the grievants had been improperly singled out for discipline when those more senior in rank who were also present and participated in the decision-making were not similarly held accountable. The Arbitrator explained at page 121), “the City’s decision to single out Lt. [redacted] and Capt. [redacted] for discipline does not adequately recognize the responsibility of others – including their organizational peers, and also some of the senior management of the Department. . . the decision to discipline Lt. [redacted] and Capt. [redacted] has the appearance of the Department needing to hold *someone* individually accountable for the tragic deaths of Sgt. [redacted] and Sgt. [redacted], but not considering the possibility that senior-level management decisions also contributed to the chain of events.” Because of this, the Arbitrator ordered both grievants restored to their prior positions, with back pay, benefits and seniority.

In a case decided by Arbitrator Bergeson on December 30, 2014, two officers were given 15-day suspensions for improper use of force (b)(3)

Despite this significant difference in the facts leading up to the officers’ use of force, the officers were initially given the same discipline. The Arbitrator rejected that result, upholding the first officer’s discipline but finding that just cause did not support a 15-day suspension for the second officer.

Similarly, in a case decided by Arbitrator Gaba on December 8, 2015, an Administrative Acting Sergeant without regular supervisory duties was assigned as an Acting Sergeant to supervise a squad during a protest. The City sought to impose a five-day suspension for gross dereliction of duty (b)(3)

(b)(3)

Instead, the Arbitrator found that the evidence only supported a finding that the grievant committed minor violations of the City's rules, which could result in no more than a written warning. He then reduced the five-day suspension to a written reprimand and made grievant whole for any loss of pay or benefits.

In this case, the Discipline Committee determined that Lt. Yu should be demoted for failure to supervise and that the remaining personnel should be terminated for excess use of force. If the officers were in fact culpable, there is a certain symmetry between those disciplinary determinations. However, the modification of Lt. Yu's penalty to a five-day suspension effectively slapping the hand of a commander while lowering the boom on officers who were just following directions.

Officer Phillips' termination – based on his discharge of a non-lethal beanbag – was emblematic of disparate treatment. Here, as noted above, there is no basis for concluding that Officer Phillips engaged in excess use of force for shooting a nonlethal beanbag at Pawlik's shin based on instructions the officer received. Yet, Officer Phillips' was terminated for this action even though his action was deemed to be a "Class 2" rather than "Class 1" violation. Presumably, the classification of his action as a "Class 2" violation was a recognition that the beanbag round he shot was not lethal. However, he was terminated for the stated reason that the shooting resulted in Pawlik's death.

The Compliance Director reduced Lt. Yu's discipline from a demotion to a 5-day suspension based on the established range for the violation under the discipline matrix.⁴⁶ If the consequences of the unlawful use of force was the significant factor that caused the Compliance Director to terminate the beanbag officer, the reduction of Lt. Yu's penalty to a relative hand slap raises an inference of preferential treatment.

The termination of the four officers in the face of Lt. Yu's five-day suspension would be of serious concern if their conduct violated the law and Department policy.

Under the matrix, the disciplinary range for excess use of force is counseling to termination. The range is not immutable, and the discipline can be higher or lower depending on all the facts and circumstances. Excess force that results in a death must be at the upper range, but the truly substantial mitigating factors in this case would auger in favor of suspensions. In my view, reinstatement without backpay would be excessive. These things said, however, it remains my opinion that the charges of excess use of force are not supported by the preponderance of the evidence.

⁴⁶ In fact, the matrix is advisory, and depending on mitigating and aggravating circumstances, the Department can deviate from the range.

RECOMMENDATIONS

1. Based on the foregoing, I recommend that the grievances be resolved as follows:

Officer Josef Phillips: exonerated

Officer William Berger: exonerated

Officer Brandon Hraiz: exonerated

Officer Craig Tanaka: exonerated

2. I recommend that the aforesaid officers be reinstated with backpay, less interim earnings. Reinstatement, however, should be conditioned on and subject to the Department's return to work procedures.

VIII. SUMMARY AND CONCLUSIONS

Some core points emerge from the long, intensive processes this case followed from March 11, 2018. First, this case would likely have been resolved with Pawlik safely in custody without death or injuries if the new policies for dealing with unconscious armed suspects had been both enacted and implemented through training before the incident occurred. The Department knew the issue of how to deal with unconscious armed suspects needed to be addressed from a similar situation in 2015, but evidently a training bulletin or program was not implemented after that incident – a lost opportunity for the officers, sergeant, and lieutenant who were involved in this case, as well as for Pawlik.

Short of training, the situation may well have been avoided had the plan for taking Pawlik into custody included a contingency to put in action if he woke up before the stage was entirely set – one of a number of flaws in the DAT plan that were not of the officers' making. It is also clear that a more thorough and timely investigation would have eliminated crucial doubts about the case, and more effective video technology may well have enabled a definitive post-incident assessment of the risk the officers were facing.

These are all, of course, hindsight reflections that do not resolve the specific question in this case: whether the terminations of these officers were supported by just cause. The answer is that they were not. The officers here were dealt a hand that placed them on the scene, with directions received from their Sergeant after clearance by the Lieutenant who was also on the scene. Their response was in accordance with their training. Because Pawlik awoke before the plan was put into action, the officers were in the potential line of fire, and had the right to respond to an imminent threat of being shot by Pawlik. They had good reason to perceive such an imminent threat and had a right to defend themselves and others who may have been shot if Pawlik had swept his arm further to his right and fired his weapon.

The conflict between the various reviewers – with the EFRB, Chief Kirkpatrick, and CPRA on one side, and the Compliance Director, Discipline Subcommittee and Skelly Officer on the other – is unfortunate and disturbing. It is especially concerning given the Compliance Director’s central role in administering the Consent Decree. Nevertheless, my charge was to assess this case based on the facts and law alone. As this Report has made clear, administrative actions against Oakland police officers are required to take into account and meet well-established just cause and preponderance of evidence standards. The terminations of the four officers met neither of those requirements. Accordingly, it is recommended that they be reinstated with back pay, less interim earnings, with actual reinstatement conditioned on and subject to the Department’s return to work procedures. If, despite my findings, it is concluded that the officers utilized excessive force, a thirty (30) day suspension is recommended for Officers Berger, Hraiz, and Tanaka. Officer Phillips should at most receive counseling (the lowest end of the disciplinary matrix for this offense).

The direction I received as Step 3 designee was to assess this case neutrally, on its merits. I have done my best to abide by that direction.

Respectfully submitted,

Jeff Sloan

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