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**ARBITRATION PROCEEDINGS
BEFORE PAUL GREENBERG**

IN RE: CITY OF OAKLAND AND
OAKLAND POLICE OFFICERS
ASSOCIATION, RICARDO OROZCO
AND CHRISTOPHER MUFARREH

**CITY OF OAKLAND'S
POST HEARING BRIEF**

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I. INTRODUCTION

On March 21, 2009, Grievants Ricardo Orozco and Christopher Mufarreh ordered the Oakland Police Department's tactical entry team into an apartment at 2755 74th Avenue. Two entry team leaders were killed, another was wounded, and the suspect was shot and killed. As Grievants knew, sending armed officers into a suspect's location is one of the most dangerous things a commander can do. In their undue haste to "clear" the apartment, Grievants ignored several Oakland Police Department (OPD) policies and procedures as well as basic principles of critical incident command and control. In particular, they ignored OPD General Order K – 5, which provides that in all cases "a resolution will be accomplished with the utmost consideration given to the safety of citizens, police personnel and all involved parties." Exh. 16, p. 15. Grievants' failure to follow this basic OPD policy led to the death of two officers, the injury of a third officer, and the officer involved shooting and killing of the suspect.

After a comprehensive investigation, the OPD Internal Affairs Division (IAD) concluded that Grievants had committed gross dereliction of duty. An Independent Board of Inquiry separately reviewed the incident and voted unanimously that Grievants had committed gross dereliction of duty. The IAD and Board of Inquiry each issued thorough reports explaining their findings and conclusions.

Chief of Police Anthony Batts, after studying the results of the Homicide, the IAD, and the Board of Inquiry investigations, decided to discipline Grievants. The appropriate range of discipline included termination; the Chief recommended double demotion. In January 2010, the Chief informed Grievant Orozco that he intended to demote him from Captain to Sergeant. In January 2010, the Chief informed Grievant Mufarreh that he intended to demote him from Lieutenant to Officer. Chief Batts also decided to terminate

1 Deputy Chief Dave Kozicki, but Kozicki retired before discipline could be imposed.

2 Grievants exercised their right to request a Skelly hearing, and a Skelly hearing
3 was held in March 2010. Thereafter, the Skelly officer recommended that the allegations
4 of gross dereliction of duties be sustained and, given the gravity of the matter and the
5 factual findings, he concurred with the recommendation that Grievants be given double
6 demotions. In May 2010, Orozco was demoted to Sergeant and Mufarreh was demoted
7 to Officer.
8

9 Grievants now ask the arbitrator to review the facts yet again, come to a different
10 conclusion than that reached by IAD, the Board of Inquiry, Chief Batts and the Skelly
11 Officer, and reinstate them to their former positions. They contend that just cause for
12 discipline does not exist. They argue that it is "impossible to tell tactical commanders
13 how to exercise their discretion because they have to make the best judgment they can
14 under the circumstances at the moment." Vol. 2, p. 45. The City strongly disagrees. The
15 fact that a commander may exercise discretion does not mean that he can ignore policy
16 and exercise poor judgment without facing discipline. The evidence presented to the
17 arbitrator during the seven day hearing, including 23 witnesses and more than 80
18 exhibits, established that there was just cause for the discipline imposed. The grievances
19 should be denied.
20
21

22 II. STATEMENT OF FACTS

23 A. Motorcycle Officers Shot

24 On Saturday, March 21, 2009, at approximately 1:08 p.m., Oakland Police
25 Sergeant Mark Dunakin conducted a routine traffic stop of a maroon sedan. The driver
26 handed Sgt. Dunakin a California driver's license in the name of Jabar Rashid Ali. Sgt.
27 Dunakin relayed the information to the OPD dispatcher who told him that neither the
28

1 name nor the license number was on file. Vol. 1, pp. 38-39.

2 Oakland Police Officer John Hege arrived to cover Sergeant Dunakin. At
3 approximately 1:15 p.m. both officers approached the driver's side of the suspect vehicle.
4 Before they reached the window, the driver leaned out and began firing. Sgt. Dunakin
5 was shot twice in his left neck area. Officer Hege was shot in the left back of his neck.
6 Both officers fell to the ground, facedown. The driver then exited the vehicle and fired a
7 round into each officer's back. Vol. 1, pp. 40-41; Exh. 7, p. 2.

9 **B. OPD's Initial Response**

10 Oakland Police Officers Factore and Smoak were working nearby on an unrelated
11 crime report. They heard the shots and ran to the scene. Exh. 1, p. 4. At 1:16 p.m.
12 Officer Factore radioed, "940B, officer down, 7400 block of MacArthur!" Vol. 1, p. 42; Exh.
13 7, p. 2. Within thirty seconds patrol supervisor Sgt. Donald Covington was also on the
14 scene. Vol. 5, p. 39.

15
16 At 1:17 p.m. two officers broadcast descriptions of the suspect they had obtained
17 from witnesses. The suspect was described as "a male black, light skinned, westbound
18 on MacArthur," and "a male black, 5'8", 150 pounds, all black clothing, light skinned, wire
19 rimmed glasses, direction of flight is south bound on 74th, unknown . . . whether on foot or
20 in car." Exh. 7, p. 3. One of the witnesses told Sgt. Covington he had seen a guy with a
21 handgun run across the street from the shooting and run up 74th. Vol. 5, p. 53. The
22 suspect's direction of flight was updated at 1:19 p.m. as being "south bound on 74th."
23 Exh. 7, p. 3.

24
25 By 1:19 p.m. so many officers had arrived at the crime scene that an officer
26 broadcast, "we have enough units out here. I need units to fan out. Spread out and look
27 for these people!" Exh. 7, p. 4.
28

1 Lt. Drennon Lindsey, the Watch Commander on duty in Area 3, the area of
2 Oakland where the shootings had occurred, radioed immediately for an outer perimeter to
3 be established "ASAP." *Id.* By 1:23 p.m. Acting Lt. Blair Alexander was on the scene,
4 assisting Lt. Lindsey in setting the perimeter. Exh. 7, p. 5. At 1:25 p.m., Lt. Alexander
5 broadcast, "Okay, let me have a sergeant answer up for the outer perimeter and start
6 checking this for me and to lock it down." Exh. 7, p. 6. The dispatcher copied, "Okay, I
7 need a sergeant for the outer perimeter," and immediately call sign 4L74 radioed, "I can
8 grab it." *Id.*

10 At approximately 1:30 p.m. the first Homicide Detective, Sgt. Tony Jones, arrived
11 on the scene. Vol. 3, p. 299. Sgt. Jones spoke to Sgt. Carman and then to Lt. Lindsey.
12 Vol. 3, p. 299. Lt. Lindsey told him that a woman Lindsey knew had told her that she
13 knew where the suspect had gone, which was an address on 74th Avenue. Vol. 3, pp.
14 300-301. Lt. Lindsey pointed the woman out to Sgt. Jones. *Id.* The woman was wearing
15 a blue jacket and a pink hat. *Id.*

17 C. Mufarreh Takes Command

18 Lt. Chris Mufarreh was the on duty Watch Commander for Area 2 when he heard
19 the 940B call. Vol. 6, pp. 196-197. At 1:31 p.m., while he was driving to the scene,
20 Mufarreh broadcast, "do we have a command post set up?" Exh. 7, p. 9. Acting Lt.
21 Alexander responded, "I don't think there's a command post set up." *Id.* Lt. Mufarreh
22 asked where Lt. Lindsey was located, and was told by Acting Lt. Alexander, "Sounds like
23 she's at 74 and Mac. Why don't we set up this command post right here, uh, at the old
24 Eastmont station," located at 73rd Avenue and MacArthur. *Id.* Lt. Mufarreh responded,
25 "Check. I'll be there in a minute." *Id.*

27 When Lt. Mufarreh and Acting Lt. Alexander met at the Eastmont Substation, Lt.
28

1 Mufarreh gave assignments to Lt. Alexander, Lt. Lindsey, and himself.¹ Vol. 1, p. 133,
2 158-159; Exh. 33, p. 4. Lt. Mufarreh told Lt. Alexander, "I'll be in charge of following up
3 on, you know, whatever leads that come in. You take care of the perimeter . . . We'll
4 have Drennon take care of the crime scene." Exh. 27 (IAD Interview), p. 10; Vol. 6, pp.
5 136-137. At 1:37 p.m., Acting Lt. Alexander announced these assignments on the radio:
6 "O.K., so – Lieutenant Mufarreh is going to go ahead and handle any searches that are
7 going to go on during this. I'm Alexander – I'll handle the outer perimeter and, uh,
8 Lieutenant Drennon [Lindsey] will go ahead and handle the scene itself." Exh. 7, p. 12.

10 After meeting with Acting Lt. Alexander, Lt. Mufarreh went to the intersection of
11 74th Avenue and MacArthur, and remained there for "95%" of the incident. Vol. 6, p. 232.

13 **D. Intelligence About The Suspect's Location And Identity**

14 At 1:40 p.m. former OPD Officer Karla Rush telephoned the police
15 communications division and informed the radio room sergeant that she had an informant
16 who was telling her that the suspect was at 2755 74th Avenue in the lower unit. *Id.* Officer
17 Rush then contacted Lt. Ersie Joyner and relayed this information to him. Vol. 1, p. 46;
18 Vol. 3, p. 188. The two of them then had a three way call with (b)(5)(B). Vol. 3, p.
19 189. Lt. Joyner had known (b)(5)(B) as an informant for about fifteen years. Vol. 3,
20 p. 189. In the past, he had known Mr. (b)(5)(B) information to be reliable. Vol. 3, p. 190. Lt.
21 Joyner had been on several operations where search warrants were yielded from
22 information that (b)(5)(B) had provided. Vol. 3, p. 190. Lt. Joyner had no reason to
23 doubt Mr. (b)(5)(B) credibility. *Id.*

25 At 1:45 p.m. Lt. Joyner asked over the radio, "who's the watch commander running
26

27 ¹ Lt. Mufarreh claimed that Lindsey was overwhelmed as a new lieutenant, and that Lt.
28 Alexander was only "acting" as lieutenant that day. At this point, however, Lt. Mufarreh
had not been to the scene and had not interacted with Lt. Lindsey at all. [Vol. 6, p. 307.]

1 the scene? I've got CI [confidential informant] information about where the suspect is. I
2 need a commander to give me a call . . . ASAP." Exh. 7, pp. 16-17. Lt. Mufarreh
3 responded to immediately -- so fast that Lt. Lindsey, who also called Joyner in response
4 to this broadcast, could not get through. *Id.* At 1:48 p.m., after speaking with Lt. Joyner,
5 Lt. Mufarreh broadcast, "everybody in front of this house [referring to 2755 74th Avenue]
6 you guys need to take cover!" Exh. 7, p. 18.

8 At 1:49 p.m. Lt. Mufarreh broadcast, "if we haven't done so, do a blue alert." Exh.
9 7, p. 19.² Lt. Mufarreh did not, however, contact the communications supervisor
10 responsible for sending the blue alert page to tactical team members. As a result, tactical
11 team members did not receive the page until 2:33 p.m. See Exh. 7, p. 37.

12 At 1:54 p.m. Lt. Joyner met with (b)(5)(B) at Hillside and 74th Avenue. He
13 learned that Mr. (b)(5)(B) had been very close to the scene when Sgt. Dunakin and Officer
14 Hege were shot, he had responded immediately, and he had tried to help one of the slain
15 officers. Vol. 1, p. 48; Vol. 3, p. 194. Mr. (b)(5)(B) had seen the suspect run westbound on
16 MacArthur and then southbound on 74th Avenue. Vol. 3, p. 197. He was adamant that
17 the address where the suspect was located was 2755 74th Avenue. Vol. 1, p. 48; Vol. 3,
18 p. 195. Mr. (b)(5)(B) told Lt. Joyner the suspect's sister lived there and that he had seen the
19 suspect's car there several times. Vol. 3, p. 195. Mr. (b)(5)(B) also told Lt. Joyner that he
20 had spoken to a lady named (b)(5)(B) who was out there and told him that the suspect went
21 into that house. Vol. 3, p. 273. Based on his conversation with Mr. (b)(5)(B), Lt. Joyner
22 believed the suspect was likely to be in the apartment. Vol. 3, p. 208. He absolutely
23 believed he had probable cause to get a warrant on that lower unit. Vol. 3, p. 274.

24 Mr. (b)(5)(B) also told Lt. Joyner that he was familiar with the layout of the apartment
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28 ² Initiation of a blue alert is reserved for the incident commander.

1 because his girlfriend had lived there at one time. Vol. 3, p. 198. From where Lt. Joyner
2 and Mr. (b)(5)(B) were meeting, Lt. Joyner could see the building, 2755 74th Avenue, and
3 broadcast a description of it over the radio. Exh. 7, p. 22.

4 By 1:55 p.m. a perimeter had been set around the building. Vol. 1, p. 50.

5 At 1:56 p.m. Lt. Joyner broadcast, "Alright, listen up. When you go inside that
6 building there, there's a short hallway, there's also supposed to be one unit downstairs
7 that's going to be to the right. Um, that's where he, that's where the suspect's been
8 staying, or at least was seen going in there." Exh. 7, p. 23.

9 At 1:58 p.m. Lt. Joyner radioed "for the Watch Commander who's running this, can
10 they 40 [meet] me at 74 and Hillside at their convenience?" Exh. 7, p. 24. He wanted to
11 personally tell the commander what was going on and let him hear what (b)(5)(B)
12 had to say. Vol. 3, p. 210. Lt. Mufarreh responded, "Yeah, I'll just walk down there."
13 Exh. 7, p. 24.

14 At approximately 2:00 p.m., Homicide Sgt. Rachel Van Sloten arrived at Lt.
15 Joyner's position. Sgt. Van Sloten had parked her car on 73rd Avenue, and walked on
16 Hillside toward 74th Avenue, looking for Homicide Sgt. Tony Jones, who she knew had
17 already arrived. Sgt. Van Sloten saw Lt. Joyner and asked him if he could direct her to
18 Sgt. Jones. Vol. 4, pp. 16-17. Lt. Joyner did so, and told her he had an informant in his
19 car that had a good idea where the suspect was hiding. Vol. 4, p. 18. He pointed up the
20 street to the lower right apartment of 2755 74th Avenue. *Id.* Sgt. Van Sloten has known
21 Lt. Joyner for a long time, had found him to have good information all the time, and
22 trusted his information. Vol. 4, p. 22. After talking to him and the informant, she thought
23 the suspect was in the lower right apartment of 2755 74th Avenue. Vol. 4, p. 22.

24 Sgt. Van Sloten was still at Lt. Joyner's position when Lt. Mufarreh arrived, and
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1 she saw him talking with Lt. Joyner and the informant. Vol. 4, p. 19. Lt. Joyner gave Lt.
2 Mufarreh a rundown of what (b)(5)(B) had told him. Vol. 3, p. 214. Lt. Joyner told
3 Lt. Mufarreh that he had a very strong hunch that the suspect was in the apartment. Vol.
4 3, p. 221. He told Mufarreh that the information he received from (b)(5)(B), the fact
5 the suspect had abandoned his car, and the fact that the perimeter was set up so quickly
6 all led him to believe that the suspect was in the apartment. Vol. 3, p. 237.

8 Lt. Joyner also had Mr. (b)(5)(B) tell Lt. Mufarreh what he knew. Vol. 3, p. 214. Lt.
9 Mufarreh asked Mr. (b)(5)(B) very pointedly, did you see him go in there? Mr. (b)(5)(B) told him
10 no, but that he believed that's where he went. Vol. 3, p. 214. At that point, Lt. Mufarreh
11 asked Lt. Joyner to get out of the car. *Id.* Lt. Mufarreh told Lt. Joyner that he had other
12 information that the suspect had possibly gotten into a red Jetta. Vol. 3, p. 215. Mr. (b)(5)(B)
13 who heard this conversation through the open window of the car, leaned out and said,
14 "That's a fucking lie, and if the bitch who told you that has blue hair, that's the suspect's
15 girlfriend." Vol. 3, p. 215. Lt. Joyner asked Lt. Mufarreh if they had the person who had
16 provided this information. Vol. 3, p. 257. Lt. Mufarreh told him that they did; that he
17 thought she was down in Homicide. Vol. 3, pp. 257-258. Lt. Joyner called Homicide and
18 confirmed that it was a girl with blue hair who had provided the information that the
19 suspect had fled the scene in a red Jetta. Vol. 3, p. 258. After learning this, Lt. Joyner
20 told Lt. Mufarreh that he believed (b)(5)(B) and that what he said made sense. Lt.
21 Joyner told Lt. Mufarreh that he had worked with (b)(5)(B) before. Vol. 3, p. 296. Lt.
22 Joyner told Lt. Mufarreh that he "thought Mr. (b)(5)(B) was telling the truth because of the fact
23 that he wasn't trying to put too much on it in regards to – he could have simply said, I saw
24 him go in there, but he was honest and said, 'I didn't. But I think that he's in there.'" Vol.
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1 3, p. 294.³

2 Lt. Mufarreh and Lt. Joyner then met with Acting Lt. Alexander, Sgt. Dan Sakai,
3 and possibly others. Vol. 3, pp. 218-219. Sgt. Sakai said that he had spoken to an
4 officer who was en route with his bloodhound, and Lt. Joyner interjected that they could
5 narrow down the search by letting the dog work off of the vehicle. Vol. 3, p. 219. As the
6 group broke up, it was Lt. Joyner's understanding that waiting for the tracking dog was
7 the game plan. Vol. 3, p. 219.

9 Lt. Joyner broadcast the suspect's location on the radio more than once. At 2:00
10 p.m., Lt. Mufarreh broadcast, "Hold the perimeter because he may not be in here." Exh.
11 7, p. 24. At 2:04 p.m. an officer broadcast, "just an update. Target location, southbound
12 window there's people looking out. 1st level." Exh. 7, p. 26.

14 After leaving Lt. Joyner's position, Sgt. Van Sloten continued eastbound on
15 Hillside to 75th Avenue, turned left, walked to MacArthur, turned left, and met up with Sgt.
16 Jones at the crime scene. Vol. 3, p. 329, Vol. 4, p. 20. Sgt. Jones had been briefed by
17 Lt. Lindsey about a confidential female informant who had information on the suspect's
18 location. Sgt. Jones directed Sgt. Van Sloten to talk to the informant in the pink hat, and
19 to get the woman to show her the suspect's location. Vol. 3, p. 303.

20 At approximately 2:30 p.m. Sgt. Van Sloten introduced herself to the woman in the
21 pink hat. Vol. 4, p. 23. The woman told Sgt. Van Sloten her name was Doris Elaine
22 Walker. Vol. 4, pp. 23, 37. Sgt. Van Sloten and the lady in the pink hat walked up
23 MacArthur to the corner of 74th and then turn left for about 15 feet before coming back.
24 Vol. 3, pp. 304, 331-332; Vol. 4, p. 25. Ms. Walker pointed out the (same) lower
25
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27 ³ Lt. Mufarreh "cannot remember" Lt. Joyner telling him that he, Lt. Joyner, believed the
28 suspect was in the apartment. Vol. 6, p. 221.

1 apartment at 2755 74th Avenue, and said she had seen the suspect's car parked in front
2 of 2755 74th Avenue for three or four days just prior to this incident and had seen a
3 woman who resided in the apartment in the car with the suspect. Vol. 4, p. 25.

4 At 2:25 p.m. Homicide Detective Sgt. Lou Cruz arrived at the scene. Vol. 5, p.
5 116.
6

7 Each of the homicide sergeants, Jones, Van Sloten, and Cruz, testified that
8 although they were yards from Mufarreh's location, neither he nor any commander
9 sought out their collected intelligence. Lt. Mufarreh testified for the first time at the
10 arbitration that at approximately 2:30 p.m., he contacted Sgt. Jones and asked him
11 whether he had any other suspect information or any other witnesses. Vol. 6, p. 236-237.
12 According to Mufarreh, Sgt. Jones told him, "no." Vol. 6, p. 237. Sgt. Jones testified that
13 no such conversation took place. Vol. 3, pp. 311-312.
14

15 At 2:35 p.m. Lt. Brian Medeiros, the commander of the OPD's Homicide Division,
16 arrived on the scene. Vol. 1, p. 52. Sgt. Cruz told Lt. Medeiros that they had found a
17 photo album in the suspect's vehicle that had the name "Mixon" and a California
18 Department of Corrections parole number written inside. Vol. 1, p. 53. Sgt. Cruz told Lt.
19 Medeiros that they were trying to identify the suspect through the parole number. *Id.*
20

21 At 2:50 p.m. the Homicide team queried the parolee number from the photo album
22 and it came back to Lovelle Mixon. Vol. 3, pp. 312, 315; Vol. 4, pp. 29-30. They pulled
23 up Mixon's photograph on a digital booking system in one of the police cars and
24 compared it with the photo on the fake driver's license left at the scene. It was clear to
25 them that Lovelle Mixon was the one they were looking for. Vol. 3, p. 314. The Homicide
26 detectives also found a cellphone in the center console of the car. This told them that his
27 ability to communicate with people was diminished. Vol. 3, pp. 316-317.
28

1 At 2:55 p.m. an Officer at the Eastmont substation was able to locate and print a
2 picture of Lovelle Mixon. See Union Exh. 4.⁴

3 At approximately 2:57 p.m. OPD Sgt. Covington provided Mixon's CDC number to
4 Officer Kevin Kaney. Vol. 5, pp. 15-16. Officer Kaney passed this information along to
5 Officer Omega Crum and Sgt. Sean Knight, who had equipment that allowed them to
6 print pictures of Lovelle Mixon, which they did. Vol. 5, p. 12. When approximately five
7 copies had been printed, Officer Kaney started to pass out the photos to different people
8 on the scene. Vol. 5, p. 13. At this point, the Tactical Operations Support Team (TOST)
9 had not arrived, the SWAT van was not there, and the sniper van was not there. Vol. 5,
10 p. 111. Officer Kaney could not tell where the command post was. Vol. 5, p. 25-26. He
11 did not know who the Incident Commander was. Vol. 5, p. 26. He specifically
12 remembers giving one of the photos to a group of commanders and sergeants standing
13 at 74th and MacArthur, Lt. Drennon Lindsey (who was on MacArthur between 74th and
14 75th), and a group of officers on 74th. Vol. 5, pp. 12-13, 27-28. Officer Kaney does not
15 recall if he saw Captain Orozco, but he believes he did see Lt. Mufarreh at 74th Avenue
16 and MacArthur. Vol. 5, p. 29. Both Orozco and Mufarreh deny seeing the photo of Mixon
17 before entry was made.
18
19

20 **E. Mufarreh Exercises Command**

21 Prior to the arrival of the entry team, Sgt. Andreotti and two deputy sheriffs
22 pressured Lt. Mufarreh to let them take a couple of patrol riflemen into the apartment to
23 "clear it real quick . . . and move on," but Lt. Mufarreh told them no. Vol. 6, p. 224.
24 Instead, he placed Sgt. Andreotti in charge of the Designated Arrest Team (DAT) and
25
26

27 ⁴ Grievants' investigator suggested that although time stamped 1:55 p.m., this photo was
28 not printed until 2:55 p.m.

1 inner perimeter for 2755 74th Avenue. Vol. 1, p. 134; Vol. 6, p. 225. He told Sgt.
2 Andreotti, "we got enough people here. Just lock it down. Let's just wait for the entry
3 team to come out, let them deal with it." Vol. 6, p. 225. See also Vol. 6, p. 230. At 2:05
4 p.m. Mufarreh broadcast, "Alright, uh, 2755 74th Avenue, Sergeant Andreotti is in charge
5 of that location. Any other sergeant out here needs to meet me at MacArthur and 74th for
6 a new assignment." Exh. 7, p. 26; Vol. 6, p. 230.

8 **F. Orozco Exercises Command**

9 On March 21, 2009, Captain Orozco was responsible for Area 2. Both Lt.
10 Mufarreh and Lt. Joyner reported to him. At 2:22 p.m. Captain Orozco called Lt.
11 Mufarreh, and they talked for approximately 3 minutes. Exh. 7, p. 33. Mufarreh told
12 Orozco "information that [he] had about the suspect, the suspect's location and the car
13 being out there." Vol. 6, p. 241. Mufarreh told Orozco the information he had received
14 from Lt. Joyner. Vol. 6, p. 245. Mufarreh recommended that they send an entry team
15 into the apartment. Vol. 7, p. 317.

17 Captain Orozco also called Lt. Joyner and asked him what was up. Vol. 3, pp.
18 275. Lt. Joyner told Captain Orozco he was working on trying to figure out who the guy
19 was. He told him, "we're trying to get a photo, but the information we have is that he
20 might be at 2755 74th Ave." Vol. 3, p. 275.⁵

22 At 2:28 p.m. Captain Tracey, the Oakland Police Department's SWAT Team
23 Commander, called Captain Orozco and they talked for approximately two minutes. Exh.
24 7, p. 35; Vol. 1, p. 160. Captain Tracey asked Orozco where he was. Orozco told him he
25 was driving to the hospital. Captain Tracey said, "Rick, I need you to go out to the scene
26

27 ⁵ Orozco denies that Joyner told him anything in regards to a suspect being inside that
28 location. Vol. 7, pp. 259-260.

1 to take over tactical command." Vol. 7, p. 251. Orozco told Captain Tracey that he
2 would. Vol. 7, pp. 251-252.

3 **G. Orozco And Mufarreh Exercise Tactical Command**

4 At approximately 2:36 p.m. Captain Orozco met up with Lt. Mufarreh at the scene.
5 Vol. 6, p. 240; Vol. 7, pp. 253-255, 323. Mufarreh took Orozco on a walk through of the
6 crime scene, pointing things out, which took a couple of minutes. Vol. 6, p. 242. At some
7 point Mufarreh pointed out 2755 74th Avenue as a possible suspect location. Vol. 7, pp.
8 256-257.

10 At 2:38 p.m. Lt. Mufarreh broadcast that the tracking dogs would arrive "in a
11 couple minutes," and that they were going to meet him at 74th and MacArthur. Exh. 7, p.
12 39. He responded to Sgt. Sakai's broadcast that the entry team is "at 75 and Ney right
13 now," "I appreciate if they can come here to my location just so we have everything kind
14 of close by." Exh. 7, p. 39.

16 At some point between 2:38 p.m. and 2:45 p.m. a canine officer entered the crime
17 scene and encountered Lt. Medeiros. Vol. 1, p. 54. The officer informed Lt. Medeiros
18 that the plan was "to do a K-9 track from the car to the location." Vol. 1, p. 54.

19 At 2:45 p.m. the OPD's helicopter, ARGUS, was in the air above the scene.
20 ARGUS asked for the location and was informed "74th and Mac, sir." Exh. 7, p. 42.
21 ARGUS responded, "just realized the last known location is only a building away from the
22 CP. I don't know if they want to move it, uh, a little further away or not." Exh. 7, p. 42.

24 At approximately 2:45 p.m. Deputy Chief Kozicki arrived. Vol. 6, pp. 243, 281. A
25 meeting was held that included Kozicki, Orozco, Mufarreh, Lindsey, and Sgt. Erv Romans,
26 although Romans was not there for the entire meeting. Vol. 7, pp. 258-259. The others
27 present were briefed by Lt. Mufarreh
28

1 about what had occurred and what information was known at that time, that a
2 suspect had shot two officers, that information was being received that the suspect
3 had run southbound on 74th Avenue. There was a discussion regarding
4 Lieutenant Joyner having an informant and Lieutenant Joyner saying that the
5 informant had made some comments about the suspect having some ties to the
6 unit.

7 Vol. 7, p. 259. Lt. Mufarreh told them

8 that the perimeter had not been set up 20 to 30 minutes after the initial incident;
9 that there was some information that the suspect may have ties to this unit at 2755
10 74th Avenue. We were – one of the first things that we thought of is we would
11 need to search that unit because there were several officers around that location
12 so we were concerned about that. But even bigger is that no active searches had
13 taken place in that general area.

14 Vol. 7, p. 262.

15 According to Orozco, the leaders also started discussing less lethal options at this
16 meeting. Vol. 7, p. 347. Mufarreh testified that he only heard a brief conversation about
17 options, which took place between Kozicki and Orozco and possibly Erv Romans, and
18 that he was just listening. Vol. 6, p. 276-277. At the arbitration hearing, Orozco testified
19 for the first time that after the meeting Mufarreh described a second meeting took place,
20 at 2:52 p.m., which did not include Mufarreh. Vol. 7, p. 277. According to Orozco, the
21 discussion of options continued at this second meeting, a fact he never mentioned in his
22 earlier statements to CID and IAD. Orozco claimed that Kozicki, Lindsey Romans, Sakai,
23 Gonzales, and Beaver attended this meeting. Vol. 7, pp. 265-266. Sgts. Gonzalez and
24 Beaver, however, have consistently denied being present for any such meeting. Vol. 3,
25 pp. 34, 42, 133.

26 According to Orozco,

27 The deputy chief was very concerned about the K – 9 track because we've never
28 done a K – 9 track with the tactical team. So he was concerned that we would be
using a tactic that we had never used before on the tactical team. This was
probably not the right setting to do something without doing the proper training.
So he ruled that out. . . . We again discussed the issues of gas. We again
discussed the issues of the throw phone. We again discussed the issues of a

1 bullhorn.

2 Vol. 7, p. 267. According to Orozco, Sakai told them that the fire escape didn't go all the
3 way down and the stairway was unworkable. Orozco says Sakai also told them "that if
4 there was an evacuation, they would have to walk citizens in front of the suspect
5 location." Vol. 7, p. 268.

6
7 Orozco testimony about this second meeting, which he claims lasted from 2:52
8 p.m. until 2:56 p.m, Vol. 7, p. 351, is not only contradicted by Sgts. Gonzelez and Beaver
9 but by his cellphone records. Orozco testified that it was after this second meeting that
10 he spoke to Mufarreh, who had been pulled away by Deputy Chief Breshears, by phone.
11 Vol. 7, p. 269-270. But the phone records show that Orozco was on the phone with
12 Mufarreh from 2:52 p.m. to 2:54 p.m. Exh. 7, p. 44.

13
14 At 2:56 p.m., having returned to 74th and MacArthur, Mufarreh broadcast, "Yeah,
15 are any of the SWAT, uh, command, er, not commanders but, uh, team leaders, uh, on
16 scene yet?" Exh. 7, p. 45. Sgt. Gonzalez responded, "Affirm, Lieutenant, at 75 and Mac
17 waiting for the track." Exh. 7, p. 45. Lt. Mufarreh then said, "Alright, you, you guys are
18 all, uh . . . can, can you . . . who is this?" Gonzalez responded, "Gonzalez, Romans is
19 here, Beaver and Reilly." Mufarreh then said: "O.K. We initially put out the, uh,
20 command post for the SWAT guys at 73rd and um, actually, why don't you give me a
21 call?" Gonzalez "copied." Exh. 7, p. 45.⁶ Notably, this exchange is consistent with the
22 entry team's resounding testimony that they had no prior communication with Lt.
23

24
25 ⁶ Mufarreh testified that at 2:56 p.m. Romans was with him at 74th and MacArthur. Vol. 7,
26 p. 50. He said that during this time Romans learned that entry was a possibility and that
27 Mufarreh assumed he shared this with the rest of the entry team. Vol. 7, pp. 53-54.
28 However, Mufarreh also testified that the reason he radioed at 2:56 p.m., "Are any of the
SWAT commanders, uh, team leaders on scene yet?" was that he didn't know where
Romans was and assumed he had gone back to 73rd and MacArthur. Vol. 7, p. 55.

1 Mufarreh or Captain Orozco.

2 Between 2:57 p.m. and 2:58 p.m. Sgt. Gonzalez and Lt. Mufarreh spoke by
3 cellphone. Exh. 7, p. 45. During this call Sgt. Gonzalez told Mufarreh that the tactical
4 team was at 75th Avenue and MacArthur waiting on the dogs to start the track. Vol. 3, p.
5 32. Lt. Mufarreh responded, "No, before you do that, please come down to 74th Avenue
6 and MacArthur to meet with me first." Vol. 3, p. 33. Up to this point Sgt. Gonzalez had
7 had no discussions with a commander about options other than a K – 9 tracking plan.
8 Vol. 3, p. 34. He did not know that entry was even being considered as an action plan.
9 Vol. 3, p. 42. Nor did Sgt. Beaver. Vol. 3, p. 133. Nor did Sgt. Reilly. Vol. 3, p. 149. In
10 sum, the entry team leaders testified that they knew of no action plan other than the K-9
11 tracking plan at this point.
12

13
14 **H. Orozco And Mufarreh Order The Tactical Entry Team To Clear The
Apartment**

15 Sgt. Gonzalez gathered the tactical entry team, they walked to 74th and MacArthur,
16 and they met with Lt. Mufarreh and Captain Orozco shortly after 2:58 p.m. Vol. 3, p. 35;
17 Vol. 7, pp. 51-52. Orozco asked Mufarreh to brief the team "on the information as far as
18 what we knew at that time," but Orozco was present for the briefing. Vol. 7, p. 272.⁷
19 Mufarreh told the team, "to clear the apartment prior to starting the K – 9 track." Vol. 7, p.
20 47. Mufarreh told the team that there was no real intelligence that the suspect was in that
21 apartment. Vol. 3, pp. 41-42. The team was not told that Lt. Joyner had an informant
22 who believed the suspect was in the apartment, that there was another confidential
23 informant who placed the suspect in the apartment, or that Homicide had developed
24
25

26 ⁷ Orozco testified that Mufarreh told the team that the track was not going to occur. Vol.
27 7, p. 273. Mufarreh testified that he told the team they were "not going to use the [K – 9]
28 track" because it was "too dangerous." Vol. 6, p. 266.

1 information about the suspect. Vol. 3, pp. 94-95. Mufarreh spoke for less than two
2 minutes. Vol. 3, pp. 35, 108 (Sgt. Gonzalez, Sgt. Beaver). As the team was walking
3 away, Mufarreh "identified a team leader." Exh. 25, p. 27.

4 Orozco told the entry team that when they were ready, he would put out the Code
5 33, the order for radio silence, and hold the air. Vol. 7, p. 275. At 3:02 p.m., as the entry
6 team was walking from the Bearcat parked across the street from 2755 74th Avenue to
7 the suspect's apartment, Captain Orozco advised by radio that the "tactical team's going
8 to be going in checking in the address . . . 2755 74th Avenue. I'd like radio silence.
9 Sergeant Gonzalez will be leading the team. Just advise units on the perimeter there will
10 be less lethal, uh, possibly deployed. I want code 33 now." Exh. 7, p. 46. There were a
11 total of eight Oakland Police Department Sergeants and Officers on the entry team: Sgt.
12 Gonzalez, Sgt. Sakai, Sgt. Romans, Sgt. Reilly, Sgt. Beaver, Officer Leite and Officer
13 Anwan Jones.
14

16 **I. Entry And Its Tragic Consequences**

17 At 3:02 p.m. Sgt. Van Sloten was on her way to share the information the
18 Homicide team had developed with the commanders, but as she reached the southeast
19 corner of 74th and MacArthur, she saw the entry team already walking toward the
20 apartment. Vol. 4, pp. 37-40, 76. She saw the entry team stack up and enter. Vol. 4, p.
21 41. She heard a flash bang device. She was shocked, as were the other Homicide
22 investigators in the immediate vicinity. Vol. 1, pp. 70-72; Vol. 3, pp. 308, 320-321; Vol. 4,
23 p. 36, 42. Vol. 5, p. 130, 165. Typically, in a situation where Homicide is involved in an
24 investigation and there is a tactical operation associated with the homicide, there is
25 information sharing between Homicide and the tactical team. Vol. 5, pp. 126, 156-159,
26 165. In all other cases Sgt. Van Sloten had been involved in, the practice had been to
27
28

1 exchange information and learn as much as possible before deciding to enter. Vol. 4, p.
2 81. It was also the practice to inform officers on the scene before an entry was going to
3 be made. Vol. 4, p. 81. Here, that didn't happen, even though the Homicide team was at
4 a place where if a bullet had flown, they could have been struck. Vol. 4, pp. 81-82, 90.

5 At 3:04 p.m. Captain Orozco broadcast, "if we don't have it out here right now, can
6 we get an ambulance to standby?" Exh. 7, p. 47. (No ambulance was present before or
7 at the time of entry.)

8 At 3:05 p.m. shots were fired. *Id.* Officers broadcast "Oh fuck!" and "Officer
9 down, officer down." *Id.* At 3:07 p.m. Sgt. Mike Reilly advised, "We have one officer
10 down – we have a suspect down. I need code 3 at the front door, copy?" Exh. 7, p. 48.
11 He is told, "It's coming, it's coming." *Id.*

12 At 3:08 p.m. an ambulance still had not arrived on scene. Sgt. Erv Romans was
13 placed in the back of an unmarked police car and driven to Highland Hospital with an
14 officer doing CPR in the back seat. He had been shot in the head by Lovelle Mixon. Sgt.
15 Romans had been an Oakland Police Officer for 13 years. He was pronounced dead
16 within a half hour of being shot. Vol. 1, pp. 62, 65-66. Eventually, Sgt. Dan Sakai was
17 placed into the Bearcat and driven to Highland Hospital. Vol. 1, p. 62. He, too, had been
18 shot in the head by Lovelle Mixon. Sgt. Sakai had been an Oakland Police Officer for
19 nine years. He was pronounced dead within two hours of being shot. Vol. 1, p. 65. Sgt.
20 Gonzalez was also shot by Lovelle Mixon: his helmet was grazed and he took a through
21 and through to his left trapezoid. Vol. 1, p. 66. Lovelle Mixon then was shot multiple
22 times by Officer Mike Leite, Sgt. Gonzalez, and Alameda County Deputy Sheriff Pope.
23 Vol. 1, p. 66.

24 At 3:12 p.m. Deputy Chief Kozicki went on the air and advised, "I'm gonna assume
25
26
27
28

1 command here. I need all non-SWAT personnel off of 74th. All non-tactical team
2 personnel off 74th now. . . . O.K., I need, someone to designate themselves as a, uh,
3 team lead, tactical team lead, down there. Who do we have? Speak up. A sergeant?"
4 Exh. 7, p. 50.

5 **III. PROCEDURAL HISTROY**

6 **A. The Internal Affairs Division Investigation**

7 The Oakland Police Department's Internal Affairs Division (IAD) investigated
8 various disciplinary charges related to the officer involved shootings on March 21, 2009.
9 The subjects of the IAD investigation regarding command and control of the incident were
10 Lt. Mufarreh, Captain Orozco, and Deputy Chief Kozicki. Vol. 1, pp. 156-157.⁸

11 On August 30, 2009, IAD completed its 332 page Investigative Report. Exhibit 1 is
12 a true and correct copy of that Report. Vol. 1, p. 151. IAD determined that there was a
13 preponderance of evidence establishing that Mufarreh, Orozco and Kozicki had engaged
14 in acts and omissions during the course of this incident which, taken together, constituted
15 gross dereliction of duty, a violation of the OPD Manual of Rules, section 234.12,
16 Commanding Officers – Authority and Responsibilities. Exh. 1, p. 325-328; Vol. 6, pp.
17 32-36.⁹ Section 234.12 provides:

18
19
20
21
22 ⁸ These three commanders were also investigated with respect to the truthfulness of their
23 statements that Lt. Drennon Lindsey had not told them about her informant, Doris Elaine
24 Walker. In turn, Lt. Lindsey was investigated with respect to the truthfulness of her
statement that she had told Kozicki, Orozco and Mufarreh about informant Doris Elaine
Walker. Vol. 1, p. 157; Vol. 6, p. 9.

25 ⁹ IAD concluded that the truthfulness allegations against Kozicki, Orozco and Mufarreh
26 were not sustained. Vol. 6, p. 115. Not sustained means that there was not a
27 preponderance of evidence to prove one way or the other. Vol. 6, p. 116. IAD concluded
28 that the truthfulness allegation against Lt. Lindsey was unfounded. Vol. 6, p. 116. Unfounded means that it is more likely that it was not true, or did not occur. Vol. 6, p. 116. IAD explained the reasons for its conclusions in its Report. See Exh. 1, pp. 287-

1 Subject to direction from higher command, a commanding officer has direct
2 control over all members and employees within his/her command. In
3 addition to the general and individual responsibilities of all members and
4 employees and supervisory officers, a commanding officer is responsible
5 for the following:

6 COMMAND The inspection, direction, and control of personnel under
7 his/her command to assure the proper performance of duties and
8 compliance with established rules, regulations, policies and procedures.

9 Exh. 13, p. 8.

10 Lt. Sean Whent, the Acting Captain supervising IAD, personally supervised the
11 investigation. Vol. 1, p. 146-147. The investigators were Sgt. Jake Floyd and Sgt. Tim
12 Shaver. Vol. 6, pp. 81, 85. The IAD investigators reviewed the recorded interviews done
13 by the Homicide Division (CID), and they conducted additional interviews. They reviewed
14 the police reports concerning the events of March 21, 2009, the photographs, the video
15 evidence, the CAD purges, the radio purge, the radio transmissions from that day, and
16 telephone records from the commanders involved. Vol. 1, pp. 148-149. The IAD Report
17 includes summaries of the witness statements and descriptions of the evidence. Exh. 1,
18 pp. 1. The IAD Report also sets forth analysis and findings, including the key finding that
19 there was a serious breakdown of command and control of the incident. Exh. 1, pp. 276-
20 317.

21 The controlling policies that IAD looked at with respect to command and control
22 issues were OPD General Orders K – 5 and M – 4. Vol. 1, p. 166; Exhs. 16 and 17.
23 General Order K – 5 covers tactical operations. Vol. 1, p. 166. Anyone who serves on
24 the tactical team is trained on K – 5. Vol. 3, pp. 14-15. Before an officer can be
25 promoted to tactical commander, he is tested on K - 5. Vol. 3, pp. 15-16. General Order
26 K- 5 provides that:

27 290, 329-331.

1 Incident resolution will be accomplished through courses of action
2 appropriate for the circumstances. **In any event, a resolution will be**
3 **accomplished with the utmost consideration given to the safety of**
4 **citizens, police personnel and all involved parties.** Common courses of
5 action, which may be used alone or in combination, are as follows:

- 6 (1) Containment,
- 7 (2) Evacuation,
- 8 (3) Wait the situation out,
- 9 (4) Establish control over environmental conditions,
- 10 (5) Negotiations via bullhorn, telephone or throw phone,
- 11 (6) Order the subject to come out and surrender,
- 12 (7) Use of chemical agents and/or other less lethal weapons,
- 13 (8) Sniper employment,
- 14 (9) Breach and entry of the objective site, and
- 15 (10) Mobile operations in the event that the suspect is mobile.

16 Vol. 1, pp. 168-169; Exh. 16, p. 15 (emphasis added).

17 General Order K – 5 also sets forth the responsibilities of the Incident Commander
18 and the Tactical Commander. Exh. 16, pp. 10-13. The responsibilities of the Incident
19 Commander include:

- 20 (1) Establish an inner perimeter,
- 21 (2) Establish an outer perimeter,
- 22 (3) Establish an Incident Command Post in a strategic location as soon as
23 practical. He/she shall manage the command post operations and
24 normally conduct operations from that location,
- 25 (4) Assume overall command of the entire incident, to include all support
26 functions,
- 27 (5) Act as the focal point of all directives or orders from any Departmental,
28 City, or outside agency official,
- (6) Ensure the evacuation of any injured parties and ensure medical aid is
provided as needed,
- (7) Designate a dedicated arrest team to take custody of the suspect(s)
should he/she surrender or attempt to escape, and to react to exigent
circumstances until the arrival of the Tactical Operations Team,
- (8) Ensure the safe and orderly evacuation of bystanders and residents who
may be in danger,
- (9) Request standby assistance from outside agencies, such as
ambulances and the Fire Department when necessary, and establish a
communication system with them,
- (10) Gather available intelligence information, including information about
suspect(s) and hostages, and prepare exterior and interior scene
diagrams,
- (11) Direct personnel at the scene NOT to take individual action which

1 may jeopardize anyone's safety (nothing in this order should be
2 interpreted to prevent an officer from acting in the event his/her, or
3 someone else's life, is in immediate danger). The Incident
4 Commander's intent is normally to avoid confrontation in favor of
controlling and containing the situation until the arrival of the Tactical
Operations Team.

5 Exh. 16, pp. 10-11. The responsibilities of the Tactical Commander include:

- 6 (1) Receive a briefing from the Incident Commander and once he/she
7 deploys the Tactical Operations Team, assume tactical responsibility of
8 the incident scene (normally defined as the area from the inner
perimeter in),
- 9 (2) Designate a Tactical Command Post if different from the Incident
Command Post,
- 10 (3) Designate an assembly area for arriving Tactical team personnel,
- 11 (4) Deploy an Emergency Response Team (ERT) – a team of Entry Team
12 (and at times Snipers) officers with a team leader that responds to the
objective as soon as they are dressed and equipped to relieve and take
over the duties of the dedicated arrest team and other responsibilities as
determined by the situation,
- 13 (5) Assign team leaders, within their areas of expertise,
- 14 (6) Develop tactical plans and courses of action,
- 15 (7) Establish operations-specific Rules of Engagement,
- 16 (8) Assume Tactical Command of the tactical operation upon the execution
of the authorized course of action.

17 Exh. 16, pp. 12-13. With regard to tactics of incident resolution, General Order K – 5
18 provides:

19 The Incident Commander is responsible for determining and approving the
20 appropriate course of action and the concept of the operation, based upon
21 recommendations from the Tactical Commander and other Incident
22 Command staff. Once deployed, the Tactical Commander is responsible
for directing and controlling tactical resources, and for the methods and
tactics used to accomplish the mission.

23 Exh. 16, p. 15.

24 General Order M – 4 concerns the coordination of criminal investigations. Section I
25 (E) provides:

- 26 (1) The ranking supervisor or command officer shall assume command at
27 the scene of a crime and shall be briefed on the circumstances of the
incident by the preliminary investigator. He/she shall be responsible for
28 directing the activities and tasks of the department personnel at the

1 crime scene.

2 (2) Tactical decisions shall be made by the ranking Patrol Division member
3 at the scene in accordance with the provisions of Departmental General
4 Order K – 5, Tactical Operations Team.

5 Exh. 17, p. 3.

6 In addition to General Orders K – 5 and M – 4, Grievants contend that OPD
7 Training Bulletin III – P, Barricaded Subject Incidents, applies. See Exh. 55. Among
8 other things, this policy provides that “an entry team is used in the event negotiations fail
9 in a hostage situation or chemical agents are ineffective. In accordance with department
10 policy on the use of escalating levels of force, less dramatic tactics must have been
11 attempted or ruled inapplicable before a forced entry is ordered.” Exh. 55, p. 7.

12 IAD’s analysis of the facts compelled its conclusion that OPD policies had been
13 violated by Grievants, warranting discipline. Exh. 1, pp. 263-317, 325-329. IAD’s
14 analysis is compelling and its findings are amply supported, as discussed below. See *id.*

15
16 **B. The Independent Board Of Inquiry**

17 OPD has a policy of establishing Force Review Boards in officer involved shooting
18 cases. Vol. 1, p. 222; Exh. 18. Force Review Board members are charged with
19 reviewing the record and determining whether or not to support the IAD’s findings on
20 disciplinary charges. Exh. 18; Vol. 2, p. 249. Ordinarily, OPD’s three deputy chiefs make
21 up the Force Review Board. However, because Deputy Chief Kozicki was a subject of
22 the investigation and the other deputy chiefs were on the scene on March 21, 2009,
23 Acting Chief Howard Jordan decided to put together a fully independent Board of Inquiry
24 to conduct a fair, impartial and transparent inquiry in this case. Vol. 1, p. 223; Vol. 4, p.
25 224.
26

27 Five police commanders with expertise in tactical procedures were chosen for the
28

1 Independent Board of Inquiry. Vol. 7, p. 256. The Board included: (1) then Pasadena,
2 California, Police Chief Bernard Melekian (now the Director of the U.S. Department of
3 Justice Community Policing Program); (2) Los Angeles Sheriff's Department Captain
4 Philip Hansen, a nationally recognized tactical operations expert; (3) Los Angeles Police
5 Deputy Chief Richard Roupoli, Special Operations Bureau; (4) Los Angeles Police
6 Internal Affairs Division Commander Richard Webb; and (5) Alameda County Sheriff's
7 Department Deputy Chief Brett Keteles, commander of special operations. Exh. 3, p. 7;
8 Exh. 5; Vol. 1, pp. 229-230. Each of the Board members was provided with all of the
9 voluminous records of the Homicide investigation and the IAD investigation. Vol. 1, p.
10 226.
11

12 In September 2009 the Board convened for a three day hearing in Oakland. Vol.
13 1, p. 226. Lt. Medeiros and Sgt. Cruz gave a presentation of the results of the Homicide
14 investigation and answered questions posed by Board members. Vol. 1, p. 227. IAD
15 Commander Sean Whent and IAD investigators Jake Floyd and Tim Shaver gave a
16 presentation of the results of the IAD investigation and answered questions posed by
17 Board members. Vol. 1, pp. 227-228, 245. A criminalist also gave a presentation to the
18 Board. Vol. 1, pp. 227-228. It is not the practice to have subjects present to answer
19 questions at Force Review Boards. Vol. 6, p. 29. However, Grievants' taped statements
20 to Homicide and IAD were made available to the Board.
21

22 After deliberating, the Board voted unanimously to support the disciplinary findings
23 of IAD with respect to command and control. Vol. 1, pp. 232, 248; Vol. 2, p. 249; Exh. 3,
24 pp. 35-39.¹⁰ Exhibit 3 is a true and correct copy of the Board's Report of Findings and
25
26

27 ¹⁰ With respect to the truthfulness allegations, the Board agreed that the allegation was
28 not sustained against Orozco and Mufarreh. Exh. 3, pp. 52-53. The Board disagreed
that the allegation against Lindsey was unfounded, and recommended a finding of not

Recommendations. Vol. 1, p. 231. The Board's findings were based on command and control deficiencies they identified in their report, including the following:

Responding commanders did not establish an appropriate command post.

Neither in the initial response nor in the subsequent hours did any command individual announce themselves as the Incident Commander.

Information on the suspect was either not transmitted or not received by persons who had placed themselves into a decision-making capacity.

The location of 2755 74th Avenue was not formally scouted.

The officers enforcing security perimeters, the specialized search teams, and the Entry Team were not given a photograph of Nixon when it was made available by investigators. Without the photograph, many of these officers lacked a common situational awareness and were not aware of how to identify the suspect beyond the verbal physical description.

Absent exigent circumstances, there was no urgency to order an expedited entry into the apartment.

Statements provided by commanders involved in the decision to enter the suspect apartment showed a fundamental lack of understanding concerning basic principles surrounding fresh pursuit and lawful warrantless entries.

Every alternative to dynamic entry was ignored (e.g., evacuations, bullhorn/PA announcements, location information development, and use of chemical agents, developing an appropriate Tactical Command Post) and dismissed with little or no discussion among team members or command personnel.

Exh. 3, pp. 2-4.

Two of the Board members appeared at this arbitration. Vol. 2, pp. 108-295. Los Angeles Sheriff's Captain Philip Hansen testified that he was a tactical commander for 12 years, has taught tactical operations, participated in a California commission to write the guidelines for special operations, and has participated in hundreds of tactical operations.

sustained. Exh. 3, p. 53. The Board explained that since the allegations against Orozco and Mufarreh were not sustained, the allegation against Lieutenant Lindsey must also be not sustained. *Id.*

1 Captain Hansen testified that OPD's policies and procedures for tactical operations were
2 in line with common practice and standards. Vol. 2, p. 166. He also explained the basic
3 rules of tactical command, and the ways in which they were broken in this case. Vol. 2,
4 pp. 108-241.

5 Assistant Alameda County Sheriff Brett Keteles testified that as a commander of
6 Alameda County's tactical team he had worked closely with the OPD's tactical
7 commanders on numerous occasions prior to March 2009. Vol. 2, pp. 244, 255.

8 Assistant Sheriff Keteles was thus in a position to compare what occurred in this case
9 with what he knows to be OPD's customary approach during a tactical incident. Vol. 2,
10 pp. 244-248. He testified that Grievants' actions on March 21, 2009, were not in accord
11 with OPD's customary procedures and practices.

12 Grievants have picked out alleged factual errors in the Board's report. See Vol. 4,
13 p. 258. The purported errors include (1) that Lindsey's informant had actually seen the
14 suspect enter the apartment; (2) that Orozco was only on scene for ten minutes before
15 entry was made, and (3) that the picture of Mixon was available for an hour before entry
16 was made. The Board members testified that the correction of these alleged errors
17 would not alter their decision to support IAD's findings that Grievants' committed gross
18 dereliction of duty on March 21, 2009. Vol. 2, pp. 270-272.

19 **C. The Decision Of The Chief Of Police**

20 Pursuant to OPD policy, it is ultimately the Chief of Police's decision what
21 recommendation to make regarding the level of discipline to be imposed. Vol. 4, p. 114.
22 He makes this recommendation to the City Administrator. *Id.* The City Administrator can
23 accept or reject the Chief's recommendation. In this case, he accepted it.

24 Chief Anthony Batts became Oakland's Chief of Police in October 2009,
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1 approximately six months after this incident occurred. Vol. 4, p. 94. Between November
2 and December 2009 he received numerous briefings on the incident from command staff.
3 Lt. Sean Whent, who was in charge of Internal Affairs, gave him an initial briefing. Vol. 4,
4 p. 96. He then had at least three follow up briefings with Lt. Whent, Lt. Medeiros, and his
5 executive staff. Vol. 4, pp. 97, 231. He was given copies of the Internal Affairs Report,
6 the Homicide report, and the Board of Inquiry Report, which he read several times. Vol.
7 4, p. 98.

9 After reviewing the materials and asking questions, Chief Batts had serious
10 concerns with the handling of the scene on March 21, 2009. Vol. 4, p. 99. It was clear to
11 him that the decision to enter was one-dimensional and failed to take into account the
12 multiple factors listed in General Order K – 5. Vol. 4, pp. 113-114. Chief Batts agreed
13 with the IAD's and the Board's determination that the command officers, Kozicki, Orozco,
14 and Mufarreh, had engaged in gross dereliction of duty. Vol. 4, p. 100. As he explained:

16 I think there was a failure at all three levels.

17 I think there was a failure at the Lieutenant level for not gathering the
18 information and doing multiple steps on the front end [before making] the
19 decision in the first place and giv[ing] the direction.

20 In think there was a failure on the part of the captain, who came on
21 scene who had prior experience, [who] had the ability to say stop, slow this
22 down, who failed to do that.

23 I think there was a failure on the deputy chief's part, who came with
24 tremendous amount of experience, who heard what was going on who had
25 the responsibility to say stop and slow down. So there was multiple levels
26 of failure.

27 Vol. 4, pp. 160-161.

28 According to the OPD disciplinary policy and matrix, Exhibits 14 and 15, the range
of penalty for a violation of Section 234, Commander Responsibilities, Gross Dereliction
of Duties, is suspension for 30 days to termination. Vol. 1, p. 212. Under Oakland's
disciplinary policy, the death of an officer is an aggravating circumstance. Vol. 6, p. 175.

1 Chief Batts debated the discipline to be imposed with his staff and thought about it for
2 many days. Vol. 4, p. 115. The initial consensus of the group was termination for all
3 three. Vol. 4, p. 117. Chief Batts' decision to terminate Deputy Chief Kozicki never
4 changed. Vol. 4, p. 119. (Deputy Chief Kozicki retired prior to discipline being
5 implemented. Vol. 1, p. 158.) However, Chief Batts came to view the Deputy Chief's
6 presence on the scene as a mitigating factor with respect to Orozco and Mufarreh, and
7 decided that rather than terminate them he would recommend that each be given a
8 double demotion. Vol. 4, pp. 120-124, 233-234; Exhs. 19 and 20. He made this
9 recommendation to City Administrator Dan Lindheim, and the City Administrator agreed
10 with the decision. Vol. 4, pp. 121-122; Exhs. 11 and 12.

12 **D. The Skelly Hearing**

13 Pursuant to Article XI of the Memorandum of Understanding that governs relations
14 between the City and Grievants, "employees shall receive fair treatment and shall be
15 disciplined only for just cause." Joint Exh. 70, p. 15. A grievance involving disciplinary
16 action taken against an employee must first be submitted in writing to the Chief of Police.
17 *Id.* Should the grievance remain unresolved after consideration by the Chief, the
18 employee may submit the grievance in writing to the Director of Personnel. *Id.*

19 Orozco's and Mufarreh's grievances remained unresolved after consideration by
20 Chief Batts. Grievants submitted their grievances to the Director of Personnel, and he
21 designated Joseph Brann to attempt to resolve the grievances. On March 17, 2010, a
22 Skelly hearing was held before Mr. Brann. Grievants appeared along with their attorney,
23 Michael Rains. Grievants had been provided with copies of the entire IAD file concerning
24 the investigation more than two months before this hearing. See Exhibits 21, 22. At the
25 hearing, Mr. Rains provided oral arguments and extensive written materials in support of
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1 Grievants' position that there is no proof they were responsible for gross dereliction of
2 duty. See Exhibit 8. Grievants' materials were discussed during the hearing and Mr.
3 Brann subsequently reviewed them in detail. Exh. 10, p. 1.

4 Based on the Skelly Officer's review of all the materials and interviews, he found
5 that the conclusions reached and the findings made by both the Board and IAD well
6 substantiated and factually supported. He found that the decisions made by Grievants
7 during the course of the event were significant factors that contributed to an unnecessary
8 and heightened exposure to risk on the part of the officers at the scene and ultimately, to
9 the deaths of two of those officers. It was the Skelly Officer's recommendation that the
10 allegations of gross dereliction of duty be sustained. In addition, given the gravity of the
11 matter and the factual findings, he concurred with the recommendation that each
12 Grievant receive a double demotion. Exh. 10, p. 2.

15 **IV. ARGUMENT**

16 **A. Grievants Were Commanders Responsible For Command And Control**

17 General Order K – 5 assigns responsibility for specific duties to the Incident
18 Commander and the Tactical Commander. Exh. 16, pp. 10-13. Grievants acted in these
19 positions on March 21, 2009 and failed to fulfill the basic duties of those positions.

20 Lt. Lindsey, as the Area 3 Watch Commander on duty at the time of the initial
21 incident, was initially the Incident Commander. Exh. 1, p. 277. However, when Mufarreh
22 arrived on the scene, he took over the role of Incident Commander. Exh. 1, p. 279. As
23 described fully above, from the moment he met with Acting Lt. Alexander at the Eastmont
24 substation, Mufarreh took actions designated to a commander. During his IAD interview
25 Mufarreh admitted this, stating, "this thing transitions, you know, from being [Lt.
26 Lindsey's] thing to being my thing." Exh. 27, p. 13; Vol. 6, pp. 141-142. Mufarreh stated
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28

1 he "ended up dealing with and taking the whole thing over." Exh. 27, p. Vol. 1, pp. 174-
2 175. Mufarreh stated that he "felt like [he] was responsible for everything. And that's
3 fine." Exh. 27, p. 30.

4 Mufarreh assumed the role of Incident Commander when he delegated
5 responsibilities to Lt. Lindsey and Lt. Alexander, commanders of equal rank. Vol. 1, p.
6 173; Exh. 1, pp. 277-283. He assumed the role of Incident Commander when he
7 responded to Lt. Joyner's request for the commander running the incident to call him. Vol.
8 1, p. 174; Vol. 7, p. 20; Exh. 16, p. 3. He assumed the role of Incident Commander when
9 he designated the dedicated arrest team. Vol. 7, pp. 21, 188-191. Exh. 16, p. 10. He
10 assumed the role of Incident Commander when he called for a "blue alert", activating the
11 tactical team, which consists of several elements, including the entry team (5 sergeants
12 and 23 officers), the sniper team, the hostage negotiation team, and TOST, the tactical
13 operations support team. Vol. 3, pp. 8-11; Exh. 16, p. 3 (General Order K – 5 provides
14 that "The Tactical Operations Team may be activated at the discretion of the Patrol
15 Division Watch Commander, or an Area Commander who is on the scene and assumes
16 Incident Command.").

17 Once he called for a blue alert, Mufarreh assumed the role of Tactical
18 Commander. Exh. 1, pVol. 7, pp. 48-49. Mufarreh had experience as a tactical operator
19 from 1995 to 2005, and thus was familiar with the basic principles of crisis management
20 and applicable policies and practices. Vol. 6, pp. 190, 295; Vol. 7, pp. 77-78. He had
21 been appointed to the position of Tactical Commander approximately a month earlier, but
22 he had not been to tactical command school and had not been shadowed for six months
23 as OPD policy requires, and he knew that he was not qualified to serve as a Tactical
24 Commander. Vol. 7, p. 79. Mufarreh had been told by Captain Tracey not to act as
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1 Tactical Commander until he had been properly trained and Captain Tracey himself had
2 certified him as qualified to serve in that capacity. Vol. 6, pp. 192-193.

3 Mufarreh assumed the role of Tactical Commander when he received and
4 evaluated intelligence from Lt. Joyner, when he formulated the search plan, and when he
5 came up with the plan to clear the suspect's apartment prior to any other actions. Vol. 1,
6 p. 179-180; Vol. 7, p. 317; Exh. 1, pp. 283-287. He also assumed the role of Tactical
7 Commander when he briefed the entry team and when he ordered the team to make
8 entry into the apartment at 2755 74th Avenue. Vol. 1, p. 180. He assumed the role of
9 Tactical Commander when he designated the team leader to be in charge of the entry
10 team, albeit almost as an afterthought as the team was heading off to make entry. Vol. 1,
11 pp. 180, 207.¹¹

12
13 Captain Orozco was asked to serve as Tactical Commander by Captain Tracey,
14 and he agreed to do so. He became the Tactical Commander upon his arrival at the
15 scene at approximately 2:32 p.m. Vol. 1, p. 178; Vol. 7, pp. 313-314; Exh. 1, pp. 283-
16 287. He understood that the Tactical Commander had the duty of providing sound
17 tactical advice to the Incident Commander. Vol. 7, pp. 307, 345. He understood that the
18 Tactical Commander was responsible for "the entry team, for their movements, for their
19 decisions as far as their planning to approve whether or not [they] use gas, evacuate, go
20 in." Exh. 24, p. 14. He understood that part of the job of the Tactical Commander was to
21 slow the tactical team down. Vol. 7, pp. 340-341. He knew slowing the tactical team
22 down was important because "We've got a lot of type A personalities on the team, and
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26 ¹¹ Mufarreh told CID, "I identified a team leader." Exh. 25, p. 27. But at the arbitration
27 hearing Mufarreh testified that he merely identified the person he assumed had been
28 designated as the team leader by someone else during a meeting he did not attend. Vol.
7, pp. 66-67; Exh. 7, p. 44.

1 they're on a go mode. They're always – they want – they like the action.” Vol. 7, p. 341.

2 Orozco had held the title of OPD Tactical Commander from 2005 to February
3 2009. In 2005, he attended the required training and was shadowed for six months. Vol.
4 7, pp. 223-224, 296-297. During his time as a Tactical Commander, he participated in 20
5 to 25 call outs. Vol. 7, pp. 227, 296.

6 Orozco knew that Mufarreh was not qualified to be the Tactical Commander. Vol.
7 7, pp. 80, 313. Yet he stood by as Mufarreh inappropriately inserted himself as a Tactical
8 Commander by taking an active, visible, vocal and primary role in dealing with the tactical
9 operations team and in giving orders to the team. Vol. 1, p. 179; Vol. 2, p. 15. All of
10 these actions violate the OPD's policy because they were the responsibilities of the
11 Tactical Commander, and that was Captain Orozco. Vol. 1, p. 180.

12 Orozco agreed with many of the Board's findings related to deficiencies in his
13 exercise of command and control. Vol. 7, pp. 357-360. He agreed that he allowed
14 Mufarreh to brief the team, that he allowed Mufarreh to deliver the order to enter to the
15 team, and that he was an integral part of the plan to send the entry team inside the
16 suspect's apartment without attempting to confirm whether or not the suspect was inside
17 and without evacuating the building. Vol. 7, pp. 257-360. Orozco agreed that this
18 prevented the use of chemical agents and created a situation in which public safety was
19 significantly threatened by the occurrence of a fire fight within the building. Vol. 7, p. 360.
20 He agreed that he was an integral part of the plan to send the entry team inside Mixon's
21 apartment without the use of any tactical options other than entry. Vol. 7, pp. 360-361.

22 **B. Grievants Failed to Fulfill Their Duty To Establish A Command Post**

23 On March 21, 2009, more than a hundred units responded to the scene of this was
24 critical incident. It was the standard procedure of the OPD to have a command post in
25

1 critical incidents, including officer involved shootings and barricaded suspects. Vol. 2, p.
2 251; Vol. 4, p. 180; Vol. 7, pp. 310-311. As the Incident and Tactical Commanders, it
3 was Grievants' duty to establish the command post. Vol. 1, pp. 197, 202-203; Exh. 16, p.
4 10 (It is the policy and procedure of the OPD for the Incident Commander to "Establish an
5 Incident Command Post in a strategic location as soon as practical. He/she shall
6 manage the command post operations and normally conduct operations from that
7 location."); Exh. 16, p. 12 (It is the policy and procedure of the OPD for the Tactical
8 Commander to "Designate a Tactical Command Post if different from the Incident
9 Command Post."). Grievants failed to fulfill their duties.

11 Mufarreh acknowledged that he would have wanted to know Mixon's name and his
12 criminal record; information that the Homicide detectives had before entry was made.
13 Vol. 7, p. 29. But because there was no command post, the commanders running the
14 search operated completely independently of the CID investigation that was going on.
15 Vol. 1, p. 203. Sgt. Lou Cruz testified that, based on his experience, the information
16 about the suspect that Homicide learned would have been gathered by the commanders
17 prior to the entry -- if there had been a command post. But because there was no
18 command post, the entry team lacked even the most basic information about the suspect,
19 the gathered intelligence, and the details of the apartment when they entered the
20 apartment. Significantly, each of the entry team leaders testified that they saw nothing
21 resembling the customary command post that day, and instead looked to where the
22 commanders were standing (at 74th & Mac) as the sole indicator of where an 'impromptu'
23 command post was located.

26 Grievants admit that it is a basic principle of critical incident management to
27 establish a command post. Vol. 7, pp. 26, 310-311. The City had a custom of
28

1 establishing and operating command posts, a practice even more critical at an intense,
2 large "officer(s) down" such as this one. As an entry team operator, Mufarreh had
3 checked in at the command post upon arriving on the scene of critical incidents, and he
4 confirmed that command posts were the norm when OPD responded to critical incidents.
5 Vol. 6, p. 301. Grievants' failure to establish a command post on March 21, 2009, was a
6 gross dereliction of duty.
7

8 **C. Grievants Failed to Fulfill Their Duty To Gather, Analyze and Disseminate**
9 **Available Intelligence**

10 General Order K – 5 provides that it is the Incident Commander's responsibility to
11 "Gather available intelligence information, including information about suspect(s) and
12 hostages, and prepare exterior and interior scene diagrams." Exh. 16, p. 11. It is the
13 Tactical Commander's responsibility to "Develop tactical plans and courses of action."
14 Exh. 16, p. 13. Grievants failed to fulfill these duties.

15 Intelligence may be obtained by questioning the landlord and/or neighbors to find
16 out the layout of the building, who is living in the unit, whether there are keys available,
17 etc. Vol. 2, p. 127. Intelligence may also be obtained by use of robots. Vol. 2, p. 142.
18 Robots and cameras attached to phones can be thrown in the window to transmit
19 pictures of the interior and sound. Vol. 2, p. 143. Asst. Sheriff Keteles testified that
20 OPD's tactical team had access to a recon robot and a throw-phone with a camera
21 attached on March 21, 2009, but Grievants failed to exercise this option. Vol. 2, pp. 256-
22 257. Clarence Ellis told Lt. Joyner that he had information about the layout of the
23 apartment, but Grievants failed to obtain it.
24

25 In addition to intelligence about the location, it is important to gather available
26 evidence about the suspect. *Id.* An officer going after a suspect needs to know as much
27 about that person as he can. Vol. 2, p. 221. In particular, when you are searching for
28

1 someone, it is important to know their name and what they look like. Had Grievants
2 followed up with any one of the several officers working to identify the suspect the entry
3 team would have had this information. But they did not do so. Instead, they ordered the
4 entry team into the apartment blind.

5 Mufarreh testified he would have made a further effort to determine the status of
6 the efforts to identify the suspect before entry if he had it to do over again. Vol. 6, p. 272.
7 But that did not prevent him from making excuses for his dereliction of duty on March 21.
8 (Mufarreh admitted that he failed to check in with Sgt. Jones, who he knew was working
9 as hard as he could to develop suspect information, before entry, but offered the excuse
10 that he checked in with Sgt. Jones at approximately 2:30 p.m. (Sgt. Jones denies this).
11 Vol. 7, p. 90. Mufarreh knew that Sean Knight was developing intelligence about the
12 suspect, and checked in with him 20 to 30 minutes before entry, but did not check in with
13 Sgt. Knight closer to entry because he felt that if Sean Knight developed information, it
14 was Sean Knight's responsibility to share it, and "he knew exactly where I was." Vol. 7,
15 p. 81. Mufarreh knew that Officers Midyett and Murray were also working on identifying
16 the suspect, as he had assigned them that task. They, too, had a picture of Nixon before
17 entry was made, but Mufarreh failed to check with them before entry because if they had
18 that information, he would have expected them to put it out over the air, but he
19 acknowledges that there was a lot of stuff going on over the air that he missed. Vol. 7,
20 pp. 46-47. Mufarreh also failed to check in with Lt. Joyner, whose informant knew the
21 layout of the building. Vol. 7, p. 83. His excuse was that he thought Orozco talked to Lt.
22 Joyner, but he doesn't know what they talked about. Vol. 7, p. 83.).

23 Orozco agreed that it is important to gain as much information about a suspect, in
24 particular his identity and his criminal record, before conducting an entry. Vol. 7, p. 335.
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1 Orozco, too, knew that people were working on gaining further intelligence on the
2 suspect. Vol. 7, p. 335. Yet he failed to ask anyone whether anything had come back
3 before entry. Vol. 7, p. 335. In his interview with IAD he said "I just felt we didn't have
4 time on our side." Vol. 7, p. 337. At the arbitration his excuse was that he "would hope
5 that Lt. Lindsey would provide that information." Vol. 7, pp. 335-336. He said he "was
6 under the assumption that she was talking to homicide, and she was the liaison with
7 homicide and to the command post," but admits that he never spoke to her about this.
8 Vol. 7, p. 338. He also never spoke to anyone in Homicide, just yards from his location.

10 In addition to their failure to obtain suspect information, Grievants failed to analyze
11 the information that they were given about the suspect's location. Based on the
12 intelligence available, IAD determined that it was unreasonable for the commanders to
13 assign a low probability to the suspect being inside the apartment. Vol. 1, p. 187; Vol. 2,
14 p. 102. (Neither IAD nor the Board took into consideration the information Lt. Lindsey
15 claimed she had provided to Mufarreh and Orozco in formulating this conclusion,
16 assuming as true Grievants' contention that they did not receive the information.).

18 Grievants knew that the suspect was associated with the apartment and that his
19 car had been parked in front of it for the previous few nights. Vol. 7, p. 42. Grievants
20 knew that the suspect had been seen running down 74th Avenue in the direction of the
21 building. Grievants knew that Lt. Joyner believed the subject was in the apartment. Vol.
22 1, p. 183; Vol. 3, p. 275.¹² Mufarreh testified that Lt. Joyner is known as an "outstanding
23

25 ¹² Lt. Joyner told CID that he also told Orozco that the suspect might be at 2755 74th
26 Avenue. Exh. 3, p. 275. Orozco denies that Lt. Joyner told him this, and claims that if Lt.
27 Joyner had told him what he knew, he would have done things differently. Vol. 7, p. 322-
28 323. But Orozco admits talking to Mufarreh about Joyner's informant information, and
Mufarreh says that he told Orozco what Joyner told him. Vol. 6, p. 245.

1 officer," "a very good street officer and [Mufarreh] respect[s] him highly." Vol. 7, p. 34.

2 Grievants had no reason to doubt Lt. Joyner's ability to work with informants. *Id.*

3 Mufarreh had no reason to believe that Lt. Joyner's belief that the suspect was in the
4 apartment changed after their meeting.

5 At the very least, Lt. Joyner's intelligence raised a real possibility that the suspect
6 was in the apartment. A reasonable tactical commander would follow the same
7 protocols, which are designed to protect the safety of officers and the public, whether he
8 "knew" the suspect was in the location or thought the suspect might be. Vol. 2, p. 159.

10 While Grievants claim that, in their experience, a suspect who shot two police
11 officers would flee the scene, that is not always the case. "Going to ground" is a common
12 enough phenomenon. As Sgt. Cruz pointed out, the suspect's phone was in the car, his
13 keys were in the car, and he had abandoned the car. Vol. 5, p. 160. He had no way to
14 contact anyone. He had to be comfortable enough wherever he was going that he
15 probably did not need keys. *Id.* He also had to be thinking, I'm so close to where I want
16 to go, I don't need my car. *Id.* It was gross dereliction of duty for Grievants to dismiss
17 this information and fail to exercise other options to protect officer and public safety. And
18 it was gross dereliction of duty for Grievants to withhold this information from the entry
19 team.
20

21 **D. Grievants Failed To Fulfill Their Duty To Develop A Tactical Plan**

22 General Order K – 5 states that it is the responsibility of the Tactical Commander
23 to "develop tactical plans and courses of action." Exh. 16, p. 13. The policy sets forth
24 specific tactics for a commander to consider in doing so,¹³ prefaced with the mandate that
25

27 ¹³ General Order K – 5 provides that in the resolution of incidents, "Common
28 courses of action, which may be used alone or in combination, are as follows:

(1) Containment,

1 "in any event, a resolution will be accomplished with the utmost consideration given to the
2 safety of citizens, police personnel and all involved parties." Exh. 16, p. 15.

3 Entering without first employing less risky options was not the usual practice of the
4 Oakland Police Department's tactical team. Vol. 4, pp. 183-184. Usually there was a
5 progression from least amount of risk to highest amount of risk. Vol. 4, pp. 183-184.
6 Orozco admits that other options were usually utilized. He was asked by his counsel,
7 "Had you ever been in those kinds of situations where you had barricaded suspects that
8 you believe to be inside where you would have made entry using dynamic entry?" Vol. 7,
9 p. 228. He responded, "Well, *eventually* it came to that." Vol. 7, p. 228 (emphasis
10 added). It was neither the policy nor custom of the OPD to conduct dynamic entries
11 without taking any of the preliminary steps designed to minimize risk to officers and the
12 public. Vol. 3, p. 25.

13
14
15 Specific ways in which Grievants failed to fulfill their duty to develop a tactical plan
16 that gave utmost consideration to the safety of citizens, police personnel and all involved
17 parties include the following:

18 **1. Grievants Failed to Await Arrival of All Tactical Teams**

19 It was customary in fatal shootings or when an officer was down for OPD
20 commanders to call out all of the elements of the tactical team. Vol. 3, p. 12. It usually
21

-
- 22 (2) Evacuation,
23 (3) Wait the situation out,
24 (4) Establish control over environmental conditions,
25 (5) Negotiations via bullhorn, telephone or throw phone,
26 (6) Order the subject to come out and surrender,
27 (7) Use of chemical agents and/or other less lethal weapons,
28 (8) Sniper employment,
 (9) Breach and entry of the objective site, and
 (10) Mobile operations in the event that the suspect is mobile."

Exh. 16, p. 15.

1 took approximately an hour from the time a blue alert was activated for the team to arrive
2 and be fully operational. Vol. 3, pp. 65-66, 139. To activate the tactical team, the
3 commander was required to call the radio room supervisor, who then used a paging
4 system to notify on and off duty tactical personnel. Exh. 16, Once they received the
5 page, tactical team members would call the number on their pager and hear a recorded
6 message informing them of the location of the command post and a safe approach. Vol.
7 1, p. 163; Vol. 3, pp. 68-69; Vol. 4, pp. 172-173; 194-195, 204. Team members would
8 then call in with their estimated time of arrival.
9

10 Because Mufarreh did not follow the proper procedure, the tactical team did not
11 receive the blue alert until 2:33 p.m., less than a half an hour before Grievants ordered
12 entry. The tactical van, containing less lethal options like gas and ballistic shields, was
13 not on scene yet. TOST, the tactical operations support team, which would have ensured
14 there was a central place where all intelligence was chronicled, was not on scene yet.
15 Vol. 1, p. 196; Vol. 4, pp. 185-188. The hostage negotiations team, which would have
16 made attempts to contact the suspect by bullhorn, throw phone, or land line, had not
17 arrived. The snipers, who would have been responsible for the inner perimeter, and for
18 covering officers and citizens during evacuations and yard searches, had not arrived.
19 And there was no ambulance on scene. Vol. 1, p. 197. The entry was ordered before a
20 reasonable commander would have expected the team to have fully assembled and
21 become operational.
22
23

24 Grievants object to the Board's characterization of the entry team they sent in as
25 "ad hoc," arguing that all of the members of the original entry team were in fact SWAT
26 officers, and the rule is intended to prohibit teams composed of SWAT and non-SWAT
27 personnel. This is beside the point. Mufarreh admits that there were only five team
28

1 leaders for all entry teams, that he sent all of them into the apartment, and that this
2 removed all the available leadership from further mission requirements. Vol. 7, pp. 74-
3 76. IAD was correct in concluding that sending all five team leaders into the apartment
4 rather than waiting for the arrival of the other elements of the tactical team violated policy.
5 Vol. 2, pp. 33-37.
6

7 **2. Grievants Failed to Give Due Consideration To Less Lethal Options¹⁴**

8 **a. Containment**

9 The notion of "surround and call out" was not foreign to Grievants. Oakland's
10 tactical team was one of the first agencies in the Bay Area to go to surround and call out
11 and get away from doing a dynamic entry as often as a lot of other teams did. Vol. 2, p.
12 254. Sgt. Gonzalez testified that during his nine years on OPD's tactical team, "For every
13 . . . unplanned operation . . . we always start with containment, isolate the suspect, and
14 then attempt to call him out, so a surround and call out." Vol. 3, pp. 24-25. Oakland did
15 not have a culture of making entry on a felony suspect as an early option. Vol. 3, p. 25.
16 In Sgt. Gonzalez's experience during the nine years before March 21, 2009, OPD always
17 engaged in other options first, using entry as a last resort. Vol. 3, p. 25.
18

19 Grievants had perimeter officers, some patrol rifle officers, a designated arrest
20 team and two helicopters. With these resources, the scene was contained. Once
21 containment had been established, the tempo of the operation should have slowed down
22 and attempts should have been made to determine if the suspect, or anyone else, was
23 inside the apartment. Vol. 1, p. 200. Things that could have been done include:
24
25

26 ¹⁴ IAD carefully analyzed Grievants' statements concerning less lethal options in its
27 Report, concluding that Grievants' stated reasons for failing to utilize any other tactical
28 option were logically invalid and demonstrated poor judgment. Rather than repeat these
arguments, the City refers the Arbitrator to Exhibit 1, pages 301-307.

1 attempting to get a telephone number for the residents, trying to make a call inside, using
2 a throw phone or a bullhorn, attempting to obtain a layout of the apartment from (b)(5)(B)
3 (b)(5)(B), obtaining photographs of the subject, using a tracking K -9 in conjunction with
4 ballistic shields, and putting snipers in place, which would have allowed an evacuation to
5 proceed and would have provided cover for the canine search team. Vol. 1, pp. 200-201.
6

7 Several officers testified that it is not uncommon for a tactical operation to last four
8 or more hours. At the time entry was made, Mufarreh had been on the scene an hour
9 and a half. Orozco had been on the scene for only 25 to 30 minutes. Kozicki had been
10 on scene for only 15 minutes. Mufarreh claimed that he was anxious to get on with the
11 search for places the suspect might be, given that he did not believe he was in the
12 apartment. But he admits that he had plenty of units out there to lock down 2755 74th
13 Avenue and still do searches elsewhere. Vol. 7, pp. 61.
14

15 The argument that a hasty entry was required because of the time -- that it was
16 going to get dark -- is not persuasive. See Vol. 2, p. 164. It was 3:02 p.m. when entry
17 was made. The sun did not set in the Bay Area in March 2009 until 7:23 p.m.
18 The perimeter was set and the scene was contained. Vol. 2, p. 164, 254. The
19 commanders could have continued to lock things down and held tight until all resources
20 had arrived and less lethal options had been explored. Vol. 2, p. 254.
21

22 **b. Evacuation**

23 When the target location is a multi-unit building, a commander should be
24 concerned about the safety of people in the surrounding units in the event a gun fight
25 takes place. Vol. 2, p. 135. Captain Hansen visited the site, and believes that an
26 evacuation could and should have taken place. Vol. 2, p. 136-137. Asst. Sheriff
27 Keteles's tactical team actually conducted a successful evacuation of 2755 74th Avenue
28

1 in September 2009. Vol. 2, p. 266. For Mufarreh and Orozco to leave residents in the
2 building not only exposed them to a fire fight, it limited the options available to the SWAT
3 team, including the use of gas to get the suspect to come out. Vol. 2, pp. 138, 267. Lt.
4 Mufarreh's claim that they couldn't use gas because nobody had gas masks on the
5 perimeter was symptomatic of the bigger problem that he had not waited for the entire
6 team to arrive. SWAT members would have had gas masks. Vol. 2, p. 224.
7

8 Orozco told CID that if Ersie Joyner had told him that the suspect was in 2755 74th
9 Avenue, he would have made a greater effort to evacuate. Vol. 7, p. 354. Orozco admits
10 that a greater effort could have been made. *Id.* And if he had been able to evacuate, he
11 could have used gas. *Id.* And he would have used a throw phone or a bullhorn. Vol. 7,
12 p. 355. Ersie Joyner testified that he did tell Orozco he believed the suspect was in the
13 apartment. Vol. 3, pp. 275-276. Grievants' failure to utilize any of these options was
14 gross dereliction of duty.
15

16 **c. Negotiations via bullhorn, telephone or throw phone**

17 Captain Hansen explained that it is safer to get the suspect to come to you than it
18 is for you to go into his ground and assault the suspect. Vol. 2, p. 133. It is an obligation
19 of the Tactical Commander to try and contact the suspect and/or uninvolved third parties
20 inside the location and see if he can get them to come out. *Id.*, p. 133. If a party other
21 than the suspect comes out, you have someone who can give you intelligence about
22 what is going on inside. Vol. 2, p. 134. As it turned out, Lovelle Mixon's sister was in the
23 apartment at the time of the entry, and was anxious to get out before the shooting
24 started.
25

26 When asked whether he had taken into account the possibility that innocent third
27 parties could have been in the building Mufarreh testified, "I mean, that's always a
28

1 possibility. But I believe that because we were out there for such a long time and nobody
2 came in and out of that place . . . our assumption was possibly there was nobody in
3 there." Vol. 7, pp. 94-95. Mufarreh admits he knew that it was a multi-unit building and
4 that, in retrospect, it would have been a "great idea" to "at least call out, use the bullhorn
5 for a while so that any uninvolved third parties could get out before armed officers went
6 in." Vol. 7, p. 96. But at the time, he testified, the conclusion was that because they
7 didn't know where the suspect was, "he could pop out anywhere if he was planning on
8 popping out." Vol. 7, p. 96. This made no sense to the Board. Vol. 2, p. 225, 264-266.
9 As Captain Hansen testified, "If he comes out from anywhere, when you call him out,
10 great, now we know where he is and we take him into custody." Vol. 2, p. 225. And, had
11 he waited for the snipers to arrive, the dangers could have been minimized.
12

13
14 In addition to a bullhorn, a throw phone could have been used to try to contact the
15 suspect or others inside an apartment. Vol. 2, p. 143. Asst. Sheriff Keteles testified that
16 OPD's tactical team had access to a PA system, a recon robot, a throw-phone with a
17 camera attached, and calling through land lines. Vol. 2, pp. 256-257. Grievants' failure
18 to utilize any of these options was gross dereliction of duty.

19 **d. Canine Search**

20 Until four minutes before entry, Sgt. Sakai and other members of the entry team
21 were working exclusively on their plan to use an Alameda County Sheriff's Department
22 tracking dog that would follow the suspect's scent from the area of the initial shooting of
23 the two motor officers to wherever it would lead. In all probability, it would have led to
24 2755 74th Avenue and provided a high probability that the suspect was in the apartment.
25 Vol. 2, pp. 162-163. The plan to use dogs to confirm whether or not the suspect was in
26 the apartment was a good one, and Grievants' unilateral decision to abandon that plan
27
28

1 was unreasonable. Vol. 1, p. 189-191; Vol. 2, pp. 162, 261-262. Mufarreh's justification
2 for discarding the canine tracking option at the last minute -- that it was too dangerous to
3 use -- is not persuasive given that sending in an armed entry team was even more
4 dangerous. Vol. 2, p. 163.

5 **3. Grievants Failed To Fulfill Their Duty To Brief The Entry Team**

6
7 Before an entry is made, it is a basic principle of tactical operations that the entry
8 team must be briefed. In this case, the team was not given an adequate briefing. Vol. 2,
9 p. 280-281. The three entry team leaders who survived the entry into 2755 74th Avenue --
10 Sergeants Gonzalez, Beaver and Reilly -- all testified that until they walked to Mufarreh's
11 location after his phone call with Sgt. Gonzalez ended at 2:58 p.m., they understood that
12 the plan was to do a canine search. All of them testified that they had no prior meetings
13 with Mufarreh or Orozco before that single briefing.

14
15 Orozco insisted at the arbitration that he briefed the entry team earlier, at a
16 "second meeting." Orozco had not mentioned this second meeting in any of his earlier
17 statements. All three team leaders deny that such a meeting took place. *Compare* Vol.
18 7, p. 350, *with* Vol. 3, pp. 34, 42, 133, 149. The team leaders have no reason to lie, and
19 their testimony about the so-called briefing they received has been consistent.
20 Usually, at a briefing, the team goes over the chronology of what occurred and the action
21 plan. Typically, there will be a scout gathering intelligence around the location who will
22 share this information. Vol. 3, p. 157. There is usually a discussion of evacuation and
23 who is going to handle that. Vol. 3, pp. 130-131. On this occasion, there was no sharing
24 of intelligence or discussion of any other options. Vol. 3, p. 156. There was merely an
25 instruction by Mufarreh for the entry team to grab the entry tools and clear the apartment.
26 Vol. 2, pp. 147, 211; Vol. 3, pp. 35-36. "Clear" meant to the team that their commanders
27
28

1 had little reason to believe the person they were looking for was inside, but they wanted
2 to double check or triple check it and just make sure he's not inside so they could take
3 the location out of play. Vol. 3, p. 156. The team was told by Mufarreh, with Orozco
4 standing nearby, that there was no real intelligence that the suspect was in that
5 apartment. Vol. 3, pp. 41-42. The team was not told that Lt. Ersie Joyner had an
6 informant who believed the suspect was in the apartment, that a second confidential
7 informant had placed the suspect in the same apartment, or that Homicide had
8 developed information about the identity and location of the suspect. Vol. 3, pp. 94-95.
9 Given Lt. Joyner's reputation, if the team had known that Lt. Joyner believed the suspect
10 was in the apartment, that alone would have made a difference in their approach. Vol. 3,
11 p. 159.
12

13
14 Moreover, there was no discussion about what to do if a man went down or shots
15 were fired. Vol. 2, p. 146. No medical plan was in place. Vol. 2, p. 147. Only after the
16 team headed into the apartment did Captain Orozco request an ambulance. Vol. 2, p.
17 148. And it had not yet arrived when Sergeants. Romans and Sakai were shot, and as
18 the video footage shows, they were transported to the hospital by their fellow officers in
19 random police vehicles.
20

21 Grievants make much of the fact that the entry plan was not challenged by any of
22 the entry team sergeants. Vol. 2, p. 32. But not all team members were even present for
23 the minimal briefing (under two minutes) that did occur. Vol. 2, p. 145. Sgt. Gonzalez,
24 who was appointed team leader by Lt. Mufarreh, had only been on scene 10 to 15
25 minutes when entry was made, and had been preparing for the canine search prior to
26 2:58 p.m. Vol. 3, p. 19. Sgt. Reilly had been on the scene even less time, arriving after
27 the briefing by Mufarreh had begun. The briefing both the time and available information
28

1 for team members to raise concerns about commanders' decision. Vol. 3, p. 146.

2 **G. Grievants' Position Poses a Paradox Viz. The Fourth Amendment**

3 Grievants acknowledge that it is OPD policy that less dramatic tactics must have
4 been attempted or ruled inapplicable before a forced entry is ordered. Vol. 7, pp. 131,
5 298-300; Exh. 55, p. 7. They argue that this rule does not apply to them, however,
6 because it only applies in barricaded suspect incidents, and March 21, 2009, was not a
7 barricaded suspect incident because they didn't believe the suspect was in the
8 apartment. Vol. 7, pp. 298-299. This position raises a paradox for Grievants. If
9 Grievants did not believe the suspect was in the apartment, then it was unlawful for them
10 to order the entry team to forcibly enter it at all. Vol. 2, p. 263. You cannot send a SWAT
11 team into a residence, force entry, and throw flash bangs when you don't think the
12 suspect is in there. Vol. 6, p. 169.

15 The Fourth Amendment to the United States Constitution provides that "the right of
16 the people to be secure in their persons, houses, papers and effects, against
17 unreasonable searches and seizures, shall not be violated, and no warrants shall issue,
18 but upon probable cause, supported by oath or affirmation, and particularly describing the
19 place to be searched , and the persons or things to be seized." U.S. Const., Amend. IV.
20 The Supreme Court has held that when probable cause exists, but immediate and
21 serious consequences would occur if a warrant were obtained, a warrantless search may
22 be justified. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The burden of
23 proving exigent circumstances is a heavy one, borne by the police. *Welsh v. Wisconsin*,
24 466 U.S. 740, 749-750 (1984). "Hot pursuit" has been recognized as an exigent
25 circumstance, but it requires that the police show, among other things, probable cause to
26 believe that the suspect is in the place to be searched. *Warden v. Hayden*, 387 U.S. 294
27
28

1 (1967); *Menotti v. City of Seattle*, 409 F.3d 1113, 1152 (9th Cir. 2005) (Exigent
2 circumstances include those circumstances that would cause a reasonable person to
3 believe that entry was necessary to prevent the escape of the suspect).

4 To be appointed Tactical Commander, Grievants were required to know the
5 warrant requirement and the exceptions to the warrant requirement of the Fourth
6 Amendment. Vol. 6, p. 302. They understood that the Fourth Amendment requires that
7 you have probable cause to believe you will find a suspect in a location before you can
8 lawfully enter with or without a warrant. Vol. 6, p. 302.

10 In this case, the facts known to other officers supported probable cause, and thus
11 the entry was not illegal. But Grievants' rejected these facts. The illegal entry into a
12 private citizen's residence is itself a gross dereliction of duty. Vol. 6, p. 174. Grievants'
13 willingness to order a warrantless entry when they did not believe the suspect was in the
14 apartment was a gross dereliction of duty.

16 V. CONCLUSION

17 The death of fellow officers hit every OPD officer hard. These are the times when
18 commanders must implement basic principles of critical incident command and follow the
19 most basic protocols of policing, including the requirement that "a resolution will be
20 accomplished with the utmost consideration given to the safety of citizens, police
21 personnel and all involved parties." It was Grievants' duty to follow these protocols and
22 procedures. Officer safety mandated that they send the entry team into the apartment
23 only as a last resort. They sent the entry team into the apartment as a first resort instead.
24 In so doing, they committed gross dereliction of duty and further lives were lost.
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The discipline imposed is just and the grievances should be denied.

Dated: September 2, 2011

Karen L. Snell
On Behalf of the City of Oakland

Exh 70

MEMORANDUM OF UNDERSTANDING

Between

CITY OF OAKLAND

And

OAKLAND POLICE MANAGEMENT ASSOCIATION

Effective July 1, 2006 through June 30, 2013

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PREAMBLE

We, the undersigned, duly appointed representatives of the City of Oakland and of the Oakland Police Management Association, a recognized employee organization, hereinafter referred to as "City" and "Association," do hereby jointly prepare and execute on the _____ day of _____, 2008, the following written Memorandum of Understanding. It is understood that the provisions set forth apply to City of Oakland employees officially designated to be members of Police Management Unit.

IT IS THEREFORE AGREED as follows:

ARTICLE I GENERAL PROVISIONS

A. Recognition

City agrees to recognize the Oakland Police Management Association as the exclusive recognized bargaining representative, within the scope of representation as described in the Meyers-Milias-Brown Act, as amended, for City employees officially designated to be members of the Police Management Unit.

B. Discrimination Prohibited

City and Association agree that they shall not discriminate in any way on account of race, creed, religion, gender, national origin, political affiliation, age, sexual orientation, disability of a member legally qualified to perform the job. City agrees that no employee shall be discriminated against because of Association membership or activity.

C. City-Association Relationship

City and Association hereby restate their joint commitment to the achievement and maintenance of a relationship built on open communication, which fosters the equitable resolution of the concerns of each party regarding wages, hours, and other terms and conditions of employment.

1. Dues Deduction

Upon receipt of a written voluntary authorization from the employee, the City shall deduct, at least monthly, the amount of Association regular and periodic dues and insurance premiums as may be specified by the Association. Said deduction, together with a written statement of names and amounts deducted, shall be forwarded promptly to the Association office.

2. Use of City Facilities

City shall reasonably make available conference rooms and other meeting areas for the purpose of holding Association meetings during off-duty time periods.

Association shall provide timely advance notice of such meetings, and agrees to pay any additional costs of security, supervision, damage, and cleanup, and shall comply with City regulations for assignment and use of such facilities.

ARTICLE II MANAGEMENT RIGHTS

A. General

The City retains and reserves all the rights, power, authority, duty, responsibility, and obligations conferred on and vested in it by its Charter and by the laws and Constitutions of the State of California and the United States of America.

The City reserves its right to determine matters outside the scope of representation.

The City reserves its right to propose changes in wages, hours, and other terms and conditions of employment not covered by this Agreement, in accordance with the provisions of Charter Section 910 and this Agreement.

Except as limited by Charter Section 910 and by the specific provisions of this Agreement, the City retains all rights, powers, and authority granted to it by law or the Charter, including, but not limited to, the exclusive right to determine the merits, necessity, and organization of any service or activity the City may now or hereafter provide; to determine the City's mission and the mission of the Police Department and its employees and to assign work to, direct, and schedule employees; to set standards of service; to determine the methods, means, and personnel by which the City will conduct its operations; to finance City operations and to determine financing methods; to establish and enforce reasonable dress and grooming standards and to determine the style or type of City-issued apparel, equipment, and technology; and to take all actions necessary to carry out its mission and these reserved rights.

Except as expressly provided in this Agreement, neither the City nor the Union concede or relinquish its rights under Charter Section 910.

ARTICLE III DIRECT PAY FOR SERVICE

A. Salary

1. Effective July 1, 2006, the base salary for represented employees shall be increased by two percent (2%).
2. Effective January 1, 2007, the base salary for represented employees shall be increased two percent (2%).
3. Effective July 1, 2007, the base salary for represented employees shall be increased by four percent (4%).

4. Effective July 5, 2008, the base salary for represented employees shall be increased by four percent (4%).
5. Effective January 1, 2013, the base salary for represented employees shall be increased by four percent (4%).

B. Adjustments for Overpayments

In the event an employee is erroneously overpaid by the City, regardless of fault, the City shall recoup overpayment by deducting from that employee's regular pay check either the full amount of the overpayment or ten percent (10%) of the employee's gross salary, whichever is less, and continue said deductions for as many consecutive pay periods as is necessary until full overpayment is recovered. The City shall not commence recovery by payroll deductions until it has given the employee thirty (30) days written notice of the details of the overpayment, the amount of the overpayment and the schedule for recovery.

In the event the overpayment is such that the gross amount the employee receives is more than twice the gross amount earned in the pay period, the employee shall notify the City of the overpayment. The City shall notify the employee of the amount of the overpayment as soon as practicable. Upon notification of the exact amount of the overpayment, the employee shall repay the full amount of the overpayment within one pay period.

C. Court Ordered Salary Deductions

If the City is ordered by a court of competent jurisdiction to garnish the wages of any employee or if a court of competent jurisdiction orders the City to make payroll deductions from the wages of any employee in favor of the City or a third party, the City shall assess and collect against the employee's regular salary one dollar (\$1.00) per deduction per pay period to compensate the City for the costs of making such court-mandated payroll adjustments.

D. Overtime

All bargaining unit members are exempt from overtime under the Fair Labor Standards Act. No employee shall be entitled to receive overtime compensation or compensatory time for work performed under this Memorandum of Understanding. Assignments that are reimbursable by third parties may, at the Chief's discretion, be paid at time and one-half. Bargaining unit members shall not be entitled to compensatory time for such work.

ARTICLE IV PERFORMANCE INCENTIVES

A. Longevity Pay

At the beginning of each fiscal year during the term of this Memorandum, eligible represented employees shall receive longevity premium pay in accordance with the rates enumerated below:

	PERS	P&F
(1) 7 through 9 years of service	\$1275	
(2) 10 through 14 years of service	\$1475	
(3) 15 through 19 years of service	\$1675	
(4) 20 or more years of service	\$1875	\$1168.30

Payment shall be in a lump sum, included with uniform allowance. Such payment shall be by separate check, payable on the first Friday, in the month of July, which is not a payday. Eligibility for receipt of special premium pay under this provision shall be determined as of the beginning of each fiscal year.

ARTICLE V RETIREMENT

A. Retirement Contribution

The City agrees to continue to contract with the Public Employee's Retirement System (PERS) to provide the 3% at 50 retirement plan for each active bargaining unit member.

The City shall contribute, on behalf of each represented employee, the designated percent of regular salary for retirement purposes of such employee, in accordance with applicable Charter provisions and/or provisions of State law except as otherwise herein provided.

B. Employer Paid Member Contribution Program

The City agrees to pay entire employees' normal contribution (currently nine percent) to the Public Employees' Retirement System until December 31, 2012.

Effective January 1, 2013, the employer shall reduce the contribution toward the employee normal contribution by two percent (2%) to seven percent (7%) and the employee shall pay a two percent (2%) contribution to the Public Employees' Retirement System.

In the event the existence of any state or federal tax law creates any personal tax liability for an employee by virtue of the employer's paying the employee's normal PERS retirement contribution, nothing contained in this section shall relieve the employee of any tax liability prescribed by law nor give rise to a grievance against the City, requiring it to assume the employee's tax liability.

The City agrees that the employer paid member contribution made pursuant to this section shall be reported to PERS as "special compensation" as provided under Government Code Section 2636.

C. PERS One Year Final Compensation

The retirement allowance of all bargaining unit members who are presently or will become members of the Public Employees Retirement System (PERS) is based on the twelve (12) highest paid consecutive months under the plan.

D. Military Service Credited as Public Service

Members may elect to purchase Military Service Credit in accordance with applicable CalPERS Service Credit Purchase Options requirements.

E. Deferred Compensation Plan

Represented employees may participate in the City's established deferred compensation plan. The Oakland Police Management Association shall have one voting member on the City's Deferred Compensation Committee. The OPMA may designate an existing member of the Committee to represent its interests.

F. Retiree Medical Liability

The parties agree that the provisions of the MOU may be reopened by either party in order to address the funding and payment of any identified unfunded liability, future liability and the associated and underlying payment for other post-employment benefits (OPEB). During the term of this MOU, the OPMA shall participate in discussions undertaken by the City with employee representatives of other bargaining units.

Any change directly affecting compensation as provided by this Agreement will have an effective date of on or after July 1, 2010.

G. Retiree Medical Trust (ERISA)

The parties agree that no later than one year from the approval of the 2009 extension of this MOU by the City Council, they will contract with a third party administrator for purposes of permitting the members of OPMA to participate in an IRS qualified retirement medical trust. The plan shall enable members of the OPMA to make pre-tax voluntary contributions into the trust. The City shall pay administrative fees in an amount not to exceed fifteen dollars (\$15.00) per member per year.

ARTICLE VI INSURANCE PROGRAMS

A. Health Insurance

The City agrees to contribute toward the premium cost of coverage in the established Public Employees' Medical and Hospital Care Act Plan (PEMHCA). Such contribution shall be an amount equal to one hundred percent (100%) of the premium cost of employee and dependent health insurance coverage in the applicable Bay Area Kaiser (PEMHCA) plan.

B. Dental Insurance

For Department employees, OPOA will continue to provide dental insurance. Upon verification by Delta Dental the City shall contribute the amount the City would be required to pay to obtain the current benefit level under a plan covering active employees administered by the City through Delta Dental. Until such time as verification is provided, the City shall continue to pay one hundred thirty six dollars and eighty-seven cents (\$136.87) per month per employee to OPOA.

Both parties agree to provide all waivers necessary to determine and verify the appropriate amount of the City's contribution. The City agrees to provide the OPOA with Delta Dental's written estimate of premiums.

C. Life Insurance

The City agrees to contribute the amount of twelve dollars (\$12.00) per month per represented employee toward the cost of employee life insurance coverage.

ARTICLE VII LEAVES AND HOLIDAYS

A. Management Leave

Management Leave may be granted pursuant to AI 516 (Appendix A for informational purposes).

B. Vacation Leave

1. Benefit

- a. Employee shall be credited with vacation leave from the date of his/her appointment by the City as a member of the Police Department, at the rates enumerated in subsections (i) through (iv) below. Such leave shall be at his/her base rate of pay, plus any applicable premium rate of pay and/or self-improvement incentive pay.
 - (i) One hundred twenty hours (120 hours) per year through the first ten (10) continuous years of service.

- (ii) One hundred forty-four hours (144 hours) per year beginning with the eleventh (11th) year of service, up to and including the thirteenth (13th) continuous full year of service.
 - (iii) One hundred sixty hours (160 hours) per year beginning with the fourteenth (14th) year of service, up to and including the twentieth (20th) continuous full year of service.
 - (iv) Two hundred hours (200 hours) beginning with the twenty first (21st) year of continuous service.
- b. Effective the first pay period after January 1, 2009, employees' vacation banks will be credited with accrued vacation on a biweekly basis.

2. Usage

Vacation leave may be taken only upon the approval of the Chief of Police or his/her designated representative.

3. Vacation Buy Back

Employees may sell back to the City up to eighty (80) hours of accrued vacation leave each calendar year provided that:

- a. The employee has taken at least eighty (80) hours of vacation leave during the preceding calendar year;
- b. The employee's remaining balance, after buy-back has occurred, is at least one (1) year's accrual at the accrual rate applicable at the time of buy-back.

C. Sick Leave

1. Definition

Sick leave is defined as a period of time taken by a bargaining unit member for the purpose of recuperation from a non-industrial injury or illness. Sick leave is a non-vested benefit and may not be cashed out or used for any purpose, except in accordance with this MOU.

2. Accrual

Effective July 1, 2008, a bargaining unit member shall earn sick leave at the rate of 3.692 hours per pay period up to a maximum of ninety-six (96) hours per

calendar year. Sick leave credits may be accumulated not to exceed four hundred eighty (480) hours.

a. Transition Credit

In recognition of the transition from the sick leave program in existence prior to the implementation of this MOU, bargaining unit members will be credited with ninety-six (96) hours per year of service.

b. Sick Leave Incentive Program

The City and OPMA will meet to develop a sick leave incentive program. The details of this revised sick leave program, such as (1) the disposition of hours over the 480 hour cap; (2) conversion and transition terms; and (3) the development, if feasible, of a retiree health benefits trust, will be subject to interest arbitration if needed.

3. Pregnancy Disability Leave

Pregnancy Disability Leave will be determined by an appropriate Departmental policy. In the absence of a revised Departmental policy, City Administrative Instruction No. 657 (Appendix B for informational purposes), as it may be amended from time to time, will apply. If either policy is in conflict with any provision of this MOU, the MOU shall prevail. This provision is not subject to the MOU grievance procedure.

D. Leave of Absence Without Pay

At the discretion of the Chief of Police, a permanent employee may be granted a leave of absence without pay for up to one hundred and twenty (120) calendar days.

E. Family Death Leave

1. Definition of Immediate Family

For purposes of this provision, immediate family shall be defined as mother, father, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, and mother-in-law, grandchildren in the custody of grandparents who are unit members, and domestic partners of unit members who have filed a Declaration of Domestic Partnership, in accordance with established City policy.

2. Benefit

Upon approval of the department head or his designated representative, an employee may be granted family death leave up to an amount not to exceed five (5) working days. Such leave shall not be charged against vacation or sick leave.

In order to be eligible for family death leave, an employee must have worked full time for the City for a period of three (3) consecutive months.

F. Military Leave

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. section 4301 *et. seq.*), an employee taking a leave of absence to perform military service is entitled to be reemployed, with reinstatement of benefits, on completion of the service, as long as the following prerequisites are satisfied:

1. With certain exceptions, the cumulative leave must not have exceeded five years;
2. The employee must have provided proper advance notice to the City of the employee's military service;
3. The employee must report back to work or submit an application for reemployment in a timely manner after conclusion of military service; and
4. The employee must not have been separated from military service with a disqualifying discharge or under other than honorable conditions.

If an employee is eligible to be reemployed, the employee must be restored to the job and benefits the employee would have attained if the employee had not been absent due to military service. An employee taking military leave retains all of his/her seniority-based benefits as if continuously employed. The employee returning from military leave is also entitled to pension benefits as if continuously employed throughout the leave period.

During a leave for military service, an employee has the right to elect to continue his/her existing health insurance plan for up to 24 months. If the employee does not elect to continue coverage during military leave, the employee retains the right to be reinstated to the City's health insurance plan when the employee is reemployed.

Although the USERRA does not require that the City pay an employee during a military leave of absence, pursuant to state law, the City will compensate employees for up to thirty (30) calendar days of paid military leave, at the normal base rate of pay for the employee's assigned classification, for each fiscal year the employee is formally ordered to active military service, so long as the employee has completed a minimum of one year of service with the City or one full year of combined active military service and City service at the time the leave is granted. (Cal. Mil. & Vet. Code section 389 *et. seq.*) An employee may elect to use accrued vacation time or personal time off in lieu of unpaid leave for the

portion of military leave which is unpaid. The period of city compensation for military may be extended by resolution of the city council.

G. Family Care and Medical Leave

The City's Family and Medical Leave policy is set forth in the City's Administrative Instruction No. 567 as may be amended from time to time. This provision is not subject to the MOU grievance procedure.

H. Holidays

1. Designated Holidays

The following days are designated as holidays:

January 1st.

The third Monday in January, known as "Martin Luther King Day."

February 12th, known as "Lincoln Day".

The third Monday in February.

The last Monday in May.

July 4th.

The first Monday in September.

September 9th, known as "Admission Day."

November 11th, known as "Veterans Day".

The Thursday in November appointed as "Thanksgiving Day".

The Friday after Thanksgiving.

December 25th.

2. Floating Holiday

The City agrees to credit each employee with eight (8) hours of compensatory leave at the beginning of each year this Agreement is in effect.

3. Holiday Pay

All bargaining unit members will be paid eight (8) hours of straight time for each holiday as defined in Article VII Section H.

4. Unpaid Holidays During FY 2009-2010, 2010-2011, and 2011-2012

For six holidays in the three fiscal years cited above, employees shall receive no pay for holidays that are not worked and shall only receive straight time pay for holidays that are worked.

The six unpaid holidays shall be designated by the Chief of Police after consultation with the Union.

ARTICLE VIII ALLOWANCES

A. Annual Uniform Allowance

Effective the first pay period after July 1, 2008, the City shall provide an annual uniform allowance of eight hundred dollars (\$800.00) to represented employees covered by this Memorandum.

In the event that an employee separates from City service, for whatever cause (except in the case of death resulting from on-the-job injury), during the fiscal year for which the annual uniform allowance has been paid, such payment shall be adjusted on a pro rata basis in relationship to the period of service in the final fiscal year of employment.

The annual Uniform Allowance shall be paid in combination with Longevity Premium Pay, as a separate check.

B. Uniform Boots

An employee who becomes regularly assigned as a motorcycle officer after the effective date of this Agreement shall receive one pair of approved boots which shall meet specifications set forth in the pertinent Police Department General Order.

C. Body Armor

Employees who elect to purchase body armor in-lieu-of standard City issued body armor shall receive a voucher for the cost of standard City issued body armor provided however that all body armor worn by employees and eligible for reimbursement under this provision must meet minimum safety requirements set by the City. Further, employees shall be entitled to a voucher only in accordance with the normal schedule for replacement of body armor, unless otherwise approved by the Chief of Police or his/her designee.

ARTICLE IX SELF IMPROVEMENT INCENTIVES

City and Association recognize the importance and the desirability of creating self-improvement incentives to motivate employees to upgrade their skills and develop their careers throughout the department, resulting in mutual benefits to the employee and to the City. It is agreed by the parties that these objectives can best be met through special training and continuing higher education. To this end, the following incentives are established. Effective July 1, 2008, these incentives will be treated as separate incentives.

A. Education Incentives

1. P.O.S.T. Management Certificate

Effective July 1, 2008, a bargaining unit member covered by this Agreement who has obtained the Post Management Certificate shall receive five percent (5%) of his/her regular base salary. Employees who qualify shall be eligible beginning with the first full pay period after submission of verification of eligibility.

2. Bachelor's Degree

Effective July 1, 2008, a bargaining unit member covered by this Agreement who has obtained a Bachelor's degree from an accredited college or university shall receive an additional five percent (5%) of his/her regular base salary. Employees who qualify shall be eligible beginning with the first full pay period after submission of verification of eligibility.

3. Masters Degree

Effective July 1, 2008, a bargaining unit member covered by this Agreement who has obtained a Master's degree from an accredited college or university shall receive an additional five percent (5%) of his/her regular base salary. Employees who qualify shall be eligible beginning with the first full pay period after submission of verification of eligibility.

B. Tuition Reimbursement

The City shall reimburse, upon notice of completion, an employee for the cost of a job-related academic course, approved in advance by the Chief of Police or his/her designated representative, in accordance with the following table:

GRADE REIMBURSEMENT:

- A - 100% of the cost of a course.
- B - 75% of the cost of a course.
- C - 50% of the cost of a course.

An employee failing or not completing a course, or receiving a grade lower than C, shall not be reimbursed. In the event that the course is graded on a Pass/Fail basis, reimbursement shall be made at fifty percent (50%) of the cost of the course. An employee shall be allowed to take up to two (2) courses eligible for reimbursement at any one time. The combined cost of the courses shall not exceed the cost of part-time enrollment (0-6 units) in the California State University System at the tuition rate applicable as of Spring 2008 (semester and quarter). The employee shall be required to provide proof of registration costs at the time they seek reimbursement.

Tuition Reimbursement will be paid through regular payroll check or in a manner specified by the City.

C. Bilingual Pay

An employee who has been certified as a bilingual speaker by the Office of Personnel shall receive an additional Fifty Dollars (\$50.00) per pay period. Bilingual pay may be discontinued if and when the Chief of Police or his/her designee determines that an employee receiving bilingual pay is in an assignment that does not have significant public contact with speakers of the qualifying languages. Determinations made by the Chief of Police and his/her designee under this provision shall not be subject to the grievance procedure.

ARTICLE X SPECIAL PROVISIONS

A. Employee Health Assistance Programs

1. Psychological Counseling

The City agrees to provide psychological counseling program for unit members. City agrees to pay the annual cost of providing psychological counseling services to employees and/or dependents. It is understood that the City contribution is intended to provide a maximum of twelve (12) counseling sessions per employee per year. In the event that a change in current provider is contemplated, the OPMA may designate a member of the selection committee to represent their interests.

The City agrees to maintain confidentiality of medical records as provided by law.

2. Substance Abuse Counseling

a. Substance Abuse Counseling

The City agrees to provide in-patient and out-patient treatment for alcohol and drug abuse for bargaining unit members, as determined by the Employee Assistance Program Coordinator. The cost of such services shall be limited to an aggregate lifetime benefit of \$30,000 or a maximum of two counseling programs, whichever is less, per eligible employee. Treatments must be authorized by the City of Oakland Employee Assistance Program Coordinator.

b. Confidentiality Agreement

All information obtained in the course of examination, rehabilitation and treatment of bargaining unit members with chemical dependency program shall be protected as confidential medical information. No data concerning this information or participation in any approved rehabilitation program will be made part of the bargaining unit member's personnel file or will be provided to any party without the written consent of the bargaining unit member.

B. Physical Fitness/Exercise Physiology Program

City agrees to provide a Physical Fitness/Exercise Program for more than one-half (1/2) of all employees per year.

C. Reduction in Force

In the event that a reduction in force is required, it shall be accomplished in accordance with the provisions of Section 9.02, Layoff Procedure of the Personnel Manual, as same existed on June 1, 1981, except with respect to paragraph (a) which is amended as follows:

a. Seniority Credit

Credit in the class of layoff shall be granted at the rate of one point for each month of service in that class or in any class higher in the Police Department in a promotional line of progression. Credit in a class that has been abolished, combined, divided or otherwise altered shall be granted at the same rate when the Personnel Director determines that such class was equal to or higher in level than the class of layoff; otherwise credit for service in such class shall be computed at the rate of one-half point per month. Service that is less than full-time shall receive seniority credit on a pro-rata basis.

This article shall not apply to members holding the rank of Deputy Chief.

D. Worker's Compensation

1. An employee that sustains an injury must notify the Medical Office within eight (8) hours of the injury. The employee must complete either an Initial Injury Packet or Declination Packet within 24 hours of injury, or as soon as reasonably possible.
2. To the extent permitted by applicable law, the City shall advise the OPMA of members who are receiving workers compensation benefits. The City shall provide such notice at a minimum of once each month.
3. The City agrees to honor the presumptives specified in and required by the California Labor Code sections 3200 through 3219 as amended and any other presumptives in the Code that apply to police officers. An individual medically diagnosed with a presumptive condition shall be placed in the ICF pay code. Provided, however, the City reserves the right to challenge such presumptive diagnosis as provided for by law. Further, the City reserves the right, as permitted by law, to recover the ICF pay code and other costs resulting from a presumptive diagnosis of an injury/illness that is subsequently determined to be non-work

related. Pending the outcome of a disputed presumptive diagnosis, the affected individual shall remain in the ICF pay code.

ARTICLE XI GRIEVANCE PROCEDURE

A. Definition

A grievance is hereby defined as any dispute which involves the interpretation or application of this Agreement, or disciplinary action taken against an employee, or controversy concerning the application of Departmental rules or general orders which are within the scope of bargaining.

It is the expressed intent of the parties that employees shall receive fair treatment and shall be disciplined only for just cause. Grievances shall be resolved expeditiously and at the lowest possible administrative level. No grievance filed by an employee, pursuant to the provisions of this Article, may be resolved inconsistent with the terms of this Agreement.

This article shall not apply to members holding the rank of Deputy Chief.

B. Election of Grievance Appeal Process

Disciplinary action, defined as written reprimand, suspension or termination, imposed upon an employee may be appealed through the Grievance Procedure as set forth in Section C of this Article. Alternatively and only in the case of a suspension, fine, demotion, or disciplinary discharge, the affected employee may submit his/her appeal directly to the Civil Service Board in accordance with Section 3, Subsection 6, of the Personnel Ordinance (Ordinance No. 8979 C.M.S. as amended). It is understood that no bargaining unit member shall be suspended for a period of less than forty (40) hours. Nothing in this MOU is intended to limit individual employee rights and alternate appeal processes under the PSOBR.

C. Procedure

1. Step 1 -- Submission

The employee or Association representative may submit the grievance, in writing and on a form provided for that purpose, to the Chief of Police. The grievance shall state the specific section of the Memorandum of Understanding or departmental rules or general orders alleged to be violated, or the disciplinary action taken, and the proposed solution. The Chief shall render a decision in writing to the employee and/or Association within seven (7) calendar days of receipt of the formal submission of the grievance. Copies of all written grievances filed by employees shall be provided to the Association within a period not to exceed five (5) calendar days.

2. Step 2 -- Appeal to Director of Personnel

Should the grievance remain unresolved, the employee or Association representative may, within seven (7) calendar days after receipt of the Chief's response, submit the grievance in writing to the Director of Personnel. The Director of Personnel, or a designated representative shall contact the employee or representative within seven (7) calendar days of receipt of the grievance to schedule a meeting to attempt to resolve the dispute. The Employee Relations Officer or designee shall respond in writing to the grievance within fifteen (15) days after any attempt to resolve the dispute is complete.

3. Step 3 -- Civil Service Board/Arbitration

Should the grievance remain unresolved, either the City or the Association may, within fourteen (14) calendar days of the second step response, submit the grievance to an impartial arbitrator who shall be selected by mutual agreement or, if such agreement is not reached, by alternately striking names from a list of seven (7) arbitrators, the parties will request a list from the California State mediation and Conciliation Service.

In accordance with Civil Service Rules, the employee or Association may elect to submit a grievance concerning a suspension, fine, demotion or discharge to the Civil Service Board in lieu of arbitration. Such election is irrevocable.

If arbitration is selected, it is agreed that the decision of the arbitrator shall be final and binding on all parties and that the arbitrator's fees shall be borne equally by the parties. It is expressly understood that the arbitrator shall have no power or authority to add to or subtract from the provisions of this Agreement or departmental rules or general orders; provided that, if any inconsistency between this Agreement and any of the foregoing rules or orders exists, this Agreement shall prevail.

Unless otherwise agreed to by the employee, in writing, all meetings and hearings for any disciplinary matter shall be private and confidential, and shall include only the parties and exclusive representatives.

D. Time Limits

Time limits prescribed in Section C above may be modified by mutual agreement of the City and Association. Failure by the employee or Union to follow time limits, unless so extended, shall nullify the grievance. Failure by the City to follow the limits, unless so modified, shall cause the grievance to advance to the next step.

Steps One and Two may be waived by mutual agreement between the Association and the Department.

ARTICLE XII RESOLUTION – FULL UNDERSTANDING NON-NULIFICATION AND DURATION

A. Resolution

It is understood that this Memorandum or any part thereof is not binding upon the City until and unless adopted by ordinances or resolutions of the City Council. This Memorandum of Understanding resolves in full, for its duration, all issues between the parties concerning wages, hours, and other terms and conditions of employment.

B. Full Understanding

The terms and conditions contained in this Agreement represent the full, complete, and entire understanding of the parties of matters within the scope of representation. In addition, this Agreement terminates and supersedes all practices, agreements, procedures, traditions, and rules and regulations inconsistent with any matters specifically covered in this Agreement.

C. Waiver

The City and the Union expressly waive the right to meet and negotiate with respect to any subject covered in this Agreement. Although nothing in this Agreement precludes the parties from mutually agreeing to meet and confer or negotiate on any subject within the scope of representation during the term of this Agreement, neither party may require the other party to meet and confer or negotiate on the subject matter covered by this Agreement. This provision shall not apply to matters covered by the provision entitled "Modification" in Section D below.

D. Modification

The parties to this Agreement intend that ordinances, resolutions, rules, and regulations enacted or revised by this Agreement shall be administered and observed in good faith. When the Department proposes to change any subject within the scope of representation but not covered or waived in this MOU, the Department will provide the Union with notice of the proposed change at least seven (7) days prior to implementation of the proposed change. If the proposed change materially impacts any matter within the scope of representation, the parties agree to meet and confer or negotiate over the impact. If no agreement is reached within thirty (30) calendar days after the request to meet and confer, either party may declare impasse. In the event of impasse, the parties will resolve the matter pursuant to the impasse procedures of the City Charter.

Either party, in its sole discretion, shall notify the other if it desires expedited arbitration within fifteen (15) days after declaration of impasse. An arbitrator to hear such case shall be selected by the parties from a panel of four professional neutral arbitrators to be determined by the parties. The arbitrator must conclude

a single day arbitration hearing and issue a decision within sixty (60) calendar days of the date of selection. The timelines or length of hearing may be shortened or extended by mutual agreement or upon an arbitrator's ruling on a request for an order shortening or extending time.

E. Non-Nullification Clause

If any provision of this Agreement should be held invalid or restrained by operation of law or by any court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby.

F. Duration

The provisions of this Memorandum shall become effective July 1, 2006, upon adoption by the City Council of implementing ordinances or resolutions. Upon approval by the City Council the MOU shall be extended from its original termination date (June 30, 2010) to June 30, 2013. Provided, however, that the wage provisions set forth in Article III, section A and Article VII, section H (4) shall be effective July 1, 2009. Provisions of this MOU shall not be retroactive, unless expressly provided herein.

FOR THE CITY OF OAKLAND

FOR THE OAKLAND POLICE OFFICERS'
ASSOCIATION

APPROVED: _____
Dan Lindheim, City Manager

APPROVED BY THE CITY COUNCIL ON: _____

ATTEST: _____
La Tonda Simmons
City Clerk and Clerk of the Council of the City of Oakland, California

APPENDIX A

CITY OF OAKLAND



ADMINISTRATIVE INSTRUCTION

SUBJECT	Management & Executive Vacation Leave	NUMBER	516
REFERENCE		EFFECTIVE	May 1, 2007
SUPERSEDE	AI 516 Dated February 15, 2006		

I. PURPOSE

The purpose of this Administrative Instruction is to explain the policies and procedures for Agency/Department Heads to award Management Leave and the award of Executive Vacation Leave by the City Administrator to eligible employees.

II. POLICY

MANAGEMENT LEAVE. Management Leave is a fringe benefit that may be awarded to employees in representation units UK1, UM1, UM2, UN1, UR1, TM1, TM2, U31, U41, and U51. Management Leave, unless otherwise noted, is retroactively granted on July 1 based upon the employee's work/performance the prior fiscal year. This award may be granted to an individual for two reasons: (a) Management Leave in lieu of overtime hours worked and/or (b) Management Leave for superior performance. All Management Leave may be cashed out or taken as paid leave. A total of fifteen (15) days maximum may be granted each fiscal year. Any Management Leave not taken or cashed out by June 30 of each year will be carried forward to the next fiscal year.

The Office of the City Administrator has final approval for all Department recommendations for Management Leave awards. The only exception to this is the automatic five days Management Leave awarded to employees in representation units UM1 and UM2 per the Memorandum of Understanding.

EXECUTIVE VACATION LEAVE. Executive Vacation Leave is a fringe benefit that may be awarded by the City Administrator to agency/department heads and executive management positions. The leave may be awarded to an individual for two reasons: (a) in lieu of or as an augmentation of a salary bonus and/or (b) as a hiring incentive for executive management positions. The leave may be granted at any time during the fiscal year at the discretion of the City Administrator. Executive Leave may be cashed out or taken as paid leave. Executive Leave not taken or cashed out by June 30 of each year will be forfeited.

APPENDIX A

Management & Executive Vacation Leave

A.I. 516

III. DEFINITIONS

<u>Term</u>	<u>Definition</u>												
Executive Vacation Leave as a Hiring Incentive	May be granted at any time upon hire from zero to fifteen (15) days as incentive for new executive management employees entering the City with no leave time at the sole discretion of the City Administrator.												
Executive Vacation Leave in Lieu of Salary Bonus	May be granted at any time from zero to fifteen (15) days in lieu of a salary bonus at the sole discretion of the City Administrator.												
Management Leave in Lieu of Overtime for Units UK1, UN1, UR1, UU1, TM1, U31, U41 and U51	<p>May be granted on July 1 from zero to ten (10) days based upon the prior year's performance upon the recommendation of the Department/Agency Head and with final approval from the City Administrator.</p> <p>If the employee was hired mid-fiscal year, the following schedule applies to Management Leave awards (these awards are granted on July 1 following the date of hire):</p> <table> <tr> <td><u>Date of Hire between:</u></td><td><u>Days Awarded:</u></td></tr> <tr> <td>July 1 and Sept. 12</td><td>5</td></tr> <tr> <td>Sept. 13 and Nov. 24</td><td>4</td></tr> <tr> <td>Nov. 25 and Feb. 7</td><td>3</td></tr> <tr> <td>Feb. 8 and Apr. 19</td><td>2</td></tr> <tr> <td>Apr. 20 and Jun. 30</td><td>1</td></tr> </table> <p>If an individual's employment is terminated mid-fiscal year for any reason, he/she will not be awarded any prorated Management Leave for that fiscal year.</p>	<u>Date of Hire between:</u>	<u>Days Awarded:</u>	July 1 and Sept. 12	5	Sept. 13 and Nov. 24	4	Nov. 25 and Feb. 7	3	Feb. 8 and Apr. 19	2	Apr. 20 and Jun. 30	1
<u>Date of Hire between:</u>	<u>Days Awarded:</u>												
July 1 and Sept. 12	5												
Sept. 13 and Nov. 24	4												
Nov. 25 and Feb. 7	3												
Feb. 8 and Apr. 19	2												
Apr. 20 and Jun. 30	1												
Management Leave in Lieu of Overtime for Units UM1 and UM2	<p>Per the Memorandum of Understanding, employees in these representation units will be awarded on July 1 five days of Management Leave.</p> <p>Employees hired mid-fiscal year shall receive a pro-rated award on date of hire based upon the following schedule:</p> <table> <tr> <td><u>Date of Hire between:</u></td><td><u>Days Awarded:</u></td></tr> <tr> <td>July 1 and Sept. 12</td><td>5</td></tr> <tr> <td>Sept. 13 and Nov. 24</td><td>4</td></tr> <tr> <td>Nov. 25 and Feb. 7</td><td>3</td></tr> <tr> <td>Feb. 8 and Apr. 19</td><td>2</td></tr> <tr> <td>Apr. 20 and Jun. 30</td><td>1</td></tr> </table> <p>An additional zero to five (5) days may be granted to employees on July 1 based upon the prior year's performance at the recommendation of the Department/Agency Head and with final approval from the City Administrator.</p>	<u>Date of Hire between:</u>	<u>Days Awarded:</u>	July 1 and Sept. 12	5	Sept. 13 and Nov. 24	4	Nov. 25 and Feb. 7	3	Feb. 8 and Apr. 19	2	Apr. 20 and Jun. 30	1
<u>Date of Hire between:</u>	<u>Days Awarded:</u>												
July 1 and Sept. 12	5												
Sept. 13 and Nov. 24	4												
Nov. 25 and Feb. 7	3												
Feb. 8 and Apr. 19	2												
Apr. 20 and Jun. 30	1												

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	If an individual's employment is terminated mid-fiscal year for any reason, he/she will not be awarded any additional prorated Management Leave for that fiscal year.
Management Leave for Superior Performance	If performance has been sustained at a superior level the prior fiscal year, an additional zero to five (5) days of Management Leave may be granted on July 1 with approval of the City Administrator.
Use of Executive Leave	Employees must utilize Executive Vacation Leave by June 30 of each year. Executive Vacation Leave may not be carried forward to the next fiscal year or cashed out.
Use of Management Leave	Employees may cash out up to fifteen (15) days of the awarded amount by June 30 of each year and/or carry their Management Leave balance forward to the next fiscal year. Departments may not fill positions for incumbents utilizing management leave immediately preceding retirement until the position is vacant.

IV PROCEDURES

<u>Responsibility</u>	<u>Action</u>
FMA/HRIS/Payroll Division	<ol style="list-style-type: none"> 1. For represented employees in Units UM1 and UM2 inputs award of Management Leave July 1. 2. By mid-May, distributes a report to each Department Head, displaying the current Management Leave balances for its employees. A Management Leave Worksheet displaying all employees within the organization who are eligible for Management Leave for the new fiscal year is included. This report also displays the prior year's Management Leave award. 3. Instructs Department Heads to indicate their recommendation for awarding eligible employees Management Leave (a) in lieu of overtime, and/or (b) for superior performance. 4. Upon receipt of the City Administrator's approval of employees to be granted Management Leave, inputs the Management Leave and Executive Vacation Leave awards and the Management Leave award for employees represented in units UM1 and UM2. The awards are reflected on the paychecks for the second pay period of July. The award for Executive Vacation Leave may be awarded at any time.
Department Head	<ol style="list-style-type: none"> 1. Reviews reports provided by HRIS/Payroll of outstanding Management Leave balances, and informs employees of amounts available for cash out or rollover to the next fiscal year.

APPENDIX A

	2. Reviews reports of departmental employees receiving Management Leave issued by HRIS/Payroll. Makes recommendations for current year award for the two types of Management Leave and submits to the Office of the City Administrator for final approval by May 30.
City Administrator	1. Provides final approval of all Management Leave not awarded by union contract and forwards lists to FMA/HRIS for processing on the second pay period of July. 2. Contacts FMA/HRIS for all awards of Executive Vacation Leave.

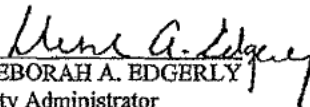
V. ADDITIONAL INFORMATION

The eligibility period for Management Leave is **July through June 30**. At the start of the eligibility period, and employee's award is based on overtime worked and performance during the prior Management Leave eligibility period unless otherwise noted.

The City Administrator has the discretion to award additional management leaves.

Any leave that an eligible employee takes *without pay* for more than a month is deducted from the total Management Leave eligibility period, and may result in prorating.

Employees may cash out Management Leave at any time during the year. Cash-out forms are available through department payroll representatives. Executive Leave may be awarded at any time throughout the year at the sole discretion of the City Administrator, but cannot be carried forward.


DEBORAH A. EDGERLY
City Administrator

APPENDIX B



CITY OF OAKLAND ADMINISTRATIVE INSTRUCTION

SUBJECT: Family Care and Medical Leave, Pregnancy
Disability Leave, and Paid Family Leave

NUMBER: 567

REFERENCE:

**EFFECTIVE
DATE:** August 3, 2004

SUPERSEDES: AI 567 dated February 5, 1994

I. POLICY

Employees may take unpaid family care and medical leave as prescribed in the federal Family and Medical Leave Act of 1993 ("FMLA") and the California Family Rights Act of 1991, as amended ("CFRA"). Implementation of this Article is governed by the FMLA and the federal regulations adopted at 29 C.F.R. Part 825 and by the CFRA and the state regulations adopted at California Code of Regulations, Title 2, division 4, sections 7297.0-7297.11.

II. PURPOSE

The purpose of this Administrative Instruction is to establish City of Oakland policy, procedures and responsibilities regarding Family Care and Medical Leave, Pregnancy Disability Leave and Paid Family Leave.

III. DEFINITIONS

A. Eligibility

To be eligible for family care and medical leave, on the date on which leave is to begin, an employee must have been employed by the City for at least 12 months, and have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. (29 C.F.R. §825.110, Government Code §12945.2(a))

1. For the purposes of meeting the 1,250 hours of service eligibility test of this Article, the determining factor is the number of hours an employee has worked for the City within the meaning of the Fair Labor Standards Act of 1938 [FLSA] (29 U.S.C. 297), (29 C.F.R. §825.110[c]; [see 29 C.F.R. §785 for FLSA])

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B. Family Care and Medical Leave Entitlement

Subject to the provisions of these administrative regulations and state and federal law, an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

1. The birth of a child and to care for the newborn child;
2. The placement with the employee of a child for adoption or foster care by the employee. (29 C.F.R. §825.200[a], §825.112[a]; Government Code §12945.2[c][3]);
3. To care for the employee's child, parent, or spouse who has a serious health condition; (See 29 C.F.R. §825.113 and 2 C.C.R. §7297.0 for definitions; Government Code §12945.2[c][1]);
4. To care for the employee's domestic partner who has a serious health condition and the employee has filed a Declaration of Domestic Partnership in accordance with established City policy;
5. Because of an employee's own serious health condition that makes the employee unable to perform the functions of the employee's position, except for disability on account of pregnancy, childbirth, or related medical conditions, which are covered by pregnancy disability leave. (Government Code §12945.2[c][3][c]; see 29 C.F.R. §825.114-115 for definitions of "serious health condition" and "unable to perform the functions of the employee's position" and Government Code §12945.2[c][8])
 - a. For family care and medical leave purposes, the "12-month period" in which the 12 weeks of leave entitlement occurs shall be defined as a "rolling" 12-month period measured backward from the date the employee uses any family care and medical leave.
 - b. "Twelve workweeks" means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes "12 workweeks" is calculated on a pro rata or proportional basis.
 - c. "Serious health condition" means an illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, spouse, or domestic partner of the employee, which involves either:

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- i. inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential health care facility; or
- ii. continuing treatment or continuing supervision by a health care provider, as described in detail in the FMLA and its implementing regulations.

C. Minimum Duration of Leave

1. Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason, rather than for one continuous period of time. (29 C.F.R. §825.203[a])
2. Reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. (29 C.F.R. §825.203[a])
3. Minimum Duration of Leave Taken for Serious Health Condition of a Parent, Child, Spouse, or Domestic Partner or for the Serious Health Condition of the Employee

Subject to the provisions of this Article, an employee may take family care and medical leave intermittently or on a reduced leave schedule to care for a sick spouse, parent, child, or domestic partner when medically necessary or for the employee's own serious health condition when medically necessary. (2 C.C.R. §7297.3[d], [e])

- a. The following conditions must be met for an employee to take family care and medical leave on an intermittent or a reduced leave schedule under this section:
 - i. there must be a medical need for leave (as distinguished from voluntary treatments and procedures);
 - ii. the medical need can be best accommodated through an intermittent or reduced leave schedule; and
 - iii. the employee must provide certification of the medical necessity of intermittent leave or leave on a reduced schedule. The certification of a serious health condition required below meets this requirement. (29 C.F.R. §825.117)
4. Minimum Duration for Leave Taken for the Birth, Adoption, or Foster Care Placement of a Child

Family care and medical leave taken because of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or adoption or foster care placement of the child with the employee. The

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basic minimum duration of the leave shall be two weeks. However, the City shall grant a request for a leave of less than two weeks duration on any two occasions. (2 C.C.R. §7297.3[d])

5. Leaves shall be taken in increments of at least one hour. Only the amount of leave actually taken will be counted toward the 12 weeks of leave to which an employee is entitled. (29 C.F.R. §825.203[d], 29 C.F.R. §825.205, see also 2 C.C.R. §7297.3[c][2] and [e])
6. Employees needing intermittent leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the City's operations. (29 C.F.R. §825.117)
7. The City may, at its discretion, assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule, as determined by the City. (29 C.F.R. §825.117, 29 C.F.R. §825.204)

IV. PAY STATUS AND BENEFITS

A. Except as provided in this section, the family care and medical leave will be unpaid. The City will continue to provide and pay for group health benefits during the period of leave on the same basis as coverage would have been provided had the employee been continuously employed during the entire leave period. (29 C.F.R. §825.207, 29 C.F.R. §825.209; Government Code §12945.2[d], [e], [f]; 2 C.C.R. §7297.5[c])

1. The employee will be required to continue to pay the employee's share of premium payments, if any. An employee's premium payment for the entire period of the unpaid leave is due before the leave begins. (29 C.F.R. §825.210, 29 C.F.R. §825.210[a] and [e])
2. The City's obligation to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. (29 C.F.R. §825.212[a] and [c]; Government Code §12935[a], 12945.2), 2 C.C.R. §7297.5[f])
3. As permitted by law, the City will recover from an employee its share of health plan premiums during a period of unpaid family care and medical leave if the employee fails to return to work after the employee's family care and medical leave entitlement has expired, if the employee's failure to return to work is not due to the employee's own serious health condition or to circumstances beyond the employee's control. (Government Code §12945.2[f], 2 C.C.R. §7297.5; §825.212 and 29 C.F.R. §825.213)

B. Other Benefits

While on unpaid family care and medical leave, an employee will not accrue seniority, sick leave, vacation leave, or retirement credit. (2 C.C.R. §7297.5[d]; Government Code §12945.2[f][2])

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C. Relationship of Unpaid Family Care and Medical Leave to Other Leaves

1. Use of Paid Leave

When an employee takes family care and medical leave because of the employee's own serious health condition, he/she shall be required to use all but 10 days of his/her accrued sick leave.

An employee may choose to use any accrued sick leave, vacation or other accrued paid personal time off that the employee is otherwise eligible to use during the otherwise unpaid family care and medical leave.

2. Concurrent Use of Leave

Any leave of absence that qualifies as family care and medical leave, and is designated by the City as family care and medical leave, will be counted as running concurrently with any other paid or unpaid leave to which the employee may be entitled or required to use for the same qualifying reason under a memorandum of understanding, City policy, or state law. (Government Code §12945.2[e]; 29 C.F.R. §825.207, §825.208; 29 C.C.R. §7297.5)

3. Workers' Compensation Leave

The City may count any time off for an employee's on-the-job injury against the employee's family care and medical leave entitlement when the employee's injury meets the criteria for a serious health condition; however, an employee's accrued paid leave may not be substituted for any part of an FMLA leave that is also a workers' compensation leave. (29 C.F.R. §825.207[d][2], also, §825.210[f], §825.216[d], §825.2209[d], §825.307[a][1])

4. Relationship to Pregnancy Disability Leave

The family care and medical leave provided under this section is in addition to any leave taken on account of pregnancy, childbirth, or related medical conditions for which an employee may be qualified under state law and described in City policy or relevant memorandum of understanding. (Government Code §12945.2, §12935[a]; 2 C.C.R. §7297.6)

5. California Paid Family Leave ("PFL")

Beginning on July 1, 2004, employees on FML in order to care for a family member or bond with a child, and who are eligible for State Disability Insurance (SDI), may apply for Paid Family Leave benefits (six weeks of partial wage replacement) through the Family Temporary Disability Insurance program, which is administered by the State Disability Insurance program.

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- a. PFL must be taken concurrently with Family Medical Leave. PFL does not entitle employees to job protection, beyond that provided under FML.
- b. Employees must be off work for seven calendar days and use two weeks of vacation leave, if it has been accrued, before PFL benefits begin. (Employees need not have worked any minimum amount of time to qualify for PFL.)
- c. PFL does not give an employee any additional rights under CFRA or FMLA. Employees whose employment is governed by a collective bargaining agreement that addresses Family Medical Leave may have additional entitlements and rights pursuant to that Agreement.

V. NOTICES TO CITY

- A. An employee should request a family care and medical leave by submitting a completed Family Care and Medical Leave application and a Health Care Provider Certification form to the employee's department personnel representative.
 1. The employee must provide written notice to the City as far in advance of the leave as possible and as soon as the employee reasonably knows of the need for the leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, the notice must be provided at least 30 calendar days in advance of the leave. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.
 2. The written notice must inform the City of the reasons for the leave, the anticipated duration of the leave, and the anticipated start of the leave. The employee should use the City's Family Care and Medical Leave application whenever possible. (29 C.F.R. §825.302; 2 C.C.R. §7297.4)
 3. If an employee fails to give 30 calendar days notice for foreseeable leave with no reasonable excuse for the delay, the City may deny the family care and medical leave request until at least 30 calendar days after the date the employee provides notice to the City of the need for family care and medical leave. (29 C.F.R. §825.304[b])
 4. The employee shall consult with the City and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the City's operations. Scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent, spouse, or domestic partner. (2 C.C.R. §7297.4 [a][2])

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B. Medical Certification

1. An employee's request for family care and medical leave to care for a child, a spouse, a domestic partner, or a parent who has a serious health condition shall be supported by a certification issued by the health care provider of the individual requiring care. If additional leave is required after the expiration of the time originally estimated by the health care provider, the employee shall provide the City with recertification by the health care provider. (Government Code §12945.2[j]; 29 C.F.R. §825.305-306; 2 C.C.R. §7297.11, §7297.0[a])
2. An employee's request for family care and medical leave because of the employee's own serious health condition shall be supported by a certification issued by the employee's health care provider. (Government Code §12945.2[k])
3. As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employee is required to obtain certification from his/her health care provider that the employee is able to resume work. (29 C.F.R. §825.310)
4. Employees are required to use the "Certification of Health Care Provider or Practitioner" form available from the City to meet the certification and recertification requirements of this policy. In addition, for the "fitness for duty" certification required under Article V B-3 above, the City may provide the health care provider with the City's customary "fitness for duty" forms, which may include a job position description and a list of the job position's essential functions.
5. If the City has reason to doubt the validity of the certification provided by an employee for the employee's own serious health condition, at the City's discretion and expense the City may require that the employee obtain the opinion of a second health care provider designated or approved by the City in accordance with the appropriate statutory provisions. At the City's discretion and expense, the City may also require the opinion of a third health care provider, in accordance with the appropriate statutory provisions, in the event that the second opinion differs from the opinion in the original certification. At the employee's request, the City shall provide the employee with copies of any second and third medical opinions. (Government Code §12945.2[k]; 29 C.F.R. §825.307-308; 2 C.C.R. §7297.4[b][2])
6. Under this Article, "health care provider" means a health care provider as defined in federal and state regulations implementing the FMLA and the CFRA. (29 C.F.R. §825.11; 2 C.C.R. §7297.1[j])
7. In cases of adoption or foster care placement, the employee must provide written verification, such as an adoptive home study, an adoption placement agreement, or a juvenile court order.

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8. An employee shall provide any health care certification or recertification or adoption/foster care verification required by the City under this AI within 15 calendar days of the City's request, unless it is not practicable for the employee to do so despite the employee's good faith efforts. An employee's failure to submit a required certification, recertification, or verification can result in a denial or delay of leave approval.

VI. CITY RESPONSE TO LEAVE REQUEST

It is the City's responsibility to designate leave, paid or unpaid, as family and medical leave-qualifying and to notify the employee of the designation. The City shall respond to the leave request as soon as practicable and no later than 10 calendar days after receiving the request. (2 C.C.R. §7297.4[a][6])

A. Parents' Dual Employment

Where both parents are entitled to family care and medical leave and both are City employees, allowable leave for the birth, adoption, or foster care placement of their child is limited to a total of 12 workweeks in a 12-month period between the two employees. Their family care and medical leave entitlement is not limited or combined for any other qualifying purpose. (2 C.C.R. §7297.1[c])

B. Employee's Status on Returning from Leave

Except as provided by law, on a timely return from family care and medical leave an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee has no right to return to the same position. An employee has no greater right to reinstatement than if the employee had been continuously employed during the leave period. The leave shall not constitute a break in service for purposes of longevity or seniority under any memorandum of understanding, City policy, or any employee benefit plan. (Government Code §12945.2[g]; 29 C.F.R. §825.214-219; 2 C.C.R. §7297.5[f])

VII. PREGNANCY DISABILITY LEAVE AND BONDING LEAVE

- A. Pregnancy disability means that, in the opinion of her health care provider, an employee is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform those functions without undue risk to herself, the successful completion of her pregnancy, or to other persons. Pregnancy disability also includes severe "morning sickness" and time off needed for prenatal care.

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1. Duration of Leave

- a. An employee is entitled to up to four months of leave for the period(s) of time the employee is actually disabled by pregnancy, childbirth, or related medical conditions.
- b. Pregnancy disability leave may be taken as needed intermittently or on a reduced work schedule when medically advisable, as determined by the employee's health care provider. Only the amount of leave actually taken may be counted toward the four months of leave to which the employee is entitled.

2. Eligibility for Leave

There is no length-of-service requirement before an employee disabled by pregnancy is entitled to a pregnancy disability leave.

B. Transfer

The City will grant the transfer request of an employee affected by pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties if both of the following conditions are met:

1. The employee's request is based on her health care provider's certification that a transfer is medically advisable; and
2. The City can reasonably accommodate a transfer. Any duty assignments resulting from an approved transfer request under this section will be determined by the City Manager or the City Manager's designee.

C. Eligibility for Transfer

There is no length of service requirement before an employee affected by pregnancy is eligible for a transfer under this section.

1. Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule

If it is medically advisable for an employee to take intermittent leave or leave on a reduced work schedule and it is foreseeable based on planned medical treatment because of pregnancy, the City may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular assignment. The temporary assignment does not have to have equivalent duties. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or reduced work schedule.

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2. Right to Reinstatement After Transfer

When the employee's health care provider certifies that there is no further medical need for the transfer, intermittent leave, or leave on a reduced work schedule, the employee must be reinstated to her same or comparable position in accordance with Article VII F.

3. Requesting Leave or Transfer

- a. An employee shall provide at least verbal notice sufficient to inform the City of the employee's need for pregnancy disability leave or transfer, and the leave's/transfer's anticipated timing and duration.
- b. An employee must provide at least 30 days advance notice before the leave/transfer is needed if the need for the leave or transfer is foreseeable. If 30 days advance notice is not practicable, for example because the employee does not know approximately when the leave/transfer will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.
- c. The employee shall consult with the City and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruptions to the City's operations. Scheduling, however, shall be subject to the employee's health care provider's approval.
- d. The City shall respond to the request as soon as practicable and in any event no later than 10 calendar days after receiving the request. The City will try to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

D. Medical Certification

1. A request for a pregnancy disability leave or transfer must be supported by medical certification.
2. A medical certification for a pregnancy disability leave is sufficient if it contains:
 - a. The date the employee became disabled due to pregnancy;
 - b. The probable duration of the period(s) of disability; and
 - c. An explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of her position without undue risk to herself, the successful completion of her pregnancy, or to other persons.

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3. A medical certification indicating that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or to less strenuous or hazardous duties is sufficient if it contains:
 - a. The date the need to transfer became medically advisable;
 - b. The probable duration of the period(s) of the need for the transfer; and
 - c. An explanatory statement that, due to the employee's pregnancy, the transfer is medically advisable.

E. Terms of Pregnancy Disability Leave

1. A pregnancy disability leave is unpaid except that an employee shall be required to use all but 10 days of her accrued and accumulated sick leave during the otherwise unpaid pregnancy disability leave. An employee may choose to use any accrued sick leave, vacation, or other accrued paid personal time off that the employee is otherwise eligible to use during the otherwise unpaid pregnancy disability leave.
2. During unpaid pregnancy disability leave, the employee is entitled to accrue seniority and to participate in all employee benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave under established City policy or memorandum of understanding.
3. During any portion of a pregnancy disability leave that an employee is using other accrued paid leave, the employee is entitled to accrue seniority and to participate in all employee benefit plans to the same extent and under the same conditions as apply to any paid sick leave, vacation, or other paid time off under established City policy or memorandum of understanding.
4. During any portion of a pregnancy disability leave that is also an FMLA leave, the City will continue to provide and pay for group health benefits on the same basis as coverage would have been provided had the employee been in paid status. When the employee has exhausted any FMLA portion of the leave and the employee continues on unpaid pregnancy disability leave only, the employee's entitlement to continued health benefit coverage will be the same as any other employee on an unpaid disability leave of absence.
5. An employee returning from pregnancy disability leave shall return with no less seniority than the employee had when the leave began for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits.

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6. The employee shall retain employee status while on pregnancy disability leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any memorandum of understanding or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualifying conditions.
7. As a condition of the employee's return to work from pregnancy disability leave or transfer, the employee must obtain a release to return to work from her health care provider stating that she is able to resume her original job duties.

F. Right to Reinstatement from Pregnancy Disability Leave/Transfer

1. Subject to state law and regulations, an employee returning from a pregnancy disability leave or transfer is usually entitled to reinstatement to the same position. If the City is excused by law from reinstating her to the same position, the employee is usually entitled to reinstatement to a comparable position.

2. Reinstatement to the Same Position

An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than if the employee had been continuously employed in her position during the leave or transfer period. The City may refuse to reinstate the employee to her same position or duties for either of the following reasons:

- a. At the time she requests reinstatement, the employee would not otherwise have been employed in her same position for legitimate business reasons unrelated to the employee's pregnancy disability leave or transfer, such as a layoff.
- b. Each means of preserving the job or duties for the employee, such as leaving it unfilled or filling it with a temporary employee, would substantially undermine the City's ability to operate safely and efficiently.

3. Reinstatement to a Comparable Position

An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the City is excused from reinstating an employee to her same position, or to the same duties, under Article VII F-2 then the City will reinstate the employee to a comparable position unless either of the following occurs:

- a. No comparable position is available; or

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- b. If the employee is returning from a pregnancy disability leave that does not qualify as an FMLA leave, a comparable position is available, but filling the available position with the returning employee would substantially undermine the City's ability to operate safely and efficiently.
4. If an employee exhausts all available leaves and is still disabled by pregnancy and unable to return to work, the employee's reinstatement rights are the same as the reinstatement rights of any other similarly situated employee.

G. Relationship of Pregnancy Disability Leave to FMLA, CFRA, and Other Leaves

1. Any period of incapacity or treatment due to pregnancy, including prenatal care, is a "serious health condition" under the FMLA. An employee's unpaid pregnancy disability leave will run concurrently with unpaid FMLA leave, up to a maximum of 12 workweeks, and will also run concurrently with any accrued paid leave the employee is required to use or elects to use under Article VII E above.

2. Bonding/CFRA Leave

- a. An employee's own disability due to pregnancy, childbirth, or related medical conditions is not included as a "serious health condition" under the CFRA. At the end of the employee's period(s) of pregnancy disability, or at the end of four months pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take unpaid CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.
- b. CFRA leave for bonding with the child does not require that either the employee or the child have a serious health condition. There is also no requirement that the employee no longer be disabled by her pregnancy before taking CFRA leave for reason of the birth of her child.
- c. The City may, but is not required to, grant unpaid CFRA leave if an employee continues to be disabled after exhaustion of pregnancy disability leave and prior to the birth of her child.

3. Maximum Entitlement

The maximum possible entitlement for qualified and eligible employees for both pregnancy disability leave under FMLA, state law, and this AI and CFRA leave for the reason of the birth of the child is four months and 12 workweeks.

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Family Care and Medical Leave, Pregnancy
Disability Leave, and Paid Family Leave

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VIII. INTEGRATION OF DISABILITY INSURANCE COVERAGE AND PAID LEAVES

An employee may supplement any disability insurance benefits paid under a City provided plan or SDI with accumulated sick leave and vacation to the extent necessary to make up the difference between the amount of insurance benefits paid and the normal weekly base pay for each week of disability.



DEBORAH EDGERLY
City Administrator