

I. OVERVIEW

Eight years ago, the Commission to Combat Police Corruption (“Commission”) was created by former Mayor Rudolph Giuliani through Executive Order 18¹ for the purpose of monitoring the anti-corruption efforts and systems of the New York City Police Department (“Department”). Throughout its tenure, the Commission has published 24 reports. While most of these reports have focused on the efforts of the Internal Affairs Bureau (“IAB”) to prevent, detect, and investigate corruption, the Commission has also studied and analyzed other entities within the Department that participate in ensuring the integrity of the officers who work for the Department. Examples of such entities include: the prosecution arm of the Department;² the Department’s investigative units;³ divisions responsible for conducting background investigations on applicants;⁴ and personnel within each individual command who are responsible for detecting, investigating, and responding to patterns of corrupt activity within their command.⁵

Throughout these eight years, the Commission has consistently found that the Department is dedicated to eradicating corruption among its members. While noting that IAB, for the most part, competently and effectively investigated the allegations of corruption it has received, the

¹ Executive Order No. 18 is reproduced as Appendix A to this report.

² See, i.e., *The New York City Police Department’s Prosecution of Disciplinary Cases* (July 2000).

³ See, i.e., *The New York City Police Department’s Non-IAB Proactive Integrity Programs* (December 2001).

⁴ See, i.e., *Performance Study: A Review of the New York City Police Department’s Background Investigation Process for the Hiring of Police Officers* (January 1999) and *Review of the New York City Police Department’s Recruitment and Hiring of New Police Officers* (December 2001).

⁵ See, i.e., *The New York City Police Department: The Role and Utilization of the Integrity Control Officer* (December 12, 1996).

Commission has recognized that no entity is perfect and there will be areas where the Department can improve its efforts. Towards this end, the Commission has made recommendations in each of its reports to improve the Department's existing systems or to create new systems. Many of these recommendations have since been adopted by the Department.

The Commission is now able to re-examine previously studied topics to determine whether its past recommendations have been adopted by the Department as well as whether a studied area has improved. The Commission has also reported in each year's Annual Report on the Department's achievements in three areas: (1) the discipline of those members of the service who are found to have made false official statements; (2) the discipline of those members of the service who engage in serious off-duty misconduct; and (3) the adequacy of the closed IAB investigations that have been reviewed by the Commission. This *Seventh Annual Report of the Commission* continues to report on the progress made by the Department in these three areas.

In these three areas, the Commission found continued improvement in the discipline of those officers found to have made false official statements and those officers found to have engaged in off-duty misconduct. Also, while the Commission found that the majority of the IAB cases it reviewed during the past year were thoroughly investigated, there were some areas where the Commission suggested improvements could be made. In addition to reporting on these three areas, the Commission also studied a particular category of closed IAB cases: those involving allegations of missing or stolen property from complainants after they had contact with members of the service. After reviewing these cases, the Commission generally found that IAB was conducting timely and thorough investigations of these allegations and recommended improved documentation and

increased supervision when an arrestee's personal property is taken or returned.

In this report, the Commission also provides a brief synopsis of its follow-up analysis to its 2000 report, *The New York City Police Department's Prosecution of Disciplinary Cases* which follows.

II. PUBLISHED REPORTS

The Commission is releasing one report simultaneously with the release of this *Annual Report*. This report was an extensive follow-up study to determine whether improvements were made both in the time it took to for cases to be administratively adjudicated and in the performance of the Department prosecutors in presenting these cases. This report is summarized below.

In its *Sixth Annual Report*, the Commission stated its intention to release reports on the manner in which the Department investigates allegations accusing members of the service of sexual misconduct or domestic violence and on the operation and investigations of the Firearms Review Board. At this time, the Commission is unable to release these reports due to the Department's lack of cooperation in providing Commission staff with access to the material necessary and relevant to complete these studies.

A. Follow-Up to the Prosecution Study of the Commission

1. Purpose of the Study

In July 2000, the Commission released a study that focused on the Department's disciplinary system ("*The Prosecution Study*"). This study examined several of the operational aspects of the

Department Advocate's Office ("DAO"), which is the unit within the Department responsible for the prosecution of disciplinary cases. The Commission chose to examine and report on this unit because of the important role that it plays in the Department's efforts to deter and punish misconduct. A fair and expeditious system demonstrates to the public that the Department is willing and capable of disciplining its members and will not tolerate misbehavior. A fair system is also necessary to instill confidence and maintain morale among members of the service.

In the 2000 study, the Commission investigated the qualifications, training, and the supervision of the Advocates, those individuals responsible for prosecuting the cases. The Commission also examined how cases were prepared and presented. This was done by reviewing a sample of files maintained by the Advocates and by observing proceedings before the Trial Rooms or the Office of Administrative Trials and Hearings. Also, a section of that report was devoted to a statistical analysis of the time between various, key steps in the disciplinary process.

At the conclusion of the original study, the Commission found that there were several areas within the disciplinary system that needed improvement. There were significant delays throughout the adjudication process, and many cases that were pending for lengthy periods of time were ultimately dismissed due to a lack of proof. The Commission also found that many Advocates did not possess the necessary skills to adequately present cases. Lack of case preparation by the Advocates and insufficient witness contact negatively affected the presentation of the cases. The Commission also noted an inappropriate lack of respect between some Advocates and Trial Commissioners which risked tainting the perception of a fair, just, and professional disciplinary system.

The Commission made several recommendations in an effort to improve the disciplinary system. To address the issue of delays, the Commission recommended that the Department develop a system to closely track cases in order to identify and address specific areas of delay. The Commission suggested that the Trial Commissioners manage the resolution of cases more aggressively by prioritizing older cases and scheduling more trials throughout the week. In reference to those cases that were pending for significant periods of time before being ultimately dismissed due to a lack of sufficient evidence, the Commission recommended that the Advocates review their evidence and evaluate the strength of their cases upon assignment in order to determine their viability. After observing that many of these dismissed cases were originally investigated and substantiated by the Civilian Complaint Review Board (“CCRB”),⁶ the Commission recommended that the prosecution of CCRB-generated cases be handled in-house by CCRB.⁷ This recommendation was made to prevent the Department and CCRB from blaming each other when these prosecutions failed.

Based upon its observations of the Advocates’ performances in the Trial Rooms and on its review of case files, the Commission recommended that the Department hire more qualified

⁶ CCRB is a city agency that has jurisdiction to conduct primary investigations of complaints against police officers that allege excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.

⁷ The prior police and mayoral administrations announced their intention to implement this recommendation. The police unions, however, argued that this prosecutorial authority exceeded the power granted to CCRB pursuant to the City Charter and filed a lawsuit to prevent the change. In July 2001, the New York State Supreme Court ruled against the unions and decided that the expanded authority would further, rather than violate, CCRB’s mandate. However, the Court found that only a member of the Department may hear cases where the penalty may include termination from the Department. Consequently, CCRB could prosecute these cases, but not at the Office of Administrative Trials and Hearings where the administrative law judges are not members of the Department. Both parties appealed. The Appellate Division ruled that CCRB could prosecute misconduct cases, but all the cases, not merely termination cases, must be heard by Department officials. Due to current budget constraints, CCRB reported that it was unable to take immediate

attorneys. Supervisors with managerial and trial experience should also be hired and should provide more extensive supervision and regular training regarding case preparation and trial presentation. The Commission further suggested that the Advocates should be required to document all work that they conduct on their cases. Finally, to address the poor relationship between some Advocates and some Trial Commissioners, it was recommended that there be increased and regular contact between the Department Advocate and the Deputy Commissioner of Trials to discuss areas of mutual concern.

Three years later, the Commission has released a follow-up study to determine whether, and in what ways, the Department has accelerated and improved the presentation of cases in the disciplinary system, which of its recommendations the Department implemented, and the effects of these recommendations on the disciplinary system. To conduct this review, the Commission met with Department officials at DAO and the Deputy Commissioner of Trials and discussed any changes that had been made since the publication of *The Prosecution Study*. The Commission also reviewed 103 closed disciplinary cases that were prosecuted by DAO and observed disciplinary proceedings in the Trial Rooms from October 2000 to the present. Finally, the Commission compiled statistical data based on 1226 closed cases and created a statistical data base for the purpose of assessing the amount of delay between key stages in the disciplinary process. The Commission separately analyzed another 306 cases adjudicated during the first two quarters of 2003.

2. Findings

action to affect this change.

During the course of this follow-up study, the Commission found minimal improvement in the Department's disciplinary system.

Significant delays still existed in the progression of all of the closed cases through the Department's disciplinary system. Half of the cases took approximately ten and one-half months from commencement to conclusion.⁸ Although cases resolved through negotiated pleas made their way through the system more quickly than similar cases in 2000, half of them took at least seven months to resolve. In comparison to the time periods examined in the original *Prosecution Study*, those cases where trials were held generally took longer to complete. Increases of three months were observed for 50% of those cases and increases of six months were observed in an additional 25% of the cases. These increases were mostly attributable to the amount of time it took to commence the trials and for the Trial Commissioners to issue their decisions at the conclusion of the trials. Delays continued to be observed in the scheduling of trials as cases were being adjourned for three to four months on a routine basis. Many times the cited reason for the length of time between adjournments was the lack of available space in which to try the case. However, during its observations, Commission staff observed that on most days, only one of the two Trial Rooms was in use for any part of the day. Finally, consistent with the findings in the original *Prosecution Study*, those cases that were investigated by CCRB were, in general, pending for lengthier periods of time than those cases that were investigated by Department personnel. Additionally, CCRB-generated cases were significantly less likely to conclude with a guilty finding.

⁸ This statistic was based on the Commission's main sample of data, calculated from cases closed by the Department between January 2001 and November 2002. Subsequently, the Commission computed updated statistics covering the first two quarters of 2003. Unless otherwise specified, all statistics refer to the Commission's initial main

Despite DAO assertions that its goal was to hire experienced trial attorneys, for the most part, until the final drafting stages of this Report, DAO was still staffed with members of the service who were law school students or recent law school graduates. Therefore, the majority of the Advocates had insufficient trial advocacy skills and limited legal experience. Furthermore, the supervision and training provided by DAO to these inexperienced Advocates were generally insufficient to counteract their lack of experience. As this Report was being prepared for publication, the Department hired seven additional civilian attorneys with outside legal experience to replace members of the service who had left DAO.

Even the majority of the supervisors and DAO senior officers lacked significant trial/legal experience. As a possible consequence, supervisory reviews of the Advocates' cases continued to be inadequate. In its examination of DAO files, the Commission found very little evidence of supervisory reviews, and some Advocates tried cases which were obviously not sufficiently prepared prior to the trial due to the Advocates' failure to contact witnesses, prepare meaningful and coherent examinations, or obtain extrinsic evidence that was necessary to prove the cases. Supervisors were rarely observed in the Trial Rooms except for the limited occasions when they were second seating Advocates, although their presence could have provided valuable feedback to those Advocates who consistently experienced the same difficulties when trying cases.

The Department appeared to be making more of a commitment to providing training to the Advocates, including mock trial workshops. However, many of these training sessions did not focus on teaching trial advocacy skills. Another training method used by the Department was the second

sample.

seating of Advocates. While the Commission commended this approach, it was often ineffective since Advocates were being second seated by either inexperienced Advocates, experienced but ineffective Advocates, or Advocates who did not have any prior knowledge of the case, thereby limiting their utility at trial. Not surprisingly, this type of second seating did not significantly improve the Advocates' overall performance.

Additionally, some Advocates did not appear to be adequately preparing their cases for trial. Complainants and witnesses were often not contacted until mere days before the trial and in many of the files reviewed by the Commission, there was no indication of any contact with the complainant or witnesses. This lack of timely contact may, in some cases, have resulted in the Advocate's inability to produce a witness at trial, either because the witness' whereabouts was unknown or because the witness became uncooperative. In some cases, the failure to present live witness testimony may have necessitated the dismissal of the charges or the presentation of hearsay cases, which almost always resulted in not guilty findings. Furthermore, it appeared that the Advocates were at times not subpoenaing necessary records, researching applicable law, or further developing evidence beyond what was given to them by the initial investigator. At times, these failures resulted in weak presentations in the Trial Rooms.

While the Commission noted that some Advocates had improved, overall, additional improvement was still needed. A number of Advocates continued to conduct ineffective direct and cross examinations of witnesses and failed to establish the proper foundation to admit items into evidence. These inadequate trial skills often necessitated the intervention of the Trial Commissioners to either ask the foundational evidentiary questions, accept an item into evidence

despite the lack of a foundation being established, or ask witnesses questions to help establish the Department's case.

Overall, the atmosphere in the Trial Rooms improved. The Trial Commissioners' attitude of frustration was less apparent, and the general demeanor of the parties appeared to be more professional and tolerant.

3. Recommendations

Below is a summary of some of the recommendations the Commission made in this follow-up study to address its findings.

- The Trial Commissioners should develop a uniform scheduling system that is accurate and efficient so that trials can be conducted in both Trial Rooms on a daily basis. This may prevent cases from being adjourned for three-to-four months and, therefore, alleviate some of the delay that exists in the disciplinary system. The Deputy Commissioner of Trials should routinely examine how the Trial Rooms are being utilized. Trial Commissioners should also prioritize older cases.
- The Department should develop a computer system with the ability to track the progression of disciplinary cases through the administrative system while these cases are still pending. This system should have the ability to capture information about the delays routinely experienced during each case's progression through the system. Furthermore, the Department should explore ways to increase the veracity of the data entered into and contained within its current informational system.
- The Department should continue its new policy of hiring more experienced civilian attorneys. More experienced lawyers could, then, serve as mentors for those Advocates who have little or no experience. Those members of the service who do join DAO should be required to commit to a term of more than two years so that DAO can capitalize on the training and experience it provides to those law students and recently graduated lawyers who are assigned to this unit. As noted previously, prior to the publication of this Report, the Department stated that it no longer intends to recruit members of the service who are in law school.

- DAO should continue its recently implemented practice of assigning personnel to supervisory positions based on legal and management skills, rather than on police experience. Since currently, the only Executive Officer with outside trial experience is the Managing Attorney, at least one other Managing Attorney with similar outside trial experience and a supervisory or management background should be hired. If this were done, both Managing Attorneys could share the responsibility of supervising all of the Advocates and, therefore, provide a greater and more substantial supervisory presence. The Commission further recommends that all Team Leaders similarly be required to have prior trial experience outside of DAO or a demonstrated record of excellence within DAO.
- Team Leaders should be obligated to conduct more substantive reviews with the Advocates whom they supervise and to monitor their performance in the Trial Rooms more closely. A stronger supervisory presence in the Trial Rooms when the Advocates try cases would provide opportunities for Advocates to receive feedback on their presentations. Case reviews must be conducted in a more meaningful manner because it appears that cases are being deemed sufficiently prepared when the Advocate has not completed fundamental steps. In light of these findings, supervisory reviews should be enhanced, and the Advocates should receive additional input about their case preparation from the supervisors.
- Given many Advocates' lack of trial experience, it is imperative that they are provided with extensive trial advocacy training. Training for Advocates should focus more on evidentiary issues and elementary trial matters rather than unrelated topics. The trial technique workshops currently provided by the Department should also be mandatory for all Advocates and not just those who are newly hired. Furthermore, to be effective, these workshops should be taught by experienced trial attorneys.
- The increased practice of second seating inexperienced Advocates during trial is a positive trend and should continue. However, the attorneys who engage in this second seating must possess demonstrable trial skills, should be familiar with the facts of the case, should be able to advise the Advocate during the trial, and should assist the Advocate with the pre-trial, preparatory work.
- Witnesses should be interviewed as a matter of course upon receipt of a case, whether or not there is an expectation that the case will proceed to trial. This may improve the likelihood that the witnesses will continue to cooperate with the Department and will provide more detailed and accurate accounts of the reported misconduct. These improvements, in turn, could decrease the dismissals of cases prior to trial or the necessity of presenting cases supported by only hearsay evidence,

and thus, may further increase the Department's level of success in the Trial Rooms. In the alternative, early contact with witnesses will enable the Advocates to determine in a more timely manner whether cases are viable.

- All steps such as supervisory reviews, witness contact, and other investigative steps should be documented on worksheets in the Advocate's file along with the dates on which these activities took place and any follow-up action that is required. This will assist supervisors in their review of cases and when necessary, aid in the transfer of cases between Advocates.

4. Conclusion

After the Commission released the original *Prosecution Study*, the Department asserted that it was going to adopt several of the recommendations made therein. This follow-up study demonstrates that many of the recommendations have not been adequately implemented and that, while there was some observable improvement, more progress was still necessary. The length of time cases are pending in the disciplinary system, the presentation of cases by the Advocates in the Trial Rooms, and the type of legal training provided to the Advocates are all issues that continue to need attention.

III. THE COMMISSION'S MONITORING OF CLOSED IAB INVESTIGATIONS

A. Introduction

As part of its mandate to assess the effectiveness of the Department's systems and methods for investigating allegations of corruption and misconduct,⁹ the Commission has continuously

⁹ See Executive Order No. 18 (February 27, 1995), at § 2(a)(ii).

studied completed IAB investigations. The Commission first reported on this issue in 1997 when it released a report which examined 78 closed IAB investigations.¹⁰ The purpose of that review was to determine whether all warranted investigatory steps were taken for these cases. The Commission noted that its evaluation “was not based upon whether investigators took every conceivable step,” but whether they “performed the steps that were warranted given the nature of the allegations and the available information.”¹¹

From its analysis, the Commission determined that the Department was committing sufficient resources to thoroughly investigate allegations of corruption and was dedicated to rooting out corruption despite the potential embarrassment this could cause the Department. Although the Commission was satisfied with the investigations conducted in the majority of the cases reviewed, there were ten cases where the Commission noted weaknesses in the investigation. Based upon the review of these cases, the Commission recommended that team leaders and group commanders provide investigating officers with rigorous supervision. Furthermore, the Commission found that some cases did not adequately document the investigative steps that were taken or failed to document why obvious steps were omitted from an investigation. Based upon this finding, the Commission recommended that all investigative steps or omissions be documented. The Commission explained that this would facilitate transferring case files and reduce the possibility of repetitive investigative steps being taken in the event that the case had to be assigned to another investigating officer.

¹⁰ See *Monitoring Study: A Review of Investigations Conducted by the Internal Affairs Bureau* (October 1997).

¹¹ *Id.* at p. 9.

Also, as part of that review, the Commission listened to audio tapes of PG hearings conducted by investigating officers.¹² Based upon these interviews, the Commission recommended that investigators improve their interviewing techniques and that investigators be trained in ways to address certain difficulties inherent in interrogating fellow members of the service. In response to this recommendation, the Chief of IAB instituted a comprehensive training program addressing interview techniques and instructed investigators' supervisors, who were experienced interviewers, to meet with investigators for the purpose of reviewing their cases and offering advice regarding how to proceed during these interviews. The Commission also made two other recommendations. First, the Commission recommended that, where possible, investigators avoid disclosing the identities of complainants and witnesses to the subject of the investigation. Secondly, the Commission suggested that IAB perform regular audits of its caseload to confirm that all of its cases were assigned and were either on track to completion or completed and closed in order to prevent undue delay in investigating cases. In addition to the above-mentioned changes ordered by the Chief of IAB, the Department also re-opened some of the cases where the Commission identified that additional investigative steps could have been taken.

154 closed investigations were reviewed and reported on in the Commission's *Fourth Annual*

¹² Patrol Guide §206-13 (formerly PG § 118-9) allows the Department to interrogate officers within the context of an official Department investigation. Officers that refuse to answer questions during these interviews are suspended, while officers that are found to have been untruthful during the examination will be, absent exceptional circumstances, dismissed from the Department. Because of the mandatory nature of these interrogations, any statement made by the officer cannot be used against him in any pending or future criminal proceedings. However, these statements can be used against the officer in administrative departmental disciplinary proceedings. Officers interviewed pursuant to this provision of the Patrol Guide can be targets of an investigation or witnesses. (Hereinafter "PG interviews," "PG hearings", "official interviews").

Report.¹³ In addition to evaluating whether investigators adequately pursued all warranted investigative leads given the nature of the allegations and the available information, the Commission also specifically examined three other areas.

Specifically, the Commission reviewed the investigations to determine whether investigative tools such as surveillance, E.D.I.T. procedures,¹⁴ and/or integrity testing¹⁵ were utilized where appropriate. In those cases where these investigative tools were employed, Commission staff then determined whether they were used in an effective manner. Also, the Commission examined whether the investigators were obtaining critical documents and interviewing complainants and witnesses in a timely manner. Finally, the Commission again reviewed the PG hearings that were conducted during these investigations because interviewing officers in this context is a valuable tool for investigators to develop inconsistencies in a subject officer's statements, to learn about other evidence, and to develop leads for the investigation.

Although the Commission found that most of the investigations were thorough and well-conducted, at the conclusion of its analysis, the Commission again recommended that the group commanders and team leaders provide their investigators with more rigorous and on-going supervision due to repetition, in some cases, of some of the aforementioned problems. Furthermore, the Commission recommended that the Department develop a stricter protocol for sharing

¹³ See *Fourth Annual Report of the Commission* (November 1999), at pp. 22-42.

¹⁴ The acronym E.D.I.T. stands for enforcement, debriefing, intelligence gathering, and testing. See *infra*, pp. 44-45 for a more detailed explanation of the E.D.I.T. program.

¹⁵ See *infra*, at pp. 39-43 for an explanation of integrity testing procedures.

confidential informants with non-IAB bureaus because these informants could possess useful information that might grow stale while investigators seek permission to speak to the confidential informant. Similarly, investigators should make every effort to interview potential witnesses in a timely manner. Based upon its review of the PG hearings, the Commission recommended that investigators should fully familiarize themselves with the case and review all of the investigative reports prior to conducting these PG hearings in order to be adequately prepared. With regard to integrity tests, the Commission recommended that these tests be more closely tailored to the original allegations against the officer and that the investigator who develops the test be fully familiar with the facts of the case and the underlying allegations.¹⁶

In its *Fifth Annual Report*,¹⁷ the Commission employed a new methodology than had previously been used to monitor closed investigations. Instead of examining a large sample of investigations all at once, the Commission began to review smaller samples of cases on a monthly basis. This enabled the Commission to analyze more current investigations. The Commission found, in general, IAB conducted satisfactory investigations in all cases, and further, noted an improvement in the timeliness of witness contact in these investigations. Improvements were also seen in the quality of PG interviews and the gathering of critical documentation. The Commission noticed, however, that investigators were still missing some opportunities to conduct surveillance

¹⁶ In addition to reviewing PG hearings and integrity tests in the context of closed cases, the Commission conducted two separate studies that concentrated on analyzing only these techniques and regularly reviews these techniques for each year's Annual Report. See *Performance Study: A Review of Internal Affairs Bureau Interrogations of Members of Service* (March 2000); and *Performance Study: The Internal Affairs Bureau's Integrity Testing Program* (March 2000).

¹⁷ See *Fifth Annual Report of the Commission* (February 2001), at pp. 18-29.

and integrity tests, and some of the scenarios used in the integrity tests needed to be more realistic and reflective of the underlying allegations. The Commission also reviewed whether IAB was correctly identifying all officers who should be subjects of an investigation and found that in some cases, IAB was not properly designating all appropriate officers as subjects. For example, in cases where the allegations involved missing property from a prisoner or home, IAB appeared to be designating only the arresting officer as a subject despite the presence of many other officers who had an equal opportunity to commit this misconduct. Consequently, the Commission recommended that investigators designate and investigate all officers who were present at the scene of the alleged misconduct as potential subjects unless there was specific information that excluded some officers or implicated a particular officer.

In its *Sixth Annual Report*,¹⁸ the Commission noted improvements in the timeliness in which the investigations were completed, the quality of PG interviews, the development and implementation of integrity tests, the timeliness of witness contact, the collection of all relevant documents, and documentation of investigative steps. Furthermore, the Commission also reported that IAB was appropriately and effectively using its E.D.I.T. program and surveillance to enhance investigations.

B. Methodology

Since the publication of its *Sixth Annual Report*, the Commission has been consistently examining investigations closed by IAB. For this study, the Commission analyzed 135 “C” cases

investigated by IAB.¹⁹ At least two cases from each of fifteen investigative groups were examined.²⁰ These cases were randomly selected from lists of closed cases supplied by IAB. All of these cases were closed between May 2000 and May 2003.²¹ When selecting these cases, the Commission was unaware of the final disposition on the case and the type of misconduct that was the subject of the investigation. Therefore, this sample included a wide range of alleged misconduct.

Given the high percentage of corruption complaints that involve one or more allegations of missing property after a civilian complainant had contact with a member of the service, the Commission separately reviewed and examined a large sample of those closed IAB investigations where missing or stolen property allegations were levied.²² In addition to the number of such allegations that the Department receives annually, as elaborated upon below, there are a number of problems inherent in investigating allegations involving missing property. The Commission, therefore, sought not only to ascertain how the Department investigated these allegations, but also to evaluate how the Department dealt with the obstacles relative to these cases and determine if the

¹⁸ See *Sixth Annual Report of the Commission* (December 2001), at pp. 20-32.

¹⁹ IAB classifies cases as “C” cases when allegations of either serious misconduct or criminal activity have been made.

²⁰ IAB has 16 investigative groups which are divided both geographically and by subject matter. The only group that was not studied for this review was Group 51, which investigates police impersonation cases.

²¹ Although the official closing date for the cases reviewed was no later than May 2003, upon the Commission’s request to review cases, the Commanding Officers of each unit reviewed the cases. As a result, some cases were returned to investigators for the completion of additional steps. Therefore, there were some cases where although still “closed” investigative steps were, in fact, completed after May 2003.

²² For purposes of clarity, cases that the Commission reviewed due to allegations that property was stolen or missing, will hereinafter be referred to as “missing property cases” while cases that the Commission reviewed pursuant to its ongoing monitoring of IAB investigations will be referred to as “general cases” or cases within the “general review.”

Department did so in the most feasible manner.

One of the main problems involving missing property allegations is that it is often difficult to obtain corroboration that the complainant actually possessed the alleged stolen property, or that the property was, in fact, missing. Additionally, many of these cases are “he said/she said” types of cases where a person states that an officer took the property, while the officer states that he did not. Therefore, when there is no additional evidence to support or disprove an allegation, they are often difficult to resolve. For all of the above reasons, the Commission looked at the investigative steps taken on these types of cases and how the Department dealt with any impediments throughout the investigation. This was done with a view towards determining if any recommendations could be made to the Department which may decrease the number of allegations made and assist the Department in resolving these cases as expeditiously and conclusively as possible. After examining 73 cases, the Commission found that the majority of these cases were thoroughly and timely investigated.

In selecting cases containing missing property allegations for review,²³ the Commission first received a list of all cases involving missing property allegations that were closed between March 2000 and December 2001. From this list, the Commission randomly selected 77 cases. This accounted for approximately 15% of the cases closed by IAB for that time period.²⁴ These cases

²³ Some of those cases involving missing property allegations reviewed by the Commission also contained other allegations that are not addressed in the context of this report. Similarly, some of the cases reviewed as part of the Commission’s closed case monitoring mandate contained allegations of missing property. However, since these cases were not examined based on the allegations, and, therefore, did not focus upon issues that were unique to the missing property review, these cases were counted among the general sample reviewed by the Commission as part of its mandate and not included in the sample of cases reviewed solely because they contained missing property allegations.

²⁴ 492 cases were closed between March of 2000 and December of 2001.

were selected without reference to the different IAB Groups or outcome of the investigations. The Commission then excluded three cases that were deemed not to be missing property cases as defined for this study, ultimately examining 73 cases for this Report.²⁵ The Commission's sample included cases emanating from fourteen different IAB Groups.

As part of its review, the Commission examined each investigative file including all worksheets, documents, audio tapes, and video tapes contained therein. As in past studies, the Commission did not review the files to determine whether IAB followed every possible investigative step. Rather, the Commission looked at each case to determine whether IAB's actions were reasonable and adequate in light of the allegations and the subsequent course of the investigation. In addition to examining the investigative steps taken, the Commission also determined whether, based on the results of the investigation, the disposition of the investigation was appropriate and whether the investigative steps were conducted in a timely manner. Specifically, the Commission examined whether complainants and witnesses were interviewed in a timely manner and whether the interviews of these witnesses were conducted skillfully and professionally. The Commission also determined whether necessary documents were gathered in a timely manner and whether investigators were sufficiently documenting their own investigative actions on the case. Finally, the Commission particularly looked at whether IAB was using investigative tools, including surveillance, PG hearings, E.D.I.T. procedures, and integrity testing, to enhance investigations and if

²⁵ These three cases involved employees of the Police Department accused of stealing property while off-duty or not in connection with their official duties. These cases, because they were more appropriately considered allegations of larceny, were not included in this study. Further, one requested case could not be located by the Department. Therefore, 73 of the 77 requested cases are included in this analysis.

IAB was utilizing them in a competent manner when such tools were employed.

In addition to the above, the Commission also considered areas that were more prevalent in those cases with missing property allegations and could, therefore, have a greater impact on the course and outcome of these investigations. These issues included the Department's vouchering procedures, uncooperative and/or incredible complainants, withdrawn complaints, and the entry by officers into civilian premises.

C. Findings

The Commission found that the majority of cases were investigated in a thorough manner and all appropriate investigative steps were taken. Generally, witnesses were interviewed in a timely manner and appropriate questions were asked during these interviews. Background documentation was gathered on the subject officers and other documentation, where appropriate, was also sought early in the case. For the most part, investigative tools such as surveillance, integrity testing, and PG hearings were effectively used when warranted. In those cases specifically reviewed due to missing property allegations, the Commission found that overall, IAB conducted competent investigations that were completed in a timely manner. With the exception of two cases, the Commission agreed with the ultimate outcomes of all the missing property cases reviewed. However, in its more general review, the Commission noted problems in 51 of the cases reviewed.²⁶

In many of these cases, the Commission believed that the investigation took too long to

²⁶ The Commission notes that in three of these cases, IAB supervisors reviewed the investigations while still open and spoke with the assigned investigators about the problems therein.

close, while in others, the Commission found that the investigator had missed or failed to adequately perform an important investigative step.²⁷ The Commission recognizes that in many of these cases where problems were noted, the final disposition of the case did not appear to be affected by these problems. The Commission maintains, however, that following these investigative steps could instill greater confidence in the ultimate disposition of the investigation. It is important to conduct thorough investigations into allegations of corruption or misconduct so those officers can be disciplined and, when appropriate, even terminated, and so that other officers will see that the Department will not tolerate misconduct from its members.

Even if an investigation does not uncover evidence to support the original allegations, it may produce evidence of other misconduct. For example, in one case, the subject officer was alleged to have made false entries in Department records when he prepared a complaint report for an employee of a tow truck driver reporting that the license plates on a particular truck were stolen. The license plates had not been stolen, but instead had been removed and vouchered by other police officers after the truck was impounded. These license plates were removed because the truck was registered with an incorrect weight.²⁸ The day before preparing the false complaint report, the subject officer

²⁷ In the remainder of this section on closed case monitoring, the Commission discusses in separate sections issues that arose in its analysis and provides numbers of cases and examples where these issues were present. While some investigations were well-conducted with the exception of a discrete issue, in other investigations, several different issues were applicable. Therefore, an individual case might be included in only one section or in several sections of this Report. When stating that the number of cases where the Commission noted problems was 51, this number is all-inclusive. Any numbers set forth in the remainder of this section are subsets of this total number.

²⁸ To qualify as a tow truck, the truck must weigh a certain amount. The truck at issue was registered as weighing significantly above this amount, although, it was actually well below the minimum weight. Removing the license plates would force the owner to re-register the truck, and the correct weight would be recorded. However, by reporting the license plates stolen, the owner did not have to re-register the truck.

had interfered with other officers who were issuing a summons to the tow truck driver. In the course of the investigation, the assigned investigator learned during an interview with the tow truck driver that the subject officer installed car radios at the tow truck owner's car repair shop. Subsequent investigation disclosed that this was unauthorized off-duty employment, and, in attempts to set up an integrity test to catch the subject officer engaged in this unauthorized off-duty employment, an undercover officer called the subject officer and learned that the subject officer was, at times, scheduling appointments to perform work on these cars while he was on duty. This resulted in further charges against the subject officer at the completion of the investigation.

A thorough investigation can provide enough evidence to support criminal or Departmental charges against a subject officer. In the alternative, it also lends credence to Department findings that an allegation is unsubstantiated or unfounded.²⁹ So, for example, in one case, allegations arose against the subject officer after an unseen person in the subject officer's car purchased stolen property during a sting on a jewelry store. Although the undercovers could not identify the male who purchased the stolen property, a DMV check on the license plates revealed that the car was registered to the subject officer. Investigators then checked the roll call of the subject officer's command which indicated that he was scheduled to be working at the time of the incident. Even though it appeared unlikely that the subject officer was the person in the car, IAB pursued the

²⁹ At the conclusion of an investigation, IAB may find that an allegation of misconduct is "substantiated" (supported by sufficient credible evidence); "unsubstantiated" (not supported by sufficient credible evidence); or "unfounded" (the act which is the basis of the complaint never occurred). IAB may also find that the officer accused of misconduct is "exonerated" which indicates that the act which is the basis of a complaint occurred but that the act was proper. Or, the allegations can be filed for "intelligence/information only" which means the allegations are deemed to be too vague, unspecific, or possessing "no investigative qualities" to warrant an investigation and are catalogued for possible future reference.

investigation by undertaking surveillance of the vehicle, interviewing relatives of the subject officer, conducting various background checks on the subject officer, and implementing another sting outside of the jewelry store where the real perpetrator was caught, arrested, and debriefed.³⁰ During this debriefing, the perpetrator cleared the subject officer of any suspicion that he was connected to or knew about the purchase of stolen jewelry. This was confirmed during a PG interview of the subject officer. The case against the subject officer was closed as unfounded within three months as a result of this diligent, investigative work.

1. The Progression of an IAB Investigation

Investigations commence when an allegation is first reported to IAB's Command Center.³¹ Generally, the Command Center receives the complaint either directly from the person who is alleging that the officer engaged in misconduct or from a member of the service to whom the initial complaint is made.³² In some cases, the subject officer reports the allegations to the Command Center himself.

In most cases, as soon as the complaint is received, IAB sends out an initial "call-out" team to interview the complainant and any potential witnesses at the earliest possible time. These

³⁰ The real perpetrator was a nephew of the subject officer's ex-girlfriend. Although the car had been registered in the subject officer's name, he had lent it to this nephew so he could pick up his daughter from daycare.

³¹ The Command Center serves as the central clearinghouse for allegations of corruption and misconduct against members of the service from the public and other members of the Department. The Command Center is open 24 hours a day.

³² In some instances, a CCRB investigator may also report allegations to the Command Center when he learns of allegations that do not fall within CCRB's jurisdiction but are uncovered during the CCRB investigation.

investigators are responsible for collecting contact information for the complainant and for potential witnesses and gathering any readily available paperwork associated with the case. Shortly thereafter, the case is transferred to the corresponding IAB Group that is responsible for the investigation, and the case generally remains with the investigator of that group until the investigation is completed.³³

Generally, an investigation involves speaking with the complainant and any potential witnesses and obtaining all relevant paperwork. Additional steps may include officially interviewing members of the service, conducting integrity tests, conducting financial inquiries into the subject officer's personal finances, or conducting surveillance of people or locations. The investigator's supervisors conduct regular case reviews and may also recommend that additional action be taken on a case. At the completion of the investigation, the investigating officer will prepare a closing report which reviews all the investigative steps taken and his conclusion as to the validity of the allegation. This is, then, forwarded and reviewed by the investigator's Commanding Officer, who ultimately decides whether the case has been thoroughly investigated and whether the conclusion reached is appropriate.³⁴ When the Commanding Officer is satisfied that no further investigation is necessary and that the disposition is correct, the case will be closed. Where

³³ Cases are assigned according to where the alleged misconduct occurred and/or the subject officer's Command.

³⁴ During the investigative process and before a case is deemed closed, the investigator's Commanding Officer may also review and discuss the case with IAB's Executive staff, including the Chief of Internal Affairs, to determine if any additional investigative steps need to be conducted and whether the conclusion reached is correct.

appropriate, the findings are forwarded to other entities in the Department.³⁵

2. Timeliness of Closing Cases

As stated earlier in this section, the Commission believes that cases should be investigated and closed in a timely manner. What constitutes a timely manner will, of course, depend on the nature of the investigation and the number and complexity of the investigative steps needed. However, timeliness is important because guilty officers need to be disciplined close in time to the act of misconduct and those officers who are innocent should be able to continue their careers without having an indefinite investigation pending against them. Furthermore, it is imperative that investigations be conducted and resolved as expeditiously as possible in order to obtain information from witnesses when the facts are still fresh in their minds and/or to disclose evidence that may be overlooked or misplaced at a later date. It is also important for the case to be resolved without undue delay so that the public perceives that the Department is taking allegations of police corruption and misconduct seriously.

The Department clearly recognizes the importance of the expeditious investigation of cases as indicated by its procedures with call-out investigators. This system enables investigators to commence an investigation immediately, even if the IAB Group ultimately assigned to the case is unavailable at the time the allegation is received. Complaining witnesses, therefore, see that the allegation is being taken seriously, and the investigative process begins quickly, thereby facilitating an expeditious resolution.

³⁵ For instance, if a case is substantiated, it will then be forwarded to the DAO for prosecution.

In the majority of cases examined in both samples, the investigations were commenced in a timely manner after IAB was informed of the allegation. In almost all the cases, this was done by the response of the call-out investigators.³⁶

Generally, investigators were also closing cases in a timely manner. However, in its general sample of closed cases, the Commission found 20% of the total cases reviewed where it believed that the investigations, given the nature of the allegations, were pending for an undue length of time.³⁷ These delays, however, did not affect the outcome of the case. In general, much of the delay was caused by a lag of time between investigative steps, either for no documented reason or because investigators were assigned elsewhere or working on a different matter.

In the missing property cases, the Commission found that approximately 95% of the cases examined were, as a whole, investigated and closed in a timely fashion.³⁸ The investigating officers contacted witnesses, gathered paperwork, and completed other investigatory steps in an expeditious manner. They also prepared closing reports shortly after the conclusion of the investigation and officially closed the cases within an acceptable time thereafter.

However, in four missing property cases examined by the Commission, there appeared to be delay at certain intervals throughout the investigation. For instance, in one case, no documented

³⁶ Call-out teams were not dispatched in some cases because a decision was made that the allegation did not warrant it. For instance, in cases where complainants were out of state, it would be unfeasible, or in cases where the allegation was dated, call-out teams would not have enhanced the investigations. In all these cases, the Commission agreed with the decision not to send out call-out investigators.

³⁷ This occurred in 27 of the 135 cases that were reviewed.

³⁸ This occurred in 69 of the 73 examined cases.

investigative work was conducted for periods in excess of a month during the course of the investigation. Further, the files did not contain documentation explaining a reason for such delays or what, if any, investigative efforts or actions were taken during these periods.

Understandably, in investigations reviewed from both samples, there was some delay associated with the aftermath of the terrorist attacks on the World Trade Center on September 11, 2001. In the months immediately following these attacks, investigators were assigned elsewhere to work on security and recovery efforts on behalf of New York City. The Commission recognizes that there was a justified interruption in investigations during this time period and did not include as untimely those cases where investigative gaps or other delays solely appeared to be a consequence of September 11th. However, there were other delays noted when investigators were reassigned to other units within the Department or were working on other cases which required the majority of their time. While recognizing that cases need to be prioritized and, at times, investigators must perform other functions, it is still important that investigations be conducted in a timely manner. If the assigned investigator is unable to work on a case for an extended period of time, the case should be transferred and reassigned to another investigator.

In some cases, while the amount of time the investigation was open was not, in and of itself, unduly lengthy, when examined in the context of the investigative steps actually performed, the case appeared to be pending much longer than necessary. For example in one case, an anonymous caller complained that the subject officer was taking bribes from store owners to not issue summonses to vehicles. The call was received on March 12, 2001. The case was closed as unsubstantiated on July 9, 2002, one year and four months later. One year and four months is not, alone, an especially

lengthy period of time in which to conduct and complete an investigation. In this investigation, numerous surveillances of the subject officer were also attempted which would, necessarily, lengthen the investigation. Integrity tests were also employed which take time to plan and create. Yet, for the first two months of the investigation, from July 19, 2001 until September 20, 2001, the only step taken was to conduct computer background checks on the subject officer. No investigative steps were documented between November 28, 2001 and February 19, 2002. And, no investigative steps were documented between April 30, 2002 and June 7, 2002. For this case, these gaps represent almost five months.

The Commission included some cases as taking too long to complete although the responsibility for a delay in the case really belonged to DAO. This type of delay was seen when an investigator requested that the Advocate prepare charges and specifications to serve on the subject officer.³⁹ In several cases, the Advocate did not respond as to the appropriateness of the requested charges and specifications and/or prepare those charges for many months. While the Commission understands that the investigator is not responsible for the Advocate's delay, the Commission believes that it is the responsibility of the investigator to continually and regularly follow-up with the Advocate in an effort to complete this step. In those cases where follow-up was minimal and occurred many months after the initial contact with the Advocate, the Commission included the investigation as untimely.

³⁹ Charges and specifications are the instruments filed to commence a disciplinary proceeding within the Department's Trial Rooms. The "charge" designates the name of the offense and the "specification" describes the specific misconduct charged.

3. Proper Dispositions

In order to maintain a reputation of fairness and impartiality, IAB must arrive at a just disposition at the conclusion of a case after conducting a thorough investigation. The Commission found that with the exception of only three cases from 150 cases reviewed for both the missing property and the general review, the Commission agreed with the disposition in these cases. However, in three cases,⁴⁰ the Commission believed that additional investigative steps might have led to different conclusions.⁴¹ In one case from the general review, the Commission believed that if additional investigative steps had been taken, a more severe disposition may have been appropriate. In this case, the complainant, after being arrested, alleged that upon her return home to her apartment, she noticed that several valuable items were missing from her bedroom. Although the

⁴⁰ There was one additional cases where the Commission questioned the disposition of exonerated that was assigned to one allegation because it was applied to all of the identified officers in the case instead of to only the subject officer for whom evidence existed which justified the exoneration. However, the Commission did agree with the overall disposition of the investigation.

⁴¹ Two of these cases were reviewed as part of the missing property sample. In the first case, the complainant alleged that money was missing from the kitchen table after several officers responded to her apartment due to her husband's suicide. None of the officers, including those who first arrived on the scene, were interviewed pursuant to PG §206-13 with the exception of one officer who arrived later, searched the apartment, and vouchered other property found in the apartment. This officer stated that no money was recovered from the kitchen table. As the money may have been missing when this officer arrived, the other responding officers should have been interviewed to determine, at least, whether any of them observed money on the kitchen table. Due to the failure to speak with these officers, the Commission questioned the unfounded disposition at the conclusion of this case. *See infra*, at pp. 37-38 for a further discussion of this case.

In the second case, at the time of the complainant's arrest, she requested her pocketbook. The Sergeant at the scene received this pocketbook from the complainant's live-in boyfriend and brought it to the Precinct where the arresting officer vouchered the pocketbook and its contents. When the complainant retrieved the pocketbook the following day, she alleged that \$10 to \$15 was missing from her wallet. The complainant also alleged that her boyfriend, who was not arrested, removed property, including \$15 in coins, from her apartment. The money alleged to be missing from her wallet consisted of a \$10 bill, some one dollar bills, and some coins. She withdrew her complaint against her boyfriend when he returned the property. The disposition on this case was unfounded primarily based on IAB's assertion that it was the boyfriend who took the missing funds. None of the officers who had access to the pocketbook were subjected to a PG interview. The arresting officer passed an integrity test. No test was performed on the Sergeant. As the boyfriend admitted taking the other property, but denied taking the missing money, the Commission believes that the more

complainant stated that she had observed some of these items in her bedroom at the time of her arrest and confirmed that she was the last person to leave the bedroom, she also stated that while being processed for her arrest, narcotics officers told her that they would be executing a search warrant of her apartment and took her apartment keys from her. The investigator determined that a warrant had not been executed after the complainant's arrest, and, after further investigation, the case was closed as unfounded since the complainant was admittedly in the bedroom where the missing property was located and saw this property after the police officers who were present had already exited the bedroom. However, the complainant also reported to the investigator that after her release, her neighbors and a maintenance man in the building told her that there were officers in her apartment following her arrest. No attempts were made to interview any of these neighbors or the maintenance man. Such attempts might have led to a different disposition.⁴²

There was one other case from the general review where the Commission believed that although the closing disposition was correct in light of the investigation that was conducted, a further step should have been taken. Here, the complainant, a civilian member of the service, alleged that two civilian supervisors were harassing him, one of these supervisors was using drugs, and the other was drinking on duty and leaving during his tour of duty to conduct personal business. While interviewing the complainant, investigators asked whether he was aware of any corruption or misconduct being committed by his colleagues. The complainant stated that there were rumors that

appropriate disposition would have been unsubstantiated.

⁴² After discussions with the Commission and the receipt of new information, the disposition on this case was changed to unsubstantiated.

one of his colleagues, also a civilian member of the service, used illegal drugs, and this colleague had admitted this to him during a conversation months earlier. Over a two-year investigation, this particular subject officer was seen during surveillances on four occasions. During at least two of these occasions, the subject was observed purchasing and drinking beer. Furthermore, in an attempted warrant sweep on the subject's building, he was observed outside, drinking beer, at 7:30 in the morning. During this same sweep, the subject was observed engaging in brief conversations with unidentified persons and placing his right hand in his right pocket and "touching hands" with an unidentified male.⁴³ During the course of this investigation, the subject had been declared AWOL from his job on two occasions, once for five days which resulted in a suspension. An examination of his absence and tardiness records demonstrated that the officer was using his sick leave to extend his weekends. The officer had also received a negative performance evaluation and was being monitored by a separate Departmental unit. While during this investigation, no concrete evidence of illegal drug use was uncovered, the Commission believes that all of the above factors tend to lend credence to the allegation. While the unsubstantiated disposition was appropriate since there was no direct evidence of illegal drug use, the Commission believes that this officer should have been placed into programmatic review. When a subject is placed in programmatic review, investigators review the case six months after it is closed and make further investigative attempts that are deemed appropriate at that time. Although the IAB investigator could not collect sufficient evidence to substantiate the specific allegation that this subject was using illegal drugs, enough information was

⁴³ When observing drug sales, officers often believe that when two individuals briefly "touch hands", the participants are most likely exchanging drugs for money.

obtained to identify him as someone who warranted further investigation and scrutiny by the Department. After discussing this case with Department officials, IAB placed this subject in programmatic review.

4. Investigative Steps

The Commission recognizes that each investigation will call for different investigative steps. While the majority of investigations will require interviews with complainants and witnesses and background investigations of the subject officers, other steps such as PG interviews, surveillance, integrity tests, and E.D.I.T. operations may not be necessary or appropriate based upon the allegations and the direction in which the investigation proceeds. So, while the Commission analyzed each case individually based on the overall investigation, the Commission also examined these cases to determine whether the above investigative devices would have been appropriate in an investigation and when these tools were employed as part of the investigation, whether they were used in a competent manner.

a. Interviews of Officers Under PG §206-13

As noted earlier, IAB has the right to command an officer to answer questions related to his duties as a police officer during a PG hearing. The officer may be questioned as either a subject or a witness to an incident of misconduct. Refusal by the officer to answer appropriate questions can result in his suspension and the levying of charges against him. Giving evasive answers or false answers to questions can result in the officer's termination from the Department. Therefore, when a

PG hearing is appropriately used and effectively conducted, it can be a valuable fact-gathering tool. In order for these interviews to be effective, however, investigators must sufficiently prepare for such questioning by developing strategies before the interviews to obtain information in the areas they wish to explore. Also, strategic decisions need to be made at the outset about who to interview depending on the likelihood of uncovering misconduct or corruption. An effectively conducted PG hearing would include one where all of the major issues are covered, open-ended questions are asked, the interviewer maintains control of the interview, and the interviewer is flexible enough and familiar enough with the facts of the case to ask appropriate follow-up or clarifying questions when necessary.

In its current review, Commission staff reviewed the PG interviews that were conducted during the course of these closed investigations and found that the majority appeared to be effectively conducted. If there was an audio tape of the PG interview in the investigative file, Commission staff listened to this tape in order to make this assessment. However, in several of the investigative files, there were no audio tapes of the PG interviews, although these interviews were described in the investigators' worksheets as being taped. In these cases, Commission staff had to rely on the investigators' worksheets summarizing the information gained during these interviews and any extrinsic information pertaining to these interviews, such as the presence of written questions in the file, in their attempts to judge the quality of these PG hearings. In its previous report on PG interviews, the Commission recommended that all audio tapes of PG interviews be included with the investigative folder.⁴⁴ This was also recommended by the Department's

⁴⁴ See *Performance Study: A Review of Internal Affairs Bureau Interrogations of Members of Service* (March

Investigative Review Unit.⁴⁵ Inclusion of the tapes is necessary to facilitate review by IAB supervisors and the Investigative Review Unit.

In the hearings listened to by Commission staff for this report, investigating officers appeared well-prepared for the interviews in that written questions were often present in the file, investigators asked open-ended questions designed to elicit substantive information, and the investigators were able to ask appropriate follow-up questions when new information was obtained or when clarification was needed. Further, in these PG interviews, the investigators were able to sustain a professional demeanor throughout the interview and maintain control of the interview when the questioning was interrupted by either the subject officer's attorney or union representative.⁴⁶

In addition to conducting the PG in a meaningful manner, it is also important to determine the proper stage at which to interview officers. IAB investigators should interview subject officers at the earliest possible time while protecting the integrity of an investigation. This symmetry may at times be difficult to achieve. While interviewing subject officers at the outset of the investigation allows investigators to gather evidence at the early stages of the investigation, it also alerts subject officers and others that an investigation has commenced and that they may be the subject of the

2000), at p. 39.

⁴⁵ The Investigative Review Unit operates as a quality-control unit which is responsible for the review and evaluation of IAB investigations. For further information about the Investigative Review Unit, see *Performance Study: The Internal Affairs Bureau Investigative Review Unit* (March 2000).

⁴⁶ As per PG §206-13, officers who are interrogated are permitted to obtain counsel if either "a serious violation is alleged" or sufficient justification is presented although the alleged violation is minor." These officers are also entitled to have a union representative present during the PG interview. In any event, while these parties are permitted to advise the officer and speak during the interview, it is the investigator's responsibility to maintain control over the questioning.

investigation. Thus, interviewing officers too early in the investigation can effectively preclude the use of integrity tests, surveillance, and other investigative techniques because the subject would be aware he is under investigation and, therefore, behave accordingly.

In all the cases reviewed where PG interviews were conducted, investigators waited until the appropriate point in the investigation to PG the subject officer. The investigators gathered sufficient evidence prior to the interviews to enable them to effectively question the officer while being equipped with knowledge about the proof in support of or refuting the allegations. In these cases, necessary investigative steps were taken without alerting the subject officer to the fact that he was under investigation in order to better determine the subject officer's behavior while on and off-duty. Thus, it appears that overall, IAB is consistently making appropriate strategic decisions as to when to interview officers while still protecting the integrity of their investigations.

In past reports, the Commission has noted certain issues associated with PG interviews, specifically that investigators sometimes missed the opportunity to conduct a PG interview of the subject officer or they conducted a perfunctory PG interview. The Commission has seen a steady improvement in the quality of PG interviews over the last five years, and this study demonstrated that the overall quality of the PG interviews reviewed remains high. However, the above issues were seen in a few isolated cases during this review.

Additionally, the Commission recognizes that the Department may have valid reasons for not holding a PG hearing with the subject officer such as protecting against the disclosure of its witnesses against the officer or not alerting the officer to the accusations against him in an effort to catch him in future wrongdoing. Furthermore, a PG interview may, in some cases, serve no purpose

other than to elicit a flat denial from the subject officer.

In the current general review, the Commission found three cases where it believed that the investigator missed an opportunity to conduct a PG interrogation of the subject officer. Of the 73 missing property cases reviewed, there were 36 cases where PG interviews were not conducted, either because investigators chose not to do so or because no subject officer was ever identified.⁴⁷ In three of those cases, the Commission believes that PG interviews may have been beneficial. For example, in one case, officers responded to an apartment where a man had committed suicide. The estranged wife of the decedent had stated that money was missing from the apartment including monies that she had observed on a kitchen table that was viewable as one entered the apartment. In this case, the first officers who responded to the scene and who asked the wife to wait outside were not interviewed nor were any other officers who had responded to the scene. In fact, only a late arriving officer who was ordered to search the apartment and voucher any money found was interviewed by the investigator. He later stated that no monies were recovered from the kitchen table. In this case, the Commission feels that all officers present, and particularly the first officers to arrive on the scene, should have been interviewed.⁴⁸

In past reports, the Commission has recommended that IAB investigators receive training in conducting PG interrogations, meet with supervisors before conducting a PG interrogation to develop a strategy or goal and to review questions, and, if necessary, have a more experienced

⁴⁷ In eight cases, the allegations were so vague that no members of the service were identified as subject officers or witnesses. In these cases, PG interviews were not warranted or a practical investigative step.

⁴⁸ For further discussion about this case, *see supra*, at p. 30, fn. 41.

interviewer in the PG hearing as support and back-up for less experienced interviewers. Over the years while the quality of PG interviews has improved, the Commission has continued to make these recommendations. As noted above, most of the PG hearings analyzed for the general review were competently conducted, and in only nine, did the Commission staff find the investigator's interrogation inadequate. Of the missing property sample, while in approximately 93% of the interviews examined, the interviews were conducted properly, effectively, and in a professional manner, in ten interviews,⁴⁹ problems were noted in the manner of how the PG interviews were conducted.

In those PG interviews from both samples that the Commission believed were not effectively conducted, either the investigator had not sufficiently prepared for the interview beforehand by developing questions, a strategy, or a goal for the interview, or the questions asked were leading and designed to elicit a denial rather than obtain new investigative leads. Some of these PG interviews appeared to be conducted as a mere formality in order to close the case. The Commission believes that if a decision to PG an officer has been made, the interviews should be conducted in a manner designed to elicit information and not merely executed in a perfunctory manner in order to close a case that has already been investigated and determined to be unsubstantiated. Alternatively, in some cases, the subject of the interrogation was not confronted with damaging evidence or pushed to clarify answers that were evasive. These issues demonstrate the Department's need to remain vigilant when training investigators to conduct PG interviews as well as when actually conducting PG interviews.

⁴⁹ These ten interviews were conducted within four separate investigations.

As referred to earlier, the Commission has observed steady improvement in how IAB conducts PG interviews since this issue was first reviewed in 1996. Over the years, the Commission has noticed that the interviewers' techniques have developed, in part due to better preparation and pre-consultation with their superior officers. Some IAB commanders report that, at times, role playing is used before a PG is conducted. In this exercise, a more senior investigator will play the part of the subject and will provide responses that are evasive and do not demonstrate full cooperation so the questioner can practice possible strategies to deflect this evasiveness. The Commission sees this as a positive exercise and believes that this type of practice should be regularly employed by IAB. While the quality of these investigations has improved, the importance of these interviews as an investigative tool requires a continued vigilance to maintain and still further improve the interview process.

b. Integrity Testing

An integrity test is an artificial situation, designed and closely monitored by IAB, to test a subject officer's adherence to the law and to Departmental guidelines. In targeted integrity tests, specific officers are tested as part of an on-going investigation into allegations of corrupt activity.⁵⁰ Undercover IAB investigators create typical police encounter scenarios which are designed to bring about the targeted officer's unwitting participation and then monitor the targeted officer's behavior. Investigators evaluate if the officer performs in accordance with Department regulations and the law.

⁵⁰ Integrity tests are classified as either random or targeted. Random integrity tests are directed towards a particular location or command and tests the unspecified officer who responds to the scene or happens upon the location.

During these tests, IAB attempts to recreate a scenario that is as closely related to the alleged misconduct as possible. The Commission has been reviewing the Department's integrity testing program and reporting its findings since the Commission's first report was issued in 1996.⁵¹ In that report, the Commission noted an increase in the frequency of integrity testing and stated its intent to more comprehensively analyze the Department's integrity testing program. In March 2000, the Commission again revisited the issue and found that overall, the integrity testing program continued to serve as a valuable deterrent to misconduct and corruption. The Commission, however, made some recommendations in order to increase the effectiveness of such testing. For instance, the Commission recommended that: IAB focus on the quality and not the quantity of random integrity tests; IAB create more realistic and creative test scenarios; and IAB increase the number of integrity tests that are either audio or video taped.⁵² In February of 2001, the Commission, again, examined the Department's integrity testing program and found continued improvement in integrity testing programs, stating that the targeted tests "tended to be more creative and realistic" but noted that the random integrity tests had become "too routine."⁵³

The value of integrity testing is that it may uncover misconduct by a subject officer and may also inadvertently disclose misconduct by members of the service who are not, at the time, suspected

⁵¹ See *First Report of the Commission; Executive Summary, New York City Police Department: Random Integrity Testing Program* (December 12, 1996). See also *Fourth Annual Report of the Commission* (November 1999), at pp. 39-40; *Performance Study: The Internal Affairs Bureau's Integrity Testing Program* (March 2000); *Fifth Annual Report of the Commission* (February 2001), at pp. 27-28; and *Sixth Annual Report of the Commission* (December 2001), at pp. 27-28.

⁵² See *Performance Study: The Internal Affairs Bureau's Integrity Testing Program*.

⁵³ See *Fifth Annual Report of the Commission, supra*.

of misconduct. Overall, the utilization of this type of testing puts officers on notice that, at any given time, they could potentially be the subject of such a test. This creates an incentive for all members of the service to perform in a more professional manner in accordance with the standards of the Department. Because integrity tests are such an important investigative tool, the Commission continues on an ongoing basis to evaluate how they are conducted and make recommendations on how to improve the quality of the tests where appropriate.

As with other investigative tools, the Commission recognizes that integrity testing may not always be useful or desirable in every investigation. Integrity tests require time, resources, and planning in order to create and execute them. Integrity tests take many hours to plan and numerous officers to execute successfully. In addition, officers who do not work in a steady location may be difficult to test because their whereabouts are unpredictable. The Commission, therefore, took these variables into consideration when evaluating the nature and execution of the tests. In the review of the closed cases from both samples, the Commission found that IAB conducted integrity tests in all but two cases where the Commission believed such testing was warranted.

Overall, IAB is appropriately and adequately devising and executing integrity tests. The integrity tests implemented during this review were well-planned and executed in a competent manner. These tests appeared to have realistic scenarios that matched the allegations of misconduct against the subject officer. Further, the investigator gathered the necessary personnel, equipment, and information prior to implementing the test.

The Commission found only one case from the general sample and one case from the missing property sample where it believed that the integrity tests could have been better devised. For

example in the case from the missing property sample, a complainant alleged that after his arrest for drunk driving, \$1600.00 was missing from his vehicle. After the arrest, the subject officers brought the complainant to the precinct for processing. At that time, the complainant stated that he had approximately \$6,000.00 in his jacket that he left in his car. The two subject officers returned to the vehicle which they had left parked on the street. They found the complainant's jacket in the car and recovered only \$4,400.00 from it which was vouchered. Approximately five months into the investigation, the complainant became uncooperative and later withdrew the allegation stating that he may have lost the money before he was arrested. Despite the withdrawal, IAB appropriately continued to investigate the allegation and as part of the investigation, planned and executed a targeted integrity test. During the test, an undercover police officer approached one of the subject officers and stated that he had been in a motor vehicle accident with a female motorist who left the scene. The undercover stated that the motorist left her purse on his car when she drove away, and he gave the purse to the subject officer. The purse contained \$15.00 and other miscellaneous objects. The subject officer properly vouchered all of the property for safekeeping. Here, while IAB commendably continued to investigate and utilize other resources once the complainant became uncooperative and withdrew the allegation, the Commission believes that the amount of money used during the test was too insignificant. Because the amount of money alleged to be missing was substantial, placing a larger sum of money in the purse may have created a more enticing scenario. Further, if possible, both subject officers should have been tested.

In general, though, the Commission has found significant improvement in IAB's development and implementation of targeted integrity tests. IAB is effectively and appropriately

utilizing integrity testing as an investigative tool, both in terms of the frequency of such use and substantively. The tests appear to be realistic and tailored to the circumstances of the allegations. While IAB should continue to be attentive to testing all appropriate subject officers, the tests are also, for the most part, properly and efficiently executed. The tests, therefore, continue to be an effective investigative tool.

c. Surveillance

Another investigative tool at the disposal of IAB is surveillance of a particular subject, a location, or a combination of both. In the closed case sample, Commission staff reviewed 55 cases where there were some attempts at surveillance. Overall, IAB effectively conducted surveillance and was appropriately using this tool as a means of enhancing investigations. IAB was using surveillance at times connected with the allegation or, if no time was specified, at various times including when the subject was both on- and off-duty, days, nights, weekends, on different days of the week, and at different times of the day.

In only four instances did the Commission believe that the use of surveillance could have been improved either because the subject was never seen, the surveillance occurred on the same day of the week at the same time of the day, or there were simply an inadequate number of observations. In one case, the investigator enlisted the help of another group to conduct surveillances. That group conducted two surveillances of the subject and two attempted surveillances during which the subject was not located. These surveillances were always conducted on a Thursday between the hours of 4:00 pm to 8:00 pm even though there was no indication that the subject officer was committing

misconduct during this specific time frame or this was a time when she would have the opportunity to do so.

The investigative tool of surveillance was not examined in the context of the missing property cases because it is not a particularly effective method for gathering evidence in these type of cases.

d. E.D.I.T. Program

Another tool that IAB is using effectively to gather corruption intelligence is E.D.I.T. operations. This program utilizes IAB personnel in proactive enforcement efforts where IAB can target a specific location or a particular type of arrestee to gather information about specific allegations of corruption, typically illegal drug activities, gambling, or prostitution offenses. In E.D.I.T. operations, IAB investigators will arrest civilians suspected of criminal activity or will ensure that another Department unit arrests these individuals so investigators can interview them regarding their knowledge about police corruption, in general, or about a particular subject officer. While E.D.I.T. operations can not be utilized in all cases, in appropriate scenarios, it can be a valuable means of gathering information from civilians. Information gathered from these civilians can then be used to generate further investigative leads.

There were sixteen cases during its general review of closed cases that utilized this technique and three more cases where investigators planned or attempted to use this tool. In one case where the technique was used, the subject officer was alleged to rape prostitutes. The investigator interviewed several prostitutes who had been arrested within the confines of the subject's precinct.

These interviews occurred on several different occasions and asked about the prostitutes' experiences with police officers in the area. While these prostitutes stated that the police officers were active in arresting them, none reported any misconduct on the part of the neighborhood law enforcement, and this particular allegation against the subject officer was deemed to be unfounded.

In its missing property sample, the Commission did not examine the use of E.D.I.T. operations because, as with the investigative tool of surveillance, this strategy would not normally enhance missing property investigations.

5. Witness Contact

a. Timeliness of Witness Contact

In the past, the Commission had criticized IAB for its failure to interview complainants and all relevant witnesses in a timely manner. Timely interviews of witnesses are critical so the investigator can obtain all relevant facts while the incident is still fresh in the witnesses' minds. In this review, the Commission found that in the majority of the cases, the complainants and witnesses were interviewed by the call-out teams almost immediately upon receipt of the allegations.

The Commission also noted that in the majority of those cases where interviews with complainants and witnesses were audio taped, the call-out team and assigned investigators conducted proficient interviews of these witnesses. Open-ended questions designed to elicit a narrative were asked of the witnesses, and appropriate follow-up questions were asked to clarify vague answers. Impressively, investigators were able to maintain appropriately professional and patient demeanors when interviewing witnesses who were patently incredible or obviously

emotionally disturbed.

In a few cases, however, the assigned investigators seemed less diligent about contacting complainants and witnesses after receiving the case from the call-out team. While the Commission understands that the files the assigned investigators receive may have written or recorded statements from the witnesses that were taken by the call-out team or that these statements are readily attainable, the Commission believes that it is still valuable for the assigned investigator to speak with the witnesses as the investigation develops so he can ascertain the credibility of the witnesses and gather new information.

In eight cases from the general review, the permanent investigating officer did not attempt to interview the complainant until months after his assignment to the case.⁵⁴ Additionally, in 25 other cases in this review, investigators made no attempts to interview witnesses with whom the call-out team had not spoken.⁵⁵ Interviewing witnesses other than the complainant is critical to gain objective information or a different perspective on what actually occurred. These witnesses can provide evidence that either corroborates that of the complainant or contradicts the complainant's version of events.

b. Complainant and Witness Contact in Missing Property Cases

⁵⁴ These were cases where there were no obstacles to the permanent investigator re-interviewing the complainant. Cases where the complainant was not re-interviewed because he could not be located, was uncooperative, or there was some other legitimate reason why the complainant could not be re-interviewed were not included in this number if attempts were made early in the investigation to conduct a second interview.

⁵⁵ There was one case where IAB investigators interviewed a witness after speaking with a member of the Commission staff who inquired why the aforementioned witness had not been previously interviewed.

Because of the high likelihood that cases involving allegations of missing property will pit the complainant's version of the events against the subject officer's version due to the lack of independent evidence that corroborates the allegations, complainant and witness cooperation and credibility are essential to these investigations. Therefore, when the Commission reviewed the cases in its missing property sample, special attention was given to those cases where complainants failed to cooperate with the investigation or told contradictory or otherwise incredible stories surrounding the events. The Commission was particularly interested in whether IAB pursued other avenues of investigation and how diligent IAB was in its pursuit of uncooperative complainants. The Commission also examined the manner in which IAB proceeded in cases where, during the investigation, the complainant withdrew his complaint.

1.) Cases Involving Problematic and Uncooperative Complainants

Almost 40% of the missing property cases examined in this study involved complainants who were uncooperative or who appeared to have credibility problems. Uncooperative complainants included those who refused to be interviewed or otherwise cooperate with investigators as well as those who made anonymous complaints or gave false names and addresses to the initial IAB investigators. Cases where credibility issues were apparent included allegations made by emotionally disturbed persons, chronic complainants, persons under the influence of drugs or alcohol at the time of the incident, and persons later determined to have been less than truthful when interviewed by investigating officers. Of the 73 cases studied, 28 of the investigations involved

complainants who were either uncooperative or suffered from evident credibility problems.⁵⁶

Where complainants were uncooperative, the Commission examined the reasons why they refused to cooperate and determined whether investigators appropriately pursued other avenues of investigation or if they merely closed the case due to the complainant's lack of cooperation. When complainants are uncooperative and IAB investigators are not able to interview them, investigations are hampered because it is more difficult to gather evidence and determine what exactly occurred. Further, uncooperative complainants also make it more difficult for investigators to determine the subject of the investigation because investigators can not conduct identification procedures with the complainant. In the eleven cases where the complainants were uncooperative, the Commission was satisfied with the investigations in that the IAB investigators appropriately continued to investigate the allegations despite the complainant's failure to cooperate, exhausted all possible avenues of investigation, and eventually closed the cases with the appropriate disposition.

For example, in one case, the complainant alleged that when he was arrested, \$140.00 was taken from him which was not vouchered or returned. After making the allegation and being initially interviewed by the call-out team, the complainant became uncooperative, failing to return telephone calls and failing to inform the investigator of his new address. Despite the inability to locate and speak with the complainant subsequent to the initial interview, the investigators traced his steps throughout the evening of the alleged misconduct and determined how much money he had spent by interviewing his employer, various bartenders, and other civilian witnesses. Further, the

⁵⁶ Of the 28 above cases, 17 of the complainants can be classified as having credibility problems with the remaining 11 labeled as uncooperative.

call-out team interviewed the complainant's cellmates who stated that the complainant also told them that he had purchased crack-cocaine that evening. At the conclusion of the investigation, the case was closed as unfounded. Consequently, even without the cooperation of the complaining witness, the investigators continued to pursue other avenues of investigation and were able to disprove the initial allegation.

In a number of the above cases, allegations were made by complainants who gave a fictitious name and address making it difficult for investigators to determine who the complainant was and, in some cases, the subject officer. Investigators, however, were diligent in their attempts to ascertain this information.

In addition to uncooperative witnesses, investigations also may be hampered by complaining witnesses with credibility issues. The inability of an investigator to rely upon the complainant's version of events frustrates investigations because the investigator must do additional investigation to verify and determine what, if any, aspects of the witness' complaint is truthful. This takes additional time and resources, and even where an allegation may have merit, if there is no corroboration and the complainant's credibility is at issue, the ability to reach an appropriate disposition may be hindered.

Where a complainant's credibility was at issue, the Commission looked at how investigators handled the investigation and evaluated how, and if, investigators determined if there was still merit to the initial missing property allegation. In the cases examined, including four cases that involved emotionally disturbed complainants and four where the complainant was heavily intoxicated at the time of the incident, IAB treated the allegations seriously and conducted appropriate investigations

into the incidents despite the inherent problems or implausibility of the complainants' allegations.⁵⁷

For example, in one case, the complainant alleged that every Wednesday for the preceding four weeks he had been "kidnapped" by plainclothes officers who put him into an unmarked police vehicle, drove him to various locations, and then released him. The day he reported these allegations, the officers also allegedly took his wallet containing \$70.00. During the interview with the investigator, the complainant stated that due to these kidnappings, he missed various Wednesday morning classes and had to change his class schedule to evening classes. Pursuant to the investigation, the IAB investigator verified the complaining witness' class schedule and determined that he was actually in class during the alleged kidnappings and he had not changed his class schedule as he had stated. The investigator also inquired into whether any unmarked vehicles in the precinct were used on the date of the last alleged kidnapping and determined that none were used. After confronting the complaining witness with the above inconsistencies, he withdrew his allegation. The case was then expeditiously closed. Here, although the initial allegation appeared doubtful, the investigator earnestly investigated the case and ultimately disproved the allegations.

There were also six cases where while the complainant appeared initially to be credible, IAB investigators uncovered evidence during the course of the investigation to prove that the allegations were not plausible.⁵⁸ In three of these cases, investigators obtained enough proof that the complainants intentionally misled investigators to arrest these complainants for filing a false

⁵⁷ There was another case where the complainant was a chronic caller to the Command Center although not clearly emotionally disturbed.

⁵⁸ In two further cases, the complainants made incredible allegations from the outset.

statement with the police.

Overall, the Commission found that IAB cases generated by problematic or uncooperative complainants are taken seriously. Investigators appropriately investigated other avenues of information so that the cases were thoroughly investigated despite a complainant's lack of cooperation or credibility issues.

2.) Withdrawn Cases

During investigations into allegations of missing and/or stolen property, complainants can and sometimes do withdraw their allegations before the completion of the investigations. There may be several reasons why an allegation is withdrawn, and depending on the circumstances, investigators may still proceed with the investigation. Similar to situations involving uncooperative or incredible witnesses, the reasons for withdrawal, as discussed below, have different significance to the investigation of a case. The Commission, therefore, looked at cases where the allegation was withdrawn during the course of the investigation in order to determine: 1) the reasons for the withdrawals; 2) whether the withdrawals were properly documented by IAB; and 3) whether IAB, where appropriate, continued to investigate cases after the allegation was formally withdrawn.

The formal withdrawal of an allegation is accomplished when the complainant signs a withdrawal form listing the reason(s) for the withdrawal. Of the 73 cases examined in this study, there were 23 cases in which the allegation was withdrawn by the complainant before the completion of the investigation. In all these cases, the withdrawal was documented by investigators.

Complaining witnesses withdrew their allegations for a number of reasons. These included:

the witness located the missing property; the witness did not want to be inconvenienced by the investigation; the witness was confronted with evidence that his allegation was not plausible; the witness came to believe that someone other than a member of the service took the property; or the witness was uncertain that he actually possessed the property during his interaction with the police. Investigators are not prohibited from pursuing an investigation after a missing and/or stolen property allegation has been withdrawn. Therefore, IAB can and, at times, does continue to pursue investigations into missing property allegations after a formal withdrawal of a complaint. In fact, it is incumbent upon them to continue to investigate in certain circumstances. For example, in situations where a complaining witness can not be bothered with aiding in the investigation yet the IAB investigator believes that misconduct may have occurred, the investigation should continue despite the withdrawal of the allegation.

In nine out of the 23 cases which warranted further investigation, IAB investigators appropriately continued with their investigations despite the fact that the complainants withdrew their allegations of missing and/or stolen property.⁵⁹ In these cases, the circumstances were such that the subject officers had some nexus to the property and the property's whereabouts was not conclusively determined. These nine cases demonstrate IAB's ability and resolve to pursue other means of investigation available to them even where a complainant formally withdraws an allegation. In only one of the 23 cases examined, did the Commission believe that a continued

⁵⁹ This included two cases where the complainant believed someone other than the police stole the currency, four cases where the complainant simply refused to go forward with the allegation, and three cases where the complainant later stated that he was intoxicated at the time of the incident and may have misplaced or lost the currency prior to his encounter with the police.

investigation may have been beneficial to the final disposition of the case.

In other cases, where the missing property is found and there is, thus, no apparent misconduct by any member of the service, the case should be closed out expeditiously. Approximately one-third of cases where the allegations were withdrawn involved situations where the missing property was located either by the complainant or by the IAB investigators during the course of the investigation.⁶⁰ IAB appropriately closed these cases soon after verifying that the property was not, in fact, missing and the allegation against any officer was, therefore, without merit.⁶¹

In conclusion, investigators appear to be assessing the reasons why complainants have withdrawn allegations and are making appropriate determinations whether to continue to investigate allegations despite such withdrawals. IAB investigators, where appropriate, continued to conduct in-depth and thorough investigations into cases that they believed merited additional investigation and utilized other avenues of investigation where a complainant was no longer available. This was particularly true where complainants withdrew allegations simply because they did not want to be inconvenienced or could not conclusively state that the property existed at the time and place initially thought.

⁶⁰ This occurred in eight of the 23 cases examined where the allegation was withdrawn.

⁶¹ Additionally, there were three cases where the complaint was withdrawn after it was determined that the complainant had not been truthful regarding his allegation of misconduct. As discussed above at p. 51, in these cases, the complainant withdrew the charge after either being confronted with the evidence gathered during the investigation which contradicted his allegation or later admitting during a subsequent interview that the incident did not occur as alleged. In these cases, IAB's investigations were so thorough and complete that the complainants actually admitted that the incidents did not occur. The remaining two cases were appropriately closed after the withdrawals because the

6. Identification of Subject Officers

The Commission has, in the past, reported on the failure to name all appropriate officers as subjects in those cases, typically, where a search warrant is executed and property is claimed to be missing at the conclusion of the search.⁶² While all officers present during the execution of the warrant should initially be named as subjects unless there is some evidence or circumstances excluding the possibility of their involvement, the Commission has noted cases where only the arresting officer or the officer who vouchered property was named as a subject and investigated. Although not exclusive to missing property cases, the identification and investigation of all appropriate members of the service has, in the past, been an issue most closely associated with these types of allegations. This association was due to past oversights in naming all officers who had access to the missing property. Past discussions between the Commission and IAB executives promulgated a policy where all officers who had contact with, or access to, the property alleged to be missing or stolen would be identified and investigated as subjects unless there was specific information pointing to or away from certain officers. The Commission believes that this policy of initially casting as wide a net as possible ensures that all potential officers are thoroughly investigated so that the investigator can then better determine on whom to focus the investigation. For instance, checking the backgrounds of all officers connected with the property may reveal an officer who has had similar allegations levied against him in the past. Alternatively, investigating all such officers may disclose information that eliminates certain officers as potential subjects.

investigations had demonstrated that there was no police misconduct.

⁶² See *Fifth Annual Report, supra*, at pp. 25-26.

The need to initially identify and investigate all officers who have had contact with specified property typically arises in situations where numerous officers are present at a scene, such as during the execution of a search warrant. In these cases, the complainants are often not able to identify individual officers or articulate which officers were in specific locations at specific times inside the premises. It is, therefore, important that IAB investigate the actions of all officers present at the location before focusing on any specific individual. The Commission, therefore, examined if this practice was being followed and if it effectively helped investigators to more narrowly focus the direction of an investigation.

The Commission found that in approximately 88% of the cases examined, IAB appropriately identified as subjects all officers who had access to the property alleged to have been missing and/or stolen.⁶³ However, in approximately nine cases, or 12%,⁶⁴ of the 73 cases examined, IAB failed to designate and investigate all officers who were present at the location and/or who had the opportunity to come in contact with the missing property as subjects before narrowing the focus of the investigation.⁶⁵ These nine cases demonstrate that IAB must remain diligent about this issue in order to ensure that all potential officers are identified and fully investigated.⁶⁶

⁶³ This encompassed 64 cases. In eight of the 64 cases, due to the vagueness of the information received, no subject officer was able to be identified throughout the course of the investigation.

⁶⁴ Some of these investigations were conducted prior to the adoption of IAB's policy of identifying all possible officers who had access to the property and designating them as subjects to be investigated.

⁶⁵ In some of these cases, although the investigator may have obtained minimal background information on an unnamed officer, such as obtaining a CPI, there was no substantive investigative focus on the officer.

⁶⁶ In five cases brought to the Department's attention by the Commission, the Department added subject officers to the cases. However, the investigations were closed at the time the subject officers were added.

Although, this issue is more prevalent with missing property allegations, sometimes, the issue of the appropriate identification and investigation of all subject officers also arises in cases with other types of allegations. The general review of closed cases demonstrated an improvement in the Department correctly designating all possible subject officers. Of the 60 cases where more than one officer should have been designated as a subject, the Department correctly named all possible subjects in 46.⁶⁷ However, the Commission saw five cases where it believed that all of the possible officers were not named as subjects, and therefore, not adequately investigated.⁶⁸ In one case, the complainant, recently released from prison, attempted to escape from officers after a marijuana cigarette was discovered in a car in which he was a passenger. The complainant led officers on a chase through a maze of backyards and over fences. At the end of this chase, the complainant hid in a shed in a backyard and was able to keep the officers out of the shed for a period of time. Eventually, though, the officers gained entrance, and the complainant was arrested. After his arrest, the complainant was taken to the hospital where he received seven stitches in his head and one stitch in his shin. The complainant alleged to the Command Center that upon his capture, he was beaten in the head with objects by seven to eight officers. The arresting officer was immediately named as a subject. When interviewed by the call-out investigator, the complainant further stated that one officer hit him in the shin with an asp.⁶⁹ He was then struck in the head with an object by an officer

⁶⁷ In nine of the remaining cases, IAB could not name all of the subject officers because either they did not have enough information to identify the officers or the named officers had retired.

⁶⁸ There was one additional case where during the course of the investigation, IAB designated one officer as the subject without specifying any rationale behind this identification.

⁶⁹ An asp, a collapsible baton, is a piece of equipment which the Department authorizes members of the service

whom he could not identify. After being struck, he passed out. When he regained consciousness, he was handcuffed and officers were kicking him in order to get him up. Once assigned to a permanent investigator, the complainant was shown two photograph arrays. From these, he identified a previously unnamed officer as being the one who struck him with the asp. This officer was also, then, designated a subject. However, during interviews with all of the officers who were at the scene when the marijuana was discovered, two other officers were identified as being present at the shed when the complainant was finally subdued. Yet, despite the fact that the complainant was unable to identify the officers who struck him with objects or who kicked him, these officers were not named as subjects. The case was eventually closed as unsubstantiated against the two identified subject officers since all of the officers who witnessed the capture of the complainant, as well as most of the civilian witnesses who witnessed the chase and arrest of the complainant, agreed that no excessive or unnecessary force was used to effectuate the seizure. In fact, once handcuffed, the complainant repeatedly hit his head against an iron fence due to his dismay at being arrested and tried to escape by rolling underneath a parked car where he may have further injured himself. While agreeing with the disposition of the case, the Commission believed that the two officers who were present when the complainant was apprehended should have been named as subjects since they also had access to the complainant. When discussed with IAB Executives, they agreed, and these two officers were added as subjects.⁷⁰

to carry.

⁷⁰ In two other cases from the general review, IAB agreed with the Commission's analysis that another officer should have been designated as a subject. These officers were subsequently added as such.

The importance of naming and investigating all possible subjects reaches beyond the outcome of the immediate investigation. If similar allegations are levied against an officer on a future date, investigators may better decide what action is appropriate based on allegations, although unsubstantiated, that are, nevertheless, part of the officer's record.

7. Issues Unique to Missing Property Cases

As stated at the beginning of this section, the Commission chose to study cases involving allegations of missing property to determine if there were any recommendations that might decrease the number of this type of allegation received by the Department or that could provide further investigative tools for more conclusive outcomes for these investigations. Therefore, there were some issues examined that related specifically and exclusively to this category of allegation. These issues included the vouchering procedures for prisoners' property, the safeguarding of personal property, and the supervision of those officers who recovered property to be vouchered or safeguarded. Furthermore, the Commission also examined those cases involving the entry or search of premises for the purpose of executing a warrant to determine whether there were any recommendations that could be made to prevent allegations that property was missing after the officers exited the premises.

a. Vouchering, Safeguarding and Supervision of Property

The Patrol Guide contains both mandatory and discretionary procedures for police personnel when handling and vouchering property. Additionally, supervisors have specific responsibilities in

ensuring that these procedures are followed and that property is properly safeguarded. The Commission examined the cases to determine if any allegations of missing and/or stolen property resulted from violations of these procedural guidelines or from inadequate supervision. The Commission also looked at if additional training of officers or Departmental policy changes could help decrease the number of allegations received by the Department.

In general, the Commission found that in more than 80% of the cases examined, officers properly dealt with civilian property as specified in the Department's Patrol Guide and were properly supervised during these instances.⁷¹ The Commission found that in nine cases, however, allegations appeared to be caused by a failure to properly voucher property as suggested under Departmental guidelines or because officers violated other Department procedures. Additionally, on four occasions, officers appeared to be improperly supervised when they handled property that should have been safeguarded.

1.) Vouchering & Documentation

Patrol Guide §218 sets out the basic procedures to be taken by members of the service "to record and process property coming into police custody."⁷² In general, when a person is arrested, he may request that his personal property, such as currency or jewelry, be kept for safekeeping with the Department. The officer must then take the property and safeguard it by listing it on a property voucher, similar to a receipt, and give a copy of the voucher to the arrestee. The arrestee may

⁷¹ This conclusion was reached in 60 of the 73 cases.

⁷² See Patrol Guide §218-01, Purpose.

reclaim the property upon being released from custody. Alternatively, where an arrestee has in his possession proceeds or instrumentalities of a crime, officers must confiscate that property and voucher it as arrest evidence for the prosecution of the arrestee. In these instances, the property is not returned to the arrestee. In addition to properly documenting on the voucher all the property that is taken from the prisoner, the officer must also take other steps, such as entering a description of the property into his memobook,⁷³ and notifying a desk officer of the property that has been recovered. The desk officer must then verify the accuracy of the voucher.

As discussed above, the vouchering of an arrestee's property is mandatory under certain circumstances, such as when it is to be forfeited by the perpetrator because it is arrest evidence or the fruit of a crime.⁷⁴ Other provisions of the Patrol Guide, however, give officers the discretion as to how to handle other property. For instance, PG §208-03 allows officers to let prisoners retain certain personal property after arrest, such as money for transportation home upon release from custody. While understanding the necessity of giving officers this discretion, the Commission found that the failure to document what items were left with, or immediately returned to, the complaining witnesses resulted in a number of allegations.

In three cases examined, the subject officers appeared to allow the complaining witnesses to retain at least some of the currency that they had possessed when arrested but failed to document the

⁷³ Memobooks, also known as activity logs, are carried by officers and are where officers record daily activity information, such as tour, assignment, and arrest information.

⁷⁴ Under PG §208-02(8), the following property must be removed from a prisoner upon his arrest: property unlawfully carried; property required as evidence; property lawfully carried, but dangerous to life or would facilitate escape; property that can be used to deface or damage property; all personal property, except clothing, if prisoner is intoxicated or unconscious; press cards issued by the Department; Auxiliary and Civilian Defense shields and identification; and legally possessed prescription drugs.

amount retained. In these cases, the complainant alleged that either money was not returned to him or an incorrect amount of money was vouchered, and the subject officers did not have documentation or proof that any money was returned. While permitting prisoners to retain some money and not documenting that fact is permissible, the lack of such documentation makes it difficult to determine if the money was, in fact, returned to the complaining witness or was misappropriated. Documenting this information would help an officer prove that the money claimed to be missing was actually returned. In fact, the property invoice has a designation at the bottom to list any property that is returned to the owner. Therefore, when property is vouchered and a portion is returned, this designation on the form should be filled out and signed by both the officer and the prisoner. Alternatively, the return of funds can also be documented in an officer's memobook or the precinct's property log. Correctly documenting when property is returned to prisoners may prevent allegations from being brought, or at a minimum, facilitate expeditious and fair resolutions of investigations.

2.) Safeguarding Property

In addition to vouchering procedures, the Patrol Guide contains general guidelines regarding the safeguarding of property. For instance, Patrol Guide §218-13 states that "property that is not inventoried from an automobile but is possessed or under the control of an arrested individual, may be inventoried and all items found therein may be vouchered as prisoner's property."⁷⁵ This section,

⁷⁵ See Procedure Number 218-13, Additional Data, regarding Inventory Searches of Automobiles and Other Property.

in conjunction with others, assists officers in determining the types of property to safeguard, giving them discretion regarding what they will confiscate and voucher. While the Commission recognizes that it is not always practical or even desirable to voucher all property that a person has in his possession when he is arrested, the Department must also ensure that when property is not vouchered, it still must be adequately safeguarded. Also, if an individual wishes that his property remain where it is instead of it being vouchered or otherwise safeguarded, this should be documented by the officer.

In four cases, the complainants' property was left at the scene of arrest rather than being brought to the Precinct and vouchered for safekeeping,⁷⁶ and it appears that this conduct caused the missing property allegations to be brought.

In one case, for example, the complainant was allowed to leave \$1400.00 in currency in his bar after his arrest and to give the key to the bar to one of his employees. After his processing, the complainant returned to his bar to find his money missing. He, then, alleged that the police took it. At the very least, if the officers allow a complainant to leave property at an arrest location, especially a large sum of money, this should be documented with the complainant's signature, the type of property left behind, and with whom the property was left, if applicable.⁷⁷

⁷⁶ More specifically, in two cases the arresting officer intentionally allowed a complainant's property to be left at the scene of arrest. In the second two cases, currency was inadvertently left in a complainant's vehicle after arrest and when the officers returned to retrieve the funds, the complainants stated that money was missing from what was recovered.

⁷⁷ In the remaining two cases, complainants were arrested in their vehicles, and unbeknownst to the arresting officers, money was left in the vehicles. Once made aware of the amount of money in the vehicles, officers went back to the scene to obtain and safeguard the money. However, the complainants alleged that the money retrieved by the recovering officers was less than the amount that had been in the cars at the time of arrest. In both of these cases, had inquiry been made at the scene and documentation been made accordingly, this may have helped investigators determine

Where complainants were arrested while in or near their vehicles, officers should simply inquire of the complainant if there is any valuable property in the vehicle that needs to be safeguarded. Alternatively, and in all the cases discussed, documenting a person's decision to keep the property instead of vouchering it for safekeeping, may prevent allegations from being brought. At a minimum, it may assist investigators in proving or disproving allegations.

3.) Failure to Supervise

In addition to officers following vouchering procedures, supervisors must also play a role in ensuring that these procedures are followed. According to the Patrol Guide, when property is vouchered, the desk officer is required to sign the invoice after verifying the form for accuracy, enter the invoice information in the property log, and safeguard the property until it is removed from his command or returned to the owner.

Specifically, Patrol Guide §218-01 states that the officer who takes any property into police custody, must invoice it by entering the “circumstances and description of the property” in the Activity Log, prepare a Property Clerk’s Invoice Worksheet (“voucher”), notify any appropriate person, section or bureau of the command’s possession of the property if applicable,⁷⁸ and deliver the property and voucher “to desk officer of command of record.” The supervisory desk officer, then, must sign the voucher after verifying its accuracy and completeness. He is responsible for noting that the property has been “properly tagged, packaged, or sealed and clearly identified by invoice

the circumstances under which the money was lost or taken.

⁷⁸ For example, if the property is believed to be a stolen vehicle, the vehicle’s owner should be notified.

number,” for entering the information contained on the invoice into the Property Log, and for safeguarding the property until it is turned over to the appropriate party.⁷⁹

In the nine cases referred to above, inadequate supervision appeared to have been a contributing factor to the missing property allegations that were made. For instance, in one case, a supervisor failed to properly supervise an arresting officer’s search of the complainant and his belongings. Here, when the complainant was arrested, he had a gym bag in his possession. The arresting officer searched the bag at the precinct in front of the supervising Lieutenant and then vouchered the bag as personal property. However, the arresting officer did not notice that there was currency in the bag, and therefore, this currency was not vouchered separately as it should have been. When the complainant retrieved the bag he alleged that the amount of money in the bag was less than the amount there when the bag was taken. Consequently, both the arresting officer and supervising officer appropriately received command disciplines⁸⁰ for the failure to follow vouchering procedures and the failure to properly supervise, respectively.⁸¹

In conclusion, it appears that additional training for police officers of the procedures in place

⁷⁹ The property may, for example, be brought to the Property Clerk’s Office, the bank, or be picked up by its rightful owner. These guidelines, according to Patrol Guide §218-13, help to “protect property, ensure against unwarranted claims of theft, and protect uniformed members of the service and others against dangerous instrumentalities.”

⁸⁰ A command discipline is a “[n]on-judicial punishment available to a commanding/executive officer to correct deficiencies and maintain discipline within the command.” *See* Patrol Guide §206-02. *See also* §§206-03 and 206-04 for violations subject to command discipline and authorized penalties under command discipline, respectively.

⁸¹ In the other cases, the allegations indicated a resulting supervisory failure in the following scenarios: an officer improperly listing a check as cash on a bank deposit ticket; a failure to provide a voucher to the complainant informing him that the money taken from him was vouchered for forfeiture; and the failure to properly document and voucher property taken from prisoners during the execution of a search warrant.

to safeguard and voucher prisoner property, coupled with more intensive supervision of their actions, may decrease the number of missing and/or stolen property allegations received by the Department each year. Additionally, more specific documentation of what is not vouchered for safekeeping may not only decrease the number of allegations, but may help expedite a proper resolution to an investigation and, therefore, save Department resources.

b. Entering or Searching Premises

Over one-third of the missing property cases reviewed by the Commission involved allegations that arose after officers had entered a person's home or place of business.⁸² The Commission, therefore, analyzed these cases with a view towards making recommendations in order to possibly decrease the number of allegations that arose in this setting. The Commission looked at if there were any recurring issues which may have prompted the bringing of these allegations, such as, if there was a lack of supervision during the execution of search warrants or if officers left premises unsecured after exiting.

As a result of this review, however, the Commission concluded that there were no notable common issues which made the bringing of a complaint more likely than in other types of cases, either in terms of misconduct or procedural failures. The circumstances surrounding the allegations varied, and the allegations in all these cases were found to be without merit.

⁸² 27 of the 73 examined cases involved allegations of missing and/or stolen property after officers had entered a premise or place of business. Of these 27 cases, 15 involved instances where officers entered the location pursuant to a search warrant, and the remainder involved officers entering the locations for other reasons such as due to exigent circumstances.

8. Documentation

Early gathering of documents, such as background checks on complainants, witnesses, and subject officers, is important because the information gathered can determine the direction an investigation should follow. Further, some documents, such as telephone records or financial records, may take a significant amount of time to obtain, so, early efforts to obtain this information is crucial so that the case is not stalled while awaiting its receipt. For the most part, the Commission found that the appropriate documents were gathered in a timely manner. Usually, call-out investigators and assigned investigators gathered the subject officer's personnel history including his disciplinary record, medical history, and assignment history upon receipt of the case. This history was often updated during the course of the investigation. When it was determined that documents requiring subpoenas would be needed, these subpoenas were requested and prepared quickly after the determination was made. Also, in those cases where the alleged misconduct took place during the arrest of the complainant, all of the corresponding arrest paperwork was gathered almost immediately.

One area, though, where the Department did not appear to be as diligent was in collecting the CCRB investigative file when a corresponding CCRB case existed. The Commission found that there were some cases where the CCRB file was not reviewed until late in the investigation and there were even cases where the file was not obtained at all. It is important for IAB investigators to review the CCRB files because they often contain contact information and statements of complainants and witnesses who have either become unavailable to be interviewed by IAB or which

contain additional information and investigative leads. These statements also may reveal contradictions with other statements made by the witnesses, including the subject officer or other members of the service, to IAB investigators.

It is also important that investigating officers adequately document their investigative actions on a case because if the case is transferred to another investigator before completion of the investigation, the new investigator can continue the investigation without repeating steps in the process which could engender further delay. The Commission has found an improvement over the years in investigators' efforts to document their actions, and that improvement continued in this review. There were only eleven cases in its general review where Commission staff found that some investigative actions were not adequately documented.

D. Findings and Recommendations

The Commission has found that, overall, IAB continues to adequately investigate its cases and use the investigative tools at its disposal appropriately. The Commission agreed with the outcomes of the investigations in the vast majority of the cases and found that most investigations were conducted diligently, thoroughly, and in a timely manner. There were a few isolated cases where investigators missed the opportunity to use a particularly appropriate investigative tool or did not employ an investigative tool in the most effective manner.

Also in some cases, the Commission found lengthy delays and these were, at times, due to investigators being temporarily reassigned. In cases where an investigator is to be reassigned for a significant period of time, the Department should consider reassigning the case to another investigator in order to ensure a timely and cohesive investigation.

In its review of the missing property cases, the Commission found, in general, that in most of the cases examined, officers properly handled and vouchered civilian property as specified in the Department's Patrol Guide and were properly supervised during these instances. However, in approximately 18% of the cases, allegations appeared to be caused by a failure to properly voucher property or because of a violation of other Department procedures. In other cases, the failure to document actions, although permissible under Departmental guidelines, may have precipitated the bringing of complaints. In some of these cases, the complainant's property was left at the scene of arrest rather than being brought to the Precinct and vouchered for safekeeping. In other cases, a portion of a prisoner's property was vouchered while some was retained by the prisoner. While permitting prisoners to retain some money is permissible, the Commission found that the failure to document these actions and the amount of money returned to the complaining witness resulted in a number of allegations being brought. Increased documentation in all arrest situations involving property would assist officers in disproving false allegations and assist investigators in reaching appropriate dispositions. If officers allow a complainant to leave property at an arrest location, this should be documented with the complainant's signature, the type of property left behind, and with whom the property was left, if applicable. In the case of complainants arrested while in or near their vehicles, officers should ask complainants if they have any valuable property in the vehicle that needs to be safeguarded, and if property is left at the scene, this should be similarly documented.

When property is vouchered and a portion is returned, the designation at the bottom of the property invoice should be filled out and signed by both the officer and the prisoner. Alternatively, the return of funds can also be documented in an officer's memobook, the Precinct's Command Log,

or the Activity Log. Further, officers should receive more periodic training regarding the procedures that are in place to safeguard and voucher prisoner property.

Supervisors should receive similar training and ensure that officers are following the procedures in safeguarding property. The Commission found that some officers were improperly supervised when they handled property that should have been safeguarded. Since supervisors are responsible for ensuring that the vouchers are accurate and that the property is properly safeguarded, they should be more attentive to completing the voucher and listing the property that was returned to the owner in the designated section on the voucher. They should also provide more intensive supervision when determining what to voucher or documenting what has been left at a scene or with a prisoner.

In the arena of entering or searching a person's property, the Commission found no notable common issues which made the bringing of a complaint more likely than in other types of cases, either in terms of misconduct or procedural failures.

IV. FOLLOW-UP ON PAST COMMISSION RECOMMENDATIONS

In addition to reviewing a sample of closed IAB investigations from IAB's various investigative groups, the Commission also annually reviews all closed disciplinary cases involving allegations of serious off-duty misconduct and allegations that fall within the Department's 1996 False Statement policy.⁸³ The purpose of these reviews is to determine whether the Department is appropriately disciplining those members of the service found to have committed these types of

⁸³ See *infra*, at pp. 123-124 for details regarding the Department's 1996 False Statement policy.

misconduct. The Commission also examines if the Department is applying its own stated guidelines, often adopted pursuant to Commission recommendations, in imposing penalties. The results of the Commission's most recent review of these categories of disciplinary cases follow.

A. Serious Off-Duty Misconduct

1. Introduction

In August 1998, the Commission released its report *The New York City Police Department's Disciplinary System: How the Department Disciplines its Members Who Engage in Serious Off-Duty Misconduct*, (*"Off-Duty Misconduct Report"*). In that report, the Commission examined adjudicated cases that involved allegations of serious off-duty misconduct, specifically, allegations involving violent behavior, display or discharge of a firearm, or alcohol-related misconduct. The Commission evaluated the dispositions of these cases to determine whether the Department was imposing appropriate penalties, and as a result of its findings, the Commission made several recommendations, many of them regarding alcohol-related misconduct.⁸⁴

In its *Fifth Annual Report*, the Commission reported on the Department's adoption of many recommendations made by the Commission and, to the extent possible, evaluated the implementation of these policy changes.⁸⁵ The Commission again revisited these issues in its *Sixth*

⁸⁴ See *infra*, at pp. 74-75 for the specific recommendations the Commission made regarding alcohol-related misconduct.

⁸⁵ Due to the time frame used for the *Fifth Annual Report*, some of the Department's new policies did not apply to enough cases for the Commission to make determinative findings regarding the application of the policies. See *infra*, at pp. 75-76 for a more specific description of the Department's responses to the Commission's 1998 recommendations.

Annual Report and further expanded its review. Instead of solely analyzing cases that involved the display or discharge of a firearm, alcohol-related misconduct, and particularly violent behavior, the Commission also reviewed cases involving domestic violence, cases where the misconduct also resulted in corresponding criminal charges against the subject officer, and cases where the subject officer was on some sort of Departmental probation while alleged to have committed misconduct.⁸⁶

⁸⁶ The two types of Department probation are either when an officer is in the initial probationary period that all officers must complete upon appointment to the Department or when an officer is placed on Dismissal Probation as part of a disciplinary penalty. *See infra*, at pp. 115-121 for a definition of Dismissal Probation and further discussion about this topic.

2. Methodology

In this study, the Commission initially reviewed all cases that were adjudicated between August 2001 and July 2003 where at least one of the charges involved misconduct committed by the subject officer while he was off-duty. The Commission then excluded from its final review those cases where the Respondent was a civilian member of the service and those cases where the off-duty misconduct was not deemed serious.⁸⁷ For example, cases solely alleging that the subject officer was out of his residence without permission while on sick leave or cases where the sole charge was that the officer engaged in unauthorized off-duty employment, without more, were not considered for this review. After excluding these cases, 429 remained.⁸⁸ The off-duty allegations ranged from those involving alcohol-related misconduct to the display or discharge of a firearm, domestic disputes, criminal sexual misconduct, and fraud.⁸⁹ Each category of cases will be discussed separately throughout the remainder of this section.

The main focus of this review was to determine whether the Department was imposing sufficient penalties upon those members of the service found guilty of off-duty misconduct. Accordingly, the Commission reviewed all of the documents it received in connection with the

⁸⁷ Civilian members of the service are afforded the option of a different, less formal adjudication process than uniformed members of the Department. Cases may be resolved and penalties may, therefore, be imposed in forums outside, and independent from, the Department.

⁸⁸ If a case had two or more officers charged together, each officer was counted as a separate case. Further, if an individual member of the service had more than one case pending against him, those cases were counted as one if one disposition applied to all of the cases combined.

⁸⁹ A number of the cases studied involve more than one category. For example, a probationary police officer may be charged with Driving Under the Influence of Intoxicants by the Department while criminal charges are simultaneously pending. For the Commission's study, this officer would be included in all applicable categories that were examined. Therefore, the numbers throughout this section reflect that accounting.

adjudication of each case and first determined whether there were any explicit Department policies that governed the charged misconduct.⁹⁰ If there was, the Commission examined whether this policy was correctly applied when the officer was penalized, and if it was not applied, whether a reason was given for the deviation from the policy. When no policy controlled the charges, the Commission judged the appropriateness of the discipline by balancing the severity of the charged misconduct and the officer's prior disciplinary history. The Commission considered whether other members of the service who were similarly situated were penalized in a consistent manner and whether the officer's disciplinary history was taken into account when fashioning a penalty. The rationale for examining the officer's prior disciplinary history is that the Commission has always supported a system of progressive discipline where given the equality of all other factors, an officer with a prior disciplinary history should be penalized more severely than an officer without a prior disciplinary history. The Commission also examined the length of time that was taken to impose the recommended discipline upon the officer. Generally, this time period was measured from the date the misconduct occurred until the date the case was administratively closed, usually through approval of the recommended penalty by the Police Commissioner.⁹¹

⁹⁰ The documents reviewed included the charges and specifications, Trial Commissioner's written decision, plea memorandum drafted by the Advocate, and memoranda prepared by those officers who investigated the allegations. These documents would set forth the facts surrounding the misconduct and the reasons underlying the decisions as to guilt and as to the appropriate penalty.

⁹¹ The Commission used a different time period in some cases where the subject officer was on Dismissal Probation at the time new charges and specifications were pending. *See infra*, pp. 118-119 for further discussion of this matter.

3. Findings

a. Alcohol-related Off-Duty Misconduct

1.) Prior Findings

In its *Off-Duty Misconduct Report*, while examining cases involving weapons and cases involving violent behavior by subject officers, the Commission noticed that in a significant number of these cases, the subject officer appeared to be intoxicated at the time of the misconduct due to his excessive consumption of alcohol.⁹² Consequently, the Commission expanded its original sample of cases reviewed to include any case that involved off-duty misconduct with alcohol use. As a result, two categories of cases were examined -- those where the officer was accused of driving under the influence of an intoxicant⁹³ and those where the officer had consumed enough of an intoxicant that he was found by his Commanding Officer to be unfit to carry out his duties as a police officer.⁹⁴ In accordance with its findings, the Commission made several recommendations specifically related to those misconduct cases involving alcohol misuse.

These recommendations essentially involved five major categories of reform. First, if possible, a determination regarding an officer's fitness for duty should be made at the time of the alleged misconduct and not solely when the Duty Captain first observes the subject officer, which

⁹² See *Off-Duty Misconduct Report*, at pp. 2-3.

⁹³ In New York State, the relevant criminal offense is called "Driving While Intoxicated" ("DWI") while the analogous departmental charge is "Driving Under the Influence" ("DUI"). Both charges refer to the same conduct.

⁹⁴ Departmental regulations require an officer to be "fit for duty at all times, except when on sick report." See New York City Police Department Patrol Guide §104-1, "Fitness for Duty," 1. Moreover, the Department expressly forbids officers to consume alcohol, "to the extent that [the] member becomes unfit for duty." See Patrol Guide §104-1, "Fitness for Duty," 2.

may be several hours after the initial misconduct. This determination should be made utilizing all scientific and testimonial relevant evidence. Second, if an officer is charged with DUI, necessarily, he should also be charged with being unfit for duty.⁹⁵ Third, a Breathalyzer test should be administered in all cases where there is reason to believe that an officer is unfit for duty due to the overindulgence of alcohol and especially in those cases where the officer is suspected of DUI. Should the officer refuse to submit to a Breathalyzer, that refusal should also be charged and used as evidence of his unfitness for duty. Fourth, in cases involving DUI, penalties should include Dismissal Probation and mandatory counseling. If the officer was found guilty of a prior alcohol-related offense and had already participated in mandatory counseling, that officer should, in most instances, be terminated. Finally, a separate category of offense for officers found to be armed while unfit for duty should be created. Penalties imposed on officers found guilty of this offense should be more severe than those imposed on officers merely found guilty of being unfit for duty alone.

As a result of the above recommendations, the Department adopted many new policies.⁹⁶ Regarding fitness for duty findings, the Department declared that these should be made as of the time of the incident rather than based solely at the time of the Duty Captain's observations. These findings should also be made by using scientific evidence or any other evidence of the officer's intoxication even if by the time the Duty Captain observed the officer, he was no longer unfit. The Department also created a specialized form to better enable the Duty Captain to consider several

⁹⁵ The maximum penalty that may be imposed for each offense upon a finding of guilt after trial is 30 days. The Department may, however, impose consecutive sentences for discrete charges. Therefore, levying additional charges against an officer will enable the Department to more severely penalize officers if appropriate.

⁹⁶ See *Fifth Annual Report*, at pp. 38-41.

physical indicia of intoxication when examining the officer. If an officer was suspected to have driven while under the influence of alcohol, a Breathalyzer would be administered. If the officer refused this test, this refusal would be used as evidence in any Departmental proceeding against him and a separate charge of engaging in conduct prejudicial to the Department would be levied against him.

The Department also formalized its requirement that all officers charged with alcohol-related misconduct must consult with the Department's Counseling Services Unit before any disciplinary matter involving alcohol is adjudicated.⁹⁷ Further, continued counseling or evaluations might be made part of any plea agreements. In addition, a new administrative charge, "Armed While Unfit for Duty," was created, and more general stronger language was added to the Patrol Guide to discourage members of the service from being armed while consuming alcohol.⁹⁸ Finally, any member of the service found to have misused his firearm while unfit for duty would be terminated.⁹⁹

In its *Fifth Annual Report*, the Commission reported on and examined the Department's application of the above newly stated policies involving the misuse of alcohol. The Commission found that, in most cases reviewed, the Department was imposing appropriate penalties in that the Department was placing the officer on Dismissal Probation and requiring counseling. This was

⁹⁷ Due to the Department's policy of keeping counseling information confidential, certain information is redacted from the files and the Commission is, therefore, unable to report specifically how many officers were mandated to complete alcohol counseling.

⁹⁸ See Patrol Guide §203-04 ("Armed While Unfit for Duty"); Patrol Guide §105-1 ("Equipment Firearms" 2. e).

⁹⁹ See *infra*, at pp. 90 and 95-100 for a further discussion of the implementation of this policy.

especially true when the officer was found guilty of DUI. The Commission also found that charges of unfitness for duty were appropriately being brought when the officer was charged with DUI or when there were other indications of alcohol consumption. The Commission observed some cases, however, where this charge, though appropriate, was not levied. The Commission also noted an increase in charging officers with refusing to take a Breathalyzer test when applicable. Finally, the Commission found that the Department began applying the charge of “unfit for duty while armed”, and when it was charged, the penalties imposed were generally more severe than when the subject officer was merely charged with being unfit for duty. However, in only one of the ten cases where this charge was not levied, did the corresponding paperwork specifically state that the subject officer was not armed.

The Commission re-examined this issue in its *Sixth Annual Report*.¹⁰⁰ For that review, the Commission analyzed 59 cases that involved alcohol-related misconduct. Although there were some exceptions, the Commission found that generally the Department was more consistently making findings about whether or not an officer was armed when he was found unfit for duty. If there was such a finding, the additional charge of “unfit for duty while armed” was usually brought. The Commission also saw greater penalties being imposed against officers found guilty of being armed while unfit for duty than those who were merely charged with being unfit for duty. However, the Commission noted that in these cases there were also other aggravating factors that may have been responsible for the more severe penalties. In addition to the increase in penalty days, the Commission also found that counseling was regularly imposed as a condition of any plea offers in

¹⁰⁰ See *Sixth Annual Report of the Commission*, (December 2001), at pp. 45-49.

alcohol-related misconduct.

2.) Current Findings

In its current review, the Commission examined all of the cases that appeared to involve alcohol consumption by the subject officer that had been adjudicated between August 2001 and July 2003. This totaled 97 cases and included cases where the officer may not have been charged with any alcohol-related offense but there was some component in the facts of the case which indicated alcohol use by the subject officer.¹⁰¹ Such circumstances could include: that the alleged misconduct occurred in an establishment that served alcohol; that a complainant noted that the subject officer had been consuming alcohol prior to the incident; or although not found unfit for duty, the subject officer was observed drinking alcohol earlier in the day.

Of these 97 cases, 32 involved charges of DUI. As stated earlier in this section, the Commission had recommended in prior reports, and the Department had agreed, that if an officer was charged with DUI, there should also, necessarily, be a charge of unfitness for duty levied against him. In the past, the Department appeared to be including an unfitness charge regularly, and in this review, this trend continued with 28 of these cases also carrying an unfitness charge. In the remaining four cases, it appeared that, based upon the available evidence, the Department could have imposed the charge, but did not.¹⁰² In previous reports, the Commission noted that, in general,

¹⁰¹ For the method used to calculate the number of cases, *see supra*, at p. 72, fn. 88.

¹⁰² In two of these cases, the Respondents were arrested for Driving While Intoxicated outside of New York State. However, in both cases, the Respondents submitted to Breathalyzer tests which registered blood alcohol levels significantly above that of legal intoxication.

penalties imposed on those officers found guilty of DUI, with no aggravating factors, involved at least Dismissal Probation and a 30-day penalty.¹⁰³ If a plea was taken, alcohol counseling was also usually mandated.¹⁰⁴ The Commission believes that this penalty is adequate if the officer has no prior history of alcohol-related misconduct or is not on Departmental probation.¹⁰⁵

In its present review, the Commission found that more severe penalties were imposed in most of these cases. Of the 32 cases where an officer was charged with DUI, ten of them were separated from the Department.¹⁰⁶ All but one of those officers who were terminated were either on Dismissal Probation or were Probationary Police Officers at the time of the misconduct.¹⁰⁷ Of the remaining 22 cases, 21 of the Respondents were placed on Dismissal Probation¹⁰⁸ and all except one were penalized with at least 30 days.¹⁰⁹ Of these 21, 17 penalties were imposed as the result of plea

¹⁰³ Aggravating factors could include accidents involving serious physical injuries, leaving the scene of the accident, resisting arrest, being unfit while armed, or refusing to take a breathalyzer test.

¹⁰⁴ Because it is not one of the dispositions available by law after an administrative trial, the Department's Trial Commissioners cannot recommend that an officer found guilty of misconduct undergo counseling.

¹⁰⁵ See *infra*, at pp. 107-121 for a discussion of Probationary Police Officers and Dismissal Probation, the two types of Departmental probation.

¹⁰⁶ Five resigned, one retired, and four were terminated.

¹⁰⁷ In the final case, the subject officer caused two accidents. He left the scene of both of these accidents, caused a physical injury to one of the accident victims, and lied to the officer who pulled him over about his involvement in the accidents.

¹⁰⁸ In the final case, the charges and specifications against the subject officer were dismissed based upon the motion of the Advocate.

¹⁰⁹ This officer forfeited the 24 days he had served on suspension after the incident. This officer, though, was not found guilty of DUI. Instead, he was found guilty of the less serious offense of driving while impaired. The Commission believes that this penalty was adequate because the evidence that the Respondent was impaired at the time of the accident was slight, he had no prior disciplinary history after a sixteen-year tenure, he was rated highly competent on his last performance evaluation, and he had been awarded two Meritorious Police Duty medals and one

offers. In 15 of these cases, counseling was mandated as part of the plea. In one of the remaining cases, the Respondent had attended counseling prior to the adjudication of the case and had participated in Alcoholics Anonymous for the 27 months between the incident and the plea. In the remaining case while counseling was not part of the plea agreement, it had been recommended to the Respondent at the time of the original incident.

Recently, the Department implemented a new policy for conducting Breathalyzer tests on those members of the service found guilty of DUI.¹¹⁰ As part of a negotiated guilty plea, in addition to Dismissal Probation, the forfeiture of vacation days or days on suspension, and mandated alcohol counseling, the Respondent must also agree to submit to unannounced Breathalyzer tests during the Dismissal Probation period to be conducted on at least a quarterly basis. At least one test per year will be given while the subject officer is not on duty. If during any of these Breathalyzer tests, the subject officer is found unfit for duty, either due to having a blood alcohol level of .04 or higher, other common indicia of intoxication, or a combination of the two, the officer will be subjected to further disciplinary action, including the possibility of summary termination. Further disciplinary action is also possible if the officer refuses to submit to the ordered breath test. The Commission approves of this new policy and believes that it will allow the Department to expeditiously terminate those members of the service who continue to demonstrate problems with their intake of alcohol,

Commendation.

¹¹⁰ See Interim Order 9-1, c.s., Conducting Ordered Breath Testing of Uniformed Members of the Service for the Presence of Alcohol, (December 26, 2002).

whether or not other misconduct is involved.¹¹¹ This policy, though, was not in effect when most of the cases reviewed for this study were adjudicated. Those cases that were adjudicated after this policy was implemented contained a provision requiring the subject officer to submit to the requisite testing as part of the plea agreement.

Another new policy, instituted in May 2002, mandates that if an officer is found to have caused serious physical injury while operating a motor vehicle while intoxicated, he will be terminated, absent exceptional circumstances.¹¹² This policy change, as well as the other discussed above, demonstrate that the Department is increasingly taking this type of misconduct more seriously.

Of the 97 cases examined, 55 contained charges that the subject officer was unfit for duty.¹¹³ In some of the remaining cases, an unfitness finding was not made, usually because the incident was reported too late or the subject officer's identity was discovered too late to make a fitness for duty finding. The Commission recognizes that in some cases it is not always possible for the Department to determine a subject officer's fitness at the time of the incident, particularly when there is a delay in the reporting of the incident to the Department, there are no witnesses to the incident that are willing to cooperate, and the subject officer denies being unfit. In these types of cases, however; the Commission believes the Department needs to explore all possible avenues of investigation before

¹¹¹ See *infra*, at pp. 85-88 for further discussion regarding the Commission's recommendation that those officers who continue to abuse alcohol be expeditiously terminated.

¹¹² See Interim Order 9, Department Policy Statement Concerning the Operation of a Motor Vehicle While Under the Influence of Alcohol, (May 17, 2002).

¹¹³ These cases included the 28 cases where the officer was also charged with DUI.

reaching the conclusion that a determination cannot be made regarding an officer's fitness for duty, and it should also document that conclusion.

In general, it appears that the Department is determining an officer's fitness for duty based upon the totality of the circumstances, the standard articulated in the Department's policies and guidelines. Duty Captains and investigating officers are considering all relevant factors, including evidentiary, testimonial, and scientific evidence, to determine the officer's fitness for duty at the time of the incident. Further, these determinations are generally being made by the Duty Captain shortly after the alleged misconduct and appear to be correct.

In almost all of the cases reviewed in this study, where there was a fitness determination made by the Duty Captain, it appeared that the determination was made, where possible, at the time of the alleged misconduct and often, also, at the time of the observation by the Duty Captain. In those cases where fitness was based solely on the Duty Captain's observations, usually, the Respondent was found unfit for duty. In seven cases, the Respondent was specifically found fit for duty but in four of those cases it was unclear from the paperwork in the file at what point in time the Respondent's fitness was being measured.

In one case, the Duty Captain responded to the Respondent's residence after his wife called 9-1-1 and reported that the Respondent was intoxicated and threatened to kill her, their children, and himself. On the date of this call, the Respondent's wife was interviewed by investigating officers. During this interview, the wife stated that the Respondent had been intoxicated for six out of the seven days leading up to this incident, had put his firearm to his head six days earlier, and again two days after that. Notwithstanding this information and that investigators assigned to the investigative

unit “detected a strong odor of alcohol several hours after the initial incident was reported,” the Duty Captain determined that the Respondent was fit for duty. Further, when officially interviewed pursuant to the provisions of PG §206-13, the Respondent admitted to drinking alcohol on the dates specified and did not remember meeting the Duty Captain or the investigating officer on the date that the 9-1-1 call was placed. Although the Department corrected this fitness finding by charging the Respondent with being unfit for duty and terminating his employment, the Commission is concerned that the Duty Captain declared that this Respondent was fit for duty despite the overwhelming evidence that he was not.¹¹⁴

Further, in 28 cases, law enforcement personnel attempted to give the subject officer a Breathalyzer test.¹¹⁵ In 22 of these cases, the subject officer refused to take the test. This resulted in the additional charge of conduct prejudicial in 20 of those cases. However, there were also three other cases where the Duty Captain should have made efforts to determine the officer’s fitness but the paperwork reviewed by the Commission did not indicate whether any such determination was made.

In contrast to determining an officer’s fitness, it appeared that the Department was less diligent in determining and enunciating whether an officer was found to be armed when he was unfit for duty. Of the 55 cases where an officer was specifically charged with being unfit for duty, there

¹¹⁴ The Respondent was on Dismissal Probation at the time of this incident, therefore, the Department exercised its right to summarily terminate him. *See infra*, at pp. 115-116 for a further discussion of Dismissal Probation. The Department, however, did not levy the separate charge of “unfit for duty while armed” though clearly from the information provided by the complainant and witnesses, the Respondent was armed while intoxicated. *See infra*, at pp. 84-85 and 95-96 for further discussion about the charge of “unfit for duty while armed.”

¹¹⁵ In this context, a Breathalyzer test would include any chemical, blood, or breath test that law enforcement officials attempted to give in order to determine the Respondent’s level of intoxication.

was only information about whether the officer was armed in 38 cases.¹¹⁶ Therefore, determinations are not being clearly made in approximately 30% of the cases.¹¹⁷ Of the 38 cases where a determination was made, the officer was found to be armed in fourteen of these cases. Of these fourteen cases, a separate charge of “unfit while armed” was included in eleven of these cases. Further, in only one of these cases did the penalty appear significantly more severe than in cases where the officer was not charged with this infraction.¹¹⁸ However, in that case, the subject officer was still on entry level probation at the time of the misconduct which may have been considered an aggravating factor leading to the officer’s termination.¹¹⁹ Of the remaining cases, the most severe penalty of these ten cases was a period of Dismissal Probation and 49-day penalty.¹²⁰

It does not appear, therefore, that the Department is making sufficient efforts to ensure that

¹¹⁶ This information did not always come in the form of a specific finding by the Duty Captain. Sometimes, the Commission was able to determine whether the Respondent was armed due to the nature of the charges against the Respondent or because the Respondent was previously on modified or restricted duty which would necessarily require that all of his firearms be vouchered with the Department for safekeeping until his restoration to full duty status. In only 21 of the cases reviewed was an actual determination about whether the Respondent was armed contained in the paperwork.

¹¹⁷ In one case, the Suffolk County police reported removing a firearm from the Respondent's possession but it was unclear from the paperwork reviewed from where the firearm was removed. As this Respondent was not given a separate charge of “unfit for duty while armed”, the Commission did not include this among the cases where a determination was made regarding whether the officer was armed. In another case, the determination was made based upon a telephone interview with the subject officer after he was arrested in Albany. Although the Duty Captain could not investigate the officer in person, he should have attempted to speak with the arresting officer regarding this issue. In one other case, although there was no specific finding or charge that the officer was armed, the officer testified at his Departmental hearing that he was armed at the time of the incident. Since no determination was made, this case was not counted as one of the 38 cases. Finally, in one case, the officer was found in possession of a firearm but it was unloaded. The Commission did not count this officer as being armed while unfit for duty.

¹¹⁸ Five of the remaining ten officers either resigned or retired prior to the imposition of a penalty.

¹¹⁹ See *infra*, at pp. 108-110 for a discussion about entry level probation and its consequences.

¹²⁰ This was a combination of suspension days and the loss of vacation days.

officers who are found to be unfit for duty while armed are penalized appropriately. This is apparent first at the investigation level with a failure to render a clear determination regarding whether the officer is in possession of a firearm while he is intoxicated. Then, even when such a finding is made, the Department does not appear to be consistently utilizing the charge of “unfit for duty while armed.” Finally, even in those few cases where the Respondent was given this separate charge, the penalty imposed was not significantly more severe than the penalties imposed on his counterparts who were not found to be armed.

As noted at the beginning of this section, one of the Commission's initial recommendations was that those officers who continue to engage in alcohol-related misconduct after receiving counseling should be separated from the Department. The rationale is that an officer, unable to conquer an obvious alcohol problem, has too great a chance of becoming a liability to the Department. Further, those members of the service with demonstrated alcohol problems may not be on full duty status, so their utility to the Department is reduced. The Commission believes that, unless the initial misconduct committed is particularly egregious, these officers should have the opportunity to get counseling and resolve their problems, but when counseling does not appear to be effective, the officers must be terminated. Of course, discretion should be used when a significant amount of time has passed between episodes.

In this study, the Commission found eight cases where the Respondent, currently charged with allegations involving alcohol-related misconduct, had prior similar allegations.¹²¹ In two of

¹²¹ There were two other cases where the subject officers indicated that they had alcohol problems in the past, however, there were no prior allegations filed against them.

these cases, the prior allegations were over ten years old and the Commission believes that the penalty imposed adequately addressed the misconduct. In two of the remaining six cases, the officers were on Dismissal Probation for alcohol-related offenses at the time of the latest allegations and were terminated. In another case, the officer resigned after garnering a second case involving his unfitness for duty.¹²² In one of the remaining cases, the Respondent accepted a plea offer which required that he file for retirement on the earliest possible date.¹²³

While it is commendable that the Department eventually terminated the two officers referred to above, both had completed alcohol counseling previously and should have been terminated sooner in their careers. For example, in one of these cases, the subject officer was appointed in 1982. She had a chronic sick history throughout her career as a police officer.¹²⁴ In 1985, she was suspended after she was found intoxicated while committing other acts of misconduct. She underwent alcohol counseling in 1987. In 1995, the Respondent was placed on Dismissal Probation for one year after her involvement in a domestic dispute. In 1998, she was placed in the Special Monitoring System and during that monitoring period, she was chronically late for work which resulted in the

¹²² The Respondent was on restricted capacity due to his alcohol problems when he engaged in the conduct which led to his first set of charges and specifications for unfitness for duty. Within two months, the Respondent engaged in further misconduct while unfit which resulted in a second set of charges and specifications.

¹²³ In another case, although not terminated for the instant misconduct, the Respondent was placed on Dismissal Probation and then terminated as a result of subsequent allegations during the probationary period. In the final case, the officer was placed on Dismissal Probation, forfeited 31 suspension days, and lost nine vacation days, was required to comply with quarterly alcohol testing and to cooperate with any counseling that the Department deemed necessary.

¹²⁴ The Department designates officers who have excessive sick-leave absences as "chronic sick."

imposition of two command disciplines.¹²⁵ In December 2001, the Respondent was placed on Dismissal Probation and received a 45-day penalty after pleading guilty to two sets of charges and specifications. One set alleged that on December 7, 2000, the Respondent was involved in an automobile accident while intoxicated and had left her children unattended at home while she was out drinking. In the second incident, on December 21, 2000, the officer was found drinking in a bar and unfit for duty after her husband notified the Department of her whereabouts. At the time of the second incident, the Respondent was still on suspension for the December 7th incident. The rationale given by the Advocate for the plea offer of 45 days and dismissal probation to encompass both cases was the Respondent's terrible sick record, her pervasive problems with alcohol, and the fact that she had a prior disciplinary matter involving alcohol. On February 23, 2002, the Respondent was again found driving while intoxicated.¹²⁶ On March 7, 2002, she was terminated. It is apparent that the Respondent continued to have alcohol-related problems throughout her career and was consistently not performing up to Department standards. Counseling did not improve the Respondent's behavior and she, therefore, should have been terminated in December 2001 instead of being given yet another opportunity on Dismissal Probation.

In its review of the 97 cases, the Commission found that the penalties imposed on the subject officers involved in alcohol-related misconduct were generally appropriate. Those cases where the

¹²⁵ The Special Monitoring System ("SMS") provides problematic officers with a high level of increased supervision. Officers in SMS typically have long disciplinary histories including the receipt of multiple charges and specifications, administrative transfers, poor sick records, negative evaluations, and/or other disciplinary infractions. Placement on SMS is usually determined by a senior level Department committee, the Special Monitoring Board.

¹²⁶ The Respondent was still on Dismissal Probation at the time of this incident because she had been on modified duty since before her placement on Dismissal Probation. The period of Dismissal Probation is automatically extended by any period of time the officer is not on full duty.

Commission believed the penalties were not sufficiently severe usually involved supervisory officers patronizing premises which sold alcohol without the required state license.¹²⁷ In this review, there were no alcohol-related cases that involved serious violent behavior, however, there was one case where the Commission believed that because the potential for violence at the time of the incident and in the future was great, the officer should have been terminated. That case is more fully discussed in the domestic violence section of this report.¹²⁸

In conclusion, it appears that the Department is appropriately penalizing those officers found guilty of alcohol-related offenses. It is also making fitness for duty findings when possible, using evidence other than the Duty Captains' observations to make those findings, and is appropriately penalizing those officers found guilty of DUI. However, the Department still needs to make improvements in: determining and documenting whether those officers found unfit for duty are armed at the time of their unfitness; charging those that are armed with being "unfit for duty while armed;" and imposing more severe penalties for those officers found guilty of this charge. The Department also has to terminate those officers with pervasive alcohol problems in a more timely manner.

b. Misconduct Involving Firearms

1.) Prior Findings

The Commission has been examining off-duty misconduct involving firearms since its *Off-*

¹²⁷ There was also one case where a Probationary Police Officer forfeited 20 vacation days after pleading guilty to consuming alcohol in a police facility. The Commission believes, at the very least, this officer's entry-level probationary period should have been extended.

¹²⁸ See *infra*, at pp. 105-107.

Duty Misconduct Report, released August 1998. During that study, the Commission found that the Department had imposed insufficient penalties in cases where officers had been found to have engaged in misconduct involving firearms. The Commission also found that many of these incidents involved officers that had consumed excessive amounts of alcohol while in the possession of a firearm.

As a result of these findings, the Commission made several recommendations, some of which were subsequently adopted by the Department. First, the Commission recommended that officers who deliberately and unjustifiably discharge their weapons while off-duty be terminated from the Department. The Commission further recommended that officers who discharge their weapons, even accidentally, and then fail to report the incident to the Department should also be terminated.¹²⁹

Additionally, in order to deter future firearm misconduct involving alcohol, the Commission proposed that the Department no longer require that officers be armed at all times in order to discourage officers from carrying firearms in situations where they would be likely to consume alcohol. The Commission further recommended that the Department consider banning officers from drinking alcohol while carrying a weapon.¹³⁰

In addition to the new administrative charge of “armed while unfit for duty,” discussed

¹²⁹ It is imperative that all officers promptly report any instance of weapon discharge because otherwise important evidence may be lost. This may include forensic evidence -- such as spent shells, physical evidence of discharge, and changes in the condition of the weapon -- as well as statements of the witnesses. This evidence is critical in determining the facts and circumstances of the discharge and whether the officer acted properly

¹³⁰ As discussed above in the alcohol-related cases, the Commission also recommended that officers who are found to be unfit for duty due to excessive alcohol consumption while armed receive significant penalties and that these officers be penalized more severely than officers that are found to be unfit for duty but unarmed. *See Off-Duty Misconduct Report*, at pp. 8-9.

above, the Department instituted other changes in order to more severely penalize officers involved in firearm misconduct. For instance, in January of 1999, the Department instituted a policy that, absent exceptional circumstances, “misconduct involving a Member’s misuse of a firearm” . . . “due to excessive consumption of, and intoxication from, alcohol will result in that Member’s termination from the Department.”¹³¹

The Commission re-examined firearm misconduct in both its *Fifth* and *Sixth Annual Reports*.¹³² In the *Fifth Annual Report*, the Commission found that in most firearm misconduct cases the penalties imposed sufficiently addressed the misconduct. Also, the charge of unfit while armed was brought in all cases where it was clearly applicable.¹³³ Where unfit while armed was charged, the Commission found that the Department more severely penalized these officers as compared to officers who were found to be unarmed while unfit. Finally, the application of the Department’s new policy that all officers who are found guilty of firearm misuse involving alcohol should be terminated could not be assessed due to the fact that no cases in the Commission’s sample fell within this criteria.

In the *Sixth Annual Report*, the Department was still not making fitness findings consistently enough in situations where officers had been engaged in misconduct involving firearms. Where

¹³¹ See Patrol Guide §203-04. This guideline, in the form of an interim order, was issued in January 1999, and the above revision became effective on July 28, 2000.

¹³² See *Fifth Annual Report of the Commission* (February 2001), at p. 34 and *Sixth Annual Report of the Commission* (December 2001), at p. 49.

¹³³ However, in many cases, there was no finding as to whether the officer was armed at the time and, therefore, it was unclear whether the charge could have been levied.

these findings were made and the officers were found to be unfit at the time of the firearm misconduct, it appeared that the Department was following its policy of terminating officers who misuse a firearm due to intoxication or excessive consumption of alcohol. However, in the cases where the officers were not separated from the Department, the paperwork failed to address the termination policy or what exceptional circumstances existed that justified a penalty short of termination. In general, the Commission also found several other cases where it believed the penalty imposed was not sufficiently severe due to the nature of the misconduct.

2.) Current Findings

As recognized by the Department, when an officer is charged with misconduct involving a firearm it is important to make determinations of fitness in order to charge and penalize officers appropriately.¹³⁴ Therefore, the Commission revisited these issues to determine whether the Department was consistently following its procedures and policies regarding serious firearm misconduct.

In this report, the Commission first reviewed all the cases adjudicated by the Department between August 2001 and July 2003. The Commission then selected for review the cases where an officer was alleged to have committed misconduct involving a firearm, resulting in the analysis of 28 cases.¹³⁵ These cases ranged from threatening a stranger with a firearm during a traffic dispute to

¹³⁴ These documented findings provide Department personnel with access to all relevant information in order to make penalty recommendations and consistently apply Department policies.

¹³⁵ The Commission did not include in this study cases involving solely an officer's loss of a firearm or the failure to safeguard a firearm.

accidentally shooting oneself.

After this selection, the Commission evaluated if the Department made findings whether officers were unfit for duty at the time of the firearm misconduct and if those determinations were consistent with the evidence in the case. In those cases where an officer was determined to be unfit and armed, the Commission examined whether this charge was levied against the officer. Further, the Commission assessed whether the Department was consistently applying its firearm policies regarding penalties, including terminating officers who have committed misconduct with a firearm while intoxicated, absent exceptional circumstances.

In the 28 cases examined,¹³⁶ the Commission found that in the majority of the cases a finding of fitness was either documented in the examined paperwork or the Department was unable to make a determination of fitness due to the circumstances of the case. However, there were nine cases, approximately 32%, where it appeared that the Department failed to properly document whether the subject officers were fit for duty at the time of the misuse of a firearm.

In some cases, the Department was not able to make a determination because the Department was not informed of the incidents until well after the events occurred. In one case, for example, where the Department was unable to make a determination as to the Respondent's fitness for duty, the subject officer's wife reported that he had placed a gun to his head and threatened to kill himself. The Department, however, did not learn of the accusation until the subject officer was arrested approximately three weeks later for violating an Order of Protection that his wife had obtained after

¹³⁶ Of these 28 cases, thirteen concerned off-duty police officers who were involved in the inappropriate discharge of a firearm and the remainder consisted of unjustifiable displays of firearms.

the initial incident. Here, the Department could not determine the subject officer's fitness at the time of the incident due to the time that had elapsed since the incident. Further, the subject officer's wife had reconciled with him and recanted the allegation.¹³⁷ In this case, as well as the other eight cases where the Department was unable to make accurate determinations as to the Respondents' fitness for duty, it appeared that appropriate investigative avenues were explored. However, given the Department's policy of making fitness determinations in all cases involving firearm misconduct, it should clearly document all its fitness determinations, including that it is unable to make a conclusive finding due to circumstances such as late reporting or recantation of the allegations.

There were an additional nine cases where the circumstances did not prevent the Department from making a fitness finding. However, there was no indication in the paperwork about the officer's fitness for duty at the time of the incident or whether a determination had, in fact, been made. This was especially troubling in two cases because the circumstances and evidence indicated that alcohol may have been involved. Further, in these two cases, it appears that the Department had the opportunity to determine the subject officers' fitness for duty as both officers and witnesses were interviewed by the Department within hours of the incidents. For instance, in one case, the subject officer fired approximately twenty rounds of ammunition from two separate firearms while in a subway tunnel. According to the subject officer, he "awoke" in the subway tunnel with a broken ankle and then fired the guns to summons assistance. He had no recollection of what occurred before he "awoke" and was unable to account for his actions on the date in question. Despite this,

¹³⁷ Consequently, the Department was unable to charge the Respondent with being either unfit for duty or being unfit while armed. After a Departmental trial, this officer was ultimately found not guilty of all charges except violating the Order of Protection and received a penalty of the loss of fifteen vacation days.

there was no finding in the paperwork as to whether the subject officer was unfit at the time of the discharges, and he was, therefore, not charged with being unfit while armed. While it appears that the Department appropriately disciplined the subject officer,¹³⁸ it is important that investigators make a finding as to the officer's fitness at the time of the investigation to ensure that all Department units which have subsequent contact with the case have the information necessary to levy the appropriate charges and impose consistent penalties for similar misconduct.

Further, in two additional cases, while the circumstances were not as indicative of intoxication as the two above-referenced cases, there was no documented finding of the subject officers' condition after they had discharged their weapons in either the plea memorandum, the final report of the findings of the Department's Firearm Discharge Review Board, or the trial paperwork even though the Department was notified of the incidents shortly after the occurrences.¹³⁹ In these instances, the Department should have evaluated if the officer was fit at the time of the discharge and documented those findings in its paperwork.¹⁴⁰

¹³⁸ Here, the subject officer was subsequently terminated because he was on Dismissal Probation at the time he was served with charges for this incident.

¹³⁹ In the first case, the subject officer shot himself in the leg while cleaning his off-duty firearm at approximately 4:30 in the morning. After the incident, the subject officer's friend, another off-duty officer, called 9-1-1 to report the incident. In the second case, while the Respondent was working unauthorized employment providing security in a diner, he shot and wounded a man who had fired numerous shots inside the diner after an argument. Immediately after the shooting, later determined to be within Department guidelines, the officer fled the scene without reporting the incident and failed to return to the scene for approximately 40 minutes.

¹⁴⁰ The officer who had accidentally shot himself pleaded guilty to the only charge filed by the Department, failing and neglecting to properly safeguard his off-duty firearm, and received a penalty of the loss of ten vacation days and additional firearm instruction. The officer involved in the other shooting was found guilty of failing to identify himself to officers responding to the scene, failing to promptly inform the Department of the shooting, unauthorized employment, and leaving the scene of a shooting for approximately 40 minutes. He received a penalty of the loss of 45 vacation and suspension days and Dismissal Probation. Under the circumstances of both cases, without a documented finding of fitness, the Commission cannot determine the appropriateness of these penalties.

After evaluating whether the Department made appropriate findings when confronted with officers engaged in misconduct involving a firearm, the Commission then examined whether appropriate charges were levied in accordance with those findings. Therefore, the Commission looked at if, in addition to the charges resulting from the firearm misconduct, the Department levied the charge of unfit while armed, where appropriate. This was looked at in order to determine if the Department was following its own policies to more severely penalize, and terminate if appropriate, those officers who were found to be intoxicated while committing misconduct with a firearm. The Commission found that the Department is appropriately charging officers in this context.

More specifically, in the ten cases where a determination of fitness was documented, the Commission found that, overall, the subject officers were properly charged as per the Department's guidelines and policies. In six of these cases, the subject officers were found to be unfit for duty due to alcohol consumption while engaged in misconduct involving a firearm. Four of them were charged with being unfit while armed in accordance with the Department's current policy. In the remaining two cases where the subject officers were unfit while they committed misconduct with a firearm, they were not charged accordingly. The subject officers either resigned or retired from the Department before the filing of the charges and specifications.¹⁴¹ Therefore, while the failure to charge the subject officers with being unfit while armed did not have the same ramifications as if they were ultimately disciplined by the Department, it should still levy all appropriate charges in order to be consistent and to ensure that proper disciplinary action is taken should the officers seek

¹⁴¹ The first officer was charged with being unfit for duty, menacing, and reckless endangerment, while the second was charged with being unfit for duty, displaying a weapon, and conduct prejudicial to the good order, efficiency, and discipline of the Department.

to return to the Department.

In the remaining four cases, three of the subject officers were found to be fit for duty and the fourth was found to be unarmed although she was in the vicinity when someone else discharged her weapon. Therefore, an “unfit while armed” charge was inapplicable. Consequently, in general, where findings of fitness were made in the context of display or discharge of a firearm, it appears that subject officers were properly charged in accordance with the Department’s guidelines and policies.

Finally, the Commission evaluated if the penalties imposed in firearm misconduct cases were appropriate. In doing so, the Commission looked at if the penalty appropriately addressed the severity of the misconduct and if the Department was applying its own policies with respect to the penalty, that of more severely penalizing officers who are unfit, as opposed to fit, while engaged in firearm misconduct and terminating officers who misuse their weapons while intoxicated, absent exceptional circumstances. The Commission found that, in general, the Department is imposing penalties consistent with the severity of the misconduct and in accordance with its own policy guidelines.

First, the Commission looked at the cases which fell within the Department’s termination policy. There was only one case involving allegations of misconduct with a firearm where the officer was found guilty of both, being unfit for duty and having engaged in the misuse of a firearm.¹⁴² In this case, the officer pled guilty to pointing his gun in an unsafe manner during a

¹⁴² There was an additional case where, although the officer was found guilty of the misuse of a firearm, there was no finding as to if the officer was fit for duty at the time.

dispute with his fiancé while he was intoxicated. The Respondent was not terminated. Instead, he received a penalty of Dismissal Probation and 49 days. While the Department faced evidentiary issues in proving the case, no other exceptional circumstances were cited to justify a deviation from the termination policy.

In an additional four cases involving charges of misuse of a firearm while intoxicated the officers were separated from the Department either by retiring, resigning, or being terminated due to the officer's probationary status.¹⁴³

As discussed above, there were also nine cases¹⁴⁴ where while the officer was found guilty of misconduct with a firearm, there was no finding as to his fitness at the time and the Commission is, therefore, unable to accurately discern if the proper penalty was imposed.¹⁴⁵ Notwithstanding the failure to make this finding, the Commission believed that it appeared that the penalty appropriately addressed the misconduct. For example, in the case discussed above where the officer alleged that he inexplicably woke up in a subway tunnel and then fired numerous rounds from two firearms, the Department terminated him. Although the Department failed to document any findings as to the officer's fitness at the time of the incident, it appropriately terminated the officer while he was on disciplinary probation due to the severity of the misconduct.¹⁴⁶

¹⁴³ Of these four, two officers were terminated, one officer resigned, and one retired.

¹⁴⁴ There were two additional cases where there were no fitness findings made at the time of the misconduct, but the charges against the officers were eventually dismissed either upon a motion of the Advocate or after a Departmental trial. In these cases, therefore, no penalty was imposed for the Commission to assess.

¹⁴⁵ The penalties in these cases ranged from 10 penalty days and firearm training to termination.

¹⁴⁶ See *supra*, at p. 94 for further discussion of this case.

Further, in seven cases, the circumstances indicated that the Department was unable to accurately make a finding as to the officer's fitness for duty at the time of the incident due to the time that elapsed between the alleged incident and the notification of the Department. The Commission believes the outcomes of these seven cases were appropriate given the Department's evidentiary problems, such as the complainant recanting the allegations.

In the remaining three cases where no finding of fitness was documented, the Commission was unable to accurately assess if the penalties were appropriate. For instance, in one case, the subject officer's girlfriend stated that during an argument, the subject officer threw an ashtray against a wall, withdrew his firearm which he held at his side in a threatening manner, and then reholstered his firearm and placed it on the floor. Further, the subject officer's girlfriend stated that she and the subject officer had been drinking alcohol prior to the above incident and that he was intoxicated. Despite the above allegations, there was no finding as to the officer's fitness documented in the paperwork. Because alcohol may have played a role in the subject officer's misconduct, the failure to determine if he was intoxicated may have prevented the officer from being penalized appropriately. Here, the officer received a penalty of Dismissal Probation and the loss of twenty vacation days. However, if he was unfit for duty at the time, the proper disposition, as per Department regulations, would have been termination from the Department, unless exceptional circumstances existed to warrant a penalty short of termination.

There were also three cases where although the officers were initially alleged to have committed misconduct involving a firearm, after a Department investigation, no charges regarding firearm misconduct were filed. In these cases, the Commission found that the Department levied

appropriate penalties as well.¹⁴⁷

In conclusion, the cases reviewed revealed that in approximately half of the cases, the Department made determinations as to fitness when officers were engaged in misconduct with a firearm. In some additional cases, due to untimely notification and uncooperative witnesses, the Department was unable to determine the subject officers' fitness for duty at the time of the incidents. However, in too many cases, the Department, although able to do so, failed to evaluate and document the officers' fitness at the time of the misconduct. The Department, therefore, needs to more consistently make these findings and document them in order to ensure that all appropriate charges are levied and appropriate penalties are meted out, including termination, where applicable. The Commission found that, in most cases, when all applicable findings were made, the Department properly charged the subject officers in accordance with its policies and guidelines. It also appropriately disciplined these officers in accordance with precedent and its policies.

c. Domestic Incidents

Domestic abuse allegations account for a significant portion of all off-duty misconduct cases investigated and prosecuted by the Department each year. The Commission, therefore, sought to review how the Department was adjudicating these types of cases to ensure that the Department was treating them seriously, applying the appropriate penalty, and providing increased supervision and/or counseling for officers, if warranted. In connection with its study of off-duty misconduct cases in its

¹⁴⁷ These penalties ranged from 12 penalty days to 45 penalty days and Dismissal Probation.

Sixth Annual Report,¹⁴⁸ the Commission conducted a review of allegations of domestic disputes and made various findings and recommendations. In this Report, the Commission sought to follow-up on its previous findings made in this area.

1.) Prior Findings

In its *Sixth Annual Report*, the Commission reviewed 68 cases involving a variety of allegations that ranged from verbal threats to physical assaults involving the subject officer and a family member.¹⁴⁹ The Commission found that while the majority of cases were appropriately adjudicated, in approximately one-third of the cases reviewed, the penalty was insufficient in light of the facts of the case and/or the officer's prior disciplinary history. The Commission noted that applying severe penalties in domestic abuse cases was important in order for the Department to send a clear message that it does not tolerate this type of misconduct. The Commission found that the Department was not implementing a system of progressive penalties and that officers with prior domestic incidents appeared to be receiving similar penalties to those officers found guilty of comparable misconduct who did not have prior domestic disciplinary histories. Given similar allegations, the Commission stated those officers with a history of domestic allegations should receive more severe penalties than those with no prior allegations. The Commission, therefore, recommended that the Department be more diligent about taking into account the officer's prior

¹⁴⁸ See *Sixth Annual Report of the Commission* (December 2001), at pp. 52-55.

¹⁴⁹ Within the Department's definition of "family members" are included relationships for which there is not a blood or marital connection such as girlfriends, boyfriends, and former paramours.

disciplinary history, applying progressive penalties, and imposing a period of dismissal probation on those officers who would benefit from added supervision or monitoring.

2.) Current Findings

In conducting its current case review, the Commission considered the following factors to determine whether the officer was given the appropriate penalty. First, the Commission looked at the nature of the allegations. Obviously, misconduct involving serious physical injury would, in most instances, warrant a more severe penalty than those cases involving a mere verbal dispute. The Commission also examined the strength of the Department's case based on the evidence available to the Department to prove the charges. In many domestic cases, the complainants refuse to cooperate with the Advocate after the initial investigation. Although the Department can present a case based on the hearsay statements of the complaining witness and other evidence to corroborate the statements, such as photographs of any injuries, eyewitness testimony, or medical records, the Department's case is more difficult to prove at an administrative trial. Therefore, in some cases where there is a lack of corroborating evidence, the Department may be faced with the choice between offering a less severe penalty or risk losing the case after trial, resulting in no penalty imposed. A third factor the Commission considered was the officer's overall disciplinary history including whether he had any history of domestic violence allegations.

In its current review, the Commission examined 102 cases involving allegations of domestic violence. Overall, the Commission found that the Department is taking these type of allegations seriously and is appropriately disciplining those members who are guilty of committing domestic

offenses. Of the 102 cases examined, the Commission agreed with the penalty imposed in 92 of them. In the remaining ten cases, the Commission believed that the Department should have administered a more severe penalty. The Commission also found that, in general, the Department is increasing its use of Dismissal Probation as a penalty. This is a positive step because Dismissal Probation is a means by which the Department can rapidly terminate an officer without a Departmental hearing and it also subjects the officer to increased supervision. When entering into plea agreements, the Department also appears to be mandating attendance at counseling, when appropriate.

The cases reviewed ranged from verbal threats to assaults which resulted in physical injury. The Commission found that the Department appropriately prosecuted officers charged with what may be deemed minor misconduct as well as those charged with more serious incidents of domestic violence. Even minor verbal threats need to be thoroughly investigated, and officers need to be properly disciplined because such threats may foreshadow more serious misconduct in the future and an officer's access to weapons may lend credence to a threat or escalate the gravity of a situation. When meting out penalties, the Department appeared to be appropriately considering the severity of the misconduct and the Respondent's prior disciplinary history in that officers found guilty of less severe allegations of domestic misconduct received penalties of suspension or a loss of vacation days while officers who committed acts of serious domestic misconduct received more significant penalties or were terminated.¹⁵⁰ When the Respondent had a prior disciplinary history that included

¹⁵⁰ 13 of the 102 cases reviewed resulted in the officer being terminated. In each of these cases, there were other aggravating factors which contributed to the decision to terminate the officer. Therefore, it was difficult to discern whether the penalty of termination was attributed to the domestic misconduct or other factors. For example, some

domestic allegations, the penalties typically included a period of Dismissal Probation in addition to a greater number of suspension or forfeited vacation days.

Additionally, the Department appears to be appropriately placing those officers who demonstrate the need for additional monitoring, either because of their conduct in the instant case or their prior disciplinary history, on Dismissal Probation. Due to the recurring and pervasive nature of domestic violence, Dismissal Probation is a valuable tool available to the Department because it allows the Department to summarily terminate those officers who commit additional misconduct without affording those officers a Departmental hearing. Dismissal Probation also provides a mechanism by which officers who have not been terminated may receive increased supervision. Within this study, four officers were on Dismissal Probation and twelve officers were Probationary Police Officers at the time that new charges were brought against them.¹⁵¹ All four officers on Dismissal Probation were appropriately summarily terminated by the Department. The Commission agreed with the penalties imposed on the Probationary Police Officers in all but one case.¹⁵²

Further, the Department appears to be pursuing the prosecution of domestic incidents even in some situations where the victim refuses to cooperate. So, although domestic abuse cases may be difficult to prosecute because victims often tend to recant their allegations or refuse to cooperate in the prosecution of the case, the Department has shown a willingness to proceed with a hearsay

officers were on probation or were also found guilty of other terminable offenses such as making false statements.

¹⁵¹ For further discussion about Probationary Police Officers, *see infra*, at pp. 107-108.

¹⁵² In that case, the Respondent created a dangerous situation by yelling to responding officers that her husband had a gun while failing to inform them that he was a police officer. For this misconduct, she forfeited 30 vacation days.

statement from the witness where there is other corroborating evidence to establish a legally sufficient case. For example, in one case, the officer was charged with hitting his wife in the face during an argument resulting in a bruise to her cheek. The victim refused to cooperate with the Department at the administrative trial. Nonetheless, the Department prosecuted the officer utilizing the victim's taped statement to the police made on the day of the incident, medical records, photographs of the complainant's face which confirmed her facial injury, and the testimony of two police officer witnesses regarding their interaction with the victim on the night of the incident and their observations of her injuries. The officer was found guilty of hitting his wife and received a penalty of the loss of 30 vacation days and Dismissal Probation. Proceeding in these types of cases demonstrates the Department's commitment to disciplining officers engaged in domestic violence misconduct.

While the Commission commends the Department for pursuing these cases, at times, the Department is left in the position of presenting a hearsay case because of the Department's own failure to prosecute the case in a timely fashion in the first instance. This delay throughout the adjudication process may impact upon the victim's and witnesses' willingness to go forward because often the victim will reconcile with the subject officer during the delay. Additionally, witnesses to domestic abuse are often family members and friends who may be influenced by a victim's refusal to cooperate. Furthermore, a significant delay may still weaken the prosecution of a case even when the victim and/or witnesses are cooperative because memories fade and other evidence may become unavailable.

As stated above, while the Commission agreed with the penalties imposed in the vast

majority of the cases, the Commission reviewed ten cases where it believed that the penalty was not appropriately severe. For example, in one case an officer barricaded himself in his home with his three children, telephoned his wife, also a member of the service, and told her that he would kill himself and the children if she ended the relationship. When the police, the Emergency Services Unit, and the Hostage Negotiations Team arrived at the subject officer's home, he reiterated his threat that he was "going to put a bullet in his brain and kill his three kids" if his wife was not brought to their home. The officer eventually exited his home without harming himself or the children and after a brief struggle, was handcuffed and removed to a hospital for a psychological examination. The Duty Captain on the scene reported that the officer was belligerent and acting irrationally. Additionally, the Duty Captain made the determination that the officer was unfit for duty due to the consumption of alcohol. Subsequent to the incident, eleven guns and rifles, a crossbow, machete, air pistol, and air rifle owned by the officer were removed from his possession.¹⁵³ The officer was only charged with two specifications: one count of prohibited conduct for barricading himself inside his residence and threatening to kill himself and his children; and one count of knowingly acting in a manner likely to be injurious to the physical, mental or moral welfare of his children due to his unfitness for duty. Most notably, he was not charged with a separate count of being unfit for duty despite the Duty Captain's finding of unfitness, and there was no finding of whether he was armed at the time although a number of weapons were removed from his possession after the incident. Approximately eleven months after the incident, the officer pled

¹⁵³ It is unclear from the paperwork in the file where these weapons were located, and there was no allegation that they were used during the incident. The 11 guns and rifles were appropriately registered with the Department.

guilty and received a penalty of 30 suspension days, Dismissal Probation, and the requirement that he complete whatever type of counseling that the Health Services Unit deemed necessary. The Advocate's rationale for the plea was that the officer and his wife were experiencing marital difficulties and the officer did not take any affirmative steps to carry out his threat of killing himself and his children.

The Commission disagrees with the penalty imposed in this case and believes this officer should have been terminated. The officer's actions should not be considered a mere verbal threat since the officer took action towards carrying out this threat by barricading himself and his children in his residence. He was intoxicated and acting in a belligerent, irrational fashion which necessitated the deployment of two specialized police units, the Emergency Services Unit and the Hostage Negotiation Team, to handle the situation. He further owned an extensive array of weapons and failed to initially cooperate with police personnel when they arrived at his home. After the officer was removed from his residence, he was admitted for psychiatric care. The Commission believes that this officer should have been terminated since he presents a potential future liability to the Department.¹⁵⁴

Despite the ten isolated cases where the Commission disagreed with the penalties, overall, the Commission found an improvement in how the Department was penalizing officers in domestic cases since its last review when the Commission found the Department was too lenient with its penalties in a significantly larger number of cases.

¹⁵⁴ Additionally, had a determination been made that the Respondent was, in fact, armed at the time, then the penalty of termination would have been appropriate pursuant to the Department's stated policy of terminating officers who engage in misconduct with a firearm while intoxicated.

d. Probationary Police Officers and Officers on Dismissal Probation

While the above sections describe the discipline imposed when particular types of misconduct are committed, the following two sections focus upon cases involving a variety of allegations. The common thread throughout the cases discussed below is the subject officer's employment status within the Department. While in most disciplinary cases, a member of the service has due process rights which entitle him to an evidentiary hearing, an officer can be terminated at the will of the Police Commissioner if he is on one of two types of probation. The officer may either be a Probationary Police Officer ("PPO"), having just started his career with the Department, or been placed on Dismissal Probation as a penalty for a disciplinary infraction. When cases involved officers who were on either type of probation, the Commission examined whether termination was being imposed, where appropriate and evaluated the length of time the Department took to decide whether or not to end the officer's employment.

1.) Probationary Police Officers

When new recruits are first appointed to the Police Department, they are initially subject to a two-year-probationary period. If a PPO is found to not meet Department standards, he can be summarily terminated from employment with the Department without any right to an administrative hearing for any reason as long as the termination is not based on bad faith, based on a

constitutionally impermissible reason, or in violation of statutory or decisional law.¹⁵⁵

a.) Prior Findings

In August 1998, the Commission released two studies that addressed the manner in which the Department disciplined PPOs. One study was devoted exclusively to this topic and addressed on- and off-duty misconduct of PPOs.¹⁵⁶ In that report, the Commission noted the importance of disciplining PPOs because they have no past history within the Department with which to determine whether they could, in the future, meet Department standards and work effectively within the Department. Also, swift and effective punishment of PPOs who engage in misconduct places other officers on notice that such misconduct by members of the service will not be tolerated. Furthermore, prompt termination of those PPOs who are unable to conform their behavior to Department standards may avoid future liability for the Department if the officer continues to engage in misconduct and also conserves Department's resources since a PPO facing termination continues to receive a salary and paid benefits until he is terminated.¹⁵⁷ Focusing on these issues,

¹⁵⁵ According to the New York City Personnel Rules and Regulations, §5.2.7, an agency head "may terminate employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the said probationer and to the city personnel director." See York v. McGuire, 63 N.Y.2d 760, 480 N.Y.S.2d 320, 469 N.E.2d 838, 839 (1984); Johnson v. Katz, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 496 N.E.2d 223 (1986); Juan v. County of Suffolk, 209 A.D.2d 523, 618 N.Y.S.2d 833, 834 (2d Dep't 1994) (stating that the Department's determination to discharge the officer must not be arbitrary and capricious and must have a rational basis and be carried out in good faith).

¹⁵⁶ See *The New York City Police Department's Disciplinary System: How the Department Disciplines Probationary Police Officers Who Engage in Misconduct* (August 1998). The other report, the *Off-Duty Misconduct Report*, addressed the discipline of PPOs in a more limited context, when they engaged in misconduct that was deemed serious and when it was committed off-duty.

¹⁵⁷ This is true except for the time that the PPO serves on suspension. The PPO does not receive salary or benefits during any suspension period. However, the Administrative Code and the New York State Civil Service Law

the Commission evaluated the discipline levied against PPOs for the adequacy and speed with which these penalties were imposed. After reviewing the cases, the Commission found that it generally agreed with the penalties imposed. However, with the exception of those PPOs found to be involved with narcotics, there were significant delays in the resolution of these cases. In addition to expediting the adjudication of these cases, the Commission also recommended that when a PPO was offered a penalty less than termination, his probationary period should be extended as a condition of the plea agreement.

In its *Fifth and Sixth Annual Reports*, the delay in the adjudication of these cases continued to be an issue.¹⁵⁸ As in prior reports, the Commission agreed with the majority of the cases where the PPO was terminated or resigned. However, the Commission believed that some of the negotiated pleas exacted penalties that were not sufficiently severe. In the context of discussing the significant delays found in disposing of these cases, the Commission also addressed the impact that a concurrent criminal case might have on the length of time the disciplinary case remained open. The Commission noted that in many instances the criminal prosecutors request that the Department delay its investigation or prosecution of a case for disciplinary purposes as this could taint the evidence in the criminal case by generating additional witness statements and/or testimony. The Commission agreed that, in general, the Department should defer to the prosecutor, but noted that the above concerns did not necessarily affect cases where the officer may be summarily terminated without any additional Departmental investigation. The Commission, therefore, recommended that each case be

§75(3-a) limits such pre-termination suspension to a maximum of thirty days.

¹⁵⁸ See *Fifth Annual Report*, at p. 41 and *Sixth Annual Report*, at pp. 55-58.

examined individually to determine if the Department could proceed with the case prior to the resolution of the criminal matter.

b.) Current Findings

For the current study, the Commission examined all cases that were adjudicated between August 2001 and July 2003 involving a PPO whose misconduct occurred while the Respondent was not on duty, resulting in the review of 66 cases.¹⁵⁹ The Commission evaluated whether the penalty was adequate given the charged misconduct and examined the length of time between the incident and the administrative closing of the case.

First, the Commission evaluated the penalties imposed and found that the Department is generally appropriately disciplining PPOs who engage in misconduct. Of the 66 cases examined, six involved the use of illegal drugs. Since the Department has a zero tolerance policy regarding members of the service using drugs, these PPOs were separated from the Department, either by resigning or being terminated. Seventeen cases involved alcohol in some respect. All but one of these PPOs were separated from the Department either through resignation or termination.¹⁶⁰ The remaining 43 cases involved a vast variety of charges, ranging from the failure to comply with an order to aggravated sexual abuse. The dispositions of these cases included termination of the subject

¹⁵⁹ If a PPO had more than one case pending against him, those cases were counted as one case if the same disposition was imposed for all of the separate cases. This occurred with four PPOs.

¹⁶⁰ As noted earlier at p. 88, fn. 127, the Commission did not agree with the penalty in the remaining case where the PPO pled guilty to consuming alcohol in a police facility as two other PPOs were terminated for the same conduct.

officer, resignation, negotiated pleas with or without an extension of the subject officer's probation, and dismissal of the charges and specifications, at times with a remand of the case to the Command level so the subject could receive a command discipline.¹⁶¹ The Commission agreed with the penalties imposed in the vast majority of these cases.

The Commission then looked at the length of time it took to resolve these cases and found again that there were significant time delays in the disposition of some cases. As in the past, the narcotics cases were expeditiously handled, in that the PPOs were separated from the Department within two months of the incidents. Of the remaining 60 cases, nineteen were closed within three months from the date of the initial incident with fifteen of those cases ending with the officer's resignation. Seventeen more were closed within nine months, and an additional eight were closed within a year of the original incident. Sixteen cases took longer than a year to close.

The Commission believes that cases involving PPOs should be adjudicated in a more expeditious manner. For example, in one case, the Respondent was arrested for driving while his ability was impaired by an intoxicant on October 9, 1999. This arrest occurred after the Respondent was involved in a motor vehicle accident in which he was the driver. The on-duty Sergeant smelled alcohol on the Respondent's breath and administered an Alco-sensor breath test. When an actual Breathalyzer test was given to the Respondent, his blood alcohol content was found to be 0.08%.¹⁶² Charges and specifications were drawn against this PPO on October 12, 1999. The Department

¹⁶¹ See *supra*, at p. 65, fn. 80 for the definition of a command discipline.

¹⁶² New York State's law on driving under the influence of alcohol (Vehicle and Traffic Law §1192) recognizes two levels of impairment: driving while ability impaired (applicable when a motorist's ability has been impaired by consumption of alcohol) and driving while intoxicated (automatically applicable when a motorist's blood alcohol content exceeds 0.10%).

charged the Respondent with operating a motor vehicle while under the influence of alcohol or drugs and being unfit for duty. Further, in his official interview, the Respondent admitted to drinking between two and six beers prior to the accident.¹⁶³ DAO notified the Employee Management Division (“EMD”) of the receipt of charges and specifications against the Respondent in November 1999 and requested that EMD notify DAO whether EMD planned to summarily terminate the Respondent or whether the charges and specifications should be served upon the Respondent so the administrative process could commence.¹⁶⁴ In April 2001, seventeen months later, EMD directed DAO to serve the charges and specifications on the Respondent. In November 2001, a plea agreement was reached whereby in exchange for the Respondent’s guilty plea, he would be placed on Dismissal Probation and suspended for 60 days. The Police Commissioner rejected the plea and the Respondent was fired on January 2, 2002. While there appears to be a valid basis for the delay from November 2001 to January 2002, the entire process, most notably EMD’s seventeen-month delay in responding to DAO’s request, took significantly longer than it should have.¹⁶⁵

While reviewing each case, the Commission looked at if there was a corresponding criminal

¹⁶³ As the Commission did not have the entire investigative file, it is unknown when the Respondent was officially interviewed.

¹⁶⁴ When a Respondent is on probation, either entry-level or for disciplinary reasons, DAO contacts EMD for a determination regarding whether the probationer will be summarily terminated or be given the opportunity to have a due process hearing. EMD reviews the probationer’s work history and the facts of the case and makes a recommendation to the Chief of Personnel. The Chief of Personnel, then, independently reviews the case and makes a recommendation to the First Deputy Commissioner. The First Deputy Commissioner, in turn, makes a recommendation to the Police Commissioner regarding this issue. The Police Commissioner has the final decision regarding whether the probationer is terminated or proceeds through the Department’s disciplinary system.

¹⁶⁵ EMD’s delay in response time to requests by DAO has been observed by the Commission in other, similar circumstances.

case which may have affected the delay in the adjudication process. The Commission recognizes that concurrent criminal cases may validly impact on the length of time taken to adjudicate a corresponding Departmental disciplinary case because, as discussed above, often state criminal prosecutors will request that the Department delay its investigation or prosecution of a case so as not to taint the state's evidence. However, as PPOs can be summarily terminated without conducting an administrative hearing, the same concerns do not always exist. The Commission recognizes that there are certain situations which would require additional investigation to validate the charges against a PPO and therefore, might require the collection of more evidence which could affect the criminal case. However, in cases where there are police witnesses, scientific, or other corroborating evidence to support the charges, a decision regarding the manner in which to proceed can be made very early in the case. For instance, in the above example, although there was a corresponding criminal case which was ultimately dismissed on a procedural technicality, a determination could have been made by EMD based on the arresting officer's paperwork describing the Respondent's condition at the time of the accident and on the Respondent's blood alcohol content disclosed by the Breathalyzer test.

Of the 66 cases reviewed by the Commission, in 21, the Respondent also had criminal charges pending against him. While all 21 Respondents were eventually separated from the Department either by termination or resignation, it appears that the Department is not evaluating these cases and terminating officers, where appropriate, quickly enough.¹⁶⁶ In another example of a

¹⁶⁶ Of those 21, ten resigned; eight of these within three months of the incident. Of the remaining eleven cases, all of the PPOs were terminated; only one PPO was terminated within three months. Of the remaining ten cases, the earliest termination date was six and one-half months after the original incident.

case where the Respondent could have been terminated more expeditiously, notwithstanding a corresponding pending criminal case, the Respondent was charged with being unfit for duty and falsely reporting an incident. While visiting his sister in upstate New York, the Respondent was denied admission to a bar when the bouncer did not believe that his identification was authentic. The Respondent then gained admission to another bar and proceeded to make three telephone calls to 9-1-1 to falsely report that a female was being raped in the first bar. Police officers traced the telephone calls to the Respondent. This PPO was arrested for falsely reporting an incident. At the station house, after being initially uncooperative, he admitted to making the false reports. He was also found to be unfit for duty. Charges and specifications were drawn three days later. However, the Respondent was not terminated until nine months later. While there was a criminal case pending against the Respondent, the Department had the Respondent's own admissions as evidence of his misconduct and therefore, could have terminated him more expeditiously.

In conclusion, the Department appears to be appropriately disciplining PPOs and terminating the employment of PPOs when warranted. The willingness of the Department to terminate a large percentage of the PPOs charged with misconduct demonstrates that the Department is taking this misconduct seriously and considering it as an indication of the PPO's future fitness for employment with the Department. However, there still are significant delays in deciding upon and implementing the appropriate discipline even when the case appears to be relatively straightforward. The Department needs to evaluate the validity of allegations against PPOs earlier and make decisions regarding the appropriateness of continued employment of PPOs more expeditiously.

2.) Officers on Dismissal Probation

When a member of the service is the subject of a disciplinary proceeding, one possible penalty that may be imposed on him is placement on Dismissal Probation. Dismissal Probation is usually imposed in conjunction with the loss of vacation days or suspension days, and mandates a high level of supervisory monitoring of the officer. When an officer is placed on Dismissal Probation, technically, his employment with the Department is terminated, but this termination is not immediately executed. Instead, it is held in abeyance while the officer continues to work for the next twelve months during which he is monitored by his Commanding Officer and other Executive Officers through the receipt of monthly evaluations about the officer's conduct while at work.¹⁶⁷ If, during this probationary period, the officer conforms his conduct to Department standards, at the end of the year, his employment status is fully restored to the position that he was in before the term of his Dismissal Probation commenced.¹⁶⁸ If, however, new charges and specifications are levied against the officer during this time period, the Department has the option of summarily terminating him without any administrative hearing. This is true even if the misconduct for which the charges and specifications are brought occurred before the officer was placed on Dismissal Probation. Like the probationary period for PPOs, executives review the new charges and the subject officer's disciplinary and performance history to determine whether he should be fired or whether the case

¹⁶⁷ For further information about Dismissal Probation and the personnel who are responsible for monitoring officers placed on Dismissal Probation, see *The New York City Police Department's Non-IAB Proactive Integrity Programs* (December 2001), at pp. 54-57, 65-67, and 68-98.

¹⁶⁸ This time period is extended by any days that the officer is on modified or restricted duty, out sick, or uses vacation.

should proceed through the Department's disciplinary system.¹⁶⁹

a.) Prior Findings

In prior reports, the Commission has found Dismissal Probation to be an effective tool at the Department's disposal and has encouraged more extensive use of this form of discipline.¹⁷⁰ It may assist in reforming the behavior of police officers who have experienced disciplinary problems in the past through the use of the monthly evaluations, the conferences between the officer and his superiors, and the officer's own awareness that he is being closely monitored. For those officers who do not reform their behavior, the Department can quickly end their employment, possibly avoiding future liability for the officer's misconduct and saving resources by not paying a salary or providing other benefits to the officer while he awaits his disciplinary hearing and its outcome.

Since 1998, the Commission has observed an increase in the imposition of Dismissal Probation as a penalty and monitoring device. However, it was not until its *Sixth Annual Report* that the Commission specifically analyzed whether those officers who were currently on Dismissal Probation and against whom new charges arose were being appropriately and expeditiously disciplined for the new misconduct. In the majority of the limited number of cases reviewed for that report, the Commission found that the Department was appropriately terminating those officers on Dismissal Probation who committed additional misconduct and was terminating those officers in a timely manner. The Commission also noted cases with corresponding criminal cases and

¹⁶⁹ If the officer proceeds through the Department's disciplinary system, he may still be terminated after trial.

¹⁷⁰ See *Off-Duty Misconduct Report*, at p. 26 and *Sixth Annual Report*, at pp. 59-60.

recommended that the Department review new allegations on a case-by-case basis to determine whether proceeding would jeopardize the criminal case or if the Department should terminate the officer prior to the conclusion of the criminal case.

b.) Current Findings

In this study, the Commission continued to review those cases where the subject officers were placed on Dismissal Probation and received charges and specifications during their probationary period for off-duty misconduct. From those cases that were closed between August 1, 2001 and July 31, 2003, the Commission found fifteen cases that fit this criteria.¹⁷¹ Fourteen of the officers were terminated as a result of the subsequent charges against them. The remaining officer was allowed to retire. In one case, for example, an officer was placed on Dismissal Probation on December 1, 2000 for: trespassing; failing to notify a patrol supervisor of his involvement in a police incident; being absent without leave from his assignment on two separate occasions; being out of residence while he was on sick report; failing to properly maintain his activity log; and failing to monitor his radio. Subsequently, on December 23, 2000, the Respondent became involved in a domestic dispute with his live-in girlfriend. During this dispute, the Respondent threw various pieces of property out of their apartment and into the hallway, damaging some of this property. Further, he swung a box at the girlfriend which hit her in the eye. The Respondent was arrested for Assault in the Third Degree and Criminal Mischief in the Fourth Degree. The Respondent was

¹⁷¹ In this sample, three officers had more than one case pending against them while on Dismissal Probation. Each officer's cases were counted as one case for the purposes of this report.

summarily terminated within five months based upon these new charges. This and other cases where the officer was summarily terminated demonstrate the overall effectiveness of dismissal probation in swiftly removing officers from service who consistently engage in misconduct.

After determining that the officers were appropriately separated from the Department, the Commission evaluated whether the Department was making decisions to terminate officers in an expeditious manner. For this analysis, the Commission measured the beginning of the case as either the date of the incident, if the incident occurred subsequent to the subject officer's placement on Dismissal Probation, or the date charges and specifications were drawn if the misconduct occurred prior to the subject officer's placement on Dismissal Probation.¹⁷² Using this starting point, six officers were terminated within three months and another four were terminated within nine months. Two more were terminated within a year. The remaining two took over one year to terminate. In one of those cases, the Commission found that at least part of the delay was excusable due to various internal investigations that needed to be conducted by different investigative branches of the Department. Also, certain legal issues had to be resolved prior to the decision being made about the most appropriate disciplinary course to pursue. However, the Commission found that the delay in the five cases where the Department took almost a year to terminate was too long.

For example, in one of the cases, the subject officer was placed on Dismissal Probation on November 23, 1999 after he was found guilty of wrongfully pointing his firearm at a civilian and making discourteous comments while off-duty. On December 2, 1999, additional charges and

¹⁷² If the Respondent had more than one set of charges and specifications levied against him, the Commission measured the time from the earlier of the two incidents.

specifications were preferred against the Respondent for possessing and fraudulently using stolen money orders during 1997. There was also an additional charge for engaging in unauthorized off-duty employment in 1996 and 1997. A second set of charges and specifications was brought against the Respondent on February 1, 2000 with the single specification that he engaged in off-duty employment on various dates in July 1999. Despite these two new sets of charges and specifications, DAO did not request a recommendation regarding the continuation of the Respondent's employment until June 2000, four months after the second set of charges were drawn. Further, EMD did not recommend the Respondent's termination until October 31, 2000, five months after the Advocate's request for a decision. The Chief of Personnel endorsed this recommendation on the same day. The First Deputy Commissioner and the Police Commissioner both agreed with this recommendation during the first two weeks of November 2000, and the Respondent was terminated on November 21, 2000.¹⁷³ The Respondent's termination, in this case, occurred almost one year into his Dismissal Probation.¹⁷⁴ It took the Department eleven months after the filing of charges based on a two-year-old incident to end the Respondent's employment. Although there was also a criminal prosecution of the subject officer, the evidence for that prosecution was derived from the Department investigation that led to the administrative charges in this case. Therefore, the Department had the information in its possession that it needed to make a decision whether to

¹⁷³ Although the Respondent was terminated in November 2000, the charges and specifications were not administratively filed, and the case was not officially closed until August 10, 2001. That is the reason why this case was included within the sample reviewed for this study.

¹⁷⁴ The Respondent was on modified duty during part of the period he was on Dismissal Probation so there was no danger that the Dismissal Probation would expire.

terminate the officer, and there did not appear to be an issue about tainting the evidence for the state's criminal case by terminating the subject officer. Moreover, even if some of the charges that encompassed criminal conduct posed an obstacle to the Department proceeding on the administrative charges, it still took the Department over nine months to terminate the Respondent after bringing the second set of charges involving solely the off-duty employment in which the Respondent had engaged sixteen months earlier. It appears that this Respondent, who was already on Dismissal Probation for very serious misconduct, should have been terminated much earlier.¹⁷⁵

In contrast to the above example, six of the cases in this sample clearly had concurrent criminal cases pending for the same misconduct. In all but one of these cases, the Respondent was terminated within six months. In some of these cases, it appeared that the Department terminated the Respondent prior to the completion of the criminal case. This demonstrates that the Department is able to and has considered cases individually to determine when it is appropriate to discipline the officer prior to the conclusion of the criminal case.

In sum, it appears that the Department is appropriately terminating those officers on Dismissal Probation who continue to engage in misconduct. However, it appears that the Department is still taking too long to terminate some of these officers.

4. Conclusion

In general, the Commission found that in all the categories of cases examined, the

¹⁷⁵ In fact, the only development that seemed to move along the decision to terminate the Respondent was the fact that he filed for early medical disability retirement two months prior to his termination.

Department was appropriately disciplining those officers found guilty of off-duty misconduct. In those cases involving misuse of alcohol, either in connection with driving under the influence of alcohol or other alcohol-related offenses, the Department continued to impose the penalty of Dismissal Probation plus at least a 30-day penalty. The Department also appeared to be making appropriate findings of the subject officer's fitness for duty in the majority of these cases. However, the Commission found that the Department needs to make improvement in explicitly documenting whether an officer is armed with a firearm when he is found unfit for duty. This should be done in order to ensure that those officers found armed while unfit for duty are penalized more severely than those officers who were found unfit for duty alone.

With respect to cases involving the wrongful discharge or display of a firearm, the penalties imposed appeared appropriate. Additionally, the Department is more consistently making findings of whether officers are unfit at the time of firearm misconduct. However, the Department still failed to document these determinations in some cases and therefore, needs to remain attentive in this area.

In the current analysis, a significant improvement was seen in the discipline of those cases involving allegations of domestic disputes. Also, the Commission found the penalties imposed on officers who were either on Dismissal Probation or who were PPOs at the time of new misconduct to be appropriate, although, the penalties for PPOs should be imposed more expeditiously.

B. False Statement Cases

1. Background

Since its inception in 1995, one topic that the Commission has chosen to continuously review

has been how the Department disciplines members of the service who have been found to have made false statements. In its first report on this topic,¹⁷⁶ the Commission mainly analyzed those false statements made under oath or in the Patrol Guide §206-13 context.¹⁷⁷ Among the Commission's reasons for reviewing this topic were that the consequences of the Department failing to appropriately discipline those members of the service who made false statements eroded both the public's confidence in the integrity of the Department and the criminal justice system's regard for those members of the service called upon to present evidence. Furthermore, the failure to impose severe penalties on this type of misconduct would help to maintain and support "the blue wall of silence" whereby members of the service chose to lie to help cover up the misconduct of their colleagues without fearing the consequences.

On the same date the Commission released its report addressing the Department's treatment of false statement cases, the then Police Commissioner, Howard Safir, announced the Department's policy regarding false statements. This policy mandated the termination of employment of any member of the service found to have made a false statement in a PG interview or in any other official context unless the Police Commissioner found exceptional circumstances that mitigated against termination. This policy comported with the recommendations proposed by the Commission in its report on this topic.

Following the announcement of this policy, each year, the Commission has continued to

¹⁷⁶ See *First Report of the Commission* (March 1996), at pp. 72-79. See also *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements* (December 12, 1996).

¹⁷⁷ See *supra*, at p. 14, fn. 12 for a definition of an interrogation conducted pursuant to PG §206-13.

analyze the Department's treatment of those cases involving false statements to ensure that it was adhering to its own stated guidelines.¹⁷⁸ In general, the Commission has found that the Department was appropriately terminating those officers who were found to have made false statements in either the PG setting or in other testimonial settings but there was less consistent and less severe penalties levied when the false statement was made in a non-testimonial context. The Commission also noted that the Department was, at times, failing to adequately document the reasons underlying decisions not to charge officers with making a false statement when such a charge appeared clearly applicable to the circumstances surrounding the case. Also at issue was the failure to adequately and consistently document decisions not to terminate the officer and to specify what exceptional circumstances existed to justify a departure from the policy. Further, the Commission also found several instances where reasons for the decisions to dismiss false statement charges either upon the motion of the Advocate¹⁷⁹ or after a hearing before the Trial Commissioner¹⁸⁰ were not systematically explained. Additionally, the Commission noticed that many times a penalty less than termination for a false statement at an initial PG interview was imposed when the officer told the truth at a subsequent PG interview. Finally, in its 1999 follow-up report, the Commission also noted

¹⁷⁸ See *Third Annual Report of the Commission* (August 1998), at pp. 12-15; *The New York City Police Department's Disciplinary System: A Review of the Department's December 1996 False Statement Policy* (August 1999) ("1999 Report"); *Fifth Annual Report of the Commission* (February 2001), at pp. 42-55; and *Sixth Annual Report of the Commission* (December 2001), at pp. 62-87.

¹⁷⁹ See *supra*, at p. 4 for discussion about the Advocates.

¹⁸⁰ In this context "Trial Commissioner" also refers to the Administrative Law Judges ("ALJ") who preside over the hearings conducted at OATH. The Trial Commissioners adjudicate issues of guilt or innocence of the charges, evidentiary issues, and preside over plea negotiations. The Trial Commissioners also recommend penalties for disciplinary infractions to the Police Commissioner, however, the final decision concerning the appropriate penalty to be imposed belongs to the Police Commissioner.

that sometimes there was a failure to terminate an officer's employment because the underlying misconduct about which the false statement was made was not, in and of itself, a terminable offense. After the Commission publicized this finding, the then Police Commissioner clarified that the penalty for any official false statement, regardless of the nature of the underlying offense, was termination absent the existence of exceptional circumstances.

In its *Sixth Annual Report*,¹⁸¹ the Commission, again, addressed the topic of the discipline imposed in cases where a member of the service made a false statement. The Commission reviewed and analyzed a total of 150 cases adjudicated between January 2000 and July 31, 2001. As in previous studies, the Commission found that in those cases where the subject officer made a false statement during a PG hearing or in another testimonial context, the appropriate penalty of termination was generally imposed. When termination was not imposed, the Commission found that the Department, Trial Commissioners, and Police Commissioner had made improvements in documenting the exceptional circumstances that justified a lesser penalty. Similarly, in these testimonial settings, reasons for the dismissal of false statement charges were also better documented than in past cases. However, the recantation of a false statement at subsequent PG hearings was still being considered as an exceptional circumstance that justified a penalty short of termination. There was also an over reliance on the officer's lack of disciplinary history and competent evaluations cited as exceptional circumstances without sufficiently addressing the facts and circumstances surrounding the making of the false statement.

In that study, the Commission continued to find that the penalties imposed when the false

¹⁸¹ See *Sixth Annual Report of the Commission* (December 2001), at pp. 62-87.

statement was not made in a testimonial context were still less consistent and generally less severe. The only category of cases within the non-testimonial context that consistently resulted in the officer's termination from employment were those cases involving some type of fraud.¹⁸² Furthermore, documentation of the rationale underlying charging and penalty decisions were not as detailed or common.

Also in that study, the Commission discussed a case where an officer was terminated after testifying falsely at his prior disciplinary hearing. In connection with this type of issue, the Commission also noted one other instance where a follow-up investigation had been conducted to determine whether the charged officers had testified falsely at their disciplinary proceedings. However, the Commission found ten other cases where the Trial Commissioner clearly stated that the subject officer's testimony at trial was incredible, yet there were no follow-up investigations as to whether these Respondents had committed perjury.

2. Methodology

In selecting cases for review, the Commission examined the documents provided by the Department for all of the cases closed between August 1, 2001 and July 31, 2003 that involved any type of false statement.¹⁸³ After reviewing these cases, the Commission excluded from its final

¹⁸² The one exception was when the member of the service committed automobile insurance fraud by registering his automobile in a county other than where he resided to obtain lower insurance rates. This type of fraud consistently resulted in the loss of vacation days.

¹⁸³ If a case had two or more officers charged together, each officer was counted as a separate case. Further, if an individual member of the service had more than one case pending against him, those cases were counted as one case if the same disposition was imposed for all of the separate cases.

analysis those cases that involved false statements that the Commission has traditionally considered not included within the Department's 1996 False Statement policy or contemplated by the Commission's 1996 report. These types of false statements included those made to supervisors in non-investigatory circumstances and those false statements involving time and leave issues that did not demonstrate a pattern or practice of making false statements. Therefore, the instant study involved 127 cases. This analysis concentrated on whether appropriate charges were brought and the appropriate penalty imposed. If the officer was found guilty but not terminated, the Commission examined whether the exceptional circumstances to support that decision were present. Further, the Commission checked whether decisions to dismiss false statement charges or to not charge an officer with making a false statement were also adequately explained. The Commission also examined whether the Department was ordering and/or conducting a follow-up investigation when the Trial Commissioner clearly stated that the officer had testified falsely during the administrative hearing.

3. Analysis

As reported in earlier Commission studies, the Commission found that while those officers found guilty of making false statements in a testimonial context or in a PG interview -- those settings explicitly set forth in the Department's 1996 False Statement policy -- were generally terminated, when the false statement was in an unsworn context such as false entries in Department records, false statements to investigative bodies, and off-duty fraudulent conduct, the penalty was more likely to involve Dismissal Probation and the loss of vacation days or a period of suspension. Furthermore, the reasons for these decisions were less likely to be documented.

Of the 127 cases reviewed by the Commission, 62 or approximately 49% involved false statements made in a testimonial setting or PG hearing. The Commission also found 19 cases where it believed, based on the allegations, some form of false statement charge or its equivalent¹⁸⁴ should have been levied, but was not.¹⁸⁵

Breakdown of False Statement Cases, by Classification

	<i>Total Number of Cases:</i>	<i>Guilty and Terminated</i>	<i>Filed</i> ¹⁸⁶	<i>Guilty and Not Terminated</i>	<i>Not Guilty or Charges Dismissed</i>
False Statements at a PG §206-13 hearing or other testimonial setting: ¹⁸⁷	62	20	14	13	15
Other False	42	5	16	15	6

¹⁸⁴ In its *Sixth Annual Report*, the Commission explained that it did not take issue with the use of a charge that did not specifically use the wording of a false statement charge for behavior that essentially was equivalent to a false statement, such as making false entries in Department records, as long as the Department recognized that the False Statement policy was still applicable. See *Sixth Annual Report of the Commission* (December 2001), at p. 80.

¹⁸⁵ In six of these 19 cases, the subject officer's employment was terminated even though a false statement charge was not levied. However, given that there is a potential for officers to be reappointed in the future, the Commission believes that inclusion of appropriate false statement charges is necessary so the Department has full information about these recruits who seek reappointment. This is crucial in those instances where the subject officer is a PPO who is summarily terminated as a result of the allegations against him. The Commission has seen instances where PPOs who were terminated during their probationary period later reapply and are reappointed to the Department despite the prior problems that they demonstrated. Of the six cases where the Commission believes that false statement charges should have been included although the subject officers were disciplined with termination, four were PPOs.

¹⁸⁶ When an officer is separated from the Department for any reason during the pendency of a disciplinary case, the Department typically "files" charges nonetheless to preserve its case against the officer in the event he reapplies to the Department. The Commission considers such cases to have positive outcomes because the officers involved are separated from the Department.

¹⁸⁷ This category includes false statements made during Federal and Criminal Court proceedings, in Grand Jury proceedings, in sworn affidavits, and during Departmental hearings.

¹⁸⁸ See below at pp. 140-146 for a further discussion of these cases.

Statements: ¹⁸⁸					
Failure to Charge:	19	n/a	n/a	n/a	n/a

a. False Statements at a PG §206-13 Interview and Other Testimonial Settings

The Police Commissioner’s 1996 False Statement policy specifically states that all false official statements will result in termination of the officer’s employment unless the Police Commissioner finds that exceptional circumstances exist to justify a lesser penalty. The policy sets forth examples of false official statements including, but not limited to, lying under oath in a criminal or civil trial as well as lying during a Departmental hearing conducted pursuant to PG 206-13. Implicit within the policy, an official False Statement would also include all statements taken in a testimonial context such as testifying before a grand jury or at a Department administrative proceeding. Also included would be written false statements attested to under oath which carry a charge of perjury.

1.) Cases Where the Officer is Terminated

Given the clear line associated with falsities in the testimonial context and their specific enumeration as belonging to the category of false official statements justifying termination, it is expected that these types of cases would clearly result in termination. And, in fact, in the majority of the cases where the officer was found guilty of making a false statement in these circumstances, the officer was terminated.

Of the 62 cases in this category, 57 occurred in the PG context.¹⁸⁹ Of the 29 cases where the officer was found guilty of making a false statement during the PG hearing, nineteen resulted in the officer's termination.¹⁹⁰ For example, in one case, the officer was charged with reporting a false burglary to 9-1-1 and for making false statements during his PG hearing when he stated he made the call to 9-1-1 from his cellular telephone from the location of the burglary. Technology demonstrated that the call was placed from a pay telephone in another borough. After finding the Respondent guilty of all of the charges, the Trial Commissioner recommended that the Respondent be terminated based upon the False Statement policy, and the Police Commissioner concurred, resulting in the termination of the officer. The Trial Commissioner explained in her opinion the rationale for this action in that she had "carefully examined the record for circumstances that would favor a lesser penalty" but had found none. Despite two good performance evaluations, the Trial Commissioner explained that, "[b]y placing a false 9-1-1 call, inventing a detailed false alibi, and then lying about his actions, the Respondent has severely damaged his integrity as a police officer." She also noted that his ability to testify credibly at future proceedings no longer existed. The Commission believes that the penalty of termination was appropriate in this case.

Five other cases occurred in settings other than a PG hearing. Three occurred during court proceedings. Two false statements were in the context of false written statements made under oath.

¹⁸⁹ In some cases, there were multiple charges involving false statements made in different settings. For the Commission's statistical analysis, if a case involved a statement made in a PG interview or other testimonial setting, the case was included in that category and not in any other category that might have applied.

¹⁹⁰ In three of the 19 cases the officer was actually allowed to retire rather than face termination. Given that the choice was not retire and be terminated, the Commission counted these cases as ones in which the officer was terminated since the end result, separation from the Department, was the same.

Only one of these cases resulted in the officer being separated from the Department after a finding of guilt was made against him.¹⁹¹ Even here, the officer was allowed to file for immediate vested retirement in exchange for his plea of guilty. In this case, at the request of another officer, the Respondent testified falsely at Brooklyn Traffic Court. During his testimony, the Respondent falsely stated that the civilian contesting the summons was not the person to whom he issued the summons. As a result, the summons was dismissed. At his PG interview, the Respondent candidly admitted his misconduct, and he aided IAB in the investigation of the other officer. The Respondent had no prior disciplinary history and mixed ratings on his performance evaluations. In justifying the plea offer of vested retirement, the Advocate relied upon the Respondent's eighteen-year tenure and lack of disciplinary history.¹⁹² The Respondent also was denied the Medal of Valor because of this investigation and received an Honorable Mention, instead, for his actions in helping fellow officers during a robbery shoot-out where he drew fire from the robbers allowing other officers to get a wounded officer out of a hostage situation and to the hospital.

2.) Cases Where the Officer is Not Terminated

Of the 33 cases where an officer was found guilty of making a false statement in a

¹⁹¹ In one case the officer was found not guilty of the false statement. In the second case, the officer was placed on Dismissal Probation for a period of twelve months plus forfeited 30 vacation days. For a discussion of this case *see infra*, at pp. 134-135. In another case, the next cited example, the subject officer was actually allowed to retire rather than face termination. Given that the choice was not retire and be terminated, for the purposes of the chart located on p. 128, the Commission counted this case as one in which the officer was terminated since the end result, separation from the Department, was the same. In the two remaining cases, the officers resigned from the Department prior to the charges being heard in the Department Trial Rooms.

¹⁹² The Trial Commissioner did not approve of this plea.

testimonial setting, the officer was allowed to continue his employment with the Department in thirteen of those cases. The Commission agreed with a penalty short of termination in one of these thirteen cases. In five of these cases, the recommendation of termination made by the Trial Commissioner was overturned by the Police Commissioner. From the Commission's review, it appears that the current Police Commissioner has been less consistently applying the False Statement policy when imposing penalties for false official statements. In four of the five cases where the Trial Commissioner's recommendation for termination was overturned, the current Police Commissioner reduced the recommended penalty.¹⁹³ He failed, however, to cite any extraordinary circumstances that justified these reductions.

The Respondent, in the one case handled by the former Police Commissioner, was accused of making false statements to a CCRB investigator and a false statement at his PG interview in addition to other charges.¹⁹⁴ In this case, the Respondent was charged with improperly stopping, searching, arresting, and strip-searching a civilian for no apparent reason. In both his interview with the CCRB investigator and his PG hearing, the Respondent maintained that he witnessed the complainant remove a small silver object from his pocket and throw it to the ground and the complainant admitted to him that this object was drugs. While finding the Respondent not guilty of the underlying misconduct, the Trial Commissioner found him guilty of making false statements in both

¹⁹³ The recommendation for termination in the remaining case was overturned by the prior Police Commissioner. However, this was the only case where the prior Police Commissioner overturned a recommendation for termination.

¹⁹⁴ *See supra*, at p. 5, fn. 6 for a definition of CCRB.

contexts.¹⁹⁵ Despite the Respondent's superior performance evaluations, his receipt of 27 Police Duty medals, and his minor disciplinary history,¹⁹⁶ the Trial Commissioner recommended that the Respondent's employment with the Department be terminated. The basis for this recommendation was the False Statement policy and the Trial Commissioner's inability to "find any exceptional circumstances to support mitigation of the penalty of dismissal." The Trial Commissioner also noted that to save his job, the Respondent accused, and thereby smeared the name of the complainant, by stating falsely that the complainant had admitted to being a drug abuser. This could have jeopardized the complainant's twenty-year civil service career. Although the Police Commissioner did not dispute the guilty findings, he changed the penalty from termination to Dismissal Probation with the forfeiture of 30 vacation days. No reason for the change in penalty was given, therefore, no exceptional circumstances supporting this change were set forth. Based on the Trial Commissioner's written opinion and her attendant reasoning, the Commission agrees with the Trial Commissioner that the appropriate penalty was termination. Although the underlying conduct would not, in and of itself, have justified termination had the Respondent been found guilty of committing it, the Respondent's behavior clearly fell within the Department's False Statement policy.

When the Commission initially examined what mitigating circumstances were used by the Department to justify a penalty short of termination, it found that the Department was not

¹⁹⁵ The Trial Commissioner theorized that the false statements were designed to enhance the Respondent's legal basis for the stop, frisk, and arrest.

¹⁹⁶ The Respondent forfeited 20 vacation days when he showed up for court in improper attire and tossed a marker at an Assistant District Attorney in front of a jury.

sufficiently diligent in specifying the extraordinary circumstances that it applied.¹⁹⁷ In its *Sixth Annual Report*, though, the Commission found an improvement in both the Trial Commissioners' enumeration of the exceptional circumstances in their written opinions and the Police Commissioner's documentation of exceptional circumstances when he decided to overturn a recommendation that the officer be terminated. Unlike in its last study, during this review, the Commission found the documentation of exceptional circumstances that spared the officer from termination to be generally inadequate.

While in its initial studies on this topic, the failure to even deal with the False Statement policy was an issue, in its *Sixth Annual Report*, the Commission reported an improvement in the Department citing to the False Statement policy and applying its directives when a Respondent was found guilty of making a false statement. However, in this current study, in six cases, the false statement policy was not addressed although the Respondents were found guilty of making false statements. Five of these false statements occurred in the context of PG hearings, while in the one remaining case, the false statement was a written statement made under oath. This suggests a decline in the Department's vigilance in applying its False Statement policy consistently.

In the sole case in this category where the false statement did not occur in the P.G. context, the false statement was made when the Respondent falsely documented on a field test report that he had completed a field test of narcotics recovered from a woman's vagina and the test results were negative for cocaine. However, the Respondent never conducted the field test because he did not want to touch the drugs. The Respondent admitted that he had not tested these drugs when he was

¹⁹⁷ See *1999 Report, Fifth Annual Report of the Commission* (February 2001), at pp. 42-55.

confronted by an Assistant District Attorney after a lab test disclosed positive results. The field test report completed and signed by the Respondent specifically and explicitly stated the preparer's statements were being made under oath. The field test report also warned that violation of the oath could subject the preparer to criminal liability.

In defending the offered plea of Dismissal Probation and the loss of 30 vacation days, the Advocate assigned to the case noted that the Respondent was highly rated by his Commanding Officer, had positive performance evaluations from prior commands, and had been transferred from a more prestigious unit to one of lesser status. However, there was no reference to the False Statement policy or the fact that by completing that form, under oath, as he did, the Respondent committed the crime of perjury. In fact, in reviewing the circumstances of the case, the Advocate specifically noted that the "respondent did not admit to his misconduct until the day that the ADA ... was to present the matter to the Grand Jury, and only admitted to the bogus field test after confronted with the Police Lab test results." Plus, the Advocate recognized that the Respondent's actions "skews the validity of narcotics arrest processing and subsequent prosecution to whim, fancy and fears of those specifically tasked with such enforcement." In other words, this very type of falsehood corrupts and compromises the entire law enforcement and prosecution systems. While relying on precedent to justify the offer, none of the precedent relied upon by the Advocate involved perjury.

This case serves as an example of the failure to adequately deal with a clear false statement at all three levels of the system. Initially, the Department's Advocate's Office offered a plea of Dismissal Probation and the forfeiture of 30 vacation days in exchange for the Respondent's guilty

plea. The Commission asserts that this should have been a no offer case where the only penalty sought by the Advocate was termination. There was failure at the Trial Commissioner level because the Trial Commissioner approved this negotiation and, thereby, recommended acceptance of this offer to the Police Commissioner. Finally, the Police Commissioner, himself, failed to apply the False Statement policy and terminate an officer who clearly should have been terminated. Yet, at none of these levels was there any clear reference to the False Statement policy and mitigating factors specific to this case that favored a penalty less than termination.

Even in those cases where the False Statement policy is specifically acknowledged, one factor that the Trial Commissioners, and by extension, the Department has always used to justify not terminating an officer found to have lied in a PG hearing is that the falsehood is a “mere denial” of the allegations without embellishment or the concoction of an entire fabricated story. The theory behind this justification is that the Respondent is entitled to mount a defense to the allegations against him. The Commission does not agree that a mere denial constitutes an exceptional circumstance because the same consequences to the officer’s credibility apply. In three of the remaining seven cases when an officer was found guilty of making a false statement during the course of a PG hearing, the Trial Commissioner did not recommend termination of the officer’s employment because the false statement simply consisted of the officer denying the underlying misconduct.

For example, in one case, the Respondent was placed on Dismissal Probation and suspended for 30 days after he was found guilty of falsely denying at his PG hearing that he hit, choked, and slapped his wife. Instead, he justified his behavior by asserting that he was merely defending

himself from his wife's physical violence. The Respondent maintained this version of events at his trial. Although his wife recanted her statements and testified on the Respondent's behalf, the Trial Commissioner found her initial taped statements to investigators more credible because the timing of this interview, in contrast to the timing of her sworn testimony in the administrative proceeding, left her with little time to fabricate the story. Furthermore her tone, affect, and manner of speech on the tape persuaded the Trial Commissioner that she was being truthful, as did the corroborating evidence of the photographs taken of her injuries, the investigator's testimony about the injuries he observed, and her calls for help which prompted a neighbor to call the police. The Trial Commissioner noted that the recantation was made after the complainant had the opportunity to confer with the Respondent and consider the consequences of pursuing the case.

While the Trial Commissioner did explicitly refer to the Department's False Statement policy in her decision, she noted that although this case presented a close question, she was not recommending termination because the Respondent's statement amounted "to a simple denial of the allegations against him" and the Respondent only had a minor disciplinary history. The Commission does not agree, first of all, that the Respondent's statements were a mere denial that allowed him to construct a defense for himself. The Respondent not only placed the onus on his wife for the altercation that ensued, he continued with this story at trial, further perjuring himself. Even more disturbing was that the Respondent presented an affidavit signed by his wife recanting the allegations and supporting his version of the events. In this affidavit, the wife had stated that she could not testify because she had to work; however, when the veracity of that affidavit was challenged, the Respondent produced his wife within 90 minutes, who was admittedly at home and

not at work, to testify. Given that the Trial Commissioner rejected the wife's subsequent recantation and believed her initial outcry, the Trial Commissioner implicitly found that the affidavit and the testimony of the wife were false. Both of these pieces of evidence were presented by the Respondent as part of his defense. However, even if the Respondent's statements at his PG and his testimony at his trial were considered mere denials of the misconduct, a mere denial still represents a falsehood with all of the attendant ills that the False Statement policy was meant to address such as loss of individual credibility and the erosion of the credibility of police officers in general.

In its *Fifth* and *Sixth Annual Reports*, the Commission addressed the issue of recantations of false statements made in subsequent PGs being used as an exceptional circumstance. This situation usually arises when a member of the service gives a statement in a PG hearing and then is confronted with evidence which contradicts his statement. Alternatively, it can arise when the subject officer asks for or is subjected to a second PG interview regarding his initial statement and changes his story. The Commission has stated its belief that this type of later correction, usually obtained as the Respondent becomes aware of the Department's evidence against him, should not automatically mitigate against termination. The Commission suggested, instead, that the Department consider the circumstances surrounding the second PG and recantation, including who requested the subsequent PG, the time interval between the false statement and the recantation, and the apparent motivation of the subject to recant. None of the cases reviewed for this report involved that specific situation.

There is one other issue that the Commission has watched evolve with the development and application of the False Statement policy. Although, initially alluded to in its *1999 Study*, in its *Sixth*

Annual Report,¹⁹⁸ the Commission commented approvingly on a case where an officer was terminated after a disciplinary hearing on charges alleging that he testified falsely at his prior disciplinary hearing. The Commission noted that in its review, it saw one other case where DAO was instructed to follow up on possible false testimony by two members of the service at their disciplinary hearing. The Commission, though, also pointed out that during its review, it found ten other cases where the Trial Commissioner specifically found the Respondents' testimony incredible yet no follow-up investigations appeared to be ordered or done.

In the current review, the Commission found ten cases where the Respondent's testimony at his administrative trial was deemed incredible, yet no action was taken to determine whether it could be proven that the Respondent made a false statement during his testimony which would necessitate his termination. For example, in one case one of the Respondents ("Respondent A") was accused of using excessive force upon a complainant by slapping him in the face and striking him in the knee and the chest with his nightstick. The complainant's testimony about his encounter with this Respondent was corroborated by photographs taken of his injuries that same night, hospital records documenting the complainant's injuries, a videotape where the complainant's injuries were clearly visible, and the testimony of the complainant's friend. Respondent B was charged with failing to notify IAB about Respondent A's misconduct.¹⁹⁹ The Respondents each testified in their own

¹⁹⁸ See *Sixth Annual Report*, *supra*, at pp. 71-72.

¹⁹⁹ Both Respondents had additional charges as well including not preparing particular documents required to be completed in the course of their duties. Respondent A was also charged with making false statements during his PG interview when he denied using force on the complainant, however, this charge was dismissed as the Department failed to present any evidence of any statement made by this Respondent.

defense.²⁰⁰ In Respondent A's version of the events, he stated that the complainant and his friends had threatened to shoot both Respondents. While stopping the complainant and trying to frisk him, the complainant attempted to run away, and when Respondent A attempted to stop him, the complainant may have hit the wall. Also, some injuries might have been caused when the complainant tripped upon exiting the police car. Respondent B basically supported Respondent A but stated that while he noticed the complainant tried to run, he was not focused on Respondent A's actions. This Respondent denied that after leaving the scene of the initial incident and traveling to a second location with the complainant, that either Respondent hit the complainant. The Trial Commissioner credited the testimony of the complainant and found that the Respondents' versions of the events that transpired did not make sense. Specifically, both Respondents testified that they believed that the complainant possessed a firearm and they chased him and his friends into an unknown building. The Trial Commissioner found that "it defied common sense that [the Respondents] would enter an unknown building and perform a vertical without calling for back-up" ". . . if they genuinely believed that [the complainant] and his friends were in possession of a gun and feared for their safety." She further found that the Respondents' actions in letting two of the four youths go without checking them for weapons, though a firearm could have easily been passed from one youth to any of the others, also defied common sense. The Trial Commissioner also commented on the Respondents' failure to notify their Command that they had a prisoner in their vehicle and to prepare the requisite reports for stopping the complainant and his friend. As a result of the guilty

²⁰⁰ Other evidence was also presented by the Respondents, but this evidence does not directly affect the example here.

findings, Respondent A forfeited twenty vacation days and Respondent B forfeited ten vacation days. While not necessarily disagreeing with the penalties imposed in this case, the Commission believes that further investigation should have been conducted to determine whether the Respondents testified falsely. According to all accounts, there was a crowd of people outside of the building where the complainant was initially stopped and arrested. At the very least, efforts could have been made to locate witnesses from the crowd to determine if there were any unbiased witnesses to the events leading up to the complainant's arrest.

b. Other False Statements

In prior reports, the Commission had noted that the Department was less consistent in imposing termination for false statements made in a non-testimonial setting. One purpose of the current review was to discern whether the Department had improved in imposing consistent penalties in all false statement cases. The inconsistency in terminating officers found guilty of making false statements that occurred in non-testimonial settings was again observed in this review. As noted in its *Sixth Annual Report*,²⁰¹ in the non-testimonial situation, often the specific charge of "Making False Statements" was not levied, instead a similar charge that encompassed the same type of behavior was used. The Commission does not object to the substitution of a similar charge that encompasses the false statement behavior as long as the False Statement policy is still applied to the misconduct. However, this does not appear to be the case. Usually, without citing any exceptional circumstances, the officer is not terminated but rather given a penalty of Dismissal Probation and the

²⁰¹ See *Sixth Annual Report*, *supra*, at p. 80.

loss of vacation days or suspended for a period of time. This is not sufficient because the same issues of the loss of the officer's credibility and his inability to testify in the future, plus the general erosion of the public's faith in the honesty and integrity of the Department still apply whether the false statement was made in a testimonial setting or in another context. The Commission, again, divided these other types of false statements into the general categories of those involving false statements made to Department or other investigative offices that were not made under oath or in PG interviews, falsifying Department records or other business records, or engaging in various types of fraud. Unlike in past reviews, none of these categories consistently resulted in termination.²⁰²

In total, 42 cases fell within this category of non-testimonial false statements. Of these, the breakdown is as follows:

	<i>Total Number of Cases:</i>	<i>Guilty and Terminated</i>	<i>Filed</i> ²⁰³	<i>Guilty and Not Terminated</i>	<i>Not Guilty or Charges Dismissed</i>
False Statement to Investigative Body:	8	1 ²⁰⁴	3	2	2 ²⁰⁵
Fraud: ²⁰⁶	15	2	6	6	1

²⁰² In the *Sixth Annual Report, supra*, the Commission found that in most cases where the Respondent was found guilty of fraud, he was terminated.

²⁰³ See *supra*, at p. 128, fn. 186.

²⁰⁴ This officer was actually allowed to retire rather than face termination. Given that the choice was not retire and be terminated, the Commission counted this case as one in which the officer was terminated since the end result, separation from the Department, was the same.

²⁰⁵ In one of these cases, the Respondent was terminated after being found guilty of charges in a separate case that was tried at the same time as the charges in this case.

²⁰⁶ This category includes automobile insurance fraud, homeowner's insurance fraud, and credit card fraud.

False Entries in Police Records:	13	1	5	5	2
Other: ²⁰⁷	6	2	2	1	1

Of the fourteen cases where the officer was found guilty of making a false statement in a non-testimonial setting and was not terminated, the Commission disagreed with this result in two cases.

An example where the Commission believed that the penalty imposed upon the officer was not sufficiently severe can be seen in the following case. The Respondent was charged with five counts of Prohibited Conduct. Four of these counts were due to the Respondent falsely completing credit card applications using her ex-boyfriend's name.²⁰⁸ The final count was for signing her ex-boyfriend's name on a Confession of Judgment. While the specific charge of "Making False Statements" was not levied, the prohibited conduct encompassed actions that were meant to be covered by the False Statement policy. In this case, the Respondent applied for three credit cards in her ex-boyfriend's name without getting his permission to do so.²⁰⁹ She used these credit cards and then, became delinquent on the payments. The total debt was approximately \$15,000. She also signed the ex-boyfriend's name to a Confession of Judgment against him without permission to do

²⁰⁷ This category includes false statements to superior officers, offering a false instrument for filing, and false statements to the District Surgeon that indicated a pattern or practice of sick leave abuse.

²⁰⁸ One of these four counts was dismissed on the motion of the Advocate when it was discovered that the Respondent opened this account in conjunction with her ex-boyfriend and there was no fraud involved.

²⁰⁹ One was applied for in 1991, and the remaining two were applied for in 1994.

so.²¹⁰ Furthermore, during her PG hearing, she denied signing the credit card applications, stating she had only initialed them with her ex-boyfriend's initials. She also stated that she did use her ex-boyfriend's name to apply for one credit card but he had consented to that application. As for the Confession of Judgment and application, she admitted signing her ex-boyfriend's name during her official interview but denied that this was what happened during the Departmental proceeding. Instead, her daughter testified that it was she who signed this document. Also at trial, the Respondent testified that she signed the credit card applications using her ex-boyfriend's name but she had his permission to do so since her credit history was poor.

In finding the Respondent guilty of forging her ex-boyfriend's name to three credit card applications and the Confession of Judgment, the Trial Commissioner did not credit the Respondent's testimony that she had permission from her ex-boyfriend to open these credit card accounts using his name and therefore, expose him to significant liability.

In determining a penalty, though, the Trial Commissioner neglected to apply the False Statement policy, and therefore, neglected to specify any exceptional circumstances that would mitigate the Respondent's conduct. The Trial Commissioner recommended, and the Police Commissioner eventually imposed, Dismissal Probation and the loss of 60 vacation days. Noting that the seriousness of the Respondent's misconduct warranted a severe penalty, the Trial Commissioner did emphasize that the Respondent did not use the cards in a vindictive manner, only to help herself out of a poor financial situation. Although the Respondent had received above average annual performance evaluations, had no prior disciplinary history, and had committed these

²¹⁰ This was signed in 1995.

forgeries between six and eleven years prior to being found guilty, these forgeries were committed during her tenure as a member of the service. Furthermore, the debts that she failed to pay continued up until at least the time of the trial. And, the Respondent continued to deny her wrongdoing at her PG interview and again during her administrative trial. It is unknown why this Respondent was not charged with Making False Statements in her PG hearing. Additionally, these actions constituted crimes, and clearly, this officer's credibility will be marred if she ever testifies in a court proceeding in the future.

In an example of one case where the member of the service did not get terminated, but the Commission agreed with the penalty based on the mitigating circumstances cited by the Trial Commissioner, the Respondent completed and signed a complaint follow-up report as if he had been at the scene of the arrest when he was not. The facts of this case are as follows. The Respondent was working on another matter, when his supervising Sergeant told him and his partner that information had been received that a shooting suspect had just returned to his apartment. The Sergeant added that detectives should pick this suspect up because the original detective assigned to the case had since retired. Since the Respondent was already busy, another pair of officers apprehended the suspect. When these officers returned with the suspect, they described the arrest to the Respondent and handed over the suspect's pedigree information. Later that night, the supervising Sergeant told the Respondent and his partner that one of them had to take the arrest. The Respondent took the arrest, and after reviewing the case folder, he obtained a written confession from the suspect. The Respondent also conducted a line-up with the victim who positively identified the suspect as the shooter. The Respondent, then, completed the arrest paperwork. Tired and

overworked, the Respondent mistakenly drafted the narrative section of an investigative report as if he had personally been present at the scene of the apprehension and had participated in the actual arrest of the suspect. The Respondent testified at his mitigation hearing that this was a terrible mistake resulting from his never having processed someone else's arrest before and that he had no intent to deceive anyone when he completed that report.²¹¹ Months later when the Assistant District Attorney ("ADA") notified the Respondent to appear to prepare to testify in a hearing to suppress the statement, the Respondent notified the ADA of his mistake. When he testified at the suppression hearing, the Respondent testified truthfully and was cross-examined about the investigative report. The judge, angered by the Respondent's actions and believing the Respondent committed perjury, suppressed all of the evidence derived from the suspect's arrest. The judge, in turn, notified the Police Commissioner that the Respondent had committed perjury.²¹²

In recommending Dismissal Probation plus a 30-day suspension, the Trial Commissioner stated that the Respondent's actions compromised an attempted murder case but was mitigated by the fact that the Respondent admitted his mistake to the ADA before testifying and admitted his mistake under oath. Additionally, the Respondent had no prior disciplinary history and was rated

²¹¹ A mitigation hearing is held before a Trial Commissioner after an officer has pled guilty to the offenses charged but wants to offer reasons to persuade the Trial Commissioner to recommend a less severe penalty than the penalty recommended by the Department.

²¹² The judge noted that the actual apprehending officers testified that they never discussed the circumstances surrounding the arrest with the Respondent, contrary to the Respondent's testimony at both the criminal suppression hearing and the administrative mitigation hearing. There were also many discrepancies between the Respondent's report and the testimony of the two apprehending officers as to the details surrounding the arrest. Whether the other officers did, in fact, describe the arrest situation to the Respondent prior to his completion of the report was never explored. Assuming that the Respondent testified truthfully at the mitigation hearing, as was assumed by the Trial Commissioner, the Commission agrees with the result in this case for the reasons stated in the text of this report. The Commission does, however, believe that a follow-up investigation to determine whether the Respondent or the apprehending officers

highly competent on his most recent performance evaluation. The Commission agrees with this assessment. Assuming that the Respondent made an error when he completed this report, a penalty short of termination rewarded his candor when he voluntarily revealed his mistake to the ADA and did not compound it by testifying falsely under oath. This could serve to encourage other members of the service who make errors to come forward and correct them rather than engage in further falsehoods in order to cover up the initial misconduct.

committed perjury at the criminal suppression hearing should have been ordered.

c. Failure to Include False Statement Charges

Since its 1999 follow-up study,²¹³ the Commission has consistently noted that there are many cases where the Department has failed to include a false statement charge though such charges are clearly applicable to the facts of these cases. In this review, the Commission found nineteen cases where it believed that sufficient evidence existed to support a false statement charge but none was brought.²¹⁴ In none of these cases was there any documentation explaining the decision not to charge the Respondent with making a false statement or its functional equivalent.

In one case, for example, the Respondent was charged with impeding an investigation and associating with a prostitute. The charges arose when the Respondent was stopped in his vehicle by a Sergeant after a prostitute who had just been arrested by the Sergeant's team identified the woman in the Respondent's vehicle as a prostitute and identified the Respondent as a member of the service. When the Sergeant approached his vehicle, the Respondent told the Sergeant that the woman was a confidential informant. Later, the prostitute from the Respondent's vehicle was interviewed and stated she knew the Respondent and knew that he was a member of the service. She also admitted to being in his vehicle the night that he was stopped and approached by the Sergeant. During his official interview, the Respondent denied telling the Sergeant that the prostitute was a confidential informant and denied knowing the prostitute who had been in his car. In the Advocate's plea memorandum, it states, "...it is apparent that the respondent made false statements during his official

²¹³ See 1999 study, *supra*.

²¹⁴ This does not include those cases where a similar charge was brought instead of a false statement charge when the Commission considered this charge to be the equivalent of a false statement charge.

interview.” When the charges and specifications were first filed, the Respondent was charged with making false statements during his PG interview, however, over two years later, that charge was amended to impeding an official Department investigation by failing to give investigators information regarding an investigation of prostitution committed by an individual known to the Department. No explanation was given in the plea memorandum for the amendment. The Respondent was offered, and accepted, a plea for Dismissal Probation and the loss of 30 vacation days.²¹⁵ In justifying this offer, the Advocate cited that the Respondent was shot by a known drug dealer while performing his duties as a narcotics undercover; had been directly involved in the investigation, arrest, and indictment of a major drug trafficker; was rated highly by his Commanding Officer; and had an excellent disciplinary history. While it is certainly praiseworthy that the Respondent was involved in high-level investigations and unfortunate that he was injured in the line of duty, that does not change the fact that he lied in a PG setting and therefore, his credibility and integrity were damaged.

d. Documentation

In its earlier reports,²¹⁶ the Commission noted the lack of documentation in Department files regarding charging decisions, reasons for dismissing false statement charges, and reasons not to terminate members of the service found guilty of making false statements. However, the

²¹⁵ This plea covered a second case as well that did not involve falsehoods.

²¹⁶ See 1999 Study, *supra*, the Fifth Annual Report of the Commission, *supra*, and the Sixth Annual Report of the Commission, *supra*.

Commission noted an improvement in documenting reasons for dismissing false statement charges and in decisions not to terminate officers found guilty of making false statements in its *Sixth Annual Report*.²¹⁷ However, it appears, in this review, that there has been a setback in documenting the reasons underlying these decisions. In the testimonial setting, the Commission found that in six of the thirteen cases where the officer was found guilty of making a false testimonial statement but was given a penalty short of termination, the decisions did not specify the exceptional circumstances that justified this lesser penalty. The Department was, though, still adequately documenting the reasons for the dismissal of false statement charges either upon motion by the Department Advocate or by the Trial Commissioner after hearing all of the evidence. Of the fifteen cases in this category, only one, a motion to dismiss by the Assistant Advocate, had insufficient documentation. As noted in its *Sixth Annual Report*, the Commission believes that documentation of these decisions will help to establish precedent, provide clear guidelines for members of the service, and result in greater consistency among charging decisions and imposed penalties.

As has been the case in past reviews, the Department still needs to improve documentation of its charging decisions when it decides not to charge making a false statement. When the requisite penalty of termination is not applied in a non-testimonial setting, the Department should document what constitutes the exceptional circumstances.

²¹⁷ See *Sixth Annual Report*, *supra*, at pp. 86-87.

4. Conclusion

As in past reports, the Commission has found that the Department is generally still applying the False Statement policy appropriately when the false statement occurs in a testimonial setting. However, the Commission found that unlike in its last review, the Department's efforts to document the exceptional circumstances that justify a downward departure from the mandated penalty of termination for these testimonial false statements has declined. The Department and the Trial Commissioners appear to be imposing less severe penalties without any reference to the False Statement policy at all. Also as noted in past reviews, in general, the Department is failing to apply the False Statement policy to those falsehoods that occur in non-testimonial contexts. Documentation of the reasons not to terminate these officers was also found to be lacking. Finally, the Commission still found that in many cases where it appears appropriate, the Department is failing to file false statement charges at the outset and fails to document its reasons for not bringing these charges. In a related matter, the Department appears to be failing to investigate the possibility of false statements being made when the Respondents testify on their own behalf at their administrative proceedings. This appears to be a step backwards from what was reported in the Commission's last review.

V. THE COMMISSION'S ONGOING WORK

A. Open/Pending Case Monitoring

Monitoring open IAB investigations is another means by which the Commission accomplishes its mandate to ensure that the Police Department is effectively and expeditiously

investigating corruption allegations. This type of monitoring is meaningful as it enables the Commission to keep up-to-date with corruption trends and allegations and evaluate how the Department investigates and responds to allegations of corruption. Open case monitoring is accomplished by various means including: daily review of corruption logs received from the Department, attendance at IAB Steering Committee meetings, attendance at IAB briefings to the Police Commissioner, periodic on-site review of non-steering cases, and ongoing discussions with group captains and other high-ranking officials in IAB. All of these monitoring activities are discussed below.

1. Log Review

The principal means by which IAB records new corruption allegations, as well as updates new information on past allegations, is through the creation of logs. All corruption and misconduct allegations received by the Department by mail, telephone, or in-person are reported to IAB's Command Center which is open 24 hours a day, seven days a week. After receiving these allegations, Command Center personnel assign the allegation a number and create a log which includes a summary of the allegation, the time and place of occurrence, information regarding the complainant and where possible, background information on the subject officer. Each day the Command Center forwards all logs received during the previous 24-hour period to an IAB assessment team who assigns them for investigation to the appropriate IAB group or directs them to CCRB.

The Commission receives and reviews new IAB logs on a daily basis. This ongoing review

of the logs allows the Commission to conduct immediate follow-up on allegations, obtain timely additional information from IAB at the outset of the investigation, and select cases for long term monitoring. The most serious allegations are entered into a Commission database which records all pertinent information and allows Commission staff to retrieve case histories on subject officers and cross reference cases and allegations.

2. Steering Committee Meetings

Throughout the year, Commission staff attend IAB Steering Committee meetings. The Steering Committee is comprised of IAB's executive staff and is chaired by the Chief of IAB. The purpose of the Steering meetings is to examine the more serious cases handled by each investigative group and discuss new developments to ensure that all appropriate investigative steps have been taken. On a regular basis, each investigative group presents their most significant cases to the Committee and reviews the investigative steps which have been taken as well as future investigative plans. Because the Committee possesses a wealth of collective investigative experience, these meetings provide a forum for the reporting group to receive feedback from Committee members on investigative strategy. Additionally, Steering meetings often also address the role of state and federal prosecutors in IAB investigations, as well as interaction between IAB investigators and the Department's administrative prosecutors.

Commission staff attend Steering meetings for most IAB groups several times during the year, including a full review of each group's caseload once per year. Attendance at these meetings allows the Commission to observe how IAB responds to and investigates allegations of corruption.

Additionally, this review of cases enables Commission staff to remain up-to-date on all pending IAB investigations.

3. Intensive Steering Committee Review

Each year between June and September, the Steering Committee conducts intensive Steering where all open cases in each group are reviewed. The Commission attends all intensive Steering meetings which provide a comprehensive overview of IAB's entire open caseload.

4. IAB Briefings to the Police Commissioner

In order to keep the Police Commissioner fully apprised of significant cases and corruption trends, on a regular basis, IAB's executive staff meets with the Police Commissioner and certain members of his executive staff, including the First Deputy Commissioner and the Chief of the Department, for briefings. The Executive Director of the Commission attends each of these meetings. At these briefings, IAB investigative Group Captains present their most serious cases and describe the investigative steps that have been taken. Additionally, periodically the Commanding Officer of IAB's Corruption Prevention and Analysis Unit presents a statistical analysis of corruption allegations which compares annual and monthly statistics by category of allegation, borough, and bureau. This analysis enables the Commissioner and executive staff to identify corruption trends and provides information as to the facts underlying the data being presented.

5. Periodic On-Site Review of Non-Steering Cases

In addition to attending intensive Steering Committee meetings where all pending cases are reviewed annually, the Commission also regularly selects a number of non-steering cases from each IAB group for on-site review. This type of review is constructive because it allows Commission staff to have in-depth discussions with the Group Captains and investigators assigned to specific cases. These discussions allow the Commission to evaluate the quality of investigations on non-steering cases and ensure that they are being carried out effectively. During the past year, the Commission conducted such reviews for each of IAB's investigative groups.

B. Other Types of Monitoring Activities

The Commission is also involved in a number of other monitoring activities that do not focus solely on evaluating case investigations.

1. Monthly Monitoring Lists

On a monthly basis, the Commission receives several monitoring lists maintained by the Department for tracking purposes. These lists identify officers who have a history of misconduct. For instance, lists are generated which identify officers who are under heightened Departmental scrutiny because of continued misconduct, such as excessive force allegations or officers who are currently on Dismissal Probation as a result of a disciplinary penalty. Commission staff regularly review these lists to remain informed about officers being monitored and also to ascertain if any of the officers on the lists are subjects of investigations under the Commission's review.

2. Interim and Operations Orders

The Commission also receives on a monthly basis all of the Interim and Operation Orders issued by the Department. The Commission reviews these and maintains an updated copy of the Patrol Guide in order to monitor any change in Department policies and procedures related to the Commission's mandate.

3. IAB Commander Conferences

Commission staff periodically attend IAB Commander Conferences, meetings at which all IAB Commanding Officers and executive staff discuss business related to IAB, including potential corruption issues in the Department, corruption strategies, policy and procedural changes, administrative concerns, personnel issues, successful operations, and any information relevant to the ongoing operations of IAB.

C. Additional Commission Functions

In addition to the above monitoring activities, the Commission also performs a number of other functions in carrying out its monitoring mission.

The Commission periodically receives allegations of police corruption or misconduct by individuals who wish to lodge complaints against the Department. Commission staff obtain all relevant information concerning the allegation and then forward that information to IAB's Command Center so that a log may be created and the appropriate investigative steps taken. In 2002, the

Commission received approximately 41 allegations, and thus far in 2003, the Commission has received approximately 29 allegations. In order to track IAB's handling of these allegations, the Commission assigns each allegation its own internal log number, and Commission staff then monitor IAB's handling of certain allegations.

Another way that the Commission fulfills its mandate to monitor corruption is through regular contact with federal and state prosecutors responsible for the investigation and prosecution of police corruption. Through these relationships, the Commission is kept informed of issues or concerns of these law enforcement agencies and of their general perceptions about IAB and the quality of its work.