I. INTRODUCTION

The Commission to Combat Police Corruption ("Commission") has issued two formal reports relating to how the New York City Police Department ("NYPD" or "Department") disciplines uniformed and civilian employees. Its first report on this subject was released on December 12, 1996, and explored how the Department had been disciplining those found to have made false statements.[1] The Commission focused on the issue of false statements because of the corrosive effect on the reputation of the Department and on its ability to do its job effectively if there is a sense that officers do not tell the truth -- whether such false statements are designed to enhance the facts relating to an arrest or search, or to cover up the wrongdoing of either the officer testifying or others. In connection with the release of this December 1996 report, the Police Commissioner articulated a policy of dismissing, absent exceptional circumstances, officers found to have made false statements. This report reviews the application of that policy since December 1996.

The Commission found that the Department's treatment of false statements has improved since the Commission's 1996 study and in general, that the Department is taking the policy seriously, even though in some cases the Commission differed with the Department's judgment not to terminate officers who had made false statements, and would have applied the policy to discharge the officer. The Commission also concluded that the Department was not attempting to undermine the policy either by failing to bring false statement charges or by dropping such charges, even though again it did not agree with the Department's decision in every case. The Commission did find, however, that the Department's articulation of its reasons for not

[1] See Commission to Combat Police Corruption, *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements*, December 12, 1996; see also Commission to Combat Police Corruption, *Executive Summary*, December 12, 1996, pp. 5-12.

terminating officers found guilty of making false statements, for accepting plea agreements that left such officers on the job, for dismissing false statement charges, or for failing to bring such charges in the first place, should be supported with better documentation. Finally, the Commission believes that consistent with the requirements of the December 1996 policy the Department should more uniformly apply the policy to all cases in which the officer lies in a PG-118.9 interview,[2] even if the underlying offense is less serious, and, absent exceptional circumstances, terminate the officer. While during the course of the study some of those individuals at the Department responsible for applying this policy took a contrary position, in responding to a draft of this report, the Police Commissioner concurred with the Commission and stated that he had corrected this misinterpretation of his December 12, 1996, policy within the Department.

II. BACKGROUND

Through its review of disciplinary cases that the Department's Internal Affairs Bureau ("IAB") referred to the Department Advocate's Office ("DAO" or "Department Advocate") for the period January 1, 1995, through April 28, 1995, the Commission examined the manner in which the Department handled false statement cases. The cases discussed in that report involved false statements made in the criminal or civil justice systems, as well as those made in the course of investigations involving possible officer misconduct.

Based upon its review, the Commission, in its report released on December 12, 1996, concluded that many of the subject officers in those cases had not received adequate punishment

[2] Under Section 118.9 ("Interrogation of Members of the Service") of the Department's Patrol Guide, a member of the service must at a formal interview answer questions pertaining to the performance of his duties, or else face Departmental charges. Failure to answer questions posed pursuant to this section is a terminable offense.

for their actions. Specifically, the Commission recommended an increase in the level of penalties and more consistency in penalties where officers were found to have made false statements. Termination was identified in the report as the most generally appropriate remedy. In addition, in its report, the Commission endorsed the Police Commissioner's policy statement, made on December 12, 1996, which advised all members of the Department[3] that,

> [a]bsent exceptional circumstances, the making of a false official statement will result in dismissal from this Department. Examples of a false official statement include, but are not necessarily limited to, lying under oath during a criminal or civil trial, as well as during an official Department interview conducted pursuant to Patrol Guide Section 118-9.

During 1998, the Commission reviewed all 1997 disciplinary cases containing a false statement charge that were dismissed or adjudicated, either by trial or negotiated plea. The Commission identified in that review 55 false statement cases that were of a similar type to those identified and analyzed in its 1996 study. Nearly all of these cases, however, involved false statements made prior to December 12, 1996, when the false statement policy was articulated. Based upon this review it became clear that, as was explicitly reflected in at least one Trial Commissioner's decision, while a number of officers had previously been dismissed for making false statements, and this continued to be the case in 1997, the Department was applying the December 12, 1996, policy on a prospective basis.[4] In light of this fact, the Commission committed itself to a follow-up study of the 1998 dispositions, in the belief that such an analysis would provide a larger number of post-December 12, 1996, cases.

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[3] Because the policy explicitly applies to both uniformed and civilian employees of the Department, the term “officer,” as used in this report, applies to all Department employees, whether uniformed or civilian.

[4] The Commission discerned that cases in which the false statement at issue had occurred prior to December 12, 1996, were far less likely to result in termination than those in which the false statement had been made after that date.

III. METHODOLOGY

In order to fully evaluate the application of the Department's false statement policy, the Commission reviewed all cases containing a false statement charge that were disposed of, either by trial, dismissal or plea, in 1998. The Commission also included in its review the relatively few cases in which the underlying facts involved a false statement but the charges alleged the making of a false statement only as an element of a different charge.[5] As expected, the Commission's review yielded a large number of cases in which the false statement was made after the issuance of the false statement policy.

Because the type of false statement that falls within the parameters of the false statement policy is largely undefined, the Commission's preliminary selection of cases for this study of 1998 dispositions was all-inclusive. Every case that included an element of falsity, ranging from false testimony at a Departmental trial to filing a phony police report to submitting a false overtime report, was considered. Using this broad framework, the Commission identified 98 cases among the 1998 dispositions that were, at least potentially, of the type to merit closer examination.

From those 98 cases, the Commission excluded those containing false statements that it believes are not of the type contemplated by its December 1996 report or the December 12, 1996, policy statement. Some of the cases eliminated from the study included instances in which false statements had been made to supervisors in a non-investigatory context where it was not an effort to cover up serious underlying misconduct, or where the false statement involved an

[5] Examples of these cases include the formal charge of "impeding an investigation" (e.g., not being forthcoming to investigators) and "conduct prejudicial to the good order of the Department" (e.g., forging other officers' signatures on Departmental records).

administrative matter, such as cases involving time and leave issues.[6] While deserving of punishment -- and in some cases even termination -- these were not the kinds of cases in which the Commission would urge virtually automatic termination absent exceptional circumstances. Twenty-two of the cases originally examined fell within this category and thus were not part of this follow-up review.

Of the 76 remaining cases, most involved issues of false statements at PG-118.9 interviews, grand jury perjury, false statements to cover up serious misconduct by officers, issuance of false summonses, or lying to other official investigative bodies such as the Civilian Complaint Review Board ("CCRB").[7]

Of these 76 cases, 67 involved actual false statement charges. The Commission identified another seven cases in which, based upon a reading of the disposition memorandum, there was at least a question as to why a false statement was not included among the charges brought. In two other cases, officers who had not been charged with false statements were found to have made false statements during their trials. These additional nine cases, although they fall outside of the main sample of categorized false statement cases, are also discussed in the report.[8]

IV. FALSE STATEMENT CASES INCLUDED IN THE COMMISSION'S 1998 SAMPLE

The Commission began its examination of each case by analyzing the disposition, the

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[6] These include two separate cases in which officers lied to supervisors about where they had been when they were off-post, and a case in which a civilian -- in the context of a confrontation with a superior -- lied about whether she had completed an assigned task.

[7] CCRB has jurisdiction to conduct primary investigations of complaints against officers that allege the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language.

[8] See discussion at pp. 23-30 below.

penalty (where there was a conviction), and the particular facts surrounding the alleged false statements. In order to assess the Department's application of the policy, the cases were categorized to allow the Commission to gauge the prevalence of each of the following types of cases:

- False statement charges of which the officer was acquitted. *(12)*
- False statement charges that were ultimately dismissed. *(13)*
- False statement charges that were never adjudicated because the officer left the force, either by resignation, retirement, or by termination on other grounds, prior to charges being filed.[9] *(5)*
- False statements of any kind that resulted in termination, resignation, or retirement of the officer. *(24)*
- False statement cases resulting in conviction, in which the penalty did not involve termination. *(13)*

A. False Statement Charges Resulting in Acquittal

In its review, the Commission found 12 cases involving false statements that ultimately resulted in acquittal after trial. Although a review of the strength of the evidence upon which the false statement charge was based was not the direct subject of the Commission's study, these were cases in which the Department sought a conviction and nothing in the Commission's review suggested there was anything about these acquittals that raised issues as to the application of the false statement policy.

One case, however, requires some discussion. That case involves an officer charged administratively with having committed perjury before a state grand jury in connection with a search and seizure of guns and drugs. Following a Departmental trial at which several

[9] In such cases, charges are filed only after the subject officer's separation from the Department. See further discussion of the issue of charges being "filed," below at p. 11.

cooperating witnesses, and others, offered an account of the events leading to their arrest for possessing the guns and drugs in question that differed radically from the officer's grand jury testimony and his testimony in the Departmental trial, the Trial Commissioner determined that the officer had testified falsely. Noting that the officer's perjury "so severely undermine[d] his credibility that it is highly doubtful that he could ever effectively testify in court again," the Trial Commissioner recommended his termination.

After reviewing the transcripts of the Departmental trial and certain evidence in the case, the Police Commissioner acquitted the officer. In large measure, the Commissioner's decision rested on a determination that the testimony of the Department's witnesses, including the cooperators and several witnesses cited as corroborating their testimony, was effectively rebutted by other evidence in the case, including a radio transmission tape and the testimony of several officers.

The Commission has long been on the record as recognizing the importance of the Police Commissioner being responsible for disciplinary decisions involving police officers and there is no doubt about the good faith of the decision in this case. Based upon its review of the evidence, however, the Commission does not agree with the reversal of this decision, particularly since the Trial Commissioner was able to assess the credibility of the witnesses, and the radio transmission, so heavily relied on by the Commissioner and which corroborated the officers' accounts, could have been made after the fact to justify an illegal search and seizure. This has happened in other cases. We have been advised that the reversal by a Police Commissioner, including the current Commissioner, of a finding of guilt is extraordinarily rare.

In a response to the Commission's draft of this report, the Police Commissioner reiterated his reasoning for reversing the Trial Commissioner's finding of guilt and stressed that, consistent

with his statutory obligations as Police Commissioner to review all disciplinary findings, he made this decision to reach what in his judgment was a just result.

B. False Statement Charges That Were Dismissed

There are three ways in which charges and specifications brought against a subject officer may be dismissed. First, the Department Advocate may move at trial to dismiss the charge against a particular officer. In most such instances, the Department Advocate will be required to provide the Trial Commissioner with a reason to support the motion to dismiss. Second, the presiding Trial Commissioner herself may determine that a charge should be dismissed.[10] In those instances, the Trial Commissioner generally provides the rationale for her dismissal. Finally, the Police Commissioner has the ultimate discretion to overrule any determinations made below and order the dismissal of a charge.[11] In reviewing these dismissals, the Commission sought to determine whether dismissals were being used by the Department as a means of circumventing the December 1996 policy.

In 13 of the 67 cases reviewed by the Commission, all false statement charges were dismissed. In ten of these instances, the charges were dismissed by the Department Advocate, and in the other three, they were dismissed upon the order of the Trial Commissioner.

In general, charges appeared to have been dismissed because of concerns about the sufficiency of the evidence. Based upon its review the Commission concluded that false

[10] All formal trials held by the Department are presided over by either the Deputy Commissioner for Trials, or one of three Assistant Deputy Commissioners. (For purposes of this report, all are referred to as Trial Commissioners.) If the case is being handled by the Office of Administrative Trials and Hearings ("OATH"), the Administrative Judge presiding can, like a Trial Commissioner, dismiss a charge.

[11] The Police Commissioner also has the discretion to render a finding of not guilty, based upon a review of the Trial Commissioner's decision below. The one instance of this in the Commission's sample is discussed above, at pp. 7-8.

statement charges were being dismissed appropriately and not with the intention of undermining the Department's termination policy.

For example, in one case, an officer was initially charged with making false statements at a PG-118.9 interview, for having lied about her[12] role in an arrest that occurred in her presence while she was off-duty. The Department initially charged her with having made false statements to the arresting officer, and then denying having done so at her PG-118.9 interview. However, as the investigation developed, interviews with participants in, and witnesses to, the incident disclosed exculpatory information, as well as material inconsistencies in their accounts, all of which called into question the validity of the false statement charges and, in any event, would likely have rendered the Department Advocate's prosecution of the case untenable.

Unlike the case above, where the Department adequately documented its rationale for dismissing false statement charges, dismissals by the Department in various other cases raise two issues. First, while the Commission is satisfied with Department's rationale, where that rationale is disclosed, for dismissing the false statement charges -- which typically appears to be based on concerns on the Advocate’s part about whether it has sufficient evidence to gain a conviction -- in some instances the Department Advocate failed to adequately record the basis for the decision. While in these particular dismissals we did not disagree with the ultimate result, the Commission believes that it is important, and in the best interest of the Department, for it to memorialize the rationale for its dismissal decisions clearly.

Second, while the manner in which these dismissals were handled did not mean that meritorious false statement cases were being ignored, the relatively large number of dismissals

[12] To preserve anonymity, the sex of the officer in question has been changed in many of the examples cited in this report.

raises some question about the quality of the DAO's initial evidentiary evaluations and subsequent drafting of charges. Recognizing that in some cases statute-of-limitations considerations may require speedy actions, obviously, it is better for all involved if the sufficiency of the evidence to sustain charges is determined prior to charges being brought. That is not always done sufficiently by the DAO.

In response to this last issue, the Commissioner pointed out that evidentiary problems, including the inability to locate witnesses or changes in witness recollections, can occur over time and sometimes initial assessments must be made quickly because of statute of limitations issues. These problems, however, do not appear to be the predominant causes for dismissals in the cases reviewed. In any event, all that can be asked is that the DAO make all efforts to fully assess the evidence before charges are drafted.

C. False Statement Charges That Were Filed

When faced with the prospect of being served with charges and specifications, a member of the Department may choose to resign or retire before such charges are formally brought. In other cases, an officer who was formally charged with acts of misconduct in another case may be terminated as a result of that case while the Department contemplates bringing additional charges for separate and unrelated acts of misconduct, including false statement charges.

In each of these circumstances, where the officer is separated from the Department before particular false statement charges can be brought, the charges -- once drafted -- are “filed” with the Department and become part of the officer’s personnel record, so that he cannot return as an employee without answering the disciplinary case. In this way, the ability to charge the officer with wrongdoing is preserved and the Department does not risk expiration of the statute of

limitations. The Commission supports the Department's policy of filing charges in these circumstances.

In its false statement study, the Commission found five cases in which the charges and specifications were filed against an officer after his separation from the Department.

D. False Statements Resulting in Termination, Resignation or Retirement

The central conclusion of the Commission's December 1996 report was that in general a finding that an officer made a false statement should result in the removal of the subject officer from the force. Such removal is important because officers who lie in the course of carrying out their duties fundamentally undermine the integrity of the Department; help foster a false impression that police officers, in general, cannot be relied upon to tell the truth; encourage, by their example, the existence of the so-called "blue wall of silence"; and damage the credibility of that officer in any subsequent judicial proceedings.

Based upon this earlier conclusion, the Commission in this study determined that, in general, while allowing an officer to retire in some extreme cases may not be appropriate, any case in which the subject officer was separated from the Department on the basis of a false statement -- either through retirement, resignation, or termination -- had an appropriate outcome.[13]

[13] While the Commission cannot know in all cases what prompted subject officers with pending false statement charges to resign or retire, it is the Commission's belief that, in light of the Department's policy mandating termination for most false statements, officers who might otherwise seek a trial on their charges may instead simply resign when confronted with their misconduct. The same is largely true for instances in which an officer retires rather than face disciplinary charges for false statements. When an officer has, after 15 years of service in the Department, vested in the retirement system, he is eligible to receive a pension, and in such cases, the Department can divest the officer of his pension only by pursuing his termination on an accelerated timetable. Therefore, it is likely that the false statement policy has influenced at least some of those officers facing false statement charges in their decisions about how to proceed in their defenses. The Commission did not analyze whether accelerated proceedings to nullify the ability to retire would have been appropriate in the one case of retirement in the sample.

Of the 37 remaining cases in the survey in which false statement charges were brought, the officer was terminated, resigned, or retired in 24 cases. This included 15 terminations after a plea or adjudication of guilt, eight resignations, and one retirement. In at least some of the adjudicated cases, reference was made in the Trial Commissioner's opinion to the December 12, 1996, policy.

E. False Statement Convictions That Did Not Result in Termination

By design, the Commission's survey consisted entirely of false statement cases in which on its face the nature of the false statement, if proven, warranted termination, absent exceptional circumstances. For this reason, the Commission closely analyzed those cases in which an officer was convicted of making a false statement but was not terminated. Thirteen cases fell into this category. Under the terms of the Department's false statement policy, such a result is warranted only if exceptional circumstances exist that militate against termination.

In assessing these cases, the Commission first separated these cases into those in which the false statement was made at a PG-118.9 interview and those in which it arose in other circumstances -- such as filing a false police report, or lying to a supervisor about serious on-duty misconduct.[14] Because of the nature of such interviews -- and because false statements at PG-118.9 interviews were specifically cited in the Department's false statement policy -- the Commission believes that such false statements are among the most serious examples of dishonesty and must be dealt with severely.

[14] One example -- not discussed below -- involves an officer who was involved in a motor-vehicle accident, failed to notify her supervisor about it, and then lied to another superior in an unsworn statement about having done so. She admitted to the misconduct at a PG-118.9 interview, plead guilty to all charges, and forfeited 20 vacation days. Given the individual circumstances of this case, the Commission agrees with the decision not to terminate, even though a more severe penalty might have been appropriate.

While, as discussed below, the Commission in retrospect likely would have come to a different conclusion in six of these 13 cases, only five involved false statements made after the policy was articulated and, based upon our overall review it does appear that the December 1996 policy generally is being applied. However even in those cases where we agree with the result, there is often no clear articulation of the rationale for non-termination, where that was the Department's penalty decision. Articulating such a rationale is important because that is one way to focus the Department's attention on the requirements of the policy.

1. False Statements in PG-118.9 Interviews

In the Commission's sample, six officers convicted of making false statements at a PG-118.9 interview were not terminated; two of these cases involved false statements made before the Department's policy was articulated in December 1996. In only one of the four post-policy cases, however, was there a statement in the file explaining why the decision had been made not to terminate the officer.

The Commission reviewed the facts and circumstances relating to each of these six cases. It has concerns about two. As to the pre-December 12, 1996 false statements, the Commission recognizes that the policy is being applied on a prospective basis. Nonetheless, officers were being terminated for making false statements prior to December 1996, and in one of these cases, the Commission believes that termination would have been the appropriate result.[15] In that case a male supervisory officer assigned to the Police Academy asked a female cadet out on a date -- in itself a violation -- then tried to get another cadet to lie on his behalf, submitted a false memorandum on the matter and lied at a PG-118.9 interview. This officer received a penalty of

a 30-day suspension and dismissal probation for one year.[16]

Regarding the three post-December 12, 1996, cases, the Commission has concerns about one. In that case, the officer -- who had only recently become a detective, but who had served undercover for several years -- realized that she had not photocopied the pre-recorded buy money used in a "buy-and-bust" operation.[17] Fearing the reaction of the prosecutor, with whom she had a difficult relationship, she photocopied other money and falsely submitted it as a copy of the unrecovered buy money. She then lied at a PG-118.9 interview, although she recanted several weeks later. The Trial Commissioner's recommendation that the officer be discharged was overruled by the Police Commissioner who attributed the problem, in part, to a lack of training and noted that the officer did not falsify the document "to wrongfully convict an innocent person." The officer had no prior disciplinary record and, as noted in the Trial Commissioner's decision, was the sole provider for two children. Given the nature of this misconduct, however, and the fact that it involved lying in a criminal case, the Police Commissioner's "lack of training" rationale is unpersuasive. All officers -- regardless of experience -- should know that they cannot submit phony evidence to a prosecutor and then lie about it in an official interview.

In the other two post-December 12, 1996, cases, given the arguable imprecision of the questions and answers at the relevant PG-118.9 interviews, the Commission agreed with the

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[15] The Commission agreed with the Department's decision not to terminate in a second pre-policy case.

[16] When sentenced to dismissal probation, an officer is actually terminated from the Department, but the penalty is held in abeyance until the expiration of the probation period, after which time the officer is restored to his prior status. While on dismissal probation, the officer may be summarily terminated at the discretion of the Police Commissioner for any misconduct.

[17] In a typical buy-and-bust operation, undercover officers work closely with a supervising detective to coordinate the purchase of illegal narcotics. In such cases, it is essential that a copy of the "buy money" be made for possible evidentiary purposes at trial.

Department's decision not to terminate. The Department, however, should have created a record as to why the officers were not terminated in these cases and it failed to do so. As discussed above, requiring such a record is a way to enforce the policy. Such a record also is useful in creating a body of precedent for false statement cases that can be used to guide the Department in future disciplinary proceedings, and to set a clear standard for members of the service. Without such documentation, it is also impossible to reconstruct how decisions were made regarding false statement charges.

2. False Statements in Other Contexts

The Commission also reviewed the seven cases in its sample in which officers made false statements outside the context of a PG-118.9 interview yet were not terminated. While such other instances of false statements can rise to the level of lying at a PG-118.9 interview, these cases do not always offer the same clear-cut facts. Nonetheless, as discussed below, the Commission does have concerns about four of these cases.

First, however, it is appropriate to discuss a case that provides a good example of the kinds of circumstances that justified an “exceptional circumstances” finding. In that case, an officer prepared a false police report of a robbery in an effort to conceal her loss of Departmental identification. Confronted at a PG-118.9 interview, the officer recanted her story. The Commission believes that the concoction of a false police report is an egregious example of a false statement by an officer because it can seriously undermine the perception of police integrity -- both among the public and in the courts. Furthermore, such actions can potentially result in the questioning of would-be suspects or even false arrests, jeopardizing the freedom and well-being of innocent parties for no reason whatsoever.

However, in this particular case, no such harm ensued. Investigators in the suburban police department to whom the officer reported the “crime” were immediately suspicious and contacted the NYPD to alert them before any police action was taken. In addition, the officer had a sterling record during 15 years of service with the Department, and admitted her misconduct at a PG-118.9 interview, rather than attempting to conceal it further. This therefore appears to be an appropriate case in which the ultimate penalty of termination should not be imposed.

Indeed, arguably, if the officer had been terminated -- despite her record, her willingness to tell the truth at the PG-118.9 interview and the limited damage done by her initial false statement -- it might have had the unfortunate result of encouraging officers to continue to lie during PG-118.9 interviews once they had engaged in any wrongdoing. In this case, absent her admission, the Department also would likely have found a case against her very difficult to prove, since it was based only upon a “feeling” communicated to the Department by the investigating detective, who felt the officer had been evasive when pressed for details about the robbery.

The plea agreement in this case -- which resulted in a 30-day suspension for the officer -- satisfied the Department's interest in disciplining her, as well as the need to get at the truth. By offering a penalty short of termination to officers who are honest at the PG-118.9 interview, the Department conveys a message to all its members about the seriousness of the PG-118.9 interview and the importance of owning up to one's misconduct. Here too, however, while there was a plea memorandum in the case file, the Department never fully articulated its basis for not pursuing termination in a case involving a potentially serious false statement.

In four of the remaining cases in this category, the Commission is concerned about the

failure to terminate the officers. Indeed, there was no indication in the materials the Commission reviewed for any of these cases that the Department had determined that exceptional circumstances existed in these cases.

In the first of these cases analyzed by the Commission, a member of the Department was involved in an accident while driving an NYPD vehicle, but instead of handling the incident as required by Department protocol, he attempted to conduct the investigation himself and forged signatures on the accident reports. For reasons that are not clear -- and are not revealed in the file -- the Department's charges did not refer specifically to forgery or false statements.[18] The officer ultimately pleaded guilty to all charges and agreed to a penalty of one-year dismissal probation and the loss of 30 vacation days. While the explanation for the decision not to terminate may lie in the failure of the Advocate to include a forgery charge,[19] this is the kind of case in which the Commission believes that, absent some exceptional circumstances, termination is appropriate.

In the second case, a part-time school crossing guard filed a false complaint against a neighbor with whom she had been feuding. Because each party had previously received orders of protection against the other, the complaint could have resulted in the neighbor's unjustified arrest; had not the investigator assigned to the case discovered inconsistencies in the complaint. That the school crossing guard was aware of the ramifications of her action is clear from the history of prior legal proceedings initiated by each party against the other. The crossing guard was charged with making a false statement and, after conviction, given a penalty of a 30-day

[18] The officer was charged with failure to request a patrol supervisor and the more general charge of conduct prejudicial to the good order of the Department for the forged documents.

[19] For a discussion of DAO's views on charging in false statement cases, see below at pp. 22-23; 27-28.

suspension.

The fact that this person intentionally and maliciously caused a false police report to be filed to further her own ends, clearly intending to cause harm to a specific person, would typically justify termination. In this case, however, while the Department did not explicitly cite the false statement policy or exceptional circumstances in its decision, it did find mitigating circumstances that, it believed, made the penalty appropriate. These circumstances included the crossing guard's long and unblemished record of service to the Department and the fact that she was not a police officer.

A third case involved an officer found guilty after a Departmental trial of filing a false complaint report and failing to properly safeguard the property of an individual arrested for drunk driving. The case arose after the individual complained to IAB that the arresting officer had stolen his personal property, including a cellular telephone and $160, following his arrest. After the individual's release from court, and prior to reporting the matter to IAB, he returned to the precinct to retrieve his property. At the precinct the individual spoke with the subject officer who informed him that any property that the individual had at the time of his arrest had been placed in his car. The subject officer filed a complaint report falsely stating that the complainant was contending these items were missing from his car.

The Trial Commissioner credited the individual's testimony that his property had been taken from him during the arrest citing cellular phone records that corroborated the individual's testimony that he had used his phone while detained at the precinct. In so finding, the Trial Commissioner concluded that the subject officer had filed a false complaint "to avoid liability for failing to safeguard [the arrestee]'s property." The Trial Commissioner also found that the officer had lied to Department investigators to cover up his actions.

Without reference to the Department's false statement policy, or articulating exceptional circumstances for not recommending the officer's termination, the Trial Commissioner recommended that the officer be suspended for 60 days and serve one year of dismissal probation. The Commission believes that based on the seriousness of the officer's conduct and his record with the Department, which included two prior periods of disciplinary probation, this officer should have been terminated.[20]

The final case involved an officer who falsely reported having been the victim of a robbery, in an attempt to cover up her chronic lateness. She repeated the lie at a PG-118.9 interview but for unexplained reasons was not charged for this additional false statement. The case was resolved with an agreement in which the officer plead guilty to falsely reporting a crime and forfeited 30 vacation days. Again, the officer was not terminated and the file contains no discussion of why that was the case.

V. OTHER ISSUES RAISED BY THE COMMISSION'S REVIEW

During its review, the Commission took note of various other issues that affect application of the false statement policy. Specifically, the Commission noted the following issues:

- Some officers were interviewed under PG-118.9 more than once, and used the second interview to recant false statements made at the first interview.
- Trial opinions in certain instances have indicated that the Trial Commissioner has found the subject officer to have lied at trial, leaving open the question of whether, and how, the Department should follow up with further investigations and/or charges in such cases.

[20] In her decision, the Trial Commissioner noted that the officer's prior disciplinary matters had "occurred six and ten years ago," and that two years had elapsed since the officer's instant misconduct.

- In some cases, false statement charges were not included, where doing so might arguably have been appropriate.

A. Multiple PG-118.9 Interviews

In several of the cases the Commission reviewed, the subject officers were interrogated under the provisions of PG-118.9 more than once regarding the same event. While the scope of the Commission's study did not extend to analyzing the underlying investigations conducted by the Department, and therefore the exact reason that multiple PG-118.9 interviews were conducted was not determined, it is likely that in some cases, officers were re-interviewed because of the development of additional information, while other re-interviews may have been initiated at the request of the subject officer in order to rehabilitate himself.

In instances in which the statements of the subject officer remain, in sum and substance, essentially the same from one interview to the next, no issue is raised as to the application of the false statement policy. However, where the officer lies in the first PG-118.9 interview and then corrects that falsity in the second interview, issues clearly exist as to how the policy should be applied.

If a subsequent recantation is never held to be a basis for avoiding termination, then, once having lied, officers will never have an incentive to tell the truth. At the same time, however, subsequently telling the truth should not always be a basis for avoiding termination, particularly where the recantation comes very late. Factors to consider in the analysis of whether an officer should be terminated include:

- Motivation: Whether the officer was mandated by the DAO to attend a second interview so that it might gather evidence to further strengthen the case, or whether the officer requested a second interview in order to correct or clarify previous misstatements.

- Timing: Whether the subject officer came forward shortly after his initial misstatement, or whether he did so only once he believed the Department had sufficient evidence to prove its falsity.

Sometimes, of course, when an officer provides conflicting statements, it is unclear which version is true. In one example, a miscommunication from an outgoing sergeant to his replacement during a shift change may have been a factor in the murder of a woman by her ex-husband, a police officer. The sergeant offered differing versions of his role in the incident at his two PG-118.9 interviews; at the first, he said that the miscommunication had been his responsibility, but at the second, he laid the blame on the other sergeant.

The Advocate took no official position on which of the subject officer's two versions of events was truthful but nonetheless brought a charge against the sergeant for making a false statement at a PG-118.9 interview, arguing in the alternative that one of his versions must have been a lie. This form of charging is fully justified since, as the DAO recognized, one of the statements was demonstrably false and the officer should be held responsible for this form of deliberate lying, even if the Department could not prove which statement was a lie. As a result, ultimately the officer was terminated.

The DAO also informed the Commission that in certain instances an officer is re-interviewed under the provisions of PG-118.9 in order to give the officer an opportunity to recant his prior false statement. According to the DAO, this situation arises when an officer's underlying misconduct is of a less serious nature and additional evidence has been developed

since the first interview. In such an instance, the Advocate would confront the officer with the additional evidence. The DAO stressed that should the officer continue to assert his lie, he would be prosecuted for his false PG-118.9 statement. We have been advised that, as part of the development of the December 12, 1996, false statement policy, the Department will be less willing in the future to allow an officer to correct an earlier false statement unless that correction comes reasonably soon after the statement.

B. False Statements Revealed at Trial

In two cases reviewed by the Commission, the Trial Commissioner's opinion indicated that she had found the subject officer to have falsified evidence and/or testimony at trial. While the Commission strongly believes that any falsity must be addressed, the issue of how to deal with false statements made in the context of a trial remains. The Commission does not believe that all subject officers convicted of misconduct, despite professing their innocence, should be tried for perjury; the practical concerns raised by such an approach are discussed below.[21] At the same time, however, there must be consequences for these false statements.

Sometimes Trial Commissioners address this issue by using false trial testimony as an aggravating factor in determining the appropriate penalty. In one case in the Commission's sample, an officer faced a charge of off-duty assault stemming from an altercation between himself and his girlfriend.[22] At trial, the officer characterized the matter as an accident and submitted written testimony in the form of letters from his girlfriend to support this contention. However, his girlfriend spoke only Spanish -- to the point of requiring an interpreter to

[21] See further discussion below at p. 25.

[22] This officer was not charged initially with having made any false statements.

communicate with investigators looking into the original assault and to testify at trial -- yet the letters that carried her signature were written in clear English and referred to a Departmental regulation not generally known to civilians. This led the Trial Commissioner to conclude that they could not possibly have been written by the girlfriend, and that the subject officer's testimony to the contrary was patently false. While the Commission believes that the officer should have been terminated on these facts, here taking account of such falsity, the Trial Commissioner, after factoring in the trial perjury in fashioning the penalty, recommended the most stringent penalty available in this case short of termination -- a total of 40 days' suspension and one year dismissal probation.

In another case reviewed by the Commission, an officer disturbed the peace at a public event by cursing and threatening a theater employee who had asked the officer to move from a prohibited area. The officer was charged with discourtesy to a civilian and abuse of authority.[23] At trial, the officer stated that it was the theater employee who had used vulgarities during the incident, and that this employee must have confused her with another patron who was causing a ruckus. In the opinion of the Trial Commissioner, the officer lied at her CCRB interview, as well as at trial, and offered the concocted testimony of her boyfriend to corroborate her story. The Trial Commissioner's decision reflected consideration of these facts, and a 25-day penalty was recommended. The First Deputy Commissioner found 20 days appropriate but instructed the Department Advocate to bring a new case based upon the false statements at trial. That case is still pending.

The above cases illustrate extreme examples of false statements that arise at trial.

[23] The abuse of authority in this instance arose from the officer's assertion that she would have the employee arrested.

Although every trial is to some extent a test of the credibility of various witnesses, many trials do not lend themselves to subsequent prosecutions for perjury. When the lie is clearly provable and relates to a core issue, however, or where the subject officer has submitted additional false testimony in furtherance of his underlying denial -- such as forged documentary evidence or the perjured testimony of other witnesses -- additional punishment (including termination) for, or new investigations into, an officer's false testimony would be appropriate.[24]

C. Failure to Charge

During the course of its regular review of closed disciplinary cases the Commission also noted eight cases in which, based upon documents analyzed by the Commission, false statement charges could have been brought against subject officers, but the Department Advocate did not pursue such charges.[25] While the Commission recognizes that the Department must retain discretion in its charging decisions, failing to charge an officer with a false statement, where there is a clear basis to do so, effectively undermines the perception of the Department's commitment to the false statement policy, by taking the case out of its purview.

With one exception, the Commission reviewed the underlying files of the Department Advocate in these cases.[26] Based upon its review, although not in agreement with all the results,

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[24] In discussions with the Commission, Trial Commissioners raised practical concerns regarding follow-up prosecutions in such cases. For example, the Trial Commissioner presiding over the original trial might have to recuse herself from the follow-up trial. Further, the issue of what evidentiary effect, if any, the prior Trial Commissioner's credibility findings would have at a subsequent trial would need to be resolved.

[25] In addition to the seven cases discussed in the "Methodology" section at pp. 5-6 above, an additional case raises this issue. This case is also considered separately in the category of officers found guilty of making a false statement but not terminated (see pp. 13-20 above).

[26] In the remaining case, information initially received by the Commission made clear that the failure to bring a false statement charge was appropriate.

the Commission does not believe that the failure to charge in these cases was part of a bad faith effort to circumvent the false statement policy. Once again, however, there often was insufficient documentation in the file explaining why particular charging decisions were made. As discussed below, however, there also appears to have been some confusion within the Department as to how this policy should be applied.

For example, in one case studied by the Commission, an officer and a civilian were involved in a car accident.[27] The civilian alleged that the officer had accosted him and screamed at him, and he reported the officer's conduct to the CCRB. After interviewing the civilian and the officer, the CCRB found the officer to have made false statements and reported this finding to the Department. Underlying memoranda in the Department Advocate's file indicated not only that false statement charges were appropriate in this case but also that, in the estimation of DAO staff, such charges would be sustainable against both the subject officer and his partner.

Ultimately, the subject officer was charged only with discourtesy and use of force while on-duty. Although a brief memo in the DAO file suggests there is a reason for not proceeding with false statement charges, this rationale is never fully explained. Without this documentation, the Commission is unable to determine whether DAO failed in its duty to charge the officer with false statements.

The DAO also informed the Commission that, in part as a result of the December 12, 1996, policy, it views false statement cases as being extremely serious. For this reason, the DAO may not bring false statement charges against an officer -- even where such charges relate to false statements that occurred in the context of a PG-118.9 interview and might be provable --

[27] Here, the underlying false statement was made pre-policy. However, the issue is about charging a false statement rather than the penalty a false statement engenders.

unless it believes termination may be the appropriate penalty in the case. Their belief is that termination in a case involving a false statement is generally appropriate only if the false statement is accompanied by serious underlying misconduct.[28] The Trial Commissioners expressed a similar view that the penalty in false statement cases must be reasonably related to the nature of the underlying misconduct the false statement was intended to conceal.

The Commission does not agree with these views. Whatever the nature of the underlying conduct, if an officer makes a conscious decision to lie at a PG-118.9 interview, that officer, absent exceptional circumstances, should be terminated. Indeed, termination would be the appropriate result not only for the policy reasons discussed above, but also because, once having lied, that officer's credibility would be materially affected in any later trials in which the officer's testimony might be required.

While the DAO and Trial Commissioners expressed the view that charging an officer with making a false statement in a PG-118.9 setting would not be appropriate if the underlying conduct is not serious enough to warrant termination, and several cases reviewed by the Commission reflect this view, in his response to a draft of this report the Police Commissioner has advised the Commission that it is the Department's policy to terminate, absent exceptional circumstances, officers who lie in a PG-118.9 interview regardless of the nature of the underlying conduct. The Police Commissioner has informed the Commission that he has now discussed this misinterpretation of the false statement policy with members of the Department's disciplinary system and has made clear that the policy applies in all cases.

[28] The DAO further expressed that it makes no difference in the outcome of a case which charge is actually brought, so long as the specification makes clear the nature of the conduct alleged. To cite one example from the Commission's sample, "impeding an investigation" might suffice as a charge, to the DAO, if the specification accompanying the charge states that this action involved lying to a superior.

The Commission reviewed an additional case disposed of in 1998 in which false statement charges could have been brought by the Department Advocate. Because of the seriousness of this case and the broader issues it raises concerning the functioning of the Department's disciplinary system, it was analyzed in greater detail and is discussed separately.

The case involved the beating by Officers "A" and "B" of a man in the squad room of a precinct station house, which resulted in severe facial bruises to the victim. In subsequent interviews conducted as part of a CCRB investigation, and during PG-118.9 interrogations that took place after the December 12, 1996, policy statement, the two officers alleged that the victim had injured himself by falling face forward on a flat surface. The two officers further alleged that it was only after the victim had first assaulted Officer "A" that a struggle ensued. Both officers denied assaulting the victim or observing any officers do so, and Officer "A" denied observing any injuries on the victim. There were significant unjustified delays in the CCRB's handling of the case,[29] but after 18 months, CCRB substantiated the assault allegations and referred its findings to the Department for investigation and prosecution. Nearly one year after the case was received by the Department, the officers were served with assault charges. Before the Departmental trial commenced, the officers pleaded guilty, and at a mitigation hearing before the Trial Commissioner, both admitted to repeatedly punching the victim both before and after he was handcuffed. Both testified that the victim never hit Officer "A" or had any contact with him before they struck him. The officers each received a loss of 20 vacation days as a penalty.

While the Commission has questions about the adequacy of the DAO's investigation and prosecution of the case, its most significant concerns involve the Department's failure to charge

[29] While this delay raises serious issues, we understand that in recent years CCRB has taken a number of steps to improve the speed with which it completes investigations. In any event, the Commission does not have jurisdiction to review the performance of the CCRB.

the officers with lying in their official interviews and in Departmental records, and the insufficiency of the penalty, given the seriousness of the assault and the officers' efforts to cover up their misconduct. This case was also never referred to the appropriate District Attorney's Office by either the CCRB or the Department.

There are several significant reasons that false statement charges should have been brought in this case. First, given the strong corroborative evidence of the assault provided by the medical records, photographs of the victim's injuries, and the opinion of the medical examiner (who concluded that the injuries were consistent with having been struck on the face and neck with blunt force and with having been punched), the officers' claims in their PG-118.9 interviews that they had not assaulted the victim were false. And second, Officer "A's" PG-118.9 statement that he had not observed the victim's injuries is patently false given the seriousness of the victim's injuries and his admission that he had helped subdue and handcuff the victim.

Given the seriousness of this case, the overall strength of the evidence against the officers, and their subsequent attempt to cover up for it by lying in their official interviews and in Departmental records, the Department should have terminated these officers. As to one of these officers, the Department had been told that he intended to retire. After the penalty was assessed, however, he did not retire. In order to avoid circumstances like these from occurring in the future, the Department has put in place a policy requiring that commitments to retire be put in writing.

In connection with this report, we have been advised that since October 1996 the Department has instituted a number of reforms to improve the performance and efficiency of the DAO. These include:

- DAO supervisors, on approximately a monthly basis, review the entire case loads of all attorneys
- the First Deputy Commissioner reviews all non-CCRB cases and all CCRB cases involving officers with the rank of detective and above
- non-CCRB cases are generally calendared for appearances before the Trial Commissioner within six to eight weeks after the officer is charged
- cases are not adjourned without a date unless supervisors approve
- appropriate CCRB cases are "fast-tracked"
- the number of staff attorneys exclusively handling CCRB cases increased from five in 1997 to 14 in 1999
- the number of investigative detectives working on CCRB cases has increased
- new civilian attorneys are required to have extensive trial experience
- charges against an officer are not drafted unless the DAO has the complete investigative file
- Trial Commissioners are involved in the review of all non-CCRB and CCRB cases, including review of plea agreements, motions to dismiss, and cases in which no disciplinary action is recommended by the DAO

The Commission has not evaluated these changes. In order to assess the effectiveness of these changes, as well as the overall performance of both the DAO and the Special Prosecutor's Office, the Commission intends to undertake a more formal study of these offices.

VI. CONCLUSION

The false statement policy articulated by the Commissioner in December 1996 remains an important positive step and the manner in which false statements are dealt with in the Department has improved since the Commission's 1996 study. In this study, as discussed above, the Commission did not agree with all the Department's decisions not to terminate. Nonetheless,

while not agreeing with all the Department's decisions not to terminate officers, the Commission found that, in general, the Department is taking seriously its December 12, 1996, policy of terminating, absent exceptional circumstances, officers who make false statements. Officers found to have lied are thus often forced to leave the Department. The Commission also found however that the Department needs to better document, where applicable, its reasons for finding exceptional circumstances that allow officers who have been found to have made false statements to retain their jobs, and for dismissing false statement charges or not bringing them in the first place. Additionally, the Commission concluded that due to a misinterpretation of the 1996 policy the Department has not been applying the false statement policy evenly insofar as it was not uniformly bringing false statement charges against some officers if, in the Department's view, the underlying conduct was not serious. The Commissioner has now made clear that his policy is to bring false statement charges in these circumstances.

VII. RECOMMENDATIONS

A. Documentation of the Rationale Behind Departmental Decisions in False Statement Cases

Given the seriousness of false statement cases -- as recognized by the Police Commissioner's policy statement on this issue -- the Commission believes that certain decisions in such cases should be supported by documentation and memorialized in the file. This would not only preserve a record explaining the Department's actions in prosecuting these cases, but would also establish a growing set of precedents for similar cases arising in the future and

provide a mechanism to focus attention on the requirements of the policy as decisions are made. In particular, the Commission believes that such documentation should be routine whenever:

- the Department Advocate chooses not to bring false statement charges where such charges might be supported by the facts, as alleged
- false statement charges are dismissed -- whether by the Department Advocate, the Trial Commissioner, or the Police Commissioner
- a plea agreement is reached with a subject officer in which the officer pleads guilty to some or all charges in exchange for a penalty short of termination
- a subject officer is found guilty of a false statement charge at trial and receives a penalty short of termination

As to the last two items, it is already Department practice to document the reasons for such actions in all cases. All plea agreements are preceded by a DAO memorandum explaining the appropriateness of the deal being offered, and all trial decisions are accompanied by a discussion of the reason for the finding and for the penalty recommended. However, the Commission believes that in false statement cases, these documents should explicitly refer to the Police Commissioner's policy statement and express the reasons that exceptional circumstances apply in the case at hand.

In response to a draft of this report, the Department asserted that it believes that existing documentation is adequate, but agreed to discuss with the Commission possible improvements.

B. Termination of Officers Who Lie in PG-118.9 Interviews (Absent Exceptional Circumstances) Regardless of Underlying Misconduct

Contrary to the views expressed to the Commission during the study by the DAO and by the Trial Commissioners, that the appropriateness of termination in a false statement case turns,

in part, on the underlying misconduct about which an officer has lied at a PG-118.9 interview, the Commission believes that such cases should result in termination regardless of the underlying misconduct, unless exceptional circumstances exist. As discussed above, the Commissioner has now reiterated that the December 1996 policy applies to all such statements and the Department should now apply the policy consistent with that understanding.

While an officer who makes a false statement to a supervisor in the course of routine Departmental inquiry may deserve leniency, once that officer sets out to lie at an official Departmental interview, that officer's credibility as a witness in future criminal or civil proceedings is permanently in doubt. An officer who intentionally lies in a PG-118.9 interview in an effort to cover up misconduct, no matter how petty, has willfully disregarded a fundamental aspect of his oath of office. The dismissal of such officers will send a message to all Department employees that the Police Commissioner's policy statement is being enforced, and that officers must be truthful in official Departmental interviews.

C. Departmental Review of Officer Testimony in Suppression Hearings and Other Criminal and Civil Proceedings

Although the Commission reviewed all 1998 dispositions involving officers who made false statements, there are instances in which an officer's false statements may not become the subject of a Departmental disciplinary matter. At a suppression hearing in a criminal case, for example, a judge's ruling may call into question the veracity of an officer's testimony. If the Department does not become aware of the potentially false testimony, the officer's conduct, while clearly subject to the December 1996 policy, will go unaddressed.

In all hearings and trials, a fact-finder must make a determination of the credibility of a

witness' testimony. In a suppression hearing, that role belongs to the court. The judge must hear the witness' testimony, make an assessment as to the credibility of that testimony, and upon the facts thus credited, rule on the admissibility of the evidence that a prosecutor seeks to introduce against a defendant.

In the Commission's view, the testimony of officers in suppression hearings, and in other proceedings in which courts make assessments of an officer's credibility, should be scrutinized by the Department in light of the December 1996 policy. In those instances in which a court has found that an officer gave false testimony, that finding should be made known to the Department. With that information, the Department may then initiate an investigation into the matter and, where appropriate, bring a Departmental case against the officer. Given that an officer's credibility is critically important in all proceedings in which he or she is called to testify, an allegation that an officer lied during a suppression hearing or other proceeding should be treated with utmost seriousness by the Department and all attorneys in the justice system.

Currently there is no formal mechanism for reporting to the Department findings that an officer did not tell the truth. Judges, prosecutors, and attorneys at times make such referrals to the Department. However, without a formal mechanism for such reporting, the Department may not become apprised of such problems. The Commission thus recommends that this issue be addressed by the Department and that mechanisms for formal and systematic reporting be explored by the Department with prosecutors and Corporation Counsel attorneys who call on officers to give testimony in criminal and civil matters. In addition, similar procedures should be developed for reporting to the Department whenever a motion to suppress is granted. Also, while not the focus of this study, even where, in granting such a motion, the court has not questioned the veracity of an officer's testimony, issues of training and/or the existence of other

problems may be raised. For example, where evidence has been repeatedly suppressed that involves searches by a particular officer or group of officers, this may suggest training and/or potential disciplinary issues that need to be addressed. And in cases where Corporation Counsel attorneys intend to settle claims or there are adverse judgments involving police officers because of liability for excessive force or other misconduct, such reporting can lead the Department to take training or disciplinary measures to address the problem.

In response to the Commission's draft report discussing these issues, the Police Commissioner has stated that he has written to the City's local and federal prosecutors, Corporation Counsel, Legal Aid Society, and Administrative Judges in the five boroughs, seeking their assistance in reporting incidences of police perjury. While these letters are a positive first step, the Commission believes that there should be follow-up meetings between the Department and these various agencies so that protocols can be developed for reporting information regarding police testimony and misconduct. The Commission recognizes that the establishment of such protocols may involve the dedication of certain resources -- a concern expressed by the Department -- although the principal additional resources within the Department would involve whatever staff is necessary to prosecute wrongdoing or perform needed training. Any added expenditures for these purposes would be money well spent. The resources necessary to implement the reporting mechanisms would largely come from the reporting agencies (e.g., District Attorneys' Offices) and the Commission will separately urge these agencies to do all that can be done to implement such a process. Finally, as discussed above, the granting of motions to suppress should also be reported to the Department.

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