

**Annual Retaliation Policy Review
Conducted by
Office of the Inspector General**

February 11, 2005

I. Background

On February 12, 2004, the Office of the Inspector General (OIG) submitted its “Review of the Department’s Retaliation Policy” (First Report). The First Report contained twelve recommendations that the OIG believed would assist the Department in better handling complaints of retaliation and better addressing and remediating problems in the workplace which might lead to perceptions of retaliation.

Shortly after the First Report was published and the recommendations therein adopted by the Police Commission (Commission), responsibility for implementation of those recommendations fell to the Commanding Officer (CO) of Professional Standards Bureau (PSB). The CO moved quickly to establish a retaliation working group (Working Group), which included staff from the OIG, PSB, the Commission, the City Attorney’s Office (CA), and when appropriate, representatives of other Department and City agencies, including Behavioral Sciences Services (BSS), the Ombuds Office (Ombuds), Medical Liaison Section (MLS), the Police Commission Discrimination Unit (PCDU), the City Personnel Department’s Equal Employment Opportunity and Employee Development Division (City EEO), the Department’s Personnel Department, the Department’s Employee Relations Group (ERG), the City Ethics Commission, the City’s Office of Discrimination Unit (ODCR), and others.

In response to one of the main themes underlying the First Report – the failure to evaluate and address work environment and workplace issues, which may have contributed to an employee’s perception of retaliation – one of the first projects the Working Group undertook was to assess and evaluate the various avenues by which and to whom Department employees could raise retaliation concerns. Though this process originally began with an evaluation of the nine entities¹ within the Department, it soon became apparent that there were also various entities within the City (City EEO, ODCR) to whom Department employees could bring such concerns. The Working Group also discovered that each of these entities had: 1) different requirements for the acceptance of retaliation concerns; 2) separate investigative protocols; 3) unique confidentiality assurances; and 4) differing adjudicative classifications and standards. There was also a recognition that all of the systems had one thing in common – they all took far too long to address and evaluate workplace concerns raised by the employee.

The Working Group, now under the direction of the CO of the Consent Decree Bureau, is working on a plan to help coordinate, and if ultimately necessary, consolidate the various

¹ Audit Division; BSS; ERG; Internal Affairs Group (IAG); MLS; OIG; the Ombuds Office (Ombuds and Women’s Coordinator); PCDU; and Risk Management Group (RMG).

systems within the Department, perhaps under the direction of one central entity who can act as a facilitator to ensure that employee workplace concerns, whether they involve actual misconduct or environmental issues short of misconduct, are timely addressed and resolved by the appropriate entity(ies).

Another step taken by the Working Group since the First Report was a recognition that the Department's Anti-Retaliation Policy (Policy) may be overly broad, and may cover actions that neither state nor federal law recognize as retaliation. As such, there was a recognition that this Policy may lead to confusion on the part of both alleged victims of retaliation and the varied entities, both inside and outside of the Department, who investigate such claims, as well as those who are accused of retaliation. Thus, the Working Group, under the direction of the CO of the Consent Decree Bureau and with the assistance of the CA's Office, has been working to modify the Policy to more closely parallel applicable retaliation laws and to avoid causing further confusion to all involved in these matters. Several drafts of this revised policy have been circulated, and we anticipate a revised policy being submitted for Commission review in a few months.

Finally, since the issuance of the First Report, the CO of PSB has worked to modify how complaints of retaliation are investigated. To begin with, it has been the OIG's experience that PSB is ensuring that all retaliation complaints brought to their attention are resulting in the initiation of personnel complaint investigations, and such cases are being assigned to a group of investigators (I/O's) selected for their understanding and appreciation as to the issues surrounding these cases. Indeed, these I/O's are seeking the input of the OIG during their investigations to ensure that issues of concern to the OIG are being addressed in the investigations. Moreover, retaliation complaints involving the same unit, area, or command are being assigned to the same I/O, which may assist the I/O, and ultimately the adjudicator, in evaluating whether there are systemic problems or other issues in a particular division that may require more immediate action and attention while the investigations are ongoing. Along those lines, the CO of PSB has been working with the Command Staff over the involved areas and divisions, with the input of others including the OIG, to address these workplace issues while the investigations are pending. We have been pleased to see swift action as a result of PSB's involvement. In some instances, new supervisors and COs have been brought in to evaluate and address workplace issues, doctors from BSS have been consulted, and off-site retreats and other efforts to improve the workplace have been implemented.

In this Second Report, we again focus on the retaliation investigations themselves, and we have made several additional recommendations. We have also taken this opportunity to revisit and, where necessary, fine-tune the recommendations from our First Report.

II. Methodology

a. Selection of Population

Paragraph 92 of the Consent Decree (CD) envisions an evaluation of the Policy and its implementation on an annual basis after the initial review. Since the First Report was

dated February 12, 2004, during discussions with the Independent Monitor (Monitor), the Monitor agreed that the OIG would submit its next report by February 12th of 2005, and that the OIG would review retaliation complaint investigations closed during an entire year's period. Because the OIG needed to select cases for review several months in advance of the February deadline, in order to allow for sufficient time to obtain the files, complete matrices, and order and review tape-recorded interviews, the OIG determined that it would not be able to review cases closed after the Third Quarter of 2004 (ending September 30, 2004). Thus, the OIG selected for review all cases closed between the Third Quarter of 2003 and the Third Quarter of 2004 (the Period).² While we recognize that utilizing this time frame to select the population of cases to review would necessarily involve the review of older cases, we believed we had to utilize this population in order to meet what we understood to be the Monitor's expectations for compliance.

Using this time frame to obtain our population, OIG staff utilized CIS to generate a list of all cases in which at least one allegation of retaliation was closed during the Period (List 1), regardless of adjudication.³ We found there to be 35 such cases, listed in Appendix A hereto, including five cases we had previously reviewed during the First Report. Moreover, two cases closed during the Period, **CF Nos. 02-0812** and **02-4568**, were not included on List 1 because the employees' allegations of retaliation, as listed in the accompanying Claims for Damages (CFDs) filed by the employees, were neither framed nor adjudicated by the Department. Because, however, the complainants in each case had initially alleged retaliation, and because the OIG was already monitoring these two cases, we included these two additional cases in our review.

Thus, our initial sample size for the Period was 37 cases. Of those 37 cases, five were excluded from review because they were reviewed in connection with the First Report. Another six⁴ of the remaining 32 cases were excluded from further evaluation when a cursory review revealed that the complainant was not a former or current Department employee, but rather a citizen claiming retaliation by the accused employee(s).

² Five cases we reviewed in the Last Report also appeared on List 1 as having been closed during the Period: CF Nos. 02-2705, 01-5363, 01-3834, 01-3579, and 01-5250. The OIG believes the explanation for this overlap is that in the year between the OIG's two Retaliation Reports, the Department had changed the way and the point at which it closes cases administratively within the Complaint Information System (CIS). Previously, the Department would not close a case in CIS until after it had been sent to the OIG and after the OIG had returned it. In late 2003, the Department changed this practice, and now cases are closed in CIS prior to being sent to the OIG for review. All five cases we reviewed in the First Report were closed in CIS after they had been initially sent to the OIG for review the last time around. The OIG did not return these cases to IAG until after the First Report was completed during the First Quarter of 2004. Thus, when the OIG attempted to assess through CIS all retaliation cases that had been closed during the Period, these five cases were included in the list of 35 generated by CIS.

³ Since the Department began recognizing Retaliation as a separate category of misconduct, not one allegation of employee versus employee retaliation has been sustained. There have, however, been a few allegations of retaliation sustained against Department employees for "retaliating" against members of the public, for example, by issuing retaliatory citations. Moreover, as will be discussed in more detail below, of the cases reviewed by the OIG during the Period, four retaliation cases were closed as Out of Statute and another eight were closed under various Non-Disciplinary dispositions.

⁴ CF Nos. 99-2671; 01-5052; 02-3575; 02-3891; 03-0519; and 03-4326.

Moreover, as will be discussed more below, of the remaining 26 cases, another four cases⁵ were closed out as Out of Statute (OOS), two of which contained no investigation, and two of which contained incomplete investigations.

Of the remaining 22 cases, another eight⁶ cases generated in response to the initiation of litigation were closed under one of several Non-Disciplinary (ND) classifications with little or no investigation that we could determine as having been done after the related litigation was either settled or dismissed. Of the remaining fourteen cases, further review of the underlying complaint in four cases⁷ revealed that though they involved allegations made by Department employees, the allegations asserted by the complainant, if true, would not constitute retaliation as currently defined by the Department.

Of the remaining ten cases, three⁸ additional cases were referred to the Ombuds with little or no investigation having been conducted prior to a determination being made that the matter was the appropriate subject of Ombuds review.

As a practical matter, during the Period there were only seven full-length personnel complaint investigations related to employee allegations of retaliation (though, in one case – **CF No. 02-0812** -- allegations of retaliation as expressed by the complainant were not properly framed in the investigation). We believe these cases warranted further analysis, as they raised similar issues discussed throughout this Report, and are thus discussed in more detail in Appendix B. Appendix B is divided between the five investigations with which the OIG had concerns and the remaining two investigations which we believed were properly conducted.

b. Evaluation of Investigations and Review of Tape-Recorded Interviews

The OIG conducted an in-depth review of all 25⁹ investigations that either were not reviewed by the OIG in the First Report or did not involve complaints by members of the public. In conducting this review, a matrix was utilized by the first and second level reviewers. This matrix contained 52 questions designed to evaluate the quality, completeness, and findings of a completed complaint investigation, including whether:

⁵ CF Nos. 98-2105; 99-4523; 00-4128; and 02-5032.

⁶ CF Nos. 02-4568; 03-0475; 03-0553; 03-0712; 03-0779; 03-0890; 03-1436; and 04-1409.

⁷ CF Nos. 03-2961; 01-5463; 04-1627; and 03-0702. In CF Nos. 01-5363 and 03-0702, OIG staff listened to the available tape recorded interviews to verify that the allegations as stated on the complaint face sheet and within the body of the complaint investigation truly did not allege retaliation as currently defined by the Department's Policy. Another one of these cases, CF 03-2961, did not have any tape recorded interviews, but the complainant's allegations were limited to allegations of discrimination based on a medical condition, with no indication of any retaliatory acts. The fourth complaint, CF No. 04-1627, was bifurcated from another complaint reviewed during the Period, CF No. 04-1377, in which the complainant did assert allegations of retaliation. However, the OIG's review of the tapes in CF No. 04-1377, revealed that the complainant's claims against the accused in CF No. 04-1627 were limited to allegations of discrimination based on the complainant's light duty status, without accompanying claims of retaliation. Moreover, there were no additional taped interviews conducted in connection with CF No. 04-1627, as the investigator relied on the taped interviews that had been conducted in CF No. 04-1377.

⁸ CF Nos. 01-5140; 02-0784; and 03-3168.

⁹ For the reasons outlined in footnote 7, a matrix was not completed in CF 04-1627.

the rationale was supported by the evidence, necessary investigative steps were taken, and any significant investigative delays were justified. The matrix also included questions regarding whether tolling of the administrative statute of limitations (SOL) was or could be properly invoked, at what point it was invoked, and whether any investigation was done during the course of the tolling.

Furthermore, the matrix included questions regarding whether any investigative efforts were made prior to a case going OOS and whether the case could have otherwise been tolled prior to going OOS. Moreover, the matrix included questions assessing whether the investigation revealed the existence of workplace issues that could have led to the perception of retaliation and whether the adjudicator recognized such issues and recommended any remedial steps.

Of the 14 cases that were completed within the Period and that were not closed out as OOS¹⁰ or ND due to related litigation, the OIG reviewed all interview tapes of all identified witnesses in eight¹¹ of these cases. In a ninth case, **CF No. 02-0812**, because the case was not handled as a retaliation investigation, the OIG reviewed the tape-recorded interview of the complainant to assess whether the complainant actually asserted allegations of retaliation during the interview and the propriety of the I/O's decision not to form retaliation allegations. In the remaining five¹² cases, no tape recorded witness interviews were identified in the complaint files.

In reviewing the taped interviews in these cases, the OIG utilized a matrix containing 17 questions designed to evaluate whether: (1) the interviews were properly paraphrased to include all relevant testimony; (2) all allegations raised by the complainant were properly formed; (3) any additional allegations raised during the interviews were addressed in the completed investigation; (4) the interviews themselves were conducted properly (i.e., whether the interviewer used inappropriate or leading questions, or adopted a hostile or inappropriate tone with the witness); and (5) logical follow up questions were asked by the interviewer. No secondary level review was conducted for the tape reviews.

c. Review of Litigation Matters

In connection with the First Report, the OIG reviewed seven litigation matters involving allegations of retaliation in which a verdict was reached or the case settled for \$150,000 or more. Toward the end of our completion of the First Report in late 2003, we learned that an additional nine retaliation lawsuits had been settled for an aggregate amount of \$6 million. We conducted a cursory review of those latest litigation matters and determined that the Department's handling of those matters in general raised the same issues we had identified in the earlier lawsuits we reviewed. As a result of our review of these

¹⁰ Given the time constraints in preparing this Report and other concurrent responsibilities placed on the OIG's limited staff, the OIG did not conduct a review of the tape recorded interviews in the OOS cases since the adequacy of the paraphrasing and the completeness of those interviews would be of concern mainly if such interviews and the paraphrased versions thereof had been incorporated into a completed investigation relied upon by a CO in adjudicating the complaint.

¹¹ CF Nos. 01-0715; 01-5463; 03-1255; 01-5140; 03-0702; 03-0912; 03-3454; and 04-1372.

¹² CF Nos. 02-0784; 02-4007; 03-2961; 03-3168; and 04-1627.

litigation matters as well as the complaint investigations we reviewed in the First Report, the OIG made a number of recommendations designed to help prevent recurrences of some of the issues that may have contributed to the large settlements and verdicts.

In preparation for this Second Report, the OIG asked to review litigation matters involving retaliation that had been closed since the First Report. In September of 2004, the OIG reviewed these recently settled matters. What our review revealed was that these litigation matters had been initiated prior to the completion of the First Report and the recommendations therein. Moreover, given that litigation is often initiated well after the events at issue began, a few of the litigation matters we reviewed involved actions dating back to 1999, and in one case, back to 1996. Thus, given that the acts identified in most cases had occurred prior to the issuance of the First Report and that the cases had settled less than one year after the adoption of the recommendations in the First Report, we believed it would be unfair to hold the current administration accountable for actions that had occurred prior to the initiation of the current effort by the Department to implement the OIG's recommendations in the First Report.

Instead, we decided to assess how the Department was implementing Recommendation Number 9 from the First Report, which provided as follows: "A copy of every retaliation claim for damages, lawsuit, and complaint filed with another agency should be forwarded to PSB and a personnel complaint initiated." Given that we at the OIG are not the custodian of records for either CFDs, civil lawsuits, and/or Department of Fair Employment and Housing (DFEH) and Equal Employment Opportunity Commission (EEOC) complaints, we relied on other sources to attempt to verify how well the Department was doing in implementing Recommendation Number 9. To begin with, we asked the staff from City EEO to print out a list of all DFEH and EEOC claims they had received from the two agencies between July 1, 2003, and September 30, 2004, which contained allegations of retaliation by current or former Department employees. They provided the OIG with a list¹³ (List 2) of such cases. Using CIS and our own internal databases, OIG staff ran the names of the employees on List 2 through these systems to determine if any related personnel complaint investigations had been initiated. The OIG found only one agency claim filed during the Period that did not result in a "related"¹⁴ personnel complaint being generated by the Department.¹⁵ We understand that PSB has been working with various Department entities (e.g., RMG, Personnel Group, PCDU) as well as with other City Departments (e.g., City EEO, the CA) to establish protocols to ensure that PSB is timely notified of all CFDs, lawsuits, and EEOC and DFEH claims alleging retaliation so that PSB can initiate its own investigation in a timely manner.

¹³ Due to confidentiality concerns cited by the City EEO, List 2 contained minimal information. Moreover, due to those same confidentiality concerns, City EEO staff asked that we not share List 2 with PSB. This issue will be discussed in more detail below.

¹⁴ As mentioned above, List 2 contained no information as to the complainant's specific allegations, other than whether the claim involved retaliation alone or retaliation combined with unlawful discrimination.

¹⁵ The OIG is aware, because of prior contacts with the complainant, that the complainant previously initiated a complaint of discrimination with the DFEH (which determined no investigation was warranted) in 2001 and that a personnel complaint was initiated in connection with complainant's DFEH claims. Moreover, though our records reveal that the complainant has not worked for the Department since August of 2002, the List indicates that complainant initiated an EEOC complaint for retaliation in July of 2004.

A related issue we discovered during our evaluation¹⁶ of how the City, as well as the Department, investigate DFEH and EEOC complaints is that there is some mutual concern on both the Department's part as well as on City EEO's part, as to how such cases are investigated and how information is exchanged between the two entities. When an employee files a complaint with the DFEH or the EEOC, City Personnel, not the Police Department, is initially served with a copy of the complaint from the respective agency. Moreover, it is the City EEO, *not the Department or PSB*, that is charged by the DFEH and EEOC with conducting the initial investigations into the employee's claims. It is our understanding that it is the responsibility of the Department's EEO Coordinator, working with staff from PCDU, to coordinate with and assist the City EEO in conducting their initial investigations, which must occur usually within 60 days of receipt of the agency complaint, including making witnesses available and gathering the documents requested by the City EEO investigator. However, it is unclear whether copies of all agency claims make it to the Department EEO Coordinator, since it is our understanding that City EEO sends these claims first to the COP with either a copy to the Department EEO Coordinator or with the understanding that the COP will forward them to the EEO Department Coordinator. It is also unclear how such claims eventually make it to PSB.

In addition, we believe that there may be a lack of understanding on all sides as to what documents may be shared amongst the various entities, the procedures that must be followed to obtain such documents, and from where or from whom in the Department City EEO investigators must obtain such documents. Moreover, there appears to be a lack of understanding as to whether the City EEO investigator must comply with both the Public Safety Officers' Procedural Bill of Rights (POBR) and the Department's established protocols in conducting interviews (e.g., compelling the employee to give an administrative statement, allowing the employee to have a representative present, taping the interviews), and whether a Department supervisor can order an employee to participate in a City EEO interview if the EEO investigator does not comply with the POBR. There is also the related issue of parallel investigations, including the possibility of parties being subjected to two separate interviews, one with City EEO and one with PSB, each with a slightly different purpose. Moreover, though the City EEO may send a general summary of its findings to the Department (which may or may not make its way to the PSB investigator handling the related complaint investigation), currently City EEO does not share its entire investigation with PSB, even though PSB may be investigating similar issues, and even though City EEO may share its entire investigation with the EEOC or the DFEH.

We have raised these various issues with the Working Group, and we are in the process of arranging further meetings to discuss and evaluate how better to coordinate the retaliation investigations being conducted by the City EEO and by PSB.

¹⁶ OIG staff has met with and discussed these issues with the Department's EEO Coordinator, the head of the City EEO, staff from PCDU, as well as others in the Department who have been involved in the processing of outside agency claims.

III. Findings

a. Cases Closed As Out of Statute

In four of the cases the OIG reviewed, the personnel complaint was closed as OOS without a final adjudication of the complaint being made. In two of the complaints, (CF Nos. 99-4523 and 02-5032), it is clear that interviews were conducted but the investigation remained in draft or rough form. The face sheet for CF No. 99-4523 indicates that the report of misconduct was received by the Department on November 16, 1999. The complaint file contains what are labeled as "rough" paraphrased statements made during the course of seven interviews by PCDU staff with the complainant only, between October 18, 1999 through February 2, 2000. However, the investigation was never completed, and the file was closed December 19, 2003 as OOS with no explanation given for four years of inactivity. The handling of CF No. 02-5032 is more troublesome and is discussed in more detail in Appendix B to this Report. Among other things, in that case, well over two years passed between the time the complainant initially made allegations of retaliation, and when the complaint was actually investigated. Moreover, it appears that the complaint may have been initially cancelled by the area captain, with input from the lieutenant whom the complainant had initially accused of retaliation.

In two other complaints, CF Nos. 00-4128¹⁷ and 98-2105, the files we reviewed contained no investigation. However, the Case Progress Report for CF. No. 98-2105 contains an entry dated April 21, 1999, which indicates that the original complaint face sheet, investigation, Letter of Transmittal (LOT), addenda, and other items were sent to IAG for review. None of these documents are contained in the file we reviewed. Moreover, there is an entry dated May 5, 1999, indicating a supervisor's "numerous concerns" as outlined in correspondence not included in the file.

Again, we recognize that all of the above are older cases which were inherited by the current administration. Moreover, we understand that the Department, and especially PSB, have made a commitment to ensuring that all future retaliation cases are closed within the SOL, and we do not anticipate this being an issue in future reports.

b. Cases Closed as Non-Disciplinary Or Withdrawn by the Chief of Police Due to Settlement/Dismissal of Related Litigation.

During our review, we noted several instances where complaint investigations alleging retaliation appeared to have been closed out after the underlying lawsuit which spawned the investigation was either dismissed or settled. In each of these eight¹⁸ cases, we could find no evidence of any complaint investigation into the allegations nor could we find any evidence of any dispositive findings as to the allegations of retaliation by the court. This raises concerns in light of the Consent Decree requirement that civil suits or CFDs

¹⁷ The fact that the claims of retaliation against this CO were never investigated are troubling because the OIG is aware of one recent complaint accusing the same CO of retaliation, and another complaint accusing a different supervisor under this same CO's command of retaliation.

¹⁸ CF Nos. 02-4568; 03-0475; 03-0553; 03-0712; 03-0779; 03-0890; 03-1436; and 04-1409.

involving Department employees must be investigated (Paragraph 93), and that such investigations must comport with the procedures outlined in Paragraph 80, including tape recording of interviews and collecting and preserving all evidence. Moreover, in light of the serious nature of the allegations, the OIG believes these cases warrant some investigation or at a minimum a detailed analysis justifying the closing out of a particular case without any investigation.

In six of these cases, some time after the complaint was dismissed and/or settled, the complaint investigation was either closed as ND or, in another two cases, classified as Withdrawn by the Chief of Police (WCOP).¹⁹ However, in all of these cases, we could find no documentation of any investigation having been conducted. In five²⁰ of the eight cases, our research revealed that there was a monetary settlement, ranging from \$25,000 to \$246,000 (including attorney's fees, compensatory damages to the plaintiff and back pay). In none of the eight cases could we find evidence of any personnel complaint investigation having been conducted.

CF Nos. 02-4568 and **04-1409** were both generated in response to CFDs initiated by the same complainant who alleged that complainant was discriminated against based on gender when complainant was accused of domestic violence and treated differently within the disciplinary system than complainant's former spouse whom complainant had also accused of domestic violence. The complainant alleged that, as a result of complaining about this disparate treatment, complainant was retaliated against by, among other things, being directed to a BOR, and later terminated. The settlement of the related litigation involved providing the complainant back pay for period from which the complainant had been discharged from the Department until the complainant could retire with a pension (less than a year we understand). However, we could find no evidence of any complaint investigation having been conducted into either complaint. Both complaints were closed as WCOP. Indeed, **CF No. 02-4568** was initiated in November of 2002 but was closed without any apparent investigation in May of 2004.

In another three cases, **CF Nos. 03-0890, 03-0779, and 03-0553**, all closed as Non-Disciplinary, no monetary settlement was reached. Rather, the cases were dismissed voluntarily by the complainants in response to the City's claims that the cases were barred by the SOL. Although the City avoided liability in these cases on technical grounds, no apparent complaint investigation was conducted to determine whether misconduct did in fact occur.

Three cases²¹ were closed by the Department as Non-Disciplinary -- "Resolved Through Alternative Complaint Resolution." The Alternative Complaint Resolution (ACR) process was instituted by the Department as a result of the revision of the complaint system pursuant to Special Order 1 (SO1), dated January 1, 2003, and was designed as a

¹⁹ These two cases, CF Nos. 02-4568 and 04-1409, involved two different CFDs filed by the same complainant. One CFD was filed against the complainant's immediate COs when disciplinary actions were first initiated against complainant. The second CFD was filed against a different CO who was responsible for complainant's ultimate termination which complainant claimed was retaliatory.

²⁰ CF Nos. 03-0712; 02-4568; 04-1409; 03-0475; and 03-1436.

²¹ CF Nos. 03-0779; 03-0553; and 03-0712.

way to allow supervisors who have been trained in or have reviewed the Department's training materials on ACR, to resolve minor complaints alleged by the public in an expedited fashion. (See SO1, at p. 8). Moreover, the ACR system as outlined in SO1 contemplates an actual face-to-face mediation between the complainant and the accused after the complainant has agreed to have the complaint resolved through ACR and has signed an ACR acknowledgement form, which is supposed to be included in the completed investigation.²² SO1 also indicates that the "presence of outside parties is discouraged," including representatives and legal counsel, during the ACR process. The OIG does not believe that these types of cases were contemplated for closure through the ACR process. First, retaliation is not a minor complaint. Second, these cases deal with internal matters and do not involve the public. Finally, there did not appear to be any evidence of any face to face mediation of the parties in these cases as contemplated by the ACR process.

Two²³ more cases were closed out as ND -- "Employees Actions Could Have Been Different." Both of these cases involved monetary settlements. One case settled for \$150,000, and in the other case, the total monetary settlement (including attorney's fees, damages to the complainant, and back pay) totaled more than \$246,000. Though the high ranking supervisor in **CF. 03-0475** is no longer with the Department, both supervisors in **CF 03-1436** are still with the Department. However, the complaint file contained no evaluation of whether these supervisors' actions merited discipline. It also contained no evidence of any evaluation as to whether training, counseling, Notices to Correct Deficiencies, or workplace assessments would have been appropriate to prevent similar claims or perceptions of retaliation from recurring in the future.

Moreover, the apparent failure in **CF No. 03-1436** to evaluate whether there existed possible problems with either accused's supervisory skills is especially concerning given that one of the accused had been accused earlier in a complaint (CF No. 97-1496) which also involved allegations of poor supervisory judgment. That complaint was sustained, and not only did the accused receive a significant penalty in connection with that earlier complaint, but the accused was also demoted in rank from a higher supervisory rank.

The related litigation in another case, **CF No. 03-0890**, was dismissed because the plaintiff's civil claims were barred by the statute of limitations. The lawsuit alleged that the complainant first reported misconduct (involving a supervisor reporting to work with alcohol on his/her breath and the unlawful use of confidential Department information) to complainant's supervisors in 1993. The complainant also claimed to have been the victim of racially-motivated remarks and discrimination from 1994 to February 1996. Plaintiff's lawsuit alleged that Department employees retaliated against the complainant by, among other things, imposing unreasonable restrictions, refusing to pay overtime, denying vacation requests, and making false accusations of misconduct and imposing improper discipline.

²² None of these three files we reviewed contained an ACR acknowledgement.

²³ CF Nos. 03-0475 and 03-1436.

The Department closed the case as Non-Disciplinary -- "Demonstrably False," apparently due to Department's position that the plaintiff's deposition testimony indicated that the plaintiff "did not suffer any wrongful conduct at any time" and that the plaintiff "was not the victim of discrimination, harassment, or retaliation." In making this determination, the Department appeared to rely on the following deposition testimony by the complainant/plaintiff as referenced in a letter, contained in the file, from the City's attorney to the plaintiff's counsel requesting that plaintiff's counsel dismiss the case voluntarily:

- Q. Let's start with your time working at [area omitted] records, OK?
- A. Okay.
- Q. From September 28, 1997 through May 6, 2000, right that was the time frame when you were there?
- A. Yes.
- Q. Did anybody discriminate against you there?
- A. Not to my knowledge, no.
- Q. Did anybody harass you there? . . .
- A. No.
- Q. Did anybody . . . retaliate against you while you were there?
- A. No.

The Complainant testified that no discrimination, harassment, or retaliation occurred between September 28, 1997 and May 6, 2000. Using this testimony, the Department found that all of complainant's allegations were Demonstrably False. In a memorandum dated August 16, 2004, the Department noted that "[complainant] was deposed and testified that [complainant] did not suffer any wrongful conduct at any time."

However, a review of the above-referenced deposition testimony as compared to the allegations raised in the civil lawsuit reveals that this is not the entirety the case. The deposition testimony revealed that the complainant acknowledged no discrimination or retaliation occurred from September 28, 1997 through May 6, 2000. However, in paragraph 17 of civil lawsuit, the complainant alleged that between May of 1994 and February of 1996, identified Department employees made racially derogatory comments toward complainant. Moreover, the next paragraph stated that "[s]ince the early 1990s and continuing today, plaintiff has been subjected to discrimination based on . . . race, ethnicity, and national origin." Thus, plaintiff's deposition testimony supports only that plaintiff suffered no wrongful conduct between September of 1997 and May of 2000, but it does not bar complainant's claim of discrimination from 1994 to 1996. Without further investigation into these earlier claims, we believe the decision to adjudicate *all* of complainant's claims as Non-Disciplinary/Demonstrably False was not justified by the contents of the file we reviewed.

As outlined above, we are concerned that in the above cases, we found little evidence that an appropriate complaint investigation was conducted either while the litigation was pending or after the litigation was concluded. While we are aware of the possibility that during the course of litigation, information may be discovered which either supports or undermines the complainant's claims, and while we would not necessarily take issue with the Department incorporating such information in its related complaint investigation,

such information was not included in seven of the eight cases we reviewed. We are concerned that were this apparent failure to investigate complaints arising from litigation which was subsequently settled to become a continued practice, it would mean that litigation could insulate an accused officer from any adverse employment action (discipline, demotion, transfer, etc.) or essential counseling or training, which might otherwise have been warranted had a proper investigation been conducted. As such, ironically, employees who are accused of retaliation in connection with *lawsuits*, if such lawsuits are dismissed or settled (regardless of amount), could fare better than employees who are accused of retaliation solely in connection with the filing of a personnel complaint for which no accompanying litigation has been initiated.

Recommendation:

To address the above concerns, the OIG makes the following recommendations:

1. The Department should re-evaluate the use of the Non-Disciplinary classification to close retaliation complaint investigations with related litigation solely because the litigation is settled or dismissed unless a properly completed investigation reveals that the case properly qualified for Non-Disciplinary classification.

c. PCDU Investigations

During the course of our analysis, we also realized the pitfalls of having another Department entity, such as PCDU, conduct a similar and/or parallel investigation into allegations of retaliation while PSB is also conducting their own investigation. This issue is of further concern in light of what we understand to be PCDU's current practice of not sharing their investigations with PSB.

In **CF 03-1436**, the two *non-tape-recorded* conversations with representatives from City EEO and PCDU as detailed in chronology entries in the file indicate that neither entity found credence to the complainant's claims of *discrimination*, though it is not clear whether PCDU conducted its own investigation or whether it relied on City EEO's findings. Moreover, the handwritten chronology entry detailing the conversation with the City EEO investigator indicated that the investigator found that it "was not the case" of racial discrimination." There is no indication in the chronology as to whether *retaliation* allegations were also addressed by City EEO. Further, the summary report from City EEO included in the file indicates that City EEO focused its investigation on the plaintiff's claim of racial discrimination, not retaliation. Moreover, it appears that in deciding to close its case (including the complainant's allegations of retaliation), the City EEO appeared to rely on its belief that "Los Angeles Police Department Internal Affairs has reviewed the allegations"

However, PSB's "investigation" consisted primarily of these same summary findings by City EEO (addressing discrimination only) and on non-tape recorded conversations with staff from PCDU and City EEO documented informally in the investigative chronology. Moreover, the PSB investigator was denied access to PCDU's files, and instead was

provided only the summary findings from City EEO. Such additional documentation could have helped to clarify whether further investigation by PSB into complainant's allegations of *retaliation* was merited. This distinction is important because an employee can still be legally retaliated against for complaining about alleged unlawful conduct, even if the conduct is later determined to be lawful. *See, e.g., Akers v. County of San Diego*, 95 Cal. App. 4th 1441 (2002); *Trent v. Valley Elec. Ass'n*, 41 F.3d 524 (9th Cir. 1994). Further, even if the complainant might have been unavailable after the settlement of the related litigation, there was no indication that either of the accused employees or other possible witnesses could not have been interviewed in connection with PSB's investigation.

A similar problem occurred in **CF. No. 02-4007**, in which the complainant alleged both sex discrimination and retaliation. The short form LOT for IAG's investigation concluded that PCDU conducted an investigation and determined that no misconduct had occurred. Again, this conclusion was based on a non-taped discussion with staff from PCDU who, according to the LOT, claimed that all of the complainant's allegations had been addressed. However, because PSB was unable to obtain PCDU's investigation due to PCDU's claims of confidentiality, it is not included in the file and there is no way for either the complaint adjudicator or the OIG to verify the grounds upon which PCDU based its determination or that issues of *retaliation*, as opposed to discrimination, were actually addressed by PCDU. Relying solely on this conversation with PCDU staff, PSB closed its own investigation. By closing its investigation with a short form LOT and reliance on PCDU's undocumented findings, PSB missed the opportunity to evaluate workplace concerns raised by the complainant, including allegations of favoritism, disparate treatment, improper sexual discussions in the workplace, and inadequate training of detectives. The Case Progress Report contains one entry indicating that the Ombuds Environmental Assessment Unit was consulted about PSB's intention to refer the matter to them. However, there is no confirmation in the investigation that this was ever done, and indeed the case was closed as Non-Disciplinary without an indication of any referral to the Ombuds.

We believe PCDU's current practice of not sharing their investigations with PSB needs to be re-evaluated. In many cases, PCDU may already have obtained information which might shed light on the allegations being investigated by PSB. We are also unaware of any legal precedent that would preclude PCDU as a general practice from sharing the contents of their investigations into discrimination and retaliation claims with IAG, especially in light of CD Paragraph 93(b), which states that IAG shall investigate claims of, among other things, (ii) invidious discrimination and (x) any act of retaliation or retribution against an officer or civilian. We believe that, at a minimum, the sharing of such information would benefit all involved parties.

Recommendation:

2. The Department and PCDU should collectively re-evaluate PCDU's current policy of not sharing its investigations with PSB, including analyzing whether this policy is both legally sound and consistent with CD paragraphs 93(b) (ii) and (x).

d. Tolling Provisions

Normally, the administrative SOL to investigate and impose discipline on an employee accused in a personnel complaint investigation is one year. However, this period may be extended if the case qualifies for tolling of the SOL under one of several exceptions in both California Government Code § 3304(d) and Los Angeles City Charter §1070 (c). One exception provided by both municipal and state law occurs when “the investigation involves a matter in civil litigation where the [accused] is named as a party defendant, the one-year time period [for imposing discipline] shall be tolled while that civil action is pending.” Cal. Gov’t Code § 3304(d)(6); City Charter § 1070(c)(6).

However, it appears by the actions of the Department in the following five cases that there may not be a clear understanding as to how the tolling provisions in the City Charter and the Government Code operate, as least as to those provisions involving tolling for related civil litigation. We acknowledge that the OIG may have contributed to a delay by the Department in requesting tolling in four²⁴ of the following investigations as there was some confusion between the OIG and the Department as to who would investigate these four complaints, and several months passed before a final determination was made that the Department, and not the OIG, would investigate these complaints.

CF No. 03-0890

The lawsuit was filed on August 16, 2002. The City and the named individual defendant were served by mail on August 23, 2002, and the personnel complaint form was generated on March 28, 2003, the face sheet of which we believe improperly²⁵ lists the March 28, 2003, date as the date that the matter was reported to an uninvolved supervisor. According to the court docket, three months later, on June 19, 2003,²⁶ the case was dismissed by the court upon mutual agreement of the parties. Thus, using the date the civil case was resolved as the date upon which the statute began running, the statute would have expired one year later.

However, the file contains a request dated March 19, 2004, to toll the complaint “pending the conclusion of the litigation.” At this point, the litigation had already concluded and, thus, the statute could no longer be tolled due to the existence of litigation and was set to expire in June of 2004. Moreover, when a request was made to close the case as ND on August 16, 2004, the complaint was already OOS.

CF No. 03-0779

This lawsuit alleged that the plaintiff’s captain ordered him and others to violate traffic laws while en route to radio calls, falsely report that they arrived at the scene before they actually arrived, and to train others to do the same, all to improve response time statistics.

²⁴ CF Nos. 03-0553; 03-0712; 03-0779; and 03-0890. A note in CF No. 03-0553, dated February 9, 2004, indicates that these four complaints were being returned from the OIG to PSB for re-assignment.

²⁵ The court docket indicates that the City and the individual defendant filed a stipulation to extend time to answer the complaint on September 12, 2002. By that point, the civil lawsuit should have been processed through RMG, and thus, arguably the matter should have come to the attention of an uninvolved supervisor in RMG. The question remains why it took another six months for the complaint to be generated.

²⁶ A memo in the file indicates that the lawsuit was resolved on April 3, 2003.

The plaintiff claimed to have reported this misconduct but no action was taken. When the plaintiff reported this and other misconduct, he/she claims to have been subjected to increased scrutiny, suspension for false misconduct charges, arbitrary rules, demotion in paygrade, and improper discharge. The plaintiff was originally part of a class action lawsuit that was filed in February of 2001. However, when class action status was denied, the plaintiff filed an individual suit on August 16, 2002.

The Department did not initiate a personnel complaint against the parties named in the plaintiff's lawsuit until March 20, 2003. At this point, all but one of the employees named within the plaintiff's civil complaint were no longer with the Department. Two weeks after the initiation of the personnel complaint, the plaintiff agreed to a dismissal of the lawsuit on April 2, 2003, due to the City's claims that the SOL for plaintiff's legal claims had expired prior to the filing of the earlier class action suit, and that the superior court's earlier upholding of the plaintiff's termination barred any subsequent action regarding the merits of the termination.

However, on March 19, 2004, a request was made to extend the statute "pending the conclusion of litigation," though the docket in the file reveals that the litigation had already been resolved. Thus, when the case was closed as ND/Resolved Through ACR on August 17, 2004, it was already OOS.

In **CF No. 03-0553**, the request to toll was made after the SOL had expired. This case arose from a lawsuit filed by a former officer against an individually named CO, and unknown defendants, alleging that the plaintiff was given an unlawful order from a CO to cease making arrests of persons described as "non-violent PCP suspects." The plaintiff alleged that the plaintiff published an article about the misconduct, was placed under surveillance and accused of being under the influence of a non-prescribed drug. As a result of reporting misconduct, the plaintiff was subjected to unwarranted surveillance, charged with fabricated allegations of misconduct, and subsequently terminated.

Though it is not clear when the lawsuit was filed, the City's attorneys in this case were served with the lawsuit on November 12, 2002. A personnel complaint was not initiated until February 25, 2003. According to a note in the file, the parties agreed to a dismissal of the case on November 27, 2002, and, thus, the administrative SOL would have expired in November of 2003. However, a request for tolling was made on March 19, 2004, which stated that the litigation was still pending. On August 18, 2004, a request was made to close the case out as Non-Disciplinary – Resolved Through ACR, even though the complaint was OOS at that point.

CF No. 02-4568 was initially generated in response to the filing of a CFD which the City Clerk's Office received on September 25, 2002. On November 7, 2002, a complaint face sheet was initiated against only three of the seven employees named in the CFD (discussed further below). At this point, the administrative SOL for these three employees would not have tolled unless and until litigation naming them was initiated, and, absent tolling, would have expired in November of 2003. On October 6, 2003, a request to toll the statute was made, due to the fact that the matter "is currently in civil

litigation . . . [naming] the involved employees . . . as defendants . . .” However, this request provides no insight as to when the litigation was initiated and at what point the statute was tolled. Moreover, when the request was made on May 7, 2004, to close this case as WCOP due to the settlement of the litigation on March 14, 2004, there was no evaluation as to whether the case would have even been in statute at that point, because there was no evaluation as to when litigation was initiated.

CF No. 03-0712

The lawsuit alleged that the plaintiff witnessed a partner damage their patrol car. Although the plaintiff advised the partner to report the incident, the partner refused and enlisted others to repair the damage. The lawsuit alleged that the plaintiff advised plaintiff's supervisor about the collision who ordered plaintiff to lie about it. The plaintiff was later interviewed regarding the incident and concealed the supervisor's misconduct, allegedly after being advised by plaintiff's representative to conceal the misconduct or face retaliation. The plaintiff later reported the misconduct, and was then subjected to punitive action without a proper hearing, was transferred and eventually discharged, and effectively prevented from obtaining law enforcement work in the future.

The lawsuit was filed on August 16, 2002. Though the complaint file does not indicate when the City and the individual defendant were served with the lawsuit, a personnel complaint was not initiated until March 11, 2003, which is the same date the Department indicated the complaint was brought to the attention of an uninvolved supervisor. On March 9, 2004, a request to toll the SOL for the complaint was made, though a note in the file indicates that the parties had reached a settlement in the case on October 29, 2003. This correspondence “requested that the administrative statute date of the complaint investigation be extended past March 11, 2004 . . .” (one year after the personnel complaint was initiated). Again, the date the personnel complaint was initiated would no longer be relevant in calculating the statute date, given that the statute only began running once the litigation had been dismissed. Though this case was adjudicated on August 18, 2004 (within the new statutory period), it is notable because the handling of it reveals an apparent lack of understanding of how tolling operates.

We hope that the above cases represent isolated incidents, and we acknowledge that quite possibly delays on the part of the OIG in transferring these cases back to the Department for investigation may have contributed to the Department's decision to make last minute tolling requests in four of these cases. We also understand that the CA is currently working with Department Command Staff and I/O's to better educate them about how tolling operates. Indeed, OIG staff recently attended a training presented by personnel from both PSB and the CA's Office on tolling which we understand was modeled on similar training currently being provided to Department personnel who investigate and adjudicate complaints.

Recommendations:

3. The Department should ensure that both CO's and I/O's who investigate and adjudicate complaints are properly trained and educated as to the application of various

tolling procedures to the cases they investigate. Such training should include when tolling would begin, and in what circumstances it would end, as well as underscoring the need to communicate with other entities such as RMG to ensure that PSB is timely notified of both the filing and dismissal of CFDs and lawsuits so that personnel complaints can be promptly initiated, and the SOL for such complaints properly calculated.

e. TEAMS Reports

We found three²⁷ cases in which allegations of retaliation by identified employees raised by the complainant were not listed on those identified employees' TEAMS reports. In two of these cases, **CF Nos. 02-0812** and **02-4568**, as mentioned above, no retaliation allegations against any employees were ever formed or included on the employees' TEAMS reports, despite a clear indication from either the complainant's interview or a CFD that the complainant was making specific allegations of retaliation.

CF No. 02-4568

This complaint was generated following the filing of a CFD by an employee who alleged sex discrimination, retaliation for complaining about sex discrimination, and a hostile work environment. However, though the CFD stated allegations of retaliation against at least two CO's, and additional allegations of misconduct against other high-level supervisors and a Detective III, only the two CO's and the Detective III were named on the complaint investigation. Moreover, the TEAMS reports of all three employees reflect only allegations of Unbecoming Conduct.

CF No. 02-0812

This complaint was generated as a result of a CFD filed by a complainant who claimed both in the CFD and during a tape-recorded interview that complainant was the victim of retaliation for reporting sexual harassment, defamation, false allegations of misconduct, and threats to write more traffic citations. As a result of these complaints, complainant was denied family illness leave, re-assigned to undesirable locations, and ultimately administratively transferred. The I/O did not frame any allegations of retaliation in the investigation. Nor were there any retaliation allegations framed in the LOT. Consequently, none of the TEAMS reports of the employees accused by the complainant of retaliation reflect these allegations. Rather, allegations of Neglect of Duty and Unbecoming Conduct were framed against three of the employees named by the complainant. Moreover, no allegations of any type against either a sergeant or a captain accused by the complainant of retaliation were ever framed. The OIG had concerns with this entire investigation, as described more fully in Appendix B.

In **CF No. 99-4523**, though the case was adjudicated as OOS, the complainant was interviewed on multiple occasions by staff from PCDU. The case file includes

²⁷ In another case, **CF 98-2105**, though the case was closed as OOS with no investigation having been done, the complainant's allegations of retaliation and failure to report misconduct were properly reflected on two employees' TEAMS reports. However, the allegation of failure to report misconduct against a third supervisory employee identified by the complainant in the face sheet was not listed on that third employee's TEAMS. Indeed, no reference whatsoever is made to this complaint on this CO's TEAMS.

paraphrased statements denoted as “rough” from these interviews, as well as 39 proposed allegations (apparently based on the interviews with the complainant) against multiple employees. However, though these allegations include claims of retaliation against two supervisors, allegations of retaliation appear on only one of their TEAMS reports.

The fact that the TEAMS of some employees who were clearly accused of retaliation by the complainant did not include retaliation allegations should be of concern. To begin with, all of the cases we reviewed in which retaliation allegations were not properly reflected on the accused employees' TEAMS involved supervisory employees, including CO's. Even though unsustainable complaints of retaliation cannot be used for evaluation or promotional purposes, it is important to know when adjudicating a subsequent retaliation complaint whether a supervisor had previously been accused of retaliation, as multiple retaliation complaints against the same supervisor, regardless of the outcome of such complaints, may portend an issue of poor supervisory skills deserving of further attention. Moreover, the Department's, the OIG's, and the Commission's efforts to truly assess how effectively the Department is handling retaliation concerns are undermined if certain cases never even make it to our radar for review because the retaliation allegations were never formed, or were improperly classified either within the investigation itself or on the employees' TEAMS reports.

f. Department Investigations Prior to Referral to Ombuds Office

In the First Report, we raised concerns about PSB's process for closing complaints originally containing retaliation allegations by referring the matters to the Ombuds. Recommendation number 12 in the First Report was that prior to referring these cases to the Ombuds, PSB should forward the complaint to the OIG, along with thorough documentation justifying the referral, so that the OIG could ensure that all of the complainant's issues had been addressed and that the referral was appropriate. However, to date, we have not yet received any such documentation on any cases prior to their being referred to the Ombuds.

The fact that we had not received such documentation and our review of three other retaliation cases referred to the Ombuds during the Period caused us to probe further into PSB's practice of referring cases to the Ombuds. When we followed up with Command Staff from PSB, we were informed that the following principles guide PSB's evaluation of whether a case can be referred to the Ombuds:

- 1) PSB must do some sort of a preliminary investigation;
- 2) there must not be any misconduct obvious to the I/O;
- 3) PSB must consult with someone in the Ombuds Office to see if they will take the case;
- 4) there is no mandate that all of the involved parties must agree to go to the Ombuds Office;
- 5) there must be documentation in the file indicating that the investigation has not identified any misconduct and the Ombuds Office has agreed to attempt to resolve the issues.

However, as discussed below, we had concerns with the contents of the Department's “preliminary investigations” in the following cases and, at least based on the contents of the files we reviewed, believed that an insufficient investigation was conducted to exclude the possibility that retaliation had occurred prior to referring the matters to the

Ombuds. Moreover, it has been our experience, as demonstrated in **CF Nos. 02-0784** and **03-3168**, as well in others we have seen, that the process of consulting with someone at the Ombuds often is conducted informally, frequently by telephone, without documentation as to what was specifically represented to the Ombuds prior to a decision being made that they are the appropriate entity to handle the complainant's concerns.

CF No. 01-5140

The complainant alleged that after being subjected to an improper "sting" audit, complainant met with a supervisor to file a grievance because such audits deprived complainant of the right to representation. After making the complaint, complainant alleges he/she was subjected to a sick time audit and ordered to produce a doctor's note if complainant was to call in sick. Complainant also claims that the supervisor and CO retaliated against complainant when they publicly served complainant with a copy of the "sick order" during roll call.

Moreover, complainant claims complainant was transferred to a different unit (2nd Unit) within the division, though complainant was not given a locker at the 2nd Unit. When the complainant then went off duty due to stress, complainant was advised that complainant's status was being changed from "sick" to "AWOL" on order of the same supervisor. After contacting complainant's representative, complainant's status was changed from "AWOL" back to "sick." Complainant was then transferred back to complainant's original unit after spending two Deployment Periods at the 2nd Unit.

The complaint was generated on November 6, 2001. On February 22, 2002, the complainant was interviewed. On June 11, 2002, the case was transferred to the Ombuds. On December 4, 2002, the Ombuds reported that it never received the case file. On February 14, 2003, the case was returned to IAG and closed as OOS. The accused supervisor later successfully petitioned the Department to adjudicate the case as WCOP due to the original referral to the Ombuds.²⁸

Although the Complainant and the main accused supervisor were interviewed, the file only contains a paraphrased statement of the complainant's tape-recorded interview. It appears that there was no interview conducted with the accused CO. Moreover, a review of the supervisor's taped interview raised several issues. First, the I/O failed to ask questions as to why the accused may have taken the actions he/she took with respect to the complainant. It was our opinion that this accused supervisor did not respond to direct questions by the I/O. In addition, the accused made several references to questions that had been asked of the complainant which is of concern given that the accused should not have had access to such information.

²⁸ In making the determination to ultimately close this case as WCOP, the Department claimed that "the complaint and related issues were handled by the Ombuds Office and addressed in that forum." However, according to the Case Progress Report, though the case was apparently sent to the Ombuds, it was later determined that Ombuds had never received the case. The case, thus, was sent back to IAG for investigation, which would seem to indicate that the Ombuds had never handled the case.

Next, despite the fact that several workplace issues were identified by the complainant during complainant's interview (i.e., allegations of disparate treatment and selective scrutiny and public dissemination of confidential personnel matters), these issues were never addressed by IAG in the complaint investigation or apparently by the Ombuds. Moreover, the handling of this case is also concerning considering that the same accused supervisors were both accused of retaliation in a previous complaint – CF 01-4535 -- reviewed in the First Report. Even though we believed that the earlier case was properly Unfounded, had a proper complaint investigation or a review by the Ombuds been conducted in CF 01-5140, it might have revealed the existence of supervisory issues or other workplace concerns short of misconduct which required further attention.

CF No. 02-0784

This complainant attempted to initiate a personnel complaint with the accused supervisor against another employee who had hit the complainant. Complainant later discovered that no action had been taken by the accused supervisor. Following the complaint, complainant was advised that complainant was being transferred to another division, without having received any documentation about any work performance deficiencies. Complainant believed the transfer was in retaliation for the earlier complaint.

According to a memorandum in the file, the complainant was interviewed in connection with this complaint, but the contents of that interview are not contained in the file. The memo also indicates that the I/O later telephonically contacted the Ombuds to discuss complainant's concerns and that staff from the Ombuds opined that the Ombuds was the appropriate entity to handle the complainant's concerns. However, there is no indication as to the specific contents of this discussion. The investigation then ceased and the case file was transferred to the Ombuds for resolution.

Although it appears that the Department may have conducted an initial investigation before transferring the case to the Ombuds, there is no documentation in the case file to demonstrate whether such a transfer was warranted. The allegations raised by the complainant, if true, would amount to misconduct. As such, transferring this matter to the Ombuds without an explanation as to why misconduct was found not to have occurred is problematic especially in the absence of any indication of what the complainant actually said in complainant's interview and without any documentation as to the contents of the discussion between staff from IAG and the Ombuds. It may well be that the referral to the Ombuds was appropriate. However, absent documentation of the rationale for that decision, such a determination by the OIG becomes very difficult.

CF No. 03-3168

Complainant alleged that complainant's supervisor had forced employees to write their own ratings and that the accused supervisor had created a hostile work environment and retaliated against complainant by giving complainant a sub-standard rating report after the complainant made a similar complaint against the accused two years prior.

The I/O interviewed the complainant and referred the case to the Ombuds. However, this interview was not paraphrased or otherwise summarized in the investigation, nor were the

subject ratings included in the investigation. The only documentation of the complainant's interview was a third-hand reference to an earlier conversation the complainant apparently had had with the interviewer in which it was discovered that rather than being forced to write complainant's own rating, the complainant was merely asked to prepare suggested language to be incorporated by the supervisor writing the rating. Thus, a suggestion was made to refer this case to the Ombuds. However, this memo contained no indication that the complainant's claims of *retaliation* for reporting what complainant believed to be an improper method of preparing ratings had been similarly refuted prior to referring this case to the Ombuds. Also, there appears to have been no consideration given to the propriety of referring this case to the Ombuds given that the same supervisor had previously been accused of retaliation in connection with an earlier case, CF No. 02-5032, also discussed in this Report.

We believe the handling of the above cases demonstrate a need to fine tune the criteria for referring cases to the Ombuds. To begin with, we believe further guidance as to the elements required of any preliminary investigation preceding the referral to the Ombuds is needed. Indeed, the Department's guide entitled, "Complaint Investigations, A Guide for Supervisors," at pages 5-9 (though it is dated October 2000), outlines the requirements of a preliminary investigation to include the following:

- 1) Identifying all involved parties, including complainant, witnesses, and involved employees;
- 2) Seeking out and speaking to witnesses;
- 3) Identifying involved employees, including consulting DFARs, time books, daily work sheets, and arrest reports;
- 4) Making every effort to identify unknown employees; and
- 5) Collecting and preserving evidence.

In two of the three cases mentioned above, though the complainant was apparently interviewed, the contents of that interview were not documented in the file. Moreover, in two cases, relevant evidence of documentation relating to the alleged retaliatory ratings and transfers were not included in the file. Additionally, given what we believe to be the relatively informal way by which cases are referred by I/O's to the Ombuds' staff, there is no way to verify exactly what was represented between staff from the two entities to obtain the Ombuds' acceptance of the referral. We believe it is important that the justification for the referral is properly documented to forestall any subsequent claims by any of the involved parties that the original retaliation complaint should never have been handled by the Ombuds.

To address these concerns, the OIG makes the following recommendations:

Recommendations:

4. The Department should work with the OIG to develop protocols for the referral of retaliation cases to the Ombuds, which should include mechanisms to ensure preliminary investigations are properly conducted and documented and that all interested parties, including PSB, the Ombuds, and the OIG, are aware of the justification for the referral.

g. Detailed Review of Retaliation Investigations

A more detailed analysis of our review of the seven full-length investigations related to employee allegations of retaliation we reviewed during the Period is contained in Appendix B. We believe these cases warranted further discussion and analysis from both a positive and negative perspective, as they raised similar issues discussed throughout this Report, and are thus discussed in more in Appendix B.

IV. CONCLUSION

The OIG believes that the Department has made tremendous improvements since the First Report in evaluating and investigating employee claims of retaliation. Though the cases reviewed during the Period included older ones that the current administration inherited after the statute of limitations had already expired, we believe the Department is currently committed to ensuring that these cases are investigated timely, by specially selected investigators who understand and appreciate the underlying issues, and that the Department is not waiting until the conclusion of such investigations to take immediate action to address work place issues which are uncovered during the investigation. We commend them for their commitment.

We also believe that the Working Group, under the leadership of the CO's of PSB and the Consent Decree Bureau, is making strides in undertaking the longer-term project of better coordinating how the various entities both inside and outside of the Department address employee claims of retaliation and related workplace issues. Moreover, we anticipate that in the coming months, the Department will have revised its Anti-Retaliation Policy to better comport with state and federal law.

We still believe that there is room for improvement in how the Department handles those retaliation complaints which (1) arise out of CFDs or lawsuits; (2) are referred to the Ombuds for resolution; or (3) are simultaneously investigated by PCDU. We recognize that some of these concerns involved older cases and were handled during a transitional period during which the Department was revising how it investigates these complaints. Moreover, based on our previous involvement with the Department in fine-tuning this process, we are confident that, working together with the Department, these problems can be addressed.

Summary of Recommendations:

To facilitate review of this Report, the recommendations made herein are as follows:

1. The Department should re-evaluate the use of the Non-Disciplinary classification to close retaliation complaint investigations with related litigation solely because the litigation is settled or dismissed unless a properly completed investigation reveals that the case properly qualified for Non-Disciplinary classification.

2. The Department and PCDU should collectively re-evaluate PCDU's current policy of not sharing its investigations with PSB, including analyzing whether this policy is both legally sound and consistent with CD paragraphs 93(b) (ii) and (x).
3. The Department should ensure that both CO's and I/O's who investigate and adjudicate complaints are properly trained and educated as to the application of various tolling procedures to the cases they investigate. Such training should include when tolling would begin, and in what circumstances it would end, as well as underscoring the need to communicate with other entities such as RMG to ensure that PSB is timely notified of both the filing and dismissal of CFDs and lawsuits so that personnel complaints can be promptly initiated, and the SOL for such complaints properly calculated.
4. The Department should work with the OIG to develop protocols for the referral of retaliation cases to the Ombuds, which should include mechanisms to ensure preliminary investigations are properly conducted and documented and that all interested parties, including PSB, the Ombuds, and the OIG, are aware of the justification for the referral.

APPENDIX A

**RETALIATION CASES CLOSED DURING THE PERIOD OF JULY 1, 2003
THROUGH SEPTEMBER 30, 2004**

1. 03-0519
 2. 01-5250 -- REVIEWED DURING FIRST RETALIATION REPORT
 3. 99-2671
 4. 01-5052
 5. 01-0715
 6. 01-5463
 7. 02-3575
 8. 02-4007
 9. 02-0784
 10. 02-3891
 11. 03-1255
 12. 00-4128
 13. 01-5140
 14. 98-2105
 15. 03-0702
 16. 01-5363 -- REVIEWED DURING FIRST RETALIATION REPORT
 17. 03-4326
 18. 02-2705 -- REVIEWED DURING FIRST RETALIATION REPORT
 19. 03-0912
 20. 03-1436
 21. 03-3168
 22. 03-3454
 23. 04-1409
 24. 03-2961
 25. 02-5032
 26. 03-0475
 27. 99-4523
 28. 04-1372
 29. 03-0779
 30. 03-0553
 31. 03-0712
 32. 03-0890
 33. 04-1627
 34. 01-3834 -- REVIEWED DURING FIRST RETALIATION REPORT
 35. 01-3579 -- REVIEWED DURING FIRST RETALIATION REPORT
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**CASES CLOSED AS OTHER THAN RETALIATION JULY 1, 2003 THROUGH
SEPTEMBER 30, 2004**

36. 02-4568
37. 02-0812

APPENDIX B

Investigations in which the OIG Noted Concerns

CF No. 02-0812

This complaint was generated as a result of a CFD filed by an employee who claimed to be the victim of retaliation for reporting occurrences of sexual harassment, defamation, false accusations of misconduct, retaliation, harassment, unreasonable denial of family leave, inappropriate supervisory pressure to write more traffic citations, and other misconduct. The complainant alleged that as a result of these complaints, the complainant was subsequently denied family illness leave, re-assigned out of the field and placed on a desk, and later administratively transferred out of the unit.

During the tape-recorded interview with the complainant, among other allegations, we believe the complainant made four allegations of retaliation, none of which were framed as allegations during the investigation. They are as follows:

- 1) A sergeant retaliated against complainant when the sergeant assigned complainant to an undesirable desk job which was already fully staffed after complainant complained about a "crime report" (PIR) the sergeant had prepared as a joke and gave to complainant which contained inappropriate sexual and scatological references.²⁹
- 2) The complainant took a picture of a Mobile Digital Terminal (MDT) message from complainant's lieutenant in which the lieutenant indicated that officers who wanted days off needed to complete a certain number of traffic citations. Complainant took the picture to the Police Protective League. The lieutenant then called complainant at home to express the lieutenant's dissatisfaction with the fact that the complainant went to the Protective League. The lieutenant later retaliated against complainant for making the complaint by denying complainant family illness leave. The lieutenant's denial of family illness leave to the complainant was later overturned by another lieutenant.
- 3) The complainant claimed that the same captain who addressed the issue of the inappropriate PIR with a comment card re-assigned the complainant from patrol to administrative duties in order to keep complainant from having further contact with the sergeant and the lieutenant against whom complainant had previously complained.
- 4) Because of all complainant's complaints, complainant was administratively transferred by another captain to another division. According to the I/O's chronology, the complainant claimed this captain told complainant to drop complainant's "issues" with the sergeant who wrote the PIR and that complainant was not a "Team Player."

²⁹ The sergeant received a comment card from the captain in response to the sergeant's giving complainant this document. Moreover, in the comment card, the CO downplayed the severity of the sergeant's actions by claiming that the "effort and intent to celebrate (another employee's) birthday . . . [was] appreciated as a morale-building process" and by informing the sergeant that it was "not an act of misconduct" Instead, the CO opined that it merely failed to "reflect good judgement."

Despite these clear allegations of retaliation, the I/O did not frame any allegations of retaliation in the investigation. Nor were there any retaliation allegations framed in the LOT. Indeed, in the entire investigation only three allegations in total were formed, involving "Neglect of Duty" and "Unbecoming Conduct" against three of the eight employees referenced by the complainant as having engaged in some form of misconduct.

Given that these allegations were not properly framed, critical witnesses to the alleged retaliation were never interviewed, including the sergeant responsible for the joke PIR, the captain who criticized complainant for not being a team player, the lieutenant who overrode the other lieutenant's denial of complainant's medical leave, and others.

Furthermore, allegations of poor supervisory skills against two lieutenants and a sergeant were never addressed by the investigation. This failure is especially concerning since the lieutenant responsible for the MDT message and who initially denied complainant family medical leave has since been the subject of two additional complaints by subordinate employees involving allegations of inappropriate behavior and poor judgement, **CF Nos. 03-3154** and **04-3124**.

CF No. 03-1255

This complaint alleged that the accused retaliated against another employee (E1) when the accused called the complainant a "liar," and told him/her "I'm broke," "it's your fault," and "you're the morale booster around here." These statements, which made complainant feel uncomfortable, were made because the accused apparently believed that the complainant was a witness in an unrelated earlier complaint investigation for which the accused had received suspension days. The accused admitted to using the words "liar" and "perjury" in a sarcastic joking manner to several employees. The accused also admitted to telling another employee that "it's your fault" given that the accused believed that second employee (E2) was to blame for the accused's suspension without pay. The accused ultimately received an Official Reprimand for unbecoming conduct for unnecessarily disrupting the work of other employees by making unwelcome comments. The retaliation allegation was Unfounded.

First, the OIG noted that although the Complaint Form identified this as a retaliation case, the investigation was not assigned to IAG as required by CD ¶ 93. Rather, the investigation was assigned to the involved unit for investigation.

The OIG also noted several problems with the investigation itself. First, the I/O failed to thoroughly interview any of the witness or accused employees. The I/O also neglected to ask numerous logical follow-up questions, which may have shed more light as to the issue of retaliation. For example, the I/O did not ask the witnesses if such comments by the accused were routine. Moreover, although another witness brought up the fact that the CO had given the accused an order to "cease and desist" these remarks, the I/O never inquired as to the name of the C/O, nor was an interview of the C/O conducted to determine: (1) whether such order was given, (2) why the order was given, and

(3) whether the order was followed. The I/O also failed to ask the accused anything about this apparent order from the CO. Moreover, when E1 described the workplace as continuing to be "uncomfortable," there was no follow up by the I/O as to what E1 meant which allowed the adjudicator to avoid having to conduct a further analysis of the subject workplace. In addition, there were no questions asked of the accused regarding the accused's relationship with E1 and/or the accused's perceptions as to E1's involvement in the earlier complaint investigation. Finally, the accused identified three more witnesses during the accused's interview, none of whom were ever interviewed.

Instead, this investigation focused on the question of whether the statements made by the accused were *intended* by the accused as retaliation for the other employees' involvement as witnesses during an earlier investigation against the accused. The Department's current Policy does not contain such a requirement that the accused intend to retaliate. Instead, the Policy prohibits, among other things, jokes and harassing language in response to another employee's "assisting or participating in any investigation"

Moreover, during E1's interview, E1 noted that E1 believed that the accused made the aforementioned remarks to E1 because the accused was under the false belief that E1 had been a witness in the accused's earlier complaint. As such, the OIG believes that there is insufficient evidence to rule out that the comments made by the accused as described by E1 constituted retaliation. Thus, the proper adjudication of the retaliation allegation should have at a minimum been Not Resolved as opposed to Unfounded. Indeed, the investigation revealed that the accused admitted to making the comment, "it's your fault," to E2 because the accused believed a co-worker was "to blame for [the accused's] suspension without pay." Such a statement would seem to be an admission of retaliation as currently defined by the Policy.

Subsequent to this investigation, the accused has been accused in a new complaint, **CF No. 04-3994**, of taking a personal and inappropriate interest in a criminal case involving E2, including attending court proceedings on Department time, and sending e-mails to all the accused's co-workers about the criminal case, despite a direct order not to do so. If true, these allegations could also be construed as retaliation.

CF No. 02-5032

This investigation was initiated on December 23, 2002, though the complainant initially made the same complaint in July 2000. However, that complaint was either cancelled or was otherwise lost or misplaced without being investigated. The complainant claimed that on December 15, 1999, the complainant was advised by the accused lieutenant that the complainant would be assigned to night watch for New Year's deployment. The complainant complained about this change, since complainant's work restrictions required complainant to be on duty for 4 hours and at physical therapy for 4 hours and prevented complainant from carrying a firearm which presented an officer safety issue if complainant were to be driving home at a late hour.

The lieutenant denied complainant's request to stay on day watch. Two days later complainant went off work due to stress. Returning after the New Year, complainant was

informed that the lieutenant had begun an investigation into complainant's work restrictions and that complainant would be re-assigned to a new detective table, which seemed odd because complainant's relative would be complainant's new supervisor.

On February 1, 2000, complainant was informed by the captain and the accused lieutenant that Medical Liaison Section (MLS) was going to go through the prior year's records and take money away from complainant for only working 4 of 8 hours each shift. Complainant claimed complainant was authorized to go to therapy for 4 hours a day on the City's time.³⁰ The lieutenant left the room, and later advised the captain that complainant was correct and asked complainant the location of the physical therapy. The captain then apologized for confronting complainant without having all of the facts.

A few days later, the lieutenant ordered complainant to sign in and out for therapy. Prior to this time, complainant had signed in for the day and signed out for end of watch without indicating that complainant was going to therapy. Complainant checked with another employee with the same work restrictions who advised complainant that though technically complainant should sign out for physical therapy time, no one had given him any problems with signing out without indicating he was going to therapy.

Between March and May 2000, complainant was placed off work again, and upon returning to work in June 2000, complainant was advised by a detective that the lieutenant must not believe that complainant was really attending therapy because the lieutenant demanded a list of complainant's work restrictions for the second time in four months. While complainant had been off, someone had also broken into the timekeeper's desk and stole the paperwork concerning complainant's work restrictions.

On June 27, 2000, the detective advised complainant that on orders of the accused lieutenant, complainant was required to take a deduct for therapy time and if complainant did not, complainant would be guilty of insubordination. Complainant was later told to disregard the order, as the lieutenant had verified that the therapy was authorized. Following this last incident, the complainant told the detective that complainant wanted to report the lieutenant for creating a hostile work environment and retaliating against complainant for failing to work on the New Year's holiday. The detective (in a later interview) claimed to have taken the complaint during the first week of July 2000, and submitted it to the Bureau instead through the chain of command, given that the accused lieutenant was in the detective's and the complainant's own chain of command.

On July 28, 2000, the complainant was ordered into the then captain's office to meet with the lieutenant. There, complainant was handed a letter from MLS stating that they could no longer accommodate complainant's work restrictions and complainant was ordered home. Although the lieutenant later claimed to have had no part in the order and had no idea it was coming, the complainant claimed that the only way MLS would prepare such a letter would be at the request of the employee's CO. On August 5, 2000, complainant

³⁰ We understand that at the time in question, such a practice was not prohibited by the Department. However, the policy has since been modified, and as a general rule employees can now attend work-related therapy for a maximum of two duty hours per day.

met with a former commander no longer with the Department, MLS and a sergeant who advised complainant that complainant would have to file for a medical pension.

In December 2000, complainant was ordered to provide a statement in a personnel complaint which had been initiated against complainant in response to an anonymous letter to the Department indicating that complainant had been overheard bragging about defrauding the City and not attending therapy. In February 2001, complainant was ordered to a Board of Rights hearing (BOR). Complainant then discovered that the completed complaint investigation only referenced one of complainant's two different therapy doctors. Complainant brought in paperwork to the accused lieutenant showing that complainant had two doctors. According to complainant, the lieutenant opined that the allegations would probably be unfounded. Later, instead of going to a BOR, complainant received an official reprimand for failing to obey the lieutenant's order that complainant list the exact location when signing out for physical therapy.

In September 2002, complainant received a call from the new captain of the division who stated that the earlier complaint against the lieutenant had never been processed. The new captain stated that the accused lieutenant and the former captain had decided that there would be no complaint because no misconduct had occurred. The new captain, however, initiated a new complaint. Finally, although the former commander had advised complainant to apply for a pension, the City later denied the pension application and a position was found for complainant.

Among other things, although the lieutenant scrutinized complainant's medical issues to the point of advising complainant that complainant's work restrictions could no longer be accommodated, the same scrutiny was not applied to a similarly-situated employee who also worked 4 hours every day and went to physical therapy for 4 hours. This employee was not asked for updated doctor's notes, to sign out to a specific location for therapy, or later advised that his work restrictions could no longer be accommodated.

The new captain stated during a taped interview that the former captain and accused lieutenant had decided that no misconduct had been alleged in the earlier complaint and therefore they dismissed the complaint. If true, the accused lieutenant should have not been involved in the consideration of a complaint in which the lieutenant was an accused.

Moreover, later that year the same lieutenant adjudicated the complaint in which the complainant was originally directed to a BOR. Although the lieutenant was arguably still complainant's supervisor, the fact that the lieutenant was simultaneously an accused officer in an earlier complaint by the complainant should have disqualified the lieutenant from adjudicating the later complaint. Although the lieutenant denied knowledge of the complaint against the lieutenant at the time the lieutenant adjudicated the complaint against the complainant, the statements of the new captain and the detective suggest otherwise. This discrepancy is not accounted for in the investigation.

This case was closed as OOS as it was initially reported initially in July 2000 and was either lost or otherwise not investigated, though the complaint against the complainant was vigorously pursued, initially resulting in complainant being directed to a BOR.

CF No. 03-3454

In this case, though we believe the investigation failed to produce direct evidence of retaliation, we were concerned about what we believed were the investigative deficiencies outlined below, as well as the failure to address what we believed were the workplace issues raised by the investigation.

The complainant was a supervisory employee claiming to have been transferred to a new unit (New Unit) after complaining to a supervisor (S1) concerning the work performance of a subordinate. Complainant also claims to have been given less than two weeks notice before the transfer, and that the re-assignment was essentially a demotion because complainant was going from a position of supervising over 100 personnel to under 20. The apparent justification given for the transfer was that a critical opening in the New Unit had to be filled, and complainant was the most qualified to fill it.

In early 2003, complainant was informed by subordinates that another subordinate (P1) was making unauthorized changes to Department records. Complainant brought this issue to the attention of S1 who advised complainant not to take a complaint but to counsel P1, though complainant believed the allegations merited a formal complaint.

In April 2003, complainant initiated an audit to track any other discrepancies in similar reports. In July 2003, a new CO (S2), whom the complainant had heard shared a close relationship with P1, arrived. A month later, complainant was transferred out, in response to, according to the complainant's allegations, his/her complaints against P1 and because of P1's relationship with S2.

The OIG noted several concerns with this investigation. First, the I/O allowed all three accused employees (S1, S2, and the Bureau CO (S3)) to give a narrative as to their involvement in this matter. While narratives themselves are not an issue, the fact that the I/O did not ask follow-up questions and that some of the issues presented in the complaint were not dealt with during the command supervisors' interviews is problematic

For example, during the interview of S1, the question of whether any other candidates could have filled the New Unit position was never answered. S1 avoided the question by instead describing other movements within the Department that necessitated the transfer of the complainant. Moreover, though complainant claimed to have been transferred out during a critical time when new and complicated projects were coming online that only complainant could implement, S1 was not asked whether a new supervisor could have effectively implemented those projects in complainant's absence, the answer to which might have either supported or undermined complainant's claim that complainant was essential to the current unit, and was transferred out not because it was in the best interest of the Department, but rather in retaliation for complainant's allegations against P1.

During the interview of S2, the I/O did not ask any follow-up questions regarding S2's alleged relationship with P1. Nor did the I/O ask whether a new supervisor could have implemented the projects in complainant's absence. The I/O did not ask S2 if anyone else could have filled the New Unit position other than complainant. The I/O did not ask S2 what conversations S1 and S2 had, if any, with the decision maker on the transfer, S3. Finally, though S2 made reference to "Department needs" that required complainant's transfer, the I/O did not elicit further detail from S2 as to what this phrase meant.

The OIG could not locate a chronology in the file detailing the investigative efforts of the I/O. As such, it was difficult to determine why there was a seven month time lapse between the initiation of the complaint and the first interview of an accused employee and why the I/O did not interview additional witnesses who could have shed light on the expressed need for the transfer of the complainant and other employees.

However, despite the foregoing, we believe the investigation contains no direct evidence of retaliation. Although S1 and S2 were never questioned as to the precise reason for complainant's transfer, S3, the final decision-maker, provided a seemingly logical explanation for the transfer. Additionally, the complaints against P1 were made in February and April 2003 whereas complainant was not transferred until August 2003.

Though the investigation revealed obvious workplace issues involving P1, complainant, and other employees, they were not addressed in the LOT. Indeed, the OIG had been aware of this and other related issues as some of the involved employees had expressed similar concerns to the OIG regarding, among other things, the actions of P1 and S1.

CF No. 03-0912

Complainant alleged retaliation by a supervisor (A1). In April or May 2001, a police officer and a clerk typist advised complainant that another employee (A2) used the Department computer to access the Internet excessively for an Internet-related business, and A2's duties had to be assumed by other employees. The complainant therefore initiated a personnel complaint against A2.

A1 was assigned to handle the complaint, but A1 told complainant A1 was "pissed off" because A1 had already told A2 not to use the Internet and did not want to spend A1's remaining time before retirement investigating a personnel complaint.

In June 2001, an officer from an outside agency contacted complainant and requested that complainant release an arrest report and a firearm in a case at complainant's division, which involved the same suspect in an homicide being investigated by the other agency. A1 then accused complainant of improperly releasing the report and the firearm, which complainant denied. Complainant claimed that A1 then stated that since complainant had made A1 "do all the work with [A2]," A1 planned to initiate a personnel complaint against complainant, which complainant believed was in retaliation for the complainant against A2. Complainant also claimed later to have been administratively transferred out of the area in retaliation for making the complaint against A2.

The investigation was improperly handled as a "Short-Form" investigation. Moreover, the Complaint Form against complainant was prepared only one day after complainant had prepared the Complaint Form against A2. This coincidence is neither explained nor discounted as evidence of retaliation in the investigation. Further, during an interview, complainant made allegations of disparate treatment and favoritism against A1 which were never investigated by the I/O. On the other hand, the I/O did not inquire as to why the complainant waited nearly a year before making the complaint. Finally, the I/O failed to frame the complainant's allegation that complainant was retaliated against by being transferred to another division.

During an interview, A1 stated that A1 discussed the concerns A1 had with complainant and the outside agency request with the captain who determined that complainant had committed misconduct and, thus, A1 initiated a personnel complaint against complainant. However, the I/O never interviewed the captain, who could have also shed light on the reasons behind complainant's administrative transfer. Moreover, none of the transfer documents were included in the investigation.

The OIG did note that the adjudicating captain properly requested in the LOT that the Ombuds office provide retaliation training to the unit's supervisors.

Investigations Which the OIG Believes Were Properly Completed

CF No. 01-0715

The complainant, a former employee, claimed that members of complainant's unit accessed pornography and downloaded material from adult web sites on the Internet via complainant's computer without complainant's knowledge or permission and that complainant reported the misconduct to supervisors. After doing so, complainant became the subject of a complaint alleging false and misleading statements and neglect of duty.

Despite the complainant's initial retaliation allegations, complainant refused to be interviewed on the topic. Instead, pursuant to advice from a representative, complainant only permitted questions on the issues concerning the allegations against the officers regarding the improper viewing of pornography. Complainant would not answer any questions as to retaliation. As such, those claims could not be investigated.

The OIG believes that this investigation was done well. Moreover, the investigation contained an exhaustive examination of the evidence. The LOT recommended that the allegation of retaliation be concluded as "Not Resolved" given that there was no evidence to suggest that the alleged act of misconduct did or did not occur. However, a Military Endorsement recommended that the classification for the retaliation claim be changed to "Unfounded." The Military Endorsement was adopted by the Department.

Finally, the OIG commends the adjudicator for recommending and implementing training of the officers assigned to the unit regarding the proper display of videos and use of the Internet at the workplace.

CF No. 04-1377

This complainant was a supervisor who claimed that complainant's duties as the area's sick/IOD coordinator were removed after complainant reported an excessive noise complaint regarding construction at the station to Cal/OSHA. Complainant also claimed that the captain retaliated against complainant by having a lieutenant serve complainant with an unwarranted comment card and failing to honor complainant's work restrictions.

Overall, we believe that the Department's investigation into this matter was thorough and exhaustive, and that the Department properly bifurcated complainant's claims against the lieutenant that the lieutenant discriminated against light duty employees in a separate personnel complaint. In addition, all necessary witnesses and relevant documents were gathered, and this complex investigation was completed well within the statutory period, indeed, even within the five month goal.

Although the timing of the captain's decision to transfer the responsibilities of the complainant was poor given that they were removed shortly after the complainant made a complaint to Cal/OSHA, the evidence suggests that the actions of the captain were justified based upon other supervisory rationales. The claims against the captain in this case, and the lieutenant in the related case, **CF 04-1627**, were properly adjudicated given the evidence contained within the Department's investigations.

