

OFFICE OF INDEPENDENT POLICE MONITOR
CITY OF NEW ORLEANS



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INDEPENDENT POLICE MONITOR

July 30, 2014

Deputy Superintendent Arlinda Westbrook
Director, Public Integrity Bureau
New Orleans Police Department
118 North Rocheblave Street
New Orleans, LA 70119

RE: OIPM # 2012-850; NOPD Retaliation Policy, Pattern and Practice

Dear Deputy Superintendent Westbrook:

Approximately twenty years ago, Kim Groves, a young mother of three had the courage to report police misconduct in her neighborhood; she was shot and killed by Paul Hardy at the request of NOPD officer Len Davis who retaliated against her for reporting New Orleans Police Department (NOPD) misconduct. The OIPM takes this opportunity at the twenty year anniversary of Kim Groves's death to report on the current state of internal and civilian retaliation in the NOPD. The Office of the Independent Police Monitor (OIPM) would like to collaborate with the Public Integrity Bureau (PIB) to create a more comprehensive NOPD policy and internal PIB procedures for investigating retaliation allegations. The OIPM sees PIB as a partner in this process to improve efforts to end acts of retaliation in the NOPD.

Civilians and NOPD personnel continue to report retaliation or a fear of retaliation from NOPD after filing complaints against officers or cooperating in complaint investigations. Both the OIPM and PIB have received and conferred on such reports before. The reported acts of retaliation have included both harassment and threats. Officers have reported retaliatory complaints filed against them by other NOPD employees. Civilians have reported unjustified police action used against them for retaliatory purposes.

The Consent Decree requires the NOPD to implement, enforce, and monitor a retaliation policy. NOPD recently proposed a retaliation policy which has not yet been approved by the NOPD Consent Decree Court, the Department of Justice (DOJ), or the Federal Monitor Team but has been shared with NOPD employees. PIB is on the front-line in preventing and responding to allegations of retaliation. We commend PIB for fostering an environment where increasingly officers can feel safe coming forward to report misconduct. The presence of a new retaliation policy and the resulting impact on misconduct will hopefully lead to greater public and officer



confidence in the department's disciplinary process. The presence of greater confidence in the department's disciplinary process will lead to greater confidence in the NOPD as a whole.

The OIPM commends the NOPD for its adoption of a retaliation policy and believes the department has taken an important first step in addressing retaliation by the department and its employees. However, based on the OIPM's review of the retaliation allegations, as well as existing policies from other police departments and other secondary sources, more needs to be done to address retaliation.

EXECUTIVE SUMMARY

The OIPM assessed the complaints and allegations it received against NOPD officers that involved retaliation and also assessed NOPD retaliation policies. The purpose of this assessment was to identify the types of reported retaliation and to determine the department's risk of failing to detect and prevent retaliation. The OIPM also undertook this assessment in order to propose appropriate recommendations to prevent future retaliation against both civilians and NOPD personnel.

The OIPM reviewed the NOPD's new retaliation policies as well as all contacts from the public and NOPD personnel involving retaliation or feared retaliation that were received by the OIPM from January 2011 through December 2013. The OIPM also reviewed Consent Decrees, retaliation policies, general department policies, and publications from the Oakland Police Department, the Los Angeles Police Department (LAPD), the Tulsa Police Department, the Detroit Police Department, the San Jose Police Department, and the Seattle Police Department. In addition, the OIPM reviewed pertinent research from the *AELE* (Americans for Effective Law Enforcement) *Law Journal*, *Rutgers University Journal of Law and Urban Policy*, and *Police Chief Magazine*.

This letter, based on the OIPM's review, makes several observations gathered through officer interactions and complaint intake observations regarding retaliation and the NOPD's efforts to combat retaliation. These observations include the following:

- The narratives associated with retaliation complaints that the OIPM referred to PIB were often incomplete and often did not reference retaliation concerns. A search of complaint narratives in IAPro¹ from 2011 to 2013 yielded only 12 civilian or internal complaints of misconduct that mentioned retaliation.

¹ IAPro is the complaint and use of force management software system shared by the OIPM and PIB. It houses complaint information for NOPD officers from 2005 – present and use of force reports for NOPD officers from 2011 – present.



- Some complaints referred by the OIPM to PIB that originally accused several officers of retaliation were recorded in IAPro as an investigation against only one officer.
- From 2011 to 2013, the OIPM received 63 contacts from non-NOPD members of the public involving an element of retaliation or fear of retaliation.
- The most common forms of retaliation alleged by members of the public include: harassment, threats, retaliatory official police action (arrests, tickets, etc.) and discouragement from filing a complaint or interference with the complaint process.
- From 2011 to 2013, the OIPM received 26 contacts from NOPD officers or employees involving an element of retaliation or fear of retaliation.
- The most common forms of internal retaliation alleged by NOPD employees were: retaliatory complaints filed against them, intimidation of complainants or potential witnesses and reassignment or threat of reassignment.
- Within the OIPM's collected sample, PIB has a sustained rate of 40% for interdepartmental retaliation allegations and a sustained/proven rate of 5.09% for civilian retaliation allegations.
- The NOPD's initial set of retaliation policies are a strong initial step in preventing retaliation and complying with the requirements of the Consent Decree.
- The NOPD's initial retaliation policy does not define "protected activity," nor does it describe for which activities officers are protected from retaliation. Further, the NOPD retaliation policies do not protect civilians for any protected activities they may engage in outside of the official PIB complaint process.
- Under its internal retaliation policy, the NOPD does not define which specific acts of retaliatory conduct are proscribed. Under its civilian retaliation policy, NOPD does not define retaliation nor mention which specific acts of retaliatory conduct are proscribed. Without clear guidance on which specific acts may constitute retaliation, NOPD employees and PIB investigators lack direction to judge their own or other's actions.
- A potential conflict of interest may arise if and when NOPD supervisors are required to initially investigate their subordinate's retaliation complaint.
- The OIPM commends the NOPD for including termination as a discipline for retaliation. This discipline is in line with other police department's retaliation policies.

Based on the OIPM's review of incidents of retaliation and existing policies of other police departments, the OIPM offers the following recommendations:

- All NOPD employees should receive training on the retaliation policy shortly after its adoption as part of recruit training and in-service training. Commanding officers and supervisors should monitor and ensure their employees are in compliance with the policy.
- NOPD's retaliation policy should clearly outline the responsibility and the method of supervisors to monitor employees for instances of retaliation.



- The NOPD should revise both its civilian and internal retaliation policies to include a more detailed definition of retaliation which includes specific examples of actions which would be considered retaliatory.
- NOPD should define and list which “protected activities” NOPD employees and members of the public can be engaged in while still being protected by the NOPD retaliation policy.
- NOPD employees should be allowed the opportunity to report official misconduct, retaliation, harassment or discrimination to the next higher ranking employee in the chain of command, directly to PIB, or to the OIPM.
- The NOPD should ensure that the requirement to report official misconduct *immediately* is not in itself used for retaliation purposes.
- NOPD employees against whom a complaint is filed should be given notice in writing by their commanding officer or by PIB, proscribing future retaliation against the complainant.
- PIB should specifically track retaliation complaints and ensure that a PIB supervisor closely monitors those investigations.
- Employees who have been subject to retaliatory conduct should have available to them, and be encouraged to seek, personal counseling or other services via an NOPD employee assistance program or human resources department.

ASSESSMENT OF NOPD RETALIATION – 2011-2013

Our goal in reviewing retaliation complaints and other incidents of retaliation is to identify past retaliation by the NOPD as reported by NOPD personnel, civilian complainants or the OIPM, and make recommendations for prevention and redress. The OIPM began its assessment of NOPD retaliation prior to the introduction of the NOPD’s new retaliation policy. In order to identify incidents which may qualify as retaliation, since the NOPD had not shared its policy at the time of the OIPM’s assessment, the OIPM utilized the San Jose Police Department’s retaliation policy. The San Jose Police Department uses a definition of retaliation similar to NOPD’s new policy. The San Jose Police Department’s retaliation policy reads as follows:

Department members shall not interfere in any way with the complaint process or with any person’s ability to raise concerns regarding alleged misconduct and/or violations of SJP/ City policy, or local, State or Federal law. Retaliation against any party to a complaint made to the Department, IA [the Public Integrity Bureau], or the Independent Police Auditor [Independent Police Monitor] is prohibited. No department member shall directly or indirectly intimidate, threaten, coerce, direct or influence any person with the intent of interfering with that person’s right to disclose alleged misconduct violations.



In its review of retaliation, the OIPM broke down the allegations into two separate categories – retaliation against NOPD employees (“Intradepartmental,” “Internal” or “Whistleblower Retaliation”) and retaliation against members of the public (“Civilian Retaliation”).

Since NOPD did not always record retaliation against civilians as retaliation in IAPro, the OIPM could not collect a fully reliable sample of retaliation cases. When attempting to collect a complete sample, the OIPM encountered disparities and inconsistencies with the data in IAPro. The narratives associated with complaints which PIB had entered into IAPro were often incomplete. Allegations or concerns of retaliation were often not included in these narratives.

A search of complaint narratives in IAPro from 2011 to 2013 only yielded 12 complaints² of misconduct which mentioned retaliation as part of the complaint. Also, some complaints referred by the OIPM to PIB which originally accused several officers of retaliation, were recorded in IAPro as an investigation against only one officer. The IAPro records did not include the remaining accused officer(s) against whom the initial complaint was lodged. Further, six retaliation complaints referred to PIB by the OIPM could not be located in the IAPro system at all. Six out of the twelve total retaliation complaints identified through a search of IAPro narratives from 2011 to 2013 were complaints filed in 2013, with four in 2012 and two in 2011. Since 2013, the number of retaliation cases appearing in IAPro has increased. The OIPM commends the NOPD for doing a better job of tracking retaliation complaints.

CIVILIAN RETALIATION

From 2011 to 2013, the OIPM received 63 contacts involving an element of retaliation or fear of retaliation from non-NOPD employed members of the public. These contacts included formal complaints referred to PIB by the OIPM, inquiries from the public, communication with individuals where the individuals did not follow through with the complaint process, and incidents when a member of the public or an NOPD officer wished to remain anonymous. These contacts also included both allegations where members of the public claimed they were retaliated against by the NOPD and incidents where the complainant and/or the OIPM feared future retaliation against the complainant based on the facts surrounding the allegation.

The most common forms of retaliation alleged by members of the public include:

- Harassment,
- Threats,
- Retaliatory police action (issuing citations, arrests, stops, etc. that civilians believe to be motivated by retaliation or believe to be unjustified), and
- Discouragement from filing a complaint or interference with complaint process.

² This includes both civilian and internal complaints.



Harassment was reported in 28 allegations of retaliatory conduct received by the OIPM. Six civilians reported being verbally threatened by a police officer. On one occasion, after officers injured a civilian during an arrest, the civilian's mother filed a complaint with the OIPM. According to the civilian's mother, the officers returned to the civilian's house and called him a "rat," asking how he could "think filing a complaint against the police was a good idea." The complainant further advised that the officers stated "they had abused the civilians once before and would do it again if they deemed it necessary."

Some civilians were so concerned about being the victim of retaliatory action they either wished to remain anonymous or decided to not file a complaint at all after initiating contact with the OIPM. Eight civilians who contacted the OIPM wished to remain anonymous when filing a complaint and one complainant ultimately decided not to file a complaint after initiating contact with the OIPM.

The table below shows data that the OIPM was able to compile regarding complaints and other instances of civilian contact involving civilian retaliation. This information is not a complete picture of retaliation from 2011 to 2013. It reflects only the information that the OIPM was able to compile from its files and information provided to the OIPM. As this data sample only represents those complaints and contacts related to retaliation and made with the OIPM, this information is representative of some instances of retaliation but is not a reliable count of civilian retaliation. Instead, given the relatively high number of instances of retaliation in an incomplete sample, the below data should be taken as further evidence that the NOPD must thoroughly address civilian retaliation.

Within the OIPM's collected sample, PIB has a sustained/proven rate of 5.09% for civilian allegations involving retaliation and a non-sustained³ rate of 74.57%. Additionally, 18.64% of the allegations were still pending and in regards to 1.69% of the allegations, officers resigned under investigation.⁴

CIVILIAN RETALIATION	2011-2013
Total IPM Complaints/Intakes/Inquiries concerning civilian retaliation	63
Civilian Complaints Filed with PIB ⁵	60
Anonymous Complaints	8

³ The non-sustained rate included cases adjudicated as Not Sustained, No Violation Observed, No Further Investigation Merited, Unfounded, and Exonerated.

⁴ The percentages were rounded for reporting purposes.

⁵ This number represents complaints as filed with PIB; PIB may opt to consolidate multiple complaints regarding the same incident.



CIVILIAN RETALIATION		2011-2013
Retaliatory Actions ⁶		
Harassment		28
Threats/Intimidation		10
Retaliatory Police Action (stop, citation, arrest, etc.)		10
Interference with Complaint Filing/Investigation		4
Complaints/Intakes/Inquiries reflecting concern about retaliation without alleging specific retaliatory action		32
Complainant/Contact Demographics		
<u>Race</u>		
Black		42
Hispanic		1
White		13
Unknown		4
<u>Gender</u>		
Female		28
Male		32
Accused Officers/Employees Demographics ⁷		
<u>Race</u>		
Black		31
White		29
Unknown		9
<u>Gender</u>		
Female		6
Male		54
Unknown		9
Accused Officers/Employees Rank		
PO1		3
PO2		15
PO3		11
PO4		22
Sergeant		6
Lieutenant		1
Captain		1
Deputy Superintendent		1
Unknown		9

⁶ On numerous occasions more than one retaliatory action is alleged.

⁷ This includes complaints, contacts, and inquiries.



CIVILIAN RETALIATION	2011-2013
Accused Officers/Employees Assignment⁸	
1 st District	2
2 nd District	1
3 rd District	5
4 th District	1
5 th District	5
6 th District	19
7 th District	3
8 th District	6
ISB	11
Office of the Superintendent	1
Public Integrity Bureau	2
Management Services Bureau	3
Field Operations Bureau	4
Unknown	6
PIB Allegations Brought Against Accused Officers/Employees	
Adherence to Law	21
Unauthorized Force/Use of Force	7
Courtesy	5
False/Inaccurate Reports	8
Professionalism	38
Honesty/Truthfulness	3
Security of Records	1
Neglect of Duty	8
Referrals	1
Instructions from Authoritative Source	15
Verbal Intimidation	2
No Allegations	8

⁸ Current assignments and ranks from IAPro. It may not reflect the assignments and ranks at the time of the complaint.



CIVILIAN RETALIATION	2011-2013
PIB Disposition of Allegations⁹	
Sustained ¹⁰	5 (4.24%)
Not Sustained	50 (42.37%)
Pending	22(18.64%)
No Violation Observed	8 (6.78%)
No Further Investigation Merited	17(14.41%)
Unfounded	7 (5.93%)
Exonerated	6 (5.08%)
Proven	1 (.85%)
Retired Under Investigation	2 (1.69%)

INTRADEPARTMENTAL/WHISTLEBLOWER RETALIATION

The OIPM reviewed complaints and information received from NOPD personnel regarding retaliation from 2011 until 2013. A total of 26 contacts involving an element of retaliation or fear of retaliation were received by the OIPM from NOPD personnel over this period.

The OIPM found that the most common forms of retaliation alleged by victims of retaliation who are NOPD employees, were:

- Officers filing retaliatory complaints or threatening retaliatory complaints against the NOPD employee,
- Intimidation of complainants and potential witnesses,
- Reassignment or threat of reassignment of whistleblowers,
- Interference with the complaint investigation and/or interference with the hearing that results from the complaint investigation,
- Refusing to receive complaints or the failure to investigate complaints, and
- Harassment and/or unprofessional conduct.

Intradepartmental complainants frequently believe the complaint process itself is being used in a retaliatory manner. In fact, the most common allegation of intradepartmental retaliatory conduct received by the OIPM is a retaliatory complaint either being threatened or filed against the complainant; nine intradepartmental complainants felt that a retaliatory complaint of this type had been lodged against them. For example, one NOPD employee had a promotion denied for a complaint filed by a supervisor who had claimed the officer had failed to attend training, when that same complaining supervisor had proof the NOPD employee had in fact attended the training. The supervisor filing the complaint and the NOPD employee had a contentious relationship for years. Another officer reported misconduct but was disciplined for

⁹ On numerous occasions more than one allegation maybe included in a single complaint.

¹⁰ This includes one complaint from 2011 which has a disposition of Sustained-RUI.



not reporting the misconduct 'immediately enough.' So, although the misconduct allegation the officer made against another officer was dismissed, the whistleblowing officer was sanctioned for not reporting the misconduct earlier.

Where officers feel there is an apparent tolerance of retaliatory misconduct investigations, it threatens officers' faith in the misconduct system and consequently faith in misconduct investigation outcomes. If officers do not believe discipline is fair, it is not an effective deterrence of misconduct. Often NOPD officers and employees wish to remain anonymous or do not wish to lodge an official complaint due to fear of retaliation.

Between 2011 and 2013, seven officers wished to remain anonymous when filing a complaint with the OIPM, and two officers did not file complaints concerning retaliation after the officers initiated contact with the OIPM, due to fears of retaliation.

The table below shows data relating to retaliation complaints that the OIPM was able to compile from its files, and information provided to the OIPM by NOPD employees or their representatives. Again, it should be noted that this information is not a complete picture of intradepartmental retaliation from 2011 to 2013 but reflects only those complaints received by the OIPM.

Within the OIPM's collected sample, PIB has a sustained rate of 40% for interdepartmental retaliation allegations and a non-sustained¹¹ rate of 35%. Additionally, 25% of the allegations were still pending, reclassified, or without disposition. While the NOPD's sustained rate for interdepartmental retaliation was 40%, the sustained/proven rate for civilian retaliation was only 5.09%.

¹¹ The non-sustained rate included cases adjudicated as Not Sustained, Unfounded, NFIM, and Withdrawn.



INTRADEPARTMENTAL/WHISTLEBLOWER RETALIATION	2011-2013
Total Complaints/Intakes/Inquiries received by the OIPM concerning intradepartmental retaliation ¹²	26
Actual Complaints Filed	13
Anonymous Complaints	7
Retaliatory Actions¹³	
Harassment	4
Threat	3
Retaliatory Complaint filed against Complainant	9
Transfer or Threatened Transfer	5
Discouragement from Filing Complaint or Interference with Investigation	3
Complaints/Intakes/Inquiries reflecting concern about retaliation without alleging specific retaliatory action	8
Unknown	1
Complainant/Contact Demographics	
<u>Race</u>	
Black	12
White	6
<u>Gender</u>	
Female	9
Male	10
Unknown	7
Complainant/Contact Rank	
PO1	1
PO3	3
PO4	4
Sergeant	3
Lieutenant	1
Civilian Employee	6
Unknown	8

¹² Any one complaint, intake or inquiry may involve more than one NOPD officer or NOPD employee.

¹³ On numerous occasions more than one retaliatory action is alleged.



INTRADEPARTMENTAL/WHISTLEBLOWER RETALIATION		2011-2013
Complainant/Contact Assignment ¹⁴		
3 rd District		1
4 th District		1
6 th District		1
7 th District		1
8 th District		4
Investigative Services Bureau		2
Office of the Superintendent		1
Central Evidence and Property		1
Management Services Bureau		3
Field Operations Bureau		2
Unknown/Not Available		9
Accused Officers/Employees Demographics		
<u>Race</u>		
Black		13
Hispanic		2
White		11
<u>Gender</u>		
Female		5
Male		21
Accused Officers'/Employees' Rank		
PO1		1
PO2		1
PO4		2
Sergeant		12
Lieutenant		3
Captain		2
Deputy Superintendent		3
Superintendent		2

¹⁴ Current assignments and ranks from IAPro. It may not reflect the assignments and ranks at the time of the complaint.



INTRADEPARTMENTAL/WHISTLEBLOWER RETALIATION	2011-2013
Accused Officers'/Employees' Assignment	
1 st District	4
2 nd District	2
8 th District	1
MSB	2
ISB	6
PIB	3
FOB	1
Central Evidence & Property	5
Office of the Superintendent	2
PIB Allegations Against Accused Officer/Employee	
Courtesy	3
Professionalism	6
No allegations	2
Neglect of Duty	3
Instructions from Authoritative Source	6
PIB Disposition	
Sustained	8 (40%)
Not Sustained	4 (20%)
Withdrawn	1 (5%)
No disposition	2 (10%)
Pending	1 (5%)
Reclassified	2 (10%)
Unfounded	1 (5%)
NFIM	1 (5%)

NOPD'S NEW RETALIATION POLICIES

In order to comply with the NOPD Consent Decree requirement on retaliation (Paragraph 377), the NOPD adopted several policies and rules addressing retaliation. The OIPM commends the NOPD for drafting these policies and believes these policies are a clear and strong initial step in preventing retaliation and complying with the requirements of the Consent Decree. These policies include: NOPD Policy 328; NOPD Procedure 1020.4, Rule 3 Paragraph 12, and NOPD Policy 1006. These NOPD policies, procedures and rule, as well as NOPD Rule 2, Paragraph 8 (requiring the reporting of misconduct) are listed below. The OIPM's concerns and recommendations which relate to these policies and rules also follow.



Paragraph 377 of the July 24, 2012 Consent Decree states as follows:

The City and NOPD agree to expressly prohibit all forms of retaliation, including discouragement, intimidation, coercion, or adverse action, against any person who reports misconduct, makes a misconduct complaint, or cooperates with an investigation of misconduct. Within 270 days of the Effective Date, and annually thereafter, the City, through PIB, shall review NOPD's anti-retaliation policy and its implementation. This review shall consider the alleged incidents of retaliation that occurred or were investigated during the reporting period, the discipline imposed for retaliation, and the supervisors' performance in addressing and preventing retaliation. Following such review, the City shall modify policy and practice as necessary to protect individuals, including other NOPD officers and employees and civilians, from retaliation for reporting misconduct. Retaliation for reporting misconduct or for cooperating with an investigation of misconduct is an egregious offense and shall be grounds for discipline, up to and including termination of employment.

- **POLICY 328, "WORKPLACE DISCRIMINATORY HARASSMENT/ RETALIATION POLICY"**

328.3.2, found under Policy 328, "Workplace Discriminatory Harassment/Retaliation Policy," states as follows:

Retaliation is treating a person differently or engaging in acts of reprisal or intimidation against the person because he/she has engaged in a protected activity, filed a charge of discrimination or complaint, participated in an investigation or opposed a discriminatory practice. Retaliation will not be tolerated.

This Department expressly prohibits all forms of retaliation, intimidation, coercion, or adverse action, against any person who reports misconduct, makes a misconduct complaint, or cooperates with an investigation of misconduct.

328.4 states in part:

Any member who believes, in good faith, that he/she has been discriminated against, harassed, subjected to retaliation, or who has observed harassment or discrimination, is encouraged to promptly report such conduct in accordance with the procedures set forth in this policy.



Supervisors receiving information regarding violations of this policy shall determine, through an investigation, if there is any basis for the allegation and shall proceed as per Procedure 328, Discriminatory Harassment.

Retaliation for reporting misconduct or for cooperating with an investigation of misconduct is an egregious offense

Policy 328 defines retaliation as treating a person differently or engaging in acts of reprisal or intimidation against the person because he/she has engaged in a protected activity. However, the OIPM was unable to locate the definition of “protected activity” in NOPD policy. The OIPM recommends that “protected activity” be clearly defined in NOPD policy to protect NOPD employees from retaliation and to provide clear guidance to NOPD personnel.

Additionally, 328.4 requires supervisors to investigate information regarding violations of the retaliation, harassment or discrimination policy. However, where a supervisor must investigate his or her own employee’s retaliation complaint, for example, it may represent a conflict of interest and may end up tainting PIB’s subsequent investigation.

- **PROCEDURE 1020 “MISCONDUCT COMPLAINTS/DISCIPLINARY INVESTIGATIONS”**

PR 1020.4 “Preventing Retaliation” found under Procedure 1020 “Misconduct complaints/disciplinary investigations” states as follows,

The New Orleans Police Department expressly prohibits all forms of retaliation, including, intimidation, coercion, or adverse action, against any person who reports misconduct, makes a misconduct complaint, or cooperates with an investigation of misconduct. Retaliation for reporting misconduct or for cooperating with an investigation of misconduct is an egregious offense and shall be grounds for discipline, up to and including termination of employment. See Policy regarding Retaliation.

This procedure wording is taken directly out of the Consent Decree Paragraph 377 forbidding retaliation. Paragraph 377 of the Consent Decree is a solid and indispensable requirement that NOPD forbid the practice of retaliation. However, Paragraph 377 cannot substitute for substantial policy, proscribing specific acts of retaliatory conduct. Without clear guidance on which specific acts may constitute retaliation, NOPD employees and PIB investigators lack direction by which to judge their own or other’s actions. Without clear guidance on which specific acts may constitute retaliation, civilians already fearful of retaliation will lack the confidence to question or report police activity.



Although it is unclear, NOPD Procedure 1020 appears to proscribe retaliation against civilians as it is found under the policy heading “Misconduct complaints/disciplinary investigations” and does not include any language which would make the policy’s protections exclusive to NOPD employees. Again although it is unclear, Policy 328, found under the policy heading “Workplace Discriminatory Harassment Retaliation Policy,” appears to provide protections only to NOPD employees since it clearly refers to retaliation within the context of workplace harassment. The policy that appears to proscribe retaliation against civilians (Procedure 1020) repeats much of the wording found in the policy proscribing retaliation against NOPD employees (Policy 328). However, the policy proscribing retaliation against NOPD employees (Policy 328) includes a definition of retaliation whereas the procedure that appears to proscribe retaliation against civilians (Procedure 1020) does not. The procedure that appears to proscribe retaliation against civilians (Procedure 1020) states, “See Policy regarding Retaliation,” but does not indicate to which Retaliation Policy the policy is referring.

Civilians report NOPD retaliatory language and conduct when they question the legality of NOPD conduct outside of the complaint process, reference their constitutional rights to an officer, video record an interaction with NOPD¹⁵, etc. However, the policy that appears to proscribe retaliation against civilians (Procedure 1020), does not define or list specific civilian activities outside of the complaint process which are protected from retaliation. In contrast, the policy proscribing retaliation against NOPD employees (Policy 328) protects those who have “engaged in a protected activity” against retaliation.

- **POLICY 1006, GRIEVANCES: EMPLOYEE NON-DISCRIMINATORY COMPLAINTS**

1006.2 states:

It is the policy of this department to resolve all employee grievances promptly and in a fair and consistent manner without discrimination or retaliation. The Department encourages effective communication between employees and supervisors.

1006.8 states:

At no time will punitive or retaliatory action be taken against an employee for exercising his/her rights during, after or in relation to the grievance procedure.

While Policy 1006 strongly proscribes punitive or retaliatory actions, Policy 328 should explicitly state that the filing of a grievance is a protected activity and subject to all of the protections of Policy 328. Furthermore, Policy 1006 should cross reference Policy 328.

¹⁵ American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651, 184 L. Ed. 2d 459 (2012).



- **RULE 2, MORAL CONDUCT, PARAGRAPH 8, FAILURE TO REPORT MISCONDUCT**

Rule 2, Paragraph 8 states:

Any department employee who observes or becomes aware of any act of misconduct by another employee of the government shall immediately report the incident to their immediate supervisor or the most appropriate New Orleans Police Department (NOPD) supervisor (Violation of this provision may be charged up to and including the category of the underlying offense not reported).

The OIPM supports the NOPD requirement that employees immediately report misconduct. However, employees must have a mechanism by which they can report misconduct when they fear retaliation from their supervisors for reporting misconduct. Additionally, the requirement that an officer report misconduct “immediately” is vague. Without further elaboration or description, the mandate that an officer report misconduct immediately can be used for retaliatory purposes where the supervisor or other authority, unhappy that the misconduct is reported at all, punishes the officer for reporting the misconduct not immediately enough. Two such incidents were recently brought to the attention of OIPM by an NOPD officer.¹⁶

RULE 3, PROFESSIONAL CONDUCT, PARAGRAPH 12, RETALIATION

Rule 3, Professional Conduct, Paragraph 12 states:

Retaliation for reporting misconduct or for cooperating with an investigation of misconduct is an egregious offense and shall be grounds for discipline, up to and including termination of employment.

Rule 3 Paragraph 12, taken directly from the text of the Consent Decree, addresses the seriousness of retaliation for reporting and cooperating with investigations of misconduct. The allowance of termination as discipline for the violation of the retaliation policy is in line with the other retaliation policies reviewed by the OIPM.

While Administrative Rule 3 conveys the serious nature of retaliation, it does not actually proscribe any specific behavior. It is merely a statement regarding the seriousness of retaliation and the possibility of discipline. Rule 3 should state that employees shall not violate the retaliation policy as set forth in Policy 328, PR 1020.4, and Policy 1006 and incorporate, at least by reference, the prohibitions outlined in those three sections.

¹⁶ One of these officer contacts came to the OIPM in 2013, one of these officer contacts came to the OIPM in 2014. The officer contact in 2014 is not included in the internal retaliation chart above since this chart only included retaliation contacts from 2011 to 2013.



OIPM RECOMMENDATIONS IN LIGHT OF EXISTING POLICIES AND PRACTICE FROM OTHER DEPARTMENTS

The OIPM reviewed Consent Decrees, retaliation policies, general department policies, and publications from over ten Police Departments, law journals, and law enforcement publications. Consideration of other police departments that have already implemented retaliation policies and whose retaliation policies have been subject to review and revision are helpful to the NOPD's reform process in the area of retaliation. The lessons learned by such departments as they have implemented retaliation policies and anti-retaliation practices can be an invaluable resource and will shorten the "learning curve" in NOPD's own anti-retaliation efforts.

- **Prevention of Retaliation through Training**

The ultimate goal of a retaliation policy should be to prevent retaliation before it occurs. As such, the department's training authority should ensure that all employees receive training on the retaliation policy shortly after its adoption, as part of both recruit training and in-service training. All training should include the use of real life examples. Further, commanding officers and supervisors should ensure their employees are in compliance with the policy, take allegations of retaliation seriously, and continually monitor their staff's behavior for retaliatory conduct.

- **Supervisory responsibility**

NOPD's retaliation policy should emphasize the responsibility supervisors have in monitoring employees for instances of retaliation. The policy should also clearly outline and describe the approved methods for undertaking that monitoring.

Like the NOPD, the LAPD implemented an internal retaliation policy that was reviewed annually by the Department and by the Los Angeles' Office of the Inspector General (LA OIG). After the LA OIG's initial assessment, the LAPD changed its retaliation policy. After the first policy review, LAPD's retaliation policy was revised to state:

"It is the duty of Department managers, commanding officers and supervisors to monitor the workplace to prevent retaliation from occurring, identify and stop retaliation when it occurs, take allegations of retaliation seriously and encourage employees to come forward without delay to report retaliation."

Additionally, PIB should make supervisory accountability part of all of its misconduct investigations. Anecdotally, the OIPM has observed very few PIB investigations that considered supervisor misconduct in relation to his or her subordinate's misconduct investigation.



- **Within Civilian Retaliation Protection Requirements there should be Concise Definitions of “retaliatory conduct” and explicit protection for “protected activities”**

PR 1020.4, which appears to relate to retaliation against civilian complainants, does not define retaliatory conduct nor include any examples of retaliatory conduct.

The NOPD’s policy to protect against civilian retaliation should prohibit retaliatory conduct of any kind. Proscribed retaliatory conduct should include any deliberate, purposeful actions or failures to act directed against members of the public that:

- Deter or could be reasonably expected to deter reporting or otherwise providing information regarding misconduct,
- Are based on a retaliatory motive rather than valid law enforcement practices,
- Are designed to harass, threaten, or embarrass members of the public, or
- Deter a civilian from exercising a constitutional right or interfere with any legal act by a civilian.

Examples of retaliatory conduct which should be proscribed if accompanied with the intent to retaliate as is set out above should include, but not be limited to:

- Verbal or written threats or harassment,
- Arrests, searches, stops, detentions, citations, or any other actions against a civilian that are unfounded under the law, inconsistent with NOPD policies,
- Damage to property or assault to the person of a complainant,
- Interference with investigations, including conducting an outside investigation, tampering with evidence, intimidations of complainants, or intimidation of witnesses, and
- Failure to investigate crimes against complainants.

Furthermore, Procedure 1020 does not offer civilian victims of retaliation any of the same safety in engaging in “protected activity” that Policy 328 affords to NOPD officers and employees. While protected activity for NOPD officers is different than protected activity for civilians, civilians should also be protected against NOPD retaliation when they exercise their constitutional rights outside of the complaint process. Civilians have reported retaliation by NOPD when they have expressed their constitutional rights such as: questioning police stops, voicing their constitutional rights and video recording police interaction.



- **Within the Rule Forbidding Internal Retaliation there should be a Concise Definition of Retaliatory Action with Specific Examples.**

While NOPD Policy 328 prohibits all forms of retaliation, the policy never suitably defines retaliation nor clarifies what actions are considered forms of retaliation. The NOPD should revise its retaliation policies to include a more detailed definition of internal retaliation which includes specific examples of actions which would be considered retaliatory.

For example, after the LA OIG's initial assessment, the LAPD policy was revised to state: "Retaliation is defined as an adverse employment action taken against an employee for engaging in protected activity." Under the revised LAPD policy an adverse employment action was defined as: "An action that would cause a reasonable employee to be deterred from engaging in a protected activity or an action in direct response to an employee engaging in a protected activity." The revised LAPD policy also said adverse employment actions "May include, but are not limited to, negative performance evaluations, negative Employee Comment Sheets, the imposition of discipline, denial of a pay grade advancement, coveted assignment or promotional opportunity, or change of assignment."

NOPD policy should prohibit officer's actions which are intended to "interfere in any way with the complaint process or with any person's ability to raise concerns regarding alleged misconduct." These employee actions should include:

- Actions which would deter or could be reasonably expected to deter reporting or otherwise providing information regarding misconduct,
- Actions which cause or that could be expected to cause physical harm, property damage, significant emotional distress, or other serious negative effect on another employee,
- Actions which could seriously impair the efficacy, safety or effectiveness of that employee, NOPD, or both, and
- Actions which interfere with investigations, including conducting an outside investigation, tampering with evidence, intimidations of complainants, or intimidation of witnesses.
- Refusing to provide or intentionally delaying response to a request for police assistance or officer back up,
- Writing negative performance evaluations,
- Imposition of discipline,
- Denial of an advancement, coveted assignment, or promotional opportunity,
- Change of assignment,
- Threats or intimidation,
- False accusations, and
- Acts that malign or disparage an individual's reputation.



- **The NOPD should define and specify which “protected activity” NOPD officers are allowed to take part in without fear of retaliation.**

NOPD Policy 328 which appears to prohibit internal retaliation includes the term “protected activity” within its definition of retaliation. However, nowhere in NOPD policy is protected activities enumerated or defined.

For example, the LAPD’s revised retaliation policy also defined “protected activities,” stating that these activities included:

1. Opposing, reporting, or participating in any claim, lawsuit, or investigation concerning unlawful discrimination or sexual harassment,
2. Filing a grievance or participating in any unfair labor complaint,
3. Taking advantage of any labor right or benefit such as using sick or family leave, seeking compensation for overtime worked, or filing an objectively valid work-related claim for damages,
4. Reporting misconduct of another Department or City employee to the OIG, any Department, or governmental entity, or
5. Supporting, assisting, or cooperating in a misconduct investigation.

Additionally, the policy should not limit an employee’s right to make “public disclosures of public concern” protected by the First Amendment. However, as not all employment-related speech is protected by the First Amendment and some disclosures of information may not be protected¹⁷, employees should be encouraged to consult with NOPD policies prior to making public disclosures. Further, the policy should in no way limit the right of employees to file complaints or grievances with outside governmental authorities, nor the ability of employees to initiate appropriate legal action.

- **Reporting and Investigating Authority for Misconduct, Harassment and Retaliation**

NOPD Rule 2, Paragraph 8 should continue to include an affirmative duty among all NOPD employees to immediately report serious acts of misconduct. However, an employee should be given the option of reporting official misconduct, retaliation, harassment or discrimination to the next higher ranking employee in the chain of command, directly to PIB, or to the OIPM. The OIPM will continue to be a safe space for complainants concerned about retaliation. Internal

¹⁷“The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968).



complainants should also be able to make complaints directly to the Superintendent in highly egregious offenses or in the case of illegality, such as broad-based corruption, conspiracy among employees, or offenses involving high-ranking officers. All of these options to report misconduct should be clearly publicized and accessible.

NOPD Policy 328 requires supervisors receiving information regarding violations of the retaliation, discrimination or harassment policy to investigate and determine the merits of the allegation. However, due to retaliation concerns, the policy should be modified to require PIB to investigate all allegations of retaliation, especially if the officer complainant is under the direct supervision of the supervisor charged with determining the merits of the retaliation allegation.

- **Immediacy Requirement in Reporting Misconduct**

The OIPM supports the NOPD requirement¹⁸ that officers and employees immediately report misconduct. However, the immediacy requirement in reporting misconduct has been the basis of internal retaliation allegations. Where the supervisor or other authority does not wish to receive allegations of misconduct or wishes to directly target the officer, the supervisor has the opportunity to do so by claiming the officer was untimely in his or her report of misconduct. The NOPD should either more thoroughly describe what is meant by the term “immediately”, allow for emergency circumstances to be taken into consideration in determining whether the NOPD employee has timely reported misconduct, or specify a certain period of time within which the employee must report misconduct. Otherwise, the immediacy requirement itself can be used for retaliation purposes.

- **Instructions to Accused Officer**

After a complaint of any misconduct is received by PIB, the officer against whom the complaint was filed should be given notice in writing by his or her commanding officer or by PIB. Such notice should proscribe future retaliation against the complainant, either by the officer who is the subject of the complaint or by other officers whom the subject officer has asked to retaliate against the complainant. The OIPM includes such an admonishment in the complaint referrals it forwards to PIB, but it remains unclear whether officers are admonished in this manner by PIB. The Oakland Police Department requires officers who are the subject of a complaint to sign a form stating they are aware that they are forbidden “from contacting any witnesses or complainants involved with internal investigations for the purpose of influencing their testimony or persuading them to withdraw complaints.” Much like in Oakland, giving this written warning to the subject NOPD officer should be a regular function accompanying the

¹⁸ Rule 2, Paragraph 8



administrative complaint process. The NOPD officer should sign a statement declaring he or she received and understands the admonishment or advisement.

Additionally, the NOPD should consider requiring the officer to call a supervisor, when possible, to the scene when there is any interaction with the complainant. Further, the civilian complainant should be notified of his or her right to request that a supervisor be present in any interaction with the complained-about officer.

- **Dedication of Resources to NOPD's Efforts against Retaliation**

Acts of retaliation create and deepen the level of distrust between the community and the NOPD. For those within the NOPD, acts of retaliation destroy morale and lead to fear. Due to the existence of specific NOPD policies prohibiting retaliation, PIB will be able to easily recognize, sort, and find complaints in IAPro in which retaliation is alleged. Considering the seriousness of retaliation complaints and the effect of retaliation on the New Orleans community and on NOPD employees, the OIPM recommends PIB specifically track retaliation complaints, and ensure a PIB supervisor closely monitor those investigations.

- **Complainant Assistance**

Employees who have been subject to retaliatory conduct should have available to them, and be encouraged to seek, assistance through personal counseling or other services via an NOPD employee assistance program or human resources department.¹⁹

REQUESTED INFORMATION

The OIPM requests the following information to assist it in reviewing this matter further:

- The draft of any new retaliation policies currently in revision but not mentioned in this letter; and
- A list of any retaliation cases currently in the possession of the NOPD.

OIPM requests that this information be provided by September 1, 2014.

¹⁹ Section XIII of the Consent Decree requires NOPD to create a department-wide health and wellness program.



CONCLUSION

The people of New Orleans will never forget the murder of Kim Groves, a woman killed by a hired assassin under the employ of an NOPD officer against whom she filed a complaint. In the eyes of civilians and many officers, retaliation is a threat to their most fundamental right to life and liberty. Retaliation is a serious issue within the NOPD that needs to be addressed in a concrete and substantial manner. Retaliation within the NOPD violates the rights of department employees and creates a hostile work environment. Retaliation against civilians and NOPD employees prevents the reporting of sometimes egregious violations of state, federal, and constitutional law. The perception that employees and civilians do not report misconduct out of fear of retaliation creates public distrust of the department. Failure to address these potential violations of legal and constitutional rights presents a risk to the department and will likely serve to extend an expensive consent decree agreement.

The NOPD's adoption of an initial set of retaliation policies shows that the NOPD leadership understands the risks that retaliation presents. The OIPM offers its assistance in the further development and implementation of retaliation policies to mitigate this risk. The OIPM considers PIB a partner in ensuring that retaliation will be addressed in the department. I appreciate your time and consideration in this important matter. Please contact me if you have any questions or concerns.

Sincerely,



Susan Hutson

Independent Police Monitor



References:

Wayne W. Schmidt, *Retaliatory Personnel Action*, AELE Monthly Law Journal, Volume 9, 2009, 201.

AELE Retaliation Specimen Policy, Available at <http://www.aele.org/law/2009all09/aele-retaliation-policy.pdf>.

Collins, John M. (March 2013), Chief's Counsel – Handling Discrimination Retaliation Claims. *Police Chief Magazine*. Available at <http://www.policechiefmagazine.org>.

Detroit Police Department Manual. Sections 102.1, 102.3, 102.7.

Detroit Police Department Training Directive No. 12-02 (2012, January), Subject: Retaliation for Exercising First Amendment Rights.

Roberta Ann Johnson, *Whistleblowing and the Police*, Rutgers Journal of Law and Public Policy, Volume 3, Number 1, 2005, 74.

Los Angeles Police Manual, Sections 272, 273.

Annual Review of Department's Retaliation Policy, Conducted by the Office of the Inspector General (LAPD) (2004, 2006, 2007)

Oakland Police Department Manual of Rules, Sections 398.73, 398.74.

Tulsa, Oklahoma Police Department Policies and Procedures No. 31-136C (2004, April), Subject: Prohibition Against Retaliation.

San Jose Police Department Policies, Rules, Procedures, Section C-1750

Ruben, Joel (May 8, 2011), "Flood of lawsuits by LAPD officers costs the city millions." *Los Angeles Times*. Available at <http://articles.latimes.com/2011/may/08/local/la-me-millionaire-lapd-cops-20110508>.

