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Community Ombudsman Oversight Panel (CO-OP)

Annual Report 2012

A summary of the Panel's review of internal investigations within the Boston Police Department. This report outlines the Panel's activities, presents statistics, and offers observations resulting from reviewed cases.

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City of Boston
Community Ombudsman Oversight Panel

December 2012

Dear Mayor Menino and Commissioner Davis:

In accordance with Article IV. E. of the Mayoral Executive Order establishing the Community Ombudsman Oversight Panel we are pleased to submit this 2012 Annual Report. This is the first CO-OP Annual Report that we as Panel members have had the privilege to prepare and present.

In addition to thanking the Mayor for the opportunity to serve the City in this capacity, we also wish to acknowledge the efforts of the Commissioner and his staff in rendering the cooperation so necessary for the Panel to carry out its responsibilities. Finally, we extend our deepest appreciation to our predecessor Panel members upon whose considerable work we have steadfastly attempted to build.

We recognize that the release of our Annual Report provides those with direct interest in the effective conduct of Boston Police internal affairs investigations an opportunity to take stock of the Police Department's performance in this critically important area. It is our genuine hope that the City Administration, Police Command, BPD rank & file, and especially our fellow citizens will find our endeavors worthwhile in this regard.

Consistent with the format of previous submittals, this Annual Report provides detailed data for complaints concerning police misconduct and resulting outcomes. As importantly, the 2012 Report continues the practice of noting observations and offering recommendations relative to the investigatory process itself.

We look forward to your continued support of our efforts through your purposeful review and consideration of this Report. Additionally, we welcome the opportunity for community comment and feedback on our findings.

Respectfully submitted,

Damon Hart
Richard Kelliher
Natashia Tidwell
Community Ombudsman Oversight Panel Members

Mayor Thomas M. Menino

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Executive Summary

While this is the fourth annual report of the Community Ombudsman Oversight Panel (CO-OP), it is the first since 2010, the year that our predecessors completed their term. Our first priority as an incoming panel was to address the appeals that were filed or returned to the CO-OP during the months between the conclusion of the first panel's term and our appointment in July 2011. We are pleased to report that we have succeeded in completing reviews of all but two investigations initiated before 2010. We were assisted in this task by Superintendent Kenneth Fong and Deputy Superintendent Michael Cox, the former heads of the Internal Affairs Division (IAD). We wish to thank them for their hard work and extend our best wishes to them in their new assignments. We look forward to developing and maintaining an equally collaborative relationship with the new command staff, Superintendent Frank Mancini and Deputy Superintendent Lisa Holmes.

Pursuant to the Mayor's Executive Order, our mission continues to be three-fold (1) to ensure that the City of Boston has a highly competent, fair and thorough process for the review of complaints of misconduct against Boston Police Officers; (2) to promote the professionalism of the Boston Police Department; and (3) to build trust and confidence within the Boston community. To this end, the CO-OP serves as an appeals body by reviewing complaints against police officers found to be "not sustained," "unfounded," or "exonerated" by the Boston Police Department.

The IAD has furnished the CO-OP with data detailing the total number and type of internal investigations of Boston Police personnel conducted during 2010 and 2011. This data was provided for the purpose of lending context to the summary of those cases we reviewed, arising during that same period, either as a result of appeal or random selection. (Summary of CO-OP reviewed cases begins p.24.) For example, in 2010, a total of one hundred and thirty (130) citizen complaints were filed against Boston Police personnel. Because individual complaints often encompass more than one allegation of misconduct, the statistics presented also detail the corresponding total number of allegations investigated by IAD in 2010 (272). In addition to the number of internal investigations conducted in 2010 and 2011, pages 12 – 17 also contain charts and graphs illustrating the type and result of the allegations investigated during that period.¹ We appreciate IAD's efforts to provide us with this data for background purposes. Further explanation of these statistics, beyond the summary format outlined herein, can be provided by the IAD.

The data portion of our report summarizes our review of cases brought to us on direct appeal by the complainant and those we reviewed pursuant to the random audit process.² During this review period, which began with our appointment in July 2011 and ended in August of 2012, we reviewed twenty (20) cases. Of the fifteen (15) cases that have been completed, we found that eleven (11) investigations were fairly and thoroughly conducted while the remaining four (4) were either unfair or not thorough. Five (5) matters are still pending, meaning that we have conducted an initial review and returned the cases to IAD for supplemental investigation or other inquiry.

As was the case in prior reports, the core aspect of this year's annual report is the "Observations by the Panel" section in which we provide our recommendations for changes in the investigative practices of the Internal Affairs Division as well as in the policies and procedures of the police department as a whole. In addition, in a section entitled, "Case Timelines," we have, for the first time, reported our observations and made

¹ In some instances, the IAD handled citizen inquiries and similar communications without the need for a full investigation. These matters were resolved at the initial contact stage or after follow-up with the complainant by IAD personnel. In 2010, these matters were classified as Letter Logs (300) or Phone Logs (402) and are not included in the IAD Complaint Data section. In 2011, these matters were classified as Preliminary Investigations (258) or General Inquiries (85) and are similarly excluded from the data section.

² A more detailed summary of each reviewed case can be found in Appendix A.

recommendations relating to the length of time involved in the processing of citizen complaints.

The Panel issues the following recommendations in regard to the policies and practices of IAD:

- All complainants should be notified, in writing, and at 90-day intervals, of the status and progress of their investigations.
- A uniform procedure should be implemented to insure that, during internal affairs investigative interviews, all departmental employees are notified of the department's zero tolerance policy towards untruthfulness and of the consequences for failure to comply.

The following recommendations of the Panel relate more directly to the policies and procedures of the police department as a whole:

- The department should amend the Use of Force Policy, Rule 304, to require, explicitly, the reporting of any use of force, by any means that results in either obvious injury or a request for medical treatment.
- The department should incorporate the First Circuit Court of Appeals decision in *Glik v. Cunniffe* into its recruit and in-service training curricula to ensure that officers respond appropriately to citizen use of cell phone cameras and similar devices to record officers in the performance of their duties.
- The department should continue strict enforcement of Rule 327A, which governs the department's response to allegations of domestic violence against sworn officers, and should offer additional support to affected officers such as counseling and/or an Employee Assistance Program.
- The department should amend Special Order 97-35, which prohibits officers from issuing motor vehicle citations relating to traffic incidents in which they are involved, to specifically encompass and prohibit officers from issuing parking tickets in similar circumstances.

We are pleased to report that several of the observations and recommendations made in the previous reports have been accepted and implemented by the police department. They include:

- The inclusion of conclusive statements in investigative reports despite the absence of supporting facts.
- The overuse of leading questions during investigative interviews of complainants and officers.
- The failure of the IAD to include, in notification letters to complainants, any rationale or summary of the facts upon which the Superintendent relied in concluding that the complaint was not sustained.

In addition, we echo our predecessors' recommendations as to the following and look forward to continuing to work with the department towards their implementation:

- The Complaint Mediation Program that was originally envisioned and incorporated into the Mayor's Executive order should be implemented.
- The department should continue in its efforts to make the citizen complaint process more accessible by dispensing forms at additional locations and by generating the forms in a language other than English.

This report also contains appendices.

- A. Boston Police Disciplinary Policy Statement: Truthfulness
- B. BPD Rule 304§2
- C. Glik v. Cunniffe
- D. BPD Rule 327A
- E. BPD Special Order 97-35
- F. CO-OP Brochure
- G. CO-OP Appeal Form

History, Purpose and Process

The Community Ombudsman Oversight Panel is charged with reviewing accusations of misconduct against Boston police officers. Cases can be appealed to the Panel by citizens if they are not satisfied with IAD decisions. Other cases are reviewed by the Panel through a random selection process and others because of the serious nature of the complaint.

History

In 2004, Kathleen M. O'Toole, then Boston's Police Commissioner, pledged to establish a Boston police conduct review board. She was spurred by the emergence of similar panels in other cities and by the death that year of Emerson College student Victoria Snelgrove, who was killed by police firing pepper-pellet guns during unrest following the Red Sox World Series victory. The appointments to the Community Ombudsman Oversight Panel were made after nearly two years of research on police conduct panels across the country. The board met for the first time in March 2007 and began reviewing case files in October 2007.³ Each board serves a term of three years, which may be renewed at the Mayor's discretion. In July 2011, a new board was appointed.

Panel Members

The ombudsmen, appointed by Mayor Thomas M. Menino, are Attorney Damon Hart, Shareholder at Ogletree, Deakins in Boston, Richard Kelliher, retired Town Administrator for Brookline, and Professor Natasha Tidwell, New England Law Boston.

Under the Mayor's Executive Order, members, also referred to as Ombudsmen, are selected because of their extensive knowledge and experience in law enforcement, the criminal justice system and/or the judicial process. Prior to reviewing cases the Panel received training at the Boston Police Academy to achieve a better understanding of such topics as use of force, race and community relations, constitutional law, internal investigation and disciplinary processes, among others.

Duties of the Panel

It is the responsibility of the panel to:

- ❖ Provide external oversight of Boston Police Internal Affairs investigations to monitor thoroughness and fairness;
- ❖ Receive appeals from aggrieved complainants;
- ❖ Participate in outreach to the community as to the Panel's purpose and procedures;
- ❖ Periodically review policies and procedures and provide a report to the Mayor and the Police Commissioner documenting cases reviewed, the outcome of the Panel's review for each case and the Complaint Mediation Program's participation level and effectiveness.

Powers of the Panel

The Panel, when reviewing Internal Affairs cases:

- ❖ Reviews completed cases as presented by the Boston Police Department's Internal Affairs Division, without the power to subpoena. It cannot interview its own witnesses nor do its own independent investigation.

³ The first board comprised of David Hall, former Dean and Professor at Northeastern University School of Law, John F. O'Brien, Dean of New England Law Boston, and Ruth Suber, a former member of the parole board. Their term extended from 2007 through 2010.

- ❖ Has access to all materials contained in the completed Internal Affairs files subject to review, except those documents protected from release by statute.
- ❖ Makes recommendations to the Chief, Bureau of Professional Standards (Chief, BPS) for further investigation or clarification and recommendations to the Police Commissioner regarding the reviewed cases.

Cases Reviewed by the Panel

The Panel reviews the following categories of cases:

- A. Not sustained, exonerated or unfounded cases involving allegations of serious misconduct and unjustified use of force. The following is the definition of serious misconduct cases developed by the Chief of BPS in cooperation with the Legal Advisor.
 1. Not sustained, exonerated, or unfounded cases involving an in-custody death or serious bodily injury that occurs while in Boston Police custody.
 2. Not sustained, exonerated or unfounded cases involving use of force by a Boston Police officer which results in death or serious bodily injury.
 3. Not sustained, exonerated or unfounded cases involving allegations of perjury by a police officer.
 4. Not sustained, exonerated or unfounded cases involving allegations that the actions of a Boston Police officer were motivated by a discriminatory intent. The allegation must include specific actions taken by the police officer that led the complainant to believe the action was discriminatory.
 5. Any other not sustained, exonerated or unfounded internal affairs case deemed appropriate for review by the Chief, Bureau of Professional Standards.
- B. A random sample of all not sustained, exonerated or unfounded complaints;
- C. Not sustained, exonerated or unfounded findings appealed to the Panel by complainants who allege that the investigation of their complaint was either not fair and/or thorough.

Panel Review Process

For cases in Category A or B above, the review process is as follows:

1. The Chief, BPS, and the Legal Advisor determine those cases to be reviewed pursuant to categories A and B above. To insure the integrity of the IAD process, the panel reviews approximately ten percent of all cases with a finding of not sustained, exonerated or unfounded.
2. The Executive Secretary to the Panel compiles the cases for review, and presents them to the reviewing Ombudsman. The Executive Secretary assigns case numbers to the reviewed cases. The entire investigative file is provided to the reviewing Ombudsman; however, a staff attorney from the Legal Advisor's Office redacts the file to prevent the unauthorized release of privileged or protected information pursuant to Massachusetts General Laws (Criminal Offender Record information, information protected by the rape shield statute, etc.). The cases are assigned to panel members on a rotating basis based on the order in which they are received.
3. The Executive Secretary notifies the police officer(s) named in the reviewed cases that the case is under review by the Panel.
4. One Ombudsman reviews each case, and the reviewing Ombudsman either finds the investigation to be thorough and fair, or sends feedback to the Chief, BPS, requesting clarification or further investigation. The Chief, BPS, may send the case back to the investigator for review, or determine that the investigation as it stands is fair and thorough. The Ombudsman may then make a request to the Police Commissioner for final review and determination. The ultimate decision as to fairness and/or

thoroughness of any internal investigation remains with the Police Commissioner, and he makes a determination as to the appropriate finding.

5. If the reviewing Ombudsman determines that a case was investigated fairly and thoroughly, he/she notifies the Police Commissioner, the Chief, BPS, the Legal Advisor and the named officer(s) of the determination.
6. If, pursuant to the procedure defined above, the Police Commissioner makes a determination as to whether a case was investigated fairly and thoroughly, he notifies the reviewing Ombudsman, the Chief, BPS, the Legal Advisor and the named officer(s) of the determination.
7. The Executive Secretary maintains all files for the Panel. The files of the Panel are regarded as confidential and are examined only by Panel members, the Executive Secretary and Boston Police Department employees as designated by the Police Commissioner. The Panel is barred from duplicating documents provided by the Police Department. The files are not available for inspection by the public. The investigative files are returned to IAD within fourteen (14) days of the final determination.

For cases in category C above, the review process is as follows:

1. Upon final determination of a finding on an internal affairs case, notification is sent to the complainant by the Chief, BPS, of the Police Commissioner's finding. If the Police Commissioner's finding is not sustained, exonerated or unfounded, the complainant is informed of his/her ability to seek an appeal of this finding to the Community Ombudsman Oversight Panel. A complainant, who wishes to appeal, must do so in writing and may do so with the included Appeal Form within fourteen (14) days of the mailing date of the notice from IAD. If the appeal is sent via mail, the appeal must be postmarked within fourteen (14) days from the date the notice from IAD is mailed.

The appeal can be e-mailed to the following address COOP.bpd@cityofboston.gov.

Hand-delivered appeals must be received by close of business on the fourteenth day from the date on the notice from IAD.

Appeals may be hand delivered to: Community Ombudsman Oversight Panel
c/o City of Boston Law Department
City Hall
Room 615
Roxbury, MA 02201

Appeals sent by mail must be postmarked by close of business on the fourteenth day from the date on the notice from IAD.

Appeals may be mailed to: Community Ombudsman Oversight Panel
P.O. Box 190189
Roxbury, MA 02119

2. The Executive Secretary stamps the appeal upon receipt and assigns a case number to the appeal. The Executive Secretary notifies the police officer(s) named in the case of the appeal, and provides a copy of the appeal to the Police Commissioner, the Chief, BPS, and the Legal Advisor. The Executive Secretary prepares the case for the Panel, and assigns the appeal to one Ombudsman. The entire investigative file is provided to the reviewing Ombudsman; however, an attorney from the Legal Advisor's Office redacts the file in order to prevent the unauthorized release of privileged or protected information pursuant to

the Massachusetts General Laws (Criminal Offender Record Information, information protected by the rape shield statute, etc.).

3. One Ombudsman reviews each case and either finds the investigation to be thorough and fair, or sends feedback to the Chief, BPS, requesting clarification or further investigation. The Chief, BPS, may send the case back to the investigator for review, or determine that the investigation as it stands is fair and thorough. The Ombudsman may then make a request to the Police Commissioner for final review and determination. The ultimate decision as to the fairness and/or thoroughness of any internal investigation remains with the Police Commissioner, and he makes a determination as to the appropriate finding.
4. If the reviewing Ombudsman determines that a case was investigated fairly and thoroughly, he/she notifies the Police Commissioner, the Chief, BPS, Legal Advisor and the named officer(s) of the determination.
5. If, pursuant to the procedure defined above, the Police Commissioner makes a determination as to whether a case was investigated fairly and thoroughly, he notifies the reviewing Ombudsman, the Chief, BPS, the Legal Advisor and the named officer(s) of the determination.
6. The Executive Secretary notifies the complainant of the determination by either the reviewing Ombudsman or the Police Commissioner. All notifications made to the complainant are sent by certified mail, return receipt requested.
7. The Executive Secretary maintains all files for the Panel. The files of the Panel, and the statements of appeal, are regarded as confidential and are examined only by Panel members, the Executive Secretary and Boston Police Department employees as designated by the Police Commissioner. The Panel is barred from duplicating documents provided by the Police Department. The files are not available for inspection by the public. The investigative files are returned to IAD within (14) days of the final determination.

Final Decision on Appeals

As stated earlier, the Boston Police Commissioner makes the final decision on appealed cases.

Recommendations by the Ombudsmen and the Chief of the Bureau of Professional Standards are considered in addition to case file documents. The Police Commissioner's determination is final and no other appeal is available.

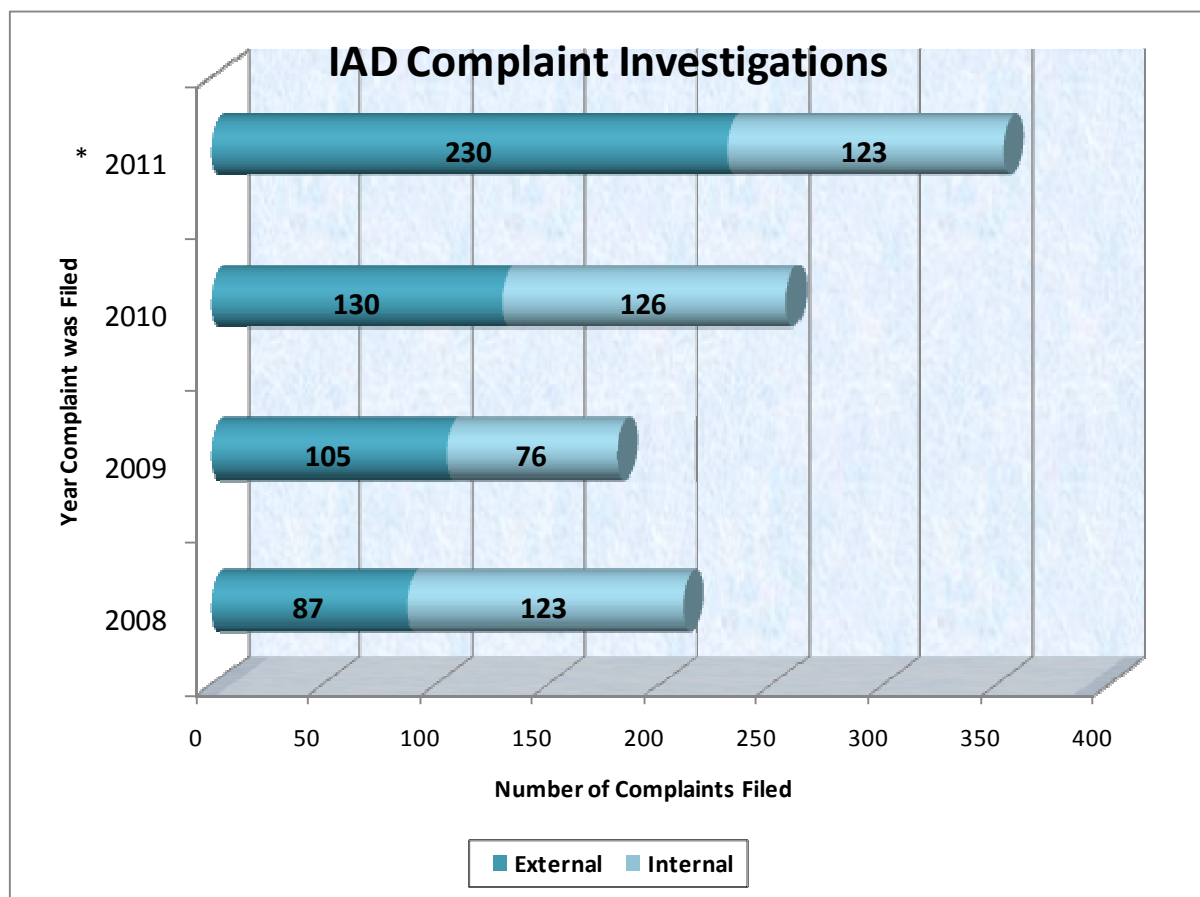
Given the time-consuming nature of reviewing an entire case file—especially a case containing several alleged violations—there is no specific time limit allotted for an appeal. Each Ombudsman may be assigned more than one case file for review at a time.

Internal Affairs Complaint Data

Investigations

The following graph (see Figure 1) illustrates the number of complaint investigations generated within the Internal Affairs Division for the years 2008 through 2011, as reported to CO-OP in November of 2012. Complaints are generally categorized by source. External complaints are those initiated by citizens unaffiliated with the Boston Police Department, while internal complaint investigations stem from allegations of misconduct brought by departmental employees.

Figure 1.

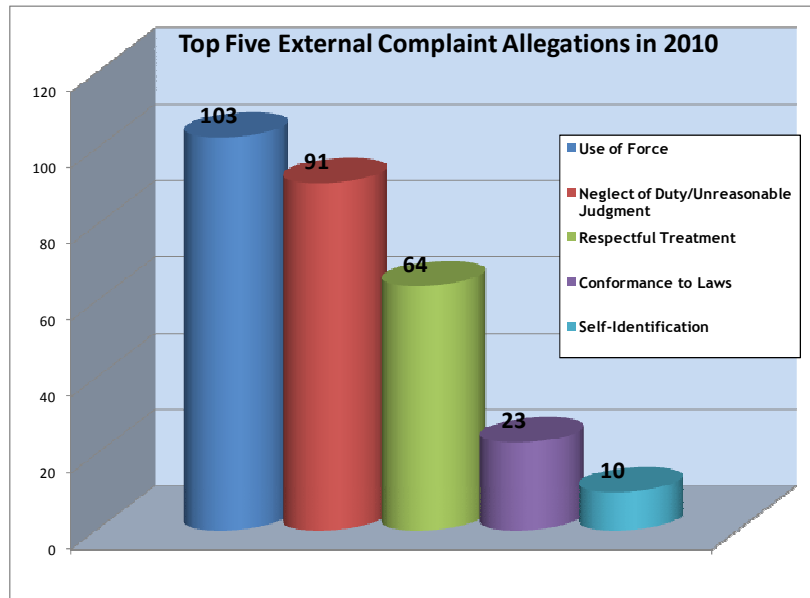


*According to the Internal Affairs Division, in 2011, the Boston Police Department experienced an increase in the submission of web complaints and went through a recategorization of the complaint process in an effort to maintain considerably more comprehensive administrative records of every complaint submitted to the Internal Affairs Division.

External Complaint Allegations

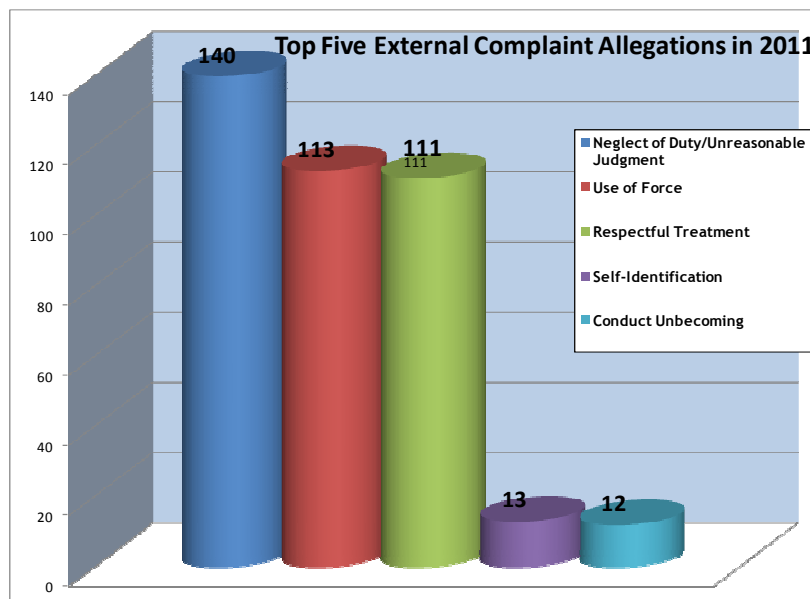
The following graph (see Figure 2) illustrates the five most common allegations of misconduct lodged against BPD personnel through the external complaint process in 2010. Use of Force was the most complained-of allegation, followed by Neglect of Duty/Unreasonable Judgment, Respectful Treatment, Conformance to Laws and Self-Identification.

Figure 2.



The following graph (see Figure 3) illustrates the five most common allegations of misconduct lodged against BPD personnel through the external complaint process in 2011. Neglect of Duty/Unreasonable Judgment was the most complained-of allegation, followed by Use of Force, Respectful Treatment, Self-Identification and Conduct Unbecoming.

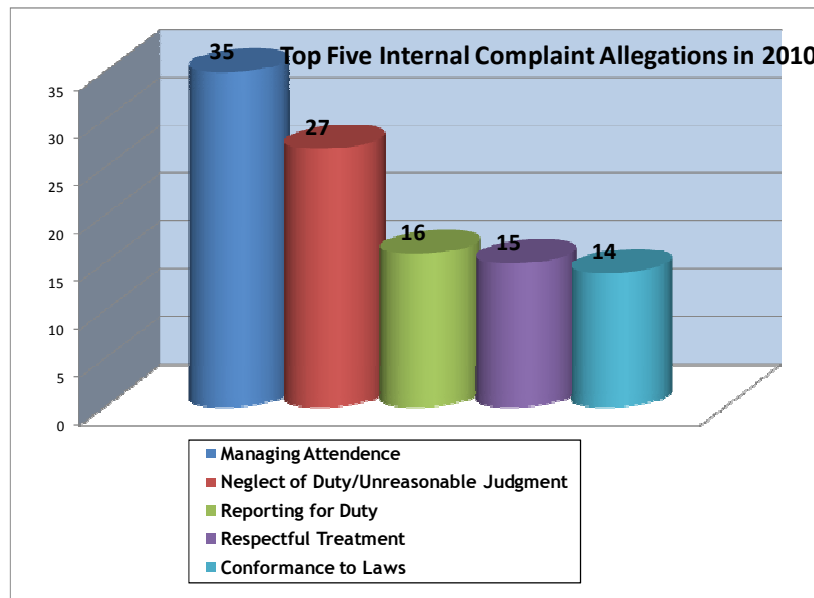
Figure 3.



Internal Complaint Allegations

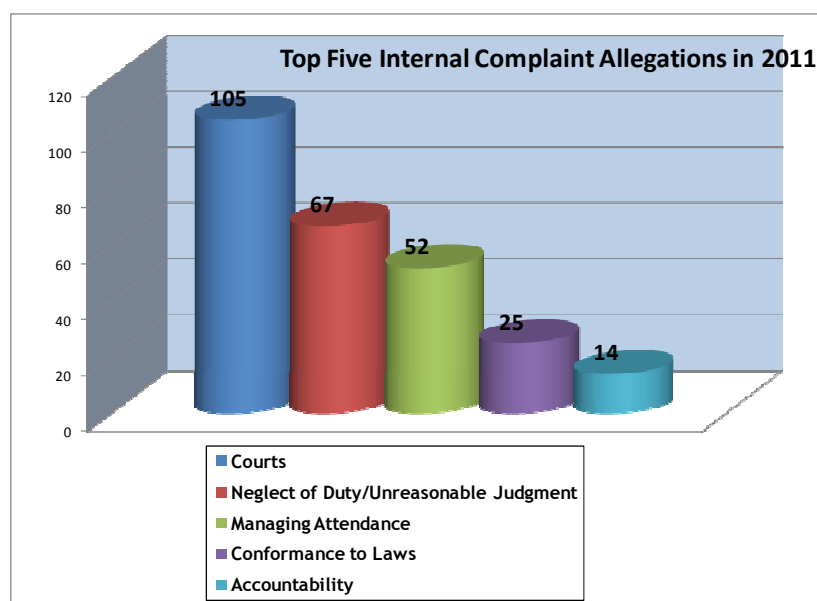
The following graph (see Figure 4) illustrates the five most common allegations of misconduct lodged against BPD personnel through the internal complaint process in 2010. Managing Attendance was the most frequent allegation, followed by Neglect of Duty/Unreasonable Judgment, Reporting for Duty, Respectful Treatment, and Conformance to Laws.

Figure 4.



The following graph (see Figure 5) illustrates the five most common allegations of misconduct lodged against BPD personnel through the internal complaint process in 2011. Violations of an officer's duty and responsibility when appearing at Court was the most frequent allegation, followed by Neglect of Duty/Unreasonable Judgment, Managing Attendance, Conformance to Laws, and Accountability.

Figure 5.



IAD Findings

Upon completion of an investigation by the Internal Affairs Division of the Boston Police Department, complainants receive an official Notice of Findings. For external complaints that result in a finding of **Exonerated**, **Not Sustained** or **Unfounded**, the complainant receives a Notice of Finding explaining their right to appeal the finding along with a CO-OP brochure and appeal form. Finding definitions are listed below:

Sustained: Investigation disclosed sufficient evidence to support allegations in the complaint. If it is a criminal case, it is presented to proper prosecuting authorities.

Exonerated: The action complained of did occur, but the investigation disclosed that the actions were reasonable, lawful, and proper.

Not Sustained: Insufficient evidence available to either prove or disprove the allegations in the complaint.

Unfounded: The complaint was not based on facts, as shown by the investigation, or the incident complained of did not occur.

Pending: The complaint is currently under investigation.

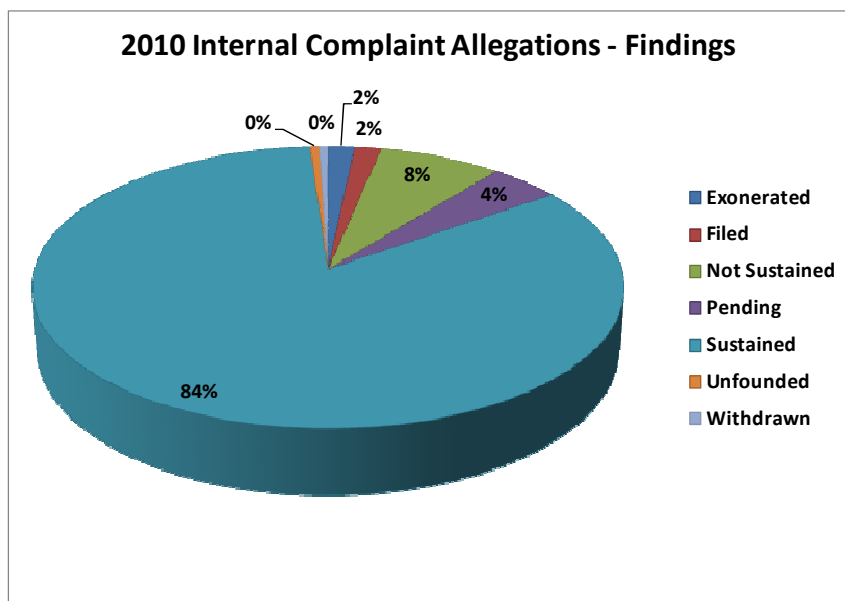
Filed: Investigation was inconclusive, due to one or more reasons beyond the control of the investigator, and may be re-opened at a later date.

Withdrawn: Complainant withdrew complaint.

Internal Complaint Allegations - Findings

The graph below (see Figure 6) illustrates the findings issued in internal complaint investigations from 2010. As demonstrated, eighty-four (84%) percent or 154 of the allegations were sustained, while ten (10%) percent or 18 allegations resulted in a finding of Not Sustained, Exonerated, or Unfounded. Two (2%) percent or 4 of internal complaint allegations were filed and withdrawn. The remaining four (4%) percent or 8 of these allegations are still pending and awaiting an outcome.

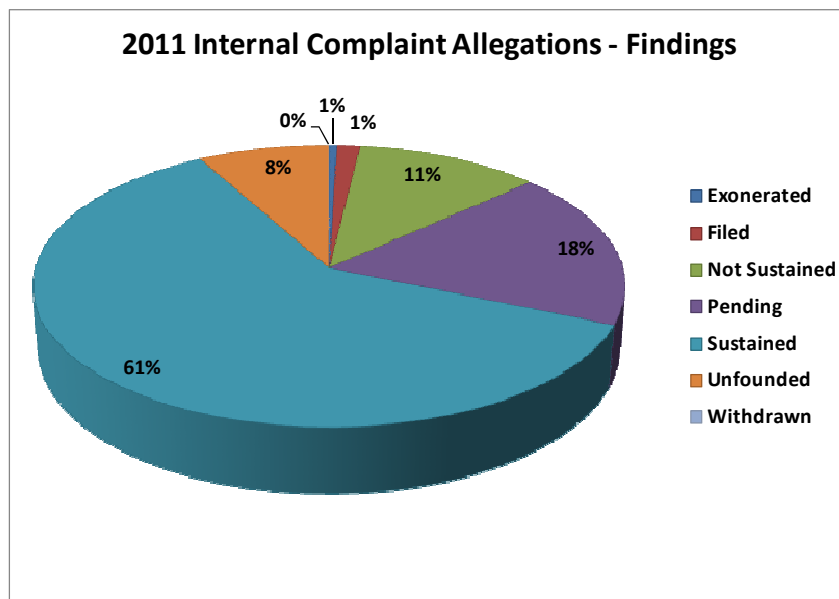
Figure 6.



The graph below (see Figure 7) illustrates the findings issued in internal complaint investigations from 2011. As demonstrated, sixty-one (61%) percent or 127 of the allegations were sustained, while twenty (20%) percent or 42

allegations resulted in a finding of Not Sustained, Exonerated, or Unfounded. One (1%) percent or 3 of internal complaint allegations were filed. The remaining eighteen (18%) percent or 38 allegations are still pending and awaiting an outcome.

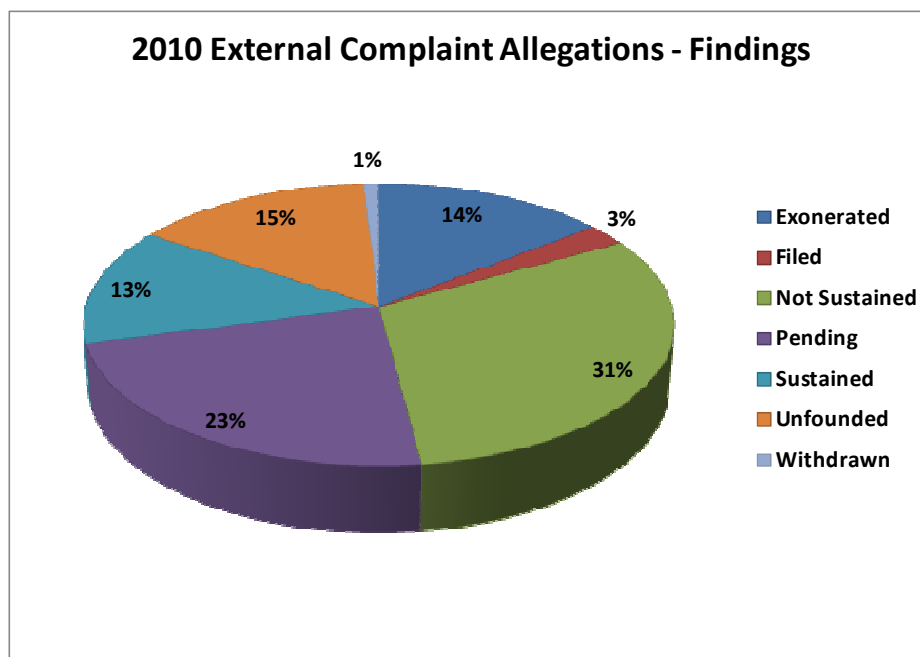
Figure 7.



External Complaint Allegations - Findings

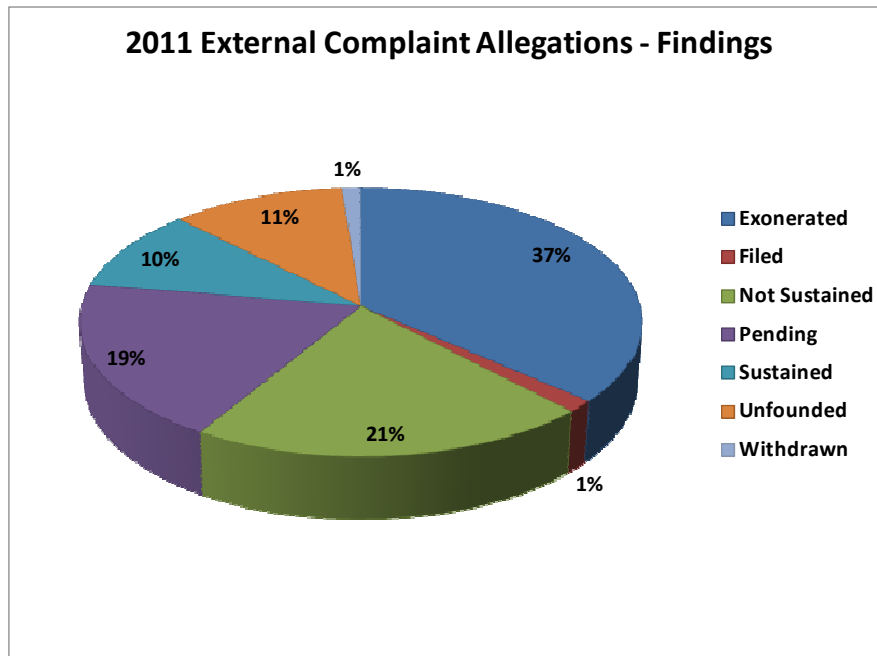
The graph below (see Figure 8) demonstrates the findings issued in external complaint investigations from 2010. As demonstrated, thirteen (13%) percent or 43 of these allegations were sustained while sixty (60%) percent or 192 allegations resulted in a finding of Not Sustained, Exonerated, or Unfounded. Four (4%) percent or 11 of the external complaint allegations were filed and withdrawn. The remaining twenty-three (23%) percent or 73 allegations are still pending and awaiting an outcome.

Figure 8.



The graph below (see Figure 9) demonstrates the findings issued in external complaint investigations from 2011. As demonstrated, ten (10%) percent or 41 of these allegations were sustained while sixty-nine (69%) percent or 281 allegations resulted in a finding of Not Sustained, Exonerated, or Unfounded. Two (2%) percent or 11 of external complaint allegations were filed and withdrawn. The remaining nineteen (19%) percent or 78 allegations are still pending and awaiting an outcome.

Figure 9.

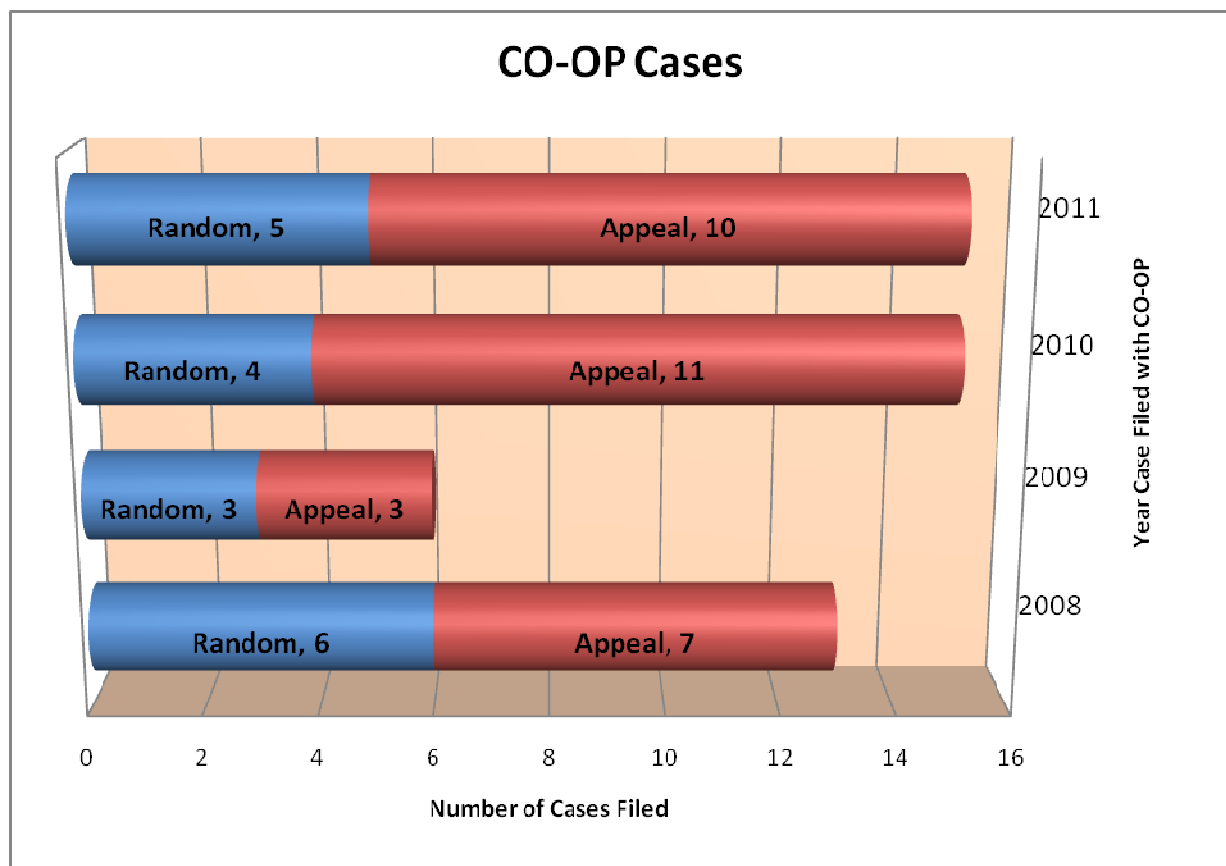


CO-OP Cases and Recommendations

Cases are referred to the Community Ombudsman Oversight Panel (“CO-OP”) by direct appeal or through a random audit process. When an investigation results in a finding of Not Sustained, Exonerated, or Unfounded, the complainant is notified of his/her right to appeal the finding to the CO-OP. The CO-OP also reviews one out of every ten cases in which the complainant chooses not to exercise his/her right of appeal an adverse finding. These cases are selected randomly.

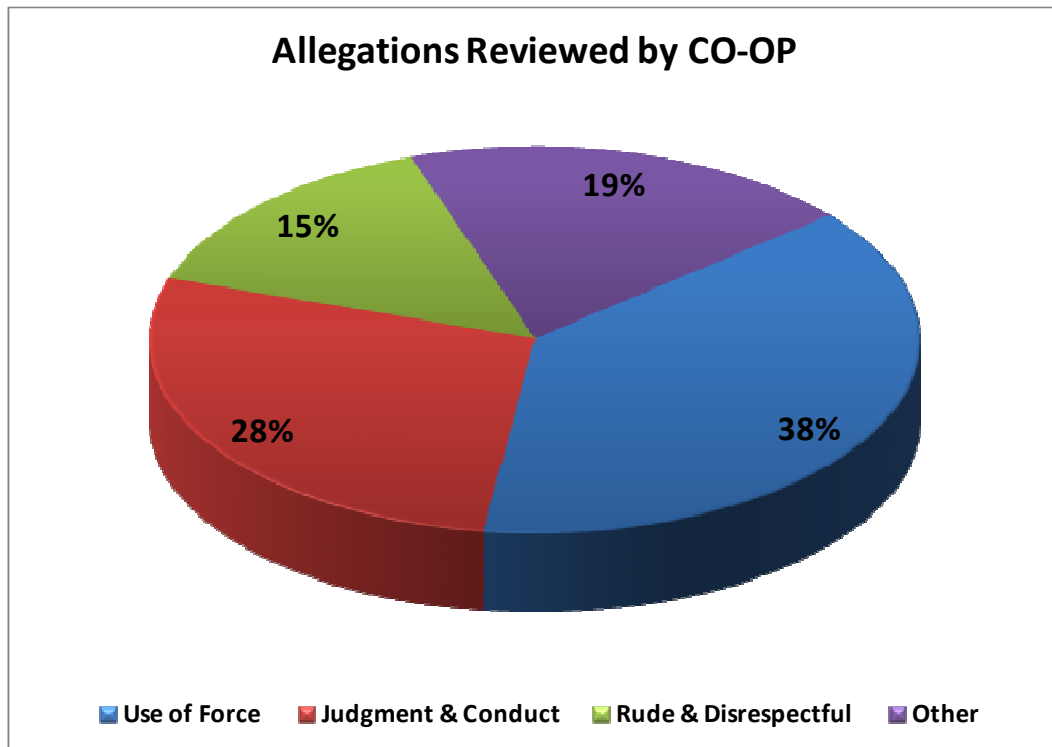
The graph below (see Figure 10) illustrates the number of cases reviewed by the current and previous CO-OP during the period of 2008 through 2011, broken down by method of referral.

Figure 10.



As shown in the following graph (see Figure 11) the bulk of allegations reviewed by the CO-OP fell within three (3) main categories: Use of Force, Judgment and Conduct, and Rude and Disrespectful Treatment. These categories are described in further detail below. The remaining allegations (Other) included Abuse of Process, Conformance to Laws [of the Commonwealth], Directives and Orders, Gifts and Gratuities, Self-Identification, and Untruthfulness in Departmental Reports. The graph illustrates a percentage breakdown of sixty-eight (68) allegations involved in the twenty (20) CO-OP cases reviewed by the current Panel. As with IAD cases generally, many CO-OP cases entail multiple allegations.

Figure 11.



Use of Force

This rule governs the guidelines for the appropriate use of non-lethal force by members of Boston Police Department in the performance of their duties.

Judgment & Conduct:

Conduct unbecoming an employee includes that which tends to indicate that the employee is unable or unfit to continue as a member of the Boston Police Department, or tends to impair the operation of the Department or its employees. This includes any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes use of unreasonable judgment in the exercising of any discretion granted to an employee.

Rude & Disrespectful:

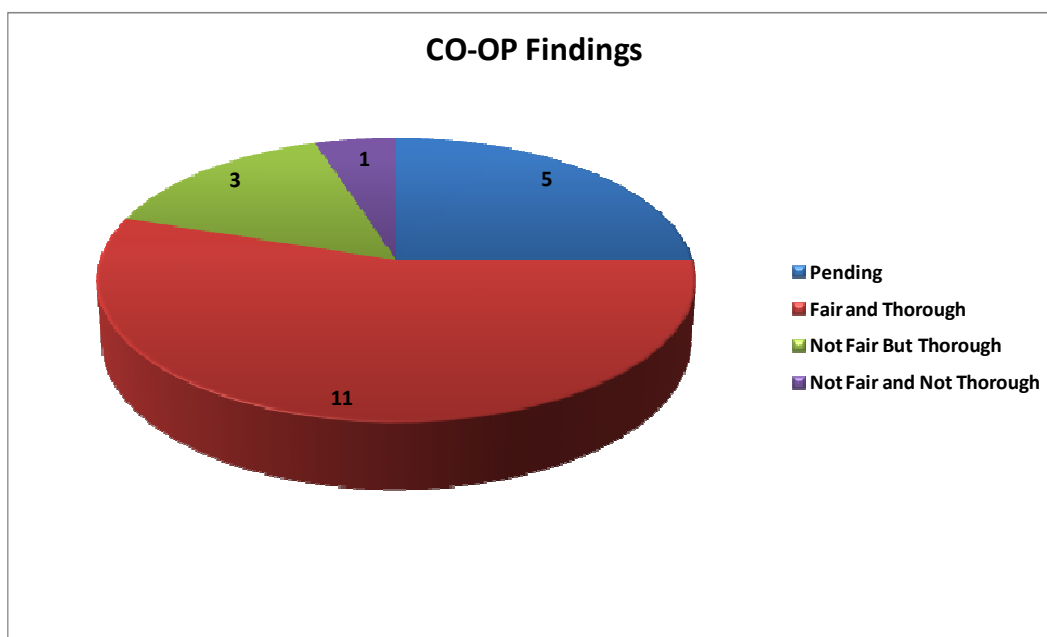
Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Boston Police Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony.

Other:

All remaining allegations made against Boston Police personnel.

The graph below (see Figure 12) summarizes the findings by the CO-OP in the twenty reviews for 2010 and 2011 completed by the current Panel. Please note that any cases reported in Figure 10 which are not included in this report were handled by the previous panel and details are available in previous CO-OP annual reports⁴. As demonstrated, 11 IAD investigations were found to be fair and thorough while 4 IAD investigations were found to be other than fair and thorough. The remaining 5 IAD investigations are still under review. Further details regarding these cases can be found in the section on page 24 entitled, “Summary of CO-OP Cases.”

Figure 12.



CO-OP Findings

Upon completion of a case review by CO-OP, complainants receive a formal letter detailing the CO-OP Finding. Finding definitions are listed below:

Fair and Thorough: The IAD investigation was found to be thorough and without bias toward either party.

Fair but Not Thorough: The IAD investigation was not found to be thorough, that is, further investigation which may have potential impact on the case finding(s) should have been completed and was not. However, the case was conducted without bias toward either party.

Not Fair but Thorough: The IAD investigation was found to be biased unfairly however investigative steps taken were thorough.

Not Fair and Not Thorough: The IAD investigation was found to be biased unfairly and more investigative steps could have been taken which may affect the case finding(s).

⁴ All CO-OP Annual Reports can be found online at www.cityofboston.gov/POLICE/CO-OP.

Observations by the Panel

Recommendations in Regard to IAD Process

Untruthfulness Policy

In a January 2010 memorandum, the Police Commissioner put all BPD personnel on notice of the department's zero tolerance policy toward untruthfulness [Appendix A]. Specifically, the memorandum provides that, in the event that an employee is found to have been untruthful in any report, sworn testimony, or internal affairs interview, termination would be the presumptive disciplinary action taken. The Panel, in its review of IAD investigative interviews conducted in the wake of the policy's issuance, noticed a concerted effort by investigating officers to make the issue of truthfulness an essential part of the interview record by referring to the policy memo at the outset or conclusion of each interview and by ensuring that the officer being interviewed had been apprised of its contents. On a few occasions, however, the Panel observed that no explicit reference was made to the policy. Rather, the interviewees were asked whether their statements were truthful without being advised of the potential consequence of untruthfulness.

Recommendation: That a uniform procedure be adopted for IAD personnel to cite the issue of untruthfulness in the same manner and at the same juncture (beginning or end) of all interviews of police officers.

Recommendations in Regard to Policies and Procedures of the Department

Reporting the Use of Non-Lethal Force

The Panel observed instances in which the use of non-lethal force was not reported in accordance with BPD Rule 304. Rule 304, in its current form, makes explicit reference to incapacitating agents such as O.C. spray, service batons, and sapsticks, but does not, by its terms, require that officers report the use of unarmed force (fists, strangleholds, etc.). Rule 304 does, however, require that officers report any force that results in: 1) obvious injury to the arrestee; or 2) a request from the arrestee for medical treatment for injury whether the injury is obvious or not.

Recommendation: The Panel recommends that Rule 304 be amended to require, explicitly, the reporting of any use of force, by any means that results in either obvious injury or a request for medical treatment.

Officer Responses to the Use of Cellphone Digital Cameras and Other Devices

In *Glik v. Cunniffe*, the First Circuit Court of Appeals reaffirmed an individual's First Amendment right to record government officials in the performance of their official duties while in public places.⁵ Because the case was decided in August 2011, one month after this Panel was appointed, we do not know whether, and to what extent, the implications of the ruling have been incorporated into the department's training of officers who may

⁵ 655 F.3d 78 (2011). In *Glik*, the plaintiff brought suit against three Boston Police officers alleging that his arrest on Boston Common for videotaping the arrest of another man violated his First and Fourteenth Amendment rights. The Appeals Court permitted the case to proceed on grounds that the plaintiff did have a constitutional right to record the officers and the matter was resolved through settlement in March 2012.

face such situations. During this review period, there were 2 cases in which an internal affairs complaint was precipitated, at least in part, by an individual's use of a cellphone digital camera.

Recommendation: The Panel recommends that the department incorporate the *Glik* decision into its recruit and in-service training curricula.

Domestic Violence Procedures

The Panel observed numerous instances in which officers and complainants were involved in domestic violence incidents. Many of the complaints appear to be related to parallel domestic dispute proceedings such as restraining orders under M.G.L. A. 209A. During our first year review period, we reviewed at least 5 cases in which domestic violence allegations were referenced in IAD's interviews. BPD Rule 327A sets forth specific procedures for insuring the safety of victims that include the prompt disarming of any officer involved in domestic violence incidents of both their department issued and personal weapons. These procedures are well reasoned and were followed in each case that we reviewed.

Recommendation: Because of the number of these incidents and the risks involved, the Panel recommends that Rule 327A be strictly enforced and that the procedures in place continue to be a focus of the department. The Panel further recommends that involved officers be offered additional support such as counseling or referral to an Employee Assistance Program.

Procedures for Officers Involved in Traffic Accidents

Special Order 97-35 forbids an officer who is involved in an auto accident from issuing a citation as a result of that accident. Another officer who was not involved in the incident must complete an investigation and issue the citation. Special Order 97-35 does not expressly cover parking tickets. The spirit and purpose of the order covers parking citations because it is designed to avoid the appearance of a conflict of interests. In one case that we reviewed, the complainant received a parking citation following an accident with an officer. The Panel concluded that the issuance of this citation was unfair. However, because Special Order 97-35 does not expressly cover parking citations the complaint was not sustained.

Recommendation: The Panel recommends that Special Order 97-35 be amended to specifically include parking citations because the purpose of the rule is to avoid the *appearance of a conflict of interests*. Thus, an officer involved in an accident is inherently biased and should not issue a citation of any type.

Case Timelines

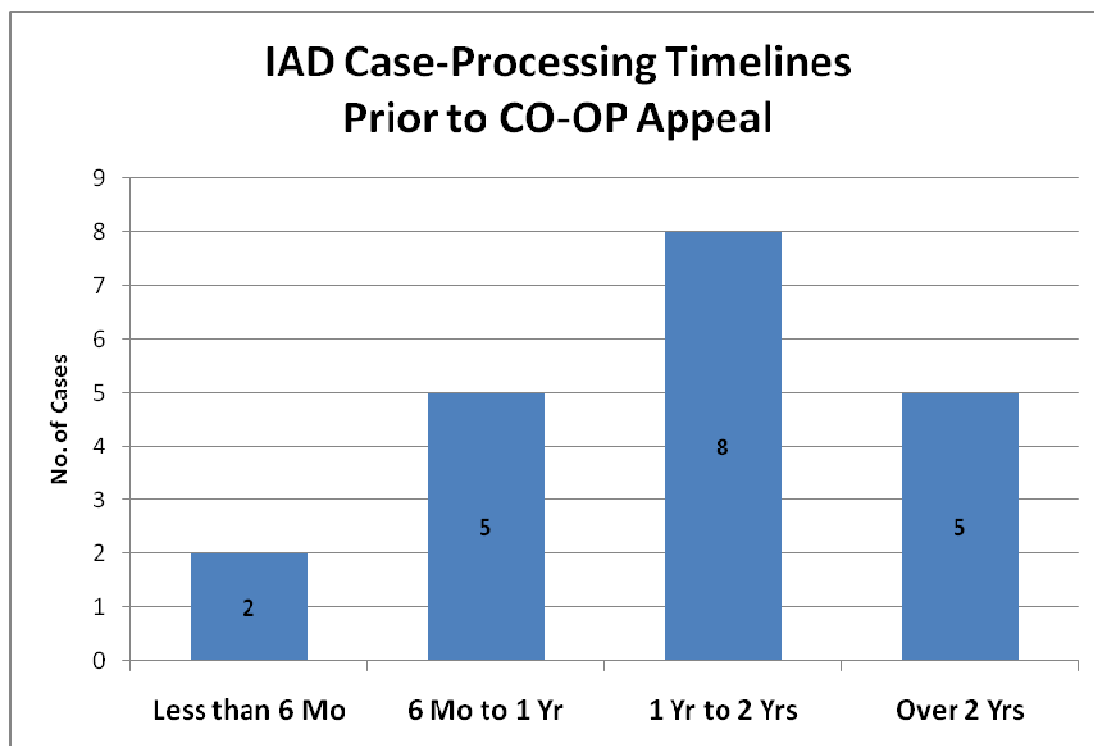
This is the first Annual Report to present Internal Affairs case-processing timelines. The processing periods presented in Figure 13 run from the date the complaint was filed with IAD to the date IAD issued the “Notice of Finding” letter, for all 20 cases subsequently reviewed by the current CO-OP Panel. This period not only includes the investigation itself, but also intra-departmental case review and administrative processing as well.

From the outset of its work, this Panel took note of case-processing timelines and shared its observations with IAD Command and Department leadership. The length of time involved in a case can potentially have a bearing on the Fairness and Thoroughness of an investigation. For example, the passage of time could hamper efforts to obtain surveillance video from private parties. It could also impact the investigator’s ability to identify and interview percipient witnesses before their recollections of an incident grow stale.

In addition, case-processing times can serve as a “customer service” benchmark, especially from the perspective of complainants. As part of its timeline observations, the Panel also noted that the Department did not have a standard practice for providing complainants with status reports, even in cases of longer than average duration.

IAD has confirmed that changes have been implemented to address factors that could contribute to prolonged processing periods, such as the mid-case transfer of investigative staff. In addition, IAD has instituted a procedure for status notifications to complainants approximately every 90 days while a case remains under active investigation. The Panel looks forward to the favorable outcomes that these actions are intended to provide.

Figure 13.



Summary of CO-OP Cases

Pending Cases

| | | |
|--------------------------|---|---------------------|
| Case #: | 09-05A | Type: Appeal |
| Summary: | Complainant alleged that during the issuance of a parking ticket, the officer verbally assaulted and threatened him and would not identify himself upon the complainant's request. | |
| Violation(s): | Respectful Treatment, Self-Identification, Conformance to Laws | |
| Recommendation: | Not Fair and Not Thorough. Further inquiry should be made. | |
| Additional Tasks: | Response sent from IA Investigator under review by Ombudsman. | |
| Case #: | 10-03A | Type: Appeal |
| Summary: | Complainant alleged that he was tackled and handcuffed by plainclothes officers who misidentified him as the suspect in a ticket scalping operation. The officers then failed to properly identify themselves. | |
| Violation(s): | Use of Non-Lethal Force, Self-Identification | |
| Recommendation: | Not Fair and Not Thorough. The investigation was returned to IAD. | |
| Additional Tasks: | Further investigation ongoing by IA. | |
| Case #: | 11-05A | Type: Appeal |
| Summary: | Complainant alleged that, following a traffic accident involving one of his friends, responding officers exhibited favoritism towards the other motorist. When complainant voiced his objection, the officers assaulted and choked him before placing him under arrest. | |
| Violation(s): | Use of Force (7 Counts), Judgment (3 Counts), Respectful Treatment (2 Counts), Gratuities | |
| Recommendation: | Pending. | |
| Case #: | 11-10A | Type: Appeal |
| Summary: | Complainant alleged that officers used excessive force when they stopped and arrested her son. | |
| Violation(s): | Judgment (2 Counts), Use of Force (2 Counts) | |
| Recommendation: | Pending. | |

| | | |
|--------------------------|---|---------------------|
| Case #: | 11-15A | Type: Appeal |
| Summary: | Complainant alleged that two officers overstated their hours on their paid detail cards, which the complainant himself signed. | |
| Violation(s): | Judgment (2 Counts) | |
| Recommendation: | Fair and Thorough (Investigation into Officer #1) Fair but Not Thorough (Investigation into Officer #2). Further inquiry suggested. | |
| Additional Tasks: | Response sent from IA Investigator under review by Ombudsman. | |

Completed Cases

| | | |
|------------------------|--|---------------------|
| Case #: | 10-04A | Type: Appeal |
| Summary: | Complainant alleged that she was verbally berated and insulted by a plain-clothes officer who boarded her disabled MBTA bus. | |
| Violation(s): | Respectful Treatment | |
| Recommendation: | Not Fair and Not Thorough. The Panel returned the investigation to IAD. As a result, the department reversed the initial finding and notified the complainant that her complaint was Sustained. ⁶ | |

| | | |
|------------------------|---|---------------------|
| Case #: | 10-14A | Type: Appeal |
| Summary: | Complainant alleged that, during their response to a domestic dispute at her home, officers used excessive force in their attempts to restrain her common-law husband. | |
| Violation(s): | Use of Force (2 Counts) | |
| Recommendation: | Fair but Not Thorough. The Panel recommended that the internal affairs investigator take additional steps in completing the investigation. Because many of these potential leads were unavailable to the investigator by the time the case reached the CO-OP, the Panel found that the investigation was Not Thorough. In the Ombudsman's view, however, these additional steps were not outcome determinative and the investigation, as a whole, was Fair. | |

⁶ The previous Panel conducted the initial review of this case and determined that the investigation was neither fair nor thorough. The case was referred back to the IAD for supplemental investigation and further review. As a result of this secondary review, the original IAD finding of "Not Sustained" was changed to "Sustained." The complainant has been notified of her successful appeal.

| | | |
|----------------|---------------|---------------------|
| Case #: | 10-15R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant alleged that he was in a motor vehicle accident with an off-duty police officer and felt threatened by the officer. Further, he alleged that an on-duty officer, who responded to the scene, refused to provide his name and badge number upon request after yelling at him.

Violation(s): Conduct-Threats, Conduct -Refusal to Exchange Papers, Directives and Orders –SO 97-35 (2 Counts), and Self-Identification

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-01A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that he was in a motor vehicle accident with a police officer and felt that he was issued a citation because he decided to report the accident.

Violation(s): Special Order 97-35

Recommendation: Not Fair but Thorough. The Investigator sustained 3 of the 4 the charges correctly, however, the existing BPD policy (Special Order 97-35) does not cover an officer involved in an accident writing a parking citation and it should. Thus, the Commissioner left the remaining charge unsustained. Pursuant to our recommendation, IAD has requested an amendment to Special Order 97-35 to expressly include parking citations.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-02A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that he was stopped at gunpoint and wrestled to ground by officers who failed to identify themselves.

Violation(s): Unreasonable Judgment (5 Counts), Use of Force

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-03A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that upon being taken into custody, officers refused to acknowledge his requests for medical attention.

Violation(s): Neglect of Duty

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-04A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that she was treated disrespectfully during a traffic stop.

Violation(s): Respectful Treatment

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-06R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant alleged that officer was rude and disrespectful.

Violation(s): Respectful Treatment

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-07R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant was engaged in a romantic relationship with an officer months prior to incident complained about. Complainant stated that the officer made an obscene gesture to her. The parties were engaged in restraining order proceedings in family court at the time of this incident.

Violation(s): Respectful Treatment, Conformance to Laws

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-08R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant alleged that, while crossing the street in the area of Fenway Park, he was accosted and verbally berated by officers working a traffic detail.

Violation(s): Respectful Treatment

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-09A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that officers used excessive force during his arrest.

Violation(s): Use of Force (9 Counts)

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-11A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainants alleged that, during a motor vehicle stop stemming from a traffic dispute, they were verbally berated and intimidated by officers who issued complainants a traffic citation in retaliation.

Violation(s): Respectful Treatment (2 Counts)

Recommendation: The Panel initially returned the complaint to IAD for supplemental investigation. Upon receipt of requested information, the Panel found that the investigation, as conducted, was Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-12A | Type: Appeal |
|----------------|---------------|---------------------|

Summary: Complainant alleged that while selling T-shirts in the area of Fenway Park, he was subjected to excessive force by an unknown, uniformed officer while being taken into custody.

Violation(s): Conduct – Unlawful Arrest, Excessive Force

Recommendation: Not Fair but Thorough. Internal Affairs investigator conducted a thorough investigation however the excessive time it took to complete cannot be classified as fair.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-13R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant alleged that officer beat up his girlfriend upon finding out that the complainant had an affair with her. Complainant further alleged that the officer made an obscene gesture to him.

Violation(s): Conduct, Judgment (2 Counts)

Recommendation: Fair and Thorough.

| | | |
|----------------|---------------|---------------------|
| Case #: | 11-14R | Type: Random |
|----------------|---------------|---------------------|

Summary: Complainant alleged that he was physically assaulted and falsely arrested by officers outside a nightclub. The complainant later recanted the allegation.

Violation(s): Abuse of Process (3 Counts), Use of Force (3 Counts), Departmental Reports - Truthfulness

Recommendation: Fair and Thorough.

Appendix A



Police Commissioner's Memo

Number: CM 10-007

Date: 1/20/10

Post/Mention: Indefinite

SUBJECT: DISCIPLINARY POLICY STATEMENT

The following statement is issued in an effort to put employees on notice that untruthfulness will not be tolerated by the Department. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer's integrity and credibility are intact. Should the Department determine that an employee has been untruthful in any report to the Department, during any sworn testimony or in an internal investigatory interview including interviews at Internal Affairs and Anti-Corruption, termination will be the presumptive disciplinary action, consistent with just cause principles.

This policy will be effective immediately.

Edward F. Davis
Police Commissioner

Appendix B



USE OF NON-LETHAL FORCE

This rule is issued to establish guidelines for the use of non-lethal force by members of this Department in the performance of their duties, and to establish appropriate training, reporting, and record keeping procedures for such use of force. Effective immediately, it supersedes all other rules, regulations, procedures, orders, bulletins, and directives issued previously regarding the use of non-lethal force by Boston police officers.

Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no rule can offer definitive answers to every situation in which the use of non-lethal force might be appropriate. Rather, this rule will set certain specific guidelines and provide officers with a concrete basis on which to utilize sound judgment in making reasonable and prudent decisions, attending to the spirit over the letter of the rule.

Sec. 1 DEFINITIONS: For the purpose of this Rule the following definitions will apply:

1. Reasonable Amount of Force is the least amount of force that will permit officers to subdue or arrest a subject while still maintaining a high level of safety for themselves and the public.
2. Non-Lethal Force is that amount of force that will generally not result in serious bodily injury or death.
3. Prudence is cautious, discreet, or shrewd action having due regard for the rights of citizens while maintaining an awareness of the responsibilities of a police officer.
4. Reasonableness means within reason, moderate and/or fair action suitable to the confrontation. The final decision as to the prudence and reasonableness of a police action will be determined on a case by case basis by those members of the Department called upon to judge the propriety of a fellow officer's action. Such judgments may not conflict with the expressed provisions of this or any other rule or order.

Sec. 2 GENERAL CONSIDERATIONS: The policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.

The right to use non-lethal force is extended to police officers as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme.

The availability of a variety of non-lethal weapons is necessary to provide the police officer with a sufficient number of alternatives when presented with a physical confrontation. However, since such force will not likely result in serious injury and the close public scrutiny that accompanies the use of deadly force, this availability may also increase the possibility for overzealous and inappropriate use of force. Therefore, application of non-lethal force will generally be limited to defensive situations where (1) an officer or other person is attacked, or (2) an officer is met with physical resistance while making an arrest.

An officer may also use non-lethal force if, in the process of making an arrest, the officer is met with passive resistance, i.e., an individual who refuses to get out of an automobile, or a protester who is illegally occupying a particular place. Such force should be limited to the absolute minimum required to move the subject. An officer who encounters resistance should be assisted by any other officers present. Two or more officers may effect an arrest, without the use of force which one officer cannot complete without resorting to the use of force.

Sec. 3 TRAINING AND QUALIFICATION: Police officers in the Department will be held accountable for proficiency, as well as compliance with Department policy in the use of non-lethal force. Specifically, sworn members shall qualify by successfully completing the course of instruction on non-lethal force approved by the Training and Education Division. This course will be conducted as part of in-service training and will include a practical application segment and a written test component. Whenever the Department adopts new non-lethal force implements, officers will qualify in their use prior to carrying or using them on duty.

In the event that an officer fails to complete the required certification, the officer will be temporarily reassigned to the Academy. The Academy will then provide a remedial training program in order to ensure such certification. Officers who still fail to qualify will be subject to reevaluation as to their fitness to continue to perform the duties of a police officer.

Sec. 4 INCAPACITATING AGENT: Officers will carry only the type of incapacitating agent issued by the Department.

In electing to use an incapacitating agent against an armed subject, officers should understand that its effects are not uniformly predictable and certain individuals may remain undeterred by its application. Any such use should be accompanied by a realization that officers may need to take further action to ensure their safety. Conversely, all officers should be aware of the potential, however limited, for serious injury arising from the use of an incapacitating agent.

For this reason, officers should generally confine the use of incapacitating agents against armed or unarmed persons to the following situations:

1. In self defense or to defend another person against a violent physical assault.
2. When an officer, while making an arrest is met with vigorous physical resistance and is in danger of either being injured or of losing custody of the suspect.

Officers should be aware of the increased potential for serious injury to the suspect when incapacitating agents are used under the following circumstances:

1. When the subject is less than two feet away.
2. When the subject is in an enclosed area without ventilation.
3. When the subject lacks normal reflexes, such as the ability to blink, or is otherwise incapacitated.

When an incapacitating agent has been applied to a subject, officers should, upon securing the suspect, provide for the thorough dousing of the exposed areas with water as soon as is practicable. This should be done as soon as possible since the seriousness of any injury or burn is directly related to the length of time the exposed area remains untreated.

Sec. 5 SERVICE BATON AND SAPSTICK: The Department currently authorizes several baton-type implements for use as non-lethal weapons against assailants. Upon issuance to and qualification by an officer, the only baton-type implements authorized for that officer's use shall be their Department issued baton or, in the case of detectives and plain clothes officers who are in the performance of those specific duties, the lead-weighted flat sapstick.

The Department issued baton shall be the standard issue for all uniformed personnel and is to be worn on the equipment belt. The lead weighted flat sapstick will be allowed in place of the Department issued baton only for detectives and plainclothes officers, when they are performing those specific duties. In such case, only the flat sapstick is to be used, not the round billy.

The primary purpose of these weapons is to provide officers with an advantage when fending off and subduing an UNARMED assailant. Officers should not rely on these weapons to overcome an ARMED attack, since they are not intended for such use.

All officers should bear in mind the essentially defensive nature of the use of non-lethal force, as outlined above in General Considerations, Section 2, when using these weapons. Officers should use the defense oriented Pressure Point Control Tactic (PPCT) whenever possible in subduing a subject. This places primary emphasis on striking motor function

controlling nerve points in the body. Except in extreme situations, where the officer is in imminent danger of serious injury, no blows should be struck above the thigh, other than to the arms. Additionally, officers should be aware of the potential for permanent disability arising from a blow to the groin, and should limit such blows to extreme situations.

Sec. 6 INJURY TO SUSPECTS: The process of booking and jailing a suspect is often time consuming and confusing, allowing for the possibility of overlooking an injury that might have been brought about by police use of force. Indeed, many injuries may not be obvious even to the injured party. Such injuries, if left untreated, could result in serious problems for both the victim and the Department.

Therefore, this Department will have Emergency Medical Technicians examine all suspects who fall under either of these categories:

1. The suspect has an obvious injury, which in the opinion of the Duty Supervisor, requires treatment.
2. The suspect requests medical treatment for any injury, whether obvious or not.

Sec. 7 INVESTIGATION OF USE OF FORCE: This Department will thoroughly investigate every incident in which an officer strikes someone with any object or an incapacitating agent is used on a subject, or when a visible injury has occurred in the course of an arrest.

All such applications of force shall be immediately reported verbally to the involved member's patrol supervisor. By the end of the tour of duty, an officer who has used non-lethal force shall make out a written report describing the incident including the names of the officer and other persons concerned, the circumstances under which such force was used, the nature of any injury inflicted and the care given afterwards to the injured party.

Prior to the end of the tour of duty, the Patrol Supervisor shall conduct a thorough investigation on the use of such non-lethal force and submit a report to the Commanding Officer. Such report shall include the Patrol Supervisor's findings and recommendations based upon the assessment of facts known, as to the justification for the use of force. A complete Patrol Supervisor's investigation shall consist of the following, where applicable:

1. Patrol Supervisor's investigative report;
2. A copy of the incident report, BPD Form 1.1;
3. Reports from the officer(s) alleged to have utilized non-lethal force;
4. Reports from all Department personnel that were present;
5. Reports on all interviews of civilian witnesses to the incident.

At the discretion of the involved member's Commanding Officer, further investigation of the incident may be undertaken. Once all the facts have been compiled and substantiated, the Commanding Officer shall submit a report of the incident through channels to the Police Commissioner within seven (7) days.

Once the Police Commissioner indicates that the report and the associated investigation is satisfactory, copies of every such report shall be forwarded to the Bureau of Professional Standards and Development, the Human Resources Division and the Training and Education Division.

The Bureau of Professional Standards and Development and the Training & Education Division shall maintain a comprehensive file of all use of force reports. Further, the Bureau of Professional Standards and Development, acting on its own authority may, or at the request of the Police Commissioner shall, investigate all incidents involving the use of non-lethal force that, based on the information at hand, indicate non-compliance with Department policy.

The Bureau of Professional Standards and Development shall forward the results of all investigations undertaken to the Police Commissioner, who may accept it and act upon its recommendations, in total or in part, or return the report with a request for further information or clarification. In every case, the authority and responsibility for final departmental disposition of a Use of Non-Lethal Force incident rests solely with the Police Commissioner.

Note: Rule 304, issued by Special Order 94-37 on October 11, 1994, was amended by the issuance of Special Order 95-16, which made clear what constitutes a proper Patrol Supervisor's report (see section 7, para 3).

Notes:

- Amended by SO 07-016, issued April 2, 2007, update the organization names to reflect the new BPD organizational structures. Section 7.

Appendix C

655 F.3d 78, 39 Media L. Rep. 2257
(Cite as: 655 F.3d 78)



United States Court of Appeals,
First Circuit.
Simon GLIK, Plaintiff, Appellee,
v.

John CUNNIFFE, in his individual capacity; Peter J.
Savalis, in his individual capacity; Jerome
Hall-Brewster, in his individual capacity; City of
Boston, Defendants, Appellants.

No. 10-1764.
Heard June 8, 2011.
Decided Aug. 26, 2011.

Background: Arrestee brought suit under § 1983, claiming that his arrest for filming police officers arresting a young man constituted a violation of his rights under the First and Fourth Amendments. The United States District Court for the District of Massachusetts, [William G. Young, J.](#), denied officers qualified immunity on arrestee's constitutional claims, and officers appealed.

Holdings: The Court of Appeals, [Lipez](#), Circuit Judge, held that:

- (1) officers were not entitled to qualified immunity on First Amendment claim, and
- (2) officers were not entitled to qualified immunity on arrestee's Fourth Amendment claim.

Affirmed.

West Headnotes

[\[1\]](#) Federal Courts 170B 574

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(C\)](#) Decisions Reviewable

[170BVIII\(C\)2](#) Finality of Determination

[170Bk572](#) Interlocutory Orders Appealable

[170Bk574](#) k. Other particular orders.

[Most Cited Cases](#)

Denial of a motion to dismiss on qualified immunity grounds, unlike denial of a typical motion to dismiss, is immediately appealable on interlocutory review.

[\[2\]](#) Constitutional Law 92 1925

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(P\)](#) Public Employees and Officials

[92k1925](#) k. In general. [Most Cited Cases](#)

Constitutional Law 92 1955

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(P\)](#) Public Employees and Officials

[92k1955](#) k. Police and other public safety officials. [Most Cited Cases](#)

Filming or videotaping of government officials engaged in their duties in a public place, including police officers performing their responsibilities, is protected by First Amendment. [U.S.C.A. Const.Amend. 1](#).

[\[3\]](#) Constitutional Law 92 1551

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(A\)](#) In General

[92XVIII\(A\)3](#) Particular Issues and Applications in General

[92k1551](#) k. Right to gather information. [Most Cited Cases](#)

Constitutional Law 92 2077

[92](#) Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(U\)](#) Press in General

[92k2077](#) k. Access to, and publication of,

655 F.3d 78, 39 Media L. Rep. 2257
(Cite as: 655 F.3d 78)

public information or records. [Most Cited Cases](#)

First Amendment right to gather news is not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press. [U.S.C.A. Const.Amend. 1](#).

[4] Civil Rights 78 1376(6)

[78](#) Civil Rights

[78III](#) Federal Remedies in General

[78k1372](#) Privilege or Immunity; Good Faith and Probable Cause

[78k1376](#) Government Agencies and Officers

[78k1376\(6\)](#) k. Sheriffs, police, and other peace officers. [Most Cited Cases](#)

Though not unqualified, a citizen's right to film law enforcement officers, in the discharge of their duties in a public space, was a well-established liberty safeguarded by the First Amendment at time of citizen's arrest, and therefore officers were not entitled to qualified immunity from arrestee's § 1983 First Amendment claim. [U.S.C.A. Const.Amend. 1](#); [42 U.S.C.A. § 1983](#).

[5] Telecommunications 372 1438

[372](#) Telecommunications

[372X](#) Interception or Disclosure of Electronic Communications; Electronic Surveillance

[372X\(A\)](#) In General

[372k1435](#) Acts Constituting Interception or Disclosure

[372k1438](#) k. Wireless or mobile communications. [Most Cited Cases](#)

Arrestee's use of his cell phone's digital video camera to film police officers arresting a young man in a public park was not "secret" within the meaning of Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him. [M.G.L.A. c. 272, § 99\(C\)\(1\)](#).

[6] Civil Rights 78 1376(6)

[78](#) Civil Rights

[78III](#) Federal Remedies in General

[78k1372](#) Privilege or Immunity; Good Faith and Probable Cause

[78k1376](#) Government Agencies and Officers

[78k1376\(6\)](#) k. Sheriffs, police, and other peace officers. [Most Cited Cases](#)

Police officers were not entitled to qualified immunity from arrestee's [§ 1983](#) Fourth Amendment claim, which was based on his arrest for violation of Massachusetts's wiretap statute; reasonable officer would not conclude that arrestee's conspicuous act of recording police officers arresting a young man in a public park was "secret" merely because the officer did not have actual knowledge of whether the audio was being recorded. [U.S.C.A. Const.Amend. 4](#); [42 U.S.C.A. § 1983](#); [M.G.L.A. c. 272, § 99\(C\)\(1\)](#).

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Before [TORRUELLA](#), [LIPEZ](#), and [HOWARD](#), Circuit Judges.

[LIPEZ](#), Circuit Judge.

Simon Glik was arrested for using his cell phone's digital video camera to film several police officers arresting a young man on the Boston Common. The charges against Glik, which included violation of Massachusetts's wiretap statute and two other state-law offenses, were subsequently judged baseless and were dismissed. Glik then brought this suit under [42 U.S.C. § 1983](#), claiming that his arrest for filming the officers constituted a violation of his rights under the First and Fourth Amendments.

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In this interlocutory appeal, the defendant police officers challenge an order of the district court denying them qualified immunity on Glik's constitutional claims. We conclude, based on the facts alleged, that Glik was exercising clearly-established First Amendment rights in filming the officers in a public space, and that his clearly-established Fourth Amendment rights were violated by his arrest without probable cause. We therefore affirm.

I.

We recite the pertinent facts based upon the allegations of the complaint, [*Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 \(1st Cir.2007\)](#), “accepting all well-pleaded facts in the complaint as true,” [*Sanchez v. Pereira-Castillo*, 590 F.3d 31, 36, 52 n. 15 \(1st Cir.2009\)](#).

As he was walking past the Boston Common on the evening of October 1, 2007, Simon Glik caught sight of three police officers—the individual defendants here—arresting a young man. Glik heard another bystander say something to the effect of, “You are hurting him, stop.” Concerned that the officers were employing *80 excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.

After placing the suspect in handcuffs, one of the officers turned to Glik and said, “I think you have taken enough pictures.” Glik replied, “I am recording this. I saw you punch him.” An officer ^{FN1} then approached Glik and asked if Glik's cell phone recorded audio. When Glik affirmed that he was recording audio, the officer placed him in handcuffs, arresting him for, inter alia, unlawful audio recording in violation of Massachusetts's wiretap statute. Glik was taken to the South Boston police station. In the course of booking, the police confiscated Glik's cell phone and a computer flash drive and held them as evidence.

^{FN1}. It is not clear from the complaint whether this was the same officer who initially addressed Glik.

Glik was eventually charged with violation of the wiretap statute, [*Mass. Gen. Laws ch. 272, § 99\(C\)\(1\)*](#), disturbing the peace, *id.* [*ch. 272, § 53\(b\)*](#), and aiding in the escape of a prisoner, *id.* [*ch. 268, § 17*](#). Acknowledging lack of probable cause for the last of these charges, the Commonwealth voluntarily dismissed the count of aiding in the escape of a prisoner. In February 2008, in response to Glik's motion to dismiss, the Boston Municipal Court disposed of the remaining two charges for disturbance of the peace and violation of the wiretap statute. With regard to the former, the court noted that the fact that the “officers were unhappy they were being recorded during an arrest ... does not make a lawful exercise of a First Amendment right a crime.” Likewise, the court found no probable cause supporting the wiretap charge, because the law requires a secret recording and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording.

Glik filed an internal affairs complaint with the Boston Police Department following his arrest, but to no avail. The Department did not investigate his complaint or initiate disciplinary action against the arresting officers. In February 2010, Glik filed a civil rights action against the officers and the City of Boston in the United States District Court for the District of Massachusetts. The complaint included claims under [*42 U.S.C. § 1983*](#) for violations of Glik's First and Fourth Amendment rights, as well as state-law claims under the Massachusetts Civil Rights Act, [*Mass. Gen. Laws ch. 12, § 11I*](#), and for malicious prosecution.

The defendants moved to dismiss Glik's complaint under [*Federal Rule of Civil Procedure 12\(b\)\(6\)*](#), arguing that the allegations of the complaint failed to adequately support Glik's claims and that the officers were entitled to qualified immunity “because it is not well-settled that he had a constitutional right to record the officers.” At a hearing on the motion, the district court focused on the qualified immunity defense, noting that it presented the closest issue. After hearing argument from the parties, the court orally denied the defendants' motion, concluding that “in the First Circuit ... this First Amendment right publicly to record the activities of police officers on public business is established.”

[1] This timely appeal followed. Denial of a motion to dismiss on qualified immunity grounds, unlike denial of a typical motion to dismiss, is immediately appealable on interlocutory review. [*Garnier v. Rodríguez*, 506 F.3d 22, 25 \(1st Cir.2007\)](#); *cf.* [**81Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct.](#)

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[534, 116 L.Ed.2d 589 \(1991\)](#) (per curiam) (stressing “the importance of resolving immunity questions at the earliest possible stage in litigation”). We limit our review to the issue of qualified immunity, [Garnier, 506 F.3d at 25](#), which is a legal determination that we review de novo, [Raiche v. Pietroski, 623 F.3d 30, 35 \(1st Cir.2010\)](#).

II.

Long-standing principles of constitutional litigation entitle public officials to qualified immunity from personal liability arising out of actions taken in the exercise of discretionary functions. See [Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 73 L.Ed.2d 396 \(1982\)](#); [Barton v. Clancy, 632 F.3d 9, 21 \(1st Cir.2011\)](#). The qualified immunity doctrine “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” [Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 \(2009\)](#). We apply a two-prong analysis in determining questions of qualified immunity. [Maldonado v. Fontanes, 568 F.3d 263, 269 \(1st Cir.2009\)](#). These prongs, which may be resolved in any order, [Pearson, 555 U.S. at 236, 129 S.Ct. 808](#), require that we decide “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation,” [Maldonado, 568 F.3d at 269](#).

The latter analysis of whether a right was “clearly established” further divides into two parts: “(1) ‘the clarity of the law at the time of the alleged civil rights violation,’ and (2) whether, given the facts of the particular case, ‘a reasonable defendant would have understood that his conduct violated the plaintiff[s] constitutional rights.’ ” [Barton, 632 F.3d at 22](#) (alteration in original) (quoting [Maldonado, 568 F.3d at 269](#)). An affirmative finding on these inquiries does “not require a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate.” [Ashcroft v. al-Kidd, — U.S. —, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 \(2011\)](#). At bottom, “the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional.” [Maldonado, 568 F.3d at 269](#).

On appeal, appellants [FN2](#) argue that they are entitled to qualified immunity on each of Glik’s constitutional claims and, accordingly, that the district erred in denying their motion to dismiss. [FN3](#) Their arguments *82 track the two parts of the “clearly established right” analysis. With regard to the First Amendment claim, appellants dispute the clarity of the law establishing a First Amendment right to record police officers carrying out their public duties. On the Fourth Amendment claim, appellants contend that, in light of Massachusetts case law interpreting the state’s wiretap statute, a reasonable officer would have believed there was probable cause to arrest Glik, and thus would not have understood that the arrest would violate the Fourth Amendment. We examine each argument in turn.

[FN2](#), Although the City of Boston is formally included in the caption to this appeal, the parties agree that the City has no right to immediate interlocutory appeal from a denial of qualified immunity, as it did not—and could not—assert such a defense. See [Walden v. City of Providence, 596 F.3d 38, 55 n. 23 \(1st Cir.2010\)](#). In referring to the appellants, then, we refer only to the individual defendants appealing the denial of qualified immunity.

[FN3](#), Appellants also argue that Glik failed to state a claim for malicious prosecution under Massachusetts law because, they argue, there was probable cause to charge Glik with a violation of the wiretap statute. As Glik rightly points out, however, appellants have no immediate right of appeal from denial of a motion to dismiss for failure to state a claim, and thus we do not reach their argument. See [Domegan v. Fair, 859 F.2d 1059, 1061–62 \(1st Cir.1988\)](#) (“Notwithstanding that we have jurisdiction to review the denial of qualified immunity midstream, ‘[a]ny additional claim presented to and rejected by the district court must independently satisfy the collateral-order exception to the final-judgment rule in order for us to address it on an interlocutory appeal.’ ” (alteration in original) (quoting [Bonitz v. Fair, 804 F.2d 164, 173 \(1st Cir.1986\)](#))).

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A. Immunity from Glik's First Amendment Claim

1. Were Glik's First Amendment Rights Violated?

[2] The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.

It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws "abridging the freedom of speech, or of the press," and encompasses a range of conduct related to the gathering and dissemination of information. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); see also *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) ("It is ... well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KOED, Inc.*, 438 U.S. 1, 11, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)).

The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). Moreover, as the Court has noted, "[f]reedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" *First Nat'l Bank*, 435 U.S. at 777 n. 11, 98 S.Ct. 1407 (alteration in original) (quoting Thomas

Emerson, *Toward a General Theory of the First Amendment* 9 (1966)). This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties. Cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035–36, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (observing that "[t]he public has an interest in [the] responsible exercise" of the discretion granted police and prosecutors). Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, see *id.* at 1034–35, 111 S.Ct. 2720 (recognizing a core First Amendment interest in "the dissemination of information relating to alleged governmental misconduct"), but also may have a "salutary effect on the functioning of government more generally, see *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (noting that "many governmental processes operate best under public scrutiny").

In line with these principles, we have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties. In *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir.1999), a local journalist brought a § 1983 claim arising from his arrest in the course of filming officials in the hallway outside a public meeting of a historic district commission. The commissioners had objected to the plaintiff's filming. *Id.* at 18. When the plaintiff refused to desist, a police officer on the scene arrested him for disorderly conduct. *Id.* The charges were later dismissed. *Id.* Although the plaintiff's subsequent § 1983 suit against the arresting police officer was grounded largely in the Fourth Amendment and did not include a First Amendment claim, we explicitly noted, in rejecting the officer's appeal from a denial of qualified immunity, that because the plaintiff's journalistic activities "were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the officer] lacked the authority to stop them." *Id.* at 25 (emphasis added).

Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts. See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th

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[Cir.1995](#)) (recognizing a “First Amendment right to film matters of public interest”); [Demarest v. Athol/Orange Cmty. Television, Inc.](#), 188 F.Supp.2d 82, 94–95 (D.Mass.2002) (finding it “highly probable” that filming of a public official on street outside his home by contributors to public access cable show was protected by the First Amendment, and noting that, “[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest”); [Channel 10, Inc. v. Gunnarson](#), 337 F.Supp. 634, 638 (D.Minn.1972) (holding that police interference with television newsmen’s filming of crime scene and seizure of video camera constituted unlawful prior restraint under First Amendment); cf. [Schnell v. City of Chi.](#), 407 F.2d 1084, 1085 (7th Cir.1969) (reversing dismissal for failure to state a claim of suit claiming police interference with news reporters and photographers’ “constitutional right to gather and report news, and to photograph news events” under the First Amendment (internal quotation mark omitted)), *overruled on other grounds by* [City of Kenosha v. Bruno](#), 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); [Connell v. Town of Hudson](#), 733 F.Supp. 465, 471–72 (D.N.H.1990) (denying qualified immunity from First Amendment claim to police chief who prevented freelance photographer from taking pictures of car accident).

[3] It is of no significance that the present case, unlike [Iacobucci](#) and many of those cited above, involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press. [Houchins](#), 438 U.S. at 16, 98 S.Ct. 2588 (Stewart, J., concurring) (noting that the Constitution “assure[s] the public and the press equal access once government has opened its doors”); *[84Branzburg](#), 408 U.S. at 684, 92 S.Ct. 2646 (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”). Indeed, there are several cases involving private individuals among the decisions from other courts recognizing the First Amendment right to film. See, e.g., [Smith](#), 212 F.3d 1332; [Robinson v. Fetterman](#), 378 F.Supp.2d 534 (E.D.Pa.2005) (holding that arrest of individual filming police activities from private property violated First Amendment); [Cirelli v. Town of Johnston Sch. Dist.](#), 897 F.Supp. 663 (D.R.I.1995) (holding that teacher had a right

under the First Amendment to videotape potentially hazardous working conditions at school, which were a matter of public concern). Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions. See [Smith](#), 212 F.3d at 1333. We have no occasion to explore those limitations here, however. On the facts alleged in the complaint, Glik’s exercise of his First Amendment rights fell well within the bounds of the Constitution’s protections. Glik filmed the defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum. In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are “sharply circumscribed.” [Perry Educ. Ass’n v. Perry Local Educators’ Ass’n](#), 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Moreover, as in [Iacobucci](#), the complaint indicates that Glik “filmed [the officers] from a comfortable remove” and “neither spoke to nor molested them in any way” (except in directly responding to the officers when they addressed him). [193 F.3d at 25](#). Such peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.

In our society, police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights. See [City of Houston v. Hill](#), 482 U.S. 451, 461, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”). Indeed, “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *Id.* at 462–63, 107

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[S.Ct. 2502](#). The same restraint demanded of law enforcement officers in the face of “provocative and challenging” speech, *id.* at 461, 107 S.Ct. 2502 (quoting [Terminiello v. Chicago](#), 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949)), must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.

2. Was the Right to Film Clearly Established?

[4] Though the “clearly established” inquiry does “not require a case directly on point,” [al-Kidd](#), 131 S.Ct. at 2083, we have such a case in [Iacobucci](#). What is particularly notable about [Iacobucci](#) is the *85 brevity of the First Amendment discussion, a characteristic found in other circuit opinions that have recognized a right to film government officials or matters of public interest in public space. See [Smith](#), 212 F.3d at 1333; [Fordyce](#), 55 F.3d at 439. This terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area. Cf. [Lee v. Gregory](#), 363 F.3d 931, 936 (9th Cir.2004) (noting that some constitutional violations are “self-evident” and do not require particularized case law to substantiate them). We thus have no trouble concluding that “the state of the law at the time of the alleged violation gave the defendant[s] fair warning that [their] particular conduct was unconstitutional.” [Maldonado](#), 568 F.3d at 269.

We find unavailing the two cases principally relied upon by the appellants in arguing that the First Amendment right to film was not clearly established at the time of the arrest, both of which were decided after Glik’s arrest. The first is an unpublished per curiam opinion from the Fourth Circuit that summarily concludes, with no discussion of the facts or relevant law, that the “right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.” [Szymecski v. Houck](#), 353 Fed.Appx. 852 (4th Cir.2009). Such unpublished opinions “have no precedential force,” [Merrimac Paper Co. v. Harrison \(In re Merrimac Paper Co.\)](#), 420 F.3d 53, 60 (1st Cir.2005); see also [United States v. King](#), 628 F.3d 693, 700 n. 3 (4th Cir.2011) (same), and the absence of substantive discussion deprives [Szymecski](#) of any marginal persuasive value it might otherwise have had.

The second case appellants cite is a Third Circuit opinion finding the right to film not clearly established

in the context of a traffic stop, characterized as an “inherently dangerous situation[.]” [Kelly v. Borough of Carlisle](#), 622 F.3d 248, 262 (3d Cir.2010). [Kelly](#) is clearly distinguishable on its facts; a traffic stop is worlds apart from an arrest on the Boston Common in the circumstances alleged. Nonetheless, even if these cases were to establish a circuit split with respect to the clarity of the First Amendment’s protections in the situation before us, that split would not undermine our conclusion that the right violated by appellants was clearly established in this circuit at the time of Glik’s arrest. See [Newman v. Massachusetts](#), 884 F.2d 19, 25 (1st Cir.1989) (finding constitutional right clearly established in the First Circuit despite “recogn[ition] that the courts are not yet unanimous on whether this ... right exists”).

In summary, though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik’s First Amendment claim.

B. Immunity from Glik’s Fourth Amendment Claim

1. Were Glik’s Fourth Amendment Rights Violated?

The existence of a Fourth Amendment violation on the facts alleged here turns on a question of Massachusetts law. The Fourth Amendment requires that an arrest be grounded in probable cause, [Martínez-Rodríguez v. Guevara](#), 597 F.3d 414, 420 (1st Cir.2010), i.e., that, “at the time of the arrest, the ‘facts and circumstances within the officer’s knowledge ... [were] sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect [had] committed, [was] committing, or *86 [was] about to commit an offense.’ ” [Holder v. Town of Sandown](#), 585 F.3d 500, 504 (1st Cir.2009) (quoting [Michigan v. DeFillippo](#), 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)). The thrust of Glik’s Fourth Amendment claim is that the appellants lacked any such probable cause that Glik had violated state law at the time of arrest. The appellants argue, to the contrary, that the allegations of the complaint establish

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probable cause that Glik violated Massachusetts's wiretap statute.^{FN4} Upon examination of the statute and relevant case law from Massachusetts's Supreme Judicial Court, we disagree.

FN4. Appellants do not attempt any argument that the facts make out probable cause for the other two offenses with which Glik was charged, disturbing the peace and aiding in the escape of a prisoner.

Massachusetts's wiretap statute makes it a crime to “willfully commit[] an interception ... of any wire or oral communication.” [Mass. Gen. Laws ch. 272, § 99\(C\)\(1\)](#). As the Supreme Judicial Court has noted, this statute sweeps more broadly than comparable laws in other jurisdictions, in that its prohibition is not restricted to the recording of communications that are made with a reasonable expectation of privacy. *See Commonwealth v. Hyde*, 434 Mass. 594, 750 N.E.2d 963, 967–68 & n. 5 (2001).^{FN5} The critical limiting term in the statute is “interception,” defined to mean “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.” [Id.](#) § 99(B)(4).

FN5. In *Hyde*, the defendant argued that the wiretap statute did not apply to his taping of police officers, as those “police officers did not possess any privacy interest in the words they spoke” in their interactions with the defendant. 750 N.E.2d at 965. The court rejected the argument, noting that the statute requires no reasonable expectation of privacy, and held that the prohibition of secret recordings squarely applies to “recordings of police officers or other public officials interacting with members of the public.” [Id.](#) at 967. Thus, in the present case, the fact that the subjects of Glik's recording were police officers is immaterial to the question of the wiretap statute's applicability.

The relevant question, then, is whether, on the facts alleged in the complaint, Glik “secretly” videotaped the appellant officers.^{FN6} The Supreme Judicial Court has held that a recording is “secret” unless the subject has “actual knowledge” of the fact of record-

ing. *Commonwealth v. Jackson*, 370 Mass. 502, 349 N.E.2d 337, 340 (1976). It has also made clear that “actual knowledge” can be proven by “objective manifestations of knowledge” to “avoid the problems involved in speculating as to the [subject's] subjective state of mind.” [Id.](#) at 340–41. Moreover, the court has noted that “actual knowledge” does not require *87 that there be any explicit acknowledgment of or reference to the fact of the recording. [Id.](#) at 340 (“[T]he person recording the conversation [need not] confirm the [subject's] apparent awareness by acknowledging the fact of the intercepting device.”). Thus, in *Hyde*, where the defendant was convicted of a wiretap violation for secretly recording a traffic stop, the Supreme Judicial Court explained that “the recording would not have been secret” within the meaning of the statute if the defendant had simply “held the tape recorder in plain sight.” 750 N.E.2d at 971. The unmistakable logic of *Hyde*, building on *Jackson*, is that the secrecy inquiry turns on notice, i.e., whether, based on objective indicators, such as the presence of a recording device in plain view, one can infer that the subject was aware that she might be recorded.

FN6. Glik also points to the statute's language requiring that an offender “willfully commit[] an interception,” [Mass. Gen. Laws ch. 272, § 99\(C\)\(1\)](#) (emphasis added), and argues that there was no probable cause for his arrest because his recording was not “willful.” In this vein, he notes that he was holding his camera in plain view and readily acknowledged that he was recording sound when asked. However, the relevant precedent suggests that the statute's reference to willfulness requires only a specific intent to record a particular communication, rather than requiring an intent to hide the recording from the subject or some other “willful” state of mind. *See Commonwealth v. Ennis*, 439 Mass. 64, 785 N.E.2d 677, 681 (2003) (noting that the Department of Correction “did willfully record” a telephone call, under circumstances where the Department expressly advised the participants that their conversation would be recorded). The allegations of the complaint leave no doubt that Glik intended to record appellants' conduct of the arrest, and thus we see no merit in Glik's argument on this point.

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[*Commonwealth v. Rivera*, 445 Mass. 119, 833 N.E.2d 1113 \(2005\)](#), forcefully illustrates this point. There, a criminal defendant argued for suppression under the wiretap statute of an audio recording by a convenience store security camera, on the theory that he lacked actual knowledge that the security cameras recorded audio as well as video. Although the case was resolved on other grounds, four of the seven justices of the Supreme Judicial Court concurred to note that the defendant's unawareness of the audio recording capabilities of the security cameras did not render the recordings "secret" under the wiretap statute where the cameras were in plain sight. [*Id.* at 1125](#) (Cowan, J., concurring in part) ("That the defendant did not know the camera also included an audio component does not convert this otherwise open recording into the type of 'secret' interception prohibited by the Massachusetts wiretap statute."); [*id.* at 1130](#) (Cordy, J., concurring) ("Just because a robber with a gun may not realize that the surveillance camera pointed directly at him is recording both his image and his voice does not ... make the recording a 'secret' one within the meaning and intent of the statute.").

[5] The complaint alleges that Glik "openly record[ed] the police officers" with his cell phone, and further that "the police officers admitted Mr. Glik was publicly and openly recording them." On its face, this conduct falls plainly outside the type of clandestine recording targeted by the wiretap statute. See [*Jackson*, 349 N.E.2d at 339](#) ("While we recognize that [the wiretap statute] is designed to control the use of electronic surveillance devices by private individuals because of the serious threat they pose to 'the privacy of all citizens,' (§ 99A), it is clear that the Legislature intended that the statutory restrictions be applicable only to the *secret use* of such devices." (emphasis added)). Moreover, not only does [*Hyde*](#) (along with the [*Rivera*](#) concurrences) indicate that the use of a recording device in "plain sight," as here, constitutes adequate objective evidence of actual knowledge of the recording, but here the police officers made clear through their conduct that they knew Glik was recording them. Specifically, one of the police officers approached Glik after the suspect had been handcuffed and told him, "I think you have taken enough pictures."

The officers protest that Glik's use of a cell phone was insufficient to put them on notice of the recording. They note that a cell phone, unlike the tape recorder

used in [*Hyde*](#), has numerous discrete functions, such as text messaging, internet browsing, video gaming, and photography, and thus the fact of an individual holding out a cell phone in front of his body is of indeterminate significance. The argument suffers from factual as well as legal flaws. The allegations of the complaint indicate that the officers were cognizant of Glik's surveillance,*⁸⁸ knew that Glik was using his phone to record them in some fashion, and were aware, based on their asking Glik whether he was recording audio, that cell phones may have sound recording capabilities. The fact that a cell phone may have other functions is thus irrelevant to the question of whether Glik's recording was "secret."

Appellants' argument reduces to the contention that, though they were aware of Glik's recording, they initially thought Glik was taking pictures of them rather than recording video and audio. This is almost precisely the argument rejected by the four concurring justices in [*Rivera*](#), and it runs directly contrary to the logic of [*Hyde's*](#) "plain view" discussion. Taking the appellants' argument to its logical end, the [*Hyde*](#) defendant's recording would have escaped a wiretap offense only if he had held his tape recorder in plain view *and* there was affirmative evidence that the officers were aware that the device was switched on and recording audio. To the contrary, [*Hyde*](#) makes the point that the use in plain view of a device commonly known to record audio is, on its own, sufficient evidence from which to infer the subjects' actual knowledge of the recording. See [*750 N.E.2d at 971*](#) (noting that recording would not have been secret under the statute if "the defendant had simply informed the police of his intention to tape record the encounter, *or* even held the tape recorder in plain sight" (emphasis added)). Simply put, a straightforward reading of the statute and case law cannot support the suggestion that a recording made with a device known to record audio and held in plain view is "secret."

We thus conclude, on the facts of the complaint, that Glik's recording was not "secret" within the meaning of Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him. Accordingly, the complaint makes out a violation of Glik's Fourth Amendment rights.

2. Was the Absence of Probable Cause Clearly Established Under the Circumstances?

655 F.3d 78, 39 Media L. Rep. 2257
(Cite as: 655 F.3d 78)

Appellants contend that, regardless of whether Glik's conduct in fact violated the wiretap law, the state of the law was such that a reasonable officer would not have understood that arresting Glik for a wiretap offense under the circumstances alleged in the complaint would violate Glik's Fourth Amendment rights. They point out, rightly, that a lesser showing is required for an officer to be entitled to qualified immunity from a Fourth Amendment claim based on a warrantless arrest than to establish probable cause. *See Cox v. Hainey*, 391 F.3d 25, 31 (1st Cir.2004). Officers are entitled to qualified immunity "so long as the presence of probable cause is at least arguable." *Ricci v. Urso*, 974 F.2d 5, 7 (1st Cir.1992) (quoting *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir.1991)).

[6] The presence of probable cause was not even arguable here. The allegations of the complaint establish that Glik was openly recording the police officers and that they were aware of his surveillance. For the reasons we have discussed, we see no basis in the law for a reasonable officer to conclude that such a conspicuous act of recording was "secret" merely because the officer did not have actual knowledge of whether audio was being recorded. We thus agree with the district court that, at this stage in the litigation, the officers are not entitled to qualified immunity from Glik's Fourth Amendment claim.

***89 III.**

For the reasons set forth above, we affirm the district court's order denying appellants' claim of qualified immunity.

So ordered.

C.A.1 (Mass.),2011.
 Glik v. Cunniffe
 655 F.3d 78, 39 Media L. Rep. 2257

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Appendix D



DOMESTIC VIOLENCE SITUATIONS INVOLVING DEPARTMENT EMPLOYEES

Sec. 1 General Considerations:

The Boston Police Department recognizes domestic violence as a universal problem that affects people from all walks of life. Domestic Violence is criminal activity and it is Department policy that arrest is the preferred response. No person is exempt, whatever his or her occupation, from the consequences of their actions that result in a violation of M.G.L. c. [208](#), [209](#), and/or [209A](#). This rule guides officers responding to incidents of domestic violence involving both sworn and civilian personnel. The purpose of this rule is to:

- Ensure the safety of the victims;
- Provide procedures for the uniformity of the investigation of said incidents;
- Provide notification and reporting procedures;
- Provide for the securing and safeguarding of Department weapons, equipment, and personally owned weapons taken into custody;
- Ensure compliance with all provisions of a court order; and
- Ensure Departmental compliance with Federal law. Federal law prohibits police officers that have been convicted of misdemeanor domestic violence crimes from possessing a firearm.

Sec. 2 Responsibilities of Operations Personnel:

A. If, upon receiving a call for assistance for DVIP, NIDV, or VIORDR, the E911 call taker determines that one of the parties is a Department employee, or a sworn officer of another police department, a Patrol Supervisor shall automatically be dispatched to the scene, along with the officers dispatched to the call.

B. If it is determined that the incident involves a Department employee, whether victim or offender, Operations personnel shall notify a DVU supervisor to respond to the scene of the incident. If it is determined that the incident involves a department employee as the offender, Operations personnel shall also notify IAD.

C. Operations personnel shall not accept miscels for employee-related domestic violence calls.

Sec. 3 Responsibilities of the Responding Officers:

The provisions of [MGL c. 209A](#) and this Rule are to be complied with in all incidents of Domestic Violence. Officers responding to an incident where a Department employee is involved

in domestic violence as either a suspect or a victim, or an incident involving a sworn member of another jurisdiction's police department, shall adhere to the following procedures:

- A. Take immediate action to ensure the safety of the victim.
- B. Request that a Patrol Supervisor respond to the scene.
- C. Comply with the requirements of [MGL c. 209A](#).
- D. Enforce the provisions of any court order that is in effect.
- E. Complete a Boston Police Incident Report and fill in the occupation box with "department employee" or "City of Boston"
- F. Remain on scene until relieved by a Superior Officer.
- G. Not miscel the call under any circumstances.

Sec. 4 Responsibilities of the Patrol Supervisor:

Upon being notified of a domestic violence incident involving a department employee, or sworn member of another police department, the Patrol Supervisor shall immediately respond to the scene of the incident and take control of the investigation of the incident. Specifically, the Patrol Supervisor shall:

- A. Assess the actual and potential harm to the victim.
- B. Confirm with Operations that the incident involves a department employee, whether victim or offender, to ensure proper notification of DVU. If the domestic violence incident involves a department employee as the offender, confirm with Operations to ensure additional notification of IAD.
- C. Upon investigation, if the Patrol Supervisor has a reasonable belief that there is evidence of physical abuse or that the threat of physical abuse exists, and that the accused is a sworn member or employee of the Department or any other police department, the Patrol Supervisor shall seize and take into custody all department-issued firearms in the possession of the employee and transfer the property to the responding DVU Supervisor.
- D. Take appropriate action, where necessary, to seize firearms considered as evidence, and firearms illegally possessed, and document such seizures on a Chain of Custody Evidence Form before transferring the firearms to the custody of the responding DVU Supervisor.
- E. If the offender is a member of another jurisdiction's police department, notify the Duty Supervisor that the offender is a sworn member of another jurisdiction.
- F. Request that the accused employee, whether sworn or civilian, surrender all personally owned firearms, his/her License to Carry Firearms and/or his/her Firearms Identification Card. The Patrol Supervisor shall attempt to obtain consent from the parties involved to search the incident scene for the purpose of seizing and taking into temporary custody all

privately owned firearms present and transfer the privately owned firearms to the responding DVU Supervisor.

G. If privately owned firearms, a License to Carry and/or Firearms Identification Card cannot be seized at the time of the incident, request that any application for a Temporary Restraining Order or Emergency Restraining Order contain a provision for the surrender of all firearms, Licenses to Carry, and/or Firearms Identification Cards.

H. If necessary, notify Operations to have the ID Unit notified to respond to the scene for photographs and crime scene processing.

I. Submit a copy of the Incident Report, BPD Form 1.1, to the Licensing Authority of appropriate jurisdiction responsible for the issuance of the alleged abuser's License to Carry and/or Firearms Identification Card.

J. Have Operations perform a Board of Probation check on all parties to determine if any outstanding restraining orders are in effect.

K. Ensure that the provisions of [M.G.L. 209A](#) and this rule are complied with; that the responding officers have completed an Incident Report, BPD Form 1.1, and submitted a special administrative report to their Commanding Officer detailing the facts of the incident, their assessment of the real and/or perceived threat to the victim and subsequent actions taken at the scene to ensure the safety of the victim and other family members (i.e., evidence gathered, weapons seized, statements made by persons present). All reports shall be submitted before the end of their tour of duty.

L. Whenever an employee-related domestic violence call does not result in an arrest or a warrant was not sought, the Patrol Supervisor shall submit a written administrative report explaining any and all reasons why an arrest was not made or a warrant was not sought.

M. Ensure that a thorough investigation is conducted and an arrest of the dominant aggressor is made.

Sec. 5 Responsibilities of the Domestic Violence Unit Supervisor:

The Domestic Violence Unit will ensure the availability of a supervisor 24 hours a day/7 days a week. Upon notification from Operations of a confirmed incident of domestic violence involving a department employee, the DVU supervisor shall respond to the scene. In accordance with M.G.L. c. 209A, when a crime involving abuse is committed by a department employee, the DVU supervisor will take the appropriate action including aiding the victim and identifying and arresting the offender.

A. If a prevention order is issued or a police officer is arrested, the DVU supervisor shall order the officer to immediately surrender his/her Department issued weapon and ammunition. The Police Commissioner shall determine if an officer's authorization to carry a department issued firearm under M.G.L. c 41 s. 98 shall be suspended while a protective order is in effect.

B. The DVU supervisor shall seize owned or controlled personal firearm(s) and forward the firearm(s) to the Firearms Analysis Unit for safekeeping. The DVU supervisor will forward seized Department issued weapons to the Range Commander for safekeeping until final disposition of the matter or until the abuse prevention order is vacated. The DVU supervisor shall also forward Department issued weapons seized as evidence to the Firearms Analysis Unit.

Sec. 6 Responsibilities of the Duty Supervisor:

The Duty Supervisor, upon being notified of a domestic violence incident involving a department employee or police officer from another jurisdiction, shall:

A. Ensure that the Patrol Supervisor has responded to the scene and commenced a preliminary investigation.

B. Upon confirmation of the incident, request Operations to notify the Commanding Officer of the District or Unit of the involved employee; notify the Commanding Officer of the District where the incident occurred; and if the incident is reported during a night shift or during a weekend, notify the on-duty city-wide Commander.

C. If the accused officer is a member of another jurisdiction's police department, notify the DVU, contact the Duty Supervisor of that officer's jurisdiction, and refer the outside department to the DVU for follow-up and reports.

D. If the involved officer/employee of the domestic violence incident is the victim, standard domestic violence response and investigation procedures should be followed, and ensure that the Domestic Violence Unit and the advocate assigned to the district are forwarded copies of all reports. If the victim/employee is injured, the Duty Supervisor shall notify their District/Unit Commander immediately.

E. Ensure proper documentation of the incident as required by Rule 327 and [M.G.L. c. 209A](#).

F. Ensure the above provisions relative to firearms have been complied with.

Sec. 7 Responsibilities of the Involved Employee:

A. A department employee who has been served with a Restraining Order, Temporary Restraining Order and/or Extension of a Restraining Order under MGL c. [208](#), [209](#), or [209A](#); or learns they are a defendant named in any such Order, or has a criminal complaint issued for any violation of MGL c. 209A, shall immediately notify his/her Commanding Officer in writing, who shall then forward a copy to the DVU. For employees residing inside the city, the Commanding Officer shall notify the District Commander in charge of the District where the employee resides of the order.

B. Employees shall also immediately notify their Commanding Officer if there is a change in status of any existing restraining order, including, but not limited to, the modification or addition of restrictions or an extension of the expiration date. Notification to an employee's Commanding Officer shall be made in writing no later than the beginning of the employee's next tour of duty or within 24 hours, whichever comes first.

The employee's Commanding Officer shall forward a copy of the written notification to the DVU, and send a copy of said change to the DVU.

C. An employee served with a Restraining Order shall attach a copy of the Restraining Order to their report along with all receipts for any surrendered firearms if so ordered by the Court, if voluntarily surrendered, or if their License to Carry or Firearms Identification Card has been suspended or revoked by the licensing authority.

D. A Department employee who is arrested outside the City of Boston for a violation of a Restraining Order and/or a violation of [M.G.L. c. 209A](#), including the issuance of a criminal complaint, shall immediately notify the Duty Supervisor, Operations Division (617-343-4680). The Duty Supervisor, Operations Division, shall notify the Commanding Officer of the employee's respective District or Unit of the arrest.

E. A Department employee who is served with a Restraining Order ordering the employee to surrender all firearms in their custody shall immediately turn their Department issued firearm, if any, over to the custody of a Superior Officer assigned to the DVU. Privately owned firearms shall be surrendered, at the first opportunity, to the employee's Commanding Officer, for an employee residing in the City of Boston, or to the police department in the city or town in which the employee resides, unless ordered otherwise by the court. The involved employee must submit receipts to their Commanding Officer verifying compliance with any order to surrender firearms, License to Carry and/or Firearms Identification Card.

F. When an outside law enforcement agency serves an abuse prevention order on a BPD officer outside the City of Boston, the officer shall comply with any request to surrender all firearms, including a department issued firearm, and notify his/her District/Unit Commander.

Sec. 8 Responsibilities of an Employee's Commanding Officer:

A District or Unit Commander, upon being notified that an employee under their command has been served a Restraining Order and/or has been involved in a Domestic Violence incident, shall take the following actions:

A. Ensure the safety of the victim.

B. If the domestic violence incident occurred in the City of Boston, recommend to the victim the services of the district domestic violence advocate and the domestic violence unit detective assigned to the district where the incident occurred, and ensure that they devise a safety plan with the victim.

C. Order that all appropriate notifications be made, and that the required documents be completed, and review all reports and documents for accuracy and completeness.

D. If a sworn Department member is the alleged abuser, ensure his/her Department issued firearm is seized for safekeeping and that privately owned firearms, a License to Carry and/or a Firearms Identification Card are also surrendered, if so ordered by the Court, or if the licensing authority has suspended or revoked his/her License to Carry or Firearms Identification Card.

E. If the department employee is the offender in a domestic violence situation, consult with the Commanding Officer of the Internal Affairs Division to determine which IAD Superior Officer shall initiate the IAD investigation of Department Rules violations.

F. Consult with the Commanding Officer of the Domestic Violence Unit to determine which DVU Supervisor shall initiate the follow-up DVU criminal investigation.

G. Immediately notify the Internal Affairs Division and the Domestic Violence Unit if there is any change in status of an employee under a restraining order (i.e., restrictions modified or added, expiration date extended, etc.).

Sec. 9 Responsibilities of the Licensing Unit Commander:

The Commander of the Licensing Unit, upon the receipt of a License to Carry or Firearms Identification Card from the Commanding Officer of a police officer who has an abuse prevention order issued against said officer, shall initiate administrative action in accordance with M.G.L. c. 140 s.131. The Commander of the Licensing Unit shall ensure that there are no statutory disqualifications before returning any firearms licenses upon the protective order being vacated.

Sec. 10 Post-Incident Administrative Decisions:

The Department shall conduct separate parallel administrative and criminal investigations of alleged incidents of employee domestic violence. If the facts of the case indicate that domestic violence has occurred or any departmental policies have been violated, administrative action shall be taken separate and distinct from any criminal proceedings as soon as practicable. Independent of the outcome of the criminal case, the department shall adhere to all positions and policies relating to the incident.

Where sufficient information exists, the Department shall take immediate administrative action to intervene, which can include removal of badge, removal of weapon, reassignment, administrative leave with or without pay, or termination.

Sec. 11 Criminal Investigations and Decisions:

A Superior Officer of the Domestic Violence Unit will assume responsibility for completing the criminal investigation of all incidents of employee related domestic violence. The designated investigating Superior Officer shall be of a rank higher than the accused officer.

A. The DVU Superior Officer shall conduct the criminal investigation as he/she would any other criminal violation of 209A.

B. Even though an initial report may already exist concerning a police officer, if the victim reports any subsequent or additional criminal activity, each incident shall be documented separately, assigned a case number, and investigated thoroughly.

C. The Department shall completely investigate the charges and where warranted, seek prosecution, even if the victim recants the charges or fails to participate in the prosecution.

Sec. 12 Surrendering Department Issued Firearms Pursuant to Abuse Prevention Orders Issued Against an Officer:

A. In accordance with M.G.L. c. 209A, s. 3B and/or s. 3C, when an Abuse Prevention Order is or has been issued against a Boston Police Department Officer, it shall be the Department's policy that the officer shall be required to surrender his/her Department issued weapon and ammunition immediately to his/her Commanding Officer or to a Superior Officer so designated by his/her Commanding Officer. Additionally, the Police Commissioner shall determine if an officer's authorization to carry a department issued firearm under M.G.L. c. 41, s. 98 is suspended while a protective order is in effect against the officer.

B. Officers who are licensed to carry a firearm pursuant to M.G.L. c.140 s. 131 or a Firearms Identification Card pursuant to M.G.L. c.140 s. 129B shall also surrender their license(s) to their Commanding Officer or his/her designee who shall forward them to the Commander of the Licensing Unit for administrative action as proscribed in section M.G.L. c. 140 s. 131 (d) (vi) and M.G.L. c. 140 s. 129B (1) (viii). Personal firearms surrendered to this Department shall be forwarded to the Department Firearms Examiner for safekeeping.

C. Department issued weapons surrendered pursuant to Section 5, Paragraph B of this rule shall be delivered to the Department Range Master at Moon Island for storage until such time as the Abuse Prevention Order is vacated.

D. Upon the protective order being vacated, the Commander of the Bureau of Professional Standards and Development shall authorize in writing the return of the officer's duty weapon and any personal weapons surrendered to the Boston Police Department. The Commander of BII shall forward this authorization to the Police Commissioner for final approval. Personal firearms surrendered to this Department by an officer shall not be subject to the requirements of Rule 311, Section 8 for their return.

E. The Commander of the Licensing Unit shall ensure there are no statutory disqualifications before returning any firearms licenses upon the protective order being vacated.

F. In situations where an outside law enforcement agency serves a protective order on a police officer from this Department at his or her residence outside the City of Boston, that officer shall comply with the request of surrender of firearms, including department issued firearms pursuant to the protective order issued against them. When such a situation occurs, the officer shall immediately notify the Operations Duty Supervisor who shall notify Internal Affairs Commander or the on call member of Internal Affairs. The designated member of Internal Affairs shall then contact the agency concerned and request the return of the department weapon and any other department property taken.

Sec. 13 Additional Considerations:

All Department personnel shall keep all information concerning victims confidential, including their whereabouts, safety plan, and any communications or impounded addresses. Federal law prohibits officers convicted of misdemeanor domestic violence assaults from carrying firearms. The department shall ensure compliance with Federal law (see 18 U.S.C.S922 (g) (9)).

Albert E. Goslin
Superintendent in Chief
Acting Police Commissioner

Notes:

- Amended by SO 06-054, issued November 24, 2006, section 2(B), section 4(B) and section 8(E).
- Amended by SO 07-016, issued April 2, 2007, update the organization names to reflect the new BPD organizational structures. Section 12.
- Amended by SO 08-034, issued 09/12/2008, all references to the “Ballistics” or “Ballistics Unit” shall be amended to Firearms Analysis Unit. All references to the “Ballistician” or the “Department Ballistician” shall be amended to the Firearms Examiner. Section 5, B. Section 12, B.

Appendix E



SPECIAL ORDER NUMBER 97-35

TO: ALL PERSONNEL

September 26, 1997

COPIES TO: ALL SUPERINTENDENTS
DEPUTY SUPERINTENDENTS
AND DIRECTORS**SUBJECT: MOTOR VEHICLE ACCIDENTS INVOLVING DEPARTMENT
VEHICLES AND/OR SWORN PERSONNEL****PURPOSE:**

To establish procedures that protect Department personnel from allegations of a conflict of interest existing whenever a motor vehicle accident involves Department vehicles and/or sworn personnel.

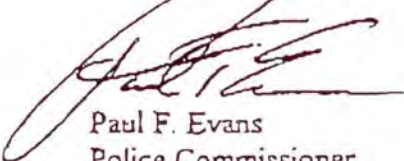
GENERAL CONSIDERATIONS:

The issuance of a Massachusetts Uniform Citation and/or the making of arrests when Department vehicles and/or sworn personnel are involved in a motor vehicle accident has led to Department personnel being accused of being biased in favor of finding the other party to the accident at fault. To protect Department personnel from charges of there being an inherent conflict of interest in such situations, the procedures set forth below are effective immediately.

CITATION AND ARREST PROCEDURES:

To avoid the appearance of a conflict of interest on the part of officers involved in motor vehicle accidents, officers personally involved in a motor vehicle accident which either involves Department vehicles or occurs within the City of Boston, shall not be the arresting officers nor issue a Massachusetts Uniform Citation to any other person involved in the accident for any criminal offenses or civil infractions which they observed or have reasonable grounds to believe have been committed. Officers involved in such accidents, whether on-duty or off-duty, shall contact the Operations Division and request a Patrol Supervisor respond to the scene.

It shall be the responsibility of the responding Patrol Supervisor to issue appropriate Massachusetts Uniform Citations for any criminal offenses or civil infractions that the Patrol Supervisor has reasonable grounds to believe have been committed (see, M.G.L. c. 90C, § 2). The issuance of such citations will be based upon the Patrol Supervisor's investigation, including the statements of the officer(s) involved and any other witnesses. If an offense has been committed for which there is only an in presence right of arrest, the responding Patrol Supervisor shall summons the offender into court for such offense. For all felonies and any offenses for which there is a past misdemeanor right of arrest, the arresting officer shall be the responding Patrol Supervisor.


Paul F. Evans
Police Commissioner

MENTION AT ROLL CALLS

POST UNTIL Indefinite

TOTAL P.02

Appendix F

How do I contact the Community Ombudsman Oversight Panel?



If you want further information, you can contact the CO-OP in writing:

By mail:

The Community Ombudsman Oversight Panel
P.O. Box 190189
Roxbury, MA 02119

By email:

COOP.bpd@cityofboston.gov

Or by phone:

617-594-9216

"Such oversight will serve to promote the professionalism of the Boston Police Department."

Excerpt from Mayor Thomas M. Menino's Executive Order

What else should I know?

The entire process is confidential. Personal information will not be released. Your appeal and any correspondence will be filed and kept secure.



City of Boston Community Ombudsman Oversight Panel

P.O. Box 190189
Roxbury, MA 02119
Phone: 617-594-9216

All CO-OP Forms and Publications are available **online** at the address listed below:

Website Address:

www.cityofboston.gov/POLICE/CO-OP



Mayor Thomas M. Menino

City of Boston Community Ombudsman Oversight Panel

"It is in the best interest of the City of Boston and the Boston Police Department to have an oversight mechanism to build trust and confidence within the community."

Excerpt from Mayor Thomas M. Menino's Executive Order



What is the CO-OP?

The Community Ombudsman Oversight Panel, or CO-OP, is a three person independent civilian board appointed by the Mayor that is empowered to review Boston Police Internal Investigations cases appealed by complainants.

What cases are eligible for appeal?

Cases eligible for appeal include those with a finding of not sustained, exonerated or unfounded that you feel were not fairly and/or thoroughly investigated.

How do I file an appeal?

You, or your legal representative, can file an appeal once you have received the Notice of Finding from the Boston Police Internal Investigations Unit. You must file your appeal in writing or using a CO-OP Appeal Form (which is sent with your Notice or available for download online) within fourteen (14) calendar days of the date on the Notice of Finding. You may also reference the Appeal Form which accompanies your Notice. This has the *Date Due* listed on it for your convenience. If your appeal is sent via mail, the appeal must be postmarked within fourteen (14) calendar days of the date on the Notice of Finding.

Please mail appeals to:

Community Ombudsman Oversight Panel
P.O. Box 190189
Roxbury, MA 02119

If your appeal is hand-delivered, it must be delivered to the address below by the close of business of the fourteenth (14th) day from the date on the Notice of Finding.

Please hand deliver appeals to:

Community Ombudsman Oversight Panel
City of Boston Law Department
Boston City Hall
Room 615
Boston, MA 02201

You may also email your appeal to:

COOP.bpd@cityofboston.gov

Please reference the IAD Case # in the subject line.

What is the process of appeal?

When an appeal is received within the allotted time-frame, it is assigned to an Ombudsman. The Ombudsman will then review the entire Internal Investigations case file and make a recommendation. Once a final decision has been made, the CO-OP will notify you by mail.

Please refer to the Mayor's Executive Order for more detailed information online at:

www.cityofboston.gov/POLICE/CO-OP

How much does it cost?

There is no fee to file an appeal.

Who makes the final decision?

The Boston Police Commissioner makes the final decision on an appealed case. Recommendations by the Ombudsman and the Chief of the Bureau of Professional Standards are considered in addition to case file documents. The Police Commissioner's determination is final and no further appeal is available.

How long will this appeal take?

There is no specific time limit allotted for an appeal. It will take time for the Ombudsman to review the entire case file, especially when a case contains multiple violations. Ombudsmen will be assigned more than one CO-OP case file for review at a time.

What training does the Panel receive?

Each of the Ombudsmen has extensive knowledge and experience in law enforcement, the criminal justice system and/or the judicial process. However, prior to reviewing any Boston Police Department Internal Investigation case, the Panel members receive training at the Boston Police Academy to better their understanding of how police officers are trained while in the Academy. Topics discussed at this training include Constitutional Law, Race and Community Relations, and Use of Force, among others. A second day of training is given by the Department to educate the Panel members on the Internal Affairs Investigation process, the disciplinary process and other related topics.

Will the Panel review cases other than civilian complaints?

The Panel will review a random sample of not sustained, exonerated or unfounded cases that *have not* been appealed by complainants. This external oversight of cases will help ensure that current Internal Investigation practices are fair, thorough and complete even when an appeal is not filed. Not sustained, exonerated, or unfounded cases involving allegations of serious misconduct or unjustified use of force will also be reviewed by the Panel at the discretion of the Department.

Appendix G

Community Ombudsman Oversight Panel Appeal Form

Instructions: Please sign this form to file your appeal in writing. The area below is provided should you wish to list additional comments. There is **no fee due** to file this appeal. **This form must be postmarked by the date listed below** (which is 14 calendar days from the date listed on your notice). Please mail this appeal to:

City of Boston
Community Ombudsman Oversight Panel
P.O. Box 190189
Roxbury, MA 02119

You may also file your appeal via email to COOP.bpd@cityofboston.gov. **Your email appeal must be sent by 5:00PM on the due date listed below.** Just please include the information listed below in your email.

DATE DUE:

NAME:

IAD CASE #:

To the Community Ombudsman Oversight Panel:

I would like to appeal the above listed Boston Police Department Internal Affairs Case.

SIGNATURE

DATE

If you would like, please include additional comments:
