



**THE CITY OF NEW YORK  
COMMISSION TO COMBAT POLICE CORRUPTION**

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**TENTH ANNUAL REPORT  
OF THE COMMISSION**

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## I. OVERVIEW

The Commission to Combat Police Corruption (the “Commission”) was created by Executive Order 18<sup>1</sup> in February 1995. The primary reason for its creation was to establish an outside monitor to analyze and report on the anti-corruption systems and policies of the New York City Police Department (the “Department”). The Commission studies areas where reforms could be implemented to prevent and detect corrupt behavior among members of the service. Additionally, the Commission examines the overall quality of investigations by the Department into allegations of corruption. Since its inception, the Commission has published twenty-four reports addressing discrete Departmental systems and policies ranging from the recruitment and hiring practices for new uniformed and civilian members of the service to the functioning of the Department’s administrative disciplinary system. The Commission also regularly conducts follow-up reviews on topics which it has previously studied. The purpose of these follow-up studies is to discern whether the Commission’s recommendations have been implemented and if so, whether these recommendations have proven effective. The Commission has also published nine Annual Reports describing the studies and audits conducted and any other work performed since the publication of the prior Annual Report.

This report, the *Tenth Annual Report of the Commission*,<sup>2</sup> covers the Commission’s work for the last twenty-two months

, describing the work conducted since January 2006, with an emphasis on the work performed

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<sup>1</sup> Executive Order No. 18 is reproduced as Appendix A to this report.

<sup>2</sup> This report covers the work performed by the Commission between January 1, 2006 and November 2007. It does not cover the Commission’s work between December 2007 and the publication of the report in February 2008 as this time was used for the editing and the publication process. That time period will be covered in the *Eleventh Annual Report of the Commission*, expected to be published in February 2009.

over the past year and a summary of the Commission's daily operations.<sup>3</sup> This work includes the ongoing areas of a review of closed Internal Affairs Bureau ("IAB")<sup>4</sup> investigations and a review of the disciplinary system and the penalties meted out to members of the service who were found to have engaged in corruption or misconduct. In addition, the Commission has begun monitoring pending IAB investigations on a regular basis and explains this type of review in the first section of this report.

The Commission is currently beginning work on three new projects which it expects to complete in the coming year: an analysis of how the Department investigates cases involving allegations of misconduct; a follow-up to the Commission's 2000<sup>5</sup> and 2004<sup>6</sup> reports on the Department's disciplinary system and; an examination of the safeguards the Department has in place to prevent and detect claims for overtime by its members when that overtime was not, in fact, performed. Further details about these projects are provided in the conclusion of this report.

## **II. THE COMMISSION'S MONITORING OF PENDING IAB INVESTIGATIONS**

### **A. Overview**

For the past several years, Commission staff had limited its extensive review of IAB

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<sup>3</sup> No Annual Report was published in 2007 while the Commission worked through staffing and jurisdictional issues, which have since been resolved.

<sup>4</sup> IAB is the unit within the Department responsible for investigating allegations of corruption or serious misconduct.

<sup>5</sup> *The New York City Police Department's Prosecution of Disciplinary Cases* (July 2000).

<sup>6</sup> *Follow-up to the Prosecution Study of the Commission* (March 2004).

investigations to those that had been completed and closed at the time of the Commission's review.<sup>7</sup> Although that type of case examination serves a useful purpose, the Commission and IAB agreed that often the Commission made suggestions that were difficult to apply in the closed cases due to the length of time that had passed between the original allegation and the time of the Commission's review. Therefore, in 2007, the Commission began monitoring pending cases where there was an immediate opportunity to comment and make suggestions to individual case investigators. This also allowed Commission staff to examine a greater volume of IAB's cases. The Commission began its review with a sample of eighty-one open cases, conducted by fourteen different IAB groups.<sup>8</sup> The remaining four groups will be reviewed in the future.

## **B. Methodology**

The Commission selected between four and six cases from each of these fourteen IAB investigative groups. For most groups, the Commission selected from the newly initiated cases that were presented at the intensive Steering Committee meetings where each IAB group presents all of its open cases to the Executive staff of IAB.<sup>9</sup> The Commission tried to choose cases that were pending for approximately three months and that were based on allegations that appeared to have some substance and evidence to support them. To achieve its goal of reviewing four to six cases, the Commission, at times, had to choose cases

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<sup>7</sup> See *infra* pp. 5-14 for a description of the Commission's monitoring of closed IAB investigations.

<sup>8</sup> IAB is divided into twenty-one groups which investigate cases based on geography or specialty. Due to the nature of the cases, the Commission does not review investigations conducted by Group 51, the police impersonation group, Group 52, the integrity testing group, or Group 55, the surveillance group.

<sup>9</sup> See *infra* at pp. 39-40 for further information about Steering Committee meetings.

that were open for longer than three months or which did not appear to have significant evidence to support the allegations. In a few instances, cases were randomly chosen from open case monitoring lists provided by IAB. In these selections, the Commission did not have any information about the allegations.

The types of allegations that the Commission observed during its review included those involving criminal association, missing or stolen property, excessive force, prisoner flaking,<sup>10</sup> and narcotics sale and possession. Although most cases were classified as “C” cases,<sup>11</sup> there were some instances where the Commission chose cases classified as “M”<sup>12</sup> or “OG.”<sup>13</sup> Staff then traveled to the offices for each group and reviewed the case file. Going forward, reviews will be performed by the Commission on a quarterly basis as Commission staff attorneys follow each case through to its closing.

## **C. Findings**

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<sup>10</sup> An allegation of flaking is one where a complainant alleges that a member of the service intentionally planted drugs, weapons, or other evidence on his person. Usually this complaint occurs in connection with a criminal prosecution for the possession of the items that were allegedly planted.

<sup>11</sup> Cases are classified as “C” cases when serious misconduct or criminal activity has been alleged. These cases are only investigated by IAB.

<sup>12</sup> Cases are classified as “M” cases when less serious misconduct has been alleged. These cases may be investigated by IAB but are usually investigated by the appropriate Borough or Bureau Investigative Unit. For the purpose of open case monitoring, all “M” cases reviewed by the Commission were investigated by IAB.

<sup>13</sup> Cases are classified as “OG” cases when a minor infraction or violation of regulations is involved. While these cases may be investigated by IAB, they are usually forwarded to the subject officer’s Command for any investigation or further action. For the purpose of open case monitoring, the OG cases reviewed by the Commission were all investigated by IAB. IAB will investigate OG cases when there is something in the allegation which indicates that there may be more serious misconduct to be uncovered or when the allegation consists of a member of the service complaining that he is suffering from retaliatory acts by other members of the service.

Open case monitoring has enabled the Commission to communicate with individual case investigators and team leaders<sup>14</sup> while the investigations are in progress. The Commission has found these discussions to be productive, since staff attorneys are making suggestions that may be considered and implemented while the investigation is still pending. Most of the investigators appear to have been receptive to the Commission's suggestions. In addition, the Commission is sometimes able to follow up on those suggestions made to investigators when the group Commanding Officers convene at their respective Steering Committee meetings<sup>15</sup> that are held approximately every six weeks.

The Commission will be able to determine whether its suggestions are being implemented in future reviews of those cases. In reviewing cases prior to closing and providing immediate feedback, the Commission believes that the suggestions will be presented at a time where they can have a greater impact on the progress and possibly the outcome of the case.

### **III. THE COMMISSION'S MONITORING OF CLOSED IAB INVESTIGATIONS**

#### **A. Introduction**

Under Executive Order No. 18 2(a) (ii), the Commission is required to analyze "the effectiveness of the Department's systems and methods... for investigating allegations of corruption." Annually, the Commission reviews a sample of corruption cases that have been closed by IAB. These are classified as "C" cases and involve allegations of serious misconduct

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<sup>14</sup> Team leaders are responsible for supervising the case investigators assigned to their respective group and are the rank of Lieutenant or higher.

<sup>15</sup> See *infra* at pp. 39-40 for a discussion about Steering Committee meetings.

or criminal activity. For this review, the Commission examined twenty-seven cases that were closed between 2006 and 2007.

## **B. Methodology**

“C” cases were randomly selected from lists of recently closed IAB cases which the Commission receives on a bi-monthly basis. When selecting these cases, the Commission did not have any information about the allegations or the disposition in the case. In evaluating these cases, the Commission examined whether, given the particular allegation, necessary investigative steps were completed. Specifically, the manner in which each step was executed and whether any significant investigative techniques were overlooked were considered during the Commission’s examination. In addition, interviews conducted by case investigators were evaluated. Commission attorneys reviewed the quality of these interviews and when these interviews were being conducted in connection with the overall progress of the investigation. In cases where surveillance and integrity tests were used, the Commission evaluated whether those techniques were appropriately executed and useful. Finally, the Commission assessed whether the case was kept open for an undue length of time based on the nature of the allegations and the investigative strategy followed.

After reviewing these investigations, the Commission discussed its findings with IAB Executive staff and investigators. During these discussions, the Commission provided feedback to group Commanding Officers regarding issues that were noted during its review. These meetings proved useful in that the Commission and IAB staff had the opportunity to exchange ideas and opinions on the quality of IAB’s investigations. In addition, suggestions made by the Commission could be implemented in future, similar investigations, if appropriate.

IAB personnel were responsive to Commission inquiries and listened to Commission suggestions. This open discourse has improved the Commission's ability to monitor investigations.

### **C. Findings**

In the last two Annual Reports, the Commission commented that in a number of cases investigators failed to adequately adjust their investigative plan when unforeseen developments occurred during the course of an investigation. Additionally, the Commission remarked that delays in the investigation of a few cases were causing them to remain open for longer than necessary. Although in recent years the Commission noted that this situation was still surfacing in some investigations, the Executive staff of IAB has been emphasizing closing cases more expeditiously. Specifically, recommendations have been made to forgo conducting Patrol Guide interviews ("PG interviews" or "PG hearings")<sup>16</sup> in certain cases where there was little information to be gained and the interview was only going to elicit a denial from the subject officer. As PG interviews are typically one of the final steps in an investigation, refraining from unnecessary PG hearings conserves resources and allows the investigation to be closed more quickly.<sup>17</sup>

The Commission has also observed that certain steps that were formerly considered a

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<sup>16</sup> Patrol Guide § 206-13 entitles the Department to interrogate officers during an official Department investigation. Members of the service who refuse to answer questions during these interviews are suspended, and members that are found to have been untruthful during the interviews are subject to termination from the Department, absent exceptional circumstances, which are determined on a case-by-case basis by the Police Commissioner. *See infra* at pp. 31-34 for a more extensive discussion of the Department's policy regarding members of the service who make false statements during PG interviews. Members of the service are entitled to have a union representative present during the interview, and subjects of the investigation are permitted to obtain counsel if either "a serious violation is alleged" or sufficient justification is presented for an attorney despite the alleged violation being minor.

<sup>17</sup> Foregoing a PG interview also minimizes the likelihood that a subject officer will become aware of the allegations against him.



mandatory part of a particular type of investigation are being evaluated for their usefulness before being planned and implemented, as previously suggested by the Commission in its last two reports on this topic.<sup>18</sup> The Commission has seen a more efficient use of time and resources since generic plans have been replaced by more direct investigations that are being narrowly tailored at the outset to suit the particular case.

Despite such improvement, the Commission continues to note lengthy delays in some cases. For the most part, such delays are not caused by IAB but by other agencies, including District Attorney's offices, United States Attorney's offices, other law enforcement agencies, and the Department Advocate's office ("DAO").<sup>19</sup> Often, IAB has to refrain from conducting specific investigative steps until other agencies have completed their criminal investigation of a subject officer so as not to jeopardize the criminal case. Another common reason for delay is difficulty obtaining telephone records.<sup>20</sup> The Commission has seen improvement, however, in the documentation of reasons for any lengthy gaps in an investigation. As a result of these measures, the Commission has observed less unnecessary intervals between investigative steps.

Due to the small sample of cases reviewed, the Commission cannot definitively assert that its sample is an accurate reflection of IAB's entire caseload; however, it appears that investigative teams have been diligently bringing cases to a close. The Commission continues to believe that IAB's investigations can be conducted in a more efficient manner if

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<sup>18</sup> See the *Eighth Annual Report of the Commission* (February 2005) at pp. 16-19 and the *Ninth Annual Report of the Commission* (February 2006) at pp. 8-12.

<sup>19</sup> DAO is the Department bureau responsible for prosecuting internal disciplinary cases. See the Commission's reports *The New York City Police Department's Prosecution of Disciplinary Cases* (July 2000) and *Follow-up to the Prosecution Study of the Commission* (March 2004).

<sup>20</sup> Often there is a delay in obtaining subpoenaed telephone records because the telephone carrier responsible for maintaining those records is difficult to identify or has sold the telephone number at issue to another carrier. In the latter case, the process for subpoenaing the records has to begin again.

investigative teams use generic plans only as a guide in the beginning of an investigation and deviate from that plan as is necessary based on the progress of the investigation. Investigative plans should then be revisited routinely to determine if the investigation has changed its course so that adjustments may be made at the appropriate time. In addition, investigative tools that are selected for particular cases should continue to be those that will likely yield evidence or have some value in affecting the disposition in the case. It appears that IAB is making an effort to evaluate the utility of each investigative step.

### **1. Specific Investigative Techniques**

Before commenting on specific issues noted during its review, the Commission is cognizant that only twenty-seven cases from over two thousand IAB investigations were reviewed and therefore, the issues the Commission observed may not be representative of IAB's entire caseload. However, the Commission is only choosing to comment on issues that were observed in more than one case in its sample and, therefore, did not appear to be isolated events.

#### **a. PG Interviews**

One investigative technique available to IAB is that investigators have the ability to compel members of the NYPD to appear and be interviewed regarding the allegations against them or other members of the service. These PG interviews can serve as an effective fact-finding tool to determine what occurred during a particular event or series of events being investigated. Interviewers are able to question members of the service who may have been present to witness the alleged events or who may have key information that will aid in the investigation. At times, PG interviews can be used to either strengthen the case against a

subject or develop evidence that may tend to disprove the allegation.

The Commission has commented in past reports on the quality of PG interviews.<sup>21</sup> The Commission recognizes that IAB is conducting fewer PG hearings where the promise of eliciting useful information is minimal and believes that this is positive. The Commission continues to evaluate whether during those PG hearings that are conducted, interviewers are prepared in their questioning, are eliciting helpful information through their questioning, and are using appropriate follow-up questions.

In many investigations, the purpose of the PG interview is to gather information on a particular event and “lock” the officer into a version of events so that it may be used to assess a witness’ credibility at a later administrative hearing should he<sup>22</sup> change his testimony. The Commission believes that, at times, an adversarial approach to a PG hearing is necessary and appropriate, while in other circumstances when the interview is conducted merely to obtain information, a more conciliatory approach is desirable. The investigator should consider the tone of the interview as part of his overall strategy to gain the most information.

In the sample of cases that the Commission reviewed, the lack of focus during interviews, the failure to ask necessary follow-up questions, and the interviewer’s demeanor remain areas which can be improved. Specifically, the Commission observed that in a few cases, interviewers possessed information that needed to be explained by the subject officer.

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<sup>21</sup> See the Commission’s reports *Performance Study: A Review of Internal Affairs Bureau Interrogations of Members of the Service* (March 2000); *Fourth Annual Report of the Commission* (November 1999) at p. 41; *Fifth Annual Report of the Commission* (February 2001) at pp. 24-25; *Sixth Annual Report of the Commission* (December 2001) at pp. 24-27; and *Seventh Annual Report of the Commission* (March 2004) at pp. 33-39.

<sup>22</sup> For simplicity, the masculine pronoun “he”, “his”, and “him” will be used to refer to all officers regardless of their gender unless specifically noted otherwise.

When questioning the officer about this information, the interviewers would accept his answer without challenging it. In some other investigations, interviewers failed to question a subject about information that may have cast doubt on the officer's version of events.

The Commission has also observed that in some cases, interviewers were not asking appropriate questions where confusing events needed to be clarified. Specifically, in cases where there are many participants playing an active role, it is necessary for interviewers to try to resolve internal inconsistencies in how a series of events transpired as well as external inconsistencies that have been developed through other avenues of investigation. The Commission recommends that when questioning an officer, investigators confront him with any evidence that tends to disprove the officer's version of events, even if this evidence is external such as statements by other officers. While educated and experienced minds can assume what the subject officer's response will be, the subject officer should be forced to state the response for the record. There may also be some situations where the subject officer's response will not be the assumed one.

Based upon the sample of interviews Commission staff reviewed, varying degrees of skill were observed among the investigators. Some of the PG interviews were performed in an efficient and thoughtful manner, while others were not conducted in a way that the Commission believed was likely to lead to the maximum amount of information. The Commission recognizes that some investigators may have stronger interviewing skills than others. Without focusing on whether any specific deficiencies were observed in this small sample, the following are some guidelines that the Commission believes investigators should

utilize when preparing for and conducting PG interviews. The interviewer should have a well thought-out approach to their questioning and ask open-ended questions intended to gain information, not to solely confirm or deny existing information. The interviewer should also maintain control over the interview while establishing and maintaining the proper tone and be flexible to the possibility that the answers provided may afford the opportunity to pose a series of follow-up questions that were not previously considered. The interviewer should attempt to avoid leading questions which tend to provide the officer with an exculpatory answer. This will also allow interviewers to observe the interviewee's demeanor while they answer questions and assist interviewers with assessing credibility. IAB provides an initial training in PG interview techniques to its new members upon their appointment to the Bureau. Refresher courses on PG interviews are also regularly provided to senior investigators. Continued training of investigators could include the revisiting of closed cases where interviews previously conducted could be reviewed to highlight flaws in investigative techniques or missed opportunities to gain further information.<sup>23</sup>

**b. Surveillance**

Although in most cases proper planning resulted in the investigator maximizing the opportunity to observe the subject officer during surveillance, there were a few instances where each time surveillance was being conducted, it was performed at approximately the same time of day and on the same day of the week despite no indication that this was when the officer was engaging in the alleged misconduct. The Commission believes that surveillance should continue to be scheduled during the time when the officer may be participating in the alleged

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<sup>23</sup> In response to this report, IAB has invited the Commission to observe and participate in future trainings on this issue.

misconduct. This may involve more preparation prior to surveillance such as obtaining the officer's schedule and verifying the officer's home address. In most cases, the investigator obtained this information prior to conducting an observation.<sup>24</sup>

### **c. Investigative Leads**

In the majority of cases, investigators were able to reach the complainant and conduct an interview during the early stages of the investigation. There were some cases, though, where the Commission noticed a delay in contacting the complainant or witnesses. In most of these cases, the delay did not impede the investigation because the complainant had previously been interviewed during the call-out investigation.<sup>25</sup> However, when a complainant or any other witnesses were transient, a delay in contact could limit the utility of a particular lead as the complainant or witnesses might disappear and any information they possessed would be lost. In these instances, investigators should remain aware that they must act quickly so as to not lose the opportunity to contact the complainant or other witnesses.

### **d. Conclusion**

Overall, the Commission has observed that IAB investigations continue to be conducted in a thorough and effective manner. The focus, however, must remain on utilizing resources to

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<sup>24</sup> The Commission recognizes that on some occasions, officers have changed their residence without notifying the Department of their new address. In these cases, IAB investigators may only learn that they have incorrect information after they have actually commenced surveillance. In the majority of these situations, IAB takes corrective action after discovering that the officer has not updated his pedigree information.

<sup>25</sup> After the complaint is received by the Command Center, IAB's twenty-four hour hotline for receiving complaints, IAB supervisors will decide whether there should be an immediate response to a location and whether other immediate investigative steps are required. This sometimes includes conducting witness interviews and gathering any information that may be useful in the investigation. After this initial, call-out, investigation is completed, a file is created that encompasses what was done during this initial investigatory stage, and that file is transferred to the investigator who will handle the case until closing.

their fullest potential while remaining aware that as an investigation progresses, it may lead investigative teams in a direction where changes in overall strategy may be necessary. The Commission found that in the vast majority of cases, investigators were collecting necessary documents in a timely manner and were appropriately utilizing investigative tools such as surveillance, integrity tests,<sup>26</sup> E.D.I.T. operations,<sup>27</sup> and A.W.A.R.E. operations.<sup>28</sup> Also, the Commission agreed with the dispositions in all of the cases based on the information that was developed during the investigations. The Commission remains optimistic that IAB Executive staff and experienced team leaders will continue to encourage and train individual investigators to improve in the areas noted above.

#### **IV. CLOSED DISCIPLINARY CASES**

Every year in addition to reviewing a random sample of the investigations conducted by IAB, the Commission has also reviewed all of the cases that were administratively prosecuted by DAO against members of the service. Historically, the Commission has given particular attention to those cases involving allegations of serious off-duty misconduct and

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<sup>26</sup> These are artificial situations that are designed and closely monitored by IAB in order to test a member of the service's adherence to the law and Departmental guidelines.

<sup>27</sup> E.D.I.T. is an acronym for enforcement, debriefing, intelligence gathering, and testing. During these operations, IAB investigators will make arrests of certain individuals who are suspected of criminal activity and interview them regarding their knowledge of police corruption. At times, IAB enlists other Department units to make the arrest. Interviews regarding an individual's knowledge can be general or specific to a particular subject of an allegation.

<sup>28</sup> A.W.A.R.E. is an acronym for active, warrant, address, review, and enforcement. This type of operation involves investigators conducting computer inquiries on a particular location in order to discern whether individuals residing in that location have any outstanding warrants. Once this information is received, investigators arrest those individuals with warrants and conduct debriefings regarding those individuals' knowledge of police corruption or other criminal-related activity.

those allegations involving the making of false statements by members of the service. The Commission reviews all cases to determine whether appropriate penalties are being levied against the subject officer as the Commission believes that strong, adequate penalties are important to deter future corruption or misconduct. During its review, the Commission also examines whether the Department is following its own guidelines in imposing penalties against officers who have been found guilty.

#### **A. Review of Closed Disciplinary Cases**

The Commission receives the Department's closed disciplinary cases on a monthly basis. These disciplinary cases consist of those cases that resulted in Department trials as well as those cases where the subject officer pled guilty to some or all of the charges. Also included in the closed disciplinary cases are those where no ultimate determination was made because the subject left the Department prior to an adjudication of the charges,<sup>29</sup> those where motions to dismiss the charges were made by DAO, and those where mitigation hearings occurred.<sup>30</sup> The documents reviewed include the charges and specifications,<sup>31</sup> dispositions of the charges, and any memoranda prepared by those officers who initially investigated the allegations. If the case was decided after a trial, mitigation hearing, or motion to dismiss by

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<sup>29</sup> Charges are filed in these cases in the event the officer tries to reinstate his employment at some point in the future. In that event, the statute of limitations for the alleged misconduct will not have expired and the officer's alleged misconduct can still be addressed.

<sup>30</sup> In a mitigation hearing, the officer admits his guilt to the charges but does not want to accept DAO's recommended penalty. The officer then testifies to explain his conduct and present any factors that would support a less serious penalty.

<sup>31</sup> The "charge" designates the name of the offense and the "specification" describes the specific misconduct charged.



the Advocate, the Trial Commissioner's written decision is included. If the subject officer agreed to a plea, the plea memorandum drafted by the Assistant Advocate is part of the paperwork. In combination, these documents set forth the facts surrounding the misconduct and the reasons underlying the decisions as to guilt and as to the appropriate penalty.

For this report, the Commission reviewed all of the cases adjudicated between January 1, 2006 and September 30, 2007. In total, the Commission reviewed seven hundred and one cases. The conduct alleged included being absent from assignment without leave, unauthorized off-duty employment, associating with criminals, using excessive force against someone, shooting without justification into a nightclub crowded with civilians, and other misconduct. While the Commission analyzed those cases involving serious off-duty misconduct including alcohol-related misconduct, firearms-related misconduct, and domestic violence, and those cases involving making false statements more closely, the Commission also evaluated the penalties, where imposed,<sup>32</sup> in the remainder of the cases. Excluding those cases discussed separately in each of the above-mentioned categories, the Commission believed a more serious penalty was warranted in four of the cases.<sup>33</sup> The Commission made these determinations using a totality of the circumstances standard in which the Commission considered the seriousness of the allegations, the evidence that was available to DAO or presented to the Trial Commissioner, the officer's disciplinary history and statements to explain the allegations, and whether the penalty was consistent with those imposed on other

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<sup>32</sup> Cases where charges were filed, charges were dismissed, or where the officer was found not guilty after trial did not have a penalty.

<sup>33</sup> In some cases, while the Commission did not necessarily agree with the penalty, it believed that the Department was not unreasonable in its assessment of the appropriate penalty. The Commission did not count these cases where reasonable minds could differ as ones where it disagreed with the adequacy of the penalty.

officers who were disciplined for similar misconduct.

## **B. Serious Off-Duty Misconduct**

### **1. Introduction**

In August 1998, the Commission began its review of closed disciplinary cases with the publication of its report *The New York City Police Department's Disciplinary System: How the Department Disciplines its Members Who Engage in Serious Off-Duty Misconduct*. After reviewing disciplinary cases with allegations of violent behavior, alcohol-related misconduct, and the display or discharge of a firearm, the Commission made several policy recommendations regarding the appropriate penalties that the Department should impose.<sup>34</sup> The Commission continued its review of these cases in its *Fifth Annual Report of the Commission*,<sup>35</sup> *Sixth Annual Report of the Commission*,<sup>36</sup> and *Seventh Annual Report of the Commission*.<sup>37</sup> A new Associate Commissioner of DAO was appointed after the release of the *Seventh Annual Report of the Commission*. About the time of this appointment, there was a miscommunication with the Department, and the Commission ceased receiving the closed disciplinary cases. Therefore, the Commission did not report on this topic in the *Eighth Annual Report of the Commission*<sup>38</sup> and only reported on the Department's treatment of false

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<sup>34</sup> See *infra* at pp. 19-21, 23-25, and 27-28 for the specific recommendations regarding alcohol-related misconduct, firearms-related misconduct, and domestic violence allegations that have been proposed by the Commission.

<sup>35</sup> February 2001.

<sup>36</sup> December 2001.

<sup>37</sup> March 2004.

<sup>38</sup> February 2005.

statement cases in the *Ninth Annual Report of the Commission*.<sup>39</sup> In September 2006, the Commission received all of the outstanding closed disciplinary cases, and the Commission is now able to comment on these cases for this report.

## **2. Methodology**

The Commission initially reviewed all cases that were adjudicated between January 2006 and September 2007 where at least one of the charges involved misconduct committed by a uniformed member of the service<sup>40</sup> while he was off-duty. The Commission only included in its review those cases where the off-duty misconduct was determined to fall into categories of alcohol-related misconduct, the display or discharge of a firearm, or domestic incidents.

The Commission reviewed these cases to determine whether the Department was imposing appropriately severe penalties upon those members of the service found guilty of off-duty misconduct. To make this determination, the Commission reviewed all of the documents it received in connection with the closed disciplinary cases. Where the Department had a specific policy to address particular misconduct, the Commission sought to determine whether that policy was followed, and if not, whether sufficient reasons existed to deviate from the policy. When there was no explicit policy governing the misconduct, the Commission balanced the severity of the misconduct for which the subject officer was found guilty against the subject officer's disciplinary history to determine if the penalty given was

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<sup>39</sup> February 2006.

<sup>40</sup> In this context, the Commission uses the term "uniformed member of the service" to mean those members of the service who are not civilians. Civilian members of the service have the option of a different, less formal disciplinary process. In most cases, the Commission does not receive closed disciplinary cases involving civilian members of the service.

appropriate. The Commission examined whether other members of the service who committed the same misconduct received similar penalties if they had a similar disciplinary history. Historically, the Commission has always advocated the use of progressive discipline where given the equality of all other factors, the Commission believes that an officer who has a prior disciplinary history, particularly if that disciplinary history includes similar misconduct, should receive a more severe penalty than an officer who does not have a prior disciplinary history.

The Commission did not offer its judgment as to whether any findings of guilt were appropriate. The Commission believes that this determination was best left to the Trial Commissioner who had the opportunity to see all of the witnesses and to review all of the evidence presented.

### **3. Findings**

#### **a. Alcohol-Related Off-Duty Misconduct**

During its initial 1998 study regarding the discipline of members of the service who engage in serious off-duty misconduct, the Commission found that alcohol use often had a role in a subject officer's violent behavior or wrongful display or use of a weapon. The Commission recommended several changes to address cases that involved alcohol misuse. Following these recommendations, the Department implemented several new policies. Specifically, the Department declared that an officer's fitness for duty<sup>41</sup> should be determined at the time of the incident using scientific or other evidence of an officer's

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<sup>41</sup> Departmental regulations require an officer to be "fit for duty at all times, except when on sick report." See New York City Police Department Patrol Guide Section 104-1, "Fitness for Duty," 1. Moreover, the Department expressly forbids officers from consuming alcohol "to the extent that [the] member becomes unfit for duty." See Patrol Guide Section 104-1, "Fitness for Duty," 2.

intoxication instead of allowing the determination to be made at the time the officer was examined by the Duty Captain which could be several hours later when the subject officer might no longer be unfit.

In cases involving the offense of Driving Under the Influence (“DUI”),<sup>42</sup> an officer suspected of engaging in this misconduct would be administered a Breathalyzer test. If the officer refused to take the Breathalyzer test, the refusal could be used as evidence of his intoxication in a future Department proceeding against him. Additionally, the officer would incur a further charge of “Conduct Prejudicial to the Department” based on his refusal to submit to the Breathalyzer test. This charge also applied if the subject officer refused to submit to a blood test to determine the level of alcohol in his system. Following the Commission’s recommendations, an administrative charge of “Armed While Unfit for Duty” was created.<sup>43</sup> Additionally, the penalty for any member of the service found to have misused his firearm while unfit for duty would be termination.

Just prior to the publication of the *Seventh Annual Report of the Commission*, the Department implemented a policy where all members of the service found guilty of “DUI” would be subjected to a penalty of Dismissal Probation.<sup>44</sup> In addition, the officer would be

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<sup>42</sup> In New York State, the relevant criminal offense is called “Driving While Intoxicated” (“DWI”). This charge is analogous to the Department’s administrative charge of “DUI.”

<sup>43</sup> See Patrol Guide Section 203-04 (“Armed While Unfit for Duty”).

<sup>44</sup> Dismissal Probation is a category in the highest level of monitoring that the Department has for members of the service. When an officer is placed on Dismissal Probation, technically, his employment with the Department has been terminated, but this termination is not immediately executed. Instead, the officer continues to work for the next twelve months while being monitored by his Commanding Officer and other executive officers through the receipt of monthly evaluations about the officer’s conduct while at work. If, during this period of probation, the officer conforms his conduct to Department standards, at the end of the year, his employment status is fully restored to the position that he was in before the term of his Dismissal Probation commenced. If, however, new charges and specifications are levied against the officer

required to undergo Department counseling and submit to quarterly random alcohol tests while on Dismissal Probation.<sup>45</sup> If an officer failed one of these tests or refused to take a test, he would be subjected to further disciplinary action which could possibly include summary termination. Another policy implemented mandated a penalty of termination if an officer was found to have caused serious physical injury to another person while operating a motor vehicle while intoxicated unless exceptional circumstances existed. Whether exceptional circumstances existed that would justify a departure from termination was to be determined by the Police Commissioner. The Commission approved of both of these new policies as an indication that the Department was taking this type of misconduct more seriously.

In its current review of cases, the Commission selected thirty-five cases<sup>46</sup> in which alcohol was involved either directly, as in the case of a charge of “DUI”, or indirectly, such as when an assault occurred in an establishment where alcohol was served and the participants had been consuming beverages containing alcohol. The Commission found that the Department is generally following its stated policies regarding off-duty misconduct involving alcohol. Of the thirty-five cases reviewed, nine of the cases did not have alcohol-related during this time period, the Department has the option of summarily terminating him without any administrative hearing. This is true even if the misconduct for which the charges and specifications are brought occurred before the officer was placed on Dismissal Probation. Dismissal Probation is usually imposed in conjunction with the loss of vacation days or suspension days.

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

<sup>45</sup> See Interim Order 9-1, c.s., Conducting Ordered Breath Testing of Uniformed Members of the Service for the Presence of Alcohol, (December 26, 2002).

<sup>46</sup> Cases were counted by sets of charges and specifications brought against a member of the service. Of the thirty-five cases, two officers each had two sets of charges and specifications pending against them. Therefore, only thirty-three officers were involved.

charges. One of these cases involved the failure to obey an order to attend alcohol counseling. Of the remaining eight cases, the Commission only disagreed with the failure to bring an alcohol-related charge in one case.

Of the thirty-five cases reviewed, twelve cases contained charges of either “DUI” or “Driving While Ability was Impaired.” In all but one of these cases, there was an additional charge of “Unfit for Duty.”<sup>47</sup> In ten of these cases, the respondent was placed on Dismissal Probation and ordered to submit to random breath testing and to cooperate with counseling as specified in Interim Order 9-1, c.s. In the remaining two cases, the respondent was either terminated or directed to file for retirement. The only case where there was a serious physical injury as a result of the respondent’s impairment resulted in the respondent’s termination, however, the respondent was criminally convicted of a felony, and therefore; his termination occurred by operation of law.<sup>48</sup> The Commission notes that the Department could not proceed administratively against the respondent while the criminal case was pending. Therefore, the Commission is unable to determine whether or not the Department would have followed its policy in this case.

Twenty-five of the thirty-five cases reviewed contained charges of “Unfit for Duty.” Of the remaining ten cases, the Commission believed that with further investigation, an “Unfit for Duty” charge may have been appropriate in one additional case. Determinations

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<sup>47</sup> The Commission understands the reason why there was not an Unfit for Duty charge in the final case as the Department was not notified of the respondent’s alcohol use until ten hours after it was notified about the accident. At that time, when a toxicology test was performed, the respondent’s blood alcohol level was .07. Also, none of the witnesses reported that the respondent appeared intoxicated at the time of the accident.

<sup>48</sup> Public Officers Law Section 30(1) (e).

of fitness for duty appeared to have been made based on reports of the respondent's appearance and behavior at the time of the incident as well as based on the responding supervisor's observations of the respondent.<sup>49</sup> Breathalyzer or blood tests were attempted in nine of the cases. The respondent refused to submit to the test in all of these cases, and all but one resulted in a separate charge against the respondent for the refusal to submit to this test.<sup>50</sup>

In eleven cases, the respondent was armed with a firearm at the time of the incident. Of the remaining twenty-four cases, there was no indication in the paperwork that the necessary determination was made concerning whether or not the respondent was armed in ten of the cases.<sup>51</sup> Of the eleven cases where the respondent was found to be armed with a firearm, a separate charge of "Unfit for Duty While Armed" was levied in nine of the cases.<sup>52</sup> Seven of these nine cases resulted in more severe penalties being imposed against the respondent, but there were additional aggravating factors in six of these cases.<sup>53</sup>

The Commission found only two cases where the respondent received prior discipline

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<sup>49</sup> There were five cases where it appeared that no finding was made concerning the respondent's fitness for duty.

<sup>50</sup> In the final case, there were three requests for the respondent to take a breathalyzer test which he refused. The respondent agreed to submit on the fourth request. No charges for refusing to take the first three tests were levied against this respondent.

<sup>51</sup> In one of these cases, state troopers were the responding officers and in a second case, although there did not appear to be an official finding about whether he was armed, the subject officer stated that he was unarmed.

<sup>52</sup> In the remaining two cases, there was no charge that the respondent was unfit for duty.

<sup>53</sup> Aggravating factors included that the respondent had a second disciplinary case, the respondent was also charged with making false statements, the respondent refused to take a Breathalyzer test, and the respondent was terminated by operation of law due to his criminal felony conviction.



for an alcohol-related offense, although these offenses were both more than five years old. The respondent was not terminated in either of these cases.

The Commission has found that the Department continues to improve in its treatment of those officers alleged to have misused alcohol. The Commission believes that the Department is imposing significant penalties for these offenses thus indicating that the Department understands the serious nature of this type of misconduct. The Commission believes, though, that the Department can still improve when documenting its determinations about whether respondents are armed when they are found to be unfit for duty.

**b. Misconduct Involving Firearms**

Since August 1998, the Commission has reviewed off-duty misconduct involving firearm-related incidents on several occasions.<sup>54</sup> In its last report on this topic,<sup>55</sup> the Commission reviewed cases where officers were alleged to have engaged in either the display or discharge of a firearm or the failure to immediately report a firearm discharge to the Department. The Commission focused on whether the Department was making findings about whether the officer was unfit for duty<sup>56</sup> at the time of the incident. If an unfitness finding was made, the Commission checked whether the Department charged the officer with being unfit for duty. Pursuant to Department policy regarding misconduct with a firearm while unfit for duty, the Commission examined whether absent exceptional circumstances, an officer found guilty of this type of violation, was

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<sup>54</sup> See the *Fifth Annual Report of the Commission* (February 2001), at pp. 34-37 and *Sixth Annual Report of the Commission* (December 2001), at pp. 49-51.

<sup>55</sup> See *Seventh Annual Report of the Commission* (March 2004), at pp. 91-100.

<sup>56</sup> See *supra* at pp. 19-20 for further discussion on fitness for duty.

terminated.

In that report, the Commission found that in a significant number of cases, the Department did not document whether the officer was unfit for duty at the time of the firearm misconduct.<sup>57</sup> The Commission recommended that a finding of fitness be performed and documented in the paperwork in all cases where it was possible to determine whether the officer was fit for duty at the time of the misconduct. The Commission also reported that the Department was found to be appropriately including the charge of “Unfit for Duty While Armed” in those cases where a determination had been made that the subject officer was unfit for duty at the time of the alleged misconduct.

The Commission also reviewed the penalties that were imposed. The penalties were evaluated based on the totality of the circumstances in each case. Generally, the Commission found that the penalties being levied were appropriate. However, there were a few cases where the Commission found that the penalty imposed was not sufficiently severe due to the nature of the misconduct.

For this report, the Commission reviewed cases that had been adjudicated by the Department between January 2006 and September 2007 involving the off-duty display or discharge of a firearm. There were nine cases<sup>58</sup> that were selected for review. The

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<sup>57</sup> The Commission recognized that there were cases where the Department was unable to make determinations of fitness for duty given the circumstances of the case, however, it was noted that in those cases, the Department should have documented why it was unable to make such a finding. Some of the cases where the Department was unable to make a finding of whether an officer was unfit for duty involved the late reporting of incidents or recantation of allegations.

<sup>58</sup> One of the cases was also analyzed for alcohol-related misconduct, and one of these cases was also analyzed for domestic violence allegations.

Commission focused on whether there was a determination of fitness for duty at the time of the misconduct and if the specific charge was levied against the officer.

The Commission determined that in only one of the nine cases a determination of fitness for duty was made. In three of the cases, the Department was unable to determine fitness for duty due to a lapse in time from the date of the alleged misconduct to when the officer was available for evaluation. In these three cases, the officers involved were not suspected of misconduct until days, months, and even years after the occurrences. The Commission recognized that in these cases, a determination of fitness was not possible due to the amount of time that had elapsed since the incident.

In four of the cases,<sup>59</sup> the Department was not prevented from making a determination of fitness. The Commission was especially concerned that these determinations were not documented in two of the cases where there was an indication that alcohol may have been a factor.<sup>60</sup> Both cases indicated that the subject officers made admissions to consuming alcohol while being armed. In both cases, NYPD uniformed officers responded and had the best opportunity to determine the officer's fitness for duty at that time. Although the Commission did not disagree with the outcomes in both of these cases, investigators should be reminded that a finding as to the officer's fitness is

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<sup>59</sup> There was an additional case involving an officer who unjustifiably displayed his firearm during an altercation. However, the Commission was unable to ascertain if the Department had the opportunity to make a determination of fitness because the records were unclear as to whether the Department responded to the location and had the opportunity to evaluate the officer.

<sup>60</sup> One of these cases involved the unjustifiable display of a firearm, and the other involved the inappropriate discharge of a firearm.

necessary.

The Department's compliance with this recommendation may become more automatic since the implementation of Interim Order No. 52<sup>61</sup> where "uniformed members of the service involved in firearm discharges, which result in injury or death of a person, will be subject to Department administered alcohol testing."<sup>62</sup>

In examining the penalties imposed in these nine cases, the Commission did not agree with the penalties that were given in two of the cases. These cases involved the display of the officer's firearm to civilians without justification. The Commission believes that based on the serious consequences that can result when a firearm is so displayed, at the very minimum, a period of Dismissal Probation to monitor the officer's future conduct is required.<sup>63</sup> In total, the officers each lost twenty days.<sup>64</sup> In six of the remaining cases involving firearm misconduct, the officers involved were terminated, resigned, or agreed to file for retirement as part of the penalty.<sup>65</sup>

The cases reviewed revealed that in four of the cases involving firearm misconduct, the Department failed to make a finding of fitness despite appearing to be

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<sup>61</sup> This order was issued by the Police Commissioner on September 30, 2007.

<sup>62</sup> This rule does not govern those cases where the subject officer only displays a firearm or discharges a firearm but does not injure or cause the death of a person.

<sup>63</sup> The Department was provided with an advance copy of this report. In response to this recommendation, the Department stated that "Dismissal Probation is only imposed when a penalty of termination is warranted. Dismissal Probation cannot be used solely for the purpose of monitoring conduct."

<sup>64</sup> One of the officers lost twenty vacation days, while the other received a penalty of a fifteen-day suspension and lost five vacation days.

<sup>65</sup> In the final case, the officer was not charged with displaying the firearm, and it appeared that particular allegation was unsubstantiated.

able to do so. The Department, therefore, should be vigilant in making fitness for duty findings in order to ensure that the proper charges are being levied and adequate penalties are being imposed. It is the Commission's hope that the adoption of Interim Order No. 52 will be beneficial in that it will require routine fitness for duty findings, although only in limited circumstances. Further, while the Commission agrees with the outcomes in seven of the nine cases that were reviewed, there were two cases involving the unjustified display of a firearm where the Commission believes that the subject officers should have been monitored through Dismissal Probation.

**c. Domestic Incidents**

In its *Sixth Annual Report*,<sup>66</sup> the Commission began reviewing how the Department instituted discipline in those cases where the officer was found to have been involved in a domestic incident while off-duty. The Commission chose this category of cases to review because it believed that it was important for the Department to send a clear message that this type of misconduct, whether it is a verbal assault or a physical one, will not be condoned. To demonstrate that this type of behavior is unacceptable, significant penalties must be imposed. The Commission also recommended that a system of progressive penalties should be implemented where given similar allegations, those officers who had a history of domestic allegations would receive more severe penalties than those without prior allegations, including the imposition of a period of Dismissal Probation where appropriate. The Commission conducted a second review in this area in its *Seventh Annual Report*.<sup>67</sup> In both reviews, the Commission found that in the majority of cases, the Department was appropriately penalizing

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<sup>66</sup> See *supra* at p. 17, fn. 36 at pp. 52-55.

<sup>67</sup> See *supra* at p. 17, fn. 37 at pp. 100-107.

officers and this improved during the Commission's second review of this category of cases. The Commission also found in its second review, that Dismissal Probation was being included in more penalties and more officers who were on Dismissal Probation or who were Probationary Police Officers<sup>68</sup> at the time of the adjudication of the domestic incident were also being terminated after being found to have engaged in this type of misconduct.

In this current review, the Commission examined forty-eight cases where a domestic dispute was involved.<sup>69</sup> The allegations ranged from making verbal threats, to physical assaults that resulted in bruises or more serious injuries, to violations of orders of protection.

When evaluating the appropriateness of the penalty imposed, the Commission considered the severity of the allegation, whether any physical injury was incurred by the complainant, and whether the respondent had a disciplinary history involving domestic issues. Other factors the Commission considered when judging the adequacy of the penalties imposed were whether the respondent expressed remorse for his actions, whether the respondent voluntarily attended counseling programs, and whether the complainant was cooperative with the prosecution of the administrative case.

The Commission found that in most of the cases where the complainant was not

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<sup>68</sup> When police officers are first appointed to the Department, they are placed on a two-year probationary period. According to the New York City Personnel Rules and Regulations, Section 5.2.7, an agency head "may terminate employment of any probationer whose conduct and performance is not satisfactory after the completion of a minimum period of probationary service and before the completion of the maximum period of probationary service by notice to the probationer and to the city personnel director." Therefore, Probationary Police Officers may be terminated for any reason as long as the termination is not based on bad faith, based on a constitutionally impermissible reason, or in violation of statutory or decisional law.

<sup>69</sup> Five of these cases were also examined in the section for alcohol-related misconduct. *See supra* at pp. 21-23. Also, this number does not represent the total officers who were accused of involvement in domestic disputes as some officers had more than one case revolving around domestic issues.

cooperating with DAO, they did not dismiss the charges, and instead, proceeded with the prosecution. In some of these cases, the Assistant Advocate tried to obtain evidence from other sources, however, in other cases, it appeared that the respondent received a less severe penalty than would otherwise have been justified. The Commission understands that when the complainant is uncooperative, the penalty offered will be affected because the case will not be as strong and the risk of defeat after a trial will increase. The Commission only reviewed four cases where specifications were dismissed on motion by the Assistant Advocate due to the complainant's failure to cooperate.<sup>70</sup> In these cases, though, the Department was able to prosecute the respondent on other specifications.

In twenty of these cases, the subject officer either had a prior allegation involving a domestic incident, or had been placed on Dismissal Probation previously. In three cases, the prior incidents were not reported by the complainant or the respondent until this incident, so discipline had never been formally imposed for this behavior. In four of the cases, there had been prior allegations levied against the subject officer, but these had been unsubstantiated,<sup>71</sup> similarly resulting in no prior discipline. In two cases, the subject officer was the victim of a domestic dispute in a prior allegation. In two cases, the subject officer had a previous or current placement on Dismissal Probation for other charges. Finally, in nine cases,<sup>72</sup> the

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<sup>70</sup> In eighteen of the cases, the Commission was able to discern that the complainant would not cooperate with the Department's prosecution. In an additional seven cases, it was unknown whether the complainant was willing to cooperate. In two other cases, though, the complainant was uncooperative, but the respondent was not charged with misconduct directly involving the domestic incident. Instead, he was charged with specifications such as being unfit for duty or failing to identify himself as a member of the service when other police officers responded to the scene of the incident.

<sup>71</sup> When an allegation is unsubstantiated, there is insufficient evidence to prove or disprove its veracity.

<sup>72</sup> Two officers were each the subject of two of these cases.

respondent had prior, substantiated allegations of domestic incidents. Of these nine cases, a period of Dismissal Probation was imposed in only two of these cases and in a third case, the subject officer retired. In the six remaining cases, the subject officer received penalties involving the loss of vacation days or was suspended. In four of these cases, the Commission believed that the subject officers should have been placed on Dismissal Probation given their prior histories.<sup>73</sup> In two cases where the same subject officer was placed on a period of Dismissal Probation, the Commission believed that officer should have been terminated.<sup>74</sup>

In twenty-two of the cases, the subject officer either voluntarily completed or was mandated to cooperate with domestic violence counseling. In six of the remaining cases, the officer was instead ordered to attend counseling to address alcohol issues. Of the remaining twenty cases, the Commission found that counseling was not imposed for legitimate reasons in fourteen of the cases. These reasons included that the domestic violence charges were dismissed or that the officer was no longer employed by the Department.

The Commission agreed with the penalty imposed on the subject officer in thirty-three of the cases reviewed. There were an additional eight cases where no penalty was imposed because the subject officer was found not guilty after the Department trial or the subject officer

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<sup>73</sup> Two of these cases involved the same officer.

<sup>74</sup> In that case, the officer had two current cases. The first charged him with Assault in the Third Degree on his girlfriend and violation of an order of protection. The second charged him with another violation of the order of protection. In the first case, the complainant also alleged that the officer displayed his firearm and implied that he was going to kill himself during the incident. There were no charges levied to address this allegation. The officer also had three prior domestic incidents, two of which resulted in charges and specifications. For the two cases, the officer was placed on Dismissal Probation and was suspended for forty-eight days and forfeited twelve vacation days. He was also ordered to continue cooperating with any counseling mandated by the Department. The Commission believes that based on this respondent's failure to conform his behavior to Department standards, which was further evidenced by the second violation of the Order of Protection, he should have been terminated.



was no longer employed by the Department. Of the seven cases where the Commission believed a more serious penalty was warranted, in five, the Commission believed based on either the respondent's disciplinary history or his stated attitude about the incident, a period of monitoring should have been imposed. In the remaining two cases involving the same officer, the Commission believed termination was the appropriate remedy.<sup>75</sup>

In conclusion, it appears that the Department is meting out appropriate penalties in the majority of its cases and counseling is routinely part of any plea agreement.<sup>76</sup> Furthermore, the Department also seems to be considering the officers' past domestic history in fashioning these penalties.

### **C. False Statement Cases**

The Commission, since its inception, has consistently reviewed those disciplinary cases where members of the service were alleged to have made false statements in both sworn and unsworn contexts to determine whether appropriate penalties are being imposed. The Commission has emphasized the importance of severe penalties in this type of case for several reasons. It is necessary and desirable that the public have confidence and believe officers when they testify in criminal trials. Without a belief in the honesty and integrity of the Department, the public will not readily accept convictions on criminal cases where the evidence relies heavily or exclusively on the testimony of a police officer. Second, strong

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<sup>75</sup> *Id.*

<sup>76</sup> Because it is not one of the dispositions available by law after an administrative trial, the Department's Trial Commissioners cannot recommend that an officer found guilty of misconduct undergo counseling.

penalties are needed to demonstrate the Department's unwillingness to tolerate officers providing false versions of events to hide the misconduct of themselves or other officers.

The Commission first reported on this topic in 1996.<sup>77</sup> Simultaneous with the publication of that report, the Department, under former Police Commissioner Howard Safir, instituted its false statement policy which dictated that any member of the Department found to have made a false statement in a PG interview<sup>78</sup> or other official context be terminated unless exceptional circumstances existed which mitigated against termination. These exceptional circumstances were to be determined on a case-by-case basis by the Police Commissioner.

Between 1998 and 2004, the Commission analyzed the Department's cases that involved falsehoods in each of its Annual Reports.<sup>79</sup> The Commission found that in most

cases, the Department was appropriately terminating those members of the service found to have made a false statement in a PG interview or other official context. The Department was less consistent, though, in terminating those officers found to have made false statements when the statements were not made while the officer was under oath. These types of statements included oral statements such as those made to supervisors or other investigative bodies such

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<sup>77</sup> See *The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements* (December 12, 1996).

<sup>78</sup> See *supra* at p. 7, fn. 16 for a definition of an interrogation conducted pursuant to PG §206-13.

<sup>79</sup> See *Third Annual Report of the Commission* (August 1998), at pp. 12-15; *Fifth Annual Report of the Commission* (February 2001), at pp. 42-55; *Sixth Annual Report of the Commission* (December 2001), at pp. 62-87; and *Seventh Annual Report of the Commission* (March 2004) at pp. 122-150. The Commission did not report on this topic in its *Fourth Annual Report of the Commission* (November 1999) because it had published a separate follow-up report on the topic. See *The New York City Police Department's Disciplinary System: A Review of the Department's December 1996 False Statement Policy* (August 1999).

as District Attorneys' offices or other law enforcement personnel, written statements including making false entries in Department paperwork, or actions such as engaging in any type of fraud. The Commission also noted that the Department was not including charges of "Making a False Statement" in all cases where it was appropriate. The Commission believed that often other similar charges were levied instead to avoid the imposition of the false statement policy's requirement of termination.

As the false statement policy was increasingly applied, the Commission found an increase in the finding of exceptional circumstances to justify a penalty that did not result in termination. In many instances, the Commission disagreed that the factors that were being routinely used to justify a penalty that was less than termination automatically qualified as exceptional circumstances without regard to the specific facts of the case. The false statement policy underwent further change in 2005 when the Department issued Interim Order 4. This order exempted the mere denial of allegations from charges of "Making a False Statement." Although understanding the reasons underlying this modification, the Commission did not agree that a mere denial of guilt should relieve an officer from the threat of termination.<sup>80</sup> The Commission explained that "[t]he denial of guilt, when it is a false denial, is still a lie and, therefore, directly erodes the credibility of the officer and indirectly affects the public's confidence in the integrity of the Department."<sup>81</sup>

Given, however, that the Department had enacted this change to its policy, the

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<sup>80</sup> The Department continues to support Interim Order 4 of 2005. The Department responded that "questions about whether a statement is material to the issues concerned, whether the statement was given extemporaneously or under oath and whether it amounts to the simple entry of a plea of guilty are reasonable and appropriate measures of the seriousness of the offense. Termination is clearly not warranted in some cases and Department policy reflects that."

<sup>81</sup> See *Ninth Annual Report of the Commission* (February 2006) at p. 32.

Commission, in its *Ninth Annual Report*,<sup>82</sup> evaluated the cases involving allegations of making false statements applying this new policy. The Commission found that the Department was appropriately disciplining those officers found guilty of making a false statement in an official context in the majority of the cases where the false statement was not simply a denial of other misconduct. In those cases where the false statement was not made under oath, the Department was less consistent in terminating the officer. Also, there were still a number of instances where a false statement charge should have been levied but was not.

Despite the fact that the Commission continues to disagree with the Department's revised false statement policy, for the purposes of this report, the Commission analyzed those cases involving falsities to exclude those cases that involved solely a denial of the questioned conduct. The Commission also excluded all cases where the false statement involved time or leave issues that did not involve a pattern or practice of behavior. For example, cases where an officer exaggerated the extent of his injury to a Department surgeon were excluded from the analysis<sup>83</sup> while an officer who submitted false claims for overtime on several occasions would be included in this study. After removing those cases that did not belong in the sample, the Commission selected sixty-three disciplinary cases closed between January 2006 and September 2007 for this review.<sup>84</sup> In seven of these sixty-three cases the Commission

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<sup>82</sup> February 2006, at pp. 30-35.

<sup>83</sup> Historically, the Commission has considered isolated time and leave issues to be an administrative, personnel matter rather than one affecting the credibility and the integrity of the Department.

<sup>84</sup> Some of these cases were also reviewed in the Serious Off-Duty Misconduct section, *supra* at pp. 16-31.

believed that a false statement charge was warranted, but no such charge was brought.<sup>85</sup>

There were an additional two cases where the Commission also believed that a false statement charge was appropriate, however, the false statement was a denial of misconduct without embellishment; therefore, the cases were not included in the Commission's examination.<sup>86</sup>

The Commission divided the cases into two categories: those involving sworn statements and those which did not.<sup>87</sup> In this review, only six cases involved an officer making a false statement in a sworn context. Four of these officers were charged with making a false statement during a PG interview. One officer submitted a false affidavit in court, and the remaining officer testified falsely at trial. Of the six cases, the officer was separated from the Department in four of the cases.<sup>88</sup> In the remaining two cases, the false statement charges were

withdrawn by DAO. Therefore, in these six cases, the Department followed its false statement policy.

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<sup>85</sup> In one of these cases, the respondent was charged with making false entries in Department records and the case was included in that category for the purposes of this study. This respondent, however, had also made false statements during a PG interview and was not charged with this misconduct.

<sup>86</sup> There were three other cases where the Commission believed false statement charges were appropriate although none were levied where the false statement constituted a mere denial of misconduct. These three cases, however, were included in the Commission's study because they had other comparable charges involving different falsities that also occurred.

<sup>87</sup> When a subject officer had more than one false statement charge, the Commission only counted the case in the more serious false statement category. The one exception was that if the Commission believed that additional false statement charges which should have been brought were not, the case was also counted as one where a false statement should have been charged.

<sup>88</sup> Separation from the Department could occur due to termination, resignation, or retirement. As the Commission believes that the importance is in the result that the officer is removed from the Department and not in the method of the removal, the Commission did not further differentiate these cases.

The Department was less likely to impose the penalty of termination for those false statements that were not made under oath. The Commission examined fifty-one cases where there was a falsity involved, but it did not occur in the context of a PG hearing, criminal testimony, or a sworn document. In twenty-two of these cases, the officer caused false entries to be made in Department records. Examples of this conduct included making false entries in memo books or daily activity reports, submitting false automobile accident reports, and submitting false overtime reports. Of these twenty-two cases, only officers in two of the cases were separated from the Department. Another officer was found not guilty after a hearing in the Department's Trial Rooms. Of the remaining nineteen cases, the Commission agreed with the penalty imposed in sixteen of the cases based on the totality of the circumstances. However, the Commission believed that in three of these cases, the penalty that was imposed was not sufficiently severe, and one of these three should have resulted in termination.<sup>89</sup>

In ten of the cases, the subject officer lied to an investigative body or agency. These statements included false reports to 911, lying to officers from the NYPD or other police departments, and making a false statement during a Civilian Complaint Review Board ("CCRB") interview.<sup>90</sup> Six of these officers were separated from the Department. Of the remaining four cases, the Commission disagreed with the penalties imposed in three of the cases. The Commission believed that in one of the three cases, the officer should have been

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<sup>89</sup> In that case, the subject officer, after a dispute with the complainant, mailed two summonses to the complainant for incidents that never occurred. The subject officer also made detailed entries in his activity logs about these fictional incidents. The subject officer was placed on Dismissal Probation, suspended for thirty days, and forfeited forty vacation days.

<sup>90</sup> CCRB is an independent, non-police Mayoral Agency. It is empowered to receive, investigate, hear, make findings, and recommend action on complaints of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language by New York City police officers. Investigations are conducted by the CCRB's investigative staff of civilian employees. Dispositions are forwarded to the Police Commissioner and may be accompanied by recommendations for disciplinary measures.

terminated<sup>91</sup> and in the other two, higher penalties were appropriate.

There were thirteen cases where the subject officer was alleged to have committed some type of fraud. The type of fraud varied in seriousness. A majority of the cases arose when an officer registered his automobile at an address in a county where he did not reside in order to obtain lower insurance rates. Historically, the Commission has accepted a penalty short of termination in this type of case. Other cases were more serious and involved tax fraud, bankruptcy fraud, and submitting fraudulent accident reports. The Commission agreed with the outcome in all of the fraud cases. Three of these officers were separated from the Department.

There were also six cases involving false statements that were not readily assignable to the other categories. These cases involved forgeries, altering a doctor's note, making false entries regarding community service performed in housing records, and making false entries in a business club's records. The Commission agreed with the penalties imposed in all of these cases. Officers were separated from the Department in two of these cases.

In conclusion, the Commission agreed with the penalties that were given in most of the cases involving falsehoods. Given the Department's history of imposing penalties short of termination for those officers whose false statements are not made under oath, the Commission

only disagreed with the penalties in six of the fifty-one cases reviewed. The Commission

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<sup>91</sup> In that case, federal agents went to the subject officer's address to arrest his half brother for bank fraud. The subject officer failed to identify himself as a member of the service to these agents and claimed he did not know the person who was to be arrested and that person never lived at the address. When his half brother was arrested, the subject officer posted bail for him. In his PG hearing, the subject officer denied impeding the federal investigation. He further stated that he was never shown a photograph of his half brother by the agents and denied his half brother ever lived with him. The half brother admitted to living with the subject officer. The subject officer was not charged with "Making False Statements" in the PG hearing and was placed on Dismissal Probation, forfeited thirty vacation days, and was suspended for ten days.

believed that termination was the only appropriate penalty in two of those cases. Additionally, the Commission found improvement in the number of cases where a false statement charge should have been included but was not.

## **V. THE COMMISSION'S ONGOING WORK**

### **A. Open/Pending Case Monitoring**

As outlined earlier in this report, the Commission has begun to review ongoing IAB investigations in an effort to further monitor the adequacy and effectiveness of these investigations. These reviews occur on a quarterly basis and are conducted in the IAB field office that is investigating the particular case.<sup>92</sup> In addition to this type of case review, the Commission also monitors open IAB investigations through daily review of corruption logs received by the Department; attendance at IAB Steering Committee meetings; and attendance at IAB briefings to the Police Commissioner and other high-ranking officials in the Department. This type of monitoring enables the Commission to keep up-to-date with corruption trends and allegations and evaluate how the Department investigates and responds to allegations of corruption. The various ways in which the Commission remains informed about open IAB investigations are discussed below.

#### **1. Log Review**

The principal means by which IAB records new corruption allegations, as well as updates new information on past allegations, is through its creation of complaint logs. All

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<sup>92</sup> See *supra* at pp. 2-5 for a more detailed explanation of the Commission's open case monitoring.



corruption and misconduct allegations received by the Department by mail, telephone, or in-person are reported to IAB's Command Center, which is open twenty-four hours a day, seven days a week. This information is entered into the Command Center's computer system. The logs consist of these computer entries.

The Commission receives and reviews all of the daily IAB logs generated from complaints that are received by the Department. This ongoing review of the logs allows the Commission to conduct immediate follow-up on allegations, obtain timely additional information from IAB at the outset of the investigation, and select cases for long term monitoring. The review of these logs also allows the Commission to discern any emerging corruption trends.

## **2. Steering Committee Meetings**

Throughout the year, Commission staff and the Commissioners attend IAB Steering Committee meetings. The Steering Committee is comprised of IAB's Executive staff and is chaired by the Chief of IAB. The purpose of the Steering Committee meetings is to examine the more serious cases or the oldest cases handled by each investigative group and discuss new developments to ensure that all appropriate investigative steps have been taken and that the cases are receiving sufficient attention. On a regular basis, each investigative group presents their most significant or their oldest cases to the Committee and reviews the investigative steps which have been taken as well as future investigative plans. Attendance at these meetings allows the Commission to observe how IAB responds to and investigates allegations of corruption. At times, Commission staff is able to offer advice or ask questions about why particular investigative steps are taken or omitted. Additionally, this review of cases enables

Commission staff to remain up-to-date on all pending IAB investigations. The Commission keeps a record of all recommendations that the Steering Committee gives the investigative group in order to determine whether the investigator follows those recommendations in the future. Generally, the Commission has observed that the investigators are following the suggestions of the Steering Committee.

### **3. Intensive Steering Committee Review**

Each year between June and September, the Steering Committee conducts intensive reviews of all open IAB cases. The Commission attends all intensive Steering Committee meetings which provide an overview of IAB's entire open caseload.

### **4. IAB Briefings to the Police Commissioner**

In order to keep the Police Commissioner fully apprised of significant cases and corruption trends, on a monthly basis, IAB's Executive staff meets with the Police Commissioner and certain members of his Executive staff, including the First Deputy Commissioner and the Chief of the Department, for briefings. Commissioners and the Executive Director of the Commission attend each of these meetings. At these briefings, IAB group Captains present selected cases and describe the investigative steps that have been taken and any anticipated investigative actions. Beginning this year, the Commission, in conjunction with the Chief of IAB, has selected cases for IAB to present to the Police Commissioner. These cases are chosen from those suggested by the Chief of IAB and from cases which the Commission learns of through its attendance at Steering Committee meetings.

## **B. Other Types of Monitoring Activities**

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

**1. Monthly Monitoring Lists**

The Commission receives several monitoring lists maintained by the Department. These lists identify officers who have a history of misconduct and are being scrutinized by the Department. Commission staff regularly reviews these lists to remain informed about officers being monitored and also to ascertain if any of the officers on the lists are involved in investigations under the Commission's review.

**2. Interim and Operations Orders**

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

**3. Department Reports**

On a monthly basis, the Commission receives a copy of the Department's Corruption and Misconduct Complaint Comparison Report. This report presents a statistical analysis of corruption allegations which compares annual and monthly statistics by category of allegation, borough, and bureau. This analysis enables the Police Commissioner and Executive staff of the Department to identify corruption trends. Similarly, the Commission also receives and reviews a copy of IAB's Annual Report which presents statistics about the various types of complaints and the dispositions of these complaints for the preceding year. Also included in this report is a discussion of the proactive measures that IAB has undertaken

to detect corruption or serious misconduct.

**C. Additional Commission Functions**

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

The Commission periodically receives allegations of police corruption or misconduct by individuals who wish to lodge complaints against the Department. Commission staff obtain all relevant information concerning the allegation and then forward that information to IAB's Command Center so that a log may be created and the appropriate investigative steps taken. In order to track IAB's handling of these allegations, the Commission assigns each allegation its own internal log number, and Commission staff then monitors IAB's handling of certain allegations.

The Commission maintains regular contact with Federal and State prosecutors throughout the City responsible for the investigation and prosecution of police corruption. Through these relationships, the Commission is kept informed of issues or concerns of these law enforcement agencies and of their general perceptions about IAB and the quality of its work.

Finally, in March 2007, the Chair of the Commission and the Executive Director testified before the Public Safety and the Civil Rights Committees of the New York City Council. The subject matter of this testimony included the manner in which the Commission operates, the resolution of the Commission's jurisdictional dispute with the Department, the cooperation the Commission receives from the Department, and future projects of the Commission.

## **VI. FUTURE PROJECTS OF THE COMMISSION**

In the *Ninth Annual Report of the Commission*,<sup>93</sup> the Commission outlined four projects on which it intended to work in the future. One of these projects, the Commission's follow-up to its 2001 report, *The New York City Police Department's Non-IAB Proactive Integrity Programs*,<sup>94</sup> resulted in a report that was released in April 2006.<sup>95</sup> A second project, open case monitoring, has been discussed earlier in this report.<sup>96</sup> The Commission expects to complete the two remaining projects and begin two more projects in the coming year. A synopsis of the Commission's planned projects is provided below.

A. The Commission is currently reviewing approximately one hundred and ten cases that were investigated by the Department's various Borough and Bureau Investigative Units. While IAB is responsible for investigating those allegations of the most serious misconduct and all complaints regarding corruption, the Borough and Bureau Investigative Units address the majority of allegations involving less serious misconduct. These allegations can range from landlord and tenant disputes, to domestic violence complaints when there is no serious injury, to

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<sup>93</sup> February 2006.

<sup>94</sup> December 2001.

<sup>95</sup> See *A Follow-Up Review of the New York City Police Department's Performance Monitoring Unit*.

<sup>96</sup> See *supra* at pp. 2-5 for a description of the Commission's open case monitoring.

allegations that officers have stolen property when the property does not consist of money, credit or debit cards, or valuable jewelry. Similar to IAB, these units are divided geographically or by subject matter. The Commission believes that some types of less serious misconduct can be indicators of a proclivity to commit more serious offenses. Therefore, the investigations into the less serious misconduct are important for detecting and deterring future corrupt acts. The Commission requested a list of all of the cases that were closed by these units between June 1, 2006 and June 30, 2007. From this list, the Commission randomly chose one hundred and ten cases to review that were initiated in 2006 or 2007. Cases were chosen so that almost all of the various Investigative Units would be represented. The Commission is completing its review of these cases and expects to issue a report with its findings and recommendations shortly.

**B.** The Commission has issued two prior reports on the Department's disciplinary system.<sup>97</sup> These reports focused on the delays in the progress of the disciplinary cases from the institution of charges and specifications to each case's conclusion and the approval of its outcome by the Police Commissioner. These reports also reviewed the performance of DAO and the sufficiency of the preparation and case enhancement by the Assistant Advocates. After the Commission's first report on this topic, the Department adopted several of the Commission's recommendations contained therein. Improvements were noted by the Commission when it conducted its second study on this issue; however, the Commission believed that the Department could perform even better. Since that report was published, a new Assistant Commissioner in DAO and a new Deputy Commissioner of Trials have been appointed. The Commission will again track the

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<sup>97</sup> *The New York City Police Department's Prosecution of Disciplinary Cases* (July 2000) and *Follow-up to The Prosecution Study of the Commission* (March 2004).

length of time it takes cases to progress through the disciplinary system. The Commission also plans to resume trial observations to evaluate the performance of the Department's Assistant Advocates.

C. The Commission intends to report on the safeguards the Department has in place in order to detect and prevent overtime abuse by its members. In 2004, the Commission became concerned regarding the issue of overtime abuse based upon the large number of disciplinary cases that were adjudicated in the Department's Trial Rooms involving officers who submitted false overtime reports. Additionally, in the Commission's daily review of complaints made to the Department, there were numerous allegations of overtime abuse. These sources confirmed that this abuse appears to be systemic and involves uniformed officers as well as supervisors. The Commission believes that the submission of false overtime reports is a classic form of corruption in that it involves the preparation of false reports to fraudulently collect unearned money from the City. The completion of these false reports certainly erodes the credibility of officers and undermines their utility in criminal investigations. The Commission intends to review the mechanisms the Department has implemented to prevent fraudulent overtime claims to determine if they are sufficient to deter this type of corruption from recurring. Specifically, the Commission will examine how the accuracy of overtime reports is verified; how personnel are held accountable for their reports; the manner in which false reports are being detected; as well as the general procedures employed by the Department to prevent the submission of false

reports at the outset.

**D.** In past reports, the Commission has reviewed the materials provided to new recruits that address integrity-related issues and observed those Police Academy classes that focused on corruption and other ethical issues.<sup>98</sup> The Commission intends to revisit this topic to determine if there have been any updates in these materials and to determine whether the instructors at the Police Academy are effectively imparting information about the consequences of engaging in corruption and the importance of reporting suspected misconduct by fellow members of the service.

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<sup>98</sup> See the Commission's reports: the *First Report of the Commission* (March 1996) at pp. 90-92 and 97-98; *Review of the New York City Police Department's Recruitment and Hiring of New Police Officers* (December 2001) at 47-49; and the *Ninth Annual Report of the Commission* (February 2006) at pp. 13-17.