

The City of New York

Commission to Combat Police Corruption

**The New York City Police Department's
Disciplinary System: How the Department
Disciplines Its Members Who Engage in
Serious Off-Duty Misconduct**

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I. INTRODUCTION

The New York City Police Department's ("the Department") ability to discipline its officers who have engaged in misconduct is a critical component in the Department's overall anti-corruption effort. An effective disciplinary system serves as a deterrent to misconduct and acts as a direct means of communicating to both the Department's members and the public that police corruption and misconduct will not be tolerated. For it to be effective, the Department must fairly, swiftly, and sufficiently discipline its members who have violated Departmental standards of conduct. It also must do so in a manner that is fair from the perspective of both the public and the members of the Department.

The Department recognizes the key importance of the disciplinary system. As stated in the Department's Strategy No. 7, "How effectively and fairly the disciplinary system does its job is one measure of organizational integrity."¹ Indeed, a Departmental Trial Commissioner has noted that "[t]he public is best served by a police disciplinary system that is fair, consistent, and supportive of the Department's mission to protect and serve."²

Since its creation by Mayor Rudolph W. Giuliani in 1995, the Commission to Combat Police Corruption ("Commission") has monitored the Department's disciplinary system by attending departmental training programs and disciplinary trials, and in particular, by reviewing and evaluating the Department's policies, procedures and actions relative to the discipline of officers who the Department determined had made false statements.³ In December 1996, the

¹ Police Strategy No. 7: Rooting Out Corruption; Building Organizational Integrity in the New York Police Department, June 14, 1995, p. 67.

² From the Trial Commissioner's decision in one of the cases reviewed by the Commission in this study, below at p. 42 (Sergeant Two).

³ The Commission to Combat Police Corruption is an independent agency created on February 27, 1995, by Executive Order Number 18.

Commission released its comprehensive study -- The New York City Police Department's Disciplinary System: How the Department Disciplines Its Members Who Make False Statements (hereinafter "False Statements Report").

This present study assesses how the disciplinary system addresses charges of serious off-duty misconduct. The Commission, through its review of allegations of corruption and misconduct received through the Internal Affairs Bureau Command Center,⁴ observed that a significant number of the allegations arose out of misconduct that occurred while the officers were off-duty. Indeed, in 1996, more than 80% of the 163 New York City police officers arrested were charged for conduct committed while off-duty.⁵ This pattern continued in 1997.

In selecting cases to review as part of this study, the Commission focused on the most serious instances of off-duty misconduct -- those off-duty cases involving discharge or display of a firearm, or those involving violent behavior committed without a gun.

During the initial phase of this review, the Commission noted that many of the cases in its sample appeared to involve officers who at the time the misconduct occurred were intoxicated due to over consumption of alcohol. In light of this, the Commission expanded the sample to include cases involving off-duty misconduct and alcohol -- that is, cases of officers driving while under the influence of alcohol and cases of officers so affected by their alcohol consumption that, whether or not they were driving, they were found by a commanding officer to be unfit to carry out their duties as police officers.

In deciding to review cases involving off-duty misconduct, the Commission also believed

⁴ The IAB Command Center is the Department's central clearinghouse for all allegations of corruption and misconduct against police officers received from the public and other members of the Department. For the Commission's study of this unit, see Performance Study: The Internal Affairs Bureau Command Center, October 1997.

that if officers engaged in such misconduct while off-duty, this behavior either might be repeated while on-duty or, in the case of alcohol misuse, might adversely affect their ability to function effectively as police officers.

The categories of off-duty misconduct in the sample of 59 cases closed between August 1996 and May 1997 that were reviewed by the Commission thus included:

- Use of a Firearm (Discharge and Display)

Because they are armed, both on- and off-duty, police officers carry an enormous responsibility to use these weapons only when appropriate and to ensure that they are safeguarded properly. The Commission reviewed cases in which officers used their weapons to threaten others -- and even to fire at others -- in private, off-duty confrontations.

- Violent Behavior Without a Firearm

The Commission also reviewed cases of officers who, while not drawing their weapons, nonetheless engaged in violent behavior toward others.

- Misconduct While Intoxicated

As noted above, the Commission readily discerned that a large number of acts of misconduct described above were committed by officers who were intoxicated. Of the 43 cases in the Commission's sample that involved violence or use or display of a firearm, 12 also involved the use of alcohol.

In reviewing cases, the Commission recognized that each case had unique circumstances and involved an officer with a distinct personal history with the Department, in terms of both prior disciplinary history and overall performance. Two officers who engage in similar misconduct but have markedly different records may not always, and should not always, be sanctioned identically by the Department. Likewise, each case arises from an incident with its own individual facts. Although the Commission divided cases into broad categories, based on the types of misconduct

⁵ New York City Police Department Internal Affairs Bureau 1996 Annual Report, p. 35.

attributed to an officer, it recognized that no two cases are precisely alike, even within these categories. Moreover, evidentiary problems -- such as uncooperative or unavailable witnesses -- may hamper the Department's ability to prosecute an administrative case and force the Department to negotiate a settlement with an officer that includes a penalty lighter than it otherwise would have sought at trial.

While individual cases are discussed, the Commission's principal goal was thus to identify patterns in the Department's handling of off-duty misconduct cases, and ways in which the Department might improve its efforts to deter such misconduct through the disciplinary system. To accomplish this goal, the Commission has selected various cases for extended discussion in this report, both where the Commission questioned, at least in part, the Department's handling of the case⁶ and where the treatment of the cases by the Department was appropriate.⁷

The first group of cases discussed in this report are six "model cases" identified by the Commission. These model cases represent, on the whole, disciplinary cases handled in an exemplary manner by the Department. While discussing in detail here only six cases, the Commission concluded that the Department appropriately handled the majority of cases reviewed.⁸ Moreover, while in various cases the Commission was critical of the Department's performance, based upon its overall monitoring activities, the Commission does believe that the

⁶ See "Case Analysis" section, beginning on p. 19.

⁷ See "Model Cases," beginning on p. 39.

⁸ This study was intended to identify broad patterns in the handling of off-duty misconduct cases -- it is not a scientific statistical analysis and should be viewed in that light. Even where specific numbers are cited in this report -- to show, for example, how many cases in the sample-represented problems of a particular type -- these numbers cannot and should not be used to form statistical conclusions about the overall disciplinary system in the Department.

Department is committed to disciplining officers who have engaged in misconduct, and that the Department takes these issues seriously.

As discussed above, analysis of the cases in this sample reveals the pervasive role of alcohol in off-duty misconduct incidents. Thus, this report also must inevitably discuss the issue of alcohol abuse and how it should be addressed. This study also focuses on the need to reconcile various core departmental requirements -- that officers be “fit” 24 hours a day and, with limited exceptions, carry their firearms whenever in the City of New York, even if off-duty -- with the reality that many officers will in fact, not always be fit. Officers, like other individuals, will, on occasion, have too much to drink, and for some officers alcohol misuse will be a persistent problem.

Departmental regulations require an officer to “be fit for duty at all times, except when on sick report.”⁹ Even while off-duty, officers are expected to be ready to serve, and to discharge their broad responsibilities, at a moment’s notice. Moreover, the Department expressly forbids officers to consume alcohol, “to the extent that [the] member becomes unfit for duty.”¹⁰ While there are laws relating to drunk driving, there is, however, no precise guidance as to what degree of intoxication will render a non-driving officer unfit.

Department regulations also require, with certain exceptions, all officers to “be armed at all times when in [the] City of New York,” unless otherwise directed.¹¹ The Department provides officers with only limited guidance about carrying their weapons off-duty under

⁹ See New York City Police Department Patrol Guide (“Patrol Guide”) Section 104-1, “Fitness for Duty,” 1.

¹⁰ See Patrol Guide Section 104-1, “Fitness for Duty,” 2.

¹¹ See Interim Order 159, “Equipment Firearms,” 1. Note: Interim Order 159 suspended Patrol Guide Section 105-1.

circumstances where alcohol will be consumed. Thus, the Department's regulations state that officers may be unarmed at their discretion, under certain circumstances, including when they are

*engaged in any activity of a nature whereby it would be advisable NOT to carry a firearm. ... Such activities especially include those at which alcoholic beverages are consumed.*¹² (emphasis in the original)

Finally, officers also are held strictly accountable to safeguard their weapons at all times;¹³ they are not permitted to store or leave their firearms in an unattended motor vehicle;¹⁴ and are not permitted to carry their firearms in briefcases, handbags, or other portable containers.¹⁵ Given these necessary requirements, officers thus have few alternatives, short of storing their weapons in the station house or their homes, than to carry their weapons on their persons.¹⁶

Each of these rules is soundly based. Crises do happen and off-duty officers may, on short notice, be required to return to their posts. There also is a benefit to public safety from having off-duty officers armed while they move around the city. At the same time, however, some off-duty officers will drink alcoholic beverages in a manner considered socially acceptable. Others, in varying frequencies, will drink excessively.

Although the Commission recognizes the appropriateness of Departmental rules

¹² See Interim Order 159, 2(d). Other exceptions to the rule exist -- also at the officer's discretion -- for when the officer is on vacation, is engaged in authorized off-duty employment, or is in a situation in which there is a risk of loss or theft of the firearm. Interim Order 159, 2.

¹³ See Interim Order 159, 7.

¹⁴ See Interim Order 159, 8.

¹⁵ See Interim Order 159, 9.

¹⁶ See Interim Order 159, 13.

regarding fitness and being armed at all times, it is also plain that if an officer has had too much to drink that officer should not use his or her weapon and, thus, should not be armed.¹⁷ The law has defined a level of intoxication applicable to driving.¹⁸ In the Commission's view, an officer who is legally intoxicated, and therefore cannot legally drive, is also not capable of safely and responsibly handling a weapon, and thus is not fit for duty.

• **Recommendations**

Consistent with this core conclusion the Commission is making several recommendations. As elaborated below, these include providing officers with clear guidance concerning the importance of not being armed when consuming alcohol, expanding the definition of unfitness to include any officer who is legally intoxicated, and setting forth a series of general principles for dealing with officers found to be unfit. Indeed, the dangers inherent in any level of drinking when an officer is armed and presumably available to respond to emergencies, may well justify a strict prohibition on any level of drinking while carrying a weapon. The Commission believes that the Department should examine this issue further and report to the Mayor as to the feasibility and appropriateness of imposing such a requirement.

Another core conclusion of the Commission is that any unjustified discharge or other unjustified use of a firearm must be treated extremely seriously. Improper use of a weapon is the

¹⁷ Recognizing the potentially deadly consequences of mixing alcohol and guns, state law prohibits hunting either while one is intoxicated (defined as a blood-alcohol content, or "BAC," of .10% or above) or while one's "control in his physical or mental faculties" is impaired as a result of alcohol consumption. Such a violation is punishable by up to one year in prison. New York State Environmental Conservation Law, Title 12, Section 11-1201 *et seq.*

¹⁸ Under New York law, the determination of legal intoxication is tied to one's ability to drive a motor vehicle safely. Evidence of such intoxication may be based both on a "common sense" standard -- observations of the subject, including breath, eyes, speech, and motor abilities, and a scientific one -- BAC level. As discussed below, similar evidence should be employed by the Department in assessing an officer's fitness.

most dangerous action an officer can take. Inappropriate use of a firearm by an officer off-duty also may well suggest an increased risk that such an officer will improperly use his or her weapon while on-duty.

In considering these issues, and based upon both its review of off-duty misconduct cases and its interviews of Department personnel, the Commission recommends that:

A. Relating to Acts of Serious Misconduct

1. In general, officers who deliberately and unjustifiably discharge their weapons off-duty should be terminated, whether or not the incident involved alcohol;¹⁹
2. In general, officers who discharge their weapons, even accidentally, and fail to report it to the Department should be terminated;
3. In general, officers who engage in more than one (or even one, depending on the nature of the violence) unjustified acts of violence should be terminated.

B. Relating to Offenses Involving the Use of Alcohol

1. Officers should be told explicitly that it is recommended that they not be armed when consuming alcohol. The Department should also consider the appropriateness and feasibility of a formal ban on any level of drinking while carrying a weapon;
2. In general, whether or not they used their weapons, officers who are unfit while armed should receive significant penalties and be treated more severely than officers who are unfit and not armed. Absent unusual mitigating circumstances, if the officer is not being terminated, penalties in these cases should include mandatory counseling and dismissal probation;
3. In general, officers who continue to engage in alcohol-related misconduct, despite having received counseling, should be discharged. Obviously, consideration can, in appropriate cases, be given to officers who suffer a relapse after a significant period;

¹⁹ Where the Commission's recommendation is phrased "In general, ..." in those circumstances where the recommended course is not followed by the Department, the Commission believes that it would be desirable for the memorandum to the Police Commissioner, which sets forth the recommended penalty for approval, to articulate the rationale for not doing so.

4. Whenever alcohol counseling is made a condition of the disposition, the Department should monitor a member's continued participation in such counseling, and where a member fails to comply, the Department should impose sanctions and be free to reevaluate the original penalty imposed;

5. In circumstances in which an officer is unfit, but is unarmed and commits no other act of misconduct, the Department should assess the overall situation before deciding whether proceeding with charges and/or some form of alcoholism evaluation is appropriate.²⁰

C. Relating to Determinations of Unfitness

1. The Department's definition of unfitness should explicitly include any officer about whom there is scientific evidence that the person is legally intoxicated,²¹

2. Duty captains should base fitness-for-duty findings upon an officer's condition at the time of the alleged misconduct, as well as at the time a duty captain personally observes the officer, and draw upon all available evidence in making that determination, including testimonial and scientific evidence. To avoid confusion, it may be necessary for the duty captain to make two preliminary findings: the condition of the officer at the time the duty captain found him and the condition of the officer, based on available evidence, at the time of the alleged misconduct;

3. In off-duty incidents, where there is objective evidence of possible intoxication, the Department should use a breathalyzer test to determine fitness in cases involving driving or the commission of violent acts with or without a weapon, and other cases in which the Department believes it would be appropriate to do so;

4. An officer's refusal to submit to a breathalyzer test requested by any law-enforcement officer should be presumptive evidence of intoxication in a Departmental prosecution for driving under the influence, and presumptive evidence of unfitness in a Departmental prosecution for unfitness.

D. Miscellaneous Recommendations

1. All appropriate charges involving sufficiently discrete offenses should be included when a disciplinary action is commenced against an officer;

²⁰ In practice, such cases will be extremely rare, since unfitness generally comes to light when the officer commits an affirmative act of misconduct while being unfit.

²¹ New York State's law on driving under the influence of alcohol (Vehicle and Traffic Law §1192) recognizes two levels of impairment: driving while ability impaired (applicable when a motorist's ability has been impaired by consumption of alcohol) and driving while intoxicated (automatically applicable when a motorist's BAC exceeds .10%). The Commission believes that this .10% standard is the standard that should be applied by the Department.

2. Where an officer is found to have engaged in misconduct involving excessive force, including domestic violence or misuse of a weapon, the Department should conduct appropriate evaluations of the officer with relevant re-training and education made part of the sanction;

3. The Department should, in appropriate cases, be more willing to impose consecutive sentences for discrete charges;

4. When the Department negotiates a settlement with a probationary police officer, it should in general require, as a mandatory condition of such settlement, an extension of the probationary term;

5. New York City's Administrative Code should be amended to allow Trial Commissioners to require officers found guilty of misconduct to undergo counseling, where appropriate.

In connection with its review of off-duty misconduct cases, the Commission determined that these principles were at times appropriately and aggressively applied by the Department. For example, as discussed in detail below, in various cases the Department terminated officers who engaged in unjustified acts of violence, placed officers on dismissal probation when alcohol consumption was related to the attendant misconduct, and expeditiously terminated probationary officers. In other cases, however, these principles were not applied. The Commission believes that the Department should continue to work towards greater consistency in the penalties being applied, recognizing, as discussed above, that in particular cases distinctions may be warranted by the facts.

II. THE DISCIPLINARY SYSTEM: AN OVERVIEW

The Department's disciplinary system consists of both an informal and a formal process for punishing the misconduct of officers. The informal process allows for minor, less serious violations of the Department's rules and regulations to be handled at the command level by the administration of a Command Discipline.²² The informal disciplinary process is not touched upon in this report, because, due to the seriousness of the cases in the sample, none of them was dealt with informally.²³

The formal disciplinary process originates when charges and specifications are brought against an officer.²⁴ The Internal Affairs Bureau ("IAB") is primarily responsible for investigating allegations of corruption and gathering evidence against target officers, while the Department's borough and bureau Investigation Units are responsible for investigating lesser allegations of misconduct. Once these investigative bodies substantiate an allegation, they request the Department Advocate's Office ("DAO") to prefer charges and specifications.²⁵

²² A Command Discipline is a "non-judicial punishment available to a commanding/executive officer to correct deficiencies and maintain discipline within the command." See Patrol Guide Section 118-3.

²³ The maximum penalty that may be imposed for a Command Discipline is the forfeiture of up to ten vacation days. Other penalties include the revocation of permission to engage in outside employment for a limited period of time and the restriction of out-of-command assignments that pay "portal-to-portal" and overtime for up to five assignments. Patrol Guide Section 118-4. Importantly, a Command Discipline may be expunged from an officer's record or sealed in one to three years, depending on the seriousness of the violation and any additional Command Disciplines the officer received.

²⁴ While the Department may also bring charges and specifications against an officer who refuses to accept a finding and penalty under the informal disciplinary process, the Commission did not review such cases.

²⁵ Investigations will result in a finding that the allegations are either unfounded, unsubstantiated, exonerated or substantiated. Only substantiated allegations are considered to merit possible discipline of an officer.

A. THE DEPARTMENT ADVOCATE AND SPECIAL PROSECUTOR OFFICES

The DAO and the Special Prosecutor's Office ("SPO") are the prosecutorial arms of the Department. The responsibilities of these offices include: determining the legal sufficiency of the allegations; drafting the charges and specifications; serving the officers with the charges and specifications; determining plea offers where appropriate;²⁶ negotiating plea agreements; and proceeding to trial. In order to secure a conviction at trial, the DAO and SPO must prove the charges based upon a preponderance of the evidence.

The DAO prosecutes the majority of disciplinary cases. The SPO was created specifically to expedite the administrative prosecution of the most serious cases to ensure a more rapid termination of an officer whose continued employment generates a potential liability and financial burden for the Department.²⁷ The SPO reviews all cases in which an officer is arrested and charged with criminal conduct and may also prosecute officers charged with other serious misconduct, whether or not pending criminal charges exist, at the discretion of the Police Commissioner and the First Deputy Commissioner. Both the DAO and the SPO report directly to the First Deputy Commissioner.²⁸

When a criminal case against an officer is also pending, the District Attorney prosecuting the officer will generally request that the Department hold its related administrative case in

²⁶ The Commission endorses the Department's efforts to reach appropriate settlements with officers charged with misconduct. This saves resources and frees space on the trial calendar for other cases to be tried more speedily. In cases in which evidentiary problems exist, a settlement averts the possibility of the Department not proving its case at trial, which could result in either a dismissal of the charges or a finding of not guilty.

²⁷ The Department is allowed to suspend an officer from service without pay for a maximum of 30 days per offense. After this 30-day suspension, the Department must reinstate the officer's pay regardless of the misconduct with which he is charged. For serious misconduct, it is in the Department's interest to terminate the officer as quickly as possible -- to prevent the officer from remaining on the payroll and creating a liability -- if his conduct is believed to have impaired his ability to serve as a police officer.

²⁸ See Interim Orders 22 and 23, March 15, 1996.

abeyance. This stems from a concern that the criminal prosecution might otherwise be compromised. With the approval of the First Deputy Commissioner, however, the SPO may proceed with administrative disciplinary action in these cases, even while criminal charges are pending.

B. TRIALS

The Deputy Commissioner of Trials (“DCT”) and two Assistant Deputy Commissioners of Trials (“ADCT”)²⁹ preside over administrative trials the DAO and the SPO bring.³⁰ These Commissioners conference cases; schedule trial dates; listen to the testimony of witnesses; decide procedural issues and any motions; find facts; make legal findings; render written decisions; and recommend penalties to be imposed. The Trial Commissioners forward their findings and penalty recommendations to the Police Commissioner for his approval. In addition, the DCT actively participates in the plea-bargaining process. The DCT reports directly to the Police Commissioner.

C. FINAL APPROVAL PROCESS

The First Deputy Commissioner has overall supervisory responsibility for the disciplinary process and approves every plea agreement made by the DAO and SPO. He is actively involved in structuring the initial plea offers of the DAO and performs a principal role in determining the

²⁹ For the purpose of this report, all references to the Commissioner who presided over a specific administrative trial will be to a Trial Commissioner, without distinguishing whether it was the DCT or an ADCT who actually heard the case.

³⁰ Those disciplinary cases involving police officers which originated from and were substantiated by the Civilian Complaint Review Board are generally heard by the Office of Administrative Trials and Hearings (“OATH”). No adjudications by OATH were reviewed in this study by the Commission.

selection of cases the SPO prosecutes. Nevertheless, the Police Commissioner approves and issues all penalties levied as a result of negotiated plea agreements and administrative trials.

D. AVAILABLE PENALTIES

Upon a finding of guilty, after a plea or administrative trial, the Department may impose one or more of the following penalties: reprimand; probation; forfeiture of vacation days;³¹ suspension without pay;³² and termination. The maximum amount of time the Department may suspend an officer without pay is 30 days per offense.³³ More than one discrete “offense” may be charged even though they arose from the same incident.³⁴ Thus, if an officer is found guilty, the Police Commissioner may impose a maximum penalty of a 30-day suspension without pay for each discrete charge, without limitation. An officer also may, in the context of a negotiated plea, consent to a period of suspension without limitation if mutually acceptable to the parties.³⁵

An officer may also be suspended without pay prior to the resolution of the charge (typically, this occurs immediately following the offense or upon an arrest). This suspension is

³¹ An officer who loses vacation days will be affected in the following manner: 1) the officer will not be able to take vacation time off during the year, unless the officer has accumulated additional vacation time by carrying accrued time from year to year -- an opportunity available to all officers; or 2) at the conclusion of the officer's service to the Department, the officer will have a shorter terminal leave -- the period prior to his official leave date when an officer who is retiring after 20 or more years of service, or upon a disability, is allowed to take time off, with pay, accrued at a rate of three days per year on the force.

³² Suspension without pay triggers the loss of all benefits for time on suspension, and the loss of service time applicable to an officer's pension. In practice, officers suspended for 30 days or less have not had health benefits interrupted. A suspended officer must also temporarily relinquish his firearm and shield, and his identification card is temporarily replaced by one indicating his suspended status.

³³ The Administrative Code of the City of New York (“Administrative Code”) Section 14-115 (a). This 30-day maximum suspension applies to the combined total of days on suspension and forfeiture of vacation days.

³⁴ For example, unfitness for duty and assault.

³⁵ In fact, there is virtually no limitation as to the conditions imposed in a negotiated settlement mutually agreed upon by the officer and the Department.

also subject to a maximum period of 30 days under the law.³⁶ Upon disposition of the charges, the time an officer already served on suspension must be applied to any sentence of suspension that is imposed.

In conjunction with other penalties, the Department also may place individuals on dismissal probation for a period of time not to exceed one year. When sentenced to dismissal probation, an officer is actually terminated from the Department but the penalty is held in abeyance until the expiration of the probation period, after which the officer is restored to his prior status. While on dismissal probation, the officer may be summarily terminated at the discretion of the Police Commissioner, without any further due-process proceeding, for any misconduct.

The Police Commissioner also has the discretion to terminate probationary police officers summarily. When an officer enters the Department, he is classified as a probationary employee and remains on probationary status for two years.³⁷ While a probationary employee, a police officer may be terminated without a hearing.³⁸ An officer can also be terminated from the Department without a hearing upon conviction of a felony or another crime involving the oath of office.³⁹

³⁶ Administrative Code Section 14-123 and New York State Civil Service Law Section 75 (3-a).

³⁷ Throughout this report, “he,” “she” and the like are used interchangeably. Indeed, even in the summaries of individual cases, the gender of the pronouns used for officers do not necessarily reflect those of the actual officers involved.

³⁸ According to the New York City Personnel Rules And Regulations, Section 5.2.7, an agency head, “may terminate the 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 said probationer and to the city personnel director.”

³⁹ Public Officers Law Section 30(1)(e). An officer may also be terminated without a hearing for other criminal convictions. According to the Administrative Code, Section 14-115, the Police Commissioner has the discretion to terminate an officer upon a conviction by “any court or officer of competent jurisdiction.” Therefore, if an officer is convicted of a misdemeanor offense in criminal court that does not involve his oath of office, rendering

For all other officers, termination from the Department, the ultimate penalty, is within the Police Commissioner's discretion, after an administrative hearing, for any criminal offense, violation of rules, disobedience of orders, conduct injurious to the public peace, neglect of duty, absence without leave, conduct unbecoming a police officer, or breach of any discipline.⁴⁰ Decisions of the Commissioner may be appealed through the filing of an Article 78 proceeding.⁴¹

The Department also may allow officers to plea *nolo contendere* to charges. Consistent with how such pleas are treated in the criminal context, a plea of *nolo contendere* means that, without admitting guilt, an officer is not contesting the charges but is subject to the same penalties as if the officer had been found guilty. A *nolo contendere* plea becomes a permanent part of an officer's record and may not be expunged or sealed.

III. METHODOLOGY

The Commission initially analyzed all 167 cases involving off-duty misconduct that the Department closed between August and December 1996. From this group, 95 cases appeared to meet the criteria for the study. The Commission reviewed copies of the disciplinary case files for each of these cases. These case files typically included dozens of documents, including, but not always limited to, charges and specifications against the officer, notes and internal DAO memoranda, official incident reports and investigative memoranda, witness statements, transcripts and/or tapes of P.G. 118-9 interviews,⁴² and negotiated plea agreements or decisions

Public Officers Law Section 30(1)(e) inapplicable, the officer may still be terminated by the Police Commissioner.

⁴⁰ Administrative Code Section 14-115 (a).

⁴¹ New York Civil Practice Law and Rules, Article 78, Sections 7801-7806.

⁴² Under Patrol Guide Section 118-9 (“Interrogation of Members of the Service”), a member of the service must answer questions at a formal interview pertaining to the performance of his duties, or else face Departmental

of the Trial Commissioner.

After eliminating all but those cases that involved the types of charges that made up the focus of the Commission's study (violence, weapon-related charges, and later, unfitness for duty and driving while under the influence), 32 of these cases remained and were included in the study.⁴³ Based upon a similar review of dispositions for all cases closed between January and May 1997, an additional 34 cases that met the study's criteria were selected for inclusion in the study.

Ultimately, of the 66 cases initially included in the study, Commission staff set aside seven cases in which officers resigned from the Department voluntarily before charges had been brought against them,⁴⁴ or in which officers were summarily dismissed upon being convicted of a felony.⁴⁵ The Commission reviewed these cases for background on the issues that arose in the study, but they were not fully representative of Departmental disciplinary procedures because they did not reveal the Department's handling of a complete disciplinary case, from incident through trial or negotiated settlement.

Of the remaining 59 cases that met all qualifications for inclusion in the Commission's

charges. Failure to answer questions posed pursuant to this section is a terminable offense.

⁴³ Also excluded were cases involving civilian (generally unarmed) members of the Department, and cases in which the officer was found not guilty after administrative trial or the charges against her were dismissed.

⁴⁴ Subsequent to these officers' resignations, the Department in each case drafted and filed charges and specifications both to ensure that, should the officer return to the force, the statute of limitations for these charges would not have lapsed, and to preserve the Department's ability to discipline the officer.

⁴⁵ Two officers were terminated on the basis of convictions for felony offenses. Because their terminations came by operation of law -- pursuant to Public Officers Law Section 30(1)(e) -- rather than by the affirmative actions of the Department, these cases were not considered for assessing the appropriateness of penalties in the study cases. Nevertheless, the Commission believes that the separation of these officers from the Department, regardless of how it was achieved, was appropriate.

Regarding the five officers who resigned rather than face disciplinary charges, while it is impossible to know for sure, many -- if not all -- of these officers might not have resigned absent pressure from the Department in the form of a pending disciplinary case.

study, about two dozen are discussed below. The Commission did, however, thoroughly examine each of the 59 cases in reaching its findings and conclusions, and each was included in the tabulation of all figures on the study that are presented in this report.

This study was commenced in early 1997. Obtaining the necessary documents for this study and interviewing various senior Department officials involved in the disciplinary system was a time-consuming process, often taking a number of months.

A draft of this report was submitted to the Department for its review. The Commission reviewed the Department's response and made those changes that it deemed appropriate.⁴⁶

IV. CASE ANALYSIS

During the course of the Commission's analysis of the cases, a number of significant issues emerged relating to the Department's role in disciplining officers who engaged in the types of misconduct that were the subject of the study.

These issues included: whether the Department was appropriately charging officers to accurately reflect the full scope of the underlying misconduct, whether adequate penalties were imposed, whether the Department effectively monitored officers after their misconduct, and whether officers were required to undergo counseling or re-training, or to receive additional

⁴⁶ Changes, for example, were made to make clear that the Commission was not recommending the needless accumulation of overlapping charges for the same offense, and that the use of breathalyzer tests should be resorted to only where there is some objective evidence of possible intoxication, and focused on cases involving driving, violent acts (with or without a weapon) and other cases in which the Department believes it to be appropriate.

In addition, a reference was removed that questioned whether the Department was expeditiously disciplining officers who were eligible for a pension, thereby running the risk that such officers might retire before discipline could be imposed. The Commission determined that each of the five officers in the Commission's sample who were separated from the Department with full pension benefits was allowed to retire as a negotiated result of the case, and that in none of these cases was this result driven by the Department's failure to act expeditiously. Four of the five officers were disciplined by the Department prior to their retirements.

education -- be it for alcohol abuse, domestic violence, improper use or display of a weapon, or the use of excessive force -- where the circumstances warranted such action.

Two distinct factual patterns also emerged during the study. First, as discussed above, was the prevalence of alcohol in off-duty misconduct incidents. Second was the fact that 18 cases in the sample arose from a confrontation between an officer and his girlfriend or spouse. Indeed, in 1996, 30 percent of all cases in which a uniformed officer was arrested involved domestic violence.⁴⁷

A. THE NEED FOR THE DEPARTMENT TO PREPARE ADEQUATE CHARGES

In some cases in the Commission's sample, the charges that were brought against the officer did not represent all charges applicable to the underlying misconduct. The Department should bring all relevant and sufficiently discrete charges against an officer, to express the Department's condemnation of all aspects of the officer's misconduct, and to ensure that the penalty meted out is appropriate given the scope of the officer's actions.

The Commission found that in 22 cases in its sample, the Department failed to charge all associated offenses. The most significant type of failure to charge that the Commission encountered, arising in 13 cases, involved the omission of a charge for unfitness for duty.⁴⁸

⁴⁷ New York City Police Department Internal Affairs Bureau 1996 Annual Report, p. 35.

⁴⁸ Other types of misconduct not charged included: menacing, assault, and refusal to submit to a blood-alcohol-content evaluation in the context of being apprehended for driving while intoxicated.

1. Unfitness for Duty

As discussed above, alcohol intoxication presents an especially troubling problem for the Department. This problem must be addressed in the context of Department rules requiring officers to be fit at all times and, in general, armed whenever in New York City.

While the Commission would not support a measure prohibiting officers from carrying their weapons off-duty, it does believe that there should be more-specific guidelines requiring officers to remove and safeguard their weapons when they will attend activities where alcoholic beverages will be consumed. Officers should know that while the Department wants them to be armed while in New York City, it affirmatively recommends that they not be armed if they have been drinking and views as a serious offense being both unfit and armed.

Failure to maintain fitness for duty triggers removal of an officer's firearms and immediate suspension or placement on modified duty.⁴⁹ In every case the Commission studied in which an officer was found unfit for duty by a duty captain, the officer was suspended, and charges were ultimately brought against the officer. A determination that an officer is unfit for duty thus can be a turning point in that officer's NYPD career. Not only will the officer likely be suspended and charged for being unfit, but the officer's future prospects for advancement may suffer as well.

Yet despite the importance of this issue to the Department, policies outlining the standards for fitness are extremely vague. The determination of an officer's fitness for duty is

⁴⁹ See Patrol Guide Section 118-10. When an officer is placed on modified duty, he must surrender his firearm, shield, and identification card to the Department. Further, he is assigned to non-enforcement duties until he is found fit by the Department to resume his usual responsibilities. The purpose of placing an officer on modified status is to assign him to non-enforcement duties pending a Departmental determination of fitness to perform police duties. Patrol Guide Section 118-12.

made by a duty captain,⁵⁰ typically after the officer has been involved in an off-duty incident. This determination is to be made based on “common sense standards.”⁵¹ The Patrol Guide offers no further guidance to a duty captain in deciding whether an officer is unfit for duty.⁵²

The Commission’s study also revealed that a number of officers who appeared -- based on the observations of first-hand witnesses at the time of the incidents and, in several cases, upon scientific evidence -- to be clearly intoxicated beyond the point of being able to carry out their duties responsibly, were nonetheless found fit for duty upon the arrival of the duty captain.

Although part of the problem may arise from the vagueness of the unfitness standard, it appears in many cases to result from the length of time between the incident and when the duty captain responds. In some instances, it appears that had the duty captain been able to observe the officer immediately after an incident and to witness the behavior that others saw, the finding might well have been different. This delay is not surprising in itself, as it often takes a considerable amount of time for a report of an incident involving an off-duty NYPD officer to reach the duty captain, and for the duty captain to travel to the scene of the incident -- especially when the incident occurs outside of New York City.

⁵⁰ Pursuant to Departmental regulations, the duty captain -- a ranking officer assigned overall responsibility for a particular borough and surrounding jurisdictions for a given tour on a rotating basis -- is responsible for evaluating an officer’s fitness for duty after notification of the officer’s involvement in an off-duty incident. (See Patrol Guide Sections 118-10 and 118-14).

⁵¹ See Patrol Guide Section 118-14.

⁵² In practice, the test is usually based upon the physical indicia of intoxication: slurred speech, odor of alcohol on the breath, glassy or bloodshot eyes, and impaired coordination and motor abilities. The “common sense standards” of intoxication applied by duty captains are rooted in legal principles holding that the determination of intoxication does not require expert opinion, and that a layman “should be able to determine whether the defendant’s consumption of alcohol has rendered him incapable of operating a motor vehicle as he should.” *People v. Cruz*, 48 N.Y.2d 419, 428 (1979). In *Cruz*, for example, the defendant was charged with driving while intoxicated based on observations by the arresting officer that the defendant had driven erratically and had a strong smell of alcohol on his breath, watery and bloodshot eyes, and pupils that did not dilate when light was shined into them. *People v. Cruz*, 48 N.Y.2d at 421.

The Commission did identify one case in which the Department brought charges for unfitness based on the credible evidence provided by first-hand witnesses to the officer's intoxication, even though the duty captain had originally found the officer fit based solely on his personal observations of the officer hours after the incident.⁵³ It is appropriate that duty captains base their findings on the totality of evidence bearing upon fitness, and this case illustrates that the Department has the capability to charge unfitness, where appropriate, based upon all of the evidence. Nevertheless, the Commission identified 13 cases in which unfitness was not charged, because the officer appeared sober by the time of the arrival of the duty captain, but where there appeared nevertheless to be sufficient evidence -- either scientific, based on the results of blood-alcohol tests, or testimonial, based on the statements of eyewitnesses -- to find that the officer was unfit.

In each of these 13 cases, the officer committed some other act of wrongdoing (e.g., driving while intoxicated, assault, menacing). The Commission believes that an unfitness charge would have been appropriate in these cases. In circumstances in which an officer is unfit, but is unarmed and commits no other act of misconduct, the Department obviously should assess the overall situation before deciding whether proceeding with charges and/or some form of alcoholism evaluation is appropriate.

a. Failure to Charge Unfitness for Duty in Cases Involving Alcohol and Driving

The Commission found that all officers in the study who were criminally charged with any type of drinking-and-driving violation, wherever it occurred, faced the Departmental charge of driving under the influence of alcohol ("DUI").⁵⁴ Furthermore, in only one case did the

⁵³ See Model Case Number 1 below, at p. 39.

⁵⁴ In New York State, the relevant criminal offense is called "driving while intoxicated," whereas the

Department fail to bring a DUI charge against an officer who had been driving at the time of an incident and was subsequently found to be unfit for duty.⁵⁵

The Commission's study included six cases in which the Department charged an officer with both DUI and unfitness for duty, but it also includes seven DUI cases in which unfitness was not charged,⁵⁶ despite ample evidence to support the charge. The Commission believes, however, that a member of the service who is considered legally intoxicated, and therefore incapable of properly driving a car, should not use a firearm. Such an officer therefore cannot be deemed fit for duty and should be charged with unfitness for duty automatically upon being found to have driven while intoxicated.

These two charges also address separate and distinct forms of misconduct. The charge of DUI addresses the particular and extreme danger of operating a motor vehicle while one's ability to do so safely is compromised as a result of alcohol consumption. The charge of unfitness for duty as a result of intoxication addresses the dereliction of a broader duty imposed on every officer to be capable of discharging his immense responsibilities -- including the ability to effect an arrest and use deadly force -- when called upon by the Department.

One related aspect of cases involving alcohol has to do with officers whom local police ask to submit to blood-alcohol tests in order to determine whether they were driving while intoxicated ("DWI"). Of the five officers in the study who refused to do so, the Department

analogous Departmental charge is "driving under the influence." Although both charges refer to the same conduct, this report preserves the distinction in terminology.

⁵⁵ See Officer A, below at p. 50.

⁵⁶ These seven cases are included within the 13 cases discussed above at p. 20. See below at p. 49 (P.O. Six), p. 64 (P.O. J), p. 65 (P.O. K) and pp. 68-70 (Sergeant M and P.O. N), for discussions of such cases.

charged only one for this refusal. This case, however, demonstrates that the Department has the ability and the willingness to charge an officer if he refuses a blood-alcohol test.⁵⁷

B. ADEQUATE PENALTIES

As the Commission has previously observed, the Department

*must adequately punish members for misbehavior to deter such conduct in the future; it must remove from the organization those offenders whose conduct is sufficiently serious to raise questions as to their continuing as "law enforcement" officers; it must act with sufficient dispatch; and it must levy penalties that are fair and appropriate and are considered so by both members of the Department and the public it serves.*⁵⁸

While most officers in the study were punished adequately for their misbehavior and received penalties the Commission considered fair and appropriate, the Commission did question the adequacy of the punishment of 18 officers charged with off-duty misconduct. This was true in some of those cases that went to trial and ended in a guilty finding against the officer, as well as cases in which there was a negotiated settlement.

The questionable penalties -- both in negotiated settlements and in cases that went to trial -- included penalties that did not include a term of dismissal probation where it was appropriate, penalties short of termination where termination was warranted, and penalties that included an insufficient period of suspension from duty or forfeiture of vacation benefits.

In addition to these areas of insufficiency, the Commission observed an unevenness of penalties in some cases involving officers with similar backgrounds who engaged in similar

⁵⁷ See pp. 47-49 (P.O.'s Five and Six) and p. 70 (P.O. O) for discussions of cases involving a refusal to submit to a blood-alcohol test.

⁵⁸ False Statements Report, at p.2.

misconduct. While most officers received penalties that, when viewed in isolation, were within a reasonable range given the circumstances of each case, the Commission found examples in which the disparity between penalties in like cases was not supported by any apparent distinctions among the officers involved or the facts of each case.⁵⁹

For example, the Commission scrutinized the DUI cases in the sample and found that while about half the cases resulted in punishments of 30 days and dismissal probation, the penalties in the other cases ranged from 20 days with no dismissal probation to termination. The Department terminated one officer charged with DUI, but another officer with a remarkably similar case received only a 30-day suspension. Meanwhile, a third officer -- whose case differs from the first two only in that he was not charged with reckless driving and, although his car struck a house, he did not cause any injuries -- was never suspended as a result of his DUI accident and ultimately negotiated a penalty of only 20 vacation days.⁶⁰

1. Dismissal Probation

The Commission believes that dismissal probation can be an effective tool, both in reforming the behavior of police officers who have had disciplinary problems and in swiftly removing those officers who engage in subsequent misconduct during the probationary period. Once an officer is sentenced to dismissal probation, he may be terminated, without a hearing, should he commit any further misconduct. Indeed, as the Commission has previously noted, the

⁵⁹ In September 1996, the Department implemented a procedure in which the DCT -- with full access to the investigative folder, the DAO's file, and the officer's prior record -- participates in the plea bargaining process. Through such participation, the DCT may be made aware of the kinds of penalties imposed for similar conduct and the Department may impose penalties that are more consistent. See also further discussion above, at [pp. 13-14](#).

In addition, the DCT has developed a database of penalties imposed in past disciplinary cases -- categorized by type of misconduct -- as a tool to assist in recommending penalties in new cases. As part of its study, the Commission was given a demonstration of how the database functions.

⁶⁰ This officer's case is discussed below at [p. 69 \(P.O. N\)](#). The first officer's case is discussed below at [p. 68 \(Sergeant M\)](#).

Department has, since the appointment of the current Police Commissioner, greatly increased its use of dismissal probation as a penalty imposed in disciplinary cases.⁶¹ And in the current sample, the Department imposed a one-year term of dismissal probation in 30 of the 45 cases in which it did not either terminate the officer or negotiate a settlement that resulted in the officer's retirement or resignation. Still, as reflected in some of the cases discussed below, its use can be further expanded.

2. Termination Cases

The Commission believes there are certain types of cases in which -- because of the prior disciplinary record of the officer, the seriousness of the misconduct, or a combination of both -- the Department should, in general, seek termination of the officer. As noted above, these cases include officers who have engaged in more than one unjustified act of violence; officers who continue to engage in alcohol-related misconduct, despite receiving alcohol counseling; officers who discharge their weapons and fail to report the incident to the Department; and officers who deliberately and unjustifiably discharge their weapons off-duty. These categories of offenses reflect the most egregious acts of misconduct that, in the Commission's view, require the Department, in general, to terminate the officer. This is obviously true with regard to officers who intentionally and inappropriately discharge their firearms or commit acts of violence. It should not matter whether these acts occur on- or off-duty; an NYPD officer, entrusted with a firearm, is expected to comport himself appropriately at all times. These actions also are the kinds of off-duty misconduct that may well be replicated while the officer is on-duty.

Equally serious is the conduct of officers who continue to engage in alcohol-related misconduct despite receiving alcohol counseling. The Commission believes that all officers who

⁶¹ See False Statements Report, at p. 39.

engage in alcohol-related misconduct should be ordered to undergo alcohol counseling as a condition of their continued employment by the Department, and that in most cases these officers should be allowed to keep their jobs on the assumption that they will be able to address their alcohol problems successfully.⁶² Nevertheless, while in some circumstances an “additional chance” may be appropriate, an officer who has undergone counseling and yet persists in abusing alcohol should, in general, be terminated. While the officer should certainly obtain further treatment for his addiction, in general it should not be while continuing to serve as a police officer. The risks to public safety simply are too great.⁶³

A final category of misconduct -- officers who discharge their weapons for whatever reason and fail to report the incident to the Department -- should also be treated, in general, as a termination case. Important evidence may be lost if an officer fails to notify the Department promptly of a firearm discharge. This may include forensic evidence -- such as spent shells, physical evidence of discharge, and changes in the condition of the weapon -- as well as statements of witnesses. Such evidence is critical in determining the facts and circumstances of the discharge -- including the possibility of injury -- and whether the officer acted properly. Moreover, it is critical to ascertain the facts of discharge in a timely manner should the officer become involved in a subsequent shooting, since evidence of discharge from a prior unreported shooting could taint the later investigation and lead to false conclusions.⁶⁴ For all these reasons, it is absolutely imperative that all officers promptly report to the Department any instance of

⁶² For further discussion of the Department’s current policy in this area, see pp. [33-36](#).

⁶³ An example of circumstances in which deviation from this policy might be appropriate is an officer who was successfully treated, but suffers a relapse after a number of years.

⁶⁴ See below at pp. [52-55](#) for discussions of two cases involving officers who failed to report the discharge of their weapons, yet were not terminated (P.O.’s B and C), as well as the case of an officer (P.O. D) who properly came forward and was appropriately allowed to remain on the force, given the accidental nature of the incident.

weapon discharge.

The Commissioner has, in numerous cases, not hesitated to terminate officers. Indeed, a number of the officers in the study who fit into one or more of these categories received the stiffest of penalties, including termination. In total, the Department terminated eight officers in the study, either after trial or on the basis of their probationary status.⁶⁵ Of these eight, one was on dismissal probation because of an earlier violation and one was a probationary police officer. In addition, six officers whose cases were included in the Commission's sample left the force in negotiated settlements with the Department -- five of them with pension benefits.

Eight officers who, in the Commission's view, should have been terminated -- either because they fell into one of the above categories or otherwise -- were, however, allowed to remain on the force.⁶⁶ Of the eight cases in which the Commission believed termination was the more appropriate penalty, six fell into one of the above categories. One of the other two cases involved an officer who performed an illegal traffic stop while off-duty, posed as an FBI agent, and sexually abused the female driver of the car pulled over. The officer in the other case, while drunk, pushed his wife down a set of stairs, chased her into their garage and, after she attempted to escape him by entering their car, smashed the window of the car with a log.⁶⁷

3. Probationary Police Officers

⁶⁵ Seven additional officers, not included in the Commission's sample of 59 cases, were also separated from the Department either by operation of law pursuant to a felony conviction, or by resignation. See discussion above, at pp. 16-18.

⁶⁶ One of these eight officers, who received a 30-day penalty and dismissal probation for one year, was summarily dismissed within the following year for being away from his residence while on sick report and then lying about it to a superior. While the Commission believes that this officer -- who is not discussed further below -- should have been terminated as a result of the initial disciplinary case against him, this case again demonstrates the effectiveness of dismissal probation as part of a sentence.

⁶⁷ The first officer plead *nolo contendere* and received a 30-day suspension. The second plead guilty and received a 29-day suspension. Both were placed on dismissal probation for one year.

During the initial two-year probationary period that commences upon their appointment, new police officers -- much like officers serving a sentence of dismissal probation -- can be terminated without the service of charges or an adjudicatory hearing for any disciplinary matter that arises. Whereas officers on dismissal probation have demonstrated problems meeting Departmental standards, the rationale for probation in the case of new officers is the very fact that these officers do not have a proven record of service. More seasoned officers have demonstrated a record that, good or bad, can be weighed against their misconduct in determining a penalty. When such an officer engages in misconduct, his behavior in that incident can be considered together with his entire history with the Department to gauge whether the incident fits into a pattern or is merely aberrational, allowing the Department to tailor its punishment accordingly.

The two-year probationary period provides an opportunity for new officers to demonstrate their ability to perform as police officers and to meet the Department's standards for conduct. When so early in his or her career an officer commits serious acts of misconduct, a question exists as to the continuing suitability of that person as a police officer. In these circumstances, the Department should aggressively pursue termination of the officers involved.

While, in a separate study focusing on probationary police officers only, the Commission determined that the Department was generally terminating such officers when warranted, of the three probationary officers who were part of the Commission's sample in this study, only one was summarily dismissed for his misconduct.⁶⁸ The others, who committed misconduct at least as serious, if not more so, were allowed to stay on the force.⁶⁹

4. More Than Thirty Day Penalties

⁶⁸ See Model Case Number 4, below at [p. 46](#).

⁶⁹ See discussion of one of these officers below at [p. 62 \(P.P.O. I\)](#).

The length of a sentence imposed by the Department is -- and should be -- a matter of discretion, dependent on the individual circumstances of a case. Nevertheless, the Commission observed that in those cases in which the Department imposed a penalty of either suspension or loss of vacation days, it infrequently imposed a sentence in excess of 30 days. This was in spite of rules that allow a Trial Commissioner to recommend, and the Police Commissioner to impose, a penalty of up to 30 days for each discrete charge,⁷⁰ and in spite of the Department's ability to impose a sentence -- without any limitation as to length -- as part of a negotiated settlement.

The Commission recognizes that a 30-day suspension is a significant penalty, with severe financial and professional consequences to an officer. Nevertheless, the Commission observed that there were only six sample cases in which officers received a penalty of more than 30 days. In other cases a lengthier penalty (if not termination) may have been appropriate but the penalty imposed was 30 days or less. Indeed, in a number of those cases it appeared that the option of a longer suspension in connection with multiple charges was not considered.

⁷⁰ See further discussion above, at p. 14.

C. DETERMINATION OF FITNESS FOR DUTY IN OTHER JURISDICTIONS

In order to place the issues of fitness for duty, intoxication, and use of breathalyzer tests within a broader context, the Commission surveyed the police departments of several other large cities. These included the Los Angeles Police Department (“LAPD”) and the Chicago Police Department (“Chicago PD”). Each of these police departments prohibits an officer from being “intoxicated” on- or off-duty, rather than requiring, as the NYPD does, that an officer be “fit” 24 hours a day. While in some ways the practical differences between these tests is not great, by prohibiting intoxication on- or off-duty, these police departments narrow the issue of fitness -- whether or not driving is involved -- to the question of whether the officer is legally intoxicated. This determination is based solely upon the results of a breathalyzer examination, in the case of the Chicago PD; or, in the case of the LAPD, upon a combination of “common sense” observations made by a duty captain and blood-alcohol-content evidence.

In each of these departments, officers are required to submit to breathalyzer examinations. Officers refusing to do so are separately charged with refusing to submit to a breathalyzer examination, and such refusal is treated in an administrative proceeding as presumptive evidence of intoxication. Additionally, while these Departments require that officers submit to breathalyzer examinations in both driving and non-driving contexts, the results of the department-ordered breathalyzer tests may not be used against the officer in any criminal case that may arise out of the same incident.

While the Commission is mindful of the concern raised during discussions with members of the Department that officers may feel that they are being treated different from other citizens if they are required to submit to breathalyzer tests in all misconduct situations in which alcohol consumption is suspected, a reliance upon objective evidence of intoxication in the form of

blood-alcohol level results would assist in minimizing some of the subjective aspects of a duty captain's determination of unfitness if the test can be administered reasonably quickly.⁷¹ This is particularly important in cases involving driving incidents, or where particularly violent actions are alleged. Moreover, not unnaturally, duty captains are, in certain instances, reluctant to find a member "unfit" given the negative ramifications on the officer's career. Through use of a breathalyzer examination, however, the duty captains can, in many situations, be relieved of the burden of making subjective judgements as to intoxication and unfitness. In addition, civilians are regularly subjected to breathalyzer tests when suspected of driving while under the influence of alcohol, and failure to comply results in an automatic six-month license suspension.⁷²

D. THE NEED FOR OFFICERS TO UNDERGO APPROPRIATE EVALUATION, COUNSELING, EDUCATION, OR RE-TRAINING

The Department offers alcohol counseling to its members in an effort to help them with problems that may be adversely affecting both their personal lives and their work. Officers can voluntarily take advantage of counseling for alcohol abuse, which encompasses the opportunity to enroll, on Department time, in an in-patient detoxification program. Additionally, the Department's Early Intervention Unit ("EIU") and Psychological Services Section evaluate officers who may be experiencing emotional distress associated with their jobs or personal lives. While the Department itself does not provide therapy for these problems -- as opposed to problems with alcohol -- it does provide education for issues relating to domestic violence, as

⁷¹ Where delays exist that prevent the duty captain from administering a meaningful test because so much time has past since the underlying incident, it will remain necessary to rely on a physical evaluation of the officer, as well as other evidence relating to the officer's condition at the time of the underlying incident.

⁷² Vehicle and Traffic Law §1194(2). This section applies equally to police officers and civilians.

well as re-training for excessive use of force and inappropriate use of a weapon.

The Department also has recently developed an eight-week Domestic Incident Education Program, designed to reduce the incidence of domestic violence by officers. Additionally, the Department has informed the Commission that it is in compliance with a newly enacted federal law making it illegal for any person, including a police officer, convicted of a qualifying misdemeanor crime of domestic violence to possess any firearm or ammunition.⁷³

The Department can compel officers to undergo evaluations for suspected problems. Failure to comply with such an order is grounds for immediate suspension. Such evaluations may be conducted by the Department's Counseling Services Unit -- for suspected alcohol abuse -- the EIU, or the Psychological Services Section. When the Department determines that the officer has an alcohol-abuse problem, it can compel the officer to attend a 30-day in-patient detoxification program. Failure to comply with this directive will result in the officer's suspension. Additionally, the Department may require the officer to attend, off-duty, meetings with Alcoholics Anonymous or other self-help organizations. The Department will then monitor the officer's attendance at such programs. If the Department determines that psychological counseling is warranted it can also refer an officer to obtain such assistance.

Often, misconduct by officers -- especially off-duty misconduct -- signals deeper problems. For example, a large number of officers in the Commission's sample appear to abuse alcohol. An arrest for driving while intoxicated may be the first indication to the Department that a member of the service has an alcohol-abuse problem. Officers may generally confine their drinking to off-duty situations, with perhaps a rise in sick leave taken but no other obvious "on

⁷³ Title 18 U.S.C. Sec. 922 (g)(9), enacted by Congress on September 30, 1996, applies to all persons, including law enforcement officers, convicted of a qualifying domestic-violence misdemeanor at any time prior to or after the passage of the law.

the job” signs of a problem. If the person is an alcoholic, however, in reality it is unlikely that there are no on-the-job consequences. Moreover, if an officer drives while drunk, or is carrying a weapon, the consequences can become potentially deadly.

While the Department frequently requires officers to undergo counseling when they have demonstrated that they may be abusing alcohol, in 27 of the cases the Commission reviewed, alcohol counseling,⁷⁴ and/or other appropriate types of evaluation, education, or re-training,⁷⁵ was not ordered when it appeared warranted.

Providing or recommending treatment that could allow these officers to correct their conduct and remain on the force is an important goal of the Department that it must continue to strive to achieve. Indeed, it is the only way to keep such officers on the force in spite of their obvious problems, instead of simply dismissing them and investing in the training of new officers to fill their places.

The Patrol Guide requires that when an officer is found to be unfit for duty, the duty captain making that determination must advise the officer of the availability of the Department’s Counseling Service Program and, if the officer expresses a desire to participate in the program, arrange for a referral to the Counseling Services Unit.⁷⁶ Although the Commission was unable to verify whether this information was made known to the officer in every instance of an unfitness

⁷⁴ The Commission’s analysis is based on the information contained in the files provided to it by the Department. When the Commission sought to verify its conclusions regarding the number of officers who did not receive alcohol counseling, the Department would not confirm or deny who had received alcohol counseling, in order to comply with its own policies of confidentiality as well as constraints imposed by statute.

⁷⁵ Officers who discharge their weapons are subject to review by the Department’s Firearms Discharge Review Board which determines the circumstances of the discharge and whether disciplinary charges should follow. Additionally, Interim Order 139-3 requires all officers who discharge a firearm, on or off-duty, to attend a one-day tactics-review session conducted by the NYPD Firearms and Tactics Section. The order does not address officers who draw their weapons improperly without discharge. Nine cases in the Commission’s sample involved the improper discharge of a weapon while 13 others involved improper display.

⁷⁶ Patrol Guide Section 118-14.

finding, the Commission believes that this policy can be highly beneficial in providing help for those officers who have experienced problems with alcohol.

Because it is not one of the dispositions available by law after an administrative trial,⁷⁷ the Department's Trial Commissioners cannot recommend that an officer found guilty of misconduct undergo counseling. While the Commission believes that the Trial Commissioners should be empowered to recommend such conditions, this will require an amendment to the Administrative Code. The Department, however, can require such treatment as a term of a negotiated settlement or upon a finding of guilt after an administrative trial. If the Department makes alcohol counseling a condition of a negotiated settlement, then in the event the officer fails to comply with this condition, the Department should be able to reevaluate the original negotiated plea and impose a stiffer sentence as a result of the failure to comply. One way to accomplish this is to include a provision in the original settlement stating that if the prescribed counseling program is not adhered to, then a harsher alternative penalty -- including termination if warranted -- will be imposed.

The Department advised the Commission that since April 1997,⁷⁸ it requires all officers to consult with the Counseling Services Unit before any disciplinary matter involving alcohol is adjudicated. In response to the Commission's concerns, on July 29, 1998, this policy was codified.

E. MONITORING OF OFFICERS WHO HAVE ENGAGED IN MISCONDUCT

In order to monitor officers who have been found guilty by the Department of using

⁷⁷ See discussion above at [p. 14](#).

⁷⁸ The Commission's sample extended through May 1997.

excessive force; or officers who have been the subject of multiple excessive-force allegations; or officers who have performed in a consistently negative way, as demonstrated by poor performance evaluations, sick leave abuse, or violations of Departmental rules resulting in charges and specifications, the Department has developed a monitoring system that identifies these officers for heightened scrutiny. Officers may be placed in one or more of the Department's monitoring programs, which include: Chronic Force Complaint Monitoring, Chronic Disciplinary Monitoring, Special Monitoring, and Disciplinary Task Force Monitoring. Depending on the program, officers may be subject to quarterly or monthly evaluations, placement in the program may be recorded in the officer's Central Personnel Index, and any subsequent complaint may result in an immediate response by the Department's Internal Affairs Bureau. Inclusion on these lists communicates to the officer that while the Department will assist the officer in becoming a responsible and productive member of the Department, the officer is on notice that future disciplinary infractions will result in severe disciplinary measures being taken, potentially including termination.

The Commission was informed that as of June 23, 1998, five of the officers in its sample -- including four discussed below (Officers Six, B, C, and F) -- had been placed in one or more of the Department's monitoring programs.

The Commission also found that the Department had placed 15 of the officers in its sample on modified duty prior to the disposition of their disciplinary cases and that such status continued beyond the impositions of their penalties. Periods of modified duty that continued after disposition ranged from a few days to more than two months. Where the Department has chosen not to terminate an officer who has been found guilty of violence or misuse of a weapon, it is appropriate for it to prevent the officer from having access to his firearm for some time

while the Department monitors his conduct.⁷⁹

Modified duty, however, is not a replacement for termination or dismissal probation, because it directly affects only on-duty conduct.⁸⁰ It does not offer the Department the means to fire the officer expeditiously for additional misconduct.⁸¹

F. DOMESTIC VIOLENCE BY POLICE OFFICERS

In addition to the issues addressed above, the Commission discovered another disturbing pattern in the cases it reviewed: Of the 43 cases in which police officers committed acts of violence while off-duty, 18 arose in the context of a domestic relationship. And, as indicated above, 30 percent of all officers who were arrested in 1996 were arrested for domestic violence.⁸² Domestic violence continued to be a problem in 1997, with most assault arrests of officers stemming from domestic incidents.

In an important statement of citywide law enforcement strategy on domestic violence, released in 1994, the NYPD announced a major new initiative toward all incidents of domestic violence occurring in New York City. The statement -- known as Police Strategy No. 4 -- began,

Although it usually takes place behind closed doors, and always between

⁷⁹ It should be noted that modified duty status is not a penalty. Rather, as discussed above, the purpose of placing an officer on modified status is to assign him to non-enforcement duties pending a Departmental determination of fitness to perform police duties. Patrol Guide Section 118-12.

⁸⁰ To the extent that an officer on modified duty must surrender all of his weapons, including "off-duty" weapons, to the Department, this status may also have positive implications for the officer's off-duty conduct and, therefore, public safety in general.

⁸¹ Since the sample period, the Commission identified seven instances in which an officer included in this study faced a new disciplinary case -- for either on-duty or off-duty misconduct. Three of these officers were terminated as a result. Cases are still pending against two others who were on dismissal probation at the time of the new case.

⁸² Of the 18 cases in which the Commission determined the Departmental penalty to be insufficient, seven involved domestic violence.

people known to one another, domestic violence is not a private matter. Domestic violence is a crime.

*It is a crime singular and intolerable in its own right. And it is a crime that breeds other crimes -- additional crimes against the victim, the children who live in the household, and against strangers who one day may be harmed by the adults who grew up in such environments.*⁸³

Police Strategy No. 4 went on to identify the problem in all its forms, highlight past Department policies dealing with reports of domestic violence, and pledge a new commitment to tracking and recording all domestic-violence cases and refocusing Department resources toward responding to and preventing such incidents.

The current domestic-violence policy represents an important effort by the Department to come to terms with a serious societal problem. And the Commission's study of off-duty misconduct cases indicates that, as with the rest of society, domestic violence committed by police officers continues to be a problem in the NYPD.

V. MODEL CASES

The Commission identified six "model cases" that illustrate many of the issues described above. In these model cases, the Department charged officers appropriately, particularly where the evidence supported a charge of unfitness, and levied appropriate penalties against tenured as well as probationary officers, including termination or dismissal probation. These Departmental actions are used to compare with other cases in the study involving officers who engaged in similar misconduct.

Following the model-case section is a series of "illustrative cases" the Commission drew

⁸³ Police Strategy No. 4: Breaking the Cycle of Domestic Violence, 1994.

from its sample that suggest a need for improvement in the various areas discussed above.

Model Case Number 1: The Department’s Proper Reliance on Credible Evidence to Charge Unfitness for Duty

This case illustrates the Department’s ability to charge an officer appropriately with unfitness for duty, based on the credible evidence of witnesses not employed by NYPD, and despite the officer’s apparent sobriety at the time of the arrival of the NYPD duty captain. It also demonstrates the Department’s ability and willingness to impose a consecutive sentence.

One night, after a day of socializing together, a group of off-duty officers from the same NYPD precinct gathered at a bar outside New York City. About three hours after their arrival, the bar’s head of security ordered his staff to stop serving the group, as they were becoming unruly. After failing to obtain the cooperation of the group, he then left to seek the assistance of the local police. As he was explaining the situation to a local police sergeant, an officer from the group, Officer One, became involved in a scuffle in front of the bar, leading to her arrest.

After the officer was arrested but before she could be removed from the scene, Officer One appeared to become ill and require hospitalization. After arriving at the hospital, she became loud and abusive toward hospital personnel, who determined that she had likely feigned her illness. Officer One was then taken to police headquarters and charged with disorderly conduct and resisting arrest.

About 4:30 a.m., the desk officer at Officer One’s NYPD precinct was made aware of the incident. The borough duty captain was notified and arrived at the local police facility. About 8 a.m. -- approximately eight hours after the initial scuffle -- the duty captain determined that Officer One was fit for duty.

Officer One was suspended later that day, and after a joint investigation by the duty

captain and an IAB captain, Departmental charges were brought against her several days later for resisting arrest and disorderly conduct. Despite the initial finding of the duty captain, she was also charged with unfitness for duty.⁸⁴ Her suspension lasted 30 days, at the end of which she was placed on modified duty.⁸⁵

Eleven months after the incident, Officer One plead guilty in criminal court to the violation of creating a public disturbance and paid a fine of \$500. Soon after, she entered into a negotiated plea agreement with the Department, in which she plead guilty to all three charges against her, and received a suspension of an additional 30 days (for a total of 60 days) and dismissal probation for one year.⁸⁶

The evidence of Officer One's intoxication, at the time of her arrest and subsequently, came from a variety of sources, including the following:

- A local police officer at the scene of the incident reported to investigators that Officer One "appeared to be intoxicated, smelled of alcohol, and had blood shot eyes."
- Another officer called her "loud, abusive, and incoherent" and said she "appeared very intoxicated."
- The nursing supervisor at the hospital and the doctor who treated her echoed these observations, declaring that she "appeared to have been drinking" and that she was "absolutely intoxicated."

Because she was not driving, a breathalyzer test was not performed by local police officers. Had such tests been timely performed, they could have provided additional evidence to

⁸⁴ It is unclear, from the Commission's review of the investigative file, who made the decision to bring this charge.

⁸⁵ See also discussion regarding the use of modified duty as a way of monitoring the officer and protecting the public, above at p. [36](#).

⁸⁶ Although she had never before faced serious disciplinary charges, she had received two negative annual evaluations in her five years on the job.

consider in determining Officer One's fitness.

This case illustrates the Department's recognition that an officer may be fit for duty at the time of the duty captain's evaluation despite having been unfit at the time of the underlying incident. An officer's fitness for duty at the time of the duty captain's evaluation, in the aftermath of an incident of misconduct, should not be dispositive of the question of the officer's fitness at the time of the misconduct itself. In order to determine an officer's fitness for duty, the duty captain should take into account all of the available evidence, including the statements of credible witnesses who observed the underlying incident, as was ultimately done here -- albeit not by the duty captain -- as well as any other credible evidence, including the results of blood-alcohol tests that may have been administered. Here, the Department appropriately pursued an administrative charge of unfitness, even though it did not have the opportunity to observe Officer One in an intoxicated state.⁸⁷ This case also represents an example of the Department securing a penalty of more than thirty days.⁸⁸

Model Case Number 2: The Importance of Aggressively Seeking Termination Where Appropriate

After an officer who had been drinking committed a brutal assault upon a man and was dismissed by the Department, the officer brought suit to keep his job, claiming that, prior to his termination, he had negotiated an agreement with the Department that permitted him to retain his job. The Department was forced to settle the lawsuit by reinstating the officer, but it continued to pursue his termination for his egregious misconduct in the original case, and in the end, it was successful.

⁸⁷ See further discussion above, at p. 22, regarding the issues surrounding the timeliness of the duty captain's arrival at the scene of an off-duty incident involving an NYPD officer.

⁸⁸ See further discussion above, at p. 30, regarding the issues of sentences in excess of thirty days. Consistent with the Commission's recommendations above, Officer One, however, also should have been evaluated

After his tour ended at midnight, Sergeant Two went to a bar and drank four or five beers. When a man appeared to take some money that Sergeant Two had left on top of the bar, the sergeant pursued the man into a nearby convenience store. He approached the man, displaying his shield. According to Sergeant Two, the man turned away and cursed at him when he suggested the man had taken the wrong money. Two other off-duty NYPD officers, who had been drinking with Sergeant Two in the bar, were also present in the store.

Sergeant Two punched the man in the head and banged his head into the counter three times. Sergeant Two admitted that the man had made no aggressive move toward him. The sergeant then threw the man to the floor and held him down. At his Departmental trial, Sergeant Two conceded it was possible he had hit the man while throwing the man down, and had kicked the man in the ribs while down.⁸⁹

Sergeant Two was arrested six weeks later, after the grand jury handed down an indictment for two counts of assault and one count of unlawful imprisonment. The Department charged the sergeant with one assault count and one count of unlawful imprisonment. Criminally, he plead guilty to the charge of misdemeanor assault. However, prior to pleading guilty to the criminal charge, Sergeant Two entered into a negotiated agreement with the Department. Under the deal, he was to have been placed on dismissal probation and forfeited his salary and benefits for the 43 days he had been suspended.

However, after the criminal conviction, the Police Commissioner dismissed Sergeant

by the Department and received alcohol counseling if warranted.

⁸⁹ While the record of this case does not reveal whether Sergeant Two was found fit for duty at the time of the incident, or whether a determination was even made, he drank four or five beers by his own admission in the three hours or so leading up to the assault. While it is by no means clear that he was unfit for duty, Sergeant Two's alcohol consumption likely contributed to the viciousness of his unprovoked attack on an unarmed man who offered no physical resistance.

Two on the basis of his guilty plea.⁹⁰ Sergeant Two then initiated an Article 78 proceeding against the Department, alleging bad faith in breaching the settlement. During the pendency of that proceeding, the Chief of Personnel approved a settlement under which Sergeant Two was reinstated, and placed on modified duty pending a new disposition of the Department's case.

At his Departmental trial, Sergeant Two plead guilty to both administrative charges. In recommending a penalty of dismissal -- which the Police Commissioner accepted -- the Trial Commissioner wrote, "If we retain this officer who engaged in conduct that disgraced everyone on the force, we would send the erroneous message that this Department condones brutality toward civilians."

Model Case Number 3: The Efficacy of Dismissal Probation

This case illustrates the effectiveness of dismissal probation as a disciplinary tool in those cases in which an officer has continued to violate Departmental standards of conduct after such a term of probation is imposed. Here, a police officer with a history of domestic violence assaulted the mother of his children. Because the Department had previously placed the officer on dismissal probation, it was able to terminate the officer expeditiously for the assault.

After a family court hearing regarding his two children, Officer Three engaged in a loud argument with the children's mother on the street outside the courthouse and struck the woman in the face with his fist. An on-duty detective restrained Officer Three, who informed the detective that he was a police officer. The woman stated she had an order of protection against the officer and wanted the detective to arrest him. The detective did so, charging him with first-degree criminal contempt and third-degree assault.

⁹⁰ See further discussion above, at [p. 16, footnote 39](#).

According to the woman, Officer Three had already grabbed her by the shoulders and pushed her against a parked car by the time the detective intervened. Over the course of the officer's six-year relationship with the woman, there had been four prior incidents of domestic violence that prompted police intervention. Three times he had faced Departmental charges for his actions toward her.

Based upon the incident, Officer Three was suspended. At the time of this suspension, he was already serving a term of dismissal probation for acts of misconduct that occurred on-duty and prior to the courthouse incident.⁹¹

Because Officer Three was on dismissal probation, the First Deputy Commissioner recommended that he be dismissed as a result of this incident, saying that he lacked "the self-control and judgement necessary to perform as a police officer." The Police Commissioner agreed, and Officer Three was terminated.⁹²

This case illustrates the importance of imposing dismissal probation when warranted. Had the Department been forced to go to trial to seek Officer Three's dismissal -- clearly justified given the seriousness of this offense alone -- it would have taken a much longer time to reach, at best, the same result. During this time, the officer would have continued to work, receive a paycheck, and accrue benefits. In this case, Officer Three was off the force within 24

⁹¹ Officer Three had been discourteous to his superiors and had been absent from his assigned post without permission.

⁹² The Commission encountered one other case in which dismissal probation in a prior case led to the termination of an officer for an instance of subsequent off-duty misconduct. The case demonstrates that misconduct while an officer is on dismissal probation need not itself be serious in order to trigger termination where the Department believes that, based upon the officer's overall performance, termination is appropriate. An officer was verbally abusive toward her superiors while off-duty. In addition to being on dismissal probation at the time -- as a result of two recent incidents of on-duty misconduct -- the officer had a long history of disciplinary problems and poor performance, and she was also in the Department's Special Monitoring program. Although the discourtesy alone would almost certainly have been insufficient to prompt the Department to dismiss the officer, the fact that she was on dismissal probation enabled the Department to dismiss a problem officer summarily.

days.⁹³

Model Case Number 4: Appropriate Termination of a Probationary Police Officer⁹⁴

On the force for less than two years, this probationary officer engaged in a verbal and physical altercation with a civilian. During the fight, the officer threatened to kill the man and menaced him with a weapon. Based upon the officer's probationary status, the Department was able to terminate him summarily for his misconduct.

Probationary Police Officer ("P.P.O.") Four -- who had been on the force for less than 21 months -- was involved, while off-duty, in an altercation with the mother of his children and a man sitting in a car, with whom she was having a conversation while she stood on the street. P.P.O. Four approached the woman and argued with her. He then turned to the man and threatened him, saying, "What are you doing with my wife? I will blow your head off." P.P.O. Four began jabbing at the man with his hand through the car's window.

The man emerged from his car and exchanged punches with P.P.O. Four. The officer withdrew his pistol, pointed it at the man, and announced, "Now you are going to jail for assaulting a police officer." At this point, the woman fled, and a retired NYPD officer -- also the man's cousin -- who had witnessed the events, approached and asked what had happened. P.P.O. Four announced that he was a police officer and that he was arresting the man with whom he had been fighting. The man's cousin offered to dial 911 on his cellular phone, and as he was about to

⁹³ Two other cases in the sample demonstrate the Department's effective use of dismissal probation in appropriate instances. In one (Officer P), an officer was charged with menacing another driver with a gun on a city highway. In the other (Detective Q), a detective was accused of breaking furniture in his house and threatening to kill his wife with a table leg.

Both of these cases suffered from problems of proof -- in the first, the other driver lacked credibility, and in the second, the wife became uncooperative -- yet in each, the Department was able to negotiate a plea (guilty in the former, *nolo contendere* in the latter), avoid a trial, and place the officer on dismissal probation.

⁹⁴ See discussion regarding probationary police officers, above at [p. 29](#).

dial, P.P.O. Four drove away in his car.

The matter came to the attention of the Department four days later, when the victim called IAB to file a complaint. Following an investigation, P.P.O. Four was terminated without trial, on the basis of his probationary status at the time the incident occurred.

In this case, P.P.O. Four removed his weapon and pointed it at a civilian during a domestic dispute. In response, the Department effectively and expeditiously exercised its ability to terminate this probationary officer summarily for his unacceptable misconduct.

Model Case Numbers 5 and 6: Alcohol Abuse -- An Effective Departmental Response: Dismissal Probation Linked with Counseling

These cases illustrate the importance of requiring that dismissal probation and alcohol counseling be part of the disposition of all cases involving officers who drive while intoxicated. In the first case, a veteran officer who had previously been cited for sick-leave abuse was arrested for drunk driving. The officer subsequently enrolled voluntarily in a counseling program. By placing the officer on dismissal probation, the Department put the officer in a position to address his alcohol-abuse problem while signaling to the officer that any such future misconduct could result in termination. In the second case, an officer charged with driving while intoxicated refused to submit to a blood test. He was properly charged for his refusal, placed on dismissal probation, and referred by the Department for treatment.

Police Officer Five

Officer Five was arrested in a suburban community shortly before midnight on a Saturday, after an accident in which the car he was driving rear-ended another car, causing minor injuries to himself and to the other driver and a passenger. The local officer who responded concluded Officer Five was intoxicated, citing his glassy and bloodshot eyes, the odor of alcohol on his breath, and his failure in two field sobriety tests. Officer Five was placed under arrest and brought to local police headquarters, where he refused to take a breathalyzer test.

Officer Five was charged criminally with driving while intoxicated. Departmentally, he faced charges both for DUI and for being unfit for duty. In the criminal case, Officer Five plead guilty to a DWI misdemeanor and was fined \$500. About a year after the accident, he reached an agreement with the Department to plead guilty to both counts against him and accept a penalty of 30 days -- 12 days from the original suspension period and an additional 18 forfeited vacation days -- plus one year of dismissal probation.

After the accident, Officer Five enrolled in the Department's Counseling Services Program, apparently seeking help for alcohol abuse.⁹⁵ He successfully completed treatment, and his counselor gave him a positive recommendation. Upon the recommendation of an official in the Department's Medical Division, he was restored to full duty after six months on modified duty.

Officer Five's willingness to seek help and his success in counseling was a factor in shaping the Department's position on his penalty. Prior to this incident, Officer Five had no disciplinary problems and was generally a model officer. Nevertheless, in negotiating a penalty that included dismissal probation, the Department recognized the seriousness of his offense.

Here, Officer Five took appropriate measures to address his alcohol-abuse problem. In order to ensure the officer's continued compliance with Departmental fitness standards, however, the Department appropriately imposed dismissal probation. The imposition of dismissal probation serves as a monitoring tool to track and address any further misconduct.⁹⁶

⁹⁵ While the officer in this case sought counseling on his own initiative, the Department can direct that an officer receive counseling whenever it deems such counseling appropriate.

⁹⁶ While the outcome in this case was appropriate, the officer nevertheless ought to have been charged for his refusal to submit to a blood-alcohol test.

Police Officer Six

In a similar case, after a one-car collision in which he and his wife were both seriously injured, Officer Six was apprehended for driving while intoxicated. He submitted to a breathalyzer test but refused to submit to a blood test. The Department properly charged the officer with DUI and refusing to submit to a blood test.⁹⁷ In addition to an 11-day suspension, the Department properly placed the officer on one-year dismissal probation and directed him to enroll in the Department's alcohol treatment program.⁹⁸

VI. ILLUSTRATIVE CASES

The following illustrative cases identify a series of prosecutions that to varying degrees fell below the standards set by the Department in the model cases discussed above. The Commission evaluated each of the following cases not for the purpose of criticizing the Department's handling of the individual cases, but rather to illustrate a pattern in which change is warranted. The cases are grouped by category of offense.

⁹⁷ Both the breathalyzer and the blood test -- obtained after a court order -- revealed P.O. Six had a BAC of .12% (20% above the legal limit). However, because of his physical condition at the time the duty captain arrived at his hospital bed, no determination of fitness for duty was made, and the officer was never charged with unfitness. Consistent with the Commission's recommendations above, the duty captain should have found P.O. Six unfit given the officer's BAC.

⁹⁸ P.O. Six was placed on the Department's Force Monitoring list for conduct unrelated to this case.

A. DISCHARGE OF A WEAPON

1. Police Officer A

This case involves an officer who while driving while intoxicated, got into a traffic dispute and fired his gun at the occupants of a second car. During a subsequent Departmental interview, the officer refused to answer questions regarding the incident in spite of being required to do so under Departmental guidelines. Given the gravity of the officer's offense, and his refusal to aid in the Department's investigation of the incident, the officer should have been terminated.

An off-duty suburban police officer observed Officer A running a red light, driving erratically, and then pulling over to the side of the road about 3 a.m. The officer pulled up alongside in his car and -- fearing the driver was intoxicated -- asked Officer A to park his car and take a cab. Officer A drove 10 yards forward, with the off-duty officer continuing his efforts. One of the two passengers in the off-duty officer's car informed Officer A that their driver was a police officer.

Officer A continued his erratic driving for a short distance, until he once again pulled over, and the other driver again pulled up alongside. Officer A then exited his car with a gun in his hand, pointed it at the off-duty officer's car -- and its three occupants -- and fired one shot as the man tried to escape Officer A. Another shot was heard as they drove away.

The local police ultimately arrested Officer A. The gun was found in his home. Two spent rounds and three live rounds of ammunition were located in the toilet. On the basis of his bloodshot eyes and slurred speech, Officer A was found unfit for duty due to intoxication by the duty captain who responded to the scene. He was suspended for 30 days, then placed on modified duty.

Officer A faced Departmental charges for pointing his gun and firing at an occupied

vehicle, and for being unfit. Despite his unfitness -- and his erratic driving --, he was never charged with driving under the influence.⁹⁹

Criminally, Officer A was charged with reckless endangerment and menacing. One year after the incident, while his criminal case was still pending and while he was still on modified duty, the Department interviewed him pursuant to P.G.118-9. After Officer A refused to answer questions during the interview, he was suspended for 30 days and a separate case arose from this refusal.¹⁰⁰ This charge and the gun charges were joined for administrative prosecution.

Several months later, Officer A was found guilty at his criminal trial of DWI, a misdemeanor. He was acquitted of each of the remaining charges. Subsequently, the officer negotiated a settlement to the two Departmental cases, in which he plead guilty to all three charges from the original incident and *nolo contendere* to the charge regarding his refusal to answer questions. He received a 120-day suspension, with credit for the total of 60 days he served on suspension for the two incidents, and one year of dismissal probation. This is the highest penalty short of termination that he could have received for a total of four charges had the case gone to trial. Nonetheless, given the extreme seriousness and potentially tragic consequences of Officer A's misconduct, the Department should have terminated the officer.

While intoxicated, Officer A aimed his gun at three others and fired his weapon. This alone should have resulted in termination. If this were not enough, though, he also created the grave risk of harm to others by driving his car while intoxicated. Finally, if he was not

⁹⁹ Such a charge was plainly appropriate. There can be little doubt that the officer's abilities were impaired by his consumption of alcohol, or that the gravity of the offenses justified this separate and distinct charge. Not only did the local police observe that he was intoxicated, but the duty captain concluded he was unfit for duty. Moreover, although termination was the appropriate penalty here, failure to charge DUI limited the Department's ability to penalize Office A an additional 30 days, given its decision not to terminate.

¹⁰⁰ See Patrol Guide Section 118-10 (2).

terminated, the Department should have required the officer to undergo alcohol counseling to address the officer's alcohol abuse, which clearly was an aggravating factor in this case.¹⁰¹

The following three cases involve officers who discharged their weapons while off-duty. In the first two cases, the officers failed to notify the Department of the discharge. In the third, the officer promptly notified the Department.

2. Police Officer B

Officer B's off-duty gun was fired in his home one afternoon amid conflicting accounts regarding the circumstances. Officer B, who had been on the job for three-and-a-half years at the time, never informed the Department of the discharge. The incident might never have come to light had the officer's girlfriend not come forward to IAB several months later, upset about a domestic dispute she had been involved in the night before with Officer B, in which she alleged he had pushed her to the floor, slapped her, dragged her, and menaced her with a pair of scissors before ultimately throwing the scissors at her. She told investigators that Officer B had a drinking problem, had beaten her previously, and had threatened in the past to kill the both of them -- even putting a loaded gun in her mouth on one occasion. She also mentioned the discharge of the gun. As a result, he was placed on modified duty pending the results of a psychiatric evaluation.

When Officer B was questioned about the incident, he admitted to the earlier discharge of the gun and to having had an argument with his girlfriend the previous night. According to

¹⁰¹ Though the Department's decision not to pursue termination in this case is questionable, there is a positive aspect of the negotiated plea -- it demonstrates that an officer can be assessed a 30-day penalty, at least in negotiated settlements, for every discrete charge he faces.

Subsequent to the disposition of this case, but while still on dismissal probation as a result, Officer A faced disciplinary charges in a new case. The substantive charges in that case were found to be unsubstantiated, but he did receive a command discipline stemming from a new charge that emerged from the investigation.

Officer B, he never reported the discharge incident -- which he claimed had occurred while he was cleaning his weapon -- to the Department because he was afraid of the disciplinary action that would be taken.¹⁰²

The discharge was determined to have been accidental, but Officer B was found negligent in his handling of the weapon.¹⁰³ Officer B was charged with negligent failure to safeguard his firearm and with failing to notify the Department promptly regarding the discharge. He was tried by the Department, plead guilty to both charges at trial, and was sentenced to a 30-day suspension and one-year dismissal probation. In addition, he was referred to a tactics-and-firearm review session upon his return to full duty.

The Commission believes that Officer B's failure to notify the Department of the weapon discharge constitutes grounds for termination. Simply put, while it may be acceptable to allow an officer to claim negligence in the handling of his weapon, refer him for further training, and punish -- though not dismiss -- him, for the reasons discussed above¹⁰⁴ it is not acceptable for an officer to fire his weapon, even if accidentally, without notifying the Department immediately, so the Department can conduct a prompt investigation.

Finally, Officer B, at the time of his trial on these charges, had received a 30-day suspension only six months earlier for solicitation of a prostitute, providing unrelated support for his termination.¹⁰⁵

¹⁰² See below at [p. 55 \(P.O. D\)](#), for discussion of a case in which an officer promptly notified the Department of an accidental off-duty discharge and received a relatively light, but appropriate, sentence.

¹⁰³ After an investigation of the alleged domestic violence, the girlfriend's complaint was found to be unsubstantiated.

¹⁰⁴ See discussion above, at [pp. 27-28](#).

¹⁰⁵ After the disposition of this case, P.O. B was added to the Department's Chronic Disciplinary Monitoring program. For a discussion of the Department's disciplinary monitoring programs, see above at [p. 36](#).

3. Police Officer C

In a similar case, Officer C discharged his weapon in his home, in what he described as an accident. In this case, too, the officer failed to report the discharge to the Department. Instead, his estranged wife reported it six months later, and Officer C was charged with failing to safeguard his firearm and failing to report the incident.

Despite the fact that Officer C's explanation of how the discharge took place was not considered credible by investigators, and despite a prior disciplinary record and consistently bad performance evaluations,¹⁰⁶ Officer C was permitted to negotiate a guilty plea that resulted in a loss of 30 vacation days and placement on dismissal probation for one year.

For the reasons discussed above, Officer C should have been terminated for not reporting the discharge. Officer C's history on the force also offers no suggestion that his punishment in this case would lead him to correct his conduct. His prior disciplinary problems were significant and the evaluations of his superiors indicate that his job performance was unacceptable and certainly not a mitigating factor.

4. Police Officer D

The Commission's study sample included one case in which immediate reporting of a discharge incident did take place. In that case, the officer was cleaning his weapon at home when a round was discharged into the floor, where it became lodged. The officer immediately called 911 to report the incident, and the Department later concluded it was accidental.

The officer faced one charge and plead guilty, negotiating a penalty of 10 vacation days.

¹⁰⁶ P.O. C had previously been disciplined for use of excessive force and for discourtesy toward a superior officer. In addition, he was variously cited in evaluations for being "a constant disciplinary problem" and "arrogant and at times abrasive," as well as his "aversion to authority." Later, he was placed in a monitoring program because of his performance problems.

He was also sent for additional instruction in proper firearm handling. While this penalty in no way overlooked the seriousness of an accidental firing of an officer's gun, it nonetheless appropriately considered that the officer acted responsibly in reporting the incident promptly, allowing the Department to conduct a thorough and timely investigation.

B. DISPLAY OF A WEAPON

1. Police Officer E

An intoxicated off-duty officer menaced a subway passenger with his gun. The officer was appropriately separated from the force, yet the fact that he was allowed to retire with full pension rights, despite poor performance and disciplinary records, is questionable.

Shortly before midnight, Officer E approached a man waiting on a subway platform, brandished a 9-millimeter automatic weapon, and, pointing the gun at the man's chest, told him, "I can either push you or shoot you." The man fled, but Officer E made a similar advance on a second man at a different platform in the same station. Pointing the gun at the man's chest, Officer E told him, "I think I'm going to kill you," and ordered him to his knees. Officer E then walked to a token booth and began banging the butt of his gun against the glass window of the booth. He was finally apprehended while boarding a train.

Upon his arrest, Officer E was found by the responding duty captain to be unfit for duty due to alcohol consumption. At the time of the incident, Officer E's firearm contained 14 live rounds of ammunition. He was arrested and suspended for 30 days, after which he was placed on modified duty. He ultimately received five Departmental charges: two for menacing, one for attempted coercion (for ordering the man to his knees), one for reckless endangerment, and one for unfitness for duty. Officer E faced four criminal charges -- identical to the Departmental

charges, save the unfitness charge -- as a result of his actions. He was also referred by the Department to its Early Intervention Unit.

In a plea agreement, Officer E was allowed to file immediately for vested retirement with full pension benefits. Additional conditions of the settlement included the loss of 30 days served on suspension and a prohibition on applying for a firearms permit and returning to the force. He plead guilty to all administrative charges against him.

While it was necessary to separate this officer from the Police Department for his misconduct, the manner in which this occurred is subject to question. Approximately ten years before this incident, Officer E had faced charges for a similar incident, in which he displayed his gun in an off-duty confrontation with a man and threatened to shoot the tires on the man's car. Then, too, he was found to be unfit for duty. In the interim, over a four-and-a-half year period ending less than a year before the subway incident, Officer E was cited 15 times by the Department for chronic sickness.¹⁰⁷

This case demonstrates the difficulty of making judgements in particular cases. From the perspective of increasing public confidence in the Department, it must appear that the Department has acted decisively and, given the very severe nature of this incident, Officer E ought to have been dismissed from the Department even if it cost him his pension. However, if one looks at this case as involving an individual suffering from alcoholism and therefore not able to comply with necessary standards, the key is removing him from the Department, and allowing him to resign and keep his pension becomes a more acceptable result.

¹⁰⁷ Officers who take sick leave on four or more occasions within a 12-month period are monitored by the Department and classified as a chronic leave abusers, level "A." If the abuse continues and the officer takes sick leave on six or more occasions within a 12-month period, the abuse classification is elevated to level "B." Both of these designations are reflected on the officer's permanent record and are considered indications of poor performance.

2. Police Officer F

A drunken officer repeatedly struck his girlfriend and during the course of the struggle, he drew his weapon and aimed it at her. The officer negotiated a penalty of a 30-day suspension. Given the serious nature of the misconduct involved, this is the kind of case that warrants a more severe penalty. Obtaining such a penalty, however, was complicated by the fact that the complaining witness did not cooperate with the Department. The Department also did not make dismissal probation a condition of the disposition nor did the Department address the need to evaluate and educate the officer in light of his acts of domestic violence.

Officer F engaged in an extended day-long verbal dispute with his girlfriend, who was the mother of his child, during the course of which he drank four 40-ounce bottles of beer. The argument became physical at times, with the officer slapping her in the head repeatedly, knocking out her earrings. At one point, he punched a hole in the wall of the apartment and pointed a gun at her midsection. After this, he fell asleep but resumed drinking when he woke up. He then slapped his girlfriend in the head and attempted to withdraw his gun from his waistband. After a struggle for the gun, the girlfriend gained possession of it and turned it over to a third party who was present in the apartment and called 911.

When police responded to the scene of the incident, Officer F was belligerent and initially refused to identify himself as a police officer. He was arrested and suspended from duty. Officer F faced Departmental charges of menacing, disorderly conduct, engaging in a verbal altercation, failing to safeguard his weapon, and, based upon observations by the duty captain who responded, being unfit for duty.

The Department's file indicates that the woman alleged she had been the victim of two similar incidents previous to this one. Within the same year, Officer F had already been found guilty of using excessive force and making false statements in connection with an on-duty

incident (for which he received a 20-day penalty).¹⁰⁸ He had been on the force for about three-and-a-half years at the time of this incident.

Under a plea agreement between the officer and the Department, entered into three months after the incident, Officer F plead guilty to all charges and was penalized 30 days (28 days already served on suspension, along with the loss of two vacation days). Officer F had enrolled in counseling for his alcohol abuse, and at the time of the case's disposition, he was no longer in contact with his girlfriend. While termination would plainly have been warranted for this conduct, the Department might not have been able to prove its case at trial because the victim would not agree to testify. Though her prior statements could have been introduced at trial through Department investigators, without corroboration, such evidence might not have been sufficient to support the charges. Here, while the third party in the apartment and the responding police officers might have been able to provide some corroboration, this would have been a difficult case to prove in the trial room. These facts required the Department to consider how critical it was to separate the officer from the Department -- whether it should seek termination at trial based on a weak case which might result in an acquittal, or secure a guilty plea and a less severe penalty. While the Department chose the latter course, it never made dismissal probation a condition of the negotiated plea (as it did in other cases in which the proof was weak -- see footnote 93 [Officer P and Detective Q]). By not imposing dismissal probation, the Department lost its best chance to monitor the officer's conduct during the forthcoming year. Moreover, the Department should have directed that Officer F receive appropriate education to

¹⁰⁸ This misconduct occurred while the officer was employed by the New York City Transit Authority Police Department, prior to its merger with the Department on April 2, 1995. Through an oversight, the DAO was unaware of this prior misconduct and penalty and did not consider it in evaluating this case. The erroneous belief that the officer had a clean record also may have contributed to the Department's decision to negotiate a settlement.

address his acts of domestic violence.¹⁰⁹

C. VIOLENCE WITHOUT A WEAPON

1. Police Officer G

An off-duty officer became enmeshed in a traffic dispute and received a 10-day suspension and a loss of 10 additional vacation days for assaulting a man after the man had parked his car outside his own home. In spite of the officer's violent behavior, neither a psychological evaluation nor dismissal probation was a condition of the disposition.

After passing a traffic tie-up, Officer G got out of his car to approach the vehicle he believed to have been causing the slowdown. The car was being driven by a man attempting to park outside his home. As the man exited his vehicle, Officer G spat on him, pushed his car door into him and proceeded to punch him, causing injury and tearing the man's sweater. When the man asked a neighbor to call 911, Officer G stated, "Call the cops, I don't care. I am a cop."

Officer G was suspended for 10 days following the incident and charged Departmentally with one count of third-degree assault. The man chose not to press criminal charges. Officer G plead *nolo contendere* in a negotiated plea with the DAO that resulted in a sentence of the 10-day suspension already served and the loss of 10 additional vacation days.

While Officer G may have encountered a stressful situation, his assault on a civilian required a sentence including, at a minimum, a period of dismissal probation. This is the type of off-duty violence that the Department needs to monitor closely since, among other things, it may

¹⁰⁹ Fifteen months after the penalty was imposed, Officer F was arrested for harassment and resisting arrest arising out of a domestic dispute. The officer was allegedly heavily intoxicated at the time. The officer was suspended for thirty days. He has been on modified duty since then, and six charges were brought against him, but the case is still pending at the time of this report. In addition, he has been placed in the Department's Special Monitoring program. For further discussion of the Department's disciplinary monitoring programs, see above at p. 36.

well be replicated on-duty. Furthermore, the Department should have required Officer G to be evaluated by the EIU or Psychological Services to address his inappropriate behavior.

2. Det. H

While on a date with a woman, an officer became extremely intoxicated and threatened to kill her, as well as himself. In spite of clear evidence of his intoxication, the Department failed to charge the officer with being unfit for duty. Moreover, although the officer received a penalty of dismissal probation in addition to a 32-day suspension, alcohol counseling was not made a condition of his plea.

Detective H, in an intoxicated state, met a woman at her apartment one evening for their third date. (On a previous date, the Detective had also become intoxicated, having consumed 21 shots of vodka.) After Detective H had consumed alcohol at a bar, the woman asked him to escort her home, which he did, stopping on the way to buy a bottle of vodka. When they returned to the woman's apartment, Detective H continued drinking and became very emotional - to the point of threatening suicide. About 2 a.m., the woman asked him to leave.

Instead, Detective H became verbally abusive and began poking her in the chest. After she begged him to leave, Detective H threatened to kill the woman and verbally abused her. When she asked him to lower his voice because her 13-year-old daughter was asleep in the apartment, he became even louder.

Fearing for her safety, the woman called 911, and when two officers responded about 5:30 a.m., he went on harassing her in their presence. Eventually, Detective H and the officers left the apartment but remained in the hallway. Though the woman had locked the door behind them, Detective H still attempted to speak to her and punched, kicked, and banged her door so hard that the lock and frame were damaged. Finally, Detective H consented to go to the nearest precinct station house, where the duty captain found him fit for duty. He was arrested for

criminal mischief and harassment.¹¹⁰

The Department suspended Detective H and charged him with damaging property and harassment. Although there is no scientific evidence of the detective's intoxication level, the evidence showed that Detective H had been drinking heavily that night, was unable to control his actions, and may have had an on-going problem with alcohol abuse. Given his conduct in front of the other officers, Detective H seems to have been patently unfit for duty, and the Department should have charged him accordingly.

Just over a year later, he agreed to plea *nolo contendere* to both charges, accepting a penalty of one-year dismissal probation, in addition to the 32-day suspension he had received following the incident.

Given the detective's apparent history of alcohol abuse and his violent conduct toward this woman, this is the kind of case in which there should have been some form of requirement to enroll in alcohol counseling. By not charging Detective H with unfitness for duty and by not making alcohol counseling a condition of the plea agreement, the Department did not address Detective H's personal problem as well as the risk he poses to the safety of others.

3. P.P.O. I

The following case involves a probationary police officer who assaulted his wife during a domestic-violence incident. Although the Department could have summarily dismissed this officer, he received only a 27-day suspension. Moreover, the Department did not require the P.P.O. to receive, as part of his disposition, additional educational training to address his violent behavior.

Late one evening, Probationary Police Officer I had a verbal altercation with his wife at their apartment. The dispute escalated, and P.P.O. I punched, kicked and knocked down his

¹¹⁰ The criminal case was ultimately adjourned in contemplation of dismissal.

wife, then dragged her across the apartment. She alleged that he also pinned her to the floor by placing his knee on her chest. P.P.O. I eventually left for his mother's apartment, and the incident went unreported for the time being.

Three days later, however, the officer called his wife to ask her to bring his uniform to him at his mother's apartment. When his wife arrived, the two became involved in another verbal altercation. The dispute escalated when his mother grabbed his wife's arm and pushed her against the wall. P.P.O. I's wife said both the officer and his mother then began punching and pushing her, causing back pain and an abrasion. She suffered scratches on her neck and upper chest as well. The woman fled and made a report to the police. Upon being located by NYPD officers, P.P.O. I was arrested and suspended for 27 days.

As a result of the two incidents, the Department charged P.P.O. I with two counts of assault. P.P.O. I had been on the job for less than six months at the time these incidents occurred. Furthermore, at the time of these incidents, P.P.O. I was on modified duty¹¹¹ for allegedly striking his neighbor's daughter in the face.¹¹² Several months later, he plead *nolo contendere* to both counts and was given a 27-day suspension -- an inappropriately low penalty under the circumstances outlined above, including his prior record over a short period of time.¹¹³

Irrespective of whether P.P.O. I was culpable of the act that resulted in his placement on modified duty, once on this duty status -- a period of heightened scrutiny -- he was unable to

¹¹¹ While a P.P.O. is on modified duty, the two-year probationary period tolls for the duration of that duty status.

¹¹² Subsequently, the Department determined that these charges were unsubstantiated.

¹¹³ Imposing a one-year period of dismissal probation in this case would not have extended the officer's underlying probationary status as a new officer, since his probationary status had tolled during the year-long period of his prior suspension and terms of modified duty. His probationary status would therefore continue for an additional 18 months after the ultimate date of disposition, to complete his initial two-year probationary status.

control his actions and incapable of avoiding misconduct. That a probationary officer could commit these acts of domestic violence, while on modified duty for alleged prior misconduct (albeit ultimately unsubstantiated) and remain on the force with no further reprimand beyond 27 days already served on suspension is questionable, given that one of the primary purposes of the probationary period is to weed out those who cannot control themselves. In comparison, in the case of P.P.O. Four,¹¹⁴ the Department appropriately dismissed him after he assaulted his ex-girlfriend's companion and threatened him with a gun. Unlike P.P.O. I, P.P.O. Four had been on the job for almost two years at the time, and had no prior record. And while P.P.O. I did not resort to the display of a gun, as P.P.O. Four did, he nonetheless attacked his wife violently.

In any event, once the Department determined that it would not terminate P.P.O. I, it should have required him to undergo psychological evaluation or review by EIU, given the violent nature of his conduct. Moreover, the Commission believes that when the Department negotiates a settlement with a P.P.O., it should in general require, as a mandatory condition of such settlement, an extension of the probationary term.

4. Police Officer J

This case involves an officer who, with another police officer, became entangled in an altercation with two civilians. Afterward, the two officers, who had been drinking for hours, fabricated an attempted-robbery charge -- resulting in the arrest of both men - - in an effort to cover up for this officer's own provocation of the fight.

After spending four hours in a bar, and having consumed what he claimed were “a few beers” during that time, Officer J and another off-duty officer got into an altercation with two civilians. The Trial Commissioner concluded that the altercation was precipitated by Officer J. During the altercation, the other officer drew his weapon, but no shots were fired.

¹¹⁴ See Model Case Number 4, above at [p. 46](#).

Officer J and his colleague alleged that the two men had tried to rob them. At the conclusion of the IAB investigation, Officer J was charged by the Department with hitting one of the civilians, and also faced charges of disorderly conduct and lying at his P.G.118-9 interview by maintaining he was a victim of an attempted robbery when no such robbery attempt was made. Neither Officer J nor his colleague was charged with falsely reporting the attempted robbery that resulted in the arrest of the two civilians.¹¹⁵

Based on the evidence, the Trial Commissioner concluded that the officers had concocted the robbery allegation after the fact to cover up their involvement in a brawl provoked by Officer J. Although neither officer was charged with unfitness, the Trial Commissioner concluded the officers had consumed more alcohol than they claimed.

Officer J, who had a clean disciplinary record at the time of the incident, was found guilty of all three counts and received a 30-day suspension and was placed on dismissal probation for a year.¹¹⁶ Nevertheless, the Department ought to have pursued a charge against him for the very serious misconduct of causing two men to be falsely arrested on trumped-up felony charges.¹¹⁷ Indeed, the Trial Commissioner lamented the Department's failure in this regard.¹¹⁸ Although termination could have been an appropriate outcome in any event, conviction of such a charge plainly would have justified termination. In addition, while it appears that both the DAO and the

¹¹⁵ This second officer was not included in the Commission's sample because he did not face any charges that fell within the Commission's parameters for this study.

¹¹⁶ The false statements took place prior to the December 1996 policy statement by the Police Commissioner that, absent exceptional circumstances, officers found guilty of such an offense would be terminated.

¹¹⁷ These charges were later dropped by the District Attorney, after the two had each spent four days in jail.

¹¹⁸ The Trial Commissioner did note that there was a basis to arrest the individuals for assault and possession of a weapon, but not attempted robbery.

Trial Commissioner concluded that both officers had consumed alcohol to excess at the time,¹¹⁹ neither officer was referred for either alcohol counseling or an evaluation.

D. DRIVING WHILE INTOXICATED/DRIVING UNDER THE INFLUENCE

1. Police Officer K

This case, involving an off-duty officer who was driving while intoxicated, illustrates the importance of imposing dismissal probation and counseling in all alcohol-related cases. Moreover, although the Department possessed strong scientific evidence of the officer's intoxication -- the officer's blood-alcohol content exceeded the legal limit for driving -- the Department failed to charge him with unfitness.

About 4 a.m., Officer K was involved in a two-car accident out of state, resulting in property damage but no injuries. The local police Officer who arrived on the scene detected alcohol on Officer K's breath and observed him to be slurring his speech and stumbling. Officer K identified himself as a police officer and, upon questioning, indicated he had been to a retirement party and had consumed several beers. Upon request, he complied with a series of three field sobriety tests, all of which he failed. The officer was arrested and given a breathalyzer test, which found that about 7:30 a.m. -- more than three hours after the accident -- his blood-alcohol level was .135%, or 35% over the legal limit of .10%.

Officer K plead guilty to a criminal charge of driving while intoxicated and paid a fine of \$1,320, plus \$450 in restitution to the other driver involved. He also had his license suspended for three months and was placed on probation for a year.¹²⁰ Departmentally, Officer K was

¹¹⁹ Both were found fit after the incident.

¹²⁰ Patrol Guide Section 104-1, "Compliance with Orders" (5), requires all officers to maintain a current New York State driver's license, and to notify their commanding officers with pertinent details when the license is

charged with driving under the influence of an intoxicant. He was not charged with unfitness for duty. Officer K plead guilty to the DUI charge and received a penalty that included the ten-day suspension he had served after the accident, as well as the loss of 20 vacation days. He was not directed to undergo alcohol counseling.

In comparison to similar cases, the penalty is insufficient because it does not include a period of dismissal probation.¹²¹ Moreover, the Department should have required the officer to undergo an evaluation for alcohol abuse or alcohol counseling.¹²²

The following three cases illustrate the imposition of adequate as well as inadequate penalties. In the first case, the Department properly placed an officer with an otherwise unblemished disciplinary record on dismissal probation -- recognizing the seriousness of driving while intoxicated -- yet it failed to order the officer to undergo counseling as a condition of his negotiated plea. In the second case, the Department aggressively sought to terminate an officer who had committed an out-of-state drunk-driving offense.

In the third case, however, the Department failed to place an officer guilty of drunk driving on dismissal probation and did not require him to undergo alcohol counseling. Moreover, in spite of clear evidence of intoxication, the officer was found fit for duty.

suspended, revoked, or not renewed. In the event the Department learns that an officer's driving privileges have been suspended, that officer is not permitted to drive a Departmental vehicle, though he may continue in full-duty status.

¹²¹ See for example, P.O. L ([this page](#)) and P.O. O (below at [p. 70](#)), both of whom were placed on dismissal probation for one year, following DUI incidents.

¹²² Plainly, the officer was unfit for duty and in normal circumstances should have been charged with that offense. Given the fact, however, that the incident took place about 90 miles from New York City, the application of a fitness requirement to these kinds of circumstances is problematic.

2. Police Officer L

Near midnight, Officer L struck another car while driving. A breathalyzer test indicated his blood-alcohol level to be .17%, and he was arrested for DWI. The duty captain who responded found him unfit for duty, and he was suspended for 30 days, after which he was placed on modified duty. Three months later, he was returned to full duty. The Department charged him with driving under the influence and unfitness for duty.

Six months after the accident, Officer L plead guilty in criminal court to driving while his ability was impaired and paid a fine of \$350. His license was suspended for 90 days. Officer L had been on the force for two years at the time of the incident and previously had never faced Departmental charges. Several months after the disposition of his criminal case, he negotiated a guilty plea to both charges with the Department, and agreed to a penalty of one year of dismissal probation and the 30 days already served on suspension.

Although this was Officer L's first disciplinary case and he caused no injuries, the Department acted properly in placing him on dismissal probation. Yet while it is critical that officers who engage in such conduct be warned in this way that further incidents will result in termination, it is equally important that these officers be offered treatment for these potential problems -- something that was not required as part of the disposition of this case. As discussed above, the Commission believes that in instances of DUI, in general, dismissal probation coupled with alcohol counseling should be a mandatory component of any sentence or plea.

3. Sgt. M

A similar case demonstrates extraordinary efforts by the Department to terminate an officer in similar circumstances. In that case, a sergeant was arrested in another state for driving while intoxicated and reckless driving when he drove into oncoming traffic on a highway, sideswiped one car and crashed into another, causing minor injuries to himself and one other driver. He faced similar Departmental charges, but before his disciplinary case came to trial, he plead guilty to a DWI charge in that state's criminal court -- and to an additional charge of Assault by Auto, which applied because of the injuries resulting from his actions.¹²³

Although the Public Officers Law requires the NYPD to dismiss summarily any officer who is convicted of a felony in any state,¹²⁴ the state where the underlying incident occurred in this case does not divide its penal law into felonies and misdemeanors, as New York does. Nevertheless, the Department was diligent in pursuing the necessary legal research to show that the Assault by Auto offense is analogous to a felony in New York, and it successfully terminated the officer.

Beyond these legal issues, the significance of this case is that the Department went out of its way to send a positive message as to how seriously it takes DWI cases. Given its actions in this case, the Department's failure to impose dismissal probation, at a minimum, in the following case is surprising.

¹²³ Although, as noted below, the Commission believes the outcome of this case was entirely appropriate, it should be pointed out that like Officer K, Sergeant M was not found unfit for duty, despite his arrest for driving while intoxicated.

¹²⁴ See discussion above at [pp. 15-16](#).

4. Police Officer N

In this case, the officer had a vehicle accident at 4 a.m., in which he hit a house with his car in another state (about 40 miles from New York City), causing property damage, but no injuries. The officer was arrested and charged with driving while intoxicated (his blood-alcohol level was .15%, 50% higher than the legal limit in both that state and New York) and careless driving. He subsequently plead guilty to driving while intoxicated and forfeited his driver's license for six months. The Department charged him with driving under the influence, to which he plead guilty, losing 20 vacation days in a plea agreement.

Despite his blood-alcohol level, the officer was found fit for duty when the duty captain arrived a few hours after the accident, and despite his guilty plea to a DWI charge, the Department never charged him with unfitness. In the end, his penalty was too light, especially in comparison to similar cases, such as that of Officer L. He should have received at least a sentence of one-year dismissal probation, and he should have been charged with unfitness for duty, as Officer One was,¹²⁵ based on the scientific evidence at hand. Additionally, Officer N should have received an evaluation for alcohol abuse or counseling.

5. Refusal to Submit to a Blood-Alcohol Test (P.O. O)

Like Officer Six,¹²⁶ four other officers in the study refused to submit to blood-alcohol level tests -- in those cases, breathalyzer tests -- upon being stopped on suspicion of driving while intoxicated. None of these four officers was charged for refusing, although all were nonetheless found unfit for duty.

In one typical case [Officer O], an officer was involved in a car accident that caused

¹²⁵ See Model Case Number 1, above at [p. 39](#).

¹²⁶ See Model Case Number 6, above at [p. 49](#).

minor injuries, and when responding officers arrived and asked the officer for permission to perform a breathalyzer test, she refused. The officer later plead guilty to DWI in criminal court, and while she was charged by the Department with driving under the influence and being unfit for duty (based on the finding of the duty captain who responded), she was not charged for her refusal to take the breathalyzer test. The Department negotiated a settlement in which she was suspended for 11 days, lost 19 vacation days, and was placed on dismissal probation for one year.

VII. CONCLUSION

How and when to discipline police officers is one of the most difficult and important responsibilities of the Police Commissioner. It is both the mechanism for removing officers who should no longer be on the force and a significant way for messages to be sent throughout the Department, and to the public at large, that improper conduct by officers will not be tolerated. At the same time, it is important that the disciplinary system be fair to police officers.

The Commission believes that the Department is committed to having an effective disciplinary system. Through this and other studies, the Commission's goal is to contribute to that result.