

1 Hon. Maria Rivera (Ret.)
2 **ADR SERVICES, INC.**
3 1999 Harrison Street, Suite 1700
4 Oakland, CA 94612
5 Tel: (510) 466-6630
6 justicerivera@adrservices.com

7 **ADMINISTRATIVE APPEAL**
8 **PURSUANT TO GOVERNMENT CODE SECTIONS 3304 and 3304.5**

10 LERONNE ARMSTRONG
11 Appellant/Employee,
12
13 v.
14 CITY OF OAKLAND,
15 Respondent/Employer.

OCA Case No. X05487
ADRS Case No. 23-2049-MPR

**REPORT OF THE HEARING
OFFICER**

Hon. Maria P. Rivera (Ret.)

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19 **THIS REPORT IS CONFIDENTIAL AND IS TO BE PROVIDED SOLELY TO**
20 **THE PARTIES TO THIS MATTER**

21
22 **APPEAL PROCEDURE**

23 Government Code §3304 provides: “No chief of police may be removed by a
24 public agency, or appointing authority, without providing the chief of police with
25 written notice and the reason or reasons therefor and an opportunity for administrative
26 appeal.” Government Code §3304.5 provides that “[a]n administrative appeal instituted
27 by a public safety officer under this chapter shall be conducted in conformance with
28 rules and procedures adopted by the local public agency.”

1 Pursuant to these statutes, the City of Oakland developed an “Appeal
2 Procedure,” which sets forth certain directives. With respect to this matter, the hearing
3 officer is to: receive evidence through documents and declarations and develop an
4 evidentiary record; hear argument from the Parties; prepare a “report that renders
5 findings of facts about the termination of Chief of Police LeRonne Armstrong; and
6 “make non-binding recommendations to the parties for the resolution of the dispute.”
7 Elsewhere, the Appeal Procedure states that the Hearing Officer shall deliver a
8 “completed written report that renders non-binding findings about the circumstances of
9 termination...and recommendations....”
10

11 After the receipt of evidence, hearing argument, and submission of closing
12 briefs, the hearing officer is directed to “provide the following materials to the
13 Removing Authorities for their consideration, which shall constitute the official hearing
14 record: (1) A summation page delineating the name of the Hearing, any and all issues
15 set forth by the Parties during the administrative appeal hearing, and a brief summary of
16 the written Report; (2) the complete written Report rendering all findings and
17 recommendations; (3) any documentary evidence, and any written briefs submitted; and
18 (4) the cassette tape(s) of the hearing.”

19 The Hearing Officer is also instructed to deliver the report within 50 calendar
20 days after the close of the hearing, if there is post-hearing briefing. At the hearing in
21 these proceedings, the parties stipulated to extend the time in which the report must be
22 delivered, to and including September 11, 2023, due to exigencies in the hearing
23 officer’s schedule.

24 This document is the summary and the complete report. This report, and all of
25 the documents and briefs comprising the record have been uploaded to a shared drive
26 provided by the City’s counsel, together with a transcript of the hearing.
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1
2 ISSUES AND SUMMARY OF REPORT

3 *Issues Delineated by the Parties:*

4 By the City of Oakland:

- 5
- 6 • Whether Chief Armstrong’s termination was in retaliation for any protected
 - 7 whistleblowing in violation of Labor Code Section 1102.5 (b).
 - 8 • Whether Chief Armstrong’s termination was in retaliation for engaging in First
 - 9 Amendment protected speech in violation of 42 U.S.C. Section 1983.
 - 10 • Whether Chief Armstrong has been heard concerning the post-termination, 30-
 - 11 day suspension imposed by the then City Administrator.

12 By Chief Armstrong:

- 13
- 14 • Should the Hearing Officer recommend that the 30-day discipline imposed
 - 15 against Chief Armstrong be reversed?
 - 16 • Has the City presented facts and evidence showing that the Chief committed the
 - 17 two alleged “sustained” Manual of Rules (MOR) violations that are cited in the
 - 18 Monitor’s Report and which formed the basis of his 30-day suspension?
 - 19 • Should the Hearing Officer recommend that Chief Armstrong’s termination be
 - 20 reversed and he be reinstated immediately?
 - 21 • Were the Mayor’s stated (publicly and otherwise) reasons for terminating Chief
 - 22 Armstrong supported by facts and evidence?
 - 23 • Did the Mayor’s termination of the Chief violate Labor Code § 1102.5?
 - 24 • Did the Mayor’s termination of the Chief violate the Chief’s First Amendment
 - 25 rights?

26 *Summary of the Report:*

- 27
- 28 • The hearing officer disagrees with the City’s contention that the issue to be
 - addressed in the appeal is whether Chief Armstrong “has been heard” concerning
 - the bases for his post-termination 30-day suspension. The hearing officer

1 concludes that it is her duty to address whether the findings and conclusions
2 reached in the Monitor's Reports, as they pertain to Chief Armstrong, and which
3 were used as a basis for his suspension, are supported in the record.

- 4 • The hearing officer recommends that the 30-day suspension imposed by the City
5 Administrator be reversed, and removed from his record.
- 6 • The hearing officer finds that the Report in File No. 22-0858 issued by the
7 investigators contains inaccuracies in its characterization of Chief Armstrong's
8 statements during his interview, making the credibility assessment unreliable.
- 9 • The hearing officer finds that the findings of violations of MORs 234.12 and
10 314.39-2f by Chief Armstrong are not adequately supported in the record, and
11 are based on an overbroad interpretation of the Rules.
- 12 • The hearing officer finds that the conclusions contained in the Conclusions and
13 Recommendations (January 14, 2023) are not adequately supported in the
14 record, and lack appropriate context.
- 15 • The hearing officer finds that the Report in File No. 22-0443 contains no basis
16 for discipline of Chief Armstrong, and that the credibility findings in the Report
17 are not germane to the issues under review.
- 18 • The hearing officer provides the opinion that Chief Armstrong does not have a
19 colorable claim for termination in violation of his rights under Labor Code
20 §1102.5.
- 21 • The hearing officer provides the opinion that Chief Armstrong has, at the least, a
22 colorable claim for termination in violation of his First Amendment rights; this
23 claim is subject to a balancing of the interests of the employer and the employee,
24 on which the hearing officer provides no opinion.
- 25 • Whether the Chief should be reinstated is not a matter within the purview of this
26 appeal, as that decision depends not just on whether the Chief was improperly
27
28

1 removed, but also on the parties’ respective current positions on the issue, and a
2 consideration of intervening events, as well as policy matters.

- 3 • The hearing officer recommends that the parties meet and confer, together with
4 their counsel to discuss all of the ways in which this dispute might be resolved in
5 negotiations, including the possibility of reinstatement. It would be wise for
6 both parties, and of great benefit to the citizens of Oakland, to avoid the costs
7 and related toll of protracted litigation.
8

9 REPORT

10 A proceeding was held on June 6, 2023, before the undersigned, who was
11 appointed by the parties to be an independent hearing officer. Present were former
12 Chief of Police, LeRonne Armstrong, and his attorney William Edelman. Also present
13 were Katharine Van Dusen and Anthony Risucci of Coblenz Patch Duffy & Bass, and
14 John Burke, and Montana Baker of the Oakland City Attorney’s Office, representing the
15 City of Oakland.¹
16

17 The proceeding was the hearing on the Administrative Appeal by the former
18 Chief of Police, LeRonne Armstrong regarding the termination of his employment by
19 the Mayor of Oakland and the imposition of discipline. The termination occurred after
20 the Mayor received copies of certain Reports of Investigations [Reports], issued by
21 independent investigators, which concluded that the Oakland Police Department [OPD]
22 had not properly investigated two incidents regarding an Oakland police sergeant, in
23 2021 and 2022. The Reports presented findings and conclusions, *inter alia*, that, in
24

25 ¹ Although Mr. Armstrong is no longer the Chief of Police, he will be referred to
26 as “the Chief” or Chief Armstrong for ease of reference. Although it was the Mayor of
27 Oakland who made the decisions to place Chief Armstrong on administrative leave and to
28 terminate his employment, and the City Administrator who imposed discipline, this
Report will variously refer to “the Mayor” and “the City” as the respondent for ease of
reference.

1 connection with those internal investigations, Chief Armstrong had violated certain
2 police rules (Manual of Rules, or MOR) and had appeared to the investigators not to
3 have been credible during his interviews. The investigators also concluded that their
4 inquiries revealed “systemic failures” and “multiple failures at every level” with respect
5 to the OPD investigations into the incidents.

6 The issues raised by these Reports are particularly salient because the OPD has
7 been under the oversight of a federal monitor for more than 20 years. As explained in
8 the City’s brief: “Since 2003, the City and OPD have been subject to the oversight of
9 an independent federal monitor: the Independent Monitoring Team (“IMT”). The City
10 became subject to the monitor’s oversight as part of the City’s Negotiated Settlement
11 Agreement [NSA] in the case of *Delphine Allen, et al. v. City of Oakland*.... The IMT
12 is chaired by Ret. Chief Robert S. Warshaw and produces monthly Reports^[2]
13 documenting OPD’s progress in complying with the various “tasks” identified by the
14 NSA. [fn omitted] The IMT ultimately Reports to United States District Court
15 Judge...William H. Orrick III, who oversees the City’s progress under the NSA. [¶]
16 After a long history of progress and setbacks, Judge Orrick issued an order placing the
17 City into a one-year ‘sustainability period’ on May 12, 2022. This order was an
18 indication that the City had achieved substantial compliance with the goals outlined in
19 the NSA and would be monitored for continued compliance—with the distinct
20 possibility of monitorship terminating at the end of that one-year period.”

21
22 It is noteworthy that, after twenty years of oversight under more than ten police
23 chiefs, the sustainability period was finally entered during Chief Armstrong’s tenure. It
24 is undisputed that the Chief has been credited with being “reform-minded” and highly
25 focused on achieving compliance with all of the tasks that were set forth in the NSA.
26

27
28 ² The Reports appear to be quarterly, rather than monthly, based upon what was
provided to the undersigned by the Oakland City Attorney’s office.

1 He did so, despite the fact that the court added five more tasks during the tenure of his
2 immediate predecessor. As stated in the monitor’s April, 2022 Report, “The Oakland
3 Police Department has reached a significant milestone, in that the Department is now in
4 compliance with all but one of the required Tasks – and even in that one, the
5 Department is in partial compliance. Chief Armstrong and the leadership of the
6 Department are to be commended for their tenacity and commitment to ensuring that
7 the Tasks in the Negotiated Settlement Agreement, which constitute modern,
8 progressive policing, have been met.”

9
10 *Scope Of Findings of Fact and Recommendations*

11 Because the Appeal Procedure is a generic one, it does not describe the scope of
12 the findings and recommendations to be issued in any individual case. Nor has the
13 Appeal Procedure been utilized previously, and so, there is no precedent for the scope
14 and content of the findings of fact and recommendations.

15 The Parties’ Contentions

16 At the hearing, and in his closing brief, Chief Armstrong contends, first, that the
17 Mayor’s decision to terminate him was unlawful. He contends, further, that, even if the
18 decision was lawful, this is the only administrative due process provided to him, and he
19 is therefore entitled to request findings pertaining to the logic and accuracy of the
20 Reports’ findings and conclusions, and to challenge what he believes are unfounded
21 assertions about his credibility, about the culture at OPD, and about his leadership.
22 Because the Reports, which triggered his termination and discipline, have been leaked
23 to the public, and will hang as a cloud over Chief Armstrong’s reputation—and will
24 most certainly affect his prospects for future employment—he contends he is entitled to
25 a *Lubey* hearing. (See discussion, below.)

26
27 At the hearing, the City denied that the Mayor’s decision was unlawful. The
28 City also contended that because the Mayor has plenary authority to terminate the
employment of the Chief of Police without cause—or for any reason other than an

1 unlawful one—the only issue in this appeal is whether that decision was made lawfully.
2 Given the Mayor’s unfettered authority, the City argues, the investigative Reports,
3 which support and explain the Mayor’s decision, should not be subject to review, so
4 long as they were credited by the Mayor. The City further argued that the Mayor’s
5 decision was based not only on the findings in the Reports, but also on the Chief’s
6 reaction to them, both in a phone call with the Mayor and in a subsequent press
7 conference, in which, she contends, the Chief failed to “take the criticisms from
8 the...investigators, or the underlying cultural issues they identified seriously,” denied
9 there were “systemic problems,” and described the underlying incident (a vehicle
10 collision in a parking garage) as “not a big scandal,” among other statements.
11 Accordingly, the City argued, it does not matter if the Reports were not accurate, and
12 there is no need to look behind them.
13

14 Analysis

15 Looking first to the language of the Appeal Procedure, it appears to be broad and
16 does not contain any restrictions on the scope of the appeal “decision.” Specifically, the
17 hearing officer is directed to provide “findings of fact about the termination of
18 Chief...Armstrong” and “non-binding recommendations to the parties for the resolution
19 of the dispute.” Thus, the Procedure devised by the City for this type of review does
20 not limit the hearing to the issue of whether the Chief was fired in a lawful manner, but
21 seeks both findings pertaining the circumstances of the Chief’s termination and
22 recommendations “for the City’s consideration” and for “resolution of the dispute.”
23

24 In addition, the undersigned is persuaded that Chief Armstrong is entitled, at
25 minimum, to a review of the investigators’ Reports that are the touchstones of the
26 Mayor’s decision to terminate him *and* the City Administrator’s decision to discipline
27 him.
28

In *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, two
probationary police officers were terminated by the police chief after the department

1 received unsworn charges of misconduct against them from a member of the public.
2 The charges were “written up” in an unverified complaint, and were forwarded to the
3 internal affairs bureau and the police chief with a recommendation that the officers be
4 “tried for misconduct.” Instead, the officers were summoned to the police chief’s
5 office, were told that the chief intended to dismiss them, and that the purpose of the
6 meeting was to provide the officers an opportunity to respond to the charges. The
7 officers had no prior notice of the charges and were never shown the evidence against
8 them, nor was the complainant present at the meeting. After the meeting the officers
9 were discharged for “misconduct on the charges made.” As a result of this termination,
10 the officers were disqualified from employment by San Francisco, and it became
11 “difficult or impossible for them to be employed as police officers anywhere.” (*Id.* at
12 pp. 343-344.)

14 The trial court determined that the officers’ rights were violated and they were
15 entitled to reinstatement and back pay. The court of appeal affirmed. The court
16 reasoned that, while “it is settled law that a probationary...civil service employee...may
17 be dismissed without a hearing or judicially cognizable good cause,” there is an
18 important exception to this rule, which is, the Fourteenth Amendment’s guarantee that
19 one shall not be deprived of one’s liberty without due process. “[That] exception will
20 be applied where the probationary employee’s job termination, or dismissal, is based on
21 charges of misconduct which ‘stigmatize’ his reputation or ‘seriously impair’ his
22 opportunity to earn a living...or which ‘might seriously damage his standing or
23 associations in his community.’” (*Id.* at pp. 345-346.)

24 Here, as with probationary employees, the Chief of Police does not have a
25 “property interest” in keeping his position. (*Id.* at p. 345 [dismissal of a probationary
26 employee does not deprive the employee of a vested or property right]; Government
27 Code § 3304 [no property interest in job of police chief].) Indeed, a chief of police can
28 be removed for no reason, or simply because there has been a change of administration

1 or there is an incompatibility of management styles. (Government Code § 3304 (c).)

2 But these are not stigmatizing reasons for removal, and that is the distinction here.

3 The City argues that the Mayor’s dismissal of the Chief based on the Reports and
4 on the Chief’s challenges to the accuracy of the Reports, is lawful and, so long as the
5 Mayor believed the Reports, they cannot be examined. The City contends that, even if
6 the Reports are “questionable,” that does not matter because the Mayor is entitled to
7 “disagree” with the Chief regarding the accuracy of the Reports and to fire the Chief
8 based on that disagreement—as, for example, if there were a disagreement as to “goals
9 and policies.” (Government Code § 3304 (c).) In effect, the City is claiming that the
10 Mayor has an unrestricted right to terminate the Chief based on the Reports and his
11 disagreement with them, *and* that the Mayor can preclude any critical review of the
12 Reports during the appeal process *because* of her unrestricted right to remove the Chief
13 from office. This kind of circular reasoning effectively eviscerates the Chief’s rights.
14 Moreover, the reliability of the Reports and the nature of the Chief’s comments are not
15 independent of each other. If the Reports are reliable, then the Chief’s comments can
16 be viewed as deflecting responsibility. If the Reports are questionable then the Chief’s
17 comments can be viewed as defending himself and the Department against unwarranted
18 criticism.
19

20 Moreover, this is not a disagreement over goals and policies—it is undisputed
21 that both the Mayor and the Chief have been singularly focused on reforming the
22 Department and exiting from federal oversight. This is, rather, a disagreement about
23 whether the Chief mishandled investigations, engaged in misconduct, and was
24 responsible for a “systemic” problem. These are matters that can stigmatize his
25 reputation, seriously impair his opportunity to earn a living, and damage his standing or
26 associations in his community. It would be grossly unfair for the City to be wholly
27 entitled to rely upon the Reports in removing the Chief but not allow the Chief to
28

1 challenge the accuracy, rigor, logic and conclusions of the Reports during his
2 administrative appeal.

3 In its closing brief, while the City did not concede that the Chief was entitled to
4 procedural due process to appeal the discipline imposed on him, it nevertheless agreed
5 that the hearing could serve that purpose, *viz.*, to provide an opportunity to refute the
6 charges made in the Reports and to clear his name. The City then effectively nullifies
7 this concession by arguing that the process which is due is *merely* an “opportunity to be
8 heard” and nothing more. According to the City, it is sufficient that Chief Armstrong
9 “make a record of his claims,” that the process of making such a record “plays the same
10 limited role that a name-clearing hearing would,” and that *no findings* with respect to
11 those claims are either “necessary or appropriate.” For this proposition the City cites
12 *Murden v. County of Sacramento [Murden]* (1984) 160 Cal.App.3d 302, 312. That case
13 however, does not support the City’s argument.
14

15 In *Murden*, the plaintiff was a volunteer member of the Sheriff’s reserve force,
16 and had been given a temporary paid assignment as an on-call deputy at the jail. Within
17 weeks he was told his job performance was unacceptable, and, further, that he had been
18 charged with misconduct based on statements, of a sexual nature, he made to two
19 female clerks. Plaintiff was suspended from his on-call position and also from the
20 reserve forces, based on his superiors’ assessment that plaintiff was unsuited to law
21 enforcement work. Plaintiff requested the opportunity to speak with a Lieutenant about
22 the allegations. The Lieutenant referred the matter to another officer to investigate the
23 misconduct allegations (his termination for incompetence being non-reviewable) and
24 gave plaintiff an opportunity to read the accusations and respond to them in writing. In
25 his response, plaintiff admitted he had made the remarks he was accused of, but
26 suggested the other employees should not have been offended by them.
27

28 Upon completing the investigation, the officer found that the allegations were
true and constituted good cause for his suspension and subsequent termination.

1 Plaintiff appealed the determination to the Lieutenant, who met with plaintiff again, and
2 reviewed the investigation, before affirming the investigator’s conclusions.

3 In court, plaintiff argued he was entitled, *before* his termination, to the full
4 panoply of due process rights on the issue of his misconduct, including the right to
5 counsel, the right to an impartial reviewer, and the right to call witnesses and confront
6 witnesses through cross-examination. The court rejected that argument. It concluded
7 plaintiff was not entitled to a full-fledged pre-termination hearing because the
8 department could terminate petitioner on the independent allegations of incompetency,
9 and therefore plaintiff’s “continued employment with the department did not hinge on
10 particular findings of fact with regard to the charges of inappropriate sexual
11 conversations. The purpose of the hearing was *solely* to provide petitioner an
12 opportunity to refute the charges and clear his name. [Citation.]” (*Murden, supra*, 160
13 Cal.App.3d at p. 312.) The court concluded that plaintiff had received a meaningful
14 and adequate opportunity to refute the charges against him. (*Ibid.*)

15
16 The court’s concern was whether the process provided had been adequate, and
17 found that it was: Plaintiff was apprised of the allegations against him, an investigation
18 was conducted, plaintiff had the opportunity to explain his behavior and respond to the
19 allegations, and a determination was made by the investigating officer. Thereafter, an
20 appeal was taken, plaintiff had a chance to present his case again, and a second
21 determination was made. The court did not conclude—as the City argues—that
22 plaintiff need *only* be provided an opportunity to “make a record of his claims,” nor did
23 it state that any findings or determinations with respect to those claims were not
24 “necessary or appropriate.”

25
26 Here, the City is contending that the Chief is entitled to “make a record” of his
27 challenges to the Reports to the hearing officer, but is not entitled to have the hearing
28 officer provide any analysis or findings with respect to those challenges. It is enough,

1 the City argues, that the Chief “make a record” of his challenges which will be placed
2 in his personnel file so the Chief can make that record available to future employers.

3 To state this argument is to refute it. The City fails to explain how a person’s
4 name can be “cleared” by way of a hearing if the hearing officer cannot provide an
5 assessment of the person’s challenges to the accusations against him. What is left,
6 under those circumstances, is no process at all.

7 In its closing brief the City also contends that the hearing officer is not in a
8 position to review the investigators’ findings to determine their accuracy and reliability.
9 This is because (a) the investigators made decisions in “real time” about the witnesses’
10 credibility, based on considerations that cannot be translated to paper, such as body
11 language and tone of voice, and (b) the underlying IAD investigation files “and other
12 considerations before the...investigator have not been and in some cases *cannot* be
13 presented in this forum.”
14

15 As to the latter contention, it was the parties who agreed upon a record to be
16 presented on this appeal. The hearing officer cannot abdicate her responsibility to issue
17 a complete report due to the absence of information.

18 As to the former contention, the hearing officer is not assessing the credibility of
19 all the witnesses, but only of Chief Armstrong. And, while it is true that the
20 undersigned, in listening to the recorded interview, was unable to observe the Chief’s
21 body language, she was able to hear the Chief’s tone of voice and speech patterns.

22 In any event, whatever may be the shortcomings of such a review, the hearing
23 officer is instructed to “delineat[e]...any and all issues set forth by the Parties during
24 the administrative appeal hearing,” and is charged with making findings of fact on those
25 issues.
26

27 It is important to note that this report does not seek to review the investigations
28 themselves, or even most of the findings of the Reports, but only seeks to determine
whether, *based on the record developed by the investigators*, the findings with respect

1 to the Chief were accurate, logical, consistent, and based on a reasoned construction of
2 the Manual of Rules.

3 This report also seeks to determine whether the “conclusions” put forward by the
4 investigators (which are actually the investigators’ opinions regarding the failings of the
5 Department) are supported by the record as a whole and in context. This is necessary
6 because these conclusions provided one of the bases for the employment actions taken
7 against the Chief, and are most stigmatizing to the Chief’s reputation.

8 Accordingly, this appeal will consider all of the issues presented by both parties.
9

10
11 *The Reports, the Mayor’s Actions and the Chief’s Responses*

12 The Reports

13 In January of 2023, the law firm of Clarence, Dyer & Cohen [investigators]
14 issued three Reports: One constituted a review of the investigation and Report of
15 Investigation (ROI) of the Internal Affairs Division (IAD) of OPD concerning an OPD
16 vehicle that hit a parked car in the garage of the apartment building where an OPD
17 officer resided. The second Report was the outside investigators’ findings and
18 conclusions concerning the discharge of a firearm in an elevator of an OPD building by
19 the same officer; they performed this investigation in lieu of the OPD IAD because the
20 subjects of the “complaint” included command staff and investigators of IAD, which
21 had initiated the investigation. The third Report was the outside investigators’
22 “Conclusions and Recommendations” resulting from internal investigations of the
23 “vehicle collision and elevator discharge incidents.” The Report sets forth the
24 investigators’ impressions and evaluations of the OPD IAD and Criminal Investigation
25 Division (CID) investigations and eight specific recommendations for new or amended
26 rules or policies. A fourth Report, issued shortly after the third, constituted the outside
27 investigators’ review of the OPD CID investigation of the elevator discharge incident.
28

1 These Reports will be discussed in greater detail later in this report. For
2 purposes of understanding what led up to the Mayor’s decisions, however, their
3 findings and conclusions need only be summarized.

4 The Report concerning the investigation of the vehicle collision found that there
5 had been affirmative misconduct by a Captain in the IAD, who made changes to the
6 ROI that would significantly reduce the IAD’s assessment of the subject officer’s fault
7 and the elements of his wrongdoing. After the ROI was altered in this fashion, it was
8 presented to the Chief and his Command Staff at their regular weekly meeting. The
9 investigators’ Report did not either suggest or conclude that the Chief was aware of the
10 Captain’s misconduct or the changes to the ROI. Rather, the investigators found that
11 the Chief violated a department rule when he “abruptly” cut off the question-and-
12 answer session following the IAD presentation at the meeting, “declined” to show a
13 video of the incident, and “refus[ed] to answer [a] question” posed by a member of the
14 Command Staff at the meeting. The investigators also found the Chief had violated an
15 MOR Rule by failing “to hold all OPD members to the standard, policies and rules of
16 the department,” and by failing to read the ROI before signing it. The Reports also
17 found the Chief to be “not credible” with respect to certain statements, when he was
18 interviewed by the investigators.
19

20 Concerning the elevator discharge incident, the investigators found that the Chief
21 was not in charge of the investigation and had violated no rules with regard to it. The
22 Report nevertheless also found the Chief to be “not credible” with respect to the extent
23 of his knowledge about the case, the extent of his involvement in a meeting to discuss
24 the unsealing of a search warrant, and regarding his knowledge of the identity of the
25 officer who opened the investigation.
26

27 With respect to the Chief, none of the Reports made any allegations of
28 “Untruthfulness” (which would be a violation of an MOR Rule).

1 The Conclusions and Recommendations Report offered the investigators'
2 normative assessment of the OPD investigations as reflecting "systemic failures far
3 larger and more serious than the actions of one police officer," and "multiple failures, at
4 every level, to hold [that] officer responsible," which "belie[d] OPD's stated position
5 that it can police itself and hold its members accountable for misconduct."

6 The Reports were signed as "Approved" by the federal monitor.

7 The Mayor's Action to Place the Chief on Administrative Leave

8 The first three Reports were sent to the Mayor shortly after she was sworn in.
9 After reading the Reports, and conferring with the City Attorney's office, the Mayor
10 placed the Chief on paid administrative leave, which she understood to be the usual
11 process when an OPD officer is "under investigation." In her declaration, the Mayor
12 averred that, in a telephone conversation with the Chief, he "blame[d] others,"
13 including the federal monitor, failed to take the investigations seriously, and denied the
14 incidents reflected "systemic problems."³

15 Chief Armstrong's Response

16 Chief Armstrong publicly opposed the personnel action. He issued a statement
17 accusing the federal monitor of acting "in the interest of his own pocketbook by
18 manufacturing a false crisis to justify extending his lucrative monitoring contract." The
19 Chief also held a press conference at which he stated, *inter alia*, the following:
20

21 ♦ He deserved to be reinstated because he had done nothing wrong. He
22 followed "all policies, protocols and procedures in the two incidents" referred to in the
23 Report. The findings in the Report are not supported by evidence. This is not about an
24

25
26
27
28 ³ The Mayor also stated in her declaration that the Chief called a subordinate
officer (who, presumably, complained about the incidents) a "snitch."

1 incident where officers were behaving poorly,⁴ and there is not a systemic problem.

2 Police officers are human beings and will make mistakes.

3 ♦ He has a proven record of holding people accountable. As Chief of Police for
4 the past two years he has brought the Department into almost full compliance [with the
5 NSA]. The Department is only five months away from exiting federal oversight. The
6 Department has changed; it has the ability to investigate itself. It doesn't mean there
7 will not be misconduct, but this incident was a minor traffic violation, not a "scandal."⁵

8 ♦ He does not fault the Mayor, [for placing him on leave] because the Mayor
9 was merely following the recommendation of the federal monitor, and since she has
10 only been in office a short time, would not be able to push back on the monitor's
11 recommendation.

12 ♦ His decision [regarding the vehicle incident] was based on the information
13 that his investigators and staff brought to him. He cannot read all of the hundreds of
14 reports that are sent to him, or he would not have time to do his job as Chief. That is
15 why he has a chain of command; the reports are reviewed by the Commanders in
16 charge. He makes his decision based on all of the evidence brought to him at the Friday
17 meetings, and he expects to be given all of the evidence, otherwise it would be unfair to
18 the officer and unfair to the community.

19 ♦ The IAD process has been in place for several years, and the federal monitor
20 has never stated there were any problems with it. The Chief agrees that, based on some
21 of the recommendations in the Reports, the Department could tighten the investigative
22 structure and make sure that there are even higher levels of reviews. But, he is
23 concerned that Reports such as this "pull at the credibility of the Department" and
24
25

26 ⁴ In context, he appeared to be referring to officers' acting poorly in their
27 interactions with the public while carrying out their duties.

28 ⁵ Presumably, the Chief was comparing the vehicle collision incident to the
"instagram" and "sex" scandals of previous years.

1 ignore all of the work that has been done to come into compliance. It leads the
2 community to believe that this is the “same old Oakland Police Department” that they
3 have experienced over the last two decades and “that’s not who we are.”

4 The Attorney’s Letter to the Mayor

5 On February 7, 2023, Chief Armstrong’s attorney sent a ten-page letter to the
6 Mayor, through her counsel. The letter provided detailed and specific criticisms of the
7 Report and its findings as to Chief Armstrong, relating to the vehicle collision
8 investigation. The letter challenged both the accuracy and the logic of the Report as it
9 pertained to the Chief. In the letter the attorney asserted that the Chief had committed
10 no misconduct, and sought his immediate reinstatement.

11 The Action of the Police Commission

12 The Police Commission expressed its concern about the accuracy of the Reports,
13 and noticed a Special Meeting of its Discipline Committee for February 15, 2023.

14 The Commission issued minutes of its meeting, stating that its intention was not
15 to conduct its own investigation but to “assess the outside investigation reports.” The
16 meeting was then canceled due to the Chief having been terminated by the Mayor on
17 February 15.

18 The Commission gave a “heartfelt farewell” to the Chief, and acknowledged
19 many of his accomplishments, including bringing OPD into sustainability after 20 years
20 of federal oversight. The Commission also noted “significant problems” that it wanted
21 to address, including “the questionable quality, sufficiency and credibility of the outside
22 investigations” and “significant gaps and shortfalls in Department policies and
23 procedures for internal investigations.”

24 The Mayor’s Action to Terminate Chief Armstrong

25 On February 15, 2023, the Mayor held a press conference announcing her
26 decision to terminate the Chief. She stated, among other things:
27
28

1 ♦ The federal monitor “determined there were systemic issues serious enough to
2 render the City out of compliance with an important requirement of the [NSA].” “In
3 order to finally bring an end to Oakland’s federal oversight...it is an absolute
4 requirement that my administration, including the Chief of Police, be able to work
5 closely with the monitoring team and to speak credibly before the court.”

6 ♦ She has respect and appreciation for the Chief’s service to the Department and
7 to the city “he loves so dearly.” She admires the Chief, which is why the decision is so
8 personally difficult.

9 ♦ “Oakland needs a Police Department that welcomes the opportunity for
10 improvement rather than immediately rejecting criticism.” The Chief made a number
11 of statements in reaction to the Report that troubled her. “In response to a public report
12 that concluded that OPD had repeatedly failed to rigorously investigate misconduct ...
13 Chief Armstrong said that these were not incidents where officers behaved poorly;” he
14 said he did not believe these incidents reflected systemic problems; he described the
15 underlying incident as a minor vehicle collision; he said “the officers made mistakes;”
16 and he stated the officer involved had been held accountable, disregarding the
17 independent investigative finding of “serious flaws in the disciplinary process.”
18

19 ♦ It is “clear” to her that there are “systemic” issues, and the city needs to
20 address them. The report demonstrates “significant cultural problems in the
21 Department.”

22 The Federal Monitor’s Alleged Role in the Mayor’s Decisions

23 Chief Armstrong asserts that, on at least three occasions (including in a
24 conversation between the Chief and the Mayor), the Mayor stated that she felt the
25 Monitor had forced her to suspend and then terminate the Chief. While strict rules of
26 evidence do not apply in this proceeding, some modicum of evidence is required to
27 support this assertion. The Chief has not provided any declarations or statements that
28

1 would tend to prove his allegations, but only argument presented by counsel. This is
2 wholly insufficient to support the Chief’s assertion, and so, it will not be considered.

3 The City Administrator Imposes Discipline

4 At some date after February 15, 2023, in an undated letter, the City
5 Administrator notified Chief Armstrong that a 30-day suspension had been imposed on
6 him based on “the findings of Internal Affairs Division investigation case number 22-
7 0858” which concluded that Chief Armstrong had violated MOR 234.00-1b
8 Commanding Officers – Authority/Responsibilities (Gross Dereliction of Duty) and
9 314.39-2f Performance of Duty General. The letter advised the Chief that the 30-day
10 suspension would be served in the event he was re-employed by OPD. The case
11 number referenced is the Report prepared by the outside investigators regarding the
12 investigation of the vehicle collision incident.
13

14
15 *Issues To Be Reported On in This Appeal*

16 The parties have agreed that the issue of whether the Chief’s removal violated
17 his constitutional or statutory rights, is one of the issues to be reported on. With respect
18 to this issue, it is critical for the reader to understand that the appeal process requires
19 only a “report;” it is not and cannot be an adjudication because this is not an
20 adjudicatory proceeding. The hearing officer has been given a limited documentary
21 record; there was no testimony from live witnesses, no cross-examination, no
22 application of evidentiary rules, no discovery, and no extensive briefing. At best,
23 therefore, the hearing officer can only “report” her opinions as to the likelihood of any
24 violations.
25

26 The second issue to be reported on is whether, pursuant to a *Lubey* hearing, the
27 findings critical of the Chief—which he has challenged to clear his name—are accurate
28 (based on the Reports and the Chief’s interview) and grounded in a reasonable analysis
of the police rules. Again, this is not an adjudication. Nevertheless, the Appeal

1 Procedure requires fact-finding by the hearing officer and, as with all of the matters
2 presented in this appeal, the findings are based on a review of the record provided.

3
4 *The Incidents Giving Rise to the Investigations*

5 In March of 2021, Sergeant Chung was driving an OPD vehicle in the garage of
6 his apartment building, when it collided with a parked car resulting in damage to the
7 car, including the detachment of the car's bumper. This incident came to the attention
8 of OPD only after a claim was filed, months later, by the owner of the vehicle that was
9 struck. Sgt. Chung was instructed to report the incident to the San Francisco Police
10 Department, which he did, and the matter was referred to the OPD Internal Affairs
11 Division [IAD] for investigation in July. At some point after the investigation was
12 opened, a video was provided by a person who worked at Sgt. Chung's apartment,
13 which showed that another person was in the passenger seat of the OPD vehicle, and
14 that the vehicle stopped for some seconds after the collision, and then drove on. It was
15 later learned that the passenger was a female OPD officer.

17 Sgt. Lee was primarily in charge of the IAD investigation. His draft report
18 included allegations of Manual of Rules [MOR] violations of Truthfulness, and
19 Obedience to Laws, and included a discussion of the OPD policies pertaining to the
20 reporting of relationships. Sgt. Lee concluded he could not determine whether Sgt.
21 Chung was credible when he denied knowing his vehicle had struck another car. In his
22 draft report Sgt. Lee indicated that Sgt. Chung had been involved in a hit-and-run
23 (implicating the MOR Rule of "Obedience to Laws).

24 Sgt. Lee's superior officer, Capt. Lau, reviewed the report and, according to Sgt.
25 Lee, twice ordered that changes be made which, effectively, eliminated all allegations
26 against Sgt. Chung except "avoidable accident," and removed the discussion of the
27 MOR regarding truthfulness. Sgt. Lee disagreed with these changes but felt he had no
28 choice because he had been given a direct order.

1 After the Report of Investigation [ROI] was completed, in December, 2021, Sgt.
2 Lee made a presentation to the Chief's Executive Command Staff at what was known as
3 the "Chief's Friday Meeting" where such reports and recommendations were presented
4 orally. The recommendation was that a finding of a "preventable collision" be
5 sustained. The Chief signed the ROI; Sgt. Chung was not disciplined other than being
6 required to take driver training.

7 In April of 2022, it was discovered that someone had discharged a weapon inside
8 an elevator of an OPD building. Only after an investigation had begun, and news got
9 around the Department that the matter was under investigation, did Sgt. Chung admit to
10 being the person who had discharged the weapon. He also admitted to picking up the
11 bullet casing/fragments and throwing them into the water as he was crossing the Bay
12 Bridge. Upon learning about the matter, the Chief instructed that Sgt. Chung be placed
13 on administrative leave. Outside counsel handled the IAD investigation and OPD's
14 Criminal Investigation Division conducted the criminal investigation. The ROI
15 prepared on behalf of IAD recommended that a finding of "sustained" be made against
16 Sgt. Chung with respect to nine separate Rule violations.

17
18
19 *The Issues Identified by the Outside Investigators*

20 The investigators identified a number of deficiencies and issues pertaining to the
21 investigation by OPD of the two incidents. The undersigned, however, is not tasked
22 with reviewing or commenting upon all of the matters set forth in the Reports; rather,
23 the question posed is whether the findings pertaining to the Chief are logical, accurate
24 and factually supported.

25 The Firearm Discharge Case

26 Focusing, first, on the Report(s) relating to the discharge of the firearm in the
27 elevator: There are no findings of any wrongdoing or dereliction of duty by the Chief.
28 The initial investigation became muddled after Sgt. Chung admitted to Lt. Turner

1 (assigned to complete the preliminary investigation) that he was the one who had
2 discharged the firearm and implied that it had been a failed suicide attempt. Lt.
3 Turner—whose prior partner had committed suicide—became extremely alarmed and,
4 feeling that this was a matter of life and death, was not thoughtful about how he
5 proceeded, nor did he reach out to any others to consult on how to proceed. As a result,
6 it was unclear where Sgt. Chung’s voluntary statements ended and his “protected”
7 statements began, which created problems in the criminal investigation. Further, the
8 CID investigation was found to be slow, desultory and lacking in rigorous investigative
9 methods. Some of this was attributed to a heavy workload and the assignment of an
10 inexperienced investigator (who was eventually replaced by someone with more
11 experience), but some was attributed to the investigators originally treating the incident
12 as an “accidental” discharge and not a willful violation of the law. Despite these initial
13 problems, the Report concluded that, ultimately, the CID investigation got back on track
14 and was completed properly.

16 None of the deficiencies described above were attributed to any affirmative fault,
17 negligence, willful ignorance, or lack of leadership of the Chief. The Report
18 acknowledged that the Chief had been effectively “walled off” from the investigation
19 and, although he was occasionally briefed on the matter and was involved in a
20 procedural issue pertaining to the unsealing of search warrants (so the investigators
21 could have access to them), the investigators concluded that the Chief had not violated
22 any rules nor failed in his duty in any way. The investigators did, however, question the
23 Chief’s “credibility” with respect to three details: (1) whether he knew it was Lt. Turner
24 who had opened the investigation; (2) the number of briefings he received on the
25 investigation; and (3) whether he was the decision-maker in a meeting regarding the
26 unsealing of a search warrant. The investigators reported that they were “left with the
27 clear impression that Chief Armstrong was intentionally minimizing both his
28 knowledge of the facts of the case and his familiarity with the investigation itself.”

1 The undersigned cannot assess these subjective impressions because the
2 recording of the Chief’s interview regarding this matter was not provided. Suffice to
3 say that the investigators found no wrongdoing or failures on the part of the Chief in
4 connection with the investigation into Sgt. Chung’s discharge of his firearm. Indeed, as
5 was specifically noted, when Sgt. Chung requested that his administrative leave be
6 changed to medical leave, the Chief denied the request on the basis that he believed the
7 “stress” allegedly being suffered by Sgt. Chung was of his own making—an indication
8 that, contrary to the primary thrust of the investigators’ Reports, the Chief was in fact
9 holding Sgt. Chung accountable.
10

11 The Report contains no suggestions as to the Chief’s possible motive for
12 dissembling regarding the matters on which he was found to be “not credible,” since
13 they are not meaningful. Whether the Chief knew it was Lt. Turner who had opened the
14 investigation, whether he received one, two, or more briefings on the case, and whether
15 he was the decision-maker during the meeting on unsealing the search warrant (where it
16 was decided, merely, to follow the City Attorney’s advice) are matters of no relevance
17 to the propriety or accountability of the internal investigations. Given the absence of
18 any allegation of wrongdoing or dereliction of duty by the Chief, the investigators’
19 impressions do not appear to be germane.
20

21 The Vehicle Collision Case

22 The outside investigators’ investigation of the IAD investigative process brought
23 to light some serious issues. Without summarizing the entire report, it is clear there was
24 egregious misconduct on the part of Captain Lau, who insisted on changing the ROI to
25 delete any discussion of the “Truthfulness” MOR (which Sgt. Lee had found to be “not
26 sustained” because he was unable to determine whether Sgt. Chung had been
27 untruthful), and to change the passenger, Officer Brandwood, from a subject to a
28 witness and remove the MOR alleged against her. Sgt. Lee improperly acquiesced in
these changes.

1 In a later draft of the ROI, Capt. Lau also directed the removal of the Training
2 and Policy recommendations regarding the reporting of a romantic relationship, and a
3 change in the credibility finding with respect to Sgt. Chung from “unable to determine”
4 to “credible.” Capt. Lau also instructed Sgt. Lee to determine whether a hit-and-run
5 offense required knowledge by the driver of the collision. When Sgt. Lee learned from
6 another officer that knowledge was an element of the offense, he changed his finding
7 from “sustained” to “not sustained.”

8 The outside investigators learned during their investigation that Capt. Lau and
9 Sgt. Chung were involved in “Community Relations” work together and both were
10 active in the Asian Police Officers Association (both were on the Board). One officer
11 stated that Sgt. Chung’s deep connection with the Oakland Chinatown community and
12 the “leadership positions like Sgt. Chung’s conferred some status.”

13
14 Neither the IAD’s ROI nor the minutes of the December 23, 2021 meeting were
15 provided as part of the record, making it difficult for the undersigned to assess the
16 Report’s statements regarding what is contained in the “documentary record.”
17 Nevertheless, it is undisputed that when Sgt. Lee presented the case to the Chief at the
18 Executive Command Staff meeting, he hewed closely to the *final* version of the report,
19 which included all of Capt. Lau’s and Sgt. Lee’s changes. Thus, the case *as presented*
20 to the Chief and his Command Staff by Sgt. Lee indicated that Sgt. Chung was found to
21 be “credible” when he denied that he was aware of the collision; that there was a
22 passenger in the vehicle who was a female OPD officer (with no mention or discussion
23 of a romantic relationship) who also credibly denied being aware of the collision; that
24 an independent “expert” (repair shop) indicated it was possible that the driver of the
25 much larger SUV would not have been aware of the collision; that any collision,
26 however minor, to a Mercedes was going to be very costly to repair (thus explaining the
27 high cost of the repair for a “minor” collision); and that there was no violation of the
28 Obedience to Laws MOR because if the driver is not aware of the collision it is not a

1 hit-and-run offense. In short, as described by one attendee, Sgt. Lee presented the
2 incident as an “accident” in which the officer did not realize he had collided with a
3 parked vehicle and caused damage.

4 With respect to the video, Sgt. Lee provided a description of what was in the
5 video of the incident, but the video was not shown nor did anyone in the meeting
6 request to see it. At least one person who attended the meeting stated that he was left
7 with the impression that the OPD vehicle “hit a car and continued.” Another attendee
8 stated that the description of the video provided by Sgt. Lee at the meeting was
9 consistent with what she had seen (previously) on the video.
10

11 It is worth noting that, after the incident was reported to SFPD, they closed the
12 case without further investigation and the S.F. District Attorney’s office declined to
13 prosecute.

14 Chief Armstrong’s Contentions

15 Chief Armstrong, has put forward the argument that the City has never
16 responded to the “detailed criticisms of [the Reports] made by not only Chief
17 Armstrong, but outside observers as well...,” and therefore the City has effectively
18 conceded that those criticisms were valid. It is true that, in these proceedings, the City
19 has not responded to any of the critiques of the Reports put forward by the Chief and
20 others, nor has it offered any defense of the Reports. It is presumed that this is because
21 the City takes the position that the Reports are not subject to review—a position that
22 has been rejected. Nevertheless, the undersigned declines the invitation to treat the
23 City’s silence as a concession, and will provide findings concerning the Reports as
24 required under the Appeal Procedure.
25

26 Credibility Findings

27 The investigators found the Chief not to be credible when he:

- 28 • “claimed to be unaware of the facts of the vehicle collision,” particularly because
he was aware of “certain specific facts” that were not provided at the meeting;

- 1 • denied he spoke with any members of OPD about the incident;
- 2 • denied that he was aware of Capt. Lau’s desire, a year later, to write an
- 3 addendum to the ROI;
- 4 • denied he requested the case file in May, 2022.

5 The investigators also stated they were left with the “strong impression” that the
6 Chief withheld relevant information regarding his knowledge of the case.

7 The hearing officer has reviewed the letter sent to the Mayor and to the City’s
8 outside counsel from the Chief’s attorney making the argument that these credibility
9 (and other) findings are not supported by the evidence, that is, they contain factual
10 errors. After listening to the interview of the Chief, and carefully re-reviewing the
11 witness statements contained in the Report, the undersigned finds those arguments, for
12 the most part, are well taken. At minimum, the Report’s credibility analysis is
13 problematic.
14

15 The first two bullet points do not accurately characterize what the Chief said. As
16 was pointed out by his attorney, the Chief never claimed to be unaware of the facts of
17 the collision, nor did he deny speaking to anyone in OPD about it. He stated that he
18 had been briefed about the incident; that it had been explained to him that the OPD did
19 not know about the incident until after the victim had filed the insurance claim (a fact
20 which piqued his interest). He did not ask a lot of “probing questions” because he
21 wanted to wait for the investigation to be completed, but he did ask why OPD was not
22 aware of the incident until the claim was filed. He stated he did not recall any
23 additional briefings before the meeting, and said that would be normal since he usually
24 would not be briefed unless there was “a problem,” and that was in order not to
25 intervene in the investigation “so [he wouldn’t] be prejudiced.” None of the other
26 witnesses stated that the Chief had been briefed other than at the initial briefing, or that
27 the Chief knew any particular facts pertaining to the case.
28

1 Regarding the first bullet point: the investigators concluded that Chief
2 Armstrong was not credible when he denied being aware of “specific facts”—the video
3 and the romantic relationship between the driver and the passenger—prior to the Friday
4 meeting.

5 The video: The Chief’s recollection with respect to the video was, to be sure,
6 confusing and inconsistent. Before being shown the meeting notes, he was asked if the
7 video had been shown at the meeting, and he stated he didn’t recall. He stated that he
8 “vaguely recalled” the showing of a video, but did not recall what it depicted; although
9 he did recall that there was a discussion of the video at the meeting. After being shown
10 the meeting notes, the Chief stated, again, that he recalled a discussion of the video at
11 the meeting, but did not recall seeing the video.

12 The Chief did recall some discussion at the meeting about the vehicle stopping
13 after it hit the other car, and whether that meant the driver and passenger “maybe felt
14 something,” but after more discussion concerning the facts that there had been no
15 damage to the OPD vehicle, and that maybe the windows had been rolled up, he
16 concluded that the issue had been properly vetted during the investigation. He stated
17 that it appeared to him that IAD had looked into it, that both officers had stated they
18 were not aware of the collision and that there was no affirmative evidence otherwise.⁶

19 At that point, the Chief contradicted himself and said he remembers “seeing
20 something that the car stopped,” but that he did not see anything like a “hit” or actual
21
22

23 ⁶ Another attendee of the meeting stated that he understood the passenger had been
24 interviewed and that there was a video of the incident, so he was (also) satisfied that the
25 investigation had been conducted thoroughly. Yet another attendee stated that Sgt. Lee
26 presented the case as an “accident” in which the subject officer did not realize he had
27 collided with a parked vehicle and caused damage. Sgt. Lee said he had investigated the
28 matter as a hit-and-run, but that was challenging because it was a “soft collision” between
a larger vehicle and a smaller one, where the driver was unaware of the collision. Sgt.
Lee explained that if the driver is not aware of the collision there is no criminal conduct
as a hit and run, which is why the Obedience to Laws MOR was not sustained.

1 “jolt” that might have shown awareness. The Chief was aware the bumper of the
2 Mercedes had come completely off, but he was also told there was previous damage to
3 the car, and that a “small collision” could cause “significant damage.”

4 The romantic relationship between Sgt. Chung and the passenger: There is no
5 evidence that the Chief was aware of this before the meeting. He stated clearly that he
6 was unaware there was a passenger in the car before the meeting, and that, “at some
7 point” it came out that they were in some kind of relationship “or maybe one might
8 have assumed they were because, two officers, you know, in the car across the bay.”
9 (Another attendee said the relationship was not part of the presentation, but he had
10 reached the same conclusion, probably based on his “perception.”) The Chief stated
11 that “something was said about it or the question was asked” but “I believe at that point
12 that was when I learned she was in the car.” When the investigators asked whether the
13 Chief thought the fact of the relationship should have been discussed at the meeting
14 because it might bear on the issue of credibility, the Chief candidly stated that he does
15 not automatically assume that OPD officers are not credible merely because they are in
16 a relationship, and so he does not question credibility unless something is raised about
17 that.
18

19 Regarding the third bullet point: the investigators called into question the Chief’s
20 statement that he did not know Capt. Lau was (later) considering preparing an
21 addendum to the ROI (that would cast blame on others for the shortcomings in the
22 investigation). It is not clear how this fact would be relevant to the inquiry, since the
23 addendum was not prepared, and since it was not the Chief’s decision to make.
24 (According to Deputy Chief Allison, this was the IMT’s decision.) In any event, Capt.
25 Lau was found to be not credible in virtually every aspect of his interview, and there is
26 no reason to believe he was truthful only with respect to his assertion that he talked to
27
28

1 the Chief about the proposed addendum. No other witnesses testified that Lau had
2 actually spoken to the Chief about the proposed addendum.⁷

3 As to the fourth bullet point: The investigators questioned the Chief's credibility
4 when he denied he had requested the case file the following year (after the discharge-in-
5 the-elevator incident). The undersigned agrees with the Chief's attorney that this is not
6 a fair representation of what the Chief actually said. The Chief stated he had not
7 "personally" requested the file, but considered the possibility that the file had been
8 requested by the outside investigators and the request would have to go through his
9 office. In context, it is clear the Chief did not deny he had directed the file to be
10 requested, but only that he had not done so for his personal use. Nothing in the record
11 contradicts the Chief's statement.
12

13 In sum, based on a careful review of the Chief's interview and the investigators'
14 Report, the undersigned finds that, for the most part, the credibility findings are largely
15 unreliable.

16 The Chief did equivocate about when and whether he saw the video, which, in
17 and of itself, might support a conclusion that he was dissembling for some improper
18 purpose. But the Report as a whole shows, without contradiction, that the investigating
19 officer at the Friday meeting: presented the case as an "accident;" accurately described
20 the video, *i.e.*, that the vehicle stopped briefly after the collision occurred; stated that an
21 independent "expert" had opined it was possible the driver had not been aware of the
22 collision; and stated that he found both the driver and the passenger to be credible in
23 their statements that they were unaware of the collision. The contents of the video were
24 known to at least some of the attendees of the meeting, none of whom asked that the
25 video be shown. The Chief's inconsistent statements notwithstanding, the evidence
26

27
28 ⁷ The investigators also opined that because "even AC Allison" knew about
Lau's desire to prepare an addendum the Chief must not have been telling the truth when
he denied knowing about it. This is pure speculation.

1 regarding the video issue does not, in the undersigned’s opinion, imply any improper
2 withholding of information material to the actions taken at the Friday meeting.

3 The MOR Findings

4 The investigators concluded that the Chief had violated the following rules:

- 5 • MOR 234.01⁸ “Authorities and Responsibilities” (specifically, 234.12
6 [Command—direction and control of personnel under his/her command] and
7 234.84 [Reports and Records—preparation or review of required reports and
8 maintenance of records]
- 9 • MOR 314.39-2f “Performance of Duty” (specifically, officers must
10 “perform...duties and responsibilities as required by...law, departmental rule,
11 policy or order” and “each member is accountable for the exercise of delegated
12 authority, and shall not conceal, divert or mitigate their true culpability.”)

13 The violation of Rule 234.01 was described as follows:

14 “Chief Armstrong failed to perform his supervisory duties adequately or properly
15 ... [relating to] the vehicle collision investigation. [1] Chief Armstrong’s stated lack of
16 awareness of the facts of the case lacked credibility. The documentary evidence makes
17 clear that he was knowledgeable about the facts of the case but [2] by refusing to
18 answer the question posed by a member of the Executive Command Staff at the ...
19 meeting and, [3] thereafter, shutting down the discussion so that no more questions
20 could be asked, he did not hold his subordinate officers [Capt. Lau and Sgt. Lee] and
21 [Sgt. Chung] accountable for their actions and inactions in both the underlying
22 misconduct and the investigation of that misconduct. As Chief of Police, Chief
23 Armstrong’s duties and responsibilities to hold all OPD members to the standard,
24
25

26 ⁸ The report also cites to “MOR 234.00-1b (Gross Dereliction of Duty).” This
27 appears to be in error. MOR 234.00 is the heading “COMMANDING OFFICERS.”
28 Under that heading are the already-cited MOR 234.12 and MOR 234.84. There is
nothing in section 234.00 that includes “Gross Dereliction of Duty.” It is, nonetheless,
cited as grounds for Chief Armstrong’s 30-day suspension.

1 policies and rules of the department are paramount and the evidence shows that he did
2 not do so in this case.”

3 The report also states that the Chief’s [4] failure to read the ROI before signing it
4 constituted a violation of Rule 234.84, “which requires a Commanding Officer to
5 review... reports... relating to the activities of his command.”

6 The violation of Rule 314.39 was described as follows:

7 “Chief Armstrong had ultimate responsibility for determining the outcome of the
8 investigation and imposition of discipline. [1] By refusing to engage or properly
9 address the questions posed by Executive Command Staff at the...meeting, he allowed
10 relevant information to remain undisclosed. [2] By shutting down the discussion before
11 other members of the Executive Command Staff could ask follow-up questions, he
12 frustrated the search for answers and deprived himself of full information on which to
13 base his ultimate decision.”
14

15 The Report also makes the point that “[a]s Chief of Police, Chief Armstrong had
16 ultimate authority over all aspects of IAD, the sustain presentation, the final report and
17 the discipline imposed on Sergeant Chung. [3] Chief Armstrong’s stated lack of
18 awareness of the facts of the case lacks credibility as much as it suggests a lack of
19 attention to the IAD process under his ultimate command.” The Report also asserts
20 that, [4] “by declining to show the video at the meeting, to answer the question posed
21 by a member of the Executive Command Staff at the...meeting, and thereafter, shutting
22 down the discussion so that no more questions could be asked, he did not hold his
23 subordinate officers...accountable.”
24

25 Analysis

26 As has been noted, the record provided in this Appeal Procedure is limited and
27 includes, for the most part, the outside investigators’ Reports, recommendations,
28 findings, and impressions. These are based upon recorded interviews that are
summarized in the Report, but not included in the record (except for one of the Chief’s

1 interviews), and on “documentary evidence” that is neither described nor included in
2 the record. Accordingly, the undersigned is working within a closed universe of
3 information and provides her own findings and conclusions based on that record. That
4 limited record is, nonetheless, the “Agreed Upon Record” that was provided jointly by
5 the parties. It can be presumed, therefore, that that City and Chief Armstrong have
6 concluded that the record is sufficient for purposes of this Appeal.

7
8 Based on a review of the record, the undersigned makes the following additional
9 findings.

10 (a) The failure to read the ROI before signing it.

11 Rule 234.84 provides that a commanding officer is “responsible for”
12 “review[ing] ... reports ... relating to the activities of his/her command.” Apparently,
13 the investigators have construed that rule to require that the Chief read every report to
14 which he affixes his signature. During his interview, the Chief explained he does not
15 have time to review every ROI—there are far too many—and that he relies upon the
16 Commanding Officer (in this case, Capt. Lau) to review each case and ensure that the
17 investigation supports the findings presented in the report. The ROI is not distributed at
18 the meeting; all relevant facts are supposed to be provided to the Chief and Executive
19 Command Staff at the meeting during the presentation.

20 The Rule cited by the investigators can rationally only be construed as requiring
21 that the commanding officer *immediately in charge* review any reports “relating to the
22 activities of his/her command.” It would not be reasonable to require the Chief of
23 Police, as the ultimate commander of all other commanding officers, to read each of the
24 hundreds (or thousands?) of reports that his subordinate commanders are required to
25 review. Additionally, the investigators’ own recommendation—that OPD should
26 “adopt” a policy that requires the Chief of Police to read reports of IAD investigations
27 before signing them—implies that no such policy was, or is, in place, and therefore
28 could not have been violated by Chief Armstrong. The undersigned finds that the
failure to read the ROI did not constitute a Rule violation.

1 (b) The “refusal to answer the question posed by a member of the
2 Executive Command Staff” at the meeting.

3 There are at least two references to this alleged refusal in the Report’s statement
4 of MOR violations. The undersigned, however, could not locate any factual predicate
5 for this in the Report. (A different question is whether the Chief “shut down” the
6 discussion of the case thus precluding additional questions, and that is discussed
7 below.) Efforts to locate a reference in the Report to a “question posed” at the meeting
8 that the Chief “refused to answer,” were unsuccessful.

9 (c) Declining to show the video at the meeting

10 As has been discussed, it is not clear whether or when the Chief saw the video,
11 although it is clear that the video was not shown at the meeting. The record does not
12 support any finding that the Chief “declined” to show the video. No attendees at the
13 meeting requested that the video be shown, and Sgt. Lee apparently chose not to show
14 the video as part of his presentation. Although the Chief did not affirmatively request
15 the video to be shown, there is no factual support in the record developed by the
16 investigators for a conclusion that he prevented or discouraged its showing.

17 The investigators asked the Chief about the fact that the video was not shown
18 and whether that was something he would have been curious to see because the issue of
19 whether there had been a legal violation depended on the driver’s knowledge of the
20 collision. The Chief explained that because there appeared to be no dispute regarding
21 the officers’ lack of awareness of the collision, there did not appear to be any need for
22 the presenter to show the video—something that is generally done where, for example,
23 there is a dispute about the nature of an officer’s interaction with the public. The
24 Chief’s “takeaway” from the discussion about the vehicle having stopped after the
25 collision was that there were other facts (e.g., no damage to the OPD vehicle) to support
26 the report’s determination that Sgt. Chung was not aware of the collision, and so he felt
27 the matter had been sufficiently vetted.

28 In sum, although the investigators might properly question whether the Chief
used his best judgment in not affirmatively asking that the video be shown, under the

1 totality of the circumstances described in the Report, the undersigned finds that this did
2 not constitute a failure to “perform...duties and responsibilities as required by...law,
3 departmental rule, policy or order.”⁹

4 (d) The Chief’s stated lack of awareness of the facts of the case
5 lacks credibility as much as it suggests a lack of attention to
6 the IAD process under his ultimate command.

7 This conclusion is internally inconsistent. It also lacks factual support. Either
8 the Chief dissembled in denying that he knew more about the case than he let on, or he
9 lacked an awareness about the case that showed he was not paying close enough
10 attention to the IAD process, but it cannot be both.

11 The undersigned has already called into question the investigators’ conclusion
12 regarding “the Chief’s stated lack of awareness” regarding the case. (Supra, at p. 27.)

13 As to the Chief’s alleged “lack of attention,” there is nothing in the record, other
14 than the investigators’ own opinion, to suggest that it is the Chief’s job to pay close
15 attention to every ongoing IAD process.¹⁰

16 There were two commanding officers in charge of that process—Deputy Chief
17 Mendoza of the Bureau of Risk Management and Capt. Lau in IAD; the former had
18 direct authority over the latter. Although the investigators assert that the “dotted line”
19 between the Chief and IAD appeared to be “a fiction” because DC Mendoza was “not
20 included in conversations regarding the vehicle collision,” in fact, DC Mendoza herself
21 delegated the matter to Capt. Lau and “felt confident that IAD would appropriately
22 handle the investigation...and did not have further involvement with the case until
23 the...[Friday] meeting.” The investigators did not ask whether DC Mendoza had
24 somehow failed in her duties to oversee the investigation, despite being in the direct
25 chain of command over Capt. Lau, yet the investigators concluded the Chief had

26 ⁹ The Report also does not cite to any requirement of any “law, departmental rule,
27 policy or order” that the Chief allegedly failed to carry out in not asking that the video be
28 shown.

¹⁰ As is discussed below, approximately 400 IAD cases are opened each quarter.

1 violated Rule 314.29 for his “lack of attention to the IAD process under his ultimate
2 command.” This conclusion is unfounded.

3 (e) Shutting down the discussion in the meeting before other
4 Members of the Executive Command Staff could ask follow-up
5 questions.

6 Three of the attendees of the meeting at which the vehicle collision case was
7 presented noted that the Chief “abruptly” shut down the discussion during which
8 questions were being asked by DC Mendoza. The investigators’ Report regarding those
9 questions is confusing because it states that DC Mendoza had questions in her mind
10 when she first learned about the case that she felt were not answered in the presentation
11 by Sgt. Lee, a key question being, how could the officer driving the OPD vehicle not
12 know about the collision, when there was “so much” damage to the other car? It is not
13 clear whether DC Mendoza was referring to a video or photo showing the damage or to
14 the dollar amount of the claim, but based on the Chief’s interview it appears to have
15 been the latter. The Chief said he was surprised when DC Mendoza asked about the
16 \$30,000 in damages, because he had not known the amount; and he was interested to
17 hear the response (*viz.*, any damage to a Mercedes is going to be very expensive to
18 repair) because he owned a Mercedes. That question, therefore was asked and
19 answered.

20 DC Mendoza also stated that she learned for the first time at the meeting that
21 there had been a passenger in the OPD vehicle, and the romantic relationship was not
22 revealed at the meeting, and so, there was no discussion of the City’s anti-fraternization
23 policy or of the implications of the non-reporting of the relationship, or how the
24 relationship might affect the credibility of their testimony. According to the Chief, DC
25 Mendoza was “pressing” for the identity of the passenger, and also asked about the
26 “reporting timeline”—from which the Chief inferred she was asking about why the
27 collision was not reported earlier, to which either Sgt. Lee or the Chief replied that they
28 [Chung and the passenger] did not report it because they did not know it had happened.
The Report does not make clear whether DC Mendoza asked questions about the anti-

1 fraternization policy and the reporting requirements regarding relationships between
2 OPD members when she was seeking to learn the identity of the passenger. Nor is it
3 clear whether she had other questions or concerns before the questions were cut off.
4 The report states only that DC Mendoza recalled “asking questions after the
5 presentation in an attempt to address some of her concerns,” and that “at a certain
6 point,” Chief Armstrong “took over the questioning” and then abruptly ended the
7 discussion of the case. Because the minutes of the meeting were not included in the
8 record, the undersigned cannot assess how many questions were asked or how long the
9 discussion lasted before the Chief took over the questioning.

10 There can be no doubt that the Chief ended the discussion of this matter at the
11 meeting “abruptly.” This does raise concerns about whether the Chief either
12 intentionally or negligently “frustrated the search for answers and deprived himself of
13 full information on which to base his ultimate decision,” and, as a result, “did not hold
14 his subordinate officers...accountable” for both the underlying misconduct and the
15 investigation.

16 The undersigned agrees that the Chief may have fallen short in the performance
17 of his duties when he did not allow a more fulsome discussion of the case such that all
18 of the questions in the minds of his Executive Command Staff were answered, and they
19 were satisfied with the investigation and its recommendation. The undersigned does
20 not agree that this *resulted* in his subordinate officers not being held accountable,
21 because it is sheer speculation whether a more complete question and answer session
22 and/or discussion would have resulted in a different outcome, or even the delivery of
23 additional information.¹¹ But, more fundamentally, there is no context in which to
24 evaluate the Chief’s conduct, because he was not asked about it during his interview.

25
26 ¹¹ This seems unlikely given that no one at the meeting (except Sgt. Lee) was
27 aware of how Capt. Lau had manipulated the report, and so, it was improbable that the
28 information about the misconduct would have surfaced unless Sgt. Lee chose to speak
about it.

1 At minimum, the Chief should have been given the opportunity to explain why
2 he “abruptly” closed the discussion, as there are myriad possible explanations,
3 including, for example, a heavy meeting agenda, a sense that the questions were not
4 germane to outcome, or even that it was the day before Christmas Eve. Consequently,
5 there was not a fair and adequate process to support the finding that, when the Chief
6 “abruptly” terminated the discussion of the case at the Friday meeting, he violated the
7 Rule requiring him to “perform...duties and responsibilities as required by...law,
8 departmental rule, policy or order.” Furthermore, the Report does not cite to any
9 requirement of any “law, departmental rule, policy or order” that the Chief failed to
10 carry out while performing his duties during the Friday meeting.

11 (f) As Chief of Police, Chief Armstrong’s duties and
12 responsibilities to hold all OPD members to the standard,
13 policies and rules of the department are paramount and the
evidence shows that he did not do so in this case.

14 This statement lacks factual support. While it is true that “the buck stops here”
15 if you are the Chief of Police, it cannot also be true that the Chief can be held directly
16 responsible for the misconduct or failures of every member of the police force, known
17 or unknown. The record shows there was affirmative misconduct with respect to the
18 IAD investigation and report on the vehicle collision, and (at least at the outset)
19 inadequate rigor and urgency brought to bear in the CID investigation of the weapon
20 discharge case. But there is no evidence that the Chief failed to hold the OPD members
21 conducting those investigations to the “standard, policies and rules of the department”
22 based on the information that was provided to him through the proper chain of
23 command. The Chief of Police cannot be supervising all OPD members at all times and
24 in all places, which is why there are levels of intermediate commanders who are
25 responsible for holding their subordinates to the standards, policies and rules of the
26 department. If the Chief knows of their failure to do so, it is his duty to take action; if
27 the Chief relies on his subordinates and knows of no reason to question their
28 competence, honesty and integrity, he cannot be accused of dereliction of duty.

1 Thus, for example, the record does not reveal any reason for the Chief to
2 mistrust the work of Capt. Lau as the head of IAD. There was no testimony by any
3 witness that Capt. Lau was known to be biased, untrustworthy, or lackadaisical in his
4 adherence to policies and rules. In fact, when asked about Capt. Lau, the Chief stated
5 that, when he took over, he met with Capt. Lau and told him he must make sure the
6 IAD investigations were complete and supported by facts and findings. The Chief
7 described Lau’s work as competent, with good attention to detail. The Chief had
8 disagreed in the past with recommendations made by Capt. Lau, and, although Lau
9 would provide his perspective, he took criticism and direction well, and was respectful.
10

11 Lau had never told the Chief—either in this case or in any other—that he had
12 “overturned” the findings of an investigating officer. As the Chief explained, he
13 expected Lau to deal with any disputed issues during the investigation. So, for
14 example, if there was another Division-level investigation parallel to that of IAD, and if
15 there was a disagreement as to findings, Lau would provide an addendum to argue for a
16 different finding. In sum, the record does not show that the Chief had any reason to
17 believe that Capt. Lau would shirk his duties, much less commit affirmative misconduct
18 in overseeing the investigation of the vehicle collision, and no other witnesses
19 suggested that Capt. Lau’s work was or should be suspect.
20

21 The Report does not state or suggest that the Chief was aware of Capt. Lau’s
22 (and Sgt. Lee’s) misconduct. And, nothing in the Report supports a conclusion that the
23 Chief failed to hold any other OPD officers to the standards, policies and rules of the
24 Department. Accordingly, there does not appear to be any basis in the Report for the
25 finding that Chief Armstrong failed to hold OPD members to the standards, policies and
26 rules of the department in connection with the investigations.
27

28 /////

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1 *Investigators' Conclusions and Recommendations*

2 As has been described, there is little factual support for the “credibility” findings
3 relating to Chief Armstrong with respect to the investigation of the discharge of the
4 weapon in the elevator and, in any event, the credibility findings are largely irrelevant
5 to the issues raised in the investigation. Additionally, both the credibility findings and
6 the MOR violation findings relating to Chief Armstrong with respect to the
7 investigation into the vehicle collision are, for the most part, unsupported. The
8 remaining question is whether the investigators’ characterization of the shortcomings in
9 the two investigations reflect “systemic failures far larger and more serious than the
10 actions of one police officer;” and whether there were “multiple failures at every level,
11 to hold this officer responsible which belie OPD’s position that it can police itself and
12 hold its members accountable for misconduct.”
13

14 It should be noted that these are not “findings” by the investigators, but
15 “conclusions” reflecting the investigators’ own views of the nature of the problems.
16 These conclusions, however, provided one of the bases for the Mayor’s decision to
17 place Chief Armstrong on administrative leave, and then, to dismiss him. As stated in
18 the Appeal Procedure and the Mayor’s letter, the hearing officer is directed to make
19 findings about the termination of Chief of Police LeRonne Armstrong, and
20 recommendations to the parties “for the resolution of the dispute.”
21

22 It is difficult to assess the investigators’ impressions, because they appear to have
23 been presented without context. In deference to the investigators, they were asked to
24 look at two investigations and to provide their findings and conclusions regarding those
25 two investigations. What is missing was a more contextualized assessment of the
26 shortcomings of the IAD and CID procedures, to provide perspective to the Mayor and
27 to the court overseeing the NSA. The narrow focus on only the two investigations may
28 well have resulted in overstating the significance of the deficits found in the two cases.

1 At this point it bears repeating that, while it is possible the investigators reached
2 their conclusions based on information or data that was not placed in the record, the
3 hearing officer can make findings based only on the information that was provided.

4 “Systemic Failures”

5 There is little evidence of a “systemic failure” in the IAD process. The
6 record shows that, in the case of the vehicle collision, there was misconduct by a
7 Captain, acquiesced in by a Sergeant who felt he was required to do so as the Captain’s
8 subordinate. There is no evidence that the Chief or anyone else in the chain of
9 command knew that this misconduct and acquiescence had occurred. More
10 importantly, there is no evidence that the deficits in the investigation were due to a
11 “failure of leadership” by anyone, including Chief Armstrong, or by any “lack of
12 commitment to hold members of the OPD accountable” on the part of anyone other
13 than those who engaged in this specific instance of misconduct.
14

15 The Report also characterizes the two investigations as having “*multiple* failures
16 at *every level*.” This conclusion is belied by the Reports themselves. In the vehicle
17 collision report, the investigators identified nine “subjects.” After completing their
18 investigation, the investigators made adverse findings against only Chief Armstrong and
19 against those actively participating in the misconduct, *i.e.*, Capt. Lau, Sgt. Lee, and Lt.
20 Daza-Quiroz (who improperly delayed initial referral of the matter to IAD until he
21 discussed it with Sgt. Chung and showed him the video). No others were found “not
22 credible” or in violation of any rules. Additionally, all other OPD officers who were
23 interviewed as witnesses were found to be credible. Similarly, regarding the firearm
24 discharge investigation, only Lt. Turner, Sgt. Tikkanen and Capt. Elzey were found
25 (among eight “subjects”) to have violated any rules. The Report goes on to state that
26 despite the violations, “through later efforts of the command staff, the investigation was
27 ultimately conducted in a sufficient manner.” This does not describe a systemic failure
28 or failures at “every level.”

1 A review of the recommendations made by the investigators regarding these
 2 matters also undermines the investigators’ sweeping conclusions. The
 3 recommendations narrowly focus on the issues and shortcomings that arose during the
 4 investigations of the vehicle collision and firearm discharge.¹² Nothing in the record
 5 suggests that these failures or shortcomings were pervasive, repeated, persistent, or
 6 anything other than isolated incidents.

7 In conducting this appeal the undersigned requested information regarding the
 8 average number of IAD investigations opened by OPD during a quarter, and the number
 9 of IAD cases reviewed by the IMT in each quarter. The City provided the following
 10 information: “OPD estimates that it opens about 400 IAD matters each quarter. This
 11 includes administrative matters, minor auto accidents, etc. The Table below...shows
 12 the total number of IAD cases that the federal monitor reviewed per quarter. For
 13 example, the April 2023 sustainability report states on page 3 that the Federal Monitor
 14 reviewed 40 Class I cases and 93 Class II cases (133 total) in the last quarter of 2022. It
 15 is within the sole discretion of the federal Monitor to review any IAD case at any time.”
 16 (The City was unable to provide information regarding CID cases.)
 17

Source	Total IAD Cases	Time Period Covered
April 2023 sustainability report	133	Oct. - Dec. 2022
Dec. 2022 sustainability report	100	July - Sept. 2022
Oct. 2022 sustainability report	129	April - June 2022
April 2022 Monthly Report	136	Jan. - March 2022
Total:	498	2022

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 24
 25 ¹² These include adopting new policies that would: require documentation of
 26 changes in IAD reports; require documentation of briefings on IAD investigations;
 27 require that the Chief of Police read every IAD report before it is signed; clarify when
 28 and how personal relationships between officers should be reported; add mental health to
 the OPD rule regarding physical fitness; and enhance the rigor of criminal investigations
 of officers. In his press conference, Chief Armstrong agreed that these recommendations
 could improve the Department’s investigative process.

Source	Total IAD Cases	Time Period Covered
<u>Feb 2022 Report</u>	117	Oct.- Dec. 2021
<u>Nov 2021 Report</u>	143	July - Sept. 2021
<u>Oct 2021 Report</u>	169	April - June 2021
<u>June 2021 Report</u>	153	Jan - March 2021
Total:	582	2021

Thus, according to the City, OPD opens about 1600 IAD cases each year, and the Monitoring Team examines between 29% and 33% of those cases. It therefore appears that, of the more than 1,000 IAD cases the IMT reviewed, only two became the subject of outside investigations. These facts provide further context and run contrary to the conclusion that there is a “systemic” failure in the IAD process that reflects a lack of commitment to hold members of the OPD accountable for their misconduct.

Legality of the Mayor’s Decision

The City contends the Mayor has plenary power to remove the Chief of Police, without cause. This premise is not disputed. The issue presented by the parties is whether the Mayor terminated the Chief lawfully.

The Mayor has candidly articulated her reasons for removing the Chief. Those reasons were: the outside investigators’ Reports described two flawed internal investigations and concluded there were “multiple failures at every level” reflecting a “systemic” or “cultural” problem within the OPD concerning officer accountability and discipline; Chief Armstrong privately and publicly challenged and minimized the findings of the Reports rather than embracing those findings and accepting responsibility for them; in order to bring an end to federal oversight, it is an “absolute requirement” that the Chief of Police be able to work closely with the monitoring team; the Chief made accusations that the federal monitor issued the inaccurate reports based on a corrupt motive; the Mayor had therefore lost confidence in the Chief and decided to terminate him.

1 Caveat

2 As has been stated, this is not an adjudicatory proceeding. The hearing officer
3 has been given a limited documentary record; there was no testimony from live
4 witnesses, no cross-examination, no application of evidentiary rules and no extensive
5 briefing. This report does not purport to provide a comprehensive assessment of the
6 Chief’s legal claims, nor can it do so, given the limitations described above.
7 Accordingly, the undersigned can provide only an opinion regarding the legal issues
8 presented.
9

10 Labor Code § 1102.5 —“Whistleblower statute”

11 Labor Code §1102.5, commonly known as the “whistleblower statute, protects
12 employees from retaliation by employers “for disclosing information, or because the
13 employer believes that the employee disclosed or may disclose information, to a
14 government or law enforcement agency, to a person with authority over the employee
15 or another employee who has the authority to investigate, discover, or correct the
16 violation or noncompliance, or for providing information to, or testifying before, any
17 public body conducting an investigation, hearing, or inquiry, if the employee has
18 reasonable cause to believe that the information discloses a violation of state or federal
19 statute, or a violation of or noncompliance with a local, state, or federal rule or
20 regulation....”

21 Chief Armstrong contends that he engaged in whistleblowing against the federal
22 monitor and was fired for that reason. The City contends that Chief Armstrong’s
23 “whistleblower” claim is unfounded because (1) he did not make any Reports or
24 disclosures to any governmental agencies, or to any employees with authority to
25 investigate his claims or to any public body conducting a hearing or investigation, but
26 only held press conferences; and (2) he has not identified any action that was a violation
27 of any statute, law, regulation or rule. The City also contends that even if Chief
28

1 Armstrong did engage in protected activity, that was not a significant factor in the
2 Mayor’s decision to terminate his employment.

3 Chief Armstrong contends that he “reported to the Mayor and Police
4 Commission his belief that the monitor’s Reports’ criticisms of him were so factually
5 baseless and inaccurate that they revealed the Monitor’s true motivation was not to
6 engage in good-faith monitoring of Oakland, but to extend his oversight responsibilities
7 for personal gain with the cooperation of Oakland city leadership.” There does not
8 appear to be any evidence to support this assertion. The record provided does not
9 include any statements made by Chief Armstrong to the Police Commission. The
10 record provided does include Mayor Thao’s characterization of Chief Armstrong’s
11 statements to her, as “blam[ing] ...the federal monitor and a subordinate officer,” but
12 states nothing about the monitor’s alleged motives. The Chief did make public
13 statements accusing the monitor of criticizing him for the purpose of extending the
14 federal monitoring (which was likely to end in May, 2023) so as to continue earning
15 income therefrom. But no cases have been cited and none have been found, supporting
16 the notion that a press conference or press release can be treated as a “Report” or
17 “disclosure” to a government or law enforcement agency, or to a person who has the
18 authority to investigate, discover, or correct an alleged violation, or to a public body
19 conducting an investigation, hearing, or inquiry. While it is clear that the Mayor heard
20 those remarks and that the City relies on them to support its argument that the Mayor
21 was entitled to remove him for making those comments, this does not convert a press
22 conference (or press release) into a whistleblowing disclosure.
23

24 Chief Armstrong also argues that the letter sent on his behalf by his attorney to
25 the Mayor criticizing and challenging the investigators’ Report constituted a
26 whistleblowing disclosure (presumably because the Report was approved and signed by
27 the monitor). A review of that letter, however, reveals no comments about the monitor.
28

1 The undersigned is also not persuaded that Chief Armstrong had a reasonable,
2 good faith belief that the monitor’s conduct violated some legal proscription.

3 The Chief argues that the monitor’s conduct was, “at minimum, [an] unlawful
4 attempt to misuse the monitor’s official position for personal gain—and aiding abetting
5 the same by Oakland leadership.” This attempt, Armstrong argues, was in violation of
6 Penal Code §68 and 18 U.S.C. §201 (Bribery) and of Oakland Municipal Code
7 §2.25.060. The Chief also argues that this was also an abuse of authority and retaliatory
8 conduct in violation of Oakland Municipal Code §2.24.100, and constituted a willful
9 violation of the federal court’s order appointing the Monitor and describing his
10 responsibilities (a violation of 18 U.S.C. §402). These contentions are unpersuasive.

11 The monitor is not a “public official” as defined by Penal Code § 68 (an
12 “executive or ministerial officer, employee, or appointee of the State of California,
13 a county or city therein, or a political subdivision thereof”), nor has Chief Armstrong
14 alleged that the monitor “ask[ed], receive[d], or agree[d] to receive, any bribe, upon any
15 agreement or understanding that his...action upon any matter then pending, or that may
16 be brought before him or her in his or her official capacity, shall be influenced
17 thereby...” (Penal Code § 68.) Rather, the Chief contends that the monitor engaged in
18 self-dealing by unfairly criticizing the Chief in order to maintain his income as the
19 monitor. For the same reasons, the monitor’s alleged actions would not violate federal
20 bribery statute. Armstrong contends that the monitor’s self-dealing was “aided and
21 abetted” by Oakland “leadership” but this cannot be described as the crime of bribery.
22 For essentially the same reasons, what the monitor has been accused of does not
23 constitute a violation of the Oakland Municipal Code §2.25.060 ¶A.1, or of 18 U.S.C.
24 §201. Nor has Chief Armstrong cited to any portion of the federal court’s order that
25 was allegedly violated and constituted contempt of court.
26

27 Again, given the nature of these proceedings, the hearing officer cannot, and
28 does not purport to, adjudicate this claim. What can be concluded is that, in the

1 undersigned's opinion based on the record presented, the Chief does not have a
2 colorable claim for a violation of Labor Code §1102.5.

3 First Amendment Claim

4 Chief Armstrong also contends that his termination and discipline were based on
5 improper retaliation for his exercise of his First Amendment rights.

6 In the seminal case of *Pickering v. Bd. Of Educ.* (1968) 391 U.S. 563, the Court
7 held that public employees do not surrender all their First Amendment rights by reason
8 of their employment. Rather, the First Amendment protects a public employee's right,
9 in certain circumstances, to speak as a citizen addressing matters of public concern.

10 The government employer, however, also does not surrender its right to take
11 employment actions against its employees for their speech, where its legitimate
12 interests in workplace efficiency and harmony outweigh the employees' right to speak.
13

14 A five-part test has developed for determining whether an employer has taken
15 unlawful action against an employee for the exercise of his or her First Amendment
16 rights. First, the plaintiff must show that the speech addressed an issue of public
17 concern. Second, the plaintiff must show the speech was spoken in the capacity of a
18 private citizen and not a public employee. Third, the plaintiff must show that the state
19 took adverse employment action *and* that the speech was a "substantial motivating
20 factor" in that action. If the plaintiff proves the first three parts of the test, the burden
21 shifts to the government to show, fourth, that under the balancing test established by
22 *Pickering* the state's legitimate administrative interests outweigh the employee's First
23 Amendment rights. Fifth, if the government does not prevail in the balancing test, it
24 may show, instead, that it would have reached the same decision even in the absence of
25 the employee's protected conduct. (*Eng v. Cooley* (9th Cir. 2009) 552 Fed.3d 1062,
26 1070-1072.)
27
28

1 (a) The First Two Elements of the Test

2 While the City does not concede that the first two elements of the *Eng* test can
3 be proven, neither does it argue that they cannot be proven. Neither in the briefing nor
4 at the hearing did the City affirmatively contend that the Chief’s speech was not a
5 matter of public concern, or that it was not made in his capacity as a private citizen
6 rather than as part of his official duties as a public employee. Based on the record
7 presented, the issues do not appear to be subject to dispute.

8 (b) The Third and Fifth Elements of the Test

9 There is no dispute that Chief Armstrong was the subject of an adverse
10 employment decision. The parties also agree that the “protected activity” for which the
11 Chief claims he was terminated was his public criticism of the federal monitor, and his
12 claim that the monitor had an ulterior motive in issuing the highly critical (but
13 inaccurate) Reports, *viz.*, to keep Oakland under the compliance program of the NSA so
14 that he could continue receiving payments for his services.

15 The City contends that Chief Armstrong cannot prove that the protected speech
16 was a “substantial or motivating” factor in the adverse employment action, because his
17 criticism of the federal monitor was only one ground for the adverse employment
18 action. The Mayor also based her decision on the findings and conclusions made in the
19 investigators’ Reports, and the Chief’s response to them—particularly, his failure to
20 accept accountability for the “systemic problems” brought to light in the Reports, his
21 statement describing the offending officers’ misconduct as “mistakes” and not incidents
22 where officers were behaving poorly, and his statement that this was not a “scandal” but
23 a minor vehicle collision. According to the Mayor, these statements were very
24 concerning because they were the “*exact opposite*” of what the situation demanded, and
25 reflected an attempt to minimize the severity of OPD’s failures. The decision to remove
26 the Chief, the City concludes, would have occurred independent of Chief Armstrong’s
27 public comments about the federal monitor.
28

1 Chief Armstrong responds by pointing out that the City itself has asserted that
2 the Chief's relationship with the monitor is "perhaps the *single most important*
3 relationship at OPD." By this admission, the Chief argues, the City also admits that the
4 Chief's criticism of the monitor was, unquestionably, a "significant motivating factor"
5 in the Chief's removal.

6 Chief Armstrong also posits that the issues are not so easily parsed. The Chief
7 challenged the monitor's motives directly but also challenged the Reports that the
8 monitor approved, signed, and submitted to the court. The City accepted the Reports at
9 face value and therefore, in effect, fired the Chief for disagreeing with the monitor.
10 Indeed, the City's own argument supports this: "[The Chief's] very public suggestion
11 that there were no systemic issues with OPD, in direct contradiction to the conclusions
12 of the independent investigators, would...negatively impact[] the working relationship
13 between Chief Armstrong and the [federal monitor]." Thus, Chief Armstrong contends,
14 the City has admitted that the Chief's criticisms of the monitor and his criticisms of the
15 Reports are intertwined as protected activity.¹³

17 There is a related underlying dispute as to whether the accuracy and fairness of
18 the Reports' findings and conclusions is *irrelevant* (because the Mayor was entitled to
19 rely upon them unquestioningly) or is *relevant* (because if they are inaccurate, then the
20 Chief's statements did not constitute a failure to accept accountability). That is, while
21 the Mayor *characterized* the Chief's remarks as reflecting a failure to accept
22 accountability, the Chief contends his remarks *in fact* were valid, demonstrable
23

24 ¹³ It also arguable that, irrespective of the Chief's criticism of the monitor, the
25 Reports themselves would also be the subject of keen public interest, as they raise the
26 question of whether the OPD has a serious, systemic problem with internal investigations.
27 If that is so, then speech critical of the Reports and Conclusions would also be protected,
28 to the extent it is made in defense of the OPD, its ability to hold its officers accountable,
and its compliance with the NSA (as distinct from a defense of the Chief, which would
likely be seen as an "employee grievance" and not protected). (See, *Garcetti v. Ceballos*
(2006) 547 U.S. 410.)

1 criticisms of the inaccurate Reports, and in defense of OPD. That being the case, Chief
2 Armstrong contends, the accuracy of the Reports becomes highly relevant.

3 The City contends the Mayor had “no basis” to question the Reports. Chief
4 Armstrong contends that when the Mayor made her decision to terminate him she *in*
5 *fact* had a basis to question the Reports, and could not simply ignore the detailed
6 criticisms of the Reports which had been spelled out in Chief Armstrong’s counsel’s
7 letter to the Mayor and also in the news, and this also bears on the issue of whether her
8 decision was retaliatory.

9
10 As has been stated more than once, a proper determination of this issue would
11 require an extensive evidentiary record and a full briefing of the issues. Therefore, the
12 issue cannot be here adjudicated or determined. What can be concluded is that, in the
13 undersigned’s opinion, Chief Armstrong’s criticisms of the monitor *and* of the Reports
14 approved by the monitor were a “substantial motivating factor” in his termination and
15 that the two issues are likely to be perceived as interlinked.¹⁴ In short, Chief
16 Armstrong has, at the least, a colorable claim that he was removed from his position for
17 exercising his legitimate First Amendment rights.

18 (c) The Fourth Element of the Test

19 The balancing test as between a public employee’s First Amendment rights and a
20 public employer’s right to restrict (or take action for) the employee’s speech in the
21 interests of promoting the efficiency of its public services, involves consideration of a
22 number of complex and competing issues. “In performing this balance, ‘the statement
23 will not be considered in a vacuum; the manner, time, and place of the employee’s
24

25 ¹⁴ The Reports cannot realistically be viewed as stand-alone documents, separate
26 and apart from the history of the NSA and OPD’s ongoing work with the monitor and the
27 IMT. The Mayor acknowledged this when she said the lack of accountability found by
28 the investigators harkens back to the “Riders” case which was the precipitating event in
creating the oversight. Similarly, the Chief expressed the same concern—that the
Reports “pull at the credibility of the Department” and lead people to believe this is “the
same old Oakland Police Department” from decades ago.

1 expression are relevant, as is the context in which the dispute arose.’ [Citation]” (*Chico*
2 *Police Officers’ Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 648 [*Chico POA*])

3 “In balancing the competing interests [the courts have considered whether the
4 employee’s speech] (1) impaired discipline or control by superiors; (2) disrupted co-
5 worker relations; (3) eroded a close working relationship premised on personal loyalty
6 and confidentiality; (4) interfered with the speaker’s performance of his or her duties; or
7 (5) obstructed routine office operations [citations]. [T]his court has [also] weighed (6)
8 whether the speaker directed the statement to the public or the media, as opposed to a
9 governmental colleague, [citation] (7) whether the speaker served in a high-level,
10 policy-making capacity; and (8) whether the statement was false or made with reckless
11 disregard of the truth. [Citation.] Because the *Pickering* balance necessarily involves a
12 fact-sensitive inquiry involving the totality of the circumstances, no single factor is
13 dispositive.” (*Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 867-868, *as*
14 *amended on denial of reh’g* [July 15, 1999].)

16 Where the speech pertains mostly to internal matters that are not of public
17 concern, the scales will tip in favor of the employer if the speech is likely to disrupt
18 working relationships and causes office turmoil (a “mini-insurrection”). (*Connick v.*
19 *Myers* (1983) 461 U.S. 138, 149-153.) The Court cautioned, however, “that a stronger
20 showing may be necessary if the employee’s speech more substantially involve[s]
21 matters of public concern.” (*Id.* at p. 152; and see, *Johnson v. Multnomah County* (9th
22 Cir. 1995) 48 F.3d 420, 426 [“The more tightly the First Amendment embraces the
23 speech the more vigorous a showing of disruption must be made.”].)

24 “[B]efore [a court] can find that ‘the government’s interest as an employer in a
25 smoothly-running office’ outweighs [an employee’s] First Amendment right, the city
26 ‘must demonstrate actual, material and substantial disruption.’ [Citation.]” “ ‘[R]eal,
27 not imagined, disruption is required, and the ‘close working relationship’ exception
28

1 cannot serve as a pretext for stifling legitimate speech or penalizing public employees
2 for expressing unpopular views.’ ” (*Chico POA, supra*, 232 Cal.App.3d at p. 650.)

3 The speech may be protected even if it is false, if it “substantially relate[s] to
4 matters of public concern. [T]he recklessness of the employee and the falseness of the
5 statements should be considered in light of the public employer’s showing of actual
6 injury to its legitimate interests, as part of the *Pickering* balancing test.” (*Johnson,*
7 *supra*, 48 F.3d at p. 424.)

8 Members of law enforcement, and particularly those in high profile positions,
9 can be subject to greater restrictions in order to avoid disruption in those government
10 functions. (*Pool v. VanRheen* (9th Cir. 2002) 297 F.3d 899, 908-909.) The employer
11 also has a legitimate interest in restricting speech that can undermine the agency’s
12 relationship with another law enforcement agency. (*Kirkland v. City of Maryville,*
13 *Tennessee* (6th Cir. 2022) 54 F.4th 901, 908.)

14 The City argues the Chief is subject to even greater speech restrictions because
15 he is in law enforcement, because of his high-profile position as the public face of OPD,
16 and additionally, because he serves at the pleasure of an elected official. (*Gonzalez v.*
17 *Benavides* (5th Cir. 1983) 712 F.2d 142, 148-150.)

18
19 ◆ The Chief’s Interests

20 The Chief contends that these balancing factors weigh strongly in his favor:

- 21 • the Chief was speaking out about “corruption at the highest levels;”
- 22 • his speech was not merely an employment grievance but bore on critical issues
23 of self-dealing and mismanagement;
- 24 • his speech did not disrupt the City’s ability to control OPD’s work environment
25 or the relationships between co-workers;
- 26 • his speech did not impair his ability to perform his job duties;
- 27 • his speech did not obstruct the OPD’s routine operations; rather, the speech was
28 supportive of the integrity of the OPD and its officers.

1 ♦ The City’s Interests

2 The City contends the Chief’s view of the City’s interests is too narrow. The
3 City, it is argued, has much broader interests in regulating the speech of a high profile
4 law enforcement officer, “especially when that speech can disrupt the relationship the
5 law enforcement agency has with other agencies.” The City’s interests include:

- 6 • insisting that its Police Chief take systemic issues within the department
7 seriously, and not publicly minimize them;
- 8 • preserving the vital relationship between the federal monitor and OPD to
9 facilitate the “long-desired” end of federal oversight, which could not occur
10 under Chief Armstrong because of his accusations against the monitor;
- 11 • having a Police Chief that accepts accountability;
- 12 • having a Police Chief that adheres to the highest standards when speaking in
13 public, because it sets the tone for all police officers and must reflect the
14 community’s values (having a Chief who recognizes that his speech can have
15 “real consequences” for the success of OPD).

16 The City’s interests, while certainly legitimate, are based in large part on the
17 factual premise that the investigators’ Reports were accurate in their assessment of the
18 Chief’s credibility and rule violations, and in their assessment that the two flawed OPD
19 investigations demonstrate a “systemic failure” and “multiple failures at every level” of
20 the department. If, however, the investigators’ Reports were not reliable with respect to
21 those assessments, then the Chief’s speech—which the City *characterizes* as
22 “minimiz[ing]” the “systemic issues” and “fail[ing] to take them seriously”—would in
23 fact be a legitimate criticism of the Reports’ findings and conclusions. Indeed, the
24 City’s argument that the Mayor had an absolute right to rely on the Reports no matter
25 whether they were accurate, and to fire the Chief for his response to them, discounts to
26 nothing the Chief’s right to speak about the Report’s inaccuracies and to defend the
27 integrity of the department.
28

1 To be sure, the City has a valid interest in preserving the relationship between
2 the federal monitor and the Chief, which the City has described as “absolutely essential
3 to continue OPD’s cultural change and progress toward ending federal oversight.” The
4 Chief’s accusations against the monitor would be likely to impair that relationship.
5 This fact, however, only complicates the analysis because it undercuts the City’s
6 argument that the Mayor would have fired the Chief even if he had not made the public
7 allegations against the monitor.

8 In sum, as the caselaw teaches, the “balanc[ing of interests] necessarily involves
9 a fact-sensitive inquiry involving the totality of the circumstances,” including the “the
10 manner, time, and place of the employee’s expression [and] the context in which the
11 dispute arose.” Here, the parties contest not only the underlying facts giving rise to the
12 speech but also the legal import of each other’s arguments. The competing
13 considerations, factual disputes and contentions put forward in this case defy any clear-
14 cut analysis of the question. The undersigned concludes that the balancing of the
15 interests is a close question and, on this summary record, is not susceptible to
16 calculation due to the complexity of the issues. It follows that both party’s contentions
17 can be viewed as viable.

18
19 RECOMMENDATIONS

20 The hearing officer is charged with preparing a “[r]eport that renders findings of
21 facts about the termination of Chief of Police LeRonne Armstrong, and make[s] non-
22 binding recommendations to the parties for the resolution of the dispute.”

23 The recommendations are these:


24 The discipline imposed on Chief Armstrong should be reversed and removed
25 from his personnel record.

26 The undersigned provides no recommendation as to whether the Chief should be
27 reinstated. That decision depends not just on whether the Chief was improperly
28

1 removed, but also on the parties' current desires regarding the issue, and the
2 consideration of intervening events, as well as policy matters.

3 The parties should meet and confer, together with their counsel, to discuss the
4 viability of resolving this dispute in a manner to be negotiated, including the possibility
5 of reinstatement. It would be wise for both parties, and of great benefit to the citizens
6 of Oakland, to avoid the costs and related toll of protracted litigation.
7

8 DATE: September 7, 2023

9 
10 Hon. Maria P. Rivera (Ret.),
11 Hearing Officer
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PROOF OF SERVICE

State of California
County of San Francisco

I certify that I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 100 First Street, 27th Floor, San Francisco, California, 94105.

On September 7, 2023, I served the foregoing document described as the **REPORT OF THE HEARING OFFICER** on the interested parties in this action as follows:

SEE SERVICE LIST

- BY ELECTRONIC SERVICE:** I caused the document(s) to be sent to the offices of the addresses via the Coblenz Patch Duffy & Bass LLP Box.com File Share system pursuant to counsel's agreement. The transmission was reported as complete and without error.
- BY EMAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from katyteam@adrservices.com to the persons at the email addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- BY U.S. MAIL:** I caused such envelope with postage thereon to be placed in the United States mail in San Francisco, California.
- BY FACSIMILE:** I caused such to be faxed to the attorneys on September 7, 2023.
- BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the attorneys on September 7, 2023.
- STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.
- BY CERTIFIED MAIL:** I caused such envelope with postage thereon to be placed in the United States mail in San Francisco, California.

Executed on September 7, 2023 in San Francisco, California by



Katy Team



Date: Sept. 7, 2023

Service List

RE: ARMSTRONG & CITY OF OAKLAND ADMINISTRATIVE HEARING (OCA CASE # X05487)

ADRS Case No. 23-2049-MPR

COUNSEL

REPRESENTING

William Edelman, Esq.
DELAHUNTY & EDELMAN LLP
200 E Randolph Street, Suite 5100
Chicago, Illinois 60601
wedelman@delawllp.com
(312) 820-2500

Representing Claimant, LeRonne Armstrong

Anthony Risucci, Esq., Katharine Van Dusen, Esq.
COBLENTZ PATCH DUFFY & BASS LLP
One Montgomery Street, Suite 3000
San Francisco, California 94104
arisucci@coblentzlaw.com, kvandusen@coblentzlaw.com
(415) 268-0554, (415) 391-4800

Representing Respondent, The City of Oakland

John Burke, Esq., Montana Baker, Esq.
OAKLAND CITY ATTORNEY'S OFFICE
One Frank Ogawa Plaza, Sixth Floor
Oakland, California 94612
jburke@oaklandcityattorney.org, mbaker@oaklandcityattorney.org
(510) 238-3601, (510) 238-6324

Representing Respondent, The City of Oakland