COUNCIL AGENDA: 01-29-08
ITEM: 8.2

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Barbara Attard

SUBJECT: **IPA Supplemental Memo No. 2 Examples of Past Inquires (REPLACEMENT)**

DATE: January 30, 2008

Council District: Citywide

RECOMMENDATION

Adopt the IPA recommendation that revises the complaint criteria for non-misconduct concerns presented in IPA Supplemental Report dated 1/25/08.

BACKGROUND

At the request of members of the Council, I am providing examples of actual complaints in which the IPA disagreed with the inquiry classification assigned by internal affairs. Each of these complaints contains misconduct allegations. Officers and complainant names have been removed to comply with the law regarding confidentiality of police misconduct complaints. Many, but not all, of the complaints delineated below were challenged to the SJPD, but none were reclassified and investigated as complaints.[1]

Because the number of complaints classified as inquiries was so large in 2005 (203 inquiries) and 2006 (233 inquiries) the IPA determined that a systemic, versus a case by case, approach to this issue was needed. In the 2005 and 2006 IPA Year End Reports the inquiry audit was discussed at length.[2] Council Referral #18 to ". . . develop a revised complaint process that determines classification based upon objective criteria and classification for complaint categories . . ." was in response to these issues raised by the IPA.

As stated in the IPA Supplemental Memo dated January 25, 2008, the proposed definition and objective criteria for the new "non-misconduct concern" category does not meet the standard of objective criteria. The aspect of the new proposed criteria, ". . . a conduct allegation which does not rise to the level of misconduct. . ." gives wide latitude to the SJPD to classify a complaint as a "non-misconduct concern." The shifting of this definition creates a system in which the SJPD has unfettered discretion to determine what is or is not an allegation in that it alone determines

[1] State law requires that complaints against peace officers be maintained, with specific protections imposed. However, according to case law, the balance tips in favor of a system that advances the right of the individual citizen to file a complaint against the officer.
[2] See IPA 2005 Year End Report at page 15 "The Rise in Cases Classified as Inquiries – An Analysis of Potential Impacts;" IPA 2006 Mid-Year Report at page 7 "The Problem with Inquiries" and IPA 2006 Year End Report at page 9 "Inquiry complaint classifications."

what "rises" to the level of misconduct after some preliminary screening with that screening being inaccessible to the IPA for audit purposes. The criteria for the non-misconduct concern category presented in the Administration's Memo is not objective and will cause the same disagreements that have been raised in the past about the problematic "inquiry" complaint category.

Sample Inquiry Scenarios from Actual Complaints

1. Custody Death Following Use Of Force

This case involved an in-custody death after the use of force by SJPD officers. The force included the use of Tasers, pepper spray and batons. The complainant stated in writing that she wanted a formal complaint. Due to the serious nature of the case, the IPA believed it was inappropriate to minimize the matter by classifying it as an inquiry. The IPA challenged this classification to the SJPD and the complaint was changed to a policy complaint.

2. Complaint about Police Captain at Airport

The IPA received two separate written communications (one anonymous) alleging that a SJPD police captain caused an unnecessary and unprofessional "ruckus" at the Mineta San Jose Airport. The captain allegedly "flew off the handle" when a ticket agent insisted that the captain show a federally accepted ID for air travel (police ID was not acceptable). One letter stated that the captain brought the ticket agent to tears and a supervisor was called before the captain was allowed through. The IPA challenged this classification to the SJPD but the matter remained an inquiry.

3. Search of Business and Check of Employee Records

The complainant contacted Internal Affairs with a complaint concerning officers responding to an audible alarm at a neighboring business. The officers allegedly entered the complainant's business through an open rollup door and then had the complainant's employees step outside of the building while officers checked through confidential employee personnel records. The classification of this matter was not challenged; nonetheless, this complaint should have been investigated and a finding rendered.

4. Use Of Baton To Mimic Bat

The complainant called the IPA office to file a complaint against an officer concerning a car stop and arrest that occurred on the street in front of his home. He alleged he saw an officer laugh at a suspect, pull out his baton, and then swing it, as if it were a baseball bat, at the suspect without hitting him. The suspect was not resisting or being uncooperative. The complainant felt that the actions of the officer were unprofessional and inappropriate. Although the IPA requested the matter be reclassified and investigated, Internal Affairs declined to investigate and stated that the complainant's belief did not amount to substantive evidence of misconduct. This matter should have been investigated and a finding rendered.

5. Unnecessary Force Outside Of Homeless Shelter

The complainant contacted Internal Affairs to express concern about the arrest of an individual with a mental illness that occurred outside of a homeless shelter. The complainant felt the officers used excessive force, including Taser use, on the individual. The complainant wanted to

remain anonymous but provided her first name and telephone number. Internal Affairs classified the matter as an inquiry and closed it because the complainant wanted to remain anonymous and because the individual arrested, who was receiving medical care while still in custody, told investigators he did not wish to proceed. After the IPA requested the matter be reclassified and investigated, Internal Affairs agreed to contact the involved individual and re-evaluate the classification. However, to date, this matter remains an inquiry although there is sufficient information for an investigation to be conducted.

6. Unnecessary Force After Surrender For Arrest

The complainant stated that he stopped running from officers who were pursuing him and laid face down on the ground in order to surrender. He alleged that he was nevertheless hit by officers four to five times with batons on his torso and limbs. When the complainant contacted Internal Affairs to file a complaint, he alleged the intake officer told him that there were witnesses claiming the complainant had been resisting so it would be hard for the complainant to prove his allegations. The complainant became reluctant to file a formal complaint. Given the extent and seriousness of the complainant's allegations, however, the IPA requested the matter be reclassified and investigated. Internal Affairs declined to do so, stating that the complainant clearly understood the complaint process and could request a formal investigation within a year if he so desired. The IPA contends that this matter should have been investigated and a finding rendered.

7. Rude Comments and Improper Agreement to Serve a Restraining Order

The complainant alleged an officer made rude and derogatory remarks to her, suggesting that she was a prostitute. She stated that the officer solicited her cooperation with locating her boyfriend and, in exchange, offered to serve a restraining order on her boyfriend on her behalf. Such service would have violated SJPD policy. The complainant was subsequently involved in an accident which rendered her out of work; she stated she was unable to follow-up with Internal Affairs. IA closed the matter as an inquiry. The IPA felt there was sufficient information to investigate the complaint and therefore challenged the inquiry classification to Internal Affairs. The classification was not changed.

8. Complainant Enroute to Airport Treated Disrespectfully and Threatened

The complainant filed a complaint with the IPA alleging that she was driving her family (including her young grandson) to the airport at approximately 5 am when she observed two police cars ahead with flashing lights blocking the outer lanes of traffic, leaving the center lanes open. The complainant proceeded toward the open center lanes where she was abruptly stopped by a patrol car darting in front of her vehicle. She alleged that the officer appeared to be out of control and berated her loudly and rudely in front of her family without allowing her to respond to his questions. The officer threatened to send her to the DMV to have her license evaluated. She apologized for her inadvertent error when the officer yelled that there was a "dead body in the road ahead" and asked if she wanted to drive over it. She and her family were "horrified by the officer's intimidating, threatening behavior." The IPA did not request reclassification of this matter. The IPA contends that this matter should have been investigated and a finding rendered.

CONCLUSION

The cases delineated above contain allegations of misconduct and should have been investigated. The IPA acknowledges that complainants sometimes raise issues that may not constitute misconduct and would be properly classified as a non-misconduct concern or an inquiry; such complaints would be discernable during the intake interview. Under the new proposed system, investigations leading to "non-misconduct concerns" could include examples such as the above cases. As set forth in the proposed changes those matters, including any preliminary investigation to substantiate the substance of the allegations, would be unavailable to the IPA for audit of the non-misconduct concerns.

BARBARA J. ATTARD
Independent Police Auditor