

OFFICE OF INDEPENDENT POLICE MONITOR
CITY OF NEW ORLEANS



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INDEPENDENT POLICE MONITOR

October 16, 2014

Deputy Superintendent Arlinda Westbrook
Director, Public Integrity Bureau
New Orleans Police Department
118 North Rocheblave Street
New Orleans, LA 70119

RE: OIPM # 2012-850; The OIPM's Response to NOPD's Comments on "NOPD Retaliation Policy, Pattern & Practice"

Dear Deputy Superintendent Westbrook:

New Orleans Police Department (NOPD)'s initial steps to prevent retaliation against NOPD employees and against residents are good news for the people of New Orleans. However, the city's residents and visitors deserve more protection from retaliation. This report highlights the need for an improved retaliation policy and recommends best practices in retaliation policy that will do more to prevent and protect officers and civilians from retaliation.

A history of retaliation has lead the community and its police officers to fear retaliation as a consequence for exercising their constitutionally protected rights to protest, complain, and make written grievances. Community fears that prevent the reporting of complaints are an obstacle to an effective accountability system. As perception often becomes reality, the existence of widespread concern about retaliation in and of itself is grounds for a strong, detailed policy against it. Likewise, officer fears of retaliation prevent them from speaking out against bad policy and practice as well as officer misconduct. In a climate of fear, officers cannot exercise their talents and give their best selves to their important work.

The OIPM considers the NOPD Public Integrity Bureau (PIB) to be on the forefront of preventing retaliation and thus strengthening the department. The NOPD's efforts will make the NOPD a better workplace for employees, increase community trust in the department, and encourage police and community to give more of themselves to public safety efforts.

There is much in the OIPM's letter to PIB on Retaliation, Pattern and Practice on which both the OIPM and PIB agree. This mutual agreement is the starting place for the OIPM and PIB's future collaboration to strengthen institutional controls that will prevent future retaliation.



Supervision

- The NOPD and the OIPM agree that closer supervision of officers engaged in retaliation is integral to stop the process of retaliation in any workplace and police department. The NOPD has agreed with the OIPM's recommendation that commanding officers and supervisors closely monitor and ensure their employees are in compliance with departmental anti-retaliation policy. Additionally, the NOPD agrees with the OIPM that any departmental policy proscribing retaliation must clearly outline the responsibility of supervisors and the method to monitor employees for having engaged in instances of retaliation.
- NOPD has stated that "all personnel can currently report official misconduct, retaliation, harassment or discrimination to the next higher ranking employee in the chain of command, directly to PIB, or to the OIPM." The OIPM recommends that NOPD personnel not be required to report official misconduct, retaliation, harassment or discrimination to the NOPD's personnel's supervisor (Rule 2, Paragraph 8). NOPD personnel should be able to report misconduct, retaliation, harassment or discrimination to another body including PIB or the OIPM even when the misconduct does not include the officer's direct chain of command. It may cause a chilling effect for officers to report other officers' misconduct especially when the reporting officer perceives the reporting would not be welcomed by his or her supervisor. Every incentive and protection must be offered to the officer reporting misconduct including not requiring officers to always report misconduct to their supervisors but instead to PIB, or in the alternative, the OIPM.

Training

The NOPD and the OIPM agree that any retaliation policy-whether it proscribes retaliation against civilians, proscribes retaliation against officers or outlines supervisory responsibility-must be a part of officers' training. This retaliation policy should be part of in-service training, so that experienced officers are trained in this retaliation policy on a yearly basis. Training on the retaliation policy should also be made available for NOPD recruits. NOPD also agrees with the OIPM on the priority of training to prevent retaliation.

The Need for Specificity in NOPD Policy

In a number of areas in the draft retaliation policy, the NOPD and the OIPM agree that the policy must be more specific. For example, the OIPM and NOPD agree that:

- NOPD policy must contain guidance as to which specific acts constitute retaliation. Specific proscribed acts of retaliation allow NOPD investigators guidance in their investigation. Specific examples of retaliation must be proscribed in NOPD policy so victims of retaliation



may have confidence to question and report their treatment at the hands of retaliatory NOPD officers.

- There should be more guidance on what constitutes retaliation. However, NOPD voiced concern over creating an exclusive list. To alleviate the NOPD's concern over creating an exclusive list, the OIPM suggests that NOPD policy should list certain proscribed behavior while cautioning that such a list is not exclusive in nature.
- All constitutional rights of a civilian should be protected from retaliation.
- An officer's act of filing a grievance should be considered a protected activity for which an officer cannot be retaliated against.

The Requirement That NOPD Officers Immediately Report Misconduct

OIPM supports the NOPD requirement that employees immediately report misconduct. However, the OIPM finds the term "immediately" vague and has concerns that the requirement leaves NOPD employees open to retaliation for not reporting misconduct "immediately enough" to a retaliating supervisor, for example. The OIPM is pleased to note that the NOPD shares the OIPM's concerns in this area and that the rule will be "reevaluated to consider retaliation protections."

NOPD Employee Assistance

The NOPD agrees that employees who have been subject to retaliatory conduct should have available to them, and be encouraged to seek, personal counseling or other services via an NOPD employee assistance program or human resources department. The OIPM and the NOPD Compliance Division are in discussions regarding the creation of a more suitable NOPD employee assistance plan so that employees are able to seek professional counseling outside of the department where they have discomfort seeking counseling within the NOPD. Consent Decree Paragraphs 289-294 also require that the NOPD create a department-wide mental and physical health and wellness program.

NOPD's Request for Further Clarification and Specificity

The NOPD has asked for additional clarification and specificity in some areas of the OIPM report. All of the items for which the NOPD has asked for additional clarification or specificity are found in the executive summary of the report. Every item, for which the NOPD has asked for clarification or specificity, has already been clarified and/or specified in the body of the OIPM report, which is found after the executive summary. In any report, the executive summary is meant to be a brief summation; the body of the report is meant to provide additional clarification and specificity. For example:



- The NOPD has asked that the OIPM be more specific in its statement (listed in the executive summary) that “civilians and NOPD personnel continue to report retaliation or a fear of retaliation from NOPD after filing complaints against officers or cooperating in complaint investigations.” On page six to nine (in the body of the report), the OIPM chronicles complaints of civilian retaliation. On page eleven through thirteen (in the body of the report), the OIPM chronicles complaints of intradepartmental retaliation. The body of the report describes whether civilian or intradepartmental complaints were filed with PIB, what type of retaliatory act was complained about, the race and gender of the complainant, the race and gender of the officer, etc.
- The NOPD asks for definition of the term “contacts” used several times in the executive summary without definition. The OIPM defines contacts (in the body of the report) on page five. Specifically, contacts “included formal complaints referred to PIB by the OIPM, inquiries from the public, communication with individuals where the individuals did not follow through with the complaint process and incidents when a member of the public or an NOPD officer wished to remain anonymous...contacts also included both allegations where members of the public claimed they were retaliated against by the NOPD and incidents where the complainant and/or the OIPM feared future retaliation against the complainant based on the facts surrounding the allegation.”
- The NOPD asks for additional specificity in the statement (found in the executive summary) “some complaints referred by the OIPM to PIB that originally accused several officers of retaliation were recorded in IAPro as an investigation against only one officer.” This statement is more thoroughly explained (in the body of the report) on page five: “Also, some complaints referred by the OIPM to PIB which originally accused several officers of retaliation, were recorded in IAPro as an investigation against only one officer. The IAPro records did not include the remaining accused officer(s) against whom the initial complaint was lodged.”
- NOPD states that the “summary introduction...does not describe the methodology used to conceptualize or form the basis for feedback and/or recommendations regarding NOPD retaliation policy.” NOPD also states that the OIPM letter does not provide the definition of retaliation nor the criteria that is being used to satisfy the “element of retaliation” or justify “fear of retaliation.” The OIPM has set out its methodology (in the body of the report) under the heading, “Assessment of NOPD Retaliation.” Specifically on page four and five of the report, the OIPM discusses the goals of its review, the specific definition used by the OIPM to identify retaliation in the NOPD, the breakdown of retaliation allegations into more specifically identified categories and the shortcomings of the examined data sample.
- The NOPD states that while the OIPM lists in its executive summary that “the most common forms of retaliation alleged by members of the public include: harassment, threats, retaliatory official police action (arrests, tickets, etc.) and discouragement from filing a complaint or interference with the complaint process,” that the OIPM does not “provide the number of incidents that comprise the list of the most common forms of retaliation



allegations.” The OIPM does provide the number of incidents that comprise the list of the most common forms of retaliation allegations, (in the body of the report) on page seven.

- The NOPD requests that raw numbers be given for the (executive summary) statement “the most common forms of internal retaliation alleged by NOPD employees were: retaliatory complaints filed against them, intimidation of complainants or potential witnesses and reassignment or threat of reassignment.” The OIPM provides those numbers (in the body of the report) on page eleven.

References

- The NOPD states “the summary does not list any training or expertise of OIPM personnel responsible for the review.” As was stated in the report, the point of this report was to identify past retaliation and make recommendations for prevention and redress. While it is standard to describe the methodology of a report of this kind, it is curious and atypical to list the training or expertise of all of personnel who worked on such a report. Nor did the OIPM question in this report the qualifications of NOPD personnel reviewing retaliation cases or writing retaliation policy; to do so would be unprofessional and outside the purview of the report. That said, several of the OIPM reviewers of the report have had expertise drafting legislation and/or reviewing retaliation for more than a decade. Several reviewers of the report have received more than fifty hours of training in whistleblowing and retaliation protection. All of the authors of the report are attorneys. The OIPM recruited an expert to review the report who is an attorney working at the National Labor Relations Board (NLRB). Additionally, the qualifications, duties, and responsibilities for each of the three positions in the OIPM - independent police monitor, deputy independent police monitor, and executive director for community relations - were created and defined by the enactment of Section 2-1121 of the Code of the City of New Orleans establishing the Office of the Independent Police Monitor.
- The NOPD asked whether the OIPM in compiling the report conducted “any review of Equal Employment Opportunity Commission (EEOC) or Fair Labor and Standards Administration criteria related to employment related retaliation, [or] any local, State, or Federal law enforcement agency criteria for addressing and/or responding to citizen retaliation complaints.” The OIPM’s report does not specifically reference EEOC or Fair Labor and Standards Administration criteria. However, all of the OIPM’s recommendations are consistent with both sets of criteria. Neither administrative law body is referenced in the report because the OIPM is not presenting criteria for a specific cause of action against the NOPD. This report’s purpose is to prevent NOPD liability, not assist in building the liability case. The OIPM extensively researched other police departments’ policies, which also do not reference federal legal standards and which were more protective and persuasive than other local, state or federal law enforcement agency criteria.



NOPD's Specific Responsibility over Retaliation Complaints

The NOPD raised a number of concerns regarding complaints not referred, allegations not labeled as retaliation, and concerns about potential future retaliatory action rather than past [alleged] behavior. The purpose of the OIPM's report is not to reproach PIB for their response to individual cases. The OIPM's intention is to highlight the need for an improved policy based upon community fears that prevent the reporting of complaints. As perception often becomes reality, the existence of widespread concern about retaliation in and of itself is grounds for a strong, detailed policy against it.

Much of NOPD's response is centered on NOPD's lack of responsibility for: (1) complaints sent to NOPD by the OIPM which were not specifically labeled retaliatory, (2) complaints NOPD claimed to have not received; (3) anonymous complaints; (4) "contacts" or those people (officers as well as civilians) who out of fear chose to not file a complaint but instead informed the OIPM of its concerns; (5) complaints where the OIPM referenced the OIPM's fear or the complainant's fear of future retaliation; and (6) the data population for earlier complaints in IAPRO not being "very reliable due to date conversion of and the newness and inexperienced use of the IAPRO database." The OIPM submits three points in response:

- Again, the purpose of the information provided in this report is to evidence and to detail the numbers of retaliatory complaints coming to the OIPM. Where the complainant out of fear asked the OIPM to not send NOPD the complaint to investigate, it is understandable that NOPD could not discipline the complained about officer. The OIPM understands that it may be difficult for the NOPD to find enough evidence to sustain a complaint where NOPD could not speak to an anonymous complainant or PIB did not receive a complaint the OIPM had sent to PIB. This report is not about critiquing PIB responses to civilian allegations. Our information teaches us that these issues exist and present liability, officer morale and community relations risks that must be addressed.
- Retaliation concerns will come to PIB in many forms, and may not necessarily be identified by the complainant as retaliation. Sometimes complainants do not distinguish between simple harassment or threats and retaliation, but a trained complaint intake investigator, hearing the complainant's whole story can properly identify the complaint as retaliation. The OIPM is cognizant that PIB may not have classified some complaints as retaliatory when such complaints listed harassment, intimidation or threats but identified intent or other evidence of retaliation. So that retaliation can be better identified by NOPD, the OIPM has made a recommendation on how to define retaliation and examples of the type of retaliatory action that should be proscribed. With a consistent and more thorough retaliation policy the OIPM and PIB will agree on which complaints involve retaliatory action, regardless of whether the complainant mentions the term retaliation or not.



- Additionally, there were several complaints sent to PIB by the OIPM where the OIPM warned PIB of the OIPM's or the complainant's fear of future retaliation. Again, the point of the report is to highlight the need for an improved policy based upon community fears that prevent the reporting of complaints. In circumstances where the OIPM has referred cases to PIB where the OIPM or the complainant fears future retaliation, such retaliation may not have yet occurred. But the concern that it may occur, based on the circumstances of the complaint, is a risk indicator. Thus, the NOPD should put mechanisms in place to prevent future retaliation so such concerns can be minimized or alleviated. As mentioned in the report, officers should sign an agreement to have no contact with complainants or witnesses to the complaint, thus offering additional safeguards to the complainant and the witnesses to the complaint.

NOPD's History of Retaliation

Finally, the NOPD cites concerns with the report's reference to Kim Groves' retaliatory murder at the request of former NOPD Officer Len Davis. NOPD states, "This reference immediately mischaracterizes the current operation and efforts of the NOPD and is not necessary to request collaboration with PIB."

The OIPM's report "NOPD Retaliation Policy, Pattern & Practice" is a description of the risks retaliation poses to NOPD as an institution, its individual officers, and the civilians it serves. Our history is part of that risk. In fact, risk assessment considers past losses, past history and past liability as integral to any assessment. In police department risk assessments, "organizations use data on the history of organizational loss including past lawsuits, complaints, and payouts resulting from liability claims."¹ The process of combining a risk assessment with decisions on how to address that risk leads to effective risk management.

NOPD may have moved past the tragic story of Len Davis and Kim Marie Groves. The community has not. The Groves Family has not. NOPD cannot eschew its difficult past any more than the community and families that share that past with them.

The OIPM sees PIB as a partner in our efforts to curb retaliation. The point of this report is to give NOPD information that it may not have yet noted. When OIPM documents the number of complaints of retaliation which have been filed with the OIPM and makes recommendations based on community concerns, we serve our purpose in assisting the department in seeing itself clearly.

¹ Carol A. Archbold, Department of Criminal Justice and Political Science, North Dakota State University, Fargo, North Dakota, USA Policing: An International Journal of Police Strategies & Management Vol. 28 No. 1, 2005 pp. 30-48, Emerald Group Publishing Limited, 1363-951X DOI 10.1108/13639510510580968.



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Sincerely,



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