

THE SECOND MONITOR'S REPORT

APD Forward's analysis of the Federal Monitor's second compliance report highlights continued quagmire in policy creation and use of force supervision in need of substantial improvement.

*Reporting Period:
June 1, 2015
through November
2015*



Executive Summary

“Do Little, Delay, and Deflect.”

- James D. Ginger on APD’s tactics to obstruct reform

The independent monitor assigned to oversee APD’s reform effort, Dr. James D. Ginger, issued his *Monitor’s Second Report* in March 2016, analyzing APD’s efforts to comply with the settlement agreement during the period June 1 through November 30, 2015 (the “reporting period”). APD’s *first* self-report covered the period from November 2014 through November 2015. In this report, APD Forward identifies highlights from the monitor’s second report and makes key comparisons with APD’s *first* self-report since both cover periods ending on the same date. This report will also address concerns raised in the status conference that occurred on March 3, 2016 before Federal District Court Judge Robert Brack.

Now that Dr. Ginger’s reports have caught up with APD’s first self-report, it is clear that APD is failing to make substantial progress in coming into compliance with the settlement agreement. What’s more, APD seems to lack any kind of meaningful self-awareness of its lack of progress. Without the ability to recognize and admit deficiencies, the path to achieving true reform is unlikely. The monitoring team found that APD is in operational compliance with only 8 tasks as compared to APD’s initial estimate that it provided documentation to show compliance with 119 tasks. This means that *APD is only 3 percent of the way to achieving compliance with the entire settlement agreement.*

During the status conference, Dr. Ginger described APD’s effort to obstruct the reform process as “do little, delay, and deflect.”

Background

Late in 2015, the City of Albuquerque and the Department of Justice filed a stipulated agreement to extend certain deadlines in the settlement agreement. The settlement agreement itself references deadlines based upon a triggering date, or the “effective date” of the settlement agreement—which is when it was signed and approved by all parties on November 14, 2014. The stipulated agreement to extend certain deadlines changed the “effective date” of 31 paragraphs to a new “operational date” of June 2, 2015. Thus, numerous deadlines were extended by approximately six months. The extended deadlines are not supposed to have an impact on the two final deadlines: initial compliance within two years of the effective date; and sustained compliance as monitored by Dr. Ginger within four years of the effective date.

The first monitor's report noted 280 tasks that were required in the settlement agreement. In the monitor's second report, the monitor notes that 277 tasks can be quantitatively evaluated and thus considers APD's progress using the 277 task number as a guideline.

Given the extensions to several requirements, APD is currently in compliance with all tasks due at the end of November 30, 2015. However, whether APD is on track to meet the remaining deadlines is highly questionable.

Then

At a status conference before U.S. District Court Judge Robert Brack on December 3, 2015, the independent monitor reported that APD was in primary compliance with 15 of 280 requirements and was in secondary and operational compliance with four out of 280 requirements as of May 31, 2015. These findings conflict with APD's *Progress/Status Summary*, the department's first self-report, which asserts that it has compiled information to document compliance with approximately 119 of 280 requirements. Note that APD's self-report covered a longer time period, from November 2014 to November 2015.

Now

Dr. Ginger reported his most recent findings before U.S. District Court Judge Robert Brack on March 3, 2016. According to Dr. Ginger, APD is in primary compliance with 22 of 277 primary tasks. APD is in secondary compliance with 9 of 277 secondary tasks. APD is in operational compliance with 8 of 277 operational tasks, constituting a compliance rate of 3 percent. Now that Dr. Ginger's report has caught up to APD's first self-report, it is clear that APD's estimate of its compliance with 119 tasks is sorely inaccurate.

Below, we extract what, from our perspective, are the most noteworthy findings from the *Monitor's Second Report*.

Highlights from the monitor's second report

Use of Force Policy and APD's Overall Policy Development

As of the end of the reporting period in the monitor's second report (November 30, 2015), APD had still not drafted an adequate use of force policy. However, in early 2016, APD did finally get approval of a new use of force policy, which is now available on the city's website at <http://apdsop.tripod.com/procedural-orders-manual/index.htm> (Procedural Order 2-52) and is dated as effective January 21, 2016.

The process involved in creating an acceptable use of force policy was “*unsustainable*,” according to Dr. Ginger. APD went through at least four different drafts of the policy before finally obtaining approval on this critical policy. Based on a review of the second draft, the monitoring team became more intimately involved in the process of crafting effective policy. Specifically, the monitoring team’s subject matter experts provided a great deal of technical assistance to APD regarding the policy drafting process, including 32 staff hours of in-person assistance during the team’s June 2015 site visit. Despite this effort, APD’s third draft still fell short of the requirements of the settlement agreement.

Dr. Ginger reported to Judge Brack at the March 3, 2016 status conference that the involvement of his team in assisting APD with crafting a constitutional use of force policy drained approximately \$100,000 from the monitor’s budget. Thus, if further policy review requires similar hand-holding, the cost would be unsustainable.

The use of force policy, while arguably the most critical piece of the settlement agreement, is only one of over 30 important policies that APD needs to re-write. As Dr. Ginger noted, without effective policy, little else can be accomplished. APD cannot adequately train its officers without clear, coherent, and constitutional policies. APD cannot adequately supervise or discipline its officers on policy that is unclear or non-existent.

The problems APD has faced in drafting the use of force policy are indicative of a department that lacks any genuine understanding of how to create useful policy. Dr. Ginger has expressed his concerns regarding the disjointed policy creation process to APD by noting three fatal flaws in the process: First, assigning policy drafting responsibilities to two APD operations majors who have other significant responsibilities and lack significant policy experience is problematic; second, policy development at APD appears to bypass what would be expected of a functioning policy development process and lacks formal, planned organization; third, APD’s policy development appears to be accomplished in conjunction and concurrently with developing training, when policy should logically be finalized prior to training.

Dr. Ginger offered the City a “primer” on policy development, however, that offer was flatly refused by City Attorney, Jessica Hernandez. The City Attorney indicated during the status conference that this was simply a misunderstanding, and APD has now accepted Dr. Ginger’s offer to train its staff on how to develop meaningful policy. The monitor also noticed a pattern of delay where APD provides draft policies to the City Attorney and, approximately two months later, the City Attorney finally forwards batches of policies to the DOJ and the monitor for

review. Hopefully, this issue will be resolved by a newly agreed upon timeline for submission and review of future policies.

Another problem is that APD is producing multiple drafts, often undated, of inconsistent policies. The department also has issued Special Order 15-91 Use of Force Investigative Procedures (October 20, 2015) mandating that all APD personnel "... follow the requirements set forth in the Settlement Agreement." The monitor disapproves of this as a form of policy development and warned that "APD has been placed on notice that such 'short hand' policy development, i.e., referring officers to the [settlement agreement], is unacceptable 'policy work.'" The monitor further stated: "[I]t is critical that APD 'own' the policies that guide its operation." Such short hand policy development "cannot be relied upon to effectively implement meaningful change" and expecting officers to accurately interpret the requirements of the settlement agreement is "simply not realistic."

Crucial Policies Still Pending Approval:

- On-Body Recording Devices
- Response to Demonstrations
- Investigations of Officer Involved Lethal Use of Force and In-Custody Deaths
- Investigative Response Team
- Internal Affairs Division
- Force Review Board
- Hostage, Suicidal, Barricaded Subject, and Sniper Situations
- Response to Mental Illness

Use of Force Investigations

In the monitor's first report, he reviewed information from 16 random supervisory force investigations between February 1, 2015 and May 31, 2015 from a total of 50 reported cases of use of force that required supervisory review (under current policies). Because he did not receive all of the necessary documentation surrounding all of the incidents, he was only able to completely review two use of force reports. Those reports and the monitor's notes on them are detailed in the monitor's first report. In his second report, Dr. Ginger followed up on his concerns regarding these use of force incidents.

APD was asked to provide all documentation regarding actions the department took to resolve the monitor's concerns detailed in his first report. In one case, APD's follow-up investigation was considered incomplete because the investigator failed to review the crucial lapel video footage that initially gave rise to the monitor's concerns, failed to recommend any sort of

counseling or training, failed to recognize that four cycles of a taser against one individual constitutes a serious use of force, and did not seem to recognize that a knee placement on a suspect's neck could constitute a neck hold, which is considered a lethal use of force under the settlement agreement.

APD's process of investigating use of force incidents is still lacking. Since the monitor's first report, "no discernable changes to the processes of use of force reporting or supervisory reviews of use of force have been noted ..."

Haphazard and Misleading Documentation

In reviewing an additional use of force incident, not previously reviewed in the first report, the monitor noted even more serious deficiencies, including flaws in the supervisory force investigation and subsequent command reviews. In February 2015, an officer sprayed his OC spray into the face of a driver of a vehicle in motion near a hospital entrance. The driver then continued to flee and nearly hit a hospital employee in the parking lot. The officer thought he activated his lapel, but after the incident he realized he had not captured anything on his lapel camera.

A sergeant responded to the scene to conduct the use of force investigation but did not document any concern that the officer deployed OC spray into the face of the driver as she fled from the hospital. The report noted "additional issues of concern not related to use of force" that were supposedly addressed in a separate memo not initially provided to the monitor. The sergeant found the use of force was reasonable but without sufficient analysis to justify this finding. A lieutenant and commander subsequently reviewed the case. Both failed to document issues with the use of force, the appropriateness of the officer's actions, or the shortcomings with the supervisory investigation.

The commander reported that the officer would be required to attend training at the academy. No training documentation was initially provided to the monitor. The monitor followed up and requested all documentation subsequent to the investigation and requested the initial memo detailing "additional issues of concerns." In August 2015—seven months after the initial incident—APD told the monitor that the officer never received any additional training but that it was scheduled for September 2015. The monitor later learned that this training was only scheduled after he requested documentation that the training had occurred. APD also then provided the monitor with a new report from the same lieutenant who originally reviewed the incident and it was dated the same date but differed significantly in that this time it recognized there was a problem with the use of force. The lieutenant, in the duplicate report, noted that the incident required further review: "The potential harm that could be created by a driver suffering the effects of OC spray does not appear to be justified by this incident."

The monitor was then provided with a second file regarding this investigation and the memo, dated February 18, 2015—not February 2, as with the original supervisory investigation—which recommended that the officer receive training regarding the proper use and techniques of: administering OC spray; calling out his position when dealing with a suspicious vehicle; and making sure his camera equipment is working properly.

As to that mandatory training, APD provided the monitor with training documentation dated July 7, 2015. Since APD admitted in August that the training was not conducted and was scheduled for September and because the monitor knew that the training was only being scheduled as a result of the monitor’s August 2015 request to review training documentation, this raises serious concerns. Specifically, it looks as if APD is trying to amend and document proper review and training recommendations that never actually happened just to satisfy the monitor. The monitor recommended that APD refer the entire case to Internal Affairs to review the time sequence of this particular case. Finally, the training documentation provided to the monitor was unsigned by the officer and the training content had absolutely nothing to do with use of force requirements.

APD claims the creation of two distinct review files on this case was an administrative error. The monitor reported that this raises concerns as to the potential for amending reports when officers can submit two separate reports for the same incident without changes to those reports being officially tracked.

Specialized Units

APD has continued to make progress in meeting the requirements of the settlement agreement related to specialized units: “SWAT operations in general were exemplary, exhibiting the level of commitment to training, supervision and self-critique the organization imposes upon itself in this area.” The monitor also consistently praised the work APD’s tactical units have done in working toward resolving high risk situations and credited the units for the lower rate of officer involved shootings recently.

Community Engagement

The entire settlement agreement is premised on the idea that APD is required to engage with the community and community stakeholders in its effort to transform itself into a constitutional and community-oriented police force. Therefore, it is fundamental to the agreement that APD maintain positive working relationships with community stakeholders. There are specific areas of the agreement which explicitly require community engagement: Crisis Intervention; On-Body Recording System Policy; Developing a Recruitment Plan; Officer Assistance; Community Engagement and Oversight; Community Meetings and Public Information; Community Policing Councils; and the Civilian Police Oversight Agency.

The Community Policing Councils (“CPCs”) are not functioning as intended. Rather than addressing APD’s compliance with the settlement agreement, they appear to be functioning similarly to neighborhood associations. The lack of constructive public critique at CPC meetings is concerning and desperately needed as these bodies are expected to provide useful recommendations to APD command specific to the reform requirements.

Conclusion

Since the first report, APD has made very little progress in attaining compliance with the settlement agreement. The monitor’s second report confirms that APD’s progress is not nearly as extensive as the optimistic appraisal that APD gave itself in its first self-report.

The monitor’s report once again makes clear that APD is facing huge challenges in carrying out the reform, especially within the 4-year time frame that it requested as part of the settlement agreement. APD *still* does not have an effective system for drafting and revising key department policies. The effort put into assisting APD in formulating effective policy is unsustainable. APD needs to figure out how to do this on its own and will certainly have little excuse for continuing to fall short after Dr. Ginger provides APD with the much-needed “primer” on policy development.

The public needs to be involved in the effort to push APD forward. We will continue to monitor crucial areas of community engagement, such as the CPC meetings. We are hopeful that the community engagement mechanisms required by the settlement agreement will soon provide genuine vehicles to the public to play an active and constructive role in the reform process.