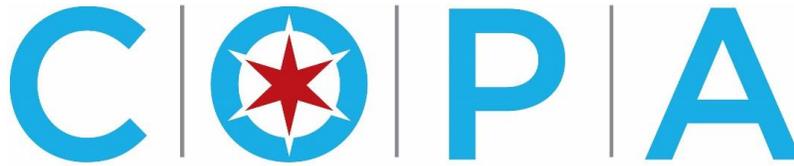


CIVILIAN OFFICE OF POLICE ACCOUNTABILITY

INTEGRITY • TRANSPARENCY • INDEPENDENCE • TIMELINESS

**Report on the Chicago Police
Department Response to COPA
Advisory Letter Recommendations
IN RE: Drug/Alcohol Testing
Following Firearm Discharge
Incidents**

September 30, 2019



CIVILIAN OFFICE OF POLICE ACCOUNTABILITY

INTEGRITY ● TRANSPARENCY ● INDEPENDENCE ● TIMELINESS

Eddie T. Johnson
Superintendent
Chicago Police Department
3510 S. Michigan Avenue
Chicago, Illinois 60653

September 30, 2019

RE: The Chicago Police Department Response to COPA Advisory Letter Recommendations IN RE: Drug/Alcohol Testing Following Firearm Discharge Incidents

Dear Superintendent Johnson:

On June 23, 2019, COPA issued an Advisory Letter¹ to the Chicago Police Department (Department) concerning the failure of some members to undergo mandatory drug/alcohol testing following firearm-discharge incidents. COPA also found that supervisors who are supposed to conduct the tests, did perform the alcohol tests but refused to perform the drug tests on five members who had been administered morphine by paramedics or hospital personnel. One of the five sustained life-threatening injuries while the others were treated for stress-related symptoms.

COPA issued two recommendations regarding Department policies on these issues.

Please find attached our report addressing COPA's Advisory Letter recommendations and the Department's response.

As is reflected in the materials that follow, in its August 23, 2019, response² the Department expressed agreement with one COPA advisory, and disagreement with the second, apparently based on a misunderstanding of the jurisdiction of COPA.

In connection with its disagreement the Department informed COPA that the policy in question was the result of an arbitration decision, and as such, in its opinion it was not something that COPA should take up with the Department, but rather with the Chicago Department of Law as "the appropriate forum to raise issues with the existing collective bargaining agreement or past arbitration results."

¹ See Appendix A for a copy of COPA's Advisory Letter regarding post shooting drug/alcohol tests.

² See Appendix B for a copy of the CPD response to COPA's recommendations.

Furthermore, the Department stated that, in its opinion, “[b]ecause contract negotiations are currently ongoing, it would be in bad faith and improper for it to comment on its strategies or commitments regarding existing or future contract provisions.” Simply put, the Department’s statement is specious.

COPA is an administrative investigation agency mandated to ensure Department oversight and accountability.³ COPA is further charged with issuing recommendations concerning “revisions to the Police Department’s policies, practices, **collective bargaining agreements**, programs, and training in order to improve the accountability, effectiveness, integrity, and transparency of the Police Department.” Similar authority is found in ¶565 of the Consent Decree entered in the matter captioned *State of Illinois v. City of Chicago* (Northern District of Illinois, Eastern Division Case No. 17-cv-6260).

Furthermore, as specified in Section 4.4.1 of COPA’s Rules and Regulations, the Chief Administrator may issue an Advisory Letter to the Superintendent “if [an] investigation uncovered a problem that hinders the effectiveness of Department operations and programs or if the investigation has identified a verifiable potential liability or risk that warrants attention by the Department.”

The Department has provided no legitimate basis to support its assertion that COPA exceeds its lawful authority in issuing to the Department its recommendations for revisions to collective bargaining agreements.

Municipal Code of Chicago § 2-78-130 and COPA Rules and Regulations §4.4.1 grant the Superintendent of Police 60 days in which to review COPA Advisories and recommendations prior to publication of the Advisory Letter file on the COPA website. This period has expired.

Respectfully,



Sydney R. Roberts
Chief Administrator

³ Municipal Code of Chicago §2-78-120(m).

I. Introduction

Pursuant to the Municipal Code of Chicago Section 2-78-120(m), the Chief Administrator of the Civilian Office of Police Accountability (COPA) is empowered and has the duty to make recommendations to the Superintendent of the Chicago Police Department (Department) concerning Department policies. To fulfill the mission, as outlined in Section 4.4.1 of COPA's Rules and Regulations, the Chief Administrator may issue an Advisory Letter to the Superintendent if an investigation uncovered a problem that hinders the effectiveness of Department operations and programs or if the investigation has identified a verifiable potential liability or risk that warrants attention by the Department.⁴

On June 23, 2019, COPA issued an Advisory Letter⁵ to the Chicago Police Department (Department) concerning the failure of some members to undergo mandatory drug/alcohol testing following firearm-discharge incidents. COPA also found that supervisors who are supposed to conduct the tests, did perform the alcohol tests but refused to perform the drug tests after five involved members had been administered morphine by paramedics or hospital personnel. One of the five sustained life-threatening injuries while the others were treated for stress-related symptoms.

II. Failure of some Department members to undergo mandatory drug testing after their involvement in Officer Involved Shootings (OIS).

In multiple 2018-2019 investigations of Officer Involved Shootings (OIS), COPA found that the involved members did not submit to drug testing as expressly required by law and unambiguous Department General Order G03-02-03(X).

Moreover, in each instance the responding supervisors responsible for compliance **knowingly failed or refused** to comply with the General Order, asserting that drug testing was inappropriate because the involved officers already had received medical treatment that may have included the administration of morphine. Five members were not drug-tested. However, only one of the five sustained life-threatening injuries, the others were treated for stress-related symptoms.

We found, however, that state law⁶ and the General Order require such testing as a mandatory procedure regardless of whether the incident occurred on-duty or off duty. There is no stated exception for prior medical treatment.

Additionally, the Standards of Conduct set forth in the Department's Rules and Regulations provide, "[T]he consumption of intoxicants...cannot be tolerated while a member is on duty, except to the minimum requirements of a specific police assignment,"

⁴ City of Chicago, Civilian Office of Police Accountability, Rules and Regulations (Eff. 4.13.2018).

⁵ See Appendix A for a copy of COPA's Advisory Letter regarding post shooting drug/alcohol tests.

⁶ 50 ILCS 727/1-25(b).

and, “[A]n off duty member under the influence of any intoxicant represents a danger to himself and to others and cannot, therefore, be permitted.”⁷

III. No penalty for off duty members who were under the influence of alcohol at the time of the OIS.

We note also that G03-02-03(X)(D) directs that: “No discipline will occur based solely on the results of the alcohol test when the member’s actions are consistent with the Department’s Use of Force policy and the member discharged their weapon off duty.” This is an exception that stands in harsh contradiction to the Department’s own Rules and Regulations.

IV. COPA’s June 2019 Recommendations

COPA therefore recommended that the Department act to strictly enforce full compliance with the unambiguous language of Illinois law and its own General Order to require:

- 1.) Prompt drug and alcohol testing for every member who discharges his/her firearm.
- 2.) That the involved Bureau of Internal Affairs (BIA) supervisor and the responding incident commander ensure that the involved member submits to an alcohol breath test and drug test for which he or she will provide a urine specimen as soon as practicable after the firearm discharge incident.
- 3.) COPA also recommended that G03-02-03(X)(D) (no discipline for an in-policy, off duty OIS where the member is under the influence of alcohol) be revised or eliminated and that the Department work to remove the same restriction from applicable Collective Bargaining Agreements so that the high standard reflected in its Standards and Rules be given full effect.

V. The Department’s Response

In its August 2019 response, the Department informed COPA that mandatory drug and alcohol testing “will be administered following a firearm discharge incident whether or not the sworn member is receiving medical treatment.”

However, the Department also informed COPA that the “no-discipline” provision of G03-02-03(X)(D) is the result of a previous arbitration and award, and as such, in its opinion the Chicago Department of Law “would be the appropriate forum to raise issues with the existing collective bargaining agreement or past arbitration results.”

⁷ Rules and Regulations of the Chicago Police Department Standards of Conduct Sec. I B 17 and Rules of Conduct ¶ 17.

Further, the Department stated that because of ongoing Collective Bargaining Agreement negotiations with the Fraternal Order of Police Chicago Lodge No. 7 it could not comment on its strategies or commitments regarding existing or future contract provisions.⁸

VI. Recommendation Status

Based on the Department's response to its Advisory Letter, COPA assessed the Department's responses to the recommendations contained therein. COPA classifies responses to its recommendations into three categories:

- **Agrees:** The Department agrees with COPA's policy recommendation and indicates that they have taken steps to implement or plan to implement such recommendation in full.
- **Agrees In Part:** The Department partially agrees with COPA's policy recommendation and may or may not have indicated that they have taken steps to implement such recommendation
- **Does Not Agree:** The Department does not agree with COPA's policy recommendation and has not taken steps to implement such recommendation or is non-responsive.

Recommendation 1: COPA recommended that without regard to medical treatment, supervisors enforce, and sworn members undergo, post-OIS incident mandatory drug and alcohol testing in compliance with State law and the Department's unambiguous General Order.

Status: Agrees.

Recommendation 2: COPA recommended that the Department revise or eliminate G03-02-03(X)(D) (no discipline for an in-policy, off duty OIS) from its directives and work to remove the same restriction from the applicable Collective Bargaining Agreements.

Status: Does not Agree.

⁸ COPA's comment regarding the validity of this statement is set forth at Paragraphs 2, 3 of Page 2 of the Chief Administrator's Letter attached hereto.

Appendix A



Eddie T. Johnson
Superintendent
Chicago Police Department
3510 S. Michigan Avenue
Chicago, Illinois 60653

June 26, 2019

Re: Advisory Letter Regarding Drug/Alcohol Testing Following Firearm-Discharge Incidents

Dear Superintendent Johnson:

Pursuant to Municipal Code of Chicago Section 2-78-120(m), the Chief Administrator of the Civilian Office of Police Accountability (COPA) is empowered and has a duty to make recommendations to the Superintendent of the Chicago Police Department (Department) “in order to improve the accountability, effectiveness, integrity and transparency of the Department.” To fulfill the mission, as outlined in Section 4.4.1 of COPA’s Rules and Regulations (effective September 15, 2017), the Chief Administrator may issue an Advisory Letter to the Superintendent if an investigation uncovered a problem that hinders the effectiveness of Department operations and programs or if the investigation has identified a verifiable potential liability or risk that warrants the Department’s attention.¹

This Advisory Letter addresses COPA’s growing concern with the Department’s lack of compliance with General Order G03-02-03(IX)(A). (General Order G03-02-03 is referred to as the General Order hereafter).²

Duty to Administer Post-Firearm Discharge Drug Testing

In COPA’s May 14, 2019, report on “Member Use of Certain Prescription Medications,” we noted that Department Directives, Rules, and Regulations did not address the legal use of prescribed medications that could impair the ability of a Department member to safely perform his or her duties. It was our conclusion that, as a result, the Department was ill-equipped to protect its members and the public from the potential adverse side effects associated with certain medications that can inhibit a member’s ability to “perform safety sensitive job duties” at a critical moment.

Now, COPA has become aware of multiple Officer-Involved Shootings (OIS) after which no drug tests were performed, despite Department directives clearly mandating that they be conducted, without exception.

¹ City of Chicago, Civilian Office of Police Accountability, Rules and Regulations (Eff. 4/13/2018).

² Chicago Police Department, General Order G03-02-03, “Firearms Discharge Incidents Involving Sworn Members”, available at <http://directives.chicagopolice.org/directives/data/a7a57be2-12bf3509-a8c12-bf4a-19387ee3b460c202.pdf?ownapi=1>, (Eff. 10/16/2017).

Under Illinois law:

[E]ach law enforcement officer who is involved in an officer-involved shooting must submit to drug and alcohol testing ... [and] the drug and alcohol **testing must be completed** as soon as practicable after the officer-involved shooting, but no later than the end of the involved officer's shift or tour of duty.

50 ILCS 727/1-25(b).³ (Emphasis added).

General Order Section (IX)(A) provides in relevant part, “[a]ny sworn Department member involved in a firearm-discharge incident, whether on or off duty, is required to submit to **mandatory alcohol and drug testing**.” (Emphasis added). **Both requirements are mandatory, not discretionary, and there are no exceptions** permitting any supervisory Department member to waive required testing for the presence of alcohol or narcotics, legal or otherwise.

COPA has identified at least four officer-involved shootings that occurred during the past year alone in which the involved member(s) were not tested as expressly required by law.⁴ Moreover, in each instance the responding incident commander *knowingly failed or refused* to comply with the General Order, asserting that drug testing was inappropriate as the involved officer received medical treatment that may have included the administration of morphine.⁵ COPA acknowledges the Department conducted the mandatory alcohol testing in these instances, and we understand that administration of certain medications to members during post-incident treatment gives rise to a potential for false positive test results. However, in such situations it is the Department's and COPA's duty to discount any positive drug test results that are directly attributable to medical care received.

The incident commanders' refusals to allow drug testing simply because an involved member received medical treatment prevents the Department and COPA from determining whether, at the time of the incident, the member was under the influence of legal or illegal substances. Surely, awareness of the presence of intoxicants has meaningful and probative value in COPA's ensuing investigation of a member's use of deadly force.

Consideration of Mandatory Alcohol Testing Results

As the Department itself recently articulated, its members must be held to a higher standard both on and off-duty. Thus, we note also that G03-02-03(X)(D), which directs that: “No discipline will occur based solely on the results of the alcohol test when the member's actions are consistent with the Department's Use of Force policy and the member discharged their weapon off duty”— is a member protection that stands in harsh contradiction to the Department's own Rules and Regulations. Rule 15, for example, expressly prohibits the intoxication of members, both on and off duty.⁶ Additionally, the Standards of Conduct set forth in the Rules and Regulations provide, “[t]he consumption of intoxicants...cannot be tolerated while a member is on duty, except to the minimum requirements of a

³ Section 1-25(b) of the Police and Community Relations Improvement Act (PCRIA), (Eff. 1/1/2016).

⁴ Two members were involved in one of these incidents; neither was tested.

⁵ Four out of the five involved members who were not drug tested were administered morphine by paramedics or hospital personnel following the OIS. COPA was unable to determine what medications, if any, were administered to the fifth involved member. It is notable that only one of the five sustained serious, life-threatening injuries; the other four members were treated for chest pains, anxiety, and other stress-related symptoms.

⁶ Rules of Conduct, Section (V)(15) - Rules and Regulations of the Chicago Police Department (Eff. 4/16/2015).

specific police assignment,” and, “[a]n off duty member under the influence of any intoxicant represents a danger to himself and to others and cannot, therefore, be permitted.”⁷

A variety of criteria are considered when analyzing any use of force incident and when considering related disciplinary recommendations, when appropriate. Our concern is that the current construction of G03-02-03(X)(D) diminishes the significance of alcohol testing results by suggesting that it carries *no* weight as a criterion relative to discipline. This appears in stark contrast to the Department’s clear concerns regarding member conduct while under the influence of intoxicants, as reflected in Rule 15. The Rule is written without limitation regarding application in a use of force analysis or a recommendation regarding discipline.

Recommendations

COPA recommends that the Department: 1) comply with the explicit requirements of Illinois law and the General Order regarding the administration of mandatory drug testing following a firearm discharge incident; and 2) revise or eliminate General Order Section (X)(D) (and work to remove the same restriction from applicable Collective Bargaining Agreements) so that the high standard reflected in Rule 15 is clearly understood.

COPA recommends that the Department strictly enforce full compliance with the unambiguous language of Illinois law and the General Order and require prompt drug and alcohol testing for any member who discharges his/her firearm. Without appropriate testing, the risk of harm is too great to return a member to full duty, without knowing whether he or she was under the influence of drugs, whether legal or illegal, at the time of the shooting. **Such testing must be undertaken without exception.** Where appropriate, the Department and COPA should account for the appearance of medically-administered substances received by members during post-incident treatment in test results. To allow a routine granting of an “unwritten exception” is to render the accountability provisions embedded in this General Order null and void.

COPA further recommends that G03-02-03(X)(D) be revised or eliminated (and that the Department work to remove the same restriction from the applicable Collective Bargaining Agreements) so that the high standard reflected in Rule 15 is clearly understood. All meaningful mitigating and aggravating factors should be considered when determining disciplinary action up to and including termination, and that should be no different in incidents involving off-duty firearm discharges by Department members. If an “off duty member under the influence of any intoxicant represents a danger to himself and to others,” this warning surely applies to members who are on duty and expected to respond to emergency situations at a moment’s notice.

Thank you for your time and consideration of this issue. We respectfully request a response to these recommendations within 60 days. COPA will publish this letter and the Department’s response, if any, on the COPA website after the 60-day response time has passed.

Respectfully,



Sydney R. Roberts
Chief Administrator

⁷ Standards of Conduct, Section (I)(B)(17) - Rules and Regulations of the Chicago Police Department (Eff. 4/16/2015).

Appendix B



Lori E. Lightfoot
Mayor

Department of Police · City of Chicago
3510 S. Michigan Avenue · Chicago, Illinois 60653

Eddie T. Johnson
Superintendent of Police

August 23, 2019

VIA ELECTRONIC MAIL

Sydney R. Roberts
Chief Administrator
Civilian Office of Police Accountability
1615 W. Chicago Ave, 4th Floor
Chicago, IL 60622
Sydney.roberts@chicagocopa.org

Re: *Advisory Letter Regarding Drug and Alcohol Testing Following Firearm Discharge Incidents*

Dear Chief Roberts,

The Chicago Police Department seeks to deliver the highest level of policing services to the public. To this end, CPD strictly prohibits the use of illegal drugs, cannabis, or non-prescription controlled substances by its members. CPD currently has both compulsory and random drug testing programs to carry out this policy. After review of the incidents described in COPA's advisory letter (dated June 26, 2019), CPD certainly agrees that the presence of illegal narcotics and non-prescription controlled substances in an officer's system has substantial value in an investigation into a firearm discharge incident.

As such, CPD has clarified its mandatory drug and alcohol testing policy internally with street deputies and relevant units. In accordance with General Order G03-02-03 and the Illinois Police and Community Relations Improvement Act, CPD commits that all sworn members involved in firearm discharge incidents will be subject to mandatory drug and alcohol testing. Specific to the issues raised in COPA's advisory letter, mandatory drug and alcohol testing will be administered following a firearm discharge incident whether or not the sworn member is receiving medical treatment.

As you may know, Section (X)(D) of General Order G03-02-03 is the result of a previous arbitration opinion and award, following consideration of CPD's overall random drug and alcohol testing policy. *See In the Matter of Arbitration between the City of Chicago and Fraternal Order of Police Chicago Lodge No. 7, Case No. 09.281, pgs. 85-86 (April 16, 2010).* Because contract negotiations are currently ongoing, it would be in bad faith and improper for CPD to comment further on its strategies or commitments regarding existing or future contract provisions.

As a reminder, the Chicago Department of Law serves as legal counsel and lead negotiator on collective bargaining agreements for City departments, including CPD. In advance of contract negotiations, the Law Department routinely solicits input on CBA modifications from relevant agencies such as COPA. In the future, these meetings would be the appropriate forum to raise issues with the existing collective bargaining agreement or past arbitration results.

Thank you for your time and attention to this matter. Please feel free to contact the Legal Affairs Section with any additional questions or considerations.

Sincerely,

A handwritten signature in black ink, appearing to read "Dana O'Malley".

Dana O'Malley
General Counsel
Office of the Superintendent
Chicago Police Department